[DE] Supreme Court rules on admissibility of Tagesschau app

IRIS 2015-7:1/6

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On 30 April 2015, the Bundesgerichtshof (Federal Supreme Court - BGH) ruled that the Tagesschau app may be unlawful if, when viewed as a whole, it is categorised as a press-like service (case no. I ZR 13/14). The case has now been referred back to the Oberlandesgericht Köln (Cologne Appeal Court - OLG Köln), which will decide whether the app breaches the ban on press-like services that are not related to a specific programme, enshrined in Article 11d(2)(1)(3) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV).

Since the end of 2010, ARD and NDR have provided the Tagesschau app, which offers mobile access to the tagesschau.de portal containing audio files, images, text and video content. Newspaper publishers applied for injunctions against both ARD and NDR with regard to the app's content on 15 June 2011, which, they argued, breached competition law. In their opinion, the app infringed Article 11d(2)(1)(3) RStV, which should be treated as a rule on market behaviour in the sense of Article 4(11) of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG). Under this provision, press-like telemedia services that are not related to a specific programme are prohibited.

On 20 December 2013, the OLG Köln had, as the appeal court, ruled that the service, under the name 'tagesschau.de', had not been considered press-like under the three-step test and had been approved by the Staatskanzlei Niedersachsen (Lower Saxony State Chancellery). The competition authorities had to abide by this court ruling (6 U 188/12). Any breach by the defendants of Article 11d(2)(1)(3) RStV could therefore not justify a claim under competition law.

The BGH has now decided that the OLG Köln was right to refuse the action for an injunction against ARD because ARD was an association of broadcasting authorities with no legal standing of its own and the action was therefore inadmissible. However, as regards the claim against NDR, the BGH upheld the appeal against the OLG Köln's decision. It ruled that the press-like nature of the app on 15 June 2011 could be verified by the courts. The approval of the concept of the "tagesschau.de" portal was not binding on the competition authorities. It only concerned the basic concept rather than how it was actually implemented in a particular case. The ban on press-like services not related to a specific programme, enshrined in the RStV, constituted a rule on market behaviour under

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Article 4(11) UWG, which was also designed to protect newspaper publishers by limiting the Internet-based activities of public service broadcasters. An infringement of this rule could certainly give rise to a claim under competition law for the publishers.

The BGH therefore referred the matter back to the OLG Köln, which must now decide whether the Tagesschau app, in its concrete form of 15 June 2011, should be considered press-like. The BGH explained that the determining factor here was not the individual content, but the press-like nature of the service accessible via the app under “tagesschau.de”, taking into account all content not related to specific programmes that had been available on the date concerned. One particular indication of its press-like nature, for example, might be the fact that it mainly comprised written text.

Pressemitteilung des BGH (Urteil vom 30. April 2015 - I ZR 13/14 - Tagesschau-App)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=1beab3da990a2e65621f07419556e15f&anz=1&pos=0&nr=70959&linked=pm&Blank=1

Press release of the Federal Supreme Court (Judgment of 30 April 2015 - I ZR 13/14 - Tagesschau-App)

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