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A practical cross-border insight into copyright law

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1 Copyright Subsistence

1.1 What are the requirements for copyright to subsist in a work?

Under Austrian law (the Austrian Federal Law on Copyright in Works of Literature and Art and on Neighbouring Rights, Federal Law Gazette (BGBl) 1936/111 as last amended by BGBl I 150/2013 – *Urheberrechtsgesetz* – UrhG), a work is defined as "an original intellectual creation" (Section 1 para 1 UrhG). The author has the exclusive right to use his or her work in the way defined by the law (in particular a reproduction right, distribution right, rental and lending right, *droit de suite*, broadcasting right, right of public performance and of communication to the public of a performance, 'making available' right; see question 4.1 below). Protection starts in the very moment of creation, which means that no registration with any authority is required for protection under the Copyright Act.

1.2 On the presumption that copyright can arise in literary, artistic and musical works, are there any other works in which copyright can subsist and are there any works which are excluded from copyright protection?

According to Section 1 para 1 UrhG, works can be original intellectual creations in the area of literature (including computer programs), musical arts, visual arts and cinematography. Official legal texts, namely laws, regulations and decisions of an administrative authority as well as particular works exclusively or preponderantly made for the use of an authority are exempted from copyright protection (Section 7 para 1 UrhG, "Free Works").

The Copyright Act further grants exclusive rights to performers (such as singers, dancers and actors) as well as to phonogram producers, photographers, broadcasters and the makers of a database (*sui generis* right).

1.3 Is there a system for registration of copyright and if so what is the effect of registration?

Copyright protection arises in the moment of creation of the work, without any registration being either necessary or even possible.

However, Austrian law recognises a copyright register for works published by an author using a pseudonym; only in case the real name of the author has been filed with the copyright register, the work will be protected for the full term of protection, namely 70 years *post mortem auctoris*.

1.4 What is the duration of copyright protection? Does this vary depending on the type of work?

Copyright protection is granted for 70 years after the death of the author or, in case the work has been created by more than one author, 70 years after the death of the last co-author of that work. The term of protection is equal for all works.

The protection of performances ends 50 years after the performance or the publication or communication of its fixation other than in a phonogram; if the performance has been fixed in a phonogram during that period, protection lasts for 70 years after publication of the phonogram or its communication to the public.

The exclusive rights of the phonogram producer expire 70 years after the phonogram has been published or communicated to the public.

The exclusive rights of the maker of a database (*sui generis right*) expire 15 years after the date of completion of the making of the database or, in case the database has been published, 15 years after publication of the database. This period can in fact be prolongated forever, as every substantial amendment (in quality or scope) of the database requiring a substantial investment leads to a new protection term for the amended database.

The exclusive right granted to the publisher of a non-published work for which copyright protection has expired ("*nachgelassene Werke*"), expires 25 years after such publication.

1.5 Is there any overlap between copyright and other intellectual property rights such as design rights and database rights?

Yes, specific works may be protected by copyright but may also – if the requirements for a design protection according to the Design Act are fulfilled (originality, novelty) – profit from design protection upon application to the patent office. A database may likewise be protected by copyright (as collection), but also by the *sui generis right* implemented in Sections 76c *et seq.* UrhG.

1.6 Are there any restrictions on the protection for copyright works which are made by an industrial process?

Only an intellectual – human – creation may be protected by copyright. "Accidental works" which are created without any human activity, e.g. done by animals or machines or by nature, are not protected by copyright.

2 Ownership

2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

The first owner of the copyright in a work will always be the natural person who created the respective work. However, in case of films, the law assumes that the film producer receives the exploitation rights (Section 38 para 1 UrhG). In case of computer programs created by employees, the law assumes that the employer receives the exploitation rights (Section 40b UrhG).

2.2 Where a work is commissioned, how is ownership of the copyright determined between the author and the commissioner?

Following the general principle, the copyright ownership generally vests with the author, but the commissioner receives a right to use the work. The scope of such right to use depends on the respective agreement concluded between author and commissioner, and in the absence of such agreement, comprises the use which is necessary for the purpose for which the work was commissioned.

2.3 Where a work is created by an employee, how is ownership of the copyright determined between the employee and the employer?

Ownership vests with the employee being the author of the respective work, however, the employer might have the exclusive exploitation rights regarding the work, depending on the circumstances and the contractual agreement (or collective agreement) between employer and employee.

Section 40b UrhG contains a legal assumption that the exclusive exploitation rights of a computer program (no such assumption is available for other works) made by an employee in the course of his work shall belong to the employer.

