

Executive Committee Paris 15 March 2014

RECENT DEVELOPMENTS IN AUSTRIA

(Michel Walter)

I. Legislation

1. As regard legislation enacted in Austria since my last report in March 2013 in the field of copyright and related rights it is to be reported that none of the points touched upon in the Working Paper (*Arbeitspapier*)¹ of November 2012 except for one issue has been taken up by the Austrian legislator. The exception alluded to is the implementation of the amended Term-Directive of 2011, which **was** enacted with Federal Law published in JO (BGBl) I Nr 150/2013 and entered into force on 1 November 2014. It may be worthwhile noting that all of the mandatory provisions of transitional law have been implemented; however, this was not the case as regards the non-mandatory provision leaving it to the national legislature of Member States to provide that certain contracts² on transfer or assignment which entitle a performer to recurring payments concluded prior to the modification of the terms can be modified.

2. As regards the implementation of the Orphan-Works-Directive, this piece of legislation will take place still in 2014. A proposal was already contained in the *Arbeitspapier* of 2012, mentioned above as well as in my report of 2013 that follows the guidelines of this Directive. However, it may still be discussed whether the Directive could not be implemented in installing a system of extended licences, which in my personal view would be the most appropriate option.

II. Jurisprudence

1. 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 by judgment of 27 June 2013 in the case *austro mechana/Amazon Gesellschaften*³. In this important case the ECJ confirmed in the first place

- that 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), in principle, is 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. However, it is for the national court to verify that practical difficulties justify such a system of financing fair compensation and the right to reimbursement is effective and does not make repayment of the levies paid excessively difficult.
- The Court, furthermore, confirmed that the mandatory dedication of 50% of the revenues from the blank tape levy to socio-cultural purposes is as well in line with Union law provided that those social and cultural establishments actually benefit those entitled and the detailed arrangements for the operation of such establishments are not discriminatory, which is for the national court to verify.

In its decision of 27 August 2013⁴ the Supreme Court referred the case to the first instance court (Commercial Court of Vienna) in order to clarify the questions of fact mentioned by the ECJ.

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

² 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.

³ Case C-521/11 *austro mechana/Amazon Gesellschaften* [2013] MR 172 (*M Walter*) = [2013] GRUR 1025 = [2013] GRUR Int 949 = [2013] CRi 632 = [2013] ÖBl 69, 283.

⁴ 4 Ob 142/13f – „Amazon/Vergütung für Trägermaterial II“ MR 2013, 327 (*Michel Walter*) = RZ 2014/60, 41 = ÖBl 2014/8, 33 (*Manfred Büchele*).

2. Furthermore, the Supreme Court's decision of 17 December 2013 in the case *HP Computer-Festplatten*⁵ (HP computer hard disks) is to be mentioned. In this case the Supreme Court overruled its decision in the case *GERICOM*⁶ and confirmed that, indeed, also computer hard disks, in principle, are deemed to be data carrier for which blank tape levy is to be paid. Also in this context the Supreme Court referred the case to the first instance court (Commercial Court of Vienna) in order to examine whether such media indeed are used for private copying to an amount that cannot be neglected.

In its reasoning the Court in the first place referred to the jurisprudence of the ECJ in its *Padawan* and *Thuiscopie* judgments as well as to critical opinions put forth against the reasoning of the Court in the *GERICOM* judgment.

3. Last but not least, the Supreme Court in its decision in the case *Live Sport TV-transmission*⁷, handed down the very same day, held that the *cession legis* so-called is to be construed in line with the ruling of the ECJ in its preliminary judgment in the *Luksan/Van der Let* case⁸ in the sense of a rebuttable presumption of transfer of rights to the film producer instead of an original ownership of rights. The Court thus overruled a series of prior decisions to the contrary.

The judgment is interesting for one more reason from the point of view of Private International Law: The Court once more confirmed the territoriality principle, according to which the law applies, where the action of exploitation takes place. This holds true as regards the first ownership of film copyright as well.

III. Activities of the Austrian Group in 2013/14

- Also the Austrian Group of ALAI has answered to the questions put forth in the European Commission's Public Consultation on the review of the EU copyright rules a copy of which is attached to this report.
- In May 2014 the Austrian Group of ALAI will organize an exchange of views in regard of the outcome of the preliminary proceeding in the case „kino.to/UPC I“⁹ jointly with the Austrian Association of intellectual property rights (*österreichische Vereinigung für Gewerblichen Rechtsschutz und Urheberrecht*).
- Of course the Austrian Group will intensively participate in the discussions to come as regards the planned Amendment of the Austrian Copyright Act in 2014.

⁵ 4 Ob 138/13t MR 2014/2 (*Michel Walter*).

⁶ OGH 12.07.2005 4 Ob 115/05y – „Gericom/Computer-Festplatten“ MR 2006, 19 = ÖBl 2006/8, 35 (*Robert Dittrich*) = RdW 2005/758, 691 (LS) = EvBl 2005/192, 963 = ÖJZ-LSK 2005/242 = ecolex 2006/91, 228 (LS) = RZ 2005, 284 = SZ 2005/99 = GRUR Int 2006, 770.

⁷ 17 December 2913 4 Ob 184/13g.

⁸ ECJ 9 February 2012 C-277/10 *Luksan/van der Let* [2012] MR 23 (*Michel Walter*) = [2012] RdW 164, 153 = [2012] wbl 72, 203 = [2012] ZUM 313 = [2012] GRUR Int 341 = [2012] GRUR 489 = [2012] MMR 320.

⁹ Case C 314/12 (see Austrian Supreme Court 4 Ob 6/12d referring the case to the ECJ [2012] MR 190 (*Walter*) = [2012] GRUR Int 934).