

ALAI 2011 – Dublin Congress
Questionnaire – Boundaries and Interfaces
Answers of the Austrian Group of ALAI

By Michel M Walter

1. The Subject-Matter of Protection – Works

1.1 How do your legislators or case law define a literary work? In particular, how is speech protected? Is ex tempore speech a literary work and what are the conditions for protection?

(a) Literary works¹ are dealt with in Sec 2 of the Austrian Copyright Act (ACA) but not defined explicitly. They comprise in the first line all sorts of literary works in the strict sense of the word (*Sprachwerke*), which are expressed by means of words (language). Literature is e.g. poetry, drama (metric or not) and prose of whatever character (fiction, scientific, technical or educational, etc). Literary works, therefore, include poems, novels, short-stories, articles in newspapers or other periodicals, textbooks of operas, operettas and musicals, film scripts, letters, lectures, sermons, scientific books and articles, abstracts, etc.

As a rule, the form is protected as well as the content on the condition that the latter is not pre-existing as is the case with regard to biographies, historical facts and the like. If the content (e.g. the story of a literary work), however, is the fruit of the author's imagination, it is covered by copyright protection. Facts, mathematical (chemical) formulae, arguments or theories as such are not copyrightable.

(b) Works must be expressed in such a form that they are perceivable by others. However, neither fixation nor any other materialisation is a prerequisite for protection. This general rule also applies to literary works; such works must, therefore, not necessarily be expressed in writing. Copyright extends, therefore, to speeches of whatever kind, lectures, sermons, pleadings, interviews, etc.

(c) On the general condition that the originality requirement is met, also spontaneous creations are protected by copyright. Thus, also ex tempore speeches are deemed copyrightable literary works. Addresses in whatever context, impromptu political statements and comments, or utterances in talk-shows and extemporaneous jokes in a cabaret program and lyrics added to a song of a dramatic work, in principle, may be covered by copyright protection.

(d) In Austrian jurisprudence, copyright protection has been affirmed e.g. with respect to legal commentaries, interviews, reviews of theatrical performances, private draft bills, indexes to a law edition, works dealing with historical questions, experts' opinions, and - in principle - diaries. Copyright protection was denied, on the other hand, e.g. as regards the arrangement of a local travel guide, the organization of a collection of legal texts, a year book of the film industry, particular advertising slogans, the wording of a simple guest certificate and a usual contract of purchase. Protection was denied, for instance, to the slogans '*Bis bald – im Wienerwald*'² and '*Holz Eich's Holz*'³, to a short excerpt from a diary⁴, to a users' information⁵, and to an advertising text⁶.

¹ For more details see MM Walter, *Österreichisches Urheberrecht – Handbuch* Part I no 174ff.

² Supreme Court (OGH) 22 March 1994 4 Ob 166/93 – „Wienerwald II“ MR 1994, 120 (Walter) = ÖBl 1994, 232 = eolex 1994, 552 = wbl 1994, 314 = RdW 1994, 279 = SZ 69/283.

³ Supreme Court (OGH) 13 September 2000 4 Ob 223/00y – „Holz Eich's Holz/Minatti“ MR 2001, 166 (Walter).

(e) As to interviews, it may be worthwhile noting that the interviewee as well as the interviewer may – depending upon the circumstances – enjoy copyright protection. The Austrian Supreme Court already in 1956 with respect to the dominating role of the interviewer in guiding the conversation with the interviewee held that in particular the interviewer is deemed to be the author of an interview⁷.

1.2 For short works – headlines in a newspaper, phrases (including slogans), book titles, for example; are these covered by statute? Does case-law provide guidance on protection? Is this issue dealt with by de minimis rules? In the EU discuss ‘Infopaq’ and how the case is accommodated in national law.

