



CHAMBERS
Global Practice Guides

Copyright

Austria – Law and Practice

Contributed by
Graf & Pitkowitz Rechtsanwälte GmbH

2018

AUSTRIA

LAW AND PRACTICE:

p.3

Contributed by Graf & Pitkowitz Rechtsanwälte GmbH

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

Contributed by Graf & Pitkowitz Rechtsanwälte GmbH

CONTENTS

1. General Information	p.5	4.14 Collective Rights Management System	p.12
1.1 Historical Roots	p.5	4.15 Powers of Societies	p.12
1.2 Principal Sources	p.5	4.16 Specific Feature	p.12
1.3 International Conventions/Treaties	p.6	5. Exceptions to Copyright	p.13
1.4 Protected Holders	p.6	5.1 General Clause	p.13
2. Copyright Works	p.6	5.2 Factors to be Considered	p.13
2.1 Essential Elements	p.6	5.3 Exemption of Private Copy	p.13
2.2 Access Copyright Protection	p.6	5.4 Exemption of Cultural Goods/Buildings	p.13
2.3 Copyrighted Works Register	p.6	5.5 Exemption of Intermediaries	p.14
2.4 Categories of Copyrightable Works	p.6	5.6 Exemption of Satire/Parody	p.14
2.5 Protection Requirements for Software	p.7	5.7 Freedom of Speech	p.14
2.6 Protection Requirements for Databases	p.7	6. Neighbouring/Entrepreneurial/Copyright-Related Rights	p.14
2.7 Protection Requirements for Industrial Design	p.7	6.1 Neighbouring Rights	p.14
2.8 Peculiar Works	p.7	6.2 Content of Neighbouring Rights	p.14
3. Authorship and Copyright Ownership	p.8	6.3 Collecting Societies	p.17
3.1 Author of Copyrightable Work	p.8	6.4 Specific Types of Contracts	p.17
3.2 Corporate Body	p.8	6.5 Exceptions to Copyright and Neighbouring Rights	p.17
3.3 Identification of the Author	p.8	7. Copyright Infringement and Litigation	p.17
3.4 Regulation on Collaborated Works	p.8	7.1 Considering Copyrighted Work as Infringed	p.17
3.5 Collective Works	p.8	7.2 Defences Available Against Infringement	p.17
3.6 Work for Hire Doctrine	p.8	7.3 Role of Privacy	p.17
3.7 Anonymous and Orphan Works	p.9	7.4 Proceedings Available	p.18
4. Copyright Protection and Management	p.9	7.5 Neighbouring Rights Versus Copyrights	p.18
4.1 Copyright-Owner's Economic Rights	p.9	7.6 Moral Rights in Court	p.18
4.2 Duration of Economic Rights	p.9	7.7 Non-Declaratory Infringement Proceedings	p.18
4.3 Alienable Economic Rights	p.9	7.8 Court Handling Copyright Proceedings	p.18
4.4 Transmissible Economic Rights	p.10	7.9 Necessary Parties	p.18
4.5 Moral Rights	p.10	7.10 Involvement of Third Parties	p.18
4.6 Duration of Moral Rights	p.11	7.11 Court Fees	p.18
4.7 Alienable Moral Rights	p.11	7.12 Formalities Required Before Initiation	p.18
4.8 Transmissible Moral Rights	p.11	7.13 Urgent Measures for Right-Holders	p.18
4.9 Minimum Age Requirement	p.11	7.14 Available Urgent Measures	p.18
4.10 Specific Types of Contract	p.11	7.15 Obtaining Information and Evidence	p.19
4.11 Exhaustion Doctrine	p.11	7.16 Requesting Urgent Seizure	p.19
4.12 Dealing with Rights	p.11		
4.13 Synchronisation	p.11		

7.17 Addressing Intermediaries with Urgent Measures	p.19
7.18 Role of Experts in Copyright Proceedings	p.19
7.19 Regimes Regarding Burden of Proof	p.19
7.20 Sanctions	p.19
7.21 Party Responsible for Paying Fees	p.20
7.22 Average Duration of Proceedings	p.20
7.23 Decisions Enforced	p.20
7.24 Administrative or Criminal Means	p.20
7.25 Customs Seizure of Counterfeits and Parallel Imports	p.21
7.26 Special Provisions	p.23
7.27 Full or Factual Review	p.23
7.28 Providing the Court with All Necessary Evidence	p.23
7.29 Alternative Dispute Resolution	p.23

Graf & Pitkowitz Attorneys-at-law has an experienced team of lawyers with extensive expertise and specialisation. The firm advise and represent clients in all areas of intellectual property law and information technology, providing services ranging from the registration of trade marks, to strategic advice on trade-mark creation, and the development and protection of all sorts of intellectual property claims (including copyright and patent rights). Graf & Pitkowitz assist clients in negotiating differentiation and coex-

istence agreements, where necessary with in-house experts on antitrust law. The firm co-operates with experts in the field of corporate law/M&A regarding the commercial exploitation of intellectual property rights in the course of the sale of a corporation or the spin-off of individual divisions of the corporation. Graf & Pitkowitz have further strengths in the areas of data protection, employment legislation and compliance – especially with regard to constantly evolving EU regulations.

Author



Claudia Csáky is an attorney at law at Graf & Pitkowitz. She advises on all areas of intellectual property law with key strength in trade marks, copyright, unfair competition law as well as information technology law. Claudia also has significant expertise and procedural experience in patent disputes. In the area of trade marks she advises well-known international and national clients from various industries. Her practice includes the full range of services required for registering trade marks,

from prior strategic advice on the selection of trade mark and licences to representation in trade-mark conflicts. Claudia regularly advises clients on intellectual property issues in the course of the sale or spin-off of a business, working together with in-house experts from the firm's corporate/M&A practice group. She is a member of the German Association for the Protection of Intellectual Property (GRUR) and the European Communities Trade Mark Association (ECTA)) as well as INTA where she is a member of INTA Bulletins Law & Practice – Europe Subcommittee.

1. General Information

1.1 Historical Roots

The beginnings of copyright protection in Austria go a long way back. The first Copyright Act was passed in 1846. In 1919, Austria – in fulfilling its obligations stipulated by the Peace Agreement of Saint Germain-en-Laye – acceded to the Revised Berne Convention for the Protection of Literary and Artistic Works (“RBC”). The revision of the RBC in 1928 was incorporated into a newly passed Copyright Act in 1936. The Copyright Act of 1936 is still in force today, though it has been amended time and again, in particular upon Austria's accession to the European Union in 1994 and by the Directive on the harmonisation of certain aspects of copy right and related rights in the information society (Directive 2001/29/EC).

1.2 Principal Sources

The principal source of law regulating copyright is the Copyright Act 1936 (“Federal Law on Copyright in Works of Literature and Art and on Related Rights” (BGBl. No 111/1936, as last amended [BGBl. I No 25/1998]) as amended from time to time. The most important amendments were introduced by transposing the following directives of the European Union into national law:

- Directive 91/250/EEC – Council Directive on the legal protection of computer programs
- Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (amending Directive 92/100/EEC)
- Directive 93/98/EEC on harmonising the term of protection of copyright and certain related rights
- Directive 93/83/EEC on the co-ordination of certain rules concerning copyrights and rights related to copyright applicable to satellite broadcasting and cable re-transmission
- Directive 96/9/EC on the legal protection of databases
- Directive 2001/29/EC on the harmonisation of certain aspects of copyright and the related rights in the information society
- Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art
- Directive 2004/48/EG on the enforcement of intellectual property rights
- Directive 2006/116/EC on the term of protection of copyright and certain related rights
- Directive 2011/77/EU on the term of protection of copyright and certain related rights (amending Directive 2006/116/EC)

- Directive 2012/28/EU on certain permitted uses of orphaned works

The last substantial amendment of the Copyright Act took place in 2015.

1.3 International Conventions/Treaties

Austria is a party to the

- Revised Berne Convention
- Universal Copyright Convention (BGBl 1982/293)
- Convention for the Protection of Human Rights and Fundamental Freedoms (BGBl 1958/210)
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (BGBl III, 2007/34)
- Agreement establishing the World Trade Organization (BGBl 1995/1 – TRIPS).
- Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS.
- European Convention relating to questions on copyright law and neighbouring rights in the framework of trans-frontier broadcasting by satellite
- WIPO Copyright Treaty (BGBl III, 2010/22)
- WIPO Performances and Phonograms Treaty (BGBl III, 2010/28).

In addition, Austria is party to a number of bilateral agreements, eg Agreement of 15 June 1957 between Austria and Federal Republic of Germany regarding Proprietary Relationships (BGBl 1958/119), Convention between Austria and the Soviet Union relating to the Reciprocal Copyright Protection (BGBl 1983/424). In addition, Austria has entered into agreements regarding the extension of the term of copyright with Norway, Spain, France, Brazil, Federal Republic of Germany and Italy. Moreover, Austria and the US exchanged declarations of reciprocity in 1907 (RGBl 265).

1.4 Protected Holders

A work enjoys copyright protection in Austria irrespective of whether or where it has been published if the author or a joint author is an Austrian national. Citizens of Member States of the European Union or the European Economic Area (“EEA”) as well as undertakings with their places of business within the EU or the EEA are equated with Austrians. Copyright protection also extends to all works which have been published in Austria as well as to works of art which are a part of or a fixture on real estate located in Austria.

