

Pictorial quotation and incidental use: 13 quotations too many according to the Austrian Court

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The Austrian Supreme Court has recently shed some light on the requirements for the admissible quotation of photos (judgment of 26 September 2017, 4Ob81/17s).



In this case, a photographer had taken photos of a poacher who was killed in 1982. The competent collecting society sued a private TV-broadcasting station for their unauthorised use of one of these photos in a documentary which was produced by that station. The photo was displayed at least 13 times in the documentary, without giving credit to the photographer. The photo was even shown on the poacher's brother's tie, and it was also printed on flyers. Furthermore, the photo was perceivable in the background on the wall of the brother's dining room. Moreover, the documentary featured scenes where the photo was shown a couple of times. The documentary was broadcast between 2013 and 2014.

The broadcasting station's defence was based on an assertion that the use of the

photo was merely a coincidence or was an admissible quotation of the picture.

In this context, the basic rule is that a piece of work may be reproduced, distributed, broadcast, made available to the public and/or used for public recitation, performance and presentation, provided that the work is only used coincidentally and without reference to the primary object of the exploitation activity (coincidental use pursuant to section 42e of the Austrian Copyright Act).

Reproduction and distribution, as well as public recitation and broadcasting, shall also be permissible when citing individual passages of a work of language which has already been published, provided that the corresponding extent of such use is legitimated by the specific purpose (quotation pursuant to section 42f of the Austrian Copyright Act). Inter alia, citation from works of literature as well as from musical and visual art works shall be admissible.

The reason for these limitations of copyright is to avoid the need for users to have to ask the author for permission where the work is only used coincidentally, without any context for the subject of exploitation or as a quote

Coincidental use?

In order to be admissible, a coincidental use must basically be insignificant. A use is to be considered insignificant in copyright terms if the copyright work reproduced may be removed or replaced and such removal/replacement only has minor or subordinate importance with a view to the overall impression/appearance generated by the reproducing work. The German Federal Supreme Court has already adopted this approach (see German Federal Supreme Court, I ZR 177/13, GRUR 2015,667). As soon as a reproduced element of a copyright work influences the style or atmospheric picture of the reproducing work, or as soon as a reproduced work is included within the main subject of the exploitation in order to support a certain effect or expression or the dramaturgical scope, it may no longer be deemed insignificant.

In the Austrian case in question, the photo was not used in a substitutable or coincidental way. Rather, the photo was used at least 13 times for achieving a certain dramaturgical effect. Therefore, this use fell short of an admissible coincidental use.

An admissible quotation?

The Court held that the requirements for an admissible quotation had not been met. For the inclusion of the photo to have been an admissible quotation would have required an analysis of or a debate about the quoted photo. For example, the photo could have legitimately been used as a form of reference or for supporting the views expressed in the documentary. Such legitimate use would have to create an internal link between the quoting work and the quoted work. The question therefore is always whether the quotation's purpose could also have been achieved in a different manner, for example by obtaining the quoted author's permission.

Last but not least: The Austrian Supreme Court also rejected the defence based on free speech in this case, because the photo in question did not have the function of quoting or demonstrating anything. Rather, it solely served an illustration purpose.