



Copyright

in 28 jurisdictions worldwide

Contributing editors: Stuart Sinder,
Jonathan Reichman and James Rosini

2009



Published by
Getting The Deal Through
in association with:

Aavik & Partners Law Office

ABBC – Azevedo Neves, Benjamim Mendes, Bessa
Monteiro, Carvalho & Associados,
Sociedade de Advogados RL

Adams & Adams

Advokatfirman NorelidHolm

AKD Prinsen Van Wijmen

Anand and Anand, Advocates

Anderson Mōri & Tomotsune

Awapatent AS

Cabinet Bruno Ryterband

Cavelier Abogados

David Garrick, Kayode & Co

Deris Patents & Trademarks Agency AS

Deris Law Office

Dorda Brugger Jordis

E Blum & Co AG

Freehills

Garcia Magliona y Cia Ltda

Hammonds LLP

Hoet Pelaez Castillo & Duque

Kenyon & Kenyon LLP

Kim & Chang

Marx Van Ranst Vermeersch & Partners

MGAP Attorneys at Law

Olivares & Cia

Preu Bohlig & Partner

Ridout & Maybee LLP

Sár and Partners Attorneys at Law

Thompson Associates

Austria

Axel Anderl

Dorda Brugger Jordis

Legislation and enforcement

1 What is the relevant legislation?

The Austrian Copyright Act in the current version of the federal gazette I No. 81/2006.

2 Who enforces it?

Civil and criminal courts, depending on the particular claim involved.

Agency

3 Is there a centralised copyright agency? What does this agency do?

No.

Subject matter and scope of copyright

4 What types of works are copyrightable?

Under the Copyright Act works are defined as intellectual creations in the area of literature, musical art, visual art and cinema. Works of literature also include computer programs. Additionally, photos, audio records, broadcasts and databases may enjoy a restricted copyright protection, even if they do not qualify as works as defined in the Copyright Act due to lack of peculiarity.

5 What types of rights are covered by copyright?

Both exploitation and moral rights are protected. Exploitation rights include:

- the right of the first table of content (Copyright Act, section 14, paragraph 3);
- the right to adapt and translate the work (Copyright Act, section 14 paragraph 2);
- the right of reproduction (Copyright Act, section 15);
- the right of distribution (Copyright Act, section 16);
- the right of lending (Copyright Act, section 16a);
- the right of broadcasting (Copyright Act, section 17);
- the right to perform or display to the public (Copyright Act, section 18); and
- the right to put internet content at the disposal of the public (Copyright Act, section 18a).

Moral rights are protected according to Copyright Act, sections 19 to 21 (see question 12).

6 What may not be protected by copyright?

Product designs are not copyrightable, neither are technical drawings, concepts, operating manuals and generally 'creations' that lack peculiarity.

7 Do the doctrines of 'fair use' or 'fair dealing' exist?

Fair use is defined in section 42 Copyright Act, which incorporates article 5, paragraphs 2, 3 and 4 of the information technology directive (2001/29/EC). Specifically, anyone is entitled to reproduce a work for personal use, on paper or a comparable medium. This general notion of fair use is expanded to reproductions in all media if the use is not for commercial ends, specifically for research, education and use within an individual's private sphere.

8 What are the standards used in determining whether a particular use is fair?

A distinction is made between entities and individuals and whether the personal use is directly or indirectly for commercial ends or not. The more a use is within a non-commercial private sphere, the more likely it is justified by fair use.

9 Are architectural works protected by copyright? How?

Architectural works are explicitly protected as works of visual art (section 3 Copyright Act). Section 54, however, limits the exploitation rights of the copyright owner and grants the public a right to produce images of a building which may be distributed, made publicly available and presented ('liberty of the urban landscape'). It is, however, neither admissible to reproduce the building itself, nor to copy the drawings.

10 Are performance rights covered by copyright? How?

Yes, performance rights are protected as derivative rights of choreographic works and entertainments in dumbshows (see article 2 of the Berne Convention, section 2(2) Copyright Act). Performance rights grant the performing artist the exclusive rights to capture the performance on any media and to reproduce and distribute the recording.

11 Are 'neighbouring rights' recognised? How?

As a member of the European Union, Austria also recognises the following neighbouring rights:

- protection of databases;
- rental and lending rights;
- protection of computer programs; and
- protection of semi-conductors and topographies, as well as protection of designs.

These are either incorporated into the Copyright Act or separate statutes such as the Halbleiterschutzgesetz (semi-conductor protection) and Musterschutzgesetz (design protection).