Copyright protection for the works of foreign authors who cannot claim protection pursuant to the above paragraph is granted protection in Austria – subject to international treaties – on the condition that the works of Austrian authors are protected in approximately the same way in the country of which the foreign author is a national, but at least to the

same extent as works of nationals of that country. A number of international treaties, in particular the RBC and the Universal Copyright Convention, regulate copyright protection of foreign authors.

2. Copyright Works

2.1 Essential Elements

A work has to meet three prerequisites to benefit from copyright protection, namely (i) it needs to be an intellectual creation, (ii) it has to have originality or individuality and (iii) it can be allotted to one of the kind of works provided for in the Copyright Act. These prerequisites apply to all works.

A work is an intellectual creation if it shows a certain shaping of an intellectual substance and is perceptible by the senses. Thus, an unshaped idea does not constitute a work. The intellectual creation is deemed original, if the author’s personality influenced the individuality of the work. It is due to this individuality that the work can be distinguished from other works. If, however, the author has no choice, for example, as to the shape of a work due to technical restraints, the work is lacking individuality and consequently there is no copyright protection. Aesthetic and artistic evaluations do not play any role in the assessment of the originality/individuality of a work.

2.2 Access Copyright Protection

Copyright protection arises upon the creation of a work. There are no formal requirements to be met to ensure the applicability of the Copyright Act.

2.3 Copyrighted Works Register

There is no longer a copyright register in Austria. A copyright register existed previously but never had any practical relevance.

2.4 Categories of Copyrightable Works

The Copyright Act provides for the following work categories: (a) works of literature, (b) musical works, (c) works of art and (d) cinematographic works (films).

- Works of literature include works of language of any kind and computer programs, theatrical works expressed by gestures or other movements of the body (works of choreography and pantomime), works of a scientific or didactic nature which consist of pictorial representations in two or three dimensions, unless they constitute works of art and works of musical art.
- Musical works.
- Works of art include works of photography (manufactured by a photographic technique or technique similar to photography), works of architecture and applied art.

- Cinematographic works (films) include motion pictures in which the events and actions that form the subject of the work are presented either by images only or simultaneously by images and sounds, irrespective of the nature of the process employed in the production or performance of the work.

Moreover, translations and other adaptations of works are protected as original works, provided they are original intellectual creations of the translator or adapter (this holds true without prejudice to any copyright subsisting in the adapted work).

Finally, collections which constitute an original intellectual production resulting from the combination of individual contributions to form a homogeneous whole are protected as collective works under the Copyright Act.

Though the list of categories is in principle comprehensive, it must not be understood as a rigid system, but rather as an adaptable and flexible framework that is not biased towards any technology. However, for works which cannot be subsumed to any of the aforementioned categories, copyright protection cannot be claimed.

2.5 Protection Requirements for Software

Computer programs (including their preparatory design material) are regarded as literary works and protected as such if they are the result of a unique intellectual creation of its author. A computer program therefore requires a certain degree of complexity. Trivial programs do not fall under the Copyright Act.

The source code is subject to copyright. The structure or sequence of a program might also be protectable under patent law or utility model law if the program contributes to the solution of a technical problem with technical means, provided the respective prerequisites are met (new, inventive and applicable on a commercial scale).

Copyright protection and protection under patent law/utility model law apply concurrently.

2.6 Protection Requirements for Databases

A database benefits from copyright protection, if the selection or arrangement of the database's content is based on the author's own intellectual creation. Copyright protection does not extend to the database's contents and is without prejudice to any rights subsisting in those contents themselves.

In addition, the maker of a database benefits from a sui generis protection, if he or she shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents. The sui generis protection of a database is independent as to

whether the database per se is eligible for copyright protection or not. Thus these protections may cumulate.

2.7 Protection Requirements for Industrial Design

Industrial design constitutes a work of art (generally applied art) if the general prerequisites are met (ie intellectual creation, originality/individuality) and can as such benefit from copyright protection.

Industrial design can also be protected as a registered or non-registered design and/or a trade mark. One of the main differences between copyright protection and such other forms of protection are the costs. Copyright protection materialises upon creation of the work whilst design and trade-mark protection require a registration triggering respective registration fees.

2.8 Peculiar Works

Austrian copyright law does not specifically take into account peculiar works such as fictional characters etc. Such peculiar works are assessed under general copyright rules. If such works are original intellectual creations perceivable by the senses and can be subsumed under one of the work categories they are protected by copyright law. If, however, they are just an idea for a peculiar work, the idea as such can be copied without infringing any copyrights.

- Fictional characters: Fictional characters which meet the general requirements are subject to copyright. This goes for the texts describing the characters as well as the figurative representations of the fictional characters, eg by cartoons or comics. The fictional character itself is also eligible for copyright protection provided the fictional character is an individual intellectual creation and embodies a distinctive combination of (i) exterior characteristics, (ii) traits, (iii) skills and (iv) a typical mode of behaviour.
- TV formats: So far there is no clear ruling by the Supreme Court as to whether TV formats are protected by copyright. It has neither explicitly been ruled out nor confirmed. The German Federal Supreme Court holds that formats of TV shows are not protected by copyright. It is likely that the Austrian court will adopt the German position.
- Sport event: A sport event is not protected by copyright because it is per se not an intellectual creation. However, the broadcasting of a sport event can be a cinematographic work, if it is an intellectual creation due to eg a combination of special camera work, commentaries and augmented visuals.
- Multimedia works: A multimedia work can be a database and be protected as such if the maker of the database made a qualitatively and/or quantitatively substantial investment in the obtaining, verification or presentation of its contents. In addition, a multimedia work might constitute a collective work if the database by reason of the selection

or arrangement of its contents constitutes the author's own intellectual creation.

- Museums: The building which houses the museum is – provided it is a work of architecture – protected by copyright. An exhibition displayed in the museum is protected by copyright if it meets the requirements of collective work (ie the individual contributions are selected or arranged in a fashion which makes the compilation an original intellectual creation). The individual pieces are generally copyright-protected provided the copyright term has not yet expired.
- Websites: Texts and pictures made available on a webpage are protected by copyright if they fulfil the general requirements. The Austrian Supreme Court held that the layout of a webpage can be a work of applied art and that the website as a whole, consisting of several webpages connected by links, can benefit from protection as a database.
- Recipes: Neither the result of the cooking (it cannot be subsumed under any one of the work categories) nor a mere list of ingredients (there is no individuality) is copyright-protected. The text describing a recipe can however, constitute a work of literature if it is an original intellectual creation.
- Perfumes: Perfumes do not fall under the Copyright Act since they cannot be subsumed to any of the work categories.
- Maps: Maps displaying a creative element as to their illustration are protected as works of scientific or didactic nature (works of literature). Mere representations of geographical facts, on the other hand, lack originality and are therefore not protected by copyright. Maps, however, may also be protected by the sui generis protection of a database as the ECJ just recently held in a preliminary ruling.

3. Authorship and Copyright Ownership

3.1 Author of Copyrightable Work

Author of a copyrightable work is the person who has created it. The term “author” also covers the persons on whom the copyright devolves after the death of the creator of the work at issue.

3.2 Corporate Body

A corporate body cannot be the author of a work.

3.3 Identification of the Author

Failing proof to the contrary, the person designated in the usual manner as the author on the copies of a work which has been published or on the original of a work of art is presumed to be the author provided the designation gives his or her true name or a pseudonym known to be used by him or her, or – in the case of works of art – the artist's known mark.

3.4 Regulation on Collaborated Works

Where two or more persons have jointly created a work in such a manner that the result forms an indivisible whole, the copyright shall belong jointly to all the authors. Each joint author is separately entitled to pursue copyright infringements; however, any alteration or exploitation of the work requires the consent of all joint authors. In the event that a joint author refuses his or her authorisation unreasonably, any other joint author may lodge an action for granting the authorisation.

3.5 Collective Works

Collections which constitute an original intellectual production resulting from the combination of individual contributions to form a homogeneous whole enjoy copyright protection as collective works. Any copyright in the individual contributions are thereby not affected. Author of the collective work is the person responsible for the selection and/or the arrangement of the works/parts of works forming part of the collective work. The works forming part of the collective work do not necessarily need to be copyrightable works themselves.

3.6 Work for Hire Doctrine

Austrian law does not have a general work-for-hire doctrine. The Copyright Act does not stipulate – except in relation to computer programs – that works created by an employee in the performance of his or her employment duties grants the employer an unlimited right to use. Therefore the copyright for works created by an employee vests with the employee unless agreed otherwise.

(i) There is no distinction between works created by employees and works created by consultants/freelance workers (in the following jointly “employee”), again with the exception of computer programs. Without an agreement between the employer and his or her employee the employee is author of the created work and holds as a general rule the copyright unless the construction of the employment agreement or consultant/freelance agreement (in the following “agreement”) leads to the conclusion that the parties to the agreement intended to bestow the right to use on the employer. In respect to computer programs the Copyright Act expressly stipulates regarding employees (thus, the provision does not cover consultants or freelance workers) that, if the computer program is created by an employee in the performance of his or her employment duties, the employer enjoys an unlimited right to use unless he or she has agreed otherwise with the author of the program. The author's right to claim authorship for him or herself remains, however, unaffected. The provision is not mandatory therefore the parties can agree otherwise.

