[CH] Federal Court Orders SRG to Broadcast Advertising Spots Critical of SRG

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Swiss public service broadcaster Schweizerische Radio- und Fernsehgesellschaft (SRG) must broadcast television advertising spots that criticise SRG after the Bundesgericht (Federal Court) upheld a complaint by the Verein gegen Tierfabriken (VgT) that the broadcaster had refused to show such a spot.

In 2011, SRG subsidiary publisuisse SA had only authorised the first version of a spot produced by the VgT. It lasted seven seconds and showed the organisation's logo and Internet address, along with the text "www.VgT.ch - was andere Medien totschweigen" ("www.VgT.ch - hushed up by other media"), which was also read aloud. This version was broadcast 18 times during advertising breaks on SRG channel Schweizer Fernsehen in return for a payment from the VgT. However, a revised version of the spot with the new wording "was das Schweizer Fernsehen totschweigt" ("hushed up by Schweizer Fernsehen") was rejected. Publisuisse described this version as harmful to its business and image, and broadcasting it would have violated Article 10 of its General Terms and Conditions.

In 2012, the broadcasting regulator Unabhängige Beschwerdeinstanz für Radio und Fernsehen (Independent Radio and Television Complaints Authority - UBI) approved of SRG's actions by five votes to two. The rejected spot accused Schweizer Fernsehen of concealing information relevant to animal welfare and deliberately suppressing important issues. This was likely to damage the reputation of Schweizer Fernsehen (see IRIS 2012-6/12, IRIS 2010-3/10, IRIS 2009-10/2, IRIS 2001-7/2, IRIS 1998-1/8).

However, in the Federal Court's opinion, the mere fear that a spot might harm SRG's reputation was not a sufficient reason to refuse to broadcast it. Switzerland's highest court upheld a complaint by the VgT against the UBI's decision. The refusal to allow the VgT to advertise on the SRG channel infringed the VgT's constitutional rights. As a privileged licensee, SRG was not as free as private broadcasters where advertising was concerned. Any company that carried out state responsibilities and financed these through additional activities (advertising) had to respect fundamental rights. SRG was obliged to maintain a neutral, objective position and should "also allow certain criticism of itself".

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In the dispute over access to advertising slots, SRG enjoyed less autonomy than in editorial matters, since it was clear to the public that advertising spots represented the opinion of external third parties. An intrusion on the VgT's freedom of expression could only be justified if, for example, there was a legal basis for it. The General Terms and Conditions of publisuisse were not a sufficient basis. Swiss law included various provisions under which it was possible or necessary to reject unlawful advertising spots. For example, the Federal Court noted that SRG, like other broadcasters, had to ensure "that advertising does not infringe national or international law". However, SRG had not explained to what extent the disputed VgT spot infringed the existing provisions of the Radio- und Fernsehgesetz (Radio and Television Act - RTVG), Zivilgesetzbuch (Civil Code - ZGB; protection of privacy) or Bundesgesetz gegen unlauteren Wettbewerb (Unfair Competition Act - UWG).

Since there was no legal basis for or prevailing public interest in the decision not to broadcast the spot, SRG (or its subsidiary publisuisse) should have accepted the version of the spot submitted by the VgT. If the VgT continued to insist on the broadcast, SRG should conclude an advertising contract under which the VgT should pay SRG for the necessary airtime.

Entscheid des Bundesgerichts vom 16. November 2013 (2C_1032/2012)

http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=16.11.2013_2C_1032/2012

Decision of the Federal Court, 16 November 2013 (2C_1032/2012)

Entscheid b.651 der Unabhängigen Beschwerdeinstanz für Radio und Fernsehen vom 22. Juni 2012

http://www.ubi.admin.ch/x/b_651.pdf

Decision b.651 of the Independent Radio and Television Complaints Authority, 22 June 2012

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