(a) Pursuant to Sec 1 para 2 of the ACA, also parts of works may be covered by copyright protection on the condition that such part in itself is original. On the other hand, also short works may be protected if they meet the originality requirement⁸. There is no strict rule neither provided for in the Act nor elaborated in doctrine or jurisprudence. The protection depends upon the circumstances of every single case. This applies also to titles of works, which in rare cases may be protected.

(b) In jurisprudence one line of the lyrics of a song („So ein Tag, so wunderschön wie heute“)⁹ as well as a single line of a poem¹⁰ („Voll Leben und voll Tod ist diese Erde“)¹¹ were held to be covered by copyright protection. As a rule, single words do not enjoy protection¹²; however, there is no general *de minimis* rule to be applied.

(c) The outcome of the ‘Infopaq’ case of the European Court of Justice¹³, therefore, does not conflict with the rules applied to short works or parts of works in Austrian copyright. So far the Supreme Court (OGH) did not explicitly deal with this case. However, the Supreme Court anticipated the ECJ’s finding insofar as it applied the circumscription of originality as

⁴ Supreme Court (OGH) 10 December 1985 4 Ob 387/85 – „Tagebücher“ MR 1986/2, 20 (Walter) = ÖBl 1986, 27 = SZ 58/201 = EvBl 1986/120 = GRUR Int 1986, 486:

„Also morgen? Gut, morgen! Ich ging. Nun traf ich meine Vorbereitungen. Milch, Gebäck, alles was ich brauche, schaffte ich in mein Schlafzimmer. An einem Seitentisch ... kochte ich selbst mit Spiritus den Kaffee“.

⁵ Supreme Court (OGH) 12 August 1996 4 Ob 2202/96v – „Mutan-Beipackzettel“ ÖBl 1997, 34 = ecolex 1996, 931 = wbl 1996, 502

⁶ Supreme Court (OGH) 9 November 2004 4 Ob 185/04s – „Dogwalker“ MR 2005, 129 (Walter) = RdW 2005/462, 426 (LS).

⁷ See Supreme Court (OGH) 12 February 1965 4 Ob 303/65 – „Silberbauer“ ÖBl 1965, 76 = GRUR Ausl 1966, 22 = Schulze Ausl Österr 37 (Schönherr).

Cf *Dittrich*, Verlagsvertrag 25f; *Walter*, MR 1995, 104ff at no 1; *Walter*, MR 1999, 341f at no 2.1.; *MM Walter*, Österreichisches Urheberrecht – Handbuch I no ; *Zanger*, Urheberrecht 30f.1

⁸ Cf *MM Walter*, Österreichisches Urheberrecht – Handbuch I no 159 (parts of works) and no 159 (short works).

⁹ Supreme Court (OGH) 23 October 1990 4 Ob 136/90 – „So ein Tag“ MR 1991, 22 (Walter) = wbl 1991, 66 = ÖBl 1991, 42 = GRUR Int 1991, 652 = ZUM 1991, 418 = ecolex 1991, 184.

¹⁰ *By Jura Soyfer*.

¹¹ Supreme Court (OGH) 10 July 1990 4 Ob 72/90 – „Das Lied von der Erde/Voll Leben und voll Tod“ MR 1990, 227 (Walter) = ÖBl 1990, 283 = wbl 1990, 382 = ecolex 1990, 679.

¹² Supreme Court (OGH) 17 February 1987 4 Ob 405/86 – „Radial“ ÖBl 1987, 109 = wbl 1987, 128 = SZ 60/26 and 22 April 1997 4 Ob 96/97i – „Ramtha“ MR 2000, 30 (Walter) = ÖBl 1998, 53 = ecolex 1997, 681 (*Schanda*). Cf *MM Walter*, Österreichisches Urheberrecht – Handbuch I n 163.

¹³ 17 July 2009 C-5/08 – „Infopaq/Danske Dagblades/elf Wörter“ OJ C220/7 12 September 2009 = EuZW 2009, 655 = GRUR 2009, 1041 = CRi 2009, 142 (*Petersen*) = MR-Int 2009, 91 = ZUM 2009, 945 = GRUR Int 2010, 35 = ecolex 2010/58, 175.

established in European copyright Directives for computer programs, copyright databases, and photographs already prior to this judgment to all categories of works¹⁴.