12 Are moral rights recognised?

Moral rights are recognised. The main provisions are Copyright Act, sections 19, 20 and 21, paragraph 3. Section 19 grants the originator the unlimited and mandatory right to defend his or her creatorship against third parties. According to the Copyright Act, section 20 it is within the creator's sole discretion as to whether or not and by which means he or she shall be indicated as originator. Section 21, paragraph 3, preserves the originator the right to object to defacing changes to his or her work even if the right to the adjustment was granted to a third party.

Copyright formalities**13** Is there a requirement of copyright notice?

No.

14 What are the consequences for failure to display a copyright notice?

Not applicable.

15 Is there a requirement of copyright deposit?

No.

16 What are the consequences for failure to make a copyright deposit?

Not applicable.

17 Is there a system for copyright registration?

Basically, no. However, the Ministry of Justice keeps a copyright register for a very specific purpose. The protection under the Copyright Act expires 70 years after death of the originator (Copyright Act, section 60). If the originator decides to refrain from naming him or herself as creator (see question 12), the protection expires 70 years after creation or publication (Copyright Act, section 61). Section 61(a)ff now grants originators the right to claim creatorship for their anonymously created or published work within this period by entering their details and those of the respective work into the register held by the Ministry of Justice. In doing so, the protection under the Copyright Act is extended to 70 years after the death of the originator. In practice, the register is of minimal relevance.

18 Is copyright registration mandatory?

No. The protection under the Copyright Act is granted automatically by creation of a copyrightable work. There is no registration required or available.

19 How do you apply for a copyright registration?

Not applicable.

20 What are the fees to apply for a copyright registration?

Not applicable.

21 What are the consequences for failure to register a copyrighted work?

Not applicable.

Ownership and transfer**22** Who is the owner of a copyrighted work?

The owner of a work's copyright is its author or his or her heirs. Other than exploitation rights, the ownership may not be assigned to any third parties (Copyright Act, section 23, paragraph 3).

23 May an employer own a copyrighted work made by an employee?

No, an employer may not technically own a work made by an employee. However, the employer may be entitled to all of the employees' exploitation rights under specific circumstances. By law, the employer is granted an exclusive right to exploit the program or the design created by an employee in the normal course of his or her work (Copyright Act, section 40b; Design Protection Act, section 7, paragraph 2). Specific rules also apply in the area of cinematographic works. According to Copyright Act, section 38, the exploitation rights will be exclusively assigned to the producer.

24 May a hiring party own a copyrighted work made by an independent contractor?

On the basis of the specific regulations stated in question 23, the Austrian Supreme Court derived a general principle of granting the employer a (limited) right to its employees' work results if the employee has been hired for the specific purpose of creating a copyrightable work. This principle is also applicable when dealing with independent contractors. It is, however, advisable to include a respective clause in the contract, since the Supreme Court decides the applicability and extent of this principle on a case-by-case basis.

25 May a copyrighted work be co-owned?

Copyrighted works are co-owned if two or more co-authors create a work that forms an inseparable unity or if two works are combined into one integral creation (Copyright Act, section 11). All co-authors are entitled to the rights to the entire work in the same proportion (there is no limitation of the shares to the actual contribution of the co-authors).

26 May rights be transferred?

The ownership itself may not be transferred except in the case of legal succession. All exploitation rights may, however, be transferred or licensed. In the case of co-ownership, transfer or licensing requires a unanimous decision of all co-owners.

27 May rights be licensed?

The originator may license any or all of his or her exclusive exploitation rights either by an exclusive or non-exclusive licence (Copyright Act, section 24).

28 Are there compulsory licences? What are they?

Once the originator has published his or her work, the law stipulates some types of compulsory licences in various circumstances. This is specifically the case for works of visual arts that have been placed in a public space, and for works of musical art that have already been broadcast, reproduced or distributed. In these instances, commercial use by third parties is legitimate; the authors and interpreters are still entitled to receive royalties. These are usually administered by collecting societies (see question 29).

29 Are licences administered by performing rights societies? How?

Austria has a specific Collecting Societies Act, which stipulates the establishment of collecting societies and their activities. Collecting societies may not be established for profit and shall collect and distribute the royalties paid by licensees to its members and beneficiaries. Currently, the main collecting societies are focused on ancillary copyrights such as the right of exhibition and broadcasting, as well as mechanical reproduction and distribution of music and literature. Although membership with the specific collecting societies is not

Update and trends

Access Providers' Duty of Disclosure – *LSG v Tele2* (ECJ 19.02.2009, C-557/07)

The Austrian Supreme Court submitted to the ECJ the following two preliminary questions regarding the access providers' duty to disclose personal data of their users to a collecting society; the users had purportedly used their internet access for file-sharing purposes:

Does the term 'intermediary' in Article 5(1)(a) and Article 8(3) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society include an access-provider who provides a user with access to the network but does neither provide nor control any additional services, such as file sharing services?

