

Executive Committee Paris 9 March 2013
RECENT DEVELOPMENTS IN AUSTRIA

(Michel Walter)

I. Legislation

1. As already mentioned in the report on mass digitization by libraries no new legislation on copyright matters is to be reported since January 2012, when the Executive Committee met in Paris. However, in November 2012 a Working Paper (*Arbeitspapier*) was submitted to discussion by interested circles by the Federal Ministry of Justice, which suggests amending the Austrian Copyright Act with several respects, as shall be summarized below.

Given that elections will take place in Austria in autumn 2013, an amendment of the Austrian Copyright Act would have to pass Parliament in June 2013 at the latest. Therefore, it is not yet sure whether this piece of legislation will indeed be enacted in 2013¹.

2. The main issues that are dealt with in the Ministry's Working Paper are the following:

2.1. Implementation of Directive 2011/77/EU amending the Term-Directive 1993/2006. The implementation follows the guidelines of the Directive. It is worthwhile noting, however, that the Working Paper does not suggest implementing the 'may-provision' of article 10a(2) of the Directive, according to which Member States may provide that contracts on transfer or assignment, which entitle a performer to recurring payments and which are concluded before the deadline for implementation (two years after its entry into force) can be modified following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public. This reflects the reluctant attitude of the Austrian legislator in regard of provisions of contract law safeguarding the interests of the (authors or) performing artists as the weaker parties.

2.2. On the occasion of the Term-Directive's implementation the Working Paper proposes to redraft the provisions of the Austrian Copyright Act in regard of the protection of the performing artists. However, apart from an overdue implementation of the obligations under the WPPT (article 5) to protect the performing artists' moral rights, no changes in substance in particular as regards the economic rights of performers are provided for, which in my view are 'underdeveloped' in Austrian law as well.

2.3. The Working Paper also suggests implementing the Orphan works Directive 2012/28/EU as well along the guidelines of this Directive. However, it is still discussed whether the Directive could not be implemented in installing a system of extended licences.

2.4. As regards the authorship of cinematographic works the Working Paper tries to 'implement' the judgement of the Court of Justice of the EU in the case "Luksan/Van der Let", which stated that at least the principal director of audiovisual works is deemed as author, which is why a *cessio legis* system as was set out in Austrian law (according to the dominant - but in my opinion wrong - interpretation) is not in line with Union law. Therefore, the Working Paper provides for a rebuttable presumption (extending to all economic rights) in adding, however, that authors of cinematographic works may at any time grant licences to the film producer irrespective of whether they had already conveyed such rights to third parties, in particular to collecting societies. In my view this ends up in a new 'mantrap' for film authors, since the only realistic option to retain some rights (of secondary use) is 'parking' such rights with a collective society. In my opinion this 'solution' again is not in line with Union law and contrary to the principle of freedom of contract.

¹ It is not even clear whether the Ministry's Working Paper will lead to an official draft of the Federal Ministry of Justice or directly be transformed into a Government's proposal.

As to the claim to equitable remunerations as provided for in the Austrian Copyright Act, the Court also has made clear that these claims are owned solely by the authors of cinematographic works, whereas the producer may claim such rights on the grounds of their status as producers of the first fixations of films. Furthermore, the Court added that such claims to an equitable remuneration are unwaivable. With this regard the Working Paper is of the opinion that this does not mean that claims to an equitable remuneration may not be transferred by contract (to the producer of the film), which in my view is incorrect and would reduce the consequences of the Court's judgement to a minimum.

2.5. Another essential issue dealt with in the Working Paper is the extending of the 'blank tape levy'² to hard disks (§ 42b of the Austrian Copyright Act), which was denied by the Austrian Supreme Court in its '*Gericom*' judgement of 2005³.

As far as the 'equitable remuneration for reprographic reproduction' is concerned, it shall be made clear that the complete 'chain of devices' is to be considered, photocopiers, scanners and printers included as well as personal computer, the latter being denied until now by the Supreme Court⁴ as well.

There is, however, still strong political pressure not to enact the amendment with this regard.

2.6. Furthermore, the Working Paper proposes to redraft the existing provision concerning the claim to information against access-providers (§ 87b of the Austrian Copyright Act), which does not work at all under the existing regime on account of a missing option or obligation to store traffic data for this purpose (data preservation). However, also the redrafted provision presupposes that the traffic data, which are necessary to achieve the respective information concerning the infringer (name and postal address), have been stored within the last three months, without providing for an obligation to store such data. Therefore, also this provision will not work in practice and again is a toothless claim.