(ii) Agreements between the employer and the employee can freely regulate that all or some of the rights granted by the

Copyright Act can be exercised by one of the parties to the agreement only.

(iii) The Copyright Act also applies to public entities such as universities. Therefore the author of any copyrightable work is – unless there is an agreement to the contrary – the employee. In respect to computer programs developed by an employee of a public entity such as a university, the legal situation depends on whether the employee is employed on the basis of a private law or public law employment contract. In the case where he or she is employed on the basis of a private law employment contract, computer programs created by that employee fall under the exception provided for by the Copyright Act (ie the right to use lies with the university). Where the employment contract is a public law employment contract the exception of the Copyright Act in respect to computer programs does not apply so that the copyright belongs to the employee unless there is an agreement to the contrary.

3.7 Anonymous and Orphan Works

As long as the author of a work which has been published has not been designated in a manner that gives rise to presumption of authorship, the editor, or where no editor is designated on the copies, the publisher, is considered the person entitled to administer the author's copyright. In such cases, the editor or publisher is entitled to institute infringement proceedings in his or her own name.

4. Copyright Protection and Management

4.1 Copyright-Owner's Economic Rights

The author of a work is granted exclusive economic rights, ie rights of reproduction, rights of distribution, rights of adaptation or translation, the right to be the first to communicate the contents of the work to the public, rights of rental and lending, the right to benefit from resale of an original work of art, the right of broadcasting, the right publicly to recite, perform, or present the work and the right to make the work publicly available.

As opposed to the general rule that all economic rights vest with the author of a work, the Copyright Act contains a specific provision dealing with the economic rights of a film producer. According to said provision anybody who commits to collaborate in the production of a cinematographic work and thereby acquires a copyright in such work grants the film producer in doubt the exclusive right to use the cinematographic work as well as translations and other cinematographic adaptations or rearrangement of the cinematographic works. Considerations provided for by statute are due to the film producer and film author (principal film director) fifty-fifty. In the case where the film producer

or the holder of a right to use grants third parties against a consideration the right to use the cinematographic work by concurrent, complete and unaltered retransmission by means of wire, the author (main director) is entitled to one third of the consideration unless the parties agree otherwise. The author's claim can be collected by a collective management organisation only.

This list of rights is comprehensive so that there is no room for the arising of new rights due to technological progress.

4.2 Duration of Economic Rights

The duration of economic rights is determined by the type of copyrighted work and starts running from the death of the author or the death of the last surviving joint author. The term is identical in relation to all individual economic rights.

The economic rights arising from works of literature, works of art, cinematographic works, translations and adaptations as well as collective works start running upon creation of the work and expire 70 years after the death of the author.

Where a work of musical art is combined with a work of literature (lyrics), the 70 years' period is calculated from the death of the last surviving author of either of the works.

In respect to a cinematographic work the 70 years' period is calculated from the death of the last surviving person among the following: the principal director of the film and the authors of the screenplay, the dialogues and the musical work specially created for the cinematographic work.

4.3 Alienable Economic Rights

A copyright is regarded as a single "uniform right" consisting of personality (moral) rights and economic rights. Economic rights are, as opposed to moral rights, alienable.

The author cannot sell the copyright as such but he or she can grant third parties either (i) the right to use the work in a particular manner or (ii) generally the right to use. The right to use is exclusive and also the author has to abstain, as any third party, from making use of the work, but without prejudice to his or her right to institute copyright infringement proceedings. The limits (eg place and time) or conditions for the transfer or license of the rights in a work depend on the contract concluded with the author which need not necessarily be in writing, although this is highly advisable for evidence purposes. The agreement between the parties is considered to be a continuous obligation and is governed by the parties' agreement. Where the agreement does not regulate an issue general civil law applies, unless there are specific copyright provisions, in which case the latter will apply.

4.4 Transmissible Economic Rights

The author's economic rights are transmissible upon death by inheritance or to specific successors by a disposition upon death.

Also a right to use granted by the author is heritable and alienable, however, as a rule, such right to use may be transferred to specific successors only with the consent of the author (thus, transferral by way of universal succession does not require the author's consent). Such consent may only be withheld for important reasons. Consent shall be deemed to have been granted if the author does not refuse it within two months from receiving a written request from the holder of the right to use or from the person to whom the right to use is to be transferred; this condition must be expressly mentioned in the request.

A person who acquires the right to use a work as a specific successor has to comply with the obligations incumbent upon the seller under the contract between the seller and the author. The seller is in addition to the purchaser – as guarantor and payor – liable for the payment due to the author, as well as for any damages for which the purchaser must compensate the author in the event of a breach of an obligation incumbent upon him or her under the contract between the author and the seller. Any agreement entered into between the seller and the purchaser without the consent of the author contradicting the aforementioned provisions to the prejudice of the author is without effect in respect to the author.

Unless otherwise agreed, the right to use a work may be transferred to another person together with the business enterprise to which it belongs, or a branch thereof, without the consent of the author. Furthermore, where the holder of the right to use is not actually required to exercise that right and has not agreed otherwise with the author, the following may be transferred without the author's consent:

(i) the right to use works of language and scientific and educational works if they are created either on the commission of the holder of the right to use and according to his or her plan defining the contents and the method of treatment or if they are created merely as aids or accessories to the work of another person;

(ii) the right to use works of photography (photographs) and of applied art which are created for a commercial enterprise on its commission or in its service.

4.5 Moral Rights

The Copyright Act lists the moral rights of the author comprehensively. According to the Copyright Act, the moral rights concern (i) the protection of authorship, (ii) designation of author, (iii) protection of works, (iv) obligations of

owners of works, (v) the rights of an author of commercially produced cinematographic work and (vi) limitation on enforcement. According to these rules:

(i) The author is entitled to claim authorship where the authorship of a work is contested or the work is attributed to a person other than its creator. After his or her death, the right to safeguard the authorship of the creator of the work is held by the person(s) upon whom the copyright devolves. A waiver of this right is without effect.

(ii) It is up to the author to determine whether and in what manner a work is to bear a designation of author. An adaptation of the work must not bear a designation of author in a manner that would make the adaptation appear to be an original work. Copies of works of art must not bear a designation of author that would make the copies appear to be originals.

(iii) Where a work is used in a manner which makes it available to the public, or where it is reproduced for the purpose of distribution, no abridgements, additions or other alterations to the work itself, its title or the designation of author may be made, even by a person entitled to such use, unless the author consents thereto or unless the law permits such alteration. This provision applies to the originals of works of art even where such originals are not used in a manner that makes the work available to the public.

The author may not prohibit alterations which are in accordance with the accepted practices of fair trading, that is to say, alterations necessitated by the manner or purpose of the authorised use of the work. When determining whether an author has to accept a specific alteration, the interests of the author have to be balanced against the interests of the holder of the right to use if the contract between the author and the holder of the right to use requires such a balance of interests. The fact of having given his or her consent to alterations which are not specifically designated does not prevent the author from opposing distortions, mutilations or other alterations of the work which seriously violate his or her moral interests in the work.

The provision concerning the permissibility of abridging, adding or otherwise altering a work itself, its title or the designation of the author is also applicable in the case of free uses. The meaning and essential nature of the work must not be distorted. Where passages of a work are legitimately reproduced within the framework of a free use the source must always be clearly shown (there are specific provisions regarding different kind of works which have to be observed).

(iv) The owner of a work of art is upon request required to afford the author access to the work where necessary for the reproduction of the work; in such a case, the author has to

show due consideration for the interests of the owner. The owner is not required to surrender the work to the author for such purpose; neither does he or she have an obligation towards the author to ensure the preservation of the work.

(v) A person who has participated in the creation of a commercially produced cinematographic work to such an extent as to give the work as a whole the character of an original intellectual creation may require from the film producer that he or she be designated on the film and in advertisements for the cinematographic work as the author thereof. Any alterations to the cinematographic work, its title or the designation of author require the consent of the author irrespective of the economic rights granted to the film producer (see **4.1 Copyright-Owner's Economic Rights**). Moreover, the consent of the author is required in addition to that of the film producer for the exploitation of adaptations and translations of the cinematographic work. Unless otherwise agreed between that author and the film producer consent is not required for translations and adaptations, including the completion of an unfinished cinematographic work, which are necessary for the normal exploitation of the cinematographic work in accordance with accepted fair practice and which do not prejudice the moral interests of the author.

(vi) Economic rights are exempt from enforcement of claims for money. Enforcement against a copy of a work for a claim for money is inadmissible where the sale of such a copy would violate the right of distribution belonging to the author or other another entitled person. The latter does not hold true with respect to copies which, at the time of seizure, have been placed in pledge by or with the consent of the holder of the right of distribution. This rule does not apply to economic rights of a film producer in respect to a film produced on a commercial scale which can be subject of enforcement proceedings. In the case of works of art, the right of distribution does not prevent enforcement against copies that are offered for sale by the holder of the right of distribution (eg a painting offered for sale in a gallery can be seized in enforcement proceedings). Devices intended exclusively for the reproduction of a work (such as moulds, plates, stones, blocks, film strips, etc) and which belong to a person entitled thereto, are subject to enforcement claims for money only as an accessory in conjunction with the right of reproduction. The same applies, *mutatis mutandis*, in the case of devices intended exclusively for the showing of a cinematographic work (film strips, etc) and which belong to a holder of the right thereto (thus for example a cinematograph does not fall under the execution prohibition because it is generally not used exclusively to show a specific film, but any film).

