[DE] Federal Supreme Court rules on admissibility of Tagesschau app

IRIS 2018-2:1/13

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In a decision of 14 December 2017, the Bundesgerichtshof (Federal Supreme Court - BGH) rejected an application for permission to appeal filed by Norddeutscher Rundfunk (NDR) concerning the long-running proceedings relating to the Tagesschau app.

The case concerned the nature of the Tagesschau app on a specific date: 15 June 2011. The plaintiffs are publishing companies that sell newspapers in printed form and/or as Internet- and app-based services. Their argument against the providers of the Tagesschau app, the ARD, and NDR in particular, was that the app was too 'press-like'.

The case was initially heard in 2013 by the Oberlandesgericht Köln (Cologne Appeal Court - OLG Köln), which rejected the complaint (case no. 6 U 188/12). The plaintiffs' 2015 appeal to the BGH was successful as regards NDR. In its subsequent ruling of 30 September 2016, the OLG Köln declared that the Tagesschau app on the aforementioned date had been unlawful and banned the distribution of that version of the app. NDR's subsequent application for permission to appeal has now also been rejected, as a result of which the OLG Köln's 2016 ruling has full legal effect.

The plaintiffs had accused the defendants, ARD and NDR, of infringing Articles 11d and 11f of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), which should be treated as rules on market behaviour in the sense of Article 4(11) of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG), and of failing to properly apply the three-step test required under the RStV.

The BGH ruled that the aforementioned three-step test had only been applied to the abstract concept of the app, but not to its practical form. Furthermore, the test had only been applied to one of the earlier versions of the online service. The second half-sentence of Article 11d(2)(1)(3) RStV had been breached and, since this was a rule on market behaviour, claims could be justified under the UWG. The approval granted by the Niedersächsische Staatskanzlei (Lower Saxony State Chancellery) had only been based on the abstract concept and was therefore not legally binding in the procedure at hand. In this respect, the BGH agreed with the

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plaintiffs.

The OLG Köln now had to decide whether the service in question had been 'press-like'. The BGH explained that the determining factor was not whether individual content was press-like, but whether, when viewed as a whole, the content available via the Tagesschau app on 15 June 2011 should be categorised as press-like. This would be the case if it mainly comprised written text.

According to the appeal ruling, the benchmark when deciding whether a telemedia service was press-like was its similarity to "printed editions of newspapers and magazines".

In the end, the OLG concluded that the app had, when viewed as a whole, been press-like on the selected date and banned its distribution, as mentioned above.

Urteil des OLG Köln vom 20. Dezember 2013, Aktenzeichen 6 U 188/12

https://openjur.de/u/665610.html

Ruling of the Cologne Appeal Court of 20 December 2013, case no. 6 U 188/12

Pressemitteilung des BGH zur Revision vom 30. April 2015

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&nr=70959&linked=pm

Press release of the Federal Supreme Court on the appeal of 30 April 2015

Urteil des OLG Köln vom 30. September 2016

http://www.justiz.nrw.de/nrwe/olgs/koeln/j2016/6_U_188_12_Urteil_20160930.html

Ruling of the Cologne Appeal Court of 30 September 2016

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