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Posting photo in Facebook group might infringe author's right to make work available to public

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The Supreme Court recently assessed the conditions under which the uploading of a photo onto social media channels is not to be judged as making the photo available to the public within the meaning of section 18a of the Copyright Act.[(1)]

Facts

A professional photographer took a picture of a political functionary and transferred all rights in the photo to the plaintiff. The defendant published the picture on a website, which referred to the defendant as the author in its metadata. The defendant was member of a Facebook group comprising members who held similar political views. The number of members of the Facebook group varied from 10 to a maximum of between 80 and 100 members. Some group members also got together temporarily in Facebook chat groups. The defendant uploaded the picture to one such Facebook chat group. Access to the Facebook group was by invitation only via the administrator.

The plaintiff requested, among other things, a cease-and-desist order against the defendant for reproducing the photo and making it available to the public. The defendant raised the defence of the free use of a work of reproduction for private use pursuant to section 42(5) of the Copyright Act.

Decision

The case went to the Supreme Court twice. In the first round, the Supreme Court ruled that uploading a picture to a Facebook group could constitute infringement of the author's right to make a work available to the public within the meaning of section 18a of the Copyright Act. If an infringement is affirmed, the infringer cannot rely on the exception of reproduction for private use pursuant to section 42(5) of the Copyright Act as invoking the private copying exception requires obtaining the work from a lawful source.

Referring to the adjudication of the European Court of Justice, the Supreme Court stated that the "public" implies an indeterminate number of potential addressees and, moreover, presupposes a purposefully large number of people. Accordingly, making a work available to the public can only be denied if:

- the access is limited to specific persons who are connected by a personal relationship and thus belong to a private group; and
- the minimum threshold, to be determined on a case-by-case basis according to the size of the group (ie, the number of members), is not exceeded.

The Supreme Court further laid down the following criteria to affirm the existence of a private group:

- There is, from the outset, a personal connecting element between the group members in the sense of a special interest or a special purpose.
- Admission to the group is only granted by a group administrator if the personal connecting element exists.
- Participation is only possible as long as the connecting feature exists.
- A certain maximum number of group members – to be assessed according to the purpose of the group – may not be exceeded.

Since the court of first instance had made no findings on the existence or absence of a personal connection between the group members nor on the size of the Facebook group, the matter was referred back to supplement the findings.

In the second round of proceedings, it was determined that:

- the Facebook group consisted of between 10 and a maximum of 80 to 100 persons;
- the members were connected by their like-minded political beliefs; and
- the members had personally been invited by an administrator after checking their profile.

The chat groups opened by the members were again accessible to individual group members by invitation only. Moreover, it was determined that the picture in question had been published in the (much smaller) chat group only.

The claim was rejected by the court of first instance and the Vienna Appeals Court. It was held that the Facebook group in question was a private group so the picture had not been made available to the public (meaning that section 18a of the Copyright Act did not apply). The defendant could therefore invoke the free use of a work of reproduction for private use pursuant to section 42(5) of the Copyright Act.

The Supreme Court rejected an extraordinary appeal by the plaintiff and confirmed the assessment of the lower courts. A decisive factor was apparently that the defendant had not posted the picture in the Facebook group but uploaded it in the chat group only.

Comment

The decision of the Supreme Court is highly welcome. It clarifies the conditions that qualify a group as a private group. It also states

clearly that the defence of free use of a work of reproduction for private use pursuant to section 42(5) of the Copyright Act presupposes that the work has been obtained legally. Moreover, it can be inferred from the Supreme Court decision that, with a group size of 80 to 100 persons, it is doubtful whether the required personal connection between group members can exist.

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Endnotes

(1) In the decisions 4 Ob 89/20x and 4 Ob 115/21x concerning the same case.