4.6 Duration of Moral Rights

The term of the moral rights is identical to the term of economic rights. See **4.2 Duration of Economic Rights**. However, the creator of a work is entitled to assert his or her

moral rights during his or her lifetime even if the term of protection has already expired.

4.7 Alienable Moral Rights

Moral rights are not alienable.

4.8 Transmissible Moral Rights

Moral rights may be transferred by inheritance or to specific successors in execution of a testamentary disposition.

Where no one makes claim to the estate of a joint author and it does not revert to the State, the copyright of that joint author devolves upon the other joint authors. The same applies where one of the joint authors waives his or her copyright to the extent that such a waiver has effect.

4.9 Minimum Age Requirement

Persons under the age of 14 cannot exercise any rights arising from works created by them. Their legal representatives, generally the parents, may exercise the economic rights on their behalf. An author older than 14 may grant licences to his or her copyright and can enforce rights in court.

4.10 Specific Types of Contract

There are no specific types of contracts provided by the Copyright Act. Within the scope of the law, the parties are free to determine the content of the contract governing their relationship.

4.11 Exhaustion Doctrine

There is an exhaustion doctrine with respect to the right of distribution of copies of the work which, with the authorisation of the person entitled thereto, have been put into circulation in a Member State of the EEA by transfer of the property rights therein. This provision does not apply to the rental of copies.

4.12 Dealing with Rights

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the Information Society has been transposed into Austrian Law by introducing new provisions into the Copyright Act. According to the law, the author has the exclusive right to make his or her work available to the public by wire or wireless means in a manner which allows members of the public to access the work from a place and a time individually chosen by them. Both hyper-linking and content-embedding do not infringe the right of the author, provided the linker refers to contents which have been made lawfully available on the internet without circumventing technical protective measures of the right-holder to avoid uncontrolled public access.

4.13 Synchronisation

There is no specific synchronisation right available under Austrian law.

4.14 Collective Rights Management System

Austria has as the rest of the European Union a collective rights management system. There are eight collecting societies (“collective management organisations”), each of which administers a different repertoire.

Collective management organisations are obliged to enter into agreements with right-holders on the basis of reasonable and standardised conditions regarding the management of the rights and claims belonging to their repertoire.

In addition, collective management organisations have to grant licences under reasonable conditions. The remunerations to be paid by users can either be determined autonomously by the collective management organisation or by master agreement entered into with user organisations or by a standing rule.

Collective management organisations manage the following rights: (i) mechanical musical rights (Austro Mechana Gesellschaft zur Verwaltung und Auswertung mechanisch musikalischer Urheberrechte, GesmbH), (ii) rights of authors, composers and music publishers (AKM Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, reg. GenmbH), (iii) works of language (Literar-Mechana Wahrnehmungsgesellschaft für Urheberrechte GesmbH), (iv) exploitation rights (LSG Wahrnehmung von Leistungsschutzrechten GesmbH), (v) works of art, photography and choreography (Bildrecht Verwertungsgesellschaft Bildende Kunst, Fotografie und Choreografie GmbH) (vi) copy rights and related rights of the professional groups direction, camera, film editing, stage design, costume design and acting (VDFS Verwertungsgesellschaft der Filmschaffenden reg. GenmbH), (vii) rights of film producers (VAM Verwertungsgesellschaft für audiovisuelle Medien GmbH) and (viii) broadcasting rights (VGR Verwertungsgesellschaft Rundfunk).

4.15 Powers of Societies

Collective management organisations have to act in the best interest of the right-holders whose rights they represent and must not impose on them any obligations which are not objectively necessary for the protection of their rights and interests for the effective management of their rights. They have to enter into management agreements with right-holders having an Austrian or EEA citizenship respectively who have their main residence within the EEA or Austria. The rights and claims of right-holders have to be managed and made usable in the right-holder’s interest but in the name of the collective management organisations (therefore they are entitled to file actions for copyright infringement); the latter further have to enter into reciprocity treaties with foreign collective management organisations.

Collective management organisations may establish for the benefit of right-holders and their family members social and cultural facilities; in certain circumstances they have to establish such facilities (eg if they collect storage medium levies). The rules regarding payments by such social and cultural facilities have to be strict.

It is up to collective management organisations to grant rights to use a work and to determine the storage medium levies and to negotiate their amount with user organisations; they have to enter into master agreements with user organisations and they also have to observe specific accounting obligations.

4.16 Specific Feature

The Copyright Act provides for specific features applying to software rights. Due to these specifics an employer has the unlimited right to use in respect to a computer program created by an employee in the performance of his or her duties unless there exists an agreement to the contrary with the author of the program. This right includes the (moral) rights to (i) determine whether and in what manner the work is to bear a designation of author and (ii) whether alterations of the work are permitted. Moreover, rights to use can be transferred without the consent of the author.

In addition exceptions to copyrights do not apply to computer programs; therefore computer programs may not be copied for personal use. Computer programs may, however, be copied and adapted by the person entitled to use the computer program where it is necessary for its usage in accordance with its intended purpose. Back-up copies of a program may only be made if it is necessary for the usage of the program.

Finally, the code of a computer program may be reproduced and its form may be translated, provided that (i) the acts are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, (ii) the acts are performed by a person having the right to use a copy of a program or on his or her behalf by a person authorised to do so, (iii) the information necessary to achieve interoperability has not previously been readily available to the relevant persons and (iv) and the acts are confined to the parts of the program which are necessary to achieve interoperability. Any renunciation of the right of decompilation is without effect.

5. Exceptions to Copyright

5.1 General Clause

The Copyright Act contains specific provisions stipulating exceptions to copyrights (utilisation) rights. The provisions are comprehensive and are based on statutory law.

5.2 Factors to be Considered

The Copyright Act assumes that the mere enjoyment of a work does not interfere with the copyright of the author. In addition to this assumption the Copyright Act provides for the below-mentioned rights to use a copyrighted work without the author's consent or the consent of the person holding a right to use.

The following uses are exempted from copyright:

- right to use a work in the interest of the administration of justice and public administration;
- transient or incidental reproductions;
- reproductions for personal and private use;
- use of works during reports of current events;
- use of published works for people with handicaps;
- use of works incidentally included;
- use of works for quoting purposes;
- use of works for e-learning purposes;
- use of works of literature: certain public speeches and political speeches given in public may be used for reporting purposes; individual articles contained in newspapers or periodicals may be used under certain conditions in other newspapers/periodicals unless expressly forbidden; use within the educational area (subject to a consideration which can be collected by a collective management organisation only); public recitation of a work where the audience did not pay an admission fee; use of small portion of a work or a short work after publication where the text is to be set to music as a musical work in connection with that work;
- use of musical works: individual musical works may after publication be used under certain condition in school area (subject to a consideration which can be collected by a collective management organisation only); free of charge recitation of a work during certain occasions (eg an ecclesiastical ceremony etc);
- use of works of art: use of certain works of art for certain catalogues; certain uses of works of art in schools and teaching (subject to a consideration which can be collected by a collective management organisation only); presenting works of art in public in a predominantly scientific or educational lecture under certain conditions; uses of a portrait by certain persons under certain conditions.
- use of video or audio media and broadcasts in commercial enterprises the purpose of which is the sale, the promotion and repair of video and audio media or devices for their production or use;
- use of video or audio media by specific Federal Institutions;

- use of video or audio media in libraries;
- use of works for the purpose of teaching and lecturing by universities and schools for a limited number of participants as far as justified by the respective purpose and the pursuit of non-commercial purposes;
- presenting cinematographic works in accommodation enterprises (subject to a consideration which can be collected by a collective management organisation only);
- certain uses of orphan works owned by certain organisations under certain conditions; use of cinematographic or audiovisual works and phonograms produced by public-service;
- broadcasters prior to 2003 contained in their archives;
- use of works in relation to commercial school books and examination questions under certain conditions;
- certain uses of computer programs (however, not for private or personal use);
- certain uses of database works;
- certain uses of databases.

Moral rights of the author have to be observed when a work is used under an exception clause. In addition, exceptions apply in many cases under the condition only that the work of which free use is made has not been produced or made publicly available by infringing copyrights.

Depending on the individual exception the Copyright Act determines which uses are allowed (right of reproduction, right of communication to the public).

5.3 Exemption of Private Copy

The Copyright Act establishes an exception to copyright in the case of private copy and in respect to reproductions for personal use.

Anyone may make individual reproductions on paper or similar media for personal use. Reproduction for personal use includes private use as well as professional and/or commercial use. In addition anyone may make individual reproductions for private use. In the case of reproduction for private use the "paper" limitation does not apply. Reproduction for private use must not serve commercial purposes.

Reproductions for personal and/or private use must not be made publicly available.

The Copyright Act provides for a media storage levy respectively reprography levy to be paid to the author in connection with the exceptions for private use/personal use. Said levies can be claimed by collective management organisations only.

5.4 Exemption of Cultural Goods/Buildings

The Copyright Act establishes an exception in respect to the reproductions of cultural goods/buildings in public places.

