[DE] Federal Administrative Court rules that Sport1 breached ban on surreptitious advertising

IRIS 2016-8:1/10

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The Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) ruled, in a judgment of 22 June 2016 (Case 6 C 9.15), that a broadcaster is in breach of the ban on surreptitious advertising if it fails to identify advertising content in one of its programmes when the purpose of the programme does not provide sufficient justification for this.

The plaintiff, which operates the TV channel “Sport1”, aired the programme “Learn from the Pros”, originally produced for the American TV market, in which professional poker players provide tips for playing the game. The plaintiff had acquired the programme under licence and provided it with a German soundtrack. During much of the broadcast, the logo of an online poker service was visible because it was printed on the gaming chips and the backs of the playing cards, as well as on the boards belonging to the studio decoration. After the Bayerische Landeszentrale für neue Medien (Bavarian New Media Office) had objected to the programme because of a breach of the ban on surreptitious advertising, the Verwaltungsgericht München (Munich Administrative Court) dismissed the channel operator’s appeal against the decision (judgment of 13 June 2013, Case M 17 K 11.6090). The plaintiff’s appeal was dismissed by the Bayerischer Verwaltungsgerichtshof (Bavarian Administrative Court of Appeal - VGH) (Case 7 B 14.1605, see IRIS 2015-8/11).

The Federal Administrative Court held that showing the logo both objectively constituted advertising and indicated an intention to advertise, and accordingly dismissed the plaintiff’s admissible appeal on points of law. In the judges’ opinion, the fact that the logo concerned was shown many times and was almost always present on screen meant that attention was drawn to the online poker service in a way that could objectively be considered advertising. Furthermore, the judges held that the plaintiff had broadcast the programme with the intention of fulfilling an advertising purpose. The Court said that element of intention, which the law requires as evidence of surreptitious advertising, must be considered to exist when there are no programme or editorial requirements that justify the broadcast. Adopting the necessary case by case approach, the judges weighed up the channel operator’s right, enshrined in Article 5(1) of the Grundgesetz (Basic Law), to freely determine the programme’s editorial concept against the viewers’ right, protected by the ban on surreptitious advertising, not to be misled by the events on screen. In this case, the judges saw no editorial justification to incorporate

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advertising messages in a programme containing tips and hints on playing poker. The Munich Administrative Court had already established the considerable frequency of these messages. The Court found that the audience was also likely to be misled as to the purpose of the programme, because the online poker service's logo had been incorporated without it being appropriately identified.

Urteil des Bundesverwaltungsgerichts (Az.: 6 C 9.15) vom 22. Juni 2016

http://www.bverwg.de/entscheidungen/entscheidung.php?ent=220616U6C9.15.0

Judgment of the Federal Administrative Court of 22 June 2016 (Case 6 C 9.15).

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