

Held: The appeal was dismissed.

The Court of Appeals first confirmed that the Italian plaintiffs could rely on German copyright law in the same way as German nationals, under section 121 paragraph 4 of the German Copyright Code in connection with Article 5 paragraphs 1 and 3 of the Revised Berne Convention. It further held that the composer still retained a right of action based on his moral right even though he had transferred all rights of use in the music to the second plaintiff. The court then stated that the witnesses had given testimony to the effect that the plaintiff had composed the music as an integral part of the original TV mini-series, that he had not relinquished control over the composition in the further process of production and that the total of the music constituted an integral work of art, forming a 'closed system of reference' interpreting the visual components of the film. The significant shortening of plaintiff's music in excess of the shortening of the visual work and the partial substitution by works of another composer constituted a substantial intrusion into the work of the plaintiff. The defendants could not rely on a contractual right to change the plaintiff's work, in fact, they did not have a contractual relationship with the composer at all. Additionally, the original contract between the composer and the Italian producer expressly required written permission by the composer for any alteration of the music.

The defendants could not rely on the general rule that a licensee must be allowed to make amendments necessary to achieve the purposes for which the work has been licensed because such adaptations do not include alterations that go to the core of the licensed work. In the case at issue the alterations significantly changed the character of the work. Such alterations could not be effected without the consent of the composer.

In discussing the scope of the plaintiff's claims, the court clarified that the plaintiffs could rely on copyright law to prohibit the defendants from selling the music of a different composer with reference to the original mini-series. Concerning the damages, the court confirmed that damages for non-material losses will be awarded in cases where moral rights are concerned.

Comment: The case highlights difficulties when movies or TV series are adapted. If such an adaptation is projected, particular care must be taken that the licensor has secured the right to make such changes in his contracts with the separate authors or artists involved. Procedurally the case is interesting with regard to the evidence the court will consider when questions of alterations to musical works are concerned. In the opinion of the court, the judges themselves are not competent to make such a determination based on their own comparison of the two versions of the work. Rather this determination must be left to an expert.

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UNFAIR COMPETITION

Sponsorship

Soccer match sponsor advertisement – Article 1 of the German Act against Unfair Competition – state treaties on broadcasting of 1987 and 1991 – directives of the ARD on the separation between advertising and programming

SAT 1 v ARD (German Public Broadcasting Organisations)
Federal Supreme Court
19 March 1992
I ZR 64/90

The German Act against Unfair Competition provides in section 1:

Any person who, in the course of business activity for purposes of competition, commits acts contrary to honest practices, may be enjoined from these acts and held liable for damages.

Article 3(7) of the State Treaty on Broadcasting of 1987 states:

Programmes which are sponsored by a third party are permissible according to the previous practice, if they do not serve the economic interests of the sponsor or another,

and Article 7 which concerns private broadcasting, says in subsection 7, fourth sentence:

The name of the sponsor shall be indicated at the beginning and at the end of the programme.

The State Treaty on Broadcasting of 1991 refers to sponsoring in section 7. It says in section 7(2) first sentence:

In the case of programmes which are wholly or partially sponsored, a reference to the financing by the sponsor shall be made at reasonable length.

The Directives of the Public Broadcasting Organisations on the Separation between Advertising and Programming of 1988 which relate to event-sponsoring in clause 4.2 say in subsection 3:

The sponsor shall be named if this is necessary for the arrangement of the programme.

Facts: The plaintiff, SAT 1, was a private broadcasting organisation. The defendants, ARD, were the German Public Broadcasting Organisations. The defendants broadcast a soccer match between the national teams of Italy and

Germany on 18 April 1987 in Cologne which was organised by the DFB, the German Soccer Federation. The match was sponsored by the AGFA-Gevaert AG company. The German Soccer Federation granted the defendants permission to broadcast the soccer match on condition that the sponsor's name and logo was faded in for 15 seconds before and after the match.

The plaintiff brought a suit to enjoin the defendants from mentioning or fading in the name of the sponsoring company before or after a soccer match and/or to refer in any other way to those undertakings which financially supported the broadcast soccer match.

The Regional Court, Frankfurt, decided in favour of the plaintiff. On appeal, the court of Appeal, Frankfurt, reversed the judgment and dismissed the suit. The plaintiff appealed to the Federal Supreme Court.

Held: The Federal Supreme Court held:

(1) In a case where, before and after a TV programme on a soccer match between national teams, the sponsor of the match is mentioned at his request, it is obvious that the broadcasting organisation broadcasts this fade-in at least with the incidental purpose of improving its competitive position; a corresponding factual conclusion by the trial judge may not be considered contrary to common logic.

(2) The fade-in of the name or of the logo of the sponsor in an editorial TV programme is advertising and is, in principle, subject to the rules applicable to TV-broadcasting.

(3) The provision in the State Treaty on Broadcasting according to which, in the case of sponsored programmes which are wholly or partially sponsored, a reference to the sponsor has to be made at the beginning and at the end of the programme, constitutes an exception to the general prohibition of advertising in a programme. With regard to its exceptional nature and to the purpose of the provisions on advertising for broadcasts, this provision is not applicable by way of analogy in the case of event-sponsoring.