According to the relevant provision, works of architecture after their constructions or other works of art permanently located in a place used as a public thoroughfare may be reproduced, distributed, presented in public by means of optical devices and broadcast. It is, however, not permitted to replicate a work of architecture.

5.5 Exemption of Intermediaries

According to the Copyright Act which transposed the European Directive 2001/29/EC on certain aspects of copyright-related rights in the information society temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (i) a transmission in a network between third parties by an intermediary, or (ii) a lawful use of a work or other subject-matter to be made and which have no independent economic significance are exempted from the reproduction right. Thus, internet service-providers whose activities are limited to such temporary acts of reproduction fall under the exception clause.

5.6 Exemption of Satire/Parody

The Copyright Act does not establish an exception to copyright for satire and/or parody.

5.7 Freedom of Speech

A copyright is a property right which is protected by the constitution. Limitations to property rights are admissible provided (i) there is a statutory regulation, (ii) a public interest and (iii) the interference is proportional.

The constitution also protects the freedoms of opinion and art. The fundamental rights of freedom of opinion and art are considered to be a public interest which might interfere with property rights. According to case law, the fundamental right of freedom of opinion may justify a free use of a copyright-protected work. Whether in an individual case such justification exists has to be determined by balancing the interests at stake according to the following criteria: (i) there are no untrue libellous statements of facts, (ii) the economic interests of the right-holder are not eroded, (iii) the common utilisation of the work is not impaired, (iv) the justified interests of the right-holder are not improperly infringed and the fundamental right of freedom of opinion cannot be exercised without interfering with the copyright-related right.

6. Neighbouring/Entrepreneurial/Copyright-Related Rights

6.1 Neighbouring Rights

The Copyright Act establishes neighbouring rights (in the following “related rights”) for the benefit of performers, producers of a presentation, film producers as well as for the protection of photographs, audio recordings, broadcasting

and posthumous works. In addition, there is a protection sui generis for certain databases.

Related rights are held by the performer, producers of a performance or film producers. As for photographs and audio recordings, related rights may be owned either by the photographer or by an enterprise. In respect of broadcasting the related rights lie with the broadcasting organisation; the publisher of a posthumous work owns the related rights of the previously unpublished work. Related rights as to databases belong to the maker of the database.

6.2 Content of Neighbouring Rights

Performer

Exploitation Rights:

A performer has the exclusive right to fix his or her performance in a video or audio recording medium and to reproduce or distribute and to make the performance available to the public, to broadcast the performance unless the transmission is made by means of a video or audio recording medium which has been produced with his or her consent and to reproduce publicly his or her performance by loudspeaker or by another technical device outside the place where the performance takes place unless the reproduction is made by a video or audio medium which has been produced with the performer’s consent or by an admissible broadcasting. Performers may prohibit a public transmission or reproduction of performances fixed on a video or audio recording medium if that medium has been produced or distributed without the consent of the performer.

The exploitation rights of a performer are heritable and alienable.

Moral Rights:

The performer is entitled to be acknowledged in relation to his or her performance as such. It is up to the performer whether and if so by which name he or she is referred to (including a pseudonym). A performance must not be used in a manner which makes it publicly available nor be reproduced for the purpose of distribution if the performance is reproduced with amendments or in a poor quality which can impair the artistic reputation of the performer. These rights do not terminate before the performer’s death. After the performer’s death and until such rights have expired, they vest in the persons upon whom such rights have devolved. Where there is more than one performer, the death of the last participating performer is relevant.

Term:

The term of the exploitation rights ends 50 years after the performance. However, if a recording of the performance is published prior to the expiry of that term or the performance is presented publicly the protection period ends fifty years after the recording of the performance or the public presen-

tation of the performance, whatever came first. In the case where the performance is fixed on an audio medium before the expiry of said period or the performance is publicly presented on an audio medium, the term ends 70 years after the publication or the public presentation, whatever came first.

Where a number of persons jointly participate in a performance (eg orchestra, choir) the exploitation right may be exercised by a joint representative only. The representative has to be selected by simple majority vote.

Film Producer

Exploitation Rights:

A film producer holds the reproduction and distribution rights of commercially produced cinematographic works and other cinematographic products if the performers were aware that the cinematographic works were produced for commercial purposes.

Considerations provided for by statute are due to the performing artists and the film producer fifty-fifty.

Producer

Exploitation Rights:

A producer who has ordered a presentation has alongside the performing artists the exclusive right to fix the presentation on a video or audio medium and to make it available to the public, to broadcast the presentation unless the broadcast has been produced by means of a video or audio medium which has been produced and distributed with the producer's consent, and to communicate the presentation to the public by means of loud speakers or another technical device outside the place where the presentation takes place unless the publication to the public is made by means of a video or audio medium which has been produced and distributed with the producer's consent or by an admissible broadcast.

The exploitation rights of a producer are heritable and alienable.

Term:

The exploitation rights of the producer ends 50 years after the presentation; where a recording of the presentation is published prior to the expiry of said term, the term ends 50 years after publication.

Photographs

Exploitation Rights:

A photographer has the exclusive right to reproduce and/or to distribute the photograph, to present it publicly it by means of optical devices to broadcast it and to make it available to the public. In the case of photographs commercially produced, the owner of the enterprise is deemed to be the producer of the photograph. The latter rule can cause sub-

stantial problems if a photograph is not only subject to related rights but also to copyright, because in such a case the copyright lies with the photographer and the related rights with the enterprise. Unless there is an agreement between the involved parties either party can exercise his or her right with the other party's consent only.

The exploitation rights of the producer of a photograph are heritable and alienable.

Moral Rights:

Where the producer has marked his or her name (pseudonym, trade name) on a photograph, copies thereof made by other persons and intended for distribution shall also bear a corresponding reference to the producer. Where a copy bearing such a reference reproduces the photograph with substantial alterations, the reference to the producer must be accompanied by an appropriate additional reference. In the case of copies bearing the producer reference, the subject designation may depart from that given by the producer only to the extent compatible with fair practice. After the producer's death all moral rights afforded him or her accrues to the persons upon whom the exploitation rights devolve. Where the exploitation rights are transferred to another person, the transferee may acquire the right to be designated as the producer of the photograph. In such a case the transferee is thereafter deemed the producer and provided he or she is named as such on the photograph enjoys protection in respect to the moral rights.

Term:

The copyrights (related rights) in respect of photographs terminates 50 years after they were taken or where the photograph is made public before the expiry of that term 50 years after publication.

Acoustic Phenomena

Exploitation Rights:

Any person who fixes acoustic phenomena on an audio medium for the purpose of repeatable communication (the producer) enjoys the exclusive right to reproduce the audio medium, distribute it and make it available to the public. Reproduction includes the use of an audio medium for reproduction on another audio medium. In the case of commercially produced audio media, the owner of the enterprise is deemed the producer of the audio media. Where an audio medium made for commercial purposes is used for broadcasting or for a communication to the public, the user has to pay to the producer an equitable remuneration. The performing artists are entitled to a share of such remuneration. The producer's and performing artists' claims can be collected by a collective management organisation only.

Moral Rights:

If the producer does not offer the audio medium in a sufficient quantity for sale after 50 years from the start of the term or he or she does not make it available to the public, the performing artist has the indispensable right to terminate the contract prematurely by which he or she granted exclusive rights as to the fixation of his or her presentation to the producer. The termination comes into force if the producer does not offer the audio medium in a sufficient quantity for sale and makes it available to the public within one year after receipt of the termination notice. The performing artist who granted a producer his or her exclusive rights against payment of a lump sum has an indispensable claim for an additional consideration to be paid by the producer yearly as of the fifty-first year from the start of the term. The producer has to make available for the benefit of the performing artists 20% of the revenues resulting from reproduction, distribution and making the audio medium available to the public which the producer generated in the previous year. If the performing artist has granted the producer his or her exclusive rights against a usage-dependent remuneration, such remuneration must not be reduced by advance payments or other deductions after the fiftieth year from the start of the term.

The exploitation rights in respect to acoustic phenomena are heritable and alienable.

Term:

The protection of audio recordings terminates 70 years after publication of the audio recording. If the audio recording has not been published within 50 years as of the recording but has legitimately been used for a communication to the public, the protection expires 70 years after such communication to the public. If the audio medium has within this period neither been published nor used for a communication to the public, the protection expires 50 years after recording.

Broadcasting

Exploitation Rights:

Any person who transmits sounds or images by broadcasting or similar means (broadcasting organisations) has the exclusive right to transmit the broadcasts simultaneously over another transmitter and to use it for the purpose of a public reproduction at a place which is accessible to the public in consideration of an admission fee, as well as the exclusive right to fix the broadcast on a video or audio medium (including on a photograph) to reproduce and distribute it, as well as to make it publicly available.

The exploitation rights in respect to broadcasting are heritable and alienable.

Term:

The protection of broadcasts terminates 50 years after the broadcast.

Posthumous Works

Exploitation Right:

Any person, who, being authorised to do so, publishes a previously unpublished work in which the copyright has expired, is entitled to the exploitation rights in respect to the work in the same way as an author. Whether or not the publisher is authorised to publish a work posthumously has to be determined from a civil law and criminal law perspective (eg the publisher of a stolen text does not obtain protection under this provision), posthumous privacy rights might also render the publication unlawful.