1.3 How does your legislation define an artistic work? A closed and defined list of works? Open-ended definitions for greater flexibility?

(a) Except for cinematographic works (Sec 4 of the ACA) no definition of the single types of works mentioned in Sec 1 to 4 of the ACA (literary works, works of visual arts, and music) is provided for in the Act. This applies also to works of visual arts (*Werk der bildenden Künste*) as explicitly mentioned in Sec 3 of the ACA. Whereas there is a closed list of works anchored in the Copyright Act, it is generally admitted that all creative productions that may be conceived as 'literature and art' in the broad sense of the word, in principle, may be covered by the copyright. Also with regard to specific categories of works there is no closed enumeration of examples set out in the Act¹⁵.

(b) However, Sec 3 of the ACA explicitly states that also works of applied arts, works of architecture included, are copyrightable subject matter. In the same time, it is made clear that also works, which serve a practical use may enjoy protection. Furthermore, the second paragraph of Sec 3 of the ACA explicitly includes works of photography.

1.4 Have court decisions provided any rulings on the availability of copyright protection for contemporary forms or types of artistic expression e.g.

- *surveillance art, installations, collage.*
- *performance art.*
- *Conceptual art*

(a) There are no court decisions to be reported with this regard. However, it is generally admitted that works of any style or form may enjoy copyright protection, all forms of contemporary art, in particular in the field of visual arts included¹⁶. Of course, protection may only be claimed for works, which meet the originality requirement.

(b) In some cases of contemporary creative expression the classification of a particular work as a literary (dramatic or choreographic) work or as a work of fine arts may be difficult. However, such classification is only of importance with regard to specific questions, as e.g. in regard of exemptions specifically provided for certain categories of works¹⁷.

1.5 Are there any judicial decisions/ academic opinions on other forms of expression, whether protected or not (e.g. Perfumes)?

(a) Whereas the enumeration of copyrightable works (literary works, works of visual arts, music, and cinematographic works) appears to be exhaustive, it is generally admitted that copyright protection may also extend to new forms of expression¹⁸.

(b) As far as perfumes are concerned, there is no case law in Austria dealing with the question whether such 'creations' are susceptible of copyright protection. According to the view of the author of this contribution, creative activities using odours or savours are not generally excluded from copyright protection. However, a specific aroma or smell as such is no

¹⁴ See Supreme Court (OGH) 17 December 2002 4 Ob 274/02a – "Felsritzbild" MR 2003, 162 (*Walter*) = *ecolx* 2004/20, 42 (*Schuhmacher*).

¹⁵ See *MM Walter*, Österreichisches Urheberrecht – Handbuch I no 170ff.

¹⁶ See *MM Walter*, Österreichisches Urheberrecht – Handbuch I no 179f and 188.

¹⁷ Cf *Walter*, *ibid* no 171.

¹⁸ See *Dittrich*, Der urheberrechtliche Werkbegriff und die moderne Kunst, *ÖJZ* 1970, 365; *MM Walter*, Österreichisches Urheberrecht – Handbuch I no 170f.

subject matter of protection¹⁹ and is to be kept clear as is the case with regard to more or less abstract tone colours (sounds)²⁰.

1.6 Is there case-law related to the protection of sporting events (soccer game, marathon race, ice skating competition, etc)? What is the basis of the protection? (dramatic or choreographic work, other?)

(a) Under Austrian law there is no specific protection provided for the efforts of organizers of sporting events. However, as far as sports are concerned, the protection of performing artists applies in cases, where literary works or music are performed²¹, as is the case with ice skating (*freestyle skating, ice dancing*) or synchronized swimming and the like. Furthermore, the choreography in such cases is protected under copyright in the strict sense, since choreographic works and dumb shows are protected as literary works (Sec 2 no 2 of the ACA)²². Last but not least, as regards performances of performing artists, also the organizer (*Veranstalter*) enjoys protection according to a specific related right, which is modelled on the protection of performing artists (Sec 66 para 5 of the ACA).

