[AT] High Court Revises its Jurisprudence on Copyright Damages

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Whoever by acting in breach of copyright law (Urheberrechtgesetz-UrhG) culpably does prejudice to another has to pay damages to the injured party under § 87 UrhG. This claim for damages under copyright law has several special features vis-a-vis general liability law : for example, the wrongdoer has to pay the injured party for loss of earnings without consideration of the degree of liability (para 1) ; furthermore the injured party may call for appropriate compensation for intangible prejudice not covered by pecuniary loss suffered (para 2) and as compensation for pecuniary damage suffered, if no greater injury can be proved, may demand liquidated damages in the amount of twice the appropriate compensation (para 3).

As regards the possibility of liquidated damages, the High Court (Oberster Gerichthof-OGH) has always taken the view, despite heavy criticism from the prevailing opinion, that the injured party must at least provide some evidence of "basic damage" (however small). Now, in a case brought by the collecting society http://services.obs.coe.int/en/index.htm representing plastic and graphic artists against the Austrian Broadcasting Corporation (ORF), the OGH has reversed its view and fallen in with the prevailing opinion that liquidated damages under § 87 para 3 UrhG do not require evidence of "basic damage".

Picking up the arguments adduced in the jurisprudential literature, the OGH bases its change of approach primarily on the fact that the historical legislator attempted to do justice to the sensitivity of copyright law by easing the evidence requirement for liquidated damages; the evidential difficulties to be overcome related not only to the level of damages but also to the occurrence of the damaging event. If too severe a level of evidence of damage were called for, the intending copyright infringer would not be worse off than any user having obtained prior agreement from the author. Both would simply be required to make payment for use. Moreover, the General Civil Code recognises liquidated damages under contractual penalties (§ 1336 ABGB) independently of the level of any actual injury and, according to the prevailing view, requiring no evidence of damage.

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