Term:

The copyright terminates 25 years after publication of the work.

Database

A database is protected as a related right under the Copyright Act if the obtaining, verification or presentation of its contents have required qualitatively or quantitatively a substantial investment. A database whose contents have been substantially amended, qualitatively or quantitatively, is deemed a new database if the amendment has required a qualitatively or quantitatively substantial investment; this also applies where said condition is met only as a result of several successive amendments.

Exploitation Right:

The maker of a database has the exclusive right to reproduce, distribute, broadcast and communicate the database to the public as well as make it available to the public as a whole or a qualitatively or quantitatively substantial part of the database. Repeated and systematic reproduction, distribution, broadcasting, public communication and making publicly available of non-substantial parts of the database, are deemed equivalent to these acts of exploitation where such acts conflict with the normal exploitation of the database or unreasonably prejudice the legitimate interest of the maker of the database.

The exploitation rights in respect to a database are heritable and alienable.

Term:

The rights in a database expire 15 years after the completion of the database; however, if the database is published before the end of that period, the term expires 15 years after publication of the database.

6.3 Collecting Societies

There are no collective management organisations specifically competent for managing related rights. Related rights are managed according to their respective repertoire by the below-mentioned collective management organisations:

LSG Wahrnehmung von Leistungsschutzrechten GmbH manages (i) related rights regarding acoustic phenomena, (ii) related rights of performing artists in respect to their recitations and presentations and (iii) related rights in respect to cinematographic works in relation to musical videos. VGR Verwertungsgesellschaft Rundfunk manages related rights of broadcasters. VBK Bildrecht Verwertungsgesellschaft Bildende Kunst, Fotografie und Choreografie GmbH manages related rights regarding photographs. VAM Verwertungsgesellschaft für audiovisuelle Medien manages related rights of film producers and, finally, VDFS Verwertungsgesellschaft der Filmschaffenden reg.Gen.mBH manages related rights in respect to cinematographic works insofar as neither film producers nor broadcasters are right-holders.

6.4 Specific Types of Contracts

The Copyright Act does not provide for any specific contracts in order to transfer/license/sell related rights. The holder of a related right can grant an authorisation or a right to use to a third party by entering into a contract orally or in writing (there are no specific legal forms to be complied with, for evidence purposes a written contract is, however, advisable). The provisions regarding copyrighted work apply *mutatis mutandis* to related rights.

6.5 Exceptions to Copyright and Neighbouring Rights

The Copyright Act provides also in respect to related-rights exceptions, which, however, do not completely correspond to the exceptions regarding copyrighted work. The following exceptions apply to related rights:

A natural person may fix on a video and audio medium a presentation which has been transmitted on a broadcast and made available to the public, as well as a presentation which has been communicated to the public by means of a video or audio medium and may make individual reproductions provided the reproductions are for private use only and neither directly nor indirectly for a commercial use.

For the purpose of reporting on current events, a presentation which becomes publicly perceivable when reporting on such events may be fixed on a video or audio medium, broadcast, communicated to the public and made available to the public to an extent justified by the informative purpose. Such a video and audio media may be reproduced and distributed to this extent. The source has to be indicated unless this turns out to be impossible or the recitation is merely incidentally included in the report.

The use of individual presentations for scientific purposes or teaching purposes to an extent justified by the non-commercial purpose is admissible. The source has to be indicated unless this turns out to be impossible. The same holds true in respect to the use of presentations for quoting purposes.

The producer may fix presentations on a video and audio medium and may communicate it to the public by means of such video and audio medium or other technical devices inside the building in which the presentation takes place for the purpose of making the presentation perceivable in another room.

In addition the following exceptions which apply to copyrighted works also apply to related rights:

- right to use a related right in the interest of the administration of justice and public administration
- transient or incidental reproductions
- use of a related right incidentally included
- use of video or audio media and broadcasts in commercial enterprises the purpose of which is the sale, the promotion and repair of video and audio media or devices for their production or use
- use of video or audio media by specific Federal Institutions
- use of works for the purpose of teaching and lecturing by universities and schools for a limited number of participants as far as justified by the respective purpose and the pursuit of non-commercial purposes
- certain uses of orphan works owned by certain organisations under certain conditions.

7. Copyright Infringement and Litigation

7.1 Considering Copyrighted Work as Infringed

A copyrighted work is considered as infringed if a person interferes either with the author's economic or moral rights or the right to use a work, without being entitled to do so.

7.2 Defences Available Against Infringement

The injured party can lodge a claim for cease-and-desist, a claim for corrective measures regarding the unlawfully produced or distributed copies or the devices used for the production of the unlawfully produced copies, such as moulds, a claim for rendering an account, a claim for the payment of a reasonable consideration or damages and finally a claim for the publication of the judgment.

7.3 Role of Privacy

Privacy law plays a big – and unfortunate – role in relation to copyright infringements and the information society. Where copyright infringements take place on the internet (sharing copyrighted cinematographic works, photographs or mu-

sic) the infringer generally is unknown. The possibilities to obtain information from an access-provider regarding the person behind a dynamic IP address are, due to the very strict rules of the Austrian Telecommunication Act which permits the saving and release of traffic data under very specific circumstances only, basically impossible.

7.4 Proceedings Available

In order to pursue an infringement the copyright-holder can either (i) lodge a claim on the merits, or (ii) lodge a claim on the merits combined with an application for a preliminary relief application for an injunction or (iii) lodge an injunction application only. In the latter case a claim on the merits must be filed eventually.

7.5 Neighbouring Rights Versus Copyrights

Related rights are subject to the same remedies and judicial procedure applicable to copyrights.

7.6 Moral Rights in Court

Moral rights can be enforced by the holder in court proceedings.

7.7 Non-Declaratory Infringement Proceedings

Pursuant to the Act on Civil Procedure a negative declaratory action is allowed if plaintiff has a legal interest that a legal relationship or a right or the authenticity of a document is ascertained shortly. Where a person seriously claims to hold a copyright/related right and thereby threatens the legal position of the alleged infringer the latter is allowed to file non-declaratory infringement proceedings.

7.8 Court Handling Copyright Proceedings

The commercial courts have exclusive subject-matter jurisdiction to handle copyright issues. Which commercial court has territorial jurisdiction depends on the place of residence of the defendant.

7.9 Necessary Parties

The right-holder and the infringer are necessary parties to infringement proceedings. The right-holder can either be the author, his or her heir, respectively holder of the related right, his or her heir, the holder of a right to use or a collective management organisation (some related rights may be claimed by collective management organisations only). Therefore, licensees who hold a right to use (ie exclusive right) are allowed to initiate infringement proceedings.

7.10 Involvement of Third Parties

Once proceedings are pending plaintiff or defendant can give a third-party notice and thereby invite a third party to join in the proceedings. A third party is entitled to join the proceedings if he or she has a legal interest in the winning of one of the parties. A third party is deemed to have a legal interest where his or her legal position is improved or preju-

diced when the main party wins or loses. Mere economic interest is insufficient.

The joining party is not bound by the judgment but cannot, as a general rule, raise any arguments in any subsequent proceedings which are contrary to the arguments ascertained in the previous proceedings (ie the proceedings which the third party joined or could have joined).

7.11 Court Fees

Filing an action triggers a court fee the amount of which depends on the value of the dispute (generally the cease-and-desist-claim is evaluated at EUR43,200, and in case other claims are lodged as well the value of such other claims is added). If the plaintiff wins the proceedings the plaintiff is entitled to reimbursement of costs which include the court fee.

7.12 Formalities Required Before Initiation

A plaintiff does not have to comply with any formalities before initiating the court proceedings. In particular, a plaintiff is not obliged to send first a cease-and-desist letter or engage in mediation before court proceedings can be started. If the plaintiff lodges a claim without getting in touch first with the defendant, the defendant may, however, claim reimbursement of costs if he or she immediately concedes the infringement and satisfies all claims of the plaintiff. There is also no need to wait a certain period of time before initiating infringement proceedings.

7.13 Urgent Measures for Right-Holders

There are urgent measures available to right-holders. Injunctions can be applied for in respect to claims for cease-and-desist, corrective measures, payment of a reasonable consideration, damages and account of profits. An injunction directed at a cease-and-desist claim and a claim for corrective measures can be issued without the plaintiff needing to show that the pursuit of the claim is endangered if the injunction is not issued. An injunction may be issued in respect to both lodging of the claim per se and to secure evidence.

An injunction may be issued before the claim on the merits is lodged. In this case, however, the enforcement court issuing the injunction has to set a reasonable period of time within which the applicant has to lodge the claim on the merits. In the event that the plaintiff fails to do so the injunction will be set aside upon application of the defendant.

7.14 Available Urgent Measures

The right-holder may request the issuance of an injunction to prevent an imminent infringement of a copyright, related right or right to use, or prohibit – on a provisional basis – the continuation of the alleged infringements and the seizure of the goods suspected of infringing such rights. Where the

infringement occurs for a commercial purpose, the court may issue an injunction also to secure the payment of a reasonable consideration or damages respectively on account of profits if the injured party demonstrates that it is likely that the fulfilment of said claims is endangered.

The right-holder need not establish that the issuance of the injunction is of particular urgency.

