

Use of clandestine recordings as evidence

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Introduction

The Supreme Court recently confirmed that both the production and disclosure of clandestine recordings violate copyright (OGH 18 February 2021, 6 Ob 16/21b). However, clandestine recordings are admissible as evidence if:

- the infringer cannot prove their claim in any other way; and
- the infringer's interests outweigh those of the affected person.

The Supreme Court further pointed out that a court cannot decide on the admissibility of evidence obtained under a copyright breach which is to be submitted in other court proceedings.

Facts

The defendant was the plaintiff's ex-partner. The plaintiff had alcohol problems, due to which custody of her children was preliminarily transferred to the defendant, their father. The defendant made video recordings of the plaintiff – who was pregnant at the time – showing her visibly inebriated and sent one such recording to the plaintiff's mother. Further, the defendant covertly photographed some of the plaintiff's personal letters and recorded several phone conversations with the plaintiff without her consent. The defendant claimed that he intended to use all of the recordings in subsequent child custody proceedings.

The plaintiff applied for an injunction against the production and disclosure of photographs and recordings made without her consent.

Lower court decisions

The Vienna Regional Court for Civil Matters issued the injunction applied for but expressly stated that the injunctive relief could not prevent the production of evidence in other court proceedings. The court held that the plaintiff's alcohol consumption during her pregnancy would be a relevant factor in subsequent child custody proceedings. Since evidence would have to be provided for this conduct of the plaintiff, the defendant had had a clear interest to make recordings thereof. However, even though the best interests of the unborn child outweighed the plaintiff's interest in respect of her personality and data protection rights, the court held that the defendant had had no legitimate interest to send the video to the plaintiff's mother. The Vienna Appeals Court confirmed this decision and allowed a further appeal to the Supreme Court.

Supreme Court decision

The Supreme Court rejected the admissibility of the appeal. It pointed out that copyright, including the right to protection of one's own image, cannot prevent a recording from being used in court proceedings (pursuant to Section 41 of the Copyright Act). In reference to existing case law, it stressed that a party cannot prevent the submission of evidence that has been obtained illegally in court proceedings. However, it noted that a court cannot decide on the admissibility of evidence to be submitted in other court proceedings. Thus, the lower courts' ruling that the recordings would be admissible as evidence in other proceedings was not legally binding.

Concerning the recordings of the plaintiff, the Supreme Court stated that the general interest of a party to have a particularly conclusive piece of evidence does not justify the infringement of a personality right. To justify such clandestine recordings, the infringer would have to prove that:

AUTHORS

Claudia Csáky



Stefan Djusic



- they cannot prove their claim in any other way; and
- their interests outweigh those of the affected person.

Noting the private setting of the covert recordings – namely, a private living area, showing the plaintiff in an emotional and inebriated state – the Supreme Court rejected the defendant's argument that the recordings were necessary to protect the wellbeing of the plaintiff's children, holding that it was insufficient.

The Supreme Court confirmed the lower courts' view that forwarding the recording to the plaintiff's mother (ie, a third party) could not be justified in any way and therefore constituted a clear copyright breach.

Comment

It is an inherent trait of the Austrian legal system that even illegally obtained evidence can, in principle, be used as evidence before courts of law (with rare exceptions). This decision confirms that this rule also applies to breaches of personality rights such as the right to one's own picture and privacy of correspondence, both of which are protected under the Copyright Act.

Further, the Supreme Court's decision clarified that the wish to use illegally obtained recordings as evidence in court proceedings does not necessarily justify a copyright breach. Rather, two prerequisites must be met for covertly produced recordings not to constitute a copyright breach:

- an evidentiary emergency (ie, there must be no other means available to prove the infringer's claim); and
- a balance of interest – if the infringer's interests outweigh those of the injured person, a copyright breach must be denied.

If the required threshold is not reached, the infringer is liable for copyright breach, but can still use the recordings in court proceedings to prove their claim.

For further information on this topic please contact [Claudia Csáky](#) or [Stefan Djusic](#) at [Graf & Pitkowitz Rechtsanwälte GmbH](#) by telephone (+43 1 401 17 0) or email (c.csaky@gpp.at or s.djusic@gpp.at). The [Graf & Pitkowitz Rechtsanwälte GmbH](#) website can be accessed at www.gpp.at.

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