

The Private International Law of Virtual Zoom Backgrounds

Written by Tobias Lutzi, University of Cologne

One of the biggest winners of the current pandemic (other than toilet paper producers, conspiracy theorists, and the climate) seems to be the former Silicon Valley startup Zoom, whose videoconferencing solutions have seen its number of daily users increase about thirtyfold since the end of 2019. While the company's success in a market otherwise dominated by some of the world's wealthiest corporations has taken many people - including investors - by surprise, it can be attributed to a number of factors - arguably including its software's highly popular virtual-background feature.

With more and more people using the cockpit of the *Millennium Falcon*, the couch from *The Simpsons*, and other iconic stills from movies or TV series as virtual backgrounds in their private and professional Zoom meetings and webinars, the question arises as to whether this may not constitute an infringement of copyright.

Unsurprisingly, this depends on the applicable law. Whereas using a single frame from a movie as a virtual background may often qualify as 'fair use' under US copyright law even in a professional setting (and thus require no permission from the copyright holder), no such limitation to copyright will be available in many European legal systems, with any 'communication to the public' in the sense of Art 3 of the Information Society Directive 2001/29/EC potentially constituting a copyright infringement under the domestic copyright laws of an EU Member State.

As far as copyright infringements are concerned, the rules of private international law differ significantly less than the rules of substantive law. Under the influence of the Berne Convention, the so-called *lex loci protectionis* principle has long become the leading approach in most legal systems, allowing copyright holders to seek protection under any domestic law under which they can establish a copyright infringement. For infringements committed through the internet, national courts have given the principle a notoriously wide application, under

which the mere accessibility of content from a given country constitutes a sufficient basis for a copyright holder to seek protection under its domestic law. Accordingly, using an image on Zoom without the copyright holder's permission in a webinar that is streamed to users in numerous countries exposes the user to just as many copyright laws - regardless of whether the image is used by the host or by someone else sharing their video with the other participants.

Interestingly, the fact that the image is only displayed to other users of the same software is unlikely to mitigate this risk. While Zoom's (confusingly numbered) terms & conditions unsurprisingly prohibit infringements of intellectual property (clause 2.d.(vi)) and - equally unsurprisingly - subject the company's legal relationship with its users to the laws of California (clause 22/20.1), courts have so far been slow to attach significance to such platform choices of law as with regard to the relationship between individual users. In fact, the EU Court of Justice held in Case C-191/15 *Verein für Konsumenteninformation v Amazon* (paras. 46-47) that even with regard to a platform host's own liability in tort,

the fact that [the platform host] provides in its general terms and conditions that the law of the country in which it is established is to apply to the contracts it concludes cannot legitimately constitute [...] a manifestly closer connection [in the sense of Art. 4(3) Rome II].

If it were otherwise, a professional [...] would de facto be able, by means of such a term, to choose the law to which a non-contractual obligation is subject, and could thereby evade the conditions set out in that respect in Article 14(1)(a) of the Rome II Regulation.

While the escape clause of Art. 4(3) Rome II is not directly applicable to copyright infringements anyway, the decision illustrates how courts will be hesitant to give effect to a platform host's choice of law as far as the relationship between users - let alone between users and third parties - is concerned. This arguably also applies to other avenues such as Art. 17 Rome II and the concept of 'local data'.

The liability risks described above are, of course, likely to remain purely theoretic. But they are also easily avoidable by not using images without permission from the copyright holder in any Zoom meeting or webinar that cannot safely be described as private under the copyright laws of all countries from where the meeting can be joined.