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Intellectual Property - Austria

Conflicting interests: court rules on monopolist's obligation to contract

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In its decision of April 12 2011⁽¹⁾ the Supreme Court dealt with the conflicting interests of a collecting society claiming copyright infringement under Section 81(1) of the Copyright Act, and an event promoter claiming his right for freedom to practise a trade.

Facts

The claimant was a collecting society that administers copyright for a large number of music compositions in Austria. The Supreme Court regarded the claimant as a monopolist.

In 1996 the claimant and the defendant, an event promoter, entered into a framework licence agreement granting the defendant the right to stage performances of music compositions whose copyright was administered by the claimant. The defendant failed to pay royalties when they were due, fell into bankruptcy and was convicted for crimes in connection with the bankruptcy. In 2009 the defendant still owed the claimant around €30,000.

On December 8 2009 the defendant organised a concert using compositions within the scope of claimant's copyrights without the

permission of the claimant. The defendant failed to comply with other formal requirements, such as early registration of the event at the claimant's homepage. The defendant then applied to the claimant for the right to organise another concert in the near future. The claimant refused to grant any licence until the defendant had fully satisfied its old debt with respect to the claimant.

The claimant filed suit and petitioned the courts for an interim injunction that would bar the defendant from using the claimant's copyright protected works. The defendant replied that the injunction would make it impossible for him to continue in business as a concert organiser. He further argued that past dues should not give the claimant the right to refuse to grant future licences, provided that the defendant satisfied the formal registration requirements and offered security for the royalties payable.

Decision

The Supreme Court ruled as a monopolist that the claimant was subject to an obligation to contract - a monopolist that offers services to the public is not allowed to refuse a contract to an interested party without a legitimate interest if there is no reasonable alternative for the other party to accommodate its demand somewhere else. In addition, Section 17(1) of the Collecting Society Act states that collecting societies must facilitate the granting of permission to use their licensed compositions under reasonable terms, especially under reasonable remuneration. Under Section 17(3) of the Collecting Society Act, the lack of an agreement on the amount of the remuneration is not a legitimate interest, if the requesting party is willing to pay the non-controversial costs and to deposit the controversial costs in court.

The Supreme Court ruled that the defendant's repeated violation of his duty to remunerate the claimant in the past objectively justified the denial of the permission to use the claimant's licenced compositions until the old debts are cleared. Weighing up the interests of all parties, the court ruled that the constitutionally protected right to practise a trade under Article 6 of the Constitution was not violated. Under the jurisdiction of the

Constitutional Court, the limitations on the freedom to practise a trade are permissible if they are:

- based on a public interest;
- capable of achieving the prospect target;
- adequate; and
- due to a legitimate interest.

Under these circumstances, the interests of an author to receive remuneration for the use of its work under Section 81 of the Copyrights Act have greater weight than the interests of practising a trade.

Comment

The Supreme Court's decision is in accordance with the prevalent German doctrine and jurisdiction on the subject concerning the monopolistic position and the obligation to contract. However, the court did not address the issue of whether security for future payments would bar the monopolist from refusing to enter into a new contract (irrespective of the old debt). The court stated only that such argument had not been raised properly by the defendant. Had this argument been made, the Supreme Court would have had to balance the rights of 'old' authors (ie, those whose works have been performed and royalty has not been paid) against the rights of 'new' authors (ie, those whose works shall be performed in the future against proper security for royalties due). Provided that the defendant gives proper security for future royalties due, it is hard to understand why new authors should lose out only in order to enforce the rights of old authors. This issue is not yet finally settled under Austrian law.

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Endnotes

⁽¹⁾ 4 Ob 222/10s.

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