2.4 Is there a concept of joint ownership and, if so, what rules apply to dealings with a jointly owned work?

Yes, joint ownership is possible; in principle, all co-authors (and co-owners) of a work must agree to any disposal of the work independent of the scope of their participation. However, in case works of a different kind (e.g. music and text) are connected, the authors of such parts of works may dispose independently of such parts.

3 Exploitation

3.1 Are there any formalities which apply to the transfer/assignment of ownership?

The copyright as such may only be transferred by way of inheritance. However, all or several exploitation rights pertaining to a work subject to copyright may be assigned to third parties by granting a copyright licence.

3.2 Are there any formalities required for a copyright licence?

No particular formalities are required to agree on a copyright licence. According to Section 24 UrhG, the author may either grant an exclusive licence or a non-exclusive licence. In the event of doubt, a non-exclusive licence is deemed to be granted.

3.3 Are there any laws which limit the licence terms parties may agree (other than as addressed in questions 3.4 to 3.6)?

According to the general principle of contractual freedom (Sections 861 *et seq.* of the Austrian General Civil Code – *Allgemeines bürgerliches Gesetzbuch* JGS 1811 as last amended by Federal Law Gazette BGBl I 33/2014 – ABGB), any right that entitles its owner to exclude others from using a work subject to copyright may be subject to a licence agreement. Hence the law does not restrict the amount of royalties or fees charged by a licensor or the duration of the contractual term. However, the rules imposed by European and Austrian antitrust law need to be considered as well as the case law applying to the principle of contractual freedom.

Further, the Copyright Act contains several general provisions on copyright licences (Sections 24 to 33 UrhG) as well as more specific provisions regarding cinematographic works (Sections 38 *et seq.* UrhG) and computer programs (Sections 40a *et seq.* UrhG).

3.4 Which types of copyright work have collective licensing bodies (please name the relevant bodies)?

Based on the Collective Licensing Bodies Act (Federal Law Gazette BGBl I 9/2006 as last amended by BGBl I 190/2013 – *Bundesgesetz über Verwertungsgesellschaften* – VerwGesG 2006), each author may appoint the respective collective licensing body for the collection and distribution of royalties resulting from the exploitation of its work. There is no mandatory membership with any collective licensing body. However, it is common practice in Austria to appoint a collective licensing body for the collection and distribution of royalties paid for ancillary copyrights such as the broadcast, performance and presentation of music compositions and works of literature or for the mechanical distribution and reproduction of music compositions.

Currently, the following collective licensing bodies are registered with the Supervisory Authority for Collecting Societies:

- *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (AKM) registrierte Genossenschaft mit beschränkter Haftung*, in particular for the exploitation of rights relating to broadcast, performance and presentation of music compositions and works of literature required in connection with the use of music compositions, in each case on behalf of authors, composers and music publishers;
- *Austro Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft m.b.H.*, in particular for the exploitation of rights relating to mechanical distribution and reproduction of music compositions, in each case on behalf of authors, composers and music publishers;
- *Literar-Mechana Wahrnehmungsgesellschaft für Urheberrechte Ges. m.b.H.*, in particular for the exploitation of rights relating to mechanical reproduction and distribution of works of literature, subject to the works of literature being required in connection with the use of music compositions;
- *LSG – Wahrnehmung von Leistungsschutzrechten Gesellschaft m.b.H.*, in particular for the exploitation of the rights of performing artists and audio record producers required for the commercialisation of audio or audio-visual media;
- *VAM – Verwertungsgesellschaft für audiovisuelle Medien GmbH*, in particular for the exploitation of the rights of film producers;
- *Bildrecht Verwertungsgesellschaft Bildende Kunst, Fotografie und Choreografie GmbH*, in particular for the exploitation of the rights of creators of visual art;

- *VDFS – Verwertungsgesellschaft der Filmschaffenden reg.Genossenschaft mit beschränkter Haftung*, in particular for the exploitation of the rights of filmmakers; and
- *Verwertungsgesellschaft Rundfunk GmbH*, in particular for the exploitation of the rights of broadcast agencies.

3.5 Where there are collective licensing bodies, how are they regulated?

The Collective Licensing Bodies Act regulates the organisation and the obligations of collective licensing bodies. In particular, the establishment and the activities of collective licensing bodies are subject to the supervision by a specific Supervisory Authority for Collecting Societies. Further, the Copyright Senate may determine general licensing terms upon request of the respective parties (see question 3.6).