(b) Furthermore, sporting events may – depending upon the circumstances – enjoy protection according to the provisions of the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb - UWG*)²³. Moreover, the taking over of sporting events without the organizer's consent may cause claims on the grounds of unfair enrichment (*Bereicherungs- und Verwendungsanspruch*) according to the general rules of civil law (Sec 1041 of the General Civil Code²⁴).

(c) In any case, the general right of the tenant (possessor) of premises or land to undisturbed possession ('domestic authority law' - *Hausrecht*) provides for some protection, which plays an important role in practice²⁵.

2. Creativity – the Originality Standard

2.1 How does your legislation set out the requisite originality standard?

(a) Initially the Austrian Supreme Court for decades after the coming into force of the Copyright Act of 1936 applied a severe originality test and required an elevated threshold for copyright protection. Thus, the standard required went far beyond skill and labour and only granted copyright protection to products attaining a high level of creativity, which was called *Werkhöhe* and required an intensive intellectual effort²⁶.

¹⁹ Cf *Walter*, *ibid.*.

²⁰ As to tone colours see *Dokalik*, *Musik-Urheberrecht* n 59f; *MM Walter*, *Österreichisches Urheberrecht – Handbuch I* n 212; *Wegener*, *musik & recht* 345f.

²¹ Cf *MM Walter*, *Österreichisches Urheberrecht – Handbuch I* n 1448 and 1519.

²² See *Bullinger* in *Wandtke/Bullinger*, *Praxiskommentar*² § 2 n 78; *MM Walter*, *Österreichisches Urheberrecht – Handbuch I* n 184.

²³ See for more details *Walter*, *Der Schutz von sportlichen Leistungen und Sportveranstaltungen nach österreichischem Recht*, MR 1995, 206.

²⁴ *Allgemeines Bürgerliches Gesetzbuch – ABGB*.

²⁵ See Supreme Court (OGH) 25 October 19884 Ob 97/88 – „Riegersburg“ MR 1989, 23 (*Walter*) = ÖBl 1989, 156 = SZ 61/220 = ÖJZ NRsp 1989/17 = RZ 1989, 277; 22 March 19944 Ob 26/94 – „Internationales Freistilringer-Turnier“ MR 1995, 231 (*Walter*) = ÖBl 1995, 139; 29 January 2002 4 Ob 266/01y – „Schwimmbad“ MR 2003, 44 (*Walter*) = EvBl 2002/118, 452 = ÖJZ-LSK 2002/139.

²⁶ See *MM Walter*, *Österreichisches Urheberrecht – Handbuch I* n 114ff.

(b) Since the late eighties, however, the Austrian Supreme Court significantly lowered the threshold for copyright protection. Since then the originality requirement is considered to be met on the sole condition that the work is ‘distinguishable’ from comparable productions²⁷.

(c) This recent development of the Austrian jurisprudence coincides with the reduced originality requirement as laid down in Article 1 para 3 of the Computer Program Directive, Art 6 of the Term Directive, and Art 2 para 2 of the Database Directive. As to computer programs, Sec 40 para 1 of the ACA 1993 explicitly implemented the originality requirement in literally adopting the wording of the Directive (‘the author’s own intellectual creation’). However, unlike the position taken with regard to computer programs, the circumscription as provided for in Art 6 of the Term Directive as regards photographs was not implemented in Austrian law. Nevertheless, the Austrian Supreme Court has adopted a corresponding liberal position also with respect to photographs²⁸.

