

## Intellectual Property - Austria

### To put you in the picture – the 'picture right' under the Copyright Act

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The Supreme Court has once again ruled on a case dealing with the so-called 'picture right' – a provision in the Copyright Act on which numerous decisions are based. In OGH 17.02.2014 4 (Ob 124/13h) the question arose as to whether a well-known criminal defence lawyer had the right to demand that his picture not be published or distributed by a media owner.

#### Facts

The claimant, a well-known criminal defence lawyer, filed a complaint against the defendant, a daily newspaper that – in a report about a fire in the claimant's apartment – published a picture showing the claimant and the façade of the building in which he lived. Based on this picture, it was possible to identify the address where the claimant resided. The claimant demanded that the defendant refrain from publishing or distributing this picture because it affected his legitimate personal interest in safety and security by disclosing his personal living circumstances. The text below the picture included the lawyer's name, his profession and information regarding the location of the building that he lived in (without mentioning the exact address).

#### Decisions

The court of first instance decided in favour of the claimant, holding that the report contained information regarding the claimant's personal living circumstances (ie, place of residence) that did not serve the public interest in information. However, the appellate court dismissed the complaint by arguing that no such personal living circumstances were included in the report, as the claimant's address was not mentioned and the information regarding the location of the building was not specific enough for readers of the newspaper to identify it on their own.

The Supreme Court disagreed with the appellate court regarding readers' ability to identify the claimant's address and weighed the claimant's interest in security against the defendant's interest in reporting the story. The Supreme Court recognised the claimant's safety and security interests in keeping his address private (which resulted from him being a criminal defence lawyer) and held that these interests outweighed the defendant's interest in reporting. Therefore, it found in favour of the claimant and obliged the defendant to refrain from publishing and distributing the picture in question.

#### Comment

In Austria, the Copyright Act consists not only of 'classic' copyright protection (ie, the protection of literary, musical, artistic and cinematographic works), but also of so-called 'related rights' for performances (eg, lectures, taking photos and broadcasting). Besides the protection of copyrights and related rights, the legislature has deemed it necessary to incorporate specific personality rights into the Copyright Act, such as the 'picture right' on which this decision is based.

Section 78 of the Copyright Act provides that a picture showing a person must not be published (or otherwise made public) if the pictured person's legitimate interests are violated by such publication. This means that the 'picture right' is not absolute – publishing a picture (or otherwise making it public) that shows a person is admissible as such; the pictured person can stop someone from publishing the picture only if he or she proves that his or her legitimate interests have been violated (objective assessment of the alleged adverse effect that the publication has on legitimate interests of the pictured person). In addition, Section 78 does not entitle a person to prevent someone from taking a picture, although there is a widely debated Supreme Court decision stating that, under certain circumstances, this can result from other personality rights under Austrian law. However, in cases of (prevailing) legitimate interests, the pictured person is fully protected against publication of his picture against his or her will.

Due to the practical relevance of this provision and the vague nature of the legal term 'legitimate interest', many Copyright Act decisions deal with the application and interpretation of this provision.

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