

## Media & Entertainment - Switzerland

### Hidden video recording by television journalists

Contributed by [Pestalozzi Attorneys at Law](#)

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#### Hidden recording

The editorial staff of Swiss TV's consumer magazine *Kassensturz* prepared a report about the alleged bad quality of insurance advice in Switzerland. A *Kassensturz* editor and its chief editor, together with Swiss TV's chief editor, decided that a consultation with an insurance adviser should be recorded using hidden cameras in order to document the advice given.

A *Kassensturz* television journalist invited an insurance adviser to a friend's apartment where the consultation took place. The journalist pretended to be a customer interested in a life insurance policy. Two cameras (so-called 'lipstick' cameras) were hidden in the room where the consultation took place. The cameras transferred the insurance adviser's voice and image to the next room where the editor and an insurance expert followed the consultation. The expert assessed the quality of the consultation in real time. A cameraman and video technician recorded the expert's assessment, together with the sound and images transferred through the lipstick cameras.

After the consultation had ended, the editor entered the room and informed the insurance adviser that:

- she worked for *Kassensturz*;
- the consultation had been recorded; and
- the advice offered had been of poor quality.

The editor invited the insurance adviser to offer his own view, which he denied.

*Kassensturz* decided to broadcast excerpts of the hidden-camera recordings as a part of the report. Before broadcasting the report, *Kassensturz* invited the adviser's insurance company to put forward its opinion. The company did not respond, but filed requests for preliminary injunctions. However, the injunctions were dismissed. Following the dismissal, *Kassensturz* broadcasted the report. The adviser's face and voice were disguised.

#### Decision

The Federal Court confirmed the penalties awarded by the Zurich Appellation Court against Swiss TV's chief editor and *Kassensturz*'s chief editor, editor and journalist. The individuals were issued with conditional fines.

On October 7 2008 the court decided that the hidden-camera recording and the broadcasting of excerpts infringed Article 179*bis* (recording of a third-party non-public discussion without consent of the participants) and Article 179*ter* (recording of a non-public discussion by a participant without the consent of the other participants) of the Penal Code.

The court argued that the consultation between the journalist and insurance adviser was obviously non-public. It further held that the discussion's content was irrelevant in connection with Articles 179*bis* and 179*ter*. The discussion must not include private or confidential information.

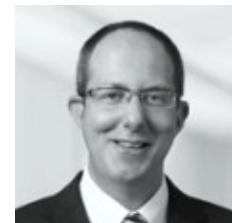
The *Kassensturz* journalists and editors argued that the broadcasting of the hidden-camera recordings was not illegal. In view of freedom of opinion and information (Article 16 of the Constitution), freedom of the press (Article 17 of the Constitution) and the general role of a journalist in a democratic society, the broadcasting was justified by overriding interests and the professional duties of a journalist (Article 14 of the Penal Code). The information about the poor quality of the insurance advice was in the public interest. *Kassensturz* argued that it was necessary to record a consultation in order to prove that the claims about bad quality were correct. Without the recording it would be one person's word against another's, which would result in the risk of lack of evidence.

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The court held that journalists have special status because of the freedom of the press and may, in particular, claim overriding interests if a media publication is in the public interest. However, the court was of the opinion that the hidden-camera recording and its broadcasting were unnecessary to inform the public about the poor quality insurance advice. It argued that there were many other possible ways to inform the public – for example, the journalists could have cited and commented on the ombudsman's annual reports on private insurance, which contained claims about the bad quality advice. The journalists could have also interviewed ombudsman employees or affected customers, as well as commenting on specific insurance contracts. The court, however, admitted that interviewing customers only was insufficient, as customer opinions may be inaccurate and subjective.

However, the court's main argument was that the recording demonstrated only that the advice offered in that specific consultation was of bad quality. The court held that it was trivial knowledge that some insurance advisers and their advice were poor quality. For the public, it was more important to know the extent or amount of insufficient advice (ie, whether bad advice was given in individual cases or whether the system was at fault). The recording of this particular consultation might not answer this question. Even if specific bad advice was accepted as an indication of an inherent fault in the insurance system's quality, the recording would have been unnecessary. The journalist could have discussed the consultation in the broadcasted report without showing hidden-camera recordings. The court admitted that this would be one person's word against another, but that such risk must be taken by television journalists, in the same way as it must be taken by newspaper journalists who do not have the opportunity of providing evidence with recordings. Critical journalism is not substantially limited by this risk of lack of evidence. The court held that it could be assumed that viewers would trust journalists of a consumer programme such as *Kassensturz* over the word of an insurance adviser.

### ***Kassensturz* behaviour legal**

On February 24 2015 the European Court of Human Rights (ECHR) accepted the appeal of the journalists and editors and declared that the hidden-camera recording and its subsequent broadcasting were legal.

The court held that fining the journalists and editors in connection with *Kassensturz's* broadcast on bad-quality insurance advice infringed freedom of opinion and information (Article 10 of the European Convention on Human Rights).

The court held that the penalty was disproportionate. The public interest in the report was substantial and overriding. Interferences in freedom of opinion are almost never justifiable in issues with substantial public interest. Freedom of the press, including the broadcasting of hidden-camera recordings, is in the public interest, and should be protected if the specific journalist provides precise and accurate facts and information, acts in good faith and complies with industry standards. In this case, compliance with these requirements was not contested. *Kassensturz* informed the insurance adviser and its employer about the intended broadcasting and offered them the opportunity to provide their own view.

The court balanced the overriding public interest against the private interest of the insurance adviser and concluded that private interest was insubstantial. The insurance adviser was not a public figure and the broadcasted report did not focus explicitly on the insurance adviser himself or his consultation, but rather on poor industry practice in general. Further, the original recordings were disclosed to only a few individuals and not to the public. The broadcasted image and voice of the adviser were disguised.

Finally, the ECHR decision included a dissenting opinion by Judge Lemmens, who argued that the majority did not sufficiently include the national statutes in their assessment. In the judge's opinion, the majority did not sufficiently consider the arguments of the Swiss Federal Court on Article 14 of the Penal Code (ie, justification of illegal conduct by overriding interests).

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