

Executive Committee Bonn 17 June 2015

RECENT DEVELOPMENTS IN AUSTRIA

(Michel Walter)

I. Legislation

1. Since the Working Paper (*Arbeitspapier*)¹ of November 2012, mentioned in my prior reports, no further substantial steps of the Austrian legislator have been taken by the Austrian legislator. However, as likewise already was mentioned earlier the implementation of the amended Term-Directive of 2011 was enacted by Copyright Law Amendment of 2013²) as well as the Orphan Works Directive of 2012 by Copyright Law Amendment of 2014³).

In recent days, however, the Federal Ministry of Justice published a draft amendment to the Austrian Copyright Act (2015) and limited the period for a response to ten days ending 12 June 2015 (a 'long' week-end included). Nonetheless the Austrian Group of ALAI reacted and delivered its (critical) statement in time. According to unofficial information the text shall be dealt with already to-morrow (Tuesday, 16 June 2015) in the Council of Ministers.

The main issues dealt with in the ministerial draft correspond more or less to those already alluded to in the *Arbeitspapier* of 2012. The law shall embrace e.g. the following topics:

- Explicit extension of the blank-tape-levy also to computer-hard-disks, and memory cards in mobile phones and the like. It must be noted, however, that the Austrian Supreme Court, in principle, already extended the 'blank tape levy' to computer hard disks according to existing law⁴).
- Extension of the claim to an equitable remuneration to all equipment used for reprographic reproduction ('chain-of-devices' so-called – "*Geräteketten*").
- However, significant restrictions of the amount of equitable remuneration to be paid by users (importers, enterprises etc) with several respects, e.g. fixed upper limit of percentage of the price of media and/or devices (6% respectively 11%), capping of the whole proceeds from blank-tape-levy and remuneration for reprographic reproduction with EUR 29 Million per year (2016 and 2017 each), plus further criteria limiting the amount of the proceeds.
- 'Implementation' of the ECJ's judgment in the "Luksan/Van der Let" case⁵) in clearly establishing a presumption rule rather than original ownership the rights by the film producer. However, in the same time the draft sets out that authors may not effectively transfer certain rights of (secondary) exploitation to CMOs, since the draft stipulates that authors may at any time transfer their rights to the film producer (!).
- Introduction of an exception in favor of reproductions to be made by libraries or archives for the purpose of sending copies on whatever medium to individuals for non-commercial use or 'private research' against payment of the costs, without a specific claim to an equitable remuneration being provided for. The explanatory Memorandum mentions that such copies or files shall be remunerated though the general blank-tape-levy and/or reprographic levy.

¹ Submitted to discussion to interested circles by the Federal Ministry of Justice.

²) JO (BGBl) I Nr 150/2013; entered into force on 1 November 2013.

³) JO (BGBl) I Nr 11/2015.

⁴) Supreme Court 17 December 2013 - *HP Computer-Festplatten* 4 Ob 138/13t MR 2014/2 (*Michel Walter*) = ÖBt 2013/21, 90 (*Roman Heidinger*) = GRUR Int 2014, 402.

⁵) ECJ 09.02.2012 C-277/10MR 2012, 23 (*Michel Walter*) = GRUR Int 2012, 341 = MMR 2012, 320.

- Amendment of the existing exemption in favor of disabled persons against the background of the Marrakesh-Treaty.
- Extension of the free use by schools and universities to all educational establishments.
- Extension of the quotation right to all categories of works on a general basis (sort of free use in this particular field of exemptions).

All things considered the draft is to be regarded at very critically.

II. Jurisprudence

As to the Austrian Supreme Court's jurisprudence handed down since the last report dating from March 2015 two decisions appear worthwhile being noted.

1. First with order dated 18 November 2014⁶ the Supreme Court referred to the ECJ⁷ the question, whether the venue of the place where the harmful event occurred or may occur in matters relating to tort, delict or quasi-delict is also to be applied in matters relating to the enforcement of claims to an equitable remuneration (blank-tape-levy). The Supreme Court is inclined to assume that this is the case, but referred to the ECJ, since this is a question to be decided under Union law (article 5 no 3 Brussels I Regulation 2001⁸).

2. Second in a brand new judgment of 22 April 2015⁹ the Austrian Supreme Court held that memory cards in mobile telephones in principle are to be regarded as media for which the blank-tape-levy is to be paid.

III. Activities of the Austrian Group in 2014/15

In June 2015 the Austrian Group of ALAI elaborated a (critical) statement with regard to the Ministry draft of an Amendment to the Austrian Copyright Act 2015.

In late 2015 the Austrian Group of ALAI will organize a meeting on several actual topics related to copyright and related rights and take part in the discussions concerning the implementation of the Collective Management Directive 2014 and possible further amendments to come.

⁶ 4 Ob 177/14d.

⁷ C-572/14 – „austro mechana/Amazon“.

⁸ See new version Regulation no 517/2013 of 13 May 2013.

⁹ 4 Ob 226/14k – „austro mechana/Nokia“ – not yet published.