7.15 Obtaining Information and Evidence

Any person who distributes copies in Austria, for which the right of distribution is exhausted due to putting into circulation in a Member State of the EU or the EEA, is required to furnish the right-holder upon request with correct and complete information on the producer, content, country of origin and quantity of copies distributed. The right to information belongs to the person to whom the right to distribute copies in Austria belonged at the time of exhaustion.

In addition, any person whose exclusive rights have been violated may request information on the origin and the distribution networks of the goods and services which infringe the rights, provided such request is not disproportionate in relation to the gravity of the infringement and does not violate statutory confidentiality obligations. The information has to be provided by the infringer and/or any other person who (i) was found in possession of the infringing goods on a commercial scale, (ii) was found to be using the infringing services on a commercial scale or (iii) was found to be providing on a commercial scale services used in infringing activities. The obligation to provide information encompasses the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services as well as the intended wholesalers and retailers, the quantities produced, manufactured, delivered, received or ordered as well as the price obtained for the goods and services in question.

Such information cannot be obtained in injunction proceedings.

7.16 Requesting Urgent Seizure

see above 7.14 Available Urgent Measures.

A bank account as such cannot, however, be seized. The right-holder can seize certain receivables belonging to the infringer and the bank or the third-party debtor may be ordered not to release or not to pay these receivables to the account-holder.

7.17 Addressing Intermediaries with Urgent Measures

The distributor can be addressed with urgent measures as direct infringer even if he or she did not have anything to do with the infringing activities per se because a copyright in-

fringement materialises regardless of whether the infringer acts negligently or not. The distribution of infringing goods constitutes direct infringement of a copyright or related right.

An intermediary can be subjected to a cease-and-desist claim if the person who committed the infringement used the services of an intermediary for the infringement. However, if the intermediary falls under the e-commerce Act – which normally is the case – an intermediary is liable for a copyright infringement only if notice has been served and the intermediary did not stop the copyright infringement. Injunctions can be issued against intermediaries.

7.18 Role of Experts in Copyright Proceedings

The question whether a work is protected by copyright or not is a legal issue being determined by the courts without the involvement of experts. The courts can, however, obtain the assistance of an expert to determine the facts of a case, eg to assess which parts of a copyrighted work are due to technical constraints and which parts of the work derive from an individual creative process.

In addition, experts may be appointed in connection with a claim for rendering an account.

7.19 Regimes Regarding Burden of Proof

There are no different rules regarding burden of proof in respect to the different types of copyrighted works.

7.20 Sanctions

Cease-and-desist orders are enforceable – regardless of whether they have been issued in the proceedings on the merits or in injunction proceedings – by enforcement order to be issued by the enforcement court ordering the infringing party to pay a fine, the amount of which is to be determined by the enforcement court for each individual violation against the cease-and-desist order. If the infringing party continues to violate the cease-and-desist order despite the imposition of such fines, the enforcement court will increase the fines or, if fines do not stop further infringements, may even impose a prison sentence of up to one year. The fine and prison sentence have to be determined by taking into account the type and gravity of the respective violation and the economic capacity of the obliged party and his or her participation in the infringement. At the request of the creditor (right-holder), the courts may also order the obliged party (infringing party) to make a security deposit in order to secure damage claims which might arise in connection with further infringements of the cease-and-desist order.

In respect to claims for corrective measures the injured person is entitled to claim, including without limitation, that copies produced or distributed in violation of the Copyright Act or copies intended for unlawful distribution be destroyed and devices intended exclusively for unlawful re-

productions (moulds, stones, plates, films etc) be rendered unusable. Where the infringing articles or devices contain parts whose unaltered state and use by infringing party do not infringe the exclusive right of the right-holder, the court has to designate such parts in the decree ordering destruction or rendering unusable. When enforcing the decree, such parts have to be – as far as possible – exempted from destruction or rendering unusable if the infringing party pays in advance the associated costs. If it transpires during the process of enforcement that rendering the infringing devices unusable would entail disproportionately heavy costs, and if such costs are not paid in advance by the infringing party, the court can – after hearing the parties – direct the destruction of the infringing devices.

Where a release may be provided other than by destruction or rendering unusable, and where such a measure would entail no, or less, destruction of assets, the right-holder may require only such measures. In particular, copies must not be destroyed merely because the statement of source is lacking or is not in compliance with the law (in this case the infringing party can be ordered to add the source on the infringing material). The right-holder may require – instead of the destruction of the infringing articles or the rendering unusable of the infringing devices that the infringing articles or devices are transferred to him or her by their owner for equitable remuneration not exceeding the production costs. The claim for corrective measures can be directed at the owner of the infringing articles or devices only (this rule does not apply for criminal proceedings).

Claims for the payment of a reasonable consideration or claims for damages are – like other claims for money – enforced pursuant to the respective provisions of the Enforcement Act.

7.21 Party Responsible for Paying Fees

The Act on Civil Procedure stipulates that the party who loses the proceedings has to reimburse the winning party all reasonable and necessary legal costs. Necessary costs include in any event attorney costs calculated on the basis of the Austrian Ordinance on Attorney's Fee, the court fee, costs for experts (if their appointment was essential), costs of witnesses (ie travel costs, translator costs). If a party wins only in part, the claim for reimbursement of costs is calculated on the ratio of losing and winning.

7.22 Average Duration of Proceedings

The duration of proceedings depends, of course, on the facts of a given case. If merely legal issues are at stake the proceedings on the merits may take between six months and one year; in the event that not only the parties but also witnesses need to be heard and expert(s) have to be appointed, a number of hearings have to be scheduled, in which case the proceedings may take between one and two years or even

more in the first instance. Appeals proceedings usually take between six months and one year. This holds also true for proceedings brought to the Supreme Court.

Injunction proceedings take on average two to four months in the first instance.

7.23 Decisions Enforced

If the infringing party does not comply with the judgment (ie cease-and-desist order, claim for corrective measures, claims for publication of the judgment, claims for money), the right-holder can enforce the judgment by filing an enforcement application with the competent district court (the court's competence arises from the place of residence of the infringing party). The enforcement application has to outline the activities violating the cease-and-desist order respectively the order regarding corrective measures though there is no need actually to prove the infringing activities; the court will presume until evidence to the contrary is furnished by the infringing party that the allegations of the right-holder are correct. Cease-and-desist orders are enforced by setting fines and as a last resort by way of an arrest order.

Corrective measures are enforced by ordering the infringing party to destroy or render unusable the infringing devices or, in case the infringing party does not abide by such an order, permitting the right-holder to take care of the destruction or rendering unusable the infringing material and infringing devices at the cost of the infringer. The right-holder can request the court to order the infringer to pre-pay the costs which are likely to arise in connection with the destruction or rendering unusable.

Claims for money are enforced by seizing assets or receivables belonging to the infringing party. Such assets will then be sold in a public auction, the proceeds of which are handed over (after deduction of all costs) to the creditor. In respect of receivables the third-party debtor will be ordered not to pay to the infringing party but to the right-holder.

7.24 Administrative or Criminal Means

Copyright infringements constitute a criminal offence, even though the infringer is prosecuted only at the request of the right-holder. Subject to the criminal provisions are infringements of the following kind:

- unauthorised use of a work of literature or art in a manner reserved to the author
- unauthorised use of a presentation in a manner reserved to the performing artist
- unauthorised use of a presentation in a manner reserved to the producer of a presentation
- unauthorised use of a picture or an audio/video in a manner reserved to the producer

- unauthorised use of a broadcast in a manner reserved to the broadcaster
- unauthorised use of a database in a manner reserved to the manufacturer
- putting any means into circulation or possessing such means for commercial purposes the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of any technical device for the protection of computer programs.
- circumventing effective technical means implemented by a right-holder to prevent infringements if:
 - (a) the infringing party knew or ought to have known that the right-holder pursued such purpose;
 - (b) the avoidance devices are manufactured, imported, distributed, sold, rented and possessed for commercial purposes;
 - (c) if the sale or the rent of such avoidance devices are advertised for; or
 - (d) if services for avoidance devices are rendered.
- removing or modifying designations applied by a right-holder
- distributing, importing for distribution, transmitting, communicating to the public or making available to the public reproductions of works or other protected items from which designations have been removed or modified without authorisation.

A criminal offence is punishable either by a prison sentence up to six months or a fine up to 360 daily rates. Where an offence is committed on a commercial scale, the penalty is a prison sentence of up to two years.

A violation is, however, not subject to criminal proceedings if the purpose of the illegal reproduction or the illegal fixation of a presentation or a recital is for private use only; this goes also for an order by someone else for private use without payment of a consideration.

The proprietor or the manager of the undertaking in the course of whose business the infringement took place and who did not prevent the infringement is also subject to criminal proceedings if the infringement has been committed by an employee or representative of the company.

The right-holder may also within the framework of criminal proceedings apply for the destruction or rendering unusable of infringing items and devices. However, as opposed to civil proceedings, such infringing devices can be destroyed and rendered unusable regardless of whether the infringing items and devices belong to the infringing party.

In the event that it is not possible to prosecute or convict a particular person, the criminal court has to order the destruction and/or rendering unusable of infringing items and devices in a non-guilty judgment or in inde-

pendent proceedings upon request of the infringed party, provided the remaining prerequisites for such measures are met.

