

Executive Committee Paris February 19, 2011

RECENT DEVELOPMENTS IN AUSTRIA

(Michel Walter)

I. Legislation

In Austria, the implementation of the **Resale Right Directive** was carried out at a rather minimalist level. Whenever the Directive left some leeway to the national legislature, the Austrian Copyright Law Amendment of 2005 implemented the Directive at the very lowest level. As to the royalty rates, the minimum resale price was set out at the amount of €3,000 and the rates provided for in Article 4(1) of the Directive were adopted without any modification. Furthermore, the resale right royalty is the only claim to an equitable remuneration in Austrian law, which is not mandatorily to be managed by collecting societies. The Austrian legislature, furthermore, according to Article 8(2) of the Directive applied the resale right only to works of artists still alive. In this respect, in late 2009 the transitional period was extended for two more years until 31 December 2011.

Note: It is submitted that the reasons given in arguing the prolongation of the transitional period of two more years are not convincing. However, in the same time, the threshold for the application of the resale right was at least reduced from €3.000 to €2.500, which is, however, still higher than in most of the EU Member States.

Furthermore, it appears to be questionable, whether the reduction of the resale right to the artist's life time, as exceptionally admitted in Article 8(2) of the Directive, is in line with the requirements of the Berne Convention.

II. Jurisprudence

- **Supreme Court 24 February 2009 – „Geräteketten [series of devices]“¹**
 - principles of interpretation – ‘versatile system’
 - The legal term ‘reprographic procedure’ is restricted to copies on paper or similar carriers; the claim to an **equitable remuneration** on **reproduction equipment**, therefore, does not extend to **personal computers**, even if they operate jointly with other equipment.

Note: The finding of the Supreme Court is questionable for several reasons, in particular with respect to the fact that traditional copying machines are increasingly replaced by several devices that work together jointly.

Furthermore, it seems questionable, whether the focussing of the levy only on printers indeed is in line with the requirement of ‘fair compensation’ as regards digitized material.

- **Supreme Court 8 September 2009 – „Passfotos II [passport photograph]“²**
 - ‘**unclean hands**’ defence (adaptation of a photo was made without the original photographer's consent) – no
 - **related rights** of the maker of a **photo**: adaptation does not require outstanding endeavours in order to be protected
 - however: the mere **taking of a picture** of a pre-existing photo does not enjoy protection

Note: The Court does not take into consideration that the related right in photographs as provided for under Sec 73f of the Austrian Copyright Act does not require any originality.

Supreme Court 8 September 2009 – „Rainhard F[endrich]“³

- **termination** of a **publishing contract** on the grounds of non-performance by the publisher
- period of grace mandatorily to be granted
- reversion of rights on account of non objection by the publisher within fourteen days (Sec 29 Austrian Copyright Act)
- declaration of termination may be included in a writ
- whereas the statement of defence is to be filed within four weeks only, the objection to the withdrawal of rights included in a writ must be declared within fourteen days.

Note: this latter conclusion as to the set period of 14 days is not convincing

¹ 4 Ob 225/08d MR 2009, 316 (Walter) = RdW 2009/369, 410.

² 4 Ob 115/09d MR 2009, 367 (Walter) = ÖBI-LS 2001/28 und 29 = EvBl 2010/32, 226 = ecolex 2010/95, 267 (Kurzanm Horak).

³ 4 Ob 113/09k MR 2010, 93 (Walter) = ÖBI-LS 2010/32 = ecolex 2010/55, 172 (Kurzanm Horak).

- **Supreme Court 8 September 2009 – „Schutzfristverlängerung“⁴**

- If an author has granted exclusive licenses against payment of a consideration, he or she may claim an **equitable remuneration** for the period of **an extended copyright term**
- According to a preceding finding of the Supreme Court⁵, this rule applies also to authors of **cinematographic** works, regardless of the fact that under the Austrian *cessio legis* system the exploitations rights are initially vested with the producer, which is why a contractual transfer of rights in the strict sense of the word is not necessary.
- The Austrian Copyright Act **Amendment of 2005**, however, abolished this claim to an equitable remuneration with regard to the authors of cinematographic works and to audiovisual performers.
- The Supreme Court in its judgment of 8 September 2009 held that the amendment of 2005 is to be understood as an ‘authentic interpretation’ and, thus, has **retroactive effect**
- Furthermore, the Court held that the **discrimination of film authors** is not in conflict with the equal treatment principle of constitutional law.

Note: Neither the wording of the provisions related to transitional law nor the concern of the amendment justify retroactive application, which itself appears to be in conflict with the provisions of constitutional law.

Furthermore, the discrimination of film authors, indeed, is contrary to the principal of equal treatment.