3.6 On what grounds can licence terms offered by a collective licensing body be challenged?

According to Section 11 of the Collective Licensing Bodies Act, the collecting agreements offered by the collective licensing bodies shall stipulate uniform licence terms for each respective group of beneficiaries. Any amendment to such uniform licence terms is subject to approval by the Supervisory Authority for Collecting Societies. In the absence of an agreement on the terms of a collecting agreement, each of the group of beneficiaries or the collective licensing body concerned may request the determination of general licence terms by the Copyright Senate.

4 Owners' Rights

4.1 What acts involving a copyright work are capable of being restricted by the rights holder?

The following exploitation rights may be restricted by the rights holder: the right of modification and translation (Section 14 para 2 UrhG); the right of the first publication of content (Section 14 para 3 UrhG); the right of reproduction (Section 15 UrhG); the right of distribution (Section 16 UrhG); the right of rental and lending (Section 16a UrhG); the right to broadcast (Section 17 UrhG); the right of recital, performance and presentation (Section 18 UrhG); and the right to making available to the public (Section 18a UrhG).

4.2 Are there any ancillary rights related to copyright, such as moral rights, and if so what do they protect, and can they be waived or assigned?

The moral rights of the copyright owner are protected in Sections 19 to 21 UrhG. In particular, the copyright owner is entitled to claim his personal creatorship and to defend it against third parties. Further, the copyright owner may request within its discretion whether or not he shall be named as the originator of a work and, if so, in which form any such indication shall be effected. Moreover, the copyright owner may oppose disfiguring changes to his work by a third party even if the right of modification has been granted to such third party. As inherent personal rights of the copyright owner, such moral rights may neither be waived by the copyright owner nor assigned to any third party.

4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

Yes, the principle of exhaustion, also referred to as "first sale doctrine", is recognised by Section 16 para 3 UrhG. Therefore, a copyright owner's exclusive distribution right is exhausted with respect to works which have been put on the market with his consent in a member state of the European Union or the European Economic Area.

5 Copyright Enforcement

5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

No statutory enforcement agencies exist in Austria. Copyright is enforced through civil action and criminal proceedings.

5.2 Other than the copyright owner, can anyone else bring a claim for infringement of the copyright in a work?

Other than the copyright owner, only a licensee can institute proceedings because of an infringement of the copyright in a work. Where the licensee has been granted an exclusive licence, he or she is entitled to institute proceedings without additional consent of the copyright owner. In the case of a non-exclusive licence, the right to institute proceedings needs to be explicitly included in the licence agreement or the licensor gives his or her explicit consent to the institution of proceedings in each individual case. The licensor might also contractually prohibit the licensee from instituting proceedings.

5.3 Can an action be brought against 'secondary' infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

Basically, actions may only be brought against the direct infringer, whereby the direct infringer is in principle liable regardless of negligence or fault (regarding claims for forbearance, publication of judgment, adequate compensation). According to case law, a "secondary infringer" may only be held liable for a copyright infringement in case he is aware (or is not aware due to gross negligence) of the copyright infringement effected by the direct infringer. By applying these principles, the Supreme Court assumed liability of a landlord for infringements effected in the leased business premises (OGH 12.5.2009, 4 Ob 34/09t); further, the Supreme Court denied liability of a father for copyright infringements (file-sharing) effected by his minor daughter through the internet access provided by the father (OGH 22.1.2008, 4 Ob 194/07v).

5.4 Are there any general or specific exceptions which can be relied upon as a defence to a claim of infringement?

In principle, any of the limitations of the exploitation rights as contained in the Copyright Act might be used as a defence to a claim of infringement, if applicable. Austrian law does not provide for a general "fair use" exception but exhaustively lists all permitted exceptions. The most important exceptions in this context might be the reproduction for one's own use (also available for legal entities) or for one's private use, as well as the quotation exception, exceptions for the use in schools and universities and the exceptions for transient and incidental copies.

5.5 Are interim or permanent injunctions available?

Yes, the claimant can request that a preliminary injunction is rendered regarding all remedies granted by the Copyright Act. Basically, the Copyright Act grants the right holder the following (civil law) remedies against a copyright infringer:

- Claim for forbearance.
- Claim for removal and destruction of the infringing copies and the tools required for manufacture of those copies.
- Claim for adequate compensation/claim for damages.
- Claims for rendering of accounts and for information about third party infringers and distribution channels.
- Claim for publication of judgment.

Any preliminary injunction will be in place until a final decision is rendered.