As to databases Sec 40f para 2 of the ACA 1997, on the other hand, refers to the general circumscription of originality as laid down in Sec 1 para 1 of the Act, which for its part refers to ‘unique intellectual creations’ (‘*eigentümliche geistige Schöpfung*’) rather than to the author’s ‘own intellectual creation’. The implementation of the Database Directive, therefore, appears to be inadequate; however, also with regard to databases the originality requirement is to be construed in line with the general understanding of this notion under Austrian and European copyright.

(d) As was already mentioned, the Austrian Supreme Court even applies the reduced originality requirement as set out in the respective Directives for computer programs, works of photography and copyright databases to all categories of works²⁹.

2.2 Does the legislation or case-law suggest a different test of originality is imposed for different kinds of work?

Neither legislation nor case-law does apply different originality tests with regard to different types of works. To the contrary, the Austrian Supreme Court correctly applied the reduced originality standard as set out for computer programs, photographs, and copyright databases in the respective copyright directives to all categories of works³⁰. This approach is reflected also in the European Court of Justice’s judgment in the “Infopaq” case³¹

2.3 For compilations / collections is the standard identical to that provided for in relation to works? [For common law jurisdictions there are significant differences on the standard e.g. IceTV (Aust) CCH (Canada). How has “sweat of the brow” been treated in recent case-law?]

²⁷ See MM Walter, *Österreichisches Urheberrecht—Handbuch* Part I nos 103 ff (originality) 234ff (computer programs); Walter in Walter (ed), *Europäisches Urheberrecht* (1st edn, 2001) Art 1 nos 42 ff Software-RL; Walter in *Walter/v Lewinski*, *European Copyright Law – A Commentary* (2010) n 5.1.8.ff, no 8.6.9.ff, and pages 218ff, 797, and 650ff.

²⁸ See Supreme Court (OGH) 12 September 2001 4 Ob 179/01d – „Eurobike“ MR 2001, 389 (Walter) = ÖBl 2003/12, 39 (Gamerith) = RdW 2002/205, 217 = MR 2002, 195 (Swoboda) = ÖBl 2003, 164 (Noll) = GRUR Int 2002, 865; 16 Dezember 2003 4 Ob 221/03h – “Weinatlas” MR 2004, 117 (Walter) = RZ 2004, 114f (LS) = ÖBl-LS 2004/94, 119 = ÖBl-LS 2004/95, 119 = ÖBl-LS 2004/96, 119 and others.

²⁹ See Austrian Supreme Court (OGH) 17 December 2002 4 Ob 274/02a “Felsritzbild” MR 2003, 162 (Walter). Cf *Kucsko* in *Kucsko*, *urheber.recht* 91; Walter, MR 2004, 119 at no I.3.

³⁰ Supreme Court (OGH) 17 December 2002 4 Ob 274/02a – “Felsritzbild” MR 2003, 162 (Walter) = *ecolex* 2004/20, 42 (Schuhmacher).

³¹ EJC 17 July 2009 C-5/08 – „Infopaq/Danske Dagblades/elf Wörter“ OJ C220/7 12 September 2009 = *EuZW* 2009, 655 = *GRUR* 2009, 1041 = *CRi* 2009, 142 (Petersen) = *MR-Int* 2009, 91 = *ZUM* 2009, 945 = *GRUR Int* 2010, 35 = *ecolex* 2010/58, 175.

(a) What was said under no 2.2 above, applies also to compilations and collections (*Sammelwerke*). No specific originality test is to be applied to such works, which are explicitly referred to in Sec 6 of the ACA.

(b) Under the Austrian concept of copyright protection, originality is a prerequisite to protection. Even if the originality standard that is to be applied is rather low, the mere application of skill and labour (sweat of the brow) does not give rise to protection. This holds true in respect of all categories of works.

2.4 Does your legislation/case law recognise copyright protection for collections such as television listings, yellow pages/white pages telephone directories? If yes, what is protected (headings, content, or both?) If not, why is protection denied (e.g. spin-off theory, competition law considerations).

