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Austria's new laws against "online hate" in light of personality rights

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In 2020, the Austrian government passed a series of measures in order to combat various forms of online misdemeanours collectively termed as "online hate". It also took the opportunity to codify and partly reform regulations regarding personality rights. With the corresponding law,⁽¹⁾ which entered into force on 1 January 2021, several legal acts in the area of civil and criminal law, including accompanying procedural and administrative acts, have been amended and new legislation concerning personality rights was passed.

Amendments to Civil Code

"Personality rights" are a type of IP right that comprise comprehensive immaterial interests such as the right to one's own name, picture, honour or reputation. The key provision regarding the protection of personality rights is section 16 of the Civil Code, which stipulates the respect of human dignity in general. With the reform, the fundamental principles developed over many years by case law and doctrine around section 16 have been codified, providing for the first time an explicit basis for claims concerning the infringement of personal rights. The new rules are applicable to online as well as offline settings.

In accordance with the prevailing opinion that rights relating to personality are highly personal, a new section 17a sets forth that the essence of personality rights cannot be transferred. Correspondingly, consent to impairment of a personality right can be granted by the holder of such right only and to the extent that such impairment does not violate public policy.

Based on the sections 77 and 78 of the Copyright Act, section 17a(3) states that personality rights continue to have effect post-mortem. After the deceased's death, certain relatives are able to assert claims for infringement of the memory of the deceased.

Section 20 of the General Civil Code expressly grants a right to injunctive relief and removal in the event of infringement of personality rights. Previously, this claim was derived from the general provisions of compensation law.

In line with section 81 of the Copyright Act, an immediate infringer as well as an intermediary can be prosecuted for infringement. Also, host providers are potentially liable for infringement – however, this is the case only if they do not act when made aware of the infringement. Access providers (section 13 of the E-Commerce Act) are never liable for infringement of personality rights by third parties (article 12 of the EU Electronic Commerce Directive).⁽²⁾

Furthermore, employers have been granted a claim for injunctive relief and removal if an employee's reputation or privacy has been infringed in a manner that the employer's possibilities to employ the employee is likely to be impaired or could cause a substantial damage to the employer's reputation. The employer's claim is independent from the employee's claim and does not need the employee's consent.

Act on Civil Procedure

Section 549 of the Code of Civil Procedure has been introduced to provide a shortened procedure for severe cases of violations of personal rights.

Persons whose personality rights have been significantly infringed upon in violation of their human dignity in electronic communication networks (eg, on the internet, but also via text message, television or radio), can file an application for injunctive relief. The injunction is to be issued without hearing the defendant if the claim asserted can be conclusively derived from the information in the application. The defendant can object to the injunction within 14 days, upon which regular proceedings will be instigated. Under certain conditions, the court may grant provisional enforceability to the injunction upon the plaintiff's request.

Comment

The non-transferability of personality rights as highly personal rights was undisputed. The wording of section 17a(1) of the Civil Code, according to which personal rights are non-transferable only in "their essence", raises the question of whether they can be transferred beyond this. It can be assumed that the exception refers to the pecuniary components of personality rights and their commercial exploitation, for example through licences.

It is debatable whether it is justified to give an employer a right to sue for infringements of an employee's personality right without requiring the consent of the concerned employee. The employee might not wish to testify or may want to deal with the matter out of court, but could be dragged into litigation regardless.

Whether the new injunctive relief provided for in the Act on Civil Procedure will actually be of help to infringed persons remains to be seen; the term "violation of human dignity" is not defined, so it is unclear under what circumstances this prerequisite for a claim is actually met.

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Endnotes

(1) Hass-im-Netz-Bekämpfungsgesetz (HiNBG), BGBl I Nr 148/2020.

