[AT] Supreme Court Rules That Blank Cassette Levy Applies to Hard Drives

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In a decision of 17 December 2013, the *Oberste Gerichtshof* (Supreme Court - OGH) referred a legal dispute over the blank cassette levy on hard drives back to the first-instance court. It considered that the trial court had failed to establish whether and, if so, to what extent the remuneration system provided for in Article 42b(1) of the *Urheberrechtsgesetz* (Copyright Act - UrhG) - particularly in connection with the refunding of remuneration under Article 42b(6) UrhG - could be deemed "fair compensation" in the sense of Article 5(2)(b) of Copyright Directive 2001/29/EC. The OGH, particularly on account of technical advances and decisions taken by the Court of Justice of the European Union (CJEU) since decision 4 Ob 115/05y (Gericom), thought that the basic obligation to pay remuneration under Article 42b(1) UrhG now also applied to computer hard drives.

Under this provision, the author is entitled to equitable remuneration (blank cassette levy) if it is probable that, owing to its nature, a work which has been broadcast, made available to the public or recorded on a video or audio recording medium for commercial purposes will be reproduced for personal use by copying onto a video or audio medium in accordance with Article 42(2) to (7) UrhG, and if recording material is commercially available on the domestic market.

Recording material particularly includes unrecorded video or audio media suitable or designed for such reproduction. According to the OGH, the wording of Article 42b(1) UrhG includes computer hard drives unless they are only used for copying to a very small extent (see OGH decision 4 Ob 115/05y of 12 July 2005).

This provision is based on Article 5(2)(b) of the Copyright Directive, according to which a member state that provides for an exception to the reproduction right in respect of reproductions made for private use must ensure that the rightsholders receive fair compensation (see CJEU judgment C-462/09 of 16 June 2011 - Thuiskopie, see IRIS 2011-7/2). In its judgment of 21 October 2010 (C-567/08 - Padawan, see IRIS 2010-10/7), the CJEU ruled that "fair compensation" should be calculated on the basis of the reduction in income suffered by rightsholders as a result of the introduction of the private copying exception. According to recital 35 of the Copyright Directive, no obligation for payment may arise if the prejudice to the rightsholder is minimal.

In its decision 4 Ob 115/05y (Gericom), the OGH had considered that external or internal hard drives were regularly used to a significant extent in a way completely unrelated to the compensation paid for private copying and that no payment was therefore due under Article 42b(1) UrhG. In its latest ruling, however, it expressed doubt over whether rightsholders only suffered "minimal prejudice" as a result of the use of hard drives for unrestricted copying. It should be borne in mind that analogue storage media were disappearing from the market and gradually being replaced by digital media that were being used to copy protected works on an economically significant scale.

The simple fact that hard drives were also used for other purposes (multi-functionality) did not mean that no remuneration was due. According to CJEU case law, when deciding whether rightsholders were entitled to "fair compensation" in the sense of Article 5(2)(b) of the Copyright Directive, account should only be taken of revenue lost as a result of legal copying. However, these losses did not depend on whether and to what extent recording equipment was used for purposes other than those for which remuneration was due. Rather, the crucial factor was whether computer hard drives were actually used to store copyright-protected works to such an extent that the threshold of "minimal prejudice" in the sense of recital 35 of the Copyright Directive was exceeded. Even using just a tiny part of a hard drive's memory could result in an obligation to pay remuneration according to Article 42b(1) UrhG.

In view of the increasing storage capacities of computer hard drives, even if they were only partly used for such copying, the resulting prejudice could no longer be described as minimal. The same conclusion would apply if, for example, half of the hard drives in people's houses were not used at all to store content for which remuneration was due, provided they were used to a "relevant extent" from a general perspective.

Beschluss des OGH vom 17.12.2013 (4 Ob 138/13t)

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OGH decision of 17 December 2013 (4 Ob 138/13t)