(a) As regards the protection of collections and compilations the Supreme Court's jurisprudence presupposes that such works form a 'unique whole' (*einheitliches Ganzes*)³². However, there is no reason for such additional condition of protection with regard to these types of works. The creative act giving rise to protection may consist in the screening of pre-existing material, in its selection, and/or in its arrangement³³.

(b) In jurisprudence protection was granted e.g. to a journal for an election campaign³⁴, to an index of key-words³⁵, to a holiday journal edited by a travel agency³⁶, and to an art collection (*Kunstsammlung*)³⁷. On the other hand, protection was denied for a lokal travel guide³⁸, a collection of legal provisions³⁹, to an almanac for the cinematographic industry⁴⁰, as well as to compilation of sound recordings⁴¹.

(c) With respect to the fact that the originality requirement must be met also as regards collections and compilations, products such as television listings, yellow pages or white pages, and telephone directories, in general, do not enjoy copyright protection. However, Unfair competition law (slavish imitation) may apply depending upon the circumstances of the case.

³² See Supreme Court (OGH) 12 October 1955 3 Ob 500/55 – „Filmalmanach“ ÖBl 1956, 10 (*Peter*) = SZ 28/224 = UFITA 24 (1957) 147. Cf also *Ciresa*, Kommentar § 6 n 13 and *Dittrich*, GRUR Ausl 1963, 12 footnote 25.

³³ Cf *MM Walter*, Österreichisches Urheberrecht – Handbuch I n 250ff. See recently also Supreme Court (OGH)

³⁴ Supreme Court (OGH) 07.11.1956 3 Ob 443 und 444/56 – „Wahlzeitungen/Heimatruf“ ÖBl 1957, 60 (*Peter*) 0 November 1956 3 Ob 443 und 444/56 – „Wahlzeitungen/Heimatruf“ ÖBl 1957, 60 (*Peter*).

however, n³⁵ Supreme Court (OGH) 7 March 1978 4 Ob 317/78 – „Stichwörterverzeichnis“ ÖBl 1978, 107 = Schulze Ausl Österr 70 (*Dittrich*) = GRUR Int 1978, 368.

³⁶ Supreme Court (OGH) 26 September 1989 4 Ob 113/89 – „Take Off“ MR 1989, 223 = ÖBl 1990, 138 = SZ 62/155 = EvBl 1990/24 = ecolex 1990, 39.

³⁷ Supreme Court (OGH) 11 February 1997 4 Ob 17/97x – „Wiener Aktionismus“ MR 1997, 98 (*Walter*) = ÖBl 1997, 301 = ecolex 1997, 419.

³⁸ Supreme Court (OGH) 18 April 1956 3 Ob 190/56 – „Heimatbuch“ ÖBl 1956, 59.

³⁹ Court of Appeals of Vienna (OLG) 29 September 1954 1 R 675/54 – „Pflichtschulgesetz“ ÖBl 1956, 70.

⁴⁰ Supreme Court (OGH) 12 October 1955 – „Filmalmanach“. Dazu krit auch *Dittrich*, GRUR Ausl 1963, 12 FN 25.

⁴¹ Supreme Court (OGH) 6 December 1994 4 Ob 135/94 – „Hit auf Hit“ ÖBl 1995, 281. Sic et *Ciresa*, Kommentar § 6 n 19.

3. Achieving Access for the visually impaired

3.1 Does your national legislation provide exceptions or limitations in favour of the visually impaired? For wider categories of disabled persons? On what condition: is there a remuneration right or right to compensation?

(a) Pursuant to Sec 42d of the ACA 2003, an exception is set out with regard to the exclusive rights of reproduction and distribution in favour of editions of a copyright work in a version making it perceptible by disabled persons, if such work is not accessible to these persons in an appropriate form or if the access to such work at least is significantly hampered. The exception is restricted to works already published and to an exploitation on a non commercial scale⁴². The exception in favour of disabled persons is covered by Art 5 para 3 lit b of the Information Society Directive.