In addition the criminal court can seize infringing devices and means upon the request of the private prosecutor (infringed party). The criminal court has to decide on such an application at once. It may order the seizure on the condition of the payment of a security deposit. The seizure has to be limited to the absolutely necessary and has to be set aside if a reasonable security is deposited to secure that the seized items will not be used in an illegal manner and will not be withdrawn from the court's access.

7.25 Customs Seizure of Counterfeits and Parallel Imports

Council Regulation 608/2013/EU concerning customs enforcements of intellectual property rights is applicable in Austria. The Austrian Counterfeit Act introduced in 2004 to establish the national procedures necessary for the application of Council Regulation 1383/2003/EC still applies, although Council Regulation 1383/2003/EC has meanwhile been replaced by the aforementioned Council Regulation 608/2013/EU. The customs authorities have nonetheless declared to act according to the amended provisions of Council Regulation 608/2013/EU.

Under Regulation 608/2013/EU certain persons and entities, intellectual property collective rights management bodies, professional defence bodies and groups and certain other groups (in the following, jointly "right-holder") can submit either a national or a union application to the customs authorities (as the case may be). The application has to disclose details concerning (i) the applicant, (ii) the status of the applicant, (iii) evidence regarding the right to submit the application, (iv) the intellectual property right or right to be enforced, (v) in the case of a union application the member states in which customs action is requested, (vi) specific and technical data on the authentic goods, including marking such as bar-coding and images where appropriate, (vii) the information needed to enable customs authorities readily to identify the goods in question and (viii) information relevant to the customs authorities' analysis and assessment of the risk of infringement of the intellectual property right or the intellectual property rights concerned, such as the authorised distributors. In addition the applicant has to undertake to notify the competent customs department immediately if an intellectual property right covered by the application ceases to have effect, if the holder of the decision ceases for other reasons to be entitled to submit the application or if there are modifications to the information provided; further mandatory undertakings concern liabilities to be assumed by the applicant and processing of data.

Upon granting an application the competent customs department – which in Austria is the customs authority Villach – has to specify the period during which the customs authorities are to take action. That period should not exceed one year. After expiry of that period the competent customs department may – at the request of the holder – extend said period for another year.

Where the customs authority identifies goods suspected of infringing an intellectual property right covered by an application, it suspends the release of the goods or detains them. Before suspending the release of or detaining the goods, the customs authority may ask the right-holder to provide it with any relevant information with respect to the goods. The customs authority may also provide the right-holder with information about the actual or estimated quantity of goods, their actual or presumed nature or images thereof as appropriate. Further, the customs authority shall notify the declarant or the holder of the goods (jointly “declarant”) as well as the right-holder (as far as possible on the same day as the declarant) of the suspension of the release of or the detention of the goods within one working day. The customs authority has upon request and where available to it to inform the right-holder of the names and addresses of the consignee, the consignor and the declarant, the customs procedure and the origin, provenance and destination of the goods the release of which has been suspended or which have been detained.

The customs authority may also without the grant of a prior application identify goods suspected of infringing an intellectual property right, except in the case of perishable goods, and suspend the release of those goods or detain them. Before suspending the release of or detaining the goods the customs authority may request any person/entity potentially entitled to submit an application, to provide it with any relevant information (without disclosing any information other than the actual or estimated quantity of goods, their actual or presumed nature and images thereof as appropriate). Furthermore, the customs authorities have to notify the declarant of the detention within one working day. The customs authorities may consult the competent public authorities in order to identify the persons or entities entitled to submit an application. The customs authorities have to release the detained goods immediately after completion of all customs formalities where they have not identified any persons/entity entitled to submit an application within one working day from the detention of the goods or where they have not received an application by the entitled person/entity or where they have rejected such application. Where an application has been granted, the customs authorities have upon request to inform the right-holder of the names and addresses of the consignee, the consignor and the declarant of the customs procedure and of the origin, provenance and destination of the goods detained.

The customs authority has to give the right-holder the opportunity to inspect the detained goods and may also take samples which are representative of the goods. Such samples may be sent to the right-holder strictly for the purposes of analysis and to facilitate the subsequent procedure in relation to counterfeit and pirated goods. The right-holder has to return the samples to the customs authority on completion of the analysis at the latest before the goods are released or the detention is ended.

Goods suspected of infringing an intellectual property right may be destroyed under customs control without there being any need to determine whether an intellectual property right has been infringed under the law of the member states where the goods are found where all of the following conditions are fulfilled

- the right-holder has confirmed in writing to the customs authorities within ten working days (three working days in the case of perishable goods) that in his or her conviction an intellectual property right has been infringed;
- the right-holder has confirmed in writing to the customs authorities within ten working days/three working days his or her agreement to the destruction of the goods; and
- the declarant has confirmed in writing to the customs authorities within ten working days/three working days his or her agreement to the destruction of the goods. Where the declarant did not confirm his or her agreement to the destruction nor notified his or her opposition thereto within those deadlines the customs authorities may deem the declarant to have confirmed his or her agreement to the destruction of the goods.

The customs authorities have to release the goods immediately after completion of all customs formalities where within the periods referred to above they did not receive both the written confirmation from the right-holder that in his or her conviction an intellectual property right has been infringed and his or her agreement to destruction unless those authorities have been duly informed about the initiation of proceedings to determine whether an intellectual property right has been infringed. The destruction of the goods shall be carried out under customs control and under the responsibility of the right-holder unless otherwise specified. Where the declarant did not agree to the destruction in writing, and can also not be deemed to have accepted the destruction, the customs authority has to notify the right-holder thereof. The right-holder has to initiate within ten working days/three working days proceedings to determine whether an intellectual property right has been infringed. The ten working days' period may be extended by the customs authorities by a maximum of ten working days upon a duly justified request by the right-holder in appropriate cases (an extension of the three working days' period is not possible).

Goods to be destroyed must not be released for free circulation, unless customs authorities with the agreement of the right-holder decide that it is necessary in the event that the goods are to be recycled or disposed of outside commercial channels (eg for awareness-raising), brought out of the customs territory of the union, exported, re-exported, placed under suspensive procedure and placed in a free zone or free warehouse. The custom authorities may allow the goods to be moved under customs supervision between different places within the customs territory of the union with a view to their destruction under customs control.

There are special provisions regarding the destruction of goods in small consignments. These procedures apply to goods where all of the following conditions are met:

- the goods are suspected of being counterfeit or pirated goods
- the goods are not perishable goods
- the goods are covered by a decision granting an application
- the right-holder has requested the use of the procedure in the application
- the goods are transported in small consignments.

The customs authority has to notify the declarant within one working day of the detention of the goods and inform him or her that the customs authorities intend to destroy the goods after ten working days if the declarant does not express his or her point of view or confirms his or her agreement to the destruction of the goods within that period. The destruction of the goods is carried out under the control of the customs authority. Where appropriate the customs authorities have to inform the right-holder about the actual or estimated quantity of destroyed goods and their nature. Where a destruction of the goods is for lack of consent of the declarant not possible the custom authority has to notify the right-holder immediately thereof and provide the right-holder with information as to the quantity of goods, their nature, including images where appropriate and upon request of the right-holder with the names and addresses of the consignee, the consignor and the declarant of the customs procedure and of the origin, provenance and destination of the goods detained. If the right-holder does not initiate within ten working days after receipt of the customs authority's notification

infringement proceedings the goods have to be released immediately after completion of the customs formalities.

Pursuant to the Product Piracy Act 2004 the importing and/or exporting of counterfeits may also constitute a tax offence with a penalty of up to EUR4,000 (EUR15,000 in the case of intention) as well as forfeiture of the counterfeits.

Regulation 608/2013/EC does not apply to parallel imports since it does not apply to goods that have been released for free circulation under the end-use regime.

7.26 Special Provisions

There are no special provisions concerning the appellate procedure for copyright proceedings. There also no specialised Courts of second (and/or third) instance for copyright issues. The general rules of civil procedure apply.

7.27 Full or Factual Review

The facts of the case as determined by the court of first instance are reviewed by the appeals court, provided the appealing party sets out why the determination of facts by the court of first instance is wrong and on the basis of what evidence the court of first instance should have determined the facts differently. Challenging the facts determined by the court of first instance is a rather formal affair. If not done correctly, the appeals court will not consider the appeal on the facts. The Supreme Court does not review the facts determined by the previous instances – as a general rule – but reviews the legal aspects of the case only.

7.28 Providing the Court with All Necessary Evidence

Pursuant to the Act on Civil Procedure new facts must not be introduced in the appeals proceedings. The same holds true in respect to new evidence which has not yet been introduced in the proceedings of first instance. Such evidence may not be filed in the appeals proceedings. Therefore new documents cannot be filed for the first time in proceedings at the court of second instance.

7.29 Alternative Dispute Resolution

Alternative dispute resolution is not common for settling copyright cases in Austria. In general, a copyright-holder who learns of an infringement addresses the infringer and tries to settle the case out of court. If such an endeavour is unsuccessful, the case goes to court.

Graf & Pitkowitz Rechtsanwälte GmbH

Stadiongasse 2
A-1010 Vienna
Austria

Tel: +43 (1) 401 17 0
Fax: +43 (1) 401 17 40
Email: c.csaky@gpp.at
Web: www.gpp.at



GRAF & PITKOWITZ
ATTORNEYS-AT-LAW