(4) The general rules on broadcasting relating to the separation between advertising and programming are part of the essential rules on the freedom of broadcasting which are subject to the reservation of legislation, because they aim at the protection of the freedom of broadcasting against interference with the programme by the advertising trade and industry; the broadcasting organisations are not authorised to decide on these rules. Therefore, an extension of the rules on advertising beyond the scope defined in the State Treaty cannot be effected by the Directives of the Broadcasting Organisations.

Comment: The Federal Supreme Court confirms that the German public broadcasting organisations are not exempt from the applicability of the German Act against Unfair Competition. The court viewed the defendants' activity as competitive, because the conduct was objectively susceptible to favour its turnover to the disadvantage of a third party, and, subjectively there was intent to improve its own competitive position. This intent was not insignificant with regard to other motives. The court thus sustained its previous jurisdiction, *Schönheits-Chirurgie*¹. The court assumed that the primary reason for broadcasting the sponsor's name and logo was not to inform the public, which would generally be indifferent on this point, but to improve the defendants' competitive position. The defendants' interest in broadcasting the popular sporting event was considered to reflect the defendants' interest in attracting viewers. The court perceived that the defendants wanted to obtain the sponsor's benevolence and, by purchasing the broadcasting rights aimed at return services such as the sale of advertising time and other advantages to improve the defendants' position in the market to the disadvantage of the plaintiff.

The court based the contravention of honest practices in the sense of section 1 of the German Act against Unfair Competition on the legal principle of prohibition of advertising in programmes. The court rejected the defendants' assertion that the reference to the sponsor could be based on Articles 3(7) and 7(7) of the State Treaty of 1987, or section 7(2) of the new Treaty of 1991. The court pointed out that these provisions only concern programme-sponsoring and not event-sponsoring.

The Directives of the Public Broadcasting Organisations of 1988 refer to sponsoring in clause 4. According to clause 4.1, programme-sponsoring is admissible if it does not serve the economic interests of the sponsor, and according to clause 4.4, mentioning the sponsor's name is limited to five seconds in the broadcast and the credits before or after the programme. These provisions are not applicable, even by way of analogy, to event-sponsoring which is dealt with in clause 4.2. In the case of programme-sponsoring it was suspected that the sponsor could influence the content of the programme, which would be incompatible with the principle that broadcasting must be objective, neutral and

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independent. Therefore the provisions on programme- and event-sponsoring assume an exceptional character insofar as they permit advertising in programmes. Accordingly, they must be interpreted strictly. It may be inferred that in the case of event-sponsoring the reference to the sponsor will contravene the principles of fair competition, if such a reference has the effect of an advertisement.

India

COPYRIGHT

Moral rights

Whether artist entitled to exercise moral rights in respect of a mural

Amar Nath Sehgal v Union of India and Another
High Court of Delhi, 29 May 1992, Case 2074/
1992

Jaspal Singh J
(Unreported)

Facts: Mr Amar Nath Sehgal is an eminent artist and sculptor. In 1957, Mr Sehgal was commissioned by the Indian government to create a sculpture or mural for Vigyan Bhavan, which is a prestigious auditorium owned by the government of India for hosting important international conferences, state meetings and so on.

It took five years for Mr Sehgal to create the mural which was personally approved by the then Prime Minister, Pandit Jawahar Lal Nehru. The mural turned out to be 140 feet long and 40 feet high. It was put up in the balcony of Vigyan Bhavan which it adorned for almost 20 years.

In 1979, the government redecorated Vigyan Bhavan and in the process brought down the mural and dumped it in a room. Since then the mural has deteriorated to the extent that certain parts of it have even been stolen.

Mr Sehgal kept making representations to the government at various levels and although individually everyone from Mrs Indira Gandhi to the Secretary of the Ministry in charge of copyright matters agreed with his point of view, the government did not provide him with any redress.

Eventually, he filed suit against the government of India claiming damages of Rupees 5 million and invoking the moral rights provisions of section 57 of the Copyright Act.

Held: He obtained an *ex parte* interim injunction restraining the government from causing any further deterioration or damage to the mural which would prejudicially affect the artist or his honour or reputation. The learned judge observed:

In a country rightly proud of its creativity and ingenuity, men who can hardly distinguish the heads of Venus from those of Mars cannot be allowed to decide the fate of artists who create our history and heritage. The cry is 'Ils ne passeront pas!' and in such a situation Indian courts will always be found dynamic and responsive. Section 57 of the Copyright Act provides the light.

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LEGISLATION

Film

Draft law on motion picture subsidies

At the beginning of this year the draft of this legislation was presented and approved by the VII Committee of the Chamber of Deputies in the legislative session on 1 February 1992. However, because of the national elections of 5 April 1992, the law has not yet been approved by both Parliament and the Senate.

The following qualifications have to be met for a film to qualify as being of Italian nationality and therefore entitled to the Italian subsidy:

- (1) the basic story must have been written or adapted by an Italian author;
- (2) the director and a majority of the screenplay writers must be Italian nationals;
- (3) at least a majority of the principal actors and of the secondary actors must be Italians (exceptions may be made in the case of foreign actors who have been Italian residents for more than three years wherever the story of the film calls for non-Italian characters);
- (4) at least a majority of the other artistic and technical persons (namely the composer, set designer, cameraman, editor, sound engineer, production manager, production inspector and production secretary) must be Italian;
- (5) the executive production staff and the labourers must all be Italian nationals;
- (6) at least 70 per cent of all interior photography must take place in Italian studios unless exemption to this requirement is granted by the committee for Cinematography of the Ministero Turismo e Spettacolo;