

RECENT DEVELOPMENTS IN AUSTRIA

(Michel Walter)

I. Legislation

No new legislation to be reported

II. Jurisprudence

- **Supreme Court January 22, 2008 – “Joey Racino Show”¹**
 - protection of **choreographic works** – body movements of any kind (yes)
 - protection of dancing puppets (yes)
 - protection of parts thereof (yes)
 - no protection for single dance steps or dance techniques
 - mere statistic originality not sufficient
 - **producer of phonograms** is deemed to be the person who organizes the recording, provides for the technical requirements and bears the economic risks
- **Supreme Court January 22, 2008 – „Buslinien-Logo“²**
 - an adaptation to be free must only take the original as an incentive for the adaptor’s own creativity
 - this may be the case if the works only resemble as regards the subject matter treated, the topic, or the problems dealt with
 - in considering these conditions the works must be compared with each other as a whole
- **Supreme Court January 22, 2008 – „Tauschbörse/Minderjährige“³**
 - no liability of the parents of a minor prior to the knowledge of an infringement
 - copyright infringement in participating in a peer-to-peer network
- **Supreme Court March 11, 2008 – „Internetportal V/Vorarlberg Online II“⁴**
 - protection of **literary works**
 - no elevated level of originality required
 - **news of the day** do not enjoy copyright protection according to general copyright principles as laid down in Article 2 para 8 of the Berne
 - the mentioning of such news of the day and mere press information in § 44 para 3 of the Austrian Copyright Act has no specific importance going beyond this general principle
 - as regards **commissioned works** exclusive or non-exclusive licences are conferred on the client by tacit agreement to the extent as required by the nature of the commission, if not agreed upon otherwise

¹ 4 Ob 216/07d MR 2008, 91 (Walter) = wbl 2008/ 139, 296 = ÖBl 2008/50, 249 (Büchele/Dittrich) = ecolex 2008/200, 553 (Kurzanm Horak) = RZ 2008/269 (LS).

² 4 Ob 221/07iMR 2008, 96 (Walter).

³ 4 Ob 194/07v MR 2008, 18 (Daum) = RdW 2008/354, 396 = ÖBl 2008/51, 256 (Büchele).

⁴ 4 Ob 248/07k MR 2008, 157 (Walter) = ecolex 2008/316, 840 (Horak).

- **Supreme Court March 11, 2008 – „Natascha K/Phantombild“⁵**
 - copyright protection of photographs – no elevated level of originality required
 - common photo portraits, therefore, enjoy copyright protection
 - related rights protection of photographs (lacking originality) runs parallel to copyright protection
 - **free adaptation** of a photograph (portrait of a kidnapped girl) used for digital adaptation in order to produce a photofit
 - use for the purpose of **public security**

- **Supreme Court May 20, 2008 – „Möbel im Hotel“⁶**
 - the exclusive **right of distribution** as laid down in § 16 of the Austrian Copyright Act is not limited to acts transferring ownership
 - thus the distribution right extends to **rental and lending** as well
 - the term ‘distribution’ under Austrian law is to be understood in the sense of conveying the **legal or factual power of disposal**, be it for a limited period of time
 - thus, the providing **pieces of furniture** protected under copyright to the clients of a hotel in its lobby for **use on the spot** is covered by the distribution right
 - to the **contrary**, the **European Court of Justice** in discussing this question under the angle of the distribution right as laid down in Article 4 para 1 of the Information Society Directive answered the question submitted by the German Federal Court of Justice to the negative, arguing that the term distribution is to be construed in line with the International Copyright Treaties which presuppose a transfer of ownership

III. Activities of the Austrian Group of ALAI since March 2008

- Statement of the Austrian Group on the request of the Federal Ministry of Justice concerning the impact of a recent Amendment to the **Code of Criminal Procedure** which entered into force on January 1, 2008 and significantly affected the criminal prosecution of infringement of intellectual property – so far the Ministry agreed in principle to again amend the Code of Criminal Procedure to avoid ambiguities. – In Austria criminal prosecution of (intentional) infringements of IP rights only takes place upon the **initiative of the infringed party** (right holder).
- Opinion of the Austrian Group to the Federal Ministry of Justice on the European **Commission’s Proposal** for a Directive amending the **Duration Directive** 1993/2006 which is, in principle, in favour of the proposed amendment as regards musical works with text, but opposed to the proposed prolongation of the term of protection with respect to performing artists and producers of sound carriers.

⁵ 4 Ob 170/07i MR 2008/5 (*Walter*) = ecollex 2008/274, 753= EvBl 2008/47, 499; see also Supreme Court July 8 2008 4 Ob 102/08s – „Natascha K/Phantombild II“ MR 2008/5.

⁶ 4 Ob 83/08x MR 2008, 197 (*Walter*).