[DE] Supreme Court finds use of ARD trademarks anti-competitive

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In a judgment of 26 January 2017, the Bundesgerichtshof (Federal Supreme Court - BGH) found that a public service broadcaster had breached competition law by giving a publishing company the right to publish a printed work bearing its protected trademarks (case no. I ZR 207/14).

The decision followed an action for an injunction brought by the Bauer publishing company against broadcaster SWR and one of its subsidiaries. The plaintiff, Bauer, which publishes cookery and lifestyle magazines, complained that SWR had, in relation to its programme “ARD Buffet” and as (co-)owner of the trademarks “ARD Buffet”, “ARD”, and “Das Erste”, through its subsidiary, granted to the Burda publishing company the right to use its trademarks in the magazine “ARD Buffet - das monatliche Magazin zur erfolgreichen TV-Sendung” (ARD Buffet - the monthly magazine about the successful TV programme). The plaintiff had claimed that the defendants were in breach of Article 11a(1)(2) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), according to which public service broadcasters are only permitted to publish printed material with programme-related content. It had also argued that this was a provision intended to regulate market conduct within the meaning of Article 3a of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG) and that a breach of Article 11a(1)(2) was therefore anti-competitive. After the complaints of the Bauer publishing company were rejected in the first instance (LG Hamburg, ruling of 19 September 2011, case no. 315 O 410/10) and on appeal (OLG Hamburg, ruling of 15 August 2014, case no. 5 U 229/11), its application to the BGH was successful.

The BGH considered that Article 11a(1)(2) RStV definitely was a provision intended to regulate market conduct in the interest of market participants. An infringement could therefore justify a claim under competition law because the rule was designed to restrict the conduct of public service broadcasters in the press market in the interest of publishing houses. It was true that SWR had not infringed the ban on publishing printed material itself, since the “ARD-Buffet” magazine was published by Burda. However, the BGH found that Article 11a(1)(2) RStV should also be interpreted as prohibiting public service broadcasters from supporting third-party publication of such material. The wording of the rule should be broadly interpreted, meaning that broadcasters, when publishing printed

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material, should not interfere in the press freedom of publishing houses to a greater extent than was necessary to fulfil their remit. If, as in this case, the broadcaster did not publish the printed material itself, but supported its publication by a third party, it interfered in competition between publishing houses and gave an advantage to whichever it supported. Such was the case here, since the SWR subsidiary had granted the right to use the aforementioned SWR trademarks to Burda and not to the plaintiff.

Since the plaintiff's injunction application was insufficiently precise, the BGH could not issue a final decision itself. It therefore quashed the Appeal Court ruling and referred the matter back to the Oberlandesgerichts (Higher Regional Court, OLG) of Hamburg for re-examination and a new decision. The Bauer publishing house now has the opportunity to submit a sufficiently precise action for an injunction.

BGH zum Urteil des BGH vom 26. Januar 2017 (Az. I ZR 207/14)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=77624&pos=0&anz=1

Judgment of the Federal Supreme Court of 26 January 2017 (case no. I ZR 207/14)

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