Do Article 6 and Article 15 of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector take precedence over article 8(3) of the Directive 2004/48/EC on the enforcement of intellectual property, thereby prohibiting the disclosure of personal traffic data to private third parties for the purpose of civil copyright infringement proceedings?

The ECJ decided the case by order – not a judgment – and referred to last year's *Promusicae* decision (ECJ 29.01.2009, C-275/06): Accordingly, access providers are considered to be 'intermediaries'. Moreover, member states are free to lay down an obligation to disclose personal data in the context of civil proceedings. The agencies and courts of the member states have a duty to interpret the national law not only according to the directives, but also to ensure that the interpretation strikes a fair balance between the various fundamental rights and does not conflict with the general principles of the Community legal order, notably the principle of proportionality.

Now, the Austrian Supreme Court is no wiser than before: when interpreting the Austrian Copyright Act, the court has to weigh the access provider's customers' data protection rights against the collecting society's interest in obtaining their names and addresses to pursue possible copyright infringement claims. However, the Austrian Copyright Act does not foresee any possibility to balance the right of the copyright owner (or its agents) with the fundamental right of data protection. If the aggrieved party adequately justifies a written request for disclosure of the personal data of a copyright infringer, the intermediary has to comply with this request (section 87b

paragraph 3 Copyright Act). Since access providers are considered to be intermediaries per the ECJ ruling, the Austrian Supreme Court is almost compelled to rule in favour of the collecting society, as Austrian national law is unambiguous and the ECJ failed to explain under which circumstances data protection rights would prevail over the intermediary's duty of disclosure.

It should be added that the Austrian Supreme Court typically does not decide questions regarding fundamental rights. Such questions are typically the ambit of the Austrian Constitutional Court. Since both courts are courts of last resort, the decision of the Supreme Court cannot be appealed to the Constitutional Court. However, the Supreme Court has the possibility to stay the proceedings and request the annulment of section 87b paragraph 3 Copyright Act as unconstitutional by the Constitutional Court. Finally, although the decision of the Supreme Court will be binding, it may be appealed before the European Court of Human Rights.

Possible amendment of the Copyright Act due to Directive 2006/24/EC on the retention of data

On a related note, the pertinent provisions in the Copyright Act may not only be subject to change because of their possible violation of fundamental rights. The Austrian legislature may also amend these provisions in the course of transposing Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, which is overdue (15 September 2007). Even the second deadline of 15 March 2009 has lapsed, which gave the member states the right to postpone the application of the Directive to the retention of communications data relating to internet access, internet telephony and e-mail.

As Austria did not transpose the directive in a timely manner, the European Commission initiated in 2008 a treaty infringement proceeding, which was stayed pending the nullity proceeding initiated by Ireland against this directive. On 10 February 2009, the ECJ dismissed the Irish action (C-301/06). It is therefore expected that the European Commission will now proceed with the treaty infringement proceeding against Austria, unless the Austrian legislature quickly transposes the directive. A pertinent proposal has not been published yet. The transposition will likely require amendments of the Telecommunications Act, the Criminal Procedure Act, the Security Police Act and the Copyright Act.

mandatory and each copyright holder is entitled to pursue its rights individually as a matter of practice, ancillary copyrights in the area of musical art and literature are entirely administrated by collecting societies.

30 Is there any provision for the termination of transfers of rights?

Sections 29 to 32 of the Copyright Act stipulate statutory reasons for a termination of exclusive licences. The most important causes are termination for failure to adequately exploit an exclusive licence (section 29) and in case of the exclusive licensee's bankruptcy termination by his administrative receiver (section 32). On the other hand, the originator's bankruptcy grants neither its administrative receiver nor the exclusive licensee a right to terminate the licence agreement. However, licence agreements typically contain standard contract clauses to grant both parties such termination rights in the event of the other party's insolvency, as well as further termination rights for good reason.

31 Can documents evidencing transfers and other transactions be recorded with a government agency?

No.

Duration of copyright

32 When does copyright protection begin?

Copyright protection begins automatically with the creation of the work.

33 How long does copyright protection last?

Copyright protection generally lasts 70 years after the death of the author or the death of the co-author dying last (Copyright Act, section 60), respectively the creation or the first publication, if the originator is unknown (Copyright Act, section 61). The rights of the interpreter of a work of literature or musical art expire 50 years after the public presentation or exhibition, unless the presentation or exhibition has been captured on media that have been published. In this instance, the right of the interpreter ends 50 years after publication. The end date for all copyrights and ancillary copyrights is 31 December of the year in which the copyright expires.