- **Supreme Court 16 December 2009 – „Künstlerexklusivvertrag“ [exclusive artists’ agreements]⁶**

- Exploitation rights of performing artists.
- According to Sec 31 of the Austrian Copyright Act, the author may grant exclusive licenses (*Werknutzungsrechte*) also with regard to works not yet created (**future works**).
- However, if such licenses do not refer to specific works, but rather extend to all works to be created by the author during his lifetimes or during a period exceeding 5 years, the author may **terminate** the contract with regard to all works, which were not yet finished.
- As to **performing artists**, the period mentioned above is reduced to **one year** only.
- In its judgment of 16 December 2009 the Supreme Court confirmed this rule, which is to be applied also in cases where the artist is behind with respect to his contractual recording duties.
- The Supreme Court added that the recording of a performing artist is accomplished as soon as the recording is fixed no further production related steps being necessary.
- The rule also applies in cases of **options** granted to the producer (unilaterally) to extend the agreement as to its duration.

Note: In practice, these provisions of the Austrian Copyright Act are not taken into consideration. The Supreme Court’s finding, however, is in line with these provisions of the Austrian Copyright Act aiming at protecting authors and performing artists.

- **Supreme Court 23 February 2010– „Gemälde im Hotel/Mozart Symphonie No 41“ [paintings in hotel rooms/Mozart Symphony No 41]⁷**

- The concern of the **reproduction right** is to allow the author to participate in the proceeds of the work’s exploitation.
- The reproduction right only comes into play, if the work is **perceivable** as this is the case with regard to the **original**.
- The reproduction and the making available of **photos of particular rooms** of a hotel on this hotel’s web-site, where paintings fixed on the wall are to be seen in a rather small format, does not infringe the author’s exclusive rights.

Note: the Austrian Copyright Act does not provide for an exception as regards the incidental inclusion of a work in other material. Nonetheless, the Court’s finding is questionable, since

⁴ 4 Ob 53/09m MR 2010, 136 (*Walter*) = EvBl 2010/21, 136.

⁵ 18 February 2003 4 Ob 235/02s – ‚Das Kind der Donau‘ MR 2003, 112 (Anm *Walter* MR 2003, 159) = RdW 2003/366, 440 (LS) = wbl 2004/125, 244 (*Dittrich*).

⁶ 4 Ob 178/09v MR 2010, 133 (*Walter*) = EvBl 2010/75, 513 = ecolex 2010/216, 585 (Kurzanm *Chr Schumacher*) = ÖBl 2010/126, 185 (*Büchele*).

⁷ 4 Ob 208/09f MR 2010, 206 (*Walter*) = wbl 2010/124, 316 (LS) = ecolex 2010/215, 584 (Kurzanm *Horak*) = RdW 2010/379, 376 (LS) = ÖBl 2010/122-123, 183 (*Büchele*) = ZUM 2010, 629 (*Handig*) = GRUR Int 2011, 77.

reproduction does not require that the work may be perceived in a similar way as is the case with regard to the original as long as the information is there or is retrievable by whatever means.

- **Supreme Court 11 March 2010 – „Hundertwasser-Krawina-Haus V“⁸**
 - The so-called „Hundertwasser-Haus“ in Vienna was created jointly by the architect *Josef Krawina* (structure) and the painter *Friedensreich Hundertwasser* (decorative facade). Both of them are, therefore, deemed to be co-authors.
 - Either of the co-authors may sue for copyright infringement independently, lawsuits against the other co-author included.
 - **Moral rights** are inalienable – they may, however, be **transferred** to a third party on a **trust basis**.
 - There is **no forfeiture** of authors’ rights on account of non-intervention against infringements for a long period of time – this principle was not modified by the implementation of Art 9(2) and Art 4(4)(c)(iii) of the First Trademark Directive.

- **Supreme Court 20 April 2010 – „Natascha K IV“⁹**
 - The free use of a work (photo) for the purpose of **public security** does not presuppose its direct distribution by police officers e.g. on a ‘wanted’ poster. It is sufficient that the work is kept ready by the police for publication purposes e.g. through news agencies.
 - In any case, **investigations** must still be carried out at the time of publication; on the other hand, an explicit reference to such investigations in the respective newspaper article is not necessary. However, mere illustration is not permitted.
 - It is up to the author to decide upon the denomination of the work (**credits**).
 - If the author decides to be credited and fixes his or her name on the work, the **later disappearance** of the name is not detrimental to the author’s moral rights.
 - No acquisition of copyrights on the grounds of good faith.

- **Supreme Court 13 July 2010 – „Lieblingshauptfrau“ [favourite governor]¹⁰**
 - The Austrian Copyright Act does not provide for a specific exception in favour of **parodies**. Such parodies may be permitted according to the general provision concerning ‘**free adaptations**’ where a work is adapted and modified in such a way that it is deemed to be a ‘new work’ (Sec 8(2) of the ACA). If this provision applies, not even the moral rights of the original author apply.
 - In case of parodies, it is sufficient that such creation is to be regarded as an ‘independent artistic intellectual creation’ where the original significantly stays behind the original. With this regards severe standard are to be applied.
 - However, parodies enjoy also protection on the grounds of the principles of ‘freedom of art’ and ‘**freedom of expression**’, both of them being constitutionally guaranteed. If in the political debate the free expression of one’s opinion only is possible in using a copyright work, such use is permitted.