5.6 On what basis are damages or an account of profits calculated?

The basis for the calculation of damages and for adequate compensation is the market value of the respective work which has been infringed, i.e. the costs for a licence for that work. It is the claimant's duty to provide evidence for a specific value of its work.

5.7 What are the typical costs of infringement proceedings and how long do they take?

The costs of the civil infringement proceedings are based on the respective amount in dispute and comprise the court fee, the plaintiff's own representation costs and, in case the proceedings are lost, the costs of the legal representation of the other party, based on the Act on Attorneys' Tariffs ("*Rechtsanwaltstarifgesetz* – RATG"). The typical amount in dispute in copyright proceedings is at least €36,000.00. The court fee for the first instance would in such case amount to €1,389.00; the amount of costs to be reimbursed also depends on the scope of actual proceedings, in particular the number and duration of court hearings and written statements.

5.8 Is there a right of appeal from a first instance judgment and if so what are the grounds on which an appeal may be brought?

Yes, the first instance judgment is subject to a full appeal (incorrect legal assessment, wrong evaluation of evidence, nullity), the second instance judgment can also be appealed by a revision to the Supreme Court in certain circumstances; however, the revision may not be based on incorrect evaluation of evidence but in practice will only deal with incorrect legal assessment of the case by the court.

5.9 What is the period in which an action must be commenced?

With respect to claims for damages and adequate compensation, an action needs to be commenced within three years from the right holder's knowledge of the copyright violation and the infringer. For the claims for forbearance and removal/destruction, the general rules for limitation of a claim applies, i.e. such action may be brought up to 30 years from the infringement.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Yes. According to Section 91 para 1 UrhG, the intentional infringement of exploitation rights and related rights constitutes a criminal offence. Not only may the person immediately violating the copyright be prosecuted, but also the owner or manager of a company which did not prevent its employees from infringing the copyrights within the course of such company's business.

6.2 What is the threshold for criminal liability and what are the potential sanctions?

The intentional infringement of exploitation rights and related rights is subject to a custodial sentence of up to six months or a fine of up to 360 daily rates. Commercially motivated violation of copyrights is subject to a custodial sentence of up to two years. However, any criminal prosecution is subject to the request of the respective infringed rights holder.

7 Current Developments

7.1 Have there been, or are there anticipated, any significant legislative changes or case law developments?

The last amendment of the Copyright Act has been effected by the law published in the Federal Law Gazette BGBl I 2013/112 which came into force on November 1, 2013 and which basically implemented the EU Directive on the term of protection of copyright and certain related rights (2006/116/EC).

In still ongoing court proceedings between the collective licensing body Austro Mechana and a manufacturer of computer hardware, the Austrian courts have to decide on the lawfulness of a flat fee the collective licensing body charged for the sale of computer hard disks ("*Leerkassettenvergütung*"). In a decision dating back to 2005, the Supreme Court had denied that compensation needed to be paid to the right holders for the sale of such hard disks (OGH 4 Ob 115/05y), but in the current case, the Supreme Court has changed its opinion and has clarified that such compensation might in principle be admissible, depending on whether the right holder's prejudice is more than just minimal. The proceedings will further be influenced by the recent ECJ decision in case ACI/ADAM (C-435/12) which clarified that the copy for private use exception may only be granted based on a lawful source. It seems doubtful whether a flat fee for the sale of hard disks can still be justified; in particular, one might argue that the prejudice to the copyright holder seems rather minimal, as set out in recital 35 to the EU Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC). The Supreme Court (OGH 17.12.2013, 4 Ob 138/13t) has referred the case back to the first instance. It will be interesting to follow the further outcome of this case.

Further, possible legislative changes to the Copyright Act in 2014 include the implementation of the Directive on Orphan Rights (to be effected until 29 October 2014) and further matters, such as a reform of the system of compensation for copies made for private use, amendments to existing exceptions and the amendment of the current version of section 38 UrhG, the interpretation of which has been reduced from a "*cessio legis*" to an assumption of a transfer of the exploitation rights by case law (OGH 4 Ob 184/13g). However, so far no draft legislation has been brought to the parliament.

7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, etc.)?

According to Austrian case law (OGH 19.11.2009, 4 Ob 163/09p), a hyperlink to internet content subject to copyright does not violate the copyright holder's right pursuant to Section 18a UrhG ('making available' right), provided that the content is accessed at its original domain and that the hyperlink does not circumvent any technical protection measures.

Further, as already mentioned in question 7.1, the ECJ's decision in case ACI/ADAM (C-435/12) has clarified (also) from an Austrian perspective that a user may only benefit from the private use exception in case a lawful source is given.

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