(b) For such use the author is vested with a claim to an equitable remuneration, which may only be claimed by collecting societies.

(c) The exception in favour of disabled persons is not limited to persons visually impaired, but applies to all kinds of disablement.

3.2 What kind of works are or would be subject to limitations or exceptions? Literary works only? Works and performances fixed in sound recording? Will the visually impaired or other beneficiaries of the exceptions or limitations obtain copies of covered works directly, or only via libraries or other institutions?

(a) The limitation of protection applies to all types of works. For the time being, the use of literary works appears to be of major interest in this context. However, also cinematographic works and even the visual arts may be concerned. As far as the latter type of works is concerned, the Austrian Authority Controlling Collecting Societies (*Aufsichtsbehörde für Verwertungsgesellschaften*), however, denied that editions of works of the visual arts may be concerned. This argumentation, however, is not convincing given that descriptions along with reproductions of such works in printed material or in films as well as editions using the tactile sense are conceivable.

(b) On the grounds of this exemption the access to the work is not restricted to an access through institutions. The impaired may have immediate access to reproductions of the work.

(c) It may be noted that there is no equivalent provided for the related rights of performing artists, producers of phonograms, producers of photographs (lacking originality), first makers of films (*Laufbildhersteller*), and broadcasting organizations.

3.3 Are the exceptions and limitations confined to the reproduction of the work? If making available or adaptation is possible, on what conditions?

The provision is restricted to reproduction and distribution and, therefore, does not apply to other kinds of exploitation. In particular the making available of works through the internet is not covered by this exemption.

3.4 Has your Government expressed a view on support for international initiatives (e.g. World Blind Council Treaty)?

In general, the Austrian Government appears to be rather reluctant in supporting activities aiming at the introduction of new exceptions from copyright protection respectively in rendering such exemptions obligatory.

⁴² For more details see *Walter*, Urheberrechtsgesetz UrhG '06 – VerwGesG 2006, 107; *MM Walter*, Österreichisches Urheberrecht – Handbuch I n 825 and 1092ff.

3.5 On an extra-legal basis, are there any market initiatives, or business practices, that your national group are aware of?

For the time being, no specific initiatives of this kind came to the Austrian Group's knowledge.

4. Access to the Internet as a Human Right

4.1 Does your legislation/constitution/case-law define access to the Internet as a specific [or human] right?

In Austria there is no right to (free) access to the internet neither on the level of constitutional law (as a fundamental human right) nor on another legal level.

4.2 Are there any specific restrictions or limitations on this right [Europe: it is not necessary to refer to ECHR but any national decisions or rulings on ECHR should be mentioned]?

Does not apply for the reason set out under 4.1 above.

5. Orphan Works

5.1 Are there existent legislative provisions allowing access/use in relation to orphan works? What kinds of work are involved? Performances?

(a) For the time being, there is no legal framework provided for orphan works in Austria. However, the discussion with regard to this topic has been opened on the occasion of the European Commission's Proposal of a Directive relating to 'certain permitted uses of orphan works', dated 24 May 2011⁴³.

(b) It may be noted in this context that the interested circles in Austria since long were aware of the problem of orphan works. As early as 1992 a private initiative⁴⁴ has been taken with this regard; however, this initiative was not taken up by the Austrian legislator. This initiative suggested an extended licence through collecting societies. This solution recently was discussed also on the European level, but eventually was not explicitly included in the Proposal of the European Commission mentioned above.

(c) It may be worthwhile noting that the presumption of authorship (ownership) as provided for in Art 5 of the Enforcement Directive may be of relevance also in regard of orphan works. In Austria the respective provisions have already been laid down in the Copyright Act (Sec 12) prior to the implementation of the Enforcement Directive.

5.2 On what conditions? Is there a remuneration right or right to compensation? Is there a court or administrative procedure to be satisfied prior to use?

According to the private proposal, mentioned above, the collecting society administering the rights in the realm of the type of work at issue was to grant (non-exclusive) licences. The use of orphan works, therefore, should take place against payment of an equitable remuneration.