Note: The standards to be applied as regards parodies, indeed, may be less severe. However, in the case at issue, it was not the photo, which was modified (parodied), but the accompanying text (in a political debate concerning abortion). Furthermore, the use of the photo was not necessary to express the critical view. Whether the fundamental right of freedom of expression includes the right to parody, may be disputed as well.

- **Supreme Court 13 July 2010 – „Zeitungslayout“ [newspaper layout]¹¹**
 - Court of Appeals of Vienna 27.04.2010¹²: Neither the **printing characters** ‘meta’ nor the **layout** of a regional **newspaper** is protected according to the.
 - Supreme Court: If a work’s originality only is minimal, the characteristics of the original fade away already in the case of minimal modifications (‘**free adaptation**’).

⁸ 4 Ob 195/09v MR 2010, 201 (*Walter*) = RdW 2010/378, 345 (LS und Kurzanm) = EvBl 2010/119, 732 = ÖBl 2010, 222 (*Knecht-Kleber*) = ecolex 2010/332, 887 (Kurzanm *Horak*).

⁹ 4 Ob 13/10f MR 2010,398 (*Walter*) = RdW 2010/518, 51 = ÖBl 2010, 220 (*Büchele*) = GRUR Int 2011, 79.

¹⁰ 4 Ob 66/10z MR 2010, 327 (*Thiele und Walter*) = ÖBl 2010/55, 285 = ecolex 2011/25, 57 (*Chr Schumacher*).

¹¹ 4 Ob 109/10y MR 2010, 404 (*Walter*).

¹² 2 R 72/10w

Note: In order to avoid erosion of copyright protection, the ‘free adaption’ excuse should to be applied severely.

- **Supreme Court 31 August 2010 – „Thermenhotel II“ [Thermal springs hotel II]**¹³
 - National law is to be **construed** in line with **Union law**.
 - This rule also applies to provisions, which have not been enacted in implementing Union law.
 - However, if the wording and the concern of a provision of national law (clearly) differ from Union law, the national law is to be applied.
 - Judgments of the European Court of Justice are to be applied by national courts in general and are not limited to the main proceeding in the course of which the preliminary ruling was initiated.
 - The **Information Society Directive** harmonizes the **communication to the public** characterized by a distance element, the **notion of public** included. In the case of transmitting television signals by the manager of a hotel to **TV sets** located in the single guest **rooms of the hotel**, there is a **distance element** to be assumed, since signals emitted by the original broadcaster are retransmitted.
 - Therefore, the European Court of Justice’s judgments in the cases ‘SGAE/Rafael hotels’¹⁴ and „ODSS“¹⁵¹⁶ are to be applied. According to these decisions, a communication is directed to the public, where there is no personal (private) relationship between the persons, to whom the work is made available, nor to the organizer of such communication.
 - The Supreme Court’s decision, thus, overrules the earlier judgment of the Court dated 16 June 1998 – „Thermenhotel I/Thermenhotel L I“¹⁷.
 - As to the qualification of this act of exploitation requiring the author’s consent under Austrian law, the Supreme Court applied the general exclusive right of communication to the public (Sec 18(3) of the ACA) rather than the right of rebroadcasting (Sec 17(2) of the ACA).

Note: According to the system of exploitation rights as set out in the Austrian Copyright Act, the retransmission of broadcastings to the TV sets in the guest rooms (of a hotel) correctly must be understood as an act of rebroadcasting under Austrian law. The exceptions provided for with regard to community antenna systems, however, are not to be applied to satellite antennas¹⁸.

- **Supreme Court 15 December 2010 - – „Bundeshymne II“ [Austrian National Anthem II]**¹⁹
To be reported in Dublin

III. Activities of the Austrian Group in 2010

9 to 12 September 2010: ALAI Study Days Vienna 2010.

Thank you for attending!

¹³ 4 Ob 120/10s MR 2010, 392 (*Walter und Mahr*, MR 2010, 383) = EvBl 2011/5, 34.

¹⁴ Judgment 7 December 2006 C-306/05 ECR 2006 I-11519 = MR 2006, 381 = EuZW 2007, 81 = ZUM 2007, 132 = GRUR 2007, 225 = ÖBl 2007, 20, 88 (*Dittrich*) = MMR 2007, 164 (*Ricke/Simon*) = GRUR Int 2007, 316 = CRi 2007, 84.

¹⁵ *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon/ Optikoakoustikon Ergon geg Divani Acropolis AE*.

¹⁶ 18 March 2010 C-136/09 MR Int 2010/4.

¹⁷ 16 June 1998 4 Ob 146/98v MR 1998, 277 (*Walter*) = ÖBl 1999, 98 = RdW 1998, 610 = JUS Z/2578 = SZ 71/101= GRUR Int 1999, 279 (*Briem*).

¹⁸ Some of these exceptions still are contrary to the Berne as well as to Union law..

¹⁹ 4 Ob 171/10s MR 2011/1 (*Walter*).