2.7. Further issues dealt with in the Working Paper shall be mentioned only in note form:

(a) Exploitation rights

- Communication to the public by means other than broadcasting to be added to the enumeration of § 18 of the Austrian Copyright Act;
- Elimination of specific limitations of the exclusive right of broadcasting (community antennas, transmission of broadcasts of the Austrian public broadcasting organization ORF etc).

(b) Limitations and exceptions

- Reproduction for one's own and/or private use: obvious illegitimacy of the source is an obstacle to invoke the exception of § 42 of the Austrian Copyright Act;
- Inclusion of works in examination questions (equitable remuneration);
- General exception in favour of libraries to make single copies of works for the inclusion in an own archive (if on other carrying material than paper only for non-commercial purposes),
note: questionable in the proposed form;
- Incidental inclusion of a work or other subject matter in other material;
- Extension of the quotation right
note: questionable in the proposed form;
- Indication of the source (credits)

² There is no equitable remuneration provided for in Austrian law in regard of copying equipment and devices.

³ See Supreme Court 12 July 2005 4 Ob 115/05y – „Gericom/Computer-Festplatten“ MR 2006, 19.

⁴ See Supreme Court 2 February 4 Ob 225/08d – „Geräteketten“ MR 2009, 316 (*Walter*).

(c) Collecting societies

- Minor amendments

II. Jurisprudence

As far as recent jurisprudence of the Supreme Court is concerned, two decisions appear to be worthwhile being mentioned, both referring to the Court of Justice of the EU:

1. Supreme Court 20 September 2011 – „austro-mechana/Amazon“⁵

This case essentially concerns the question whether media are subject to payment of the Austrian blank tape levy in cases of their trans-border delivery from Germany to Austria when the levy has already been paid in Germany (which is, as a question of facts, however disputed in the main proceeding) given the reimbursement of such payment may be claimed at least by the person or entity that had paid the levy (a question of construing the German Copyright Act that also is disputed between the parties of the main proceeding).

The main legal issues of this case are the following:

- Is the Austrian system of reimbursement of the levy in cases where the material eventually is not used for private copying purposes (or for one's own use, which under Austrian law causes claims to an equitable remuneration as well) in line with Union law with respect to the fact that the levy initially is to be paid irrespective of the eventual use made of it?
- Is the mandatory dedication of 50% of the revenues from the blank tape levy to socio-cultural purposes in line with Union law? If this should not be the case, the further question arises whether this is a question to be settled between the national collecting society and its members (as a question of repartition) or has a direct impact upon the (missing) obligation of the importer to pay the blank tape levy at all?
- Is the system of reimbursement of the blank tape levy in cases of exportation (from Germany to Austria) in conflict with the principle of free movement of goods?

• Supreme Court 11 Mai 2012 – „kino.to/UPC I“⁶

In this case the question is raised whether an access-provider is obliged to block access of his clients to a website from which cinematographic works illegitimately are made available over the internet by means of streaming.

The main legal issues of this case are the following:

- Are such access-providers intermediaries within the sense of Union law with regard to their relationship to end users and not to those who illegitimately are making works available to the public? (the Supreme Court is inclined to assume that this is the case)
- Is the legitimacy of the source a prerequisite for the application of the exception in favour of the reproduction for one's own and/or for one's private use? (the Supreme Court has doubts since it assumed that the blank tape levy is to be paid in such cases as well)
- Is the general blockage of a steadily infringing website permitted under Union law? The Supreme Court is inclined to answer this question affirmatively but hesitates with

⁵ Case 4 Ob 79/11p MR 2011, 369 (Walter) = wbl 2011/252, 686 = ÖBI-LS 2012/5, 11 = ÖBI 2012/24, 86 (Büchtele) = GRUR 2012, 262.

⁶ Case 4 Ob 6/12d MR 2012, 190 (Walter) = ecolex 2012/291, 708 (Axel Anderl) = wbl 2012/180, 473 = GRUR Int 2012, 934 = RZ 2013/13, 22 (LS).

respect to the fact that in this case the question of feasibility as well as the balancing of the conflicting fundamental rights would be shifted to the enforcement of the judgement.

- Last but not least the question is raised which specific measures may be claimed against such access-provider.

III. Activities of the Austrian Group in 2011

- In June 2012 the Austrian Group has organized a conference in regard of the ACTA Agreement jointly with the Austrian Association of Intellectual Property Rights (*Österreichische Vereinigung für Gewerblichen Rechtsschutz und Urheberrecht*).
- Furthermore, the Austrian Group has participated in discussions and hearings organized by the Austrian Ministry of Justice and commented on the legislative initiatives as dealt with in the Working Paper mentioned above.