

## Media & Entertainment - Austria

### Protecting one's image: Supreme Court issues controversial ruling

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#### Background

The latest decision of the Supreme Court<sup>(1)</sup> regarding the protection of an individual's image has provoked harsh criticism and raised concerns for photographers and media companies alike.

On February 27 2013 the Supreme Court prohibited the taking of photographs of a person without his or her permission. The taking of pictures of a person had previously been viewed as unproblematic under applicable law, longstanding jurisdiction and doctrine; instead, Austrian law has banned publications from printing such images where they infringe on the legitimate interests of the person depicted, based on Section 78 of the Copyright Act. In case of a threatened interference with his or her rights, an affected person could file for preventive injunctive relief, which was also aimed at prohibiting publication of the offending image.

Following this judgment, questions have arisen as to whether a change in jurisdiction is imminent that would place a wholesale ban on the taking of pictures, rather than simply addressing infringing publication thereof.

#### Facts

The defendant had taken a picture during a site inspection that captured all the people present, including the plaintiff, without their consent. When the plaintiff asked why the picture had been taken, the defendant casually replied: "For my amusement". The plaintiff then requested that the picture be deleted, but the defendant refused.

The plaintiff filed a claim seeking to ban photographs of himself being taken, as this would infringe his right to personal privacy and secrecy. The first and second instance courts rejected the broad claim for omission based on applicable jurisdiction and doctrine. However, the Supreme Court granted the claim.

#### Decision

The court did not declare the taking of photographs to be inadmissible *per se*, but upheld the claim only after weighing the different positions and legally protected interests of the case at hand. Nevertheless, the verdict (which has now become final and binding) reads as follows: "The Defendant is guilty [and must] refrain from taking photographs or similar images of the Plaintiff."

It might be argued that this broad ban violates the principles of necessity and definiteness. Like any other claim, the omission order that the plaintiff sought should be oriented towards the specific breach of law. Instead, the verdict appears to lead to a general prohibition on photographing the defendant, which is not only contrary to the legal situation and past doctrine, but also does not reflect either the specific situation or the weighing of interests undertaken by the Supreme Court. Therefore, criticism that the omission order is too broad is justified.

Moreover, the references to German law on which the judgment relied must be questioned - the legal situation differs from that in Austria. In Germany, the mere taking of a photograph is banned, whereas the Austrian legislature has refrained from implementing a ban on the taking of pictures, instead prosecuting infringing publications. In the materials to the amendment of Section 78 of the Austrian Copyright Act, which deal with the limitations on the publication of photos, the Austrian legislature

expressly stated that the German approach should not be followed. Hence, the court's decision to leverage German provisions and bypass the legislature is questionable.

Despite these concerns, the decision does not indicate an absolute prohibition on photographing persons - the particular facts of the case were too specific and the court rendered the decision only after a detailed assessment of the facts. As stated, the photograph was taken for no other purpose than the defendant's amusement. Therefore, the taking of this specific photograph was seen as an unpleasant encroachment on the plaintiff's personality rights.

In addition, following the defendant's casual attitude and the technical possibilities available, the court deemed there to be a serious threat that the picture could be manipulated and published as such, thereby leaving the plaintiff open to further abuse. The court diligently weighed the interests of the parties. It therefore cannot be alleged that the court intended to make any general statements or change longstanding jurisdiction and doctrine. On the contrary, it stated that had the case concerned holiday photographs or random persons in the background, it would have come to a different conclusion.

## Comment

The decision should be seen as specific to the case at hand, and not an intention of the courts to prohibit the taking of pictures without permission in general. Unfortunately, as this was reflected only in the grounds for the decision, and not in the (arguably too broad) verdict, concerns about the decision are understandable.

There is no doubt that the decision was reasonable in its outcome. Even based on the existing legal situation, the court would have been likely to reach the same result. There was a justified concern that interference with the defendant's rights was imminent through subsequent publication of a manipulated or unfavorable picture. The court could thus have granted the omission order as a preventive legal remedy, but limited such order to disparaging publication. However, although the content of the decision was justifiable, the broad verdict and the focus on the taking of pictures, rather than the publication thereof, was not.

It remains to be seen whether the decision will be interpreted strictly, based on existing legal provisions, or if it will lead to prohibitions on the mere taking of a picture. However, it is hoped that the legislature will consider the concerns raised and that the ruling will remain merely an individual decision in a rather extreme case.

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## Endnotes

(1) 6 Ob 256/12h.

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