34 Does copyright duration depend on when a particular work was created or published?

Copyright duration may depend on the publication date (see question 33), but as a general rule, the creation of the work is the crucial event. If the work is published later, ancillary rights may be extended by the time period between creation and publication.

35 Do terms of copyright have to be renewed? How?

Copyright terms are not renewable.

Copyright infringement and remedies**36** What constitutes copyright infringement?

Any kind of unlicensed exploitation (see question 3) not covered by of the fair use doctrine (see question 7) or any other right to free use such as concomitant reproduction (Copyright Act, section 41a) or the right of quotation (Copyright Act, section 46), constitutes a copyright infringement. Further, any untrue allegation of authorship is also deemed an infringement.

37 Does secondary liability exist for copyright infringement? What actions incur such liability?

Yes, Austrian law provides for a kind of secondary liability, *Gehilfenhaftung*. This liability for aiding and abetting has been developed by the Austrian Supreme Court to expand liability to persons who deliberately or consciously assist the perpetrator. To become liable, the aider or abettor must have contributed or facilitated the infringement and have either actual or wrongful failure of knowledge (negligence) of the infringements (OGH 22.01.2008, 4 Ob 194/07v). However, only wanton and conspicuous infringements by the perpetrator lead to the aider's duty to enquire about a possible copyright infringement (OGH 12.06.2007, 4 Ob 50/07t).

The aider or abettor's liability is identical to the perpetrator's; equally, the possible legal remedies and actions remain the same.

38 What remedies are available against a copyright infringer?

As regards civil law, the following remedies are available:

- claim for omission, also means of a preliminary injunction;
- disposal and destruction of the unlicensed reproductions or tools required for their reproduction;
- adequate compensation, determined by the market value of the grant of such a licence (which includes, in cases of negligence, loss of profits or twice the amount of compensation considered 'adequate'); and
- non-pecuniary damages.

Ancillary rights to request disclosure of information about the distribution channels, infringing third parties and rendering of accounts shall safeguard the originator's claims. Further, the claimant is granted a right to publish the judgment at the defendant's cost.

Besides the civil law claims, the originator may also initiate criminal proceedings against the infringer.

39 Is there a time limit for seeking remedies?

Remedies for damages may be sought within three years after knowledge of the copyright violation. In any event, proceedings must be initiated no later than 30 years after the actual violation has occurred.

40 Are monetary damages available for copyright infringement?

Yes. The claimant is entitled to adequate compensation for the infringement. In cases of negligence, also loss of profits or twice the amount of adequate compensation is granted. The claimant may also request compensation for non-pecuniary damages.

These payments only compensate for the infringement in the past and do not grant a right to exploit the protected work in the future.

41 Are attorneys' fees and costs available for copyright infringement?

Yes, according to general Austrian principles of civil procedure, attorneys' fees have to be reimbursed by the losing party according to statutory attorneys' fees tariffs. Since specialised practitioners usually bill according to an hourly rate, the winning party has to bear the difference between the reimbursed statutory fees and the actual hourly rates.

42 Are there criminal copyright provisions? What are they?

Yes, a wilful violation of copyright is punished with imprisonment of up to six months or fines up to 360 times a daily rate computed on basis of the violator's income (Copyright Act, section 91, paragraph 1). Not only the violator, but also the owner or the manager of a company, who failed to keep his employees from violating copyrights within the course of business, may be punished (Copyright Act, section 91, paragraph 2). Violations conducted with a commercial background may be punished with imprisonment of up to two years. Any criminal proceedings can only be conducted on the rights holder's request.

43 Is online copyright infringement actionable?

Online and offline copyright infringement are actionable in the same way. There are no additional or specific provisions.

44 How may copyright infringement be prevented?

Since there is no specific register, it is necessary to carefully review all content before its use and to enter into respective licence agreements.



Axel Anderl

axel.anderl@dbj.at

Dr-Karl-Lueger-Ring 10
1010 Vienna
Austria

Tel: +43 1 533 47 95 0
Fax: +43 1 533 47 97
www.dbj.at

Relationship to foreign rights

45 Which international copyright conventions does your country belong to?

Austria is a member of the European Union and belongs to all the main international copyrights conventions such as the Berne Convention, the Paris Cooperation Treaty, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the Universal Copyright Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the TRIPs Agreement, which have largely superseded former bilateral agreements with other countries.

46 What obligations are imposed by your country's membership of international copyright conventions?

As a member of the European Union, Austria has implemented the obligations stipulated in international copyrights conventions in its domestic law.