Executive Committee Paris 14 January 2012
RECENT DEVELOPMENTS IN AUSTRIA

(*Michel Walter*)

I. Legislation

No new legislation is to be reported except for a Law by means of which the Austrian National Anthem (*Bundeshymne*) was 'gendered' in modifying its text from

'Homeland you are of grand sons' into
'Homeland of grand daughters and sons' and from

'Choirs of brothers' into
'Jubilee choirs'.

The text of the single Sec 1 of this Federal Law reads as follows

> § 1. The National Anthem of the Federal Republic of Austria consists of three versus of the poem 'Country of mountains' („*Land der Berge*") as well as of the melodyof the so-called 'Federal Song' („*Bundeslied"*)[1], both of it as set out in the Schedule to this law, which is an integral part thereof[2].

Note:

1. Please be reminded of the Supreme Court decision of 15 December 2010[3] - „*Bundeshymne II/Rock me Paula*", which was mentioned in the Austrian Report of June 2011 (Dublin) dealing with questions of moral rights and criticized in several respects.

2. The Austrian National Anthem now being anchored by law, the question arises whether a non-official work (text of the poem 'country of the mountains' by *Paula von Preradović*) is rendered into an official work (lacking copyright protection) in case it is integrated into an official work (Federal Law). The Supreme Court did not yet answer to this question, which is disputed in doctrine. In my opinion this is not the case under Austrian law.

3. It appears to be worthwhile mentioning that the law itself does not respect the moral rights of the text author, since *Paula von Preradović* is not even mentioned neither in the text of the law nor in the schedule thereof. Thus the legislator itself appears to infringer copyright.

4. Furthermore, the music of the National Anthem as it is reproduced in the Schedule to the law is a composition for two voices and piano accompaniment that was composed by *Viktor Keldorfer* who died in 1959 and whose works, therefore, are still under copyright protection. Hence also in this regard the law appears to infringe basic copyright rules and not even mentions the author either.

---

1 The tune has for a long time been attributed to *Wolfgang Amadeus Mozart*; recent musicologist research work is rather inclined to hold that it has been composed by an anonymous contemporary of *Mozart*. In any case the tune is in the public domain, whereas the text is still under copyright protection. Its author is the well known Austrian poet *Paula von Preradović* who died in 1951.

2 The law entered into force on 1 January 2012.

3 Case 4 Ob 171/10s MR 2011,79 (*Walter*) = ZUM 2011, 360 = RdW 2011/210, 217) JBl 2011, 313.

II. Jurisprudence

- **12.04.2011 4 Ob 222/10s – „AKM-Aufführungsverbot“**[4]
  - **Collecting societies** are deemed to be **monopolists** in regard of their field of business action.
  - They are, therefore, **obliged** to enter into **agreements** with interested users.
  - However, if there are **sound reasons** for **refusing** to contract, the obligation does not apply. If a user is with regard to a considerable amount in arrears with his payments, this is deemed to be a sound reason for refusing to contract.
  -
- **Supreme Court (OGH) 08.09.2011 4 Ob 101/11y – „Gemälde im Hotel II/Mozart Symphonie No 41 II“**[5]

Supreme Court 23 February 2010– „Gemälde im Hotel/Mozart Symphonie No 41 I“[6]
In 2010 the Supreme Court (OGH) held as set out below (see report and critical note ExComm Paris February 2011)

- The concern of the **reproduction right** is to allow the author to participate in the proceeds of the work’s exploitation.
- The reproduction right only comes into play, if the work is **perceivable** as this is the case with regard to the **original** of a painting.
- The reproduction and the making available of **photos of particular rooms** of a hotel on the hotel’s web-site, where paintings fixed on the wall are to be seen in a rather small format, does not infringe the author’s exclusive rights.

However, in its second decision rendered in 2011 in the main proceeding of this case the Court with some respect overruled its first decision and held:

- The **reproduction** of a work presupposes that the work can be perceived by **human senses**.
- The reproduction and the making available of **photos of particular rooms** of a hotel on the hotel’s web-site, where paintings fixed on the wall are to be seen in a rather small format, is **relevant** with respect to copyright if the painting may be ‘blown up’ by means of a mouse-click/mouse-over.
- Apart from the economic aspects of exclusive exploitation rights, the issue of **moral rights** and the author’s interest to **control** the exploitation of his/her works is to be taken into consideration.
- Copyright as such can **not be waived**. However, the author may consent to specific uses of his/her work. Under the circumstances of the case at issue, the Court held that the artist had **tacitly consented** to the use of photos taken **during the exposition** of her works in the hotel rooms. Such ‘simple’ consent[7], however, may at any time be withdrawn.

Note:

The Court responded to the criticism expressed in doctrine and with some respect overruled its earlier decision.

---

4 MR 2011, 278 (*Walter*) = ÖBl 2011/44, 184 (*Büchele*).

5 MR 2011, 311 (*Walter*) = ecolex 2011/405, 1030 (short note *Eva Heil*).

6 4 Ob 208/09f MR 2010, 206 (*Walter*) = wbl 2010/124, 316 (LS) = ecolex 2010/215, 584 (Kurzanm *Horak*) = RdW 2010/379, 376 (LS) = ÖBl 2010/122-123, 183 (*Büchele*) = ZUM 2010, 629 (*Handig*) = GRUR Int 2011, 77.

7 Which is not deemed to be an agreement in the strict sense of the word.

- **20.09.2011 4 Ob 105/11m – „123people/Vorschaubilder/thumbnails“** [8]
  - **Computer generated** works are not protected under copyright. If thumbnails are generated automatically, they do not enjoy copyright protection.
  - The author's exploitation rights are to be understood as a **system of gradually covering the end-user** in order to secure the claims of the author whenever a new public is involved.
  - The operator of meta-search-engine sets a **hyperlink** to the content of a website (pictures) in automatically producing thumbnails thereof does **not reproduce** such content but rather facilitates the end-user's browser to access the website. If such content has been put on the website legitimately and without circumventing technical measures, there is **no making available** of such content either in hyper linking to it.

Note:

1. Since the answering to the questions at issue in this case require the interpretation of provision on the European level, it appears astonishing that in this case the Austrian Supreme Court did not launch a preliminary proceeding with the European Court of Justice.
2. The question whether the linking to a website's legitimate content is to be regarded as a relevant reproduction or making available, is disputed in Austrian doctrine. However, the Court did not discuss the arguments that were put forth and only underscored that the content was already legitimately put on the internet, which is, however, always the case in regard to secondary uses. The argument that hyper linking often takes place for commercial purposes was not taken into consideration either.
3. It may be worthwhile noting that in restricting its finding to contents put on the internet with the author's consent and without using technological protection measures, the Court in essence came to a solution, which is equivalent to the German Federal Court's finding in its '*Vorschaubilder'* decision that was based on the tacit consent of the author.

III. Activities of the Austrian Group in 2011

- The Austrian Group has repeatedly commented on the Commission's proposed Amendment of the Term Directive, which eventually was adopted in September 2011.
- Furthermore, the Austrian Group has prepared an extensive and rather critical comment on the European Commission's Proposal of a Directive on certain permitted uses of orphan works.

[8] MR 2011, 313 (*Walter*).