[DE] Federal Supreme Court rules on admissibility of online display of protected works in the background of video posts

IRIS 2024-9:1/19

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In various judgments issued on 11 September 2024 (case Nos. I ZR 139/23; I ZR 140/23; I ZR 141/23), the *Bundesgerichtshof* (Federal Supreme Court – BGH) decided that the use of images of a photo wallpaper on the Internet did not infringe rights protected under the *Urheberrechtsgesetz* (Copyright Act – UrhG) to the photographs printed on the wallpaper. The court examined in particular whether influencers could breach copyright law if protected works that they had no right to communicate to the public were visible in the background of videos or still images that they published in social media posts.

The defendant in case I ZR 139/23 had purchased a photo wallpaper online from a company founded by a professional photographer that markets photographs taken by the photographer as photo wallpapers. The wallpaper, which the defendant had put up on a wall in her house, was later seen in the background of several video posts on her Facebook page. The company applied for damages and reimbursement of warning costs, claiming that the appearance of the wallpaper online had infringed its copyright.

However, the BGH disagreed. It was true that the defendant had made the work available to the public within the meaning of Article 19a of the Copyright Act and communicated it to the public within the meaning of Article 3 of Directive 2001/29/EC. However, since the company concerned should be assumed to have given implied consent, any interference in the defendant's rights was irrelevant in this case. The existence of such consent depended on the objective content of the declaration from the perspective of its recipient, in particular whether it concerned normal acts of use that the rights holder must expect. The taking of photographs and video recordings in rooms decorated with photo wallpapers and the uploading of these photographs and videos on the Internet were such normal acts of use. Creators of such photo wallpapers should expect them to appear in the background of photos or videos that might then be posted on social media, whether for private or commercial purposes. Since it also made no difference to whom the consent was declared, it did not matter whether the uploader of the video was also the person who had purchased the wallpaper or not, e.g. if a web and media agency had acted as an intermediary. However, the author was free to contractually agree restrictions on use as part of a sale and to make such restrictions visible to third parties, such as by adding an author's name or a

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reservation of rights. However, this was not the case in the disputed cases. The BGH also approved the assumption made by the Court of Appeal in all proceedings that claims for infringement of the right to name the author pursuant to Article 13, sentence 2 of the Copyright Act did not exist because the author had waived this right by implication when selling the photo wallpapers.

Pressemitteilung Nr. 179/2024 des BGH

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2024/2024179.html

Federal Supreme Court press release No. 179/2024

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