[DE] Administrative appeal court confirms that Bild.de live streams can still be broadcast without a licence

IRIS 2019-6:1/6

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In a ruling of 2 April 2019 (Case no. OVG 11 S 72.18), the Oberverwaltungsgericht Berlin-Brandenburg (Berlin-Brandenburg Administrative Appeal Court - OVG) decided that live streams available on the website of the Bild newspaper could continue to be broadcast for the time being without the need for a broadcasting licence. It therefore rejected a complaint from the Medienanstalt Berlin-Brandenburg (Berlin-Brandenburg media authority - mabb) about a decision taken by the Verwaltungsgericht Berlin (Berlin Administrative Court - VG) in 2018 (see IRIS 2019-1/13).

The case at hand concerned various Internet video services streamed live on the Bild website and various social media such as Facebook and YouTube. In July 2018, the mabb decided that this constituted broadcasting without a licence (which is required in Germany) because the services were linear audiovisual information and communication services aimed at the general public and designed for simultaneous reception. It therefore prohibited the live video streams (see IRIS 2018-7/15).

The publisher lodged an action against this decision and, at the same time, requested that the action be given suspensive effect under a summary procedure.The VG Berlin granted this request on the grounds that it was highly debatable whether the videos were provided “within a schedule”, which is a necessary part of the German concept of broadcasting. This aspect had not yet been conclusively clarified by the courts. Since such a complex question could not be answered in a summary procedure, it was decided that the effects of the decision should at least be postponed, as otherwise the publisher might lose audience reach and its activity, which was protected under the Basic Law, could be temporarily restricted, and this carried more weight than the mabb’s interest in the enforcement of the law.

The OVG Berlin-Brandenburg rejected the mabb’s appeal against this decision, essentially on the same grounds as those set out in the VG Berlin ruling. The mabb had complained in particular that the VG Berlin could have decided in the summary procedure whether the streams were provided “within a schedule” and whether they should therefore be classified as broadcasting. However, the OVG disagreed: although legal questions could, in principle, be answered in summary proceedings, this was not the case if the questions were so complex that there

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was not sufficient time to review all the evidence, in which case they must be answered in the main proceedings. The latter applied here since, in the digital world, the distinction between broadcasting, for which a licence was required, and telemedia, for which it was not, was not defined in either the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement) or the AVMSD, and was also highly contentious among legal experts. In the case at hand, it could be particularly relevant that, since the streams were not shown in a fixed time slot, that is, systematically or regularly in terms of time of day or sequence, a summary examination could not determine whether they formed a cohesive sequence of programmes, as was generally required in order to be classified as broadcasting.

Finally, the appeal court ruled that the VG Berlin had correctly weighed up the relevant interests. The mabb had claimed that, since the content was received simultaneously, live transmissions had a much higher potential to influence the public through mass communication. Since this influence was difficult to control, prior checks of the broadcaster and its programming concept were necessary. However, the OVG rejected this argument on the grounds that the mabb had not expressed any concern about the actual content of the streams, but had in fact stated that there was no apparent reason why the necessary licences would have been refused. As a result, the public interest in the immediate enforcement of the mabb's prohibition order was reduced to a general interest in enforcement, which carried much less weight than the publisher's interests. In this respect, the OVG emphasised that features such as the comments functions that accompanied the live streams were very attractive to users.

Although the OVG's decision cannot be appealed, it is only provisional. A definitive verdict will only be reached in the parallel main proceedings, which may take some time.

Beschluss des OVG Berlin-Brandenburg vom 2. April 2019 (Az.: OVG 11 S 72.18)

http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/?quelle=jlink&docid=MWRE190001247&psml=sammlung.psml&max=true&bs=10

Decision of the Berlin-Brandenburg Administrative Appeal Court of 2 April 2019 (Case no. OVG 11 S 72.18)

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