5.3 Are there proposals for the introduction of, or changes to, orphan works provisions?

There are no official proposals to be reported from Austria as regards the regime of orphan works for the time being.

⁴³ KOM(2011) 289 final (http://ec.europa.eu/internal_market/copyright/orphan_works_de.htm).

⁴⁴ See *Walter*, Vorentwurf eines österreichischen Urheberrechtsgesetzes (March 1992), ÖSGRUM 14/1993, 58.

6. Graduated Response Laws or Agreements

6.1 Within the specific context of p2p filesharing of audio-visual works and sound recordings, does your national law contain laws (or proposed laws) providing for a graduated response “solution”? On what conditions? Three strikes, etc.?

In Austria there is no legal instrument of this kind provided for in existing law nor is such ‘graduated response solution’ proposed or planned. To the contrary, the Austrian legislator appears to be rather reluctant with this regard and did not even manage to provide for an efficient claim for information according to Art 8 of the Enforcement Directive.

6.2 Do such proposals include an educational aspect – enhancing awareness of intellectual property protection, as well as measures to (1) make Internet access more secure in order to prevent illegal activity; (2) – favour availability of legal services?

Does not apply (see no 6.1. above).

6.3 Is there a court procedure and/ or administrative agency that oversees the proceedings or authorises interruption or termination of internet access?

Does not apply (see no 6.1. above).

6.4 Is it possible to assess the effectiveness of the implementation of these measures, both as a matter of stemming piracy, and with respect to the development of legal services ?

Does not apply (see no 6.1. above).

6.5 Is there any case-law on the possible (own initiative) use of blocking or filtering technology by an ISP, as distinct from situations where an ISP is required by a court or administrative agency to terminate subscribers access (i.e. injunctive relief)?

(a) So far there is no case-law dealing with such blocking or filtering techniques applied by Internet Service Providers on their own initiative in Austria.

(b) However, there is a case pending with the Commercial Court of Vienna where the plaintiff claims injunctive relief against an Internet Service Provider (UPC) in regard of the making available by means of streaming of top cinematographic films to users by the internet platform ‘Kino-to’. In this proceeding the Commercial Court of Vienna granted injunctive relief in an interlocutory proceeding in ordering the blocking; the decision was appealed by the defendant.

6.6 Are there private agreements among copyright owners and internet service providers that function similarly to “3-strikes” laws?

Apparently there are no private agreements between rightholders and Internet Service Providers modelled on Three-Strikes-regulations.

7. Private Agreements and UGC

7.1 Are there private agreements among copyright owners and hosts of UGC content sites regarding the filtering of content posted to the sites? Are there inter-industry statements of "best practices" regarding filtering? Have government authorities in your country undertaken initiatives to encourage the adoption of such accords?

No agreements, inter-industry statements, or governmental initiatives are to be reported from Austria.

7.2 How is the filtering to be accomplished?

See previous answer.

7.3 Have there been any cases concerning such agreements or "best practices"?

See no 7.1. above

7.4 Outside the existence of such accords, have courts themselves imposed remedies requiring measures such as "take down, stay down"?

(a) So far no court decisions can be reported. Under Austrian law the claim to apply for injunctive relief (interlocutory proceedings included) extends to ISP ('intermediaries') as well. According to Sec 81 para 1a of the ACA 2003, such claim may be raised against intermediaries regardless of whether the restricted acts are carried out by providers and irrespective of whether the exception of Art 5 para 1 of the Infosoc Directive applies (Sec 41a of the ACA). However, if in such case the conditions of Articles 12 to 14 of the E-Commerce-Directive (Sec 13 to 17 of the Austrian E-Commerce-Law) are met, the right holder must first give notice to the intermediary ('notice and take-down').

(b) The same procedure applies to the claim for destruction (deletion) (Sec 82 para 1 of the ACA).