[AT] Copyright infringement by Internet live stream and use of an online video recorder

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In a decision issued on 22 September 2020, the Austrian *Oberste Gerichtshof* (Supreme Court – OGH) gave its views on (cable) retransmission via the open Internet and online video recorders that use the deduplication technique.

The plaintiffs are television broadcasters based in Germany who had signed collection agreements with the German collecting society VG Media that expressly excluded the rights for retransmission via open networks (OTT services). The defendant, who operates an Austrian mobile communications network, offers public telephone and Internet services and a TV service that enables its customers to receive television programmes, including those of the plaintiffs, via TV sets, PCs or mobile devices. These programmes are retransmitted to the defendant's customers either via the defendant's network or via a third-party Internet service where, in the final stage of the process, the programmes are carried through a password-protected 'virtual pipeline' via OTT services over which the defendant has no control. The defendant also operates an online video recorder that enables its customers to watch television programmes on a time-shifted basis. In the injunction procedure, the plaintiffs demanded that the retransmission of their programmes via the third-party Internet service and the use of the online video recorder be stopped.

The OGH confirmed the decisions of the first-instance and appeal courts in the plaintiffs' favour and rejected the defendant's appeal. It concluded that the defendant had interfered in the plaintiffs' cable retransmission right, enshrined in Article 59a(1) of the *Urhebergesetz* (Copyright Act – UrhG). Cable retransmission involved the retransmission of an upstream broadcast and needed to meet the integrality principle, that is, the programme must be retransmitted in full, unmodified and in real time. However, on account of the technology-neutral approach of Austrian copyright law, it was not necessary for the signal to actually be retransmitted via cable. It could also be retransmitted via microwave or UMTS. For the user, it made no difference whether the programme was retransmitted via the Internet or over a mobile network. Users often had no idea what kind of data connection they were using to access content. In the case at hand, the programmes were being retransmitted via cable. The only part of the process over which the defendant had no control was the final stage of retransmission via the OTT services of a third-party Internet provider. However, Article 59a(1) UrhG

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did not state that the cable rebroadcasting right was limited to processes in which the original broadcaster's programmes were transmitted via a communication network totally controlled by the retransmission company. This would go against the technology-neutral approach of the provision.

Additionally, the court ruled that the retransmission right enshrined in Article 76(1) UrhG had been infringed. The retransmission right was an example of communication to the public, since when a company other than the original broadcaster made content available via online streaming, it was communicating that content to the public. Article 76a(1) UrhG covered both wireless and wired retransmission; TV streaming over the Internet was a form of wired retransmission. The OGH also decided that the online video recorder had breached the plaintiffs' reproduction right under Article 15(1) UrhG. The online video recorder was used to create digital copies of the plaintiffs' television programmes using the deduplication technique. It was debatable whether this process was covered by the private copying exemption provided in Article 42(4) UrhG. It depended on whether the copy was attributed to the user, who could, in principle, claim the private copying exemption, or the defendant, who used the copies for commercial purposes, that is, to make them available to its customers, and to whom the exemption therefore did not apply.

Regarding the attribution of the copying process, the OGH referred to the case law of the German *Bundesgerichtshof* (Federal Supreme Court – BGH). It was necessary to assess who had organisational responsibility for the recording process and whether the copy was made only for the individual user or whether a master copy was produced and the user merely given access to it. This case law could be applied to Austrian copyright law. The programmes were proactively stored and copied by the defendant on its servers, while the user only had the right to access the copy. The copies produced using the deduplication process were therefore attributable to the defendant, who could not rely on the private copying exemption.

Urteil des OGH vom 22.09.2020 – Geschäftszahl 4Ob149/20w

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Supreme Court ruling of 22 September 2020 - Case no. 4Ob149/20w

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