

Executive Committee Paris March 15, 2008

RECENT DEVELOPMENTS IN AUSTRIA

(Michel Walter)

I. Legislation

No new legislation to be reported

II. Jurisprudence

- Court of Appeals of Vienna April 4, 2007 5 R 193/06y – „MediaSentry I“<sup>1</sup> (appealed)
  - The active participation in file-sharing-systems requires the authors' consent
  - Private copying: legal source is a precondition (passive participation in file-sharing-systems)
  - Claim to information (*Auskunftsanspruch*): also access providers have to disclose the name and address of the holder of (dynamic) IP-numbers
- Supreme Court November 13, 2007 4 Ob 141/07z – „MediaSentry II“<sup>2</sup>  
Preliminary Reference Procedure under Article 234 EC Treaty:
  - Does the notion of “intermediary” (*Vermittler*) include access providers?  
Question which should be answered to by the ECJ in the affirmative
  - Does the information of (private) third parties (holders of intellectual property rights) under Article 8 (1) Enforcement Directive conflict with the protection of “traffic data” in a civil procedure?  
Question which should be answered to by the ECJ in the negative on principle – however with respect to the „ProMusicaE/Telefónica de España“ decision a balancing between the interests of right holders and fundamental rights must be provided for – this is why some further comments may be expected from the ECJs decision<sup>3</sup>.
    - ECJ January 29, 2008 Rs C-275/06 - „ProMusicaE/Telefónica de España“<sup>4</sup>
- Supreme Court November 13, 2007 4 Ob 165/07d – „Donauinsselfest II“<sup>5</sup>  
Preliminary Reference Procedure under Article 234 EC Treaty:  
Article 5 (1) Brussels I Regulation and licence agreements related to Copyright and neighbouring rights
  - Does Article 5 (1) (b) referring to services apply also to licence agreements?
  - If so, where is the performing of services deemed to take place (in any territory covered by the licence agreement<sup>6</sup> or where the author or phonogram producer is domiciled)?
  - If these answers are answered to by the ECJ to the affirmative, may the licence fees be claimed by the plaintiffs with the competent court irrespective of the territory where the proceeds come from?
  - If these questions shall be answered to by the ECJ to the negative, is Article 5 (1) (a) to be construed under the jurisprudence of the Court as decided under

<sup>1</sup> MR 2007, 198 (Walter).

<sup>2</sup> MR 2007, 437 (Walter).

<sup>3</sup> § 87b (3) Austrian CA reads as follows:

„Intermediaries in the sense of § 81 (1a) of the Act shall by well-founded request of the injured [owner of Copyright] in writing inform such owner of Copyright about the identity (name and address) of the infringer respectively give all other information necessary to find out the infringer. Such request shall include in particular all facts, put forth in a sufficient concrete form, arousing the suspicion of infringement. The equitable expenses of such information shall be born by the injured person.“

<sup>4</sup> MR 2007, 433.

<sup>5</sup> MR 2007/7 (Walter).

<sup>6</sup> In the particular case: Germany, Austria and Switzerland.

the provisions of the European Treaty on the competence in civil and commercial matters?

- Supreme Court January 16, 2007 4 Ob 198/06f – „Internet-Gebrauchtwagenbörse“<sup>7</sup>
  - Protection of computer programs
  - Originality: complex programs or programs showing an extraordinary degree of experience, skill and knowledge (?)
  - Unfair competition: the taking over of app 35% of a HTML-Code and about 10 to 15% of a Java-Script-Code
- Supreme Court November October, 2, 2007 4 Ob 124/07z – „Leerkassettenvergütung V/Lcckassettenversandhandel II“<sup>8</sup>
  - Blanc tape Levy
  - Mail-order delivery of blank carrier material from abroad to Austria is deemed to be distribution in Austria
  - Third parties (domiciled in Austria) participating in the delivery system (storing, package up and shipping) are liable for payment of the blank tape levy
  - Article 6 (1) Brussels I Regulation applies in this case where only one co-defendant was domiciled in Austria
- Supreme Court September 4, 2007 4 Ob 62/07g – „Flughafen Wien“<sup>9</sup>
  - No Copyright protection for a architectural plans in the first line depending upon functional and technical requirements
  - However: Claim to an equitable remuneration in the case of a taking over such plans (*versio in rem*)
- Supreme Court September 4, 2007 4 Ob 112/07k – „Internetwerbung mit Lichtbildern“<sup>10</sup>
  - Copyright contracts shall be construed in line with the purpose of the contract
  - Thus the scope of the rights conveyed to the author's partner is limited to the very purpose from a practical viewpoint
  - Comment: This rule is, however, only a rule of interpretation and is not to be compared with the German “*Zweckübertragungsgrundsatz*”, which for its part applies also to a clear language of the contract not sufficiently specific (transparent)
- Supreme Court June 12, 2007 4 Ob 11/07g – “EDV-Firmenbuch III”<sup>11</sup>
  - Protection of the Commercial Register run by the Republic of Austria
  - Notion of obtaining, verification and presentation: costs for the providing of electronic access are to be taken into consideration
  - The exception provided for official works does not apply to the *sui generis* protection of databases (under Austrian Law)

### III. Activities of the Austrian Group of ALAI in 2007 and 2008

- December 2007: Lecture and Discussion of the German “Second Basket” (Speakers: *Hoeren, Walter*)
- April/Mai 2008: Lecture and Discussion of the criminal prosecution of Copyright infringements in the light of the Commissions proposal for an EC Directive dealing with criminal sanctions of infringements of IP rights and the recent Amendment of the Austrian Criminal Procedure Code eliminating the investigation procedure by an investigation judge (*Untersuchungsrichter*) with regard to infringements prosecuted by request of the infringed party only (*Privatanklage*)

<sup>7</sup> MR 2007, 138 (*Wiebe und Walter*) = RdW 2007/568, 536.

<sup>8</sup> MR 2007, 332.

<sup>9</sup> MR 2007, 321 (*Höhne*).

<sup>10</sup> MR 2007, 330.

<sup>11</sup> MR 2007, 384 = ÖBl 2007/65, 291 (*Dittrich*) = RdW 2008/109, 147.