

## **IAJ THIRD STUDY COMMISSION**

November 11 2012- November 15 2012 Washington DC, USA

### **The infringement of copyright and other intellectual property rights, especially through the use of the internet**

#### **ANSWERS TO THE QUESTIONNAIRE FROM THE AUSTRIAN ASSOCIATION OF JUDGES (Vereinigung der österreichischen Richterinnen und Richter)**

##### **Question 1**

- Does your country have specific legislation dealing with:

##### **1.1. The violation of copyrights?**

Yes, the Copyright Act (Urheberrechtsgesetz, UrhG), which has been in legal effect since 1936, with its latest amendment in 2010.

##### **1.2. Other intellectual property rights?**

Yes, there are legal protection laws, especially regarding trademarks, designs, models and patents. Regulations dealing with these topics are the Trademark Act (Markenschutzgesetz, MarkSchG) and the Act against Unfair Trade Practices (Gesetz gegen den unlauteren Wettbewerb, UWG), the Act concerning the Protection of Copyright in Designs and Models (Musterschutzgesetz, MuSchG) and the Patent Act (Patentgesetz, PatG).

##### **1.3. If so, could you specify to what extent?**

The Copyright Act protects all works of literature, music, film and art from unauthorized exploitation such as publication, reproduction, distribution and modification. This includes literary works, computer programs, works of music and dance, works of fine art and architecture, works of photography and film and illustrations of scientific nature.

The Trademark Act and the Act against Unfair Trade Practices deal with the protection of commercial names, brands, logos and all distinctive signs or indicators unique to companies or entrepreneurs.

Designs, being the physical appearance of a product, are protected by the Act concerning Copyright in Designs and Models.

The Patent Act grants the originator the exclusive right of utilization of novel technological inventions.

In case of infringement of the rights protected by the acts mentioned above, the law provides civil claims for compensation and restitution on account of unjust enrichment (§§ 86 f UrhG, § 53 MarkSchG, § 150 PatG, § 34 MuSchG), remedial action (§ 82 UrhG, § 52 Mark SchG, § 148 PatG, § 34 MuSchG), inhibition (§ 81 UrhG, § 51 MarkSchG, § 9 UWG, § 147 PatG, § 34 MuSchG) and publication (§ 85 UrhG, § 55 MarkSchG, § 149 PatG, § 34 MuSchG).

Furthermore, the offender is subject to criminal charges if protected rights are infringed intentionally (§ 60 MarkSchG, § 35 MuSchG, § 159 PatG: fine or up to 2 years imprisonment,

if the offence has been committed commercially). According to Art. 91 of the Copyright Act, the unauthorized utilization of copyrighted works, with the exception of the reproduction for one's personal use, or, if ordered by another person for their personal use in a non-paid manner, the neutralization of technical protective measures, or the destruction, the removal of copyright information, or the manufacturing, distribution or holding of instruments for this purpose, is punishable (fine or up to 6 months of imprisonment, up to 2 years, if the offence has been committed commercially).

1.4. Do specific rules exist for criminal investigation?

Yes, there are such rules, insofar as all criminal acts are subject to private prosecution. The criminal police and the customs authorities are entitled to effect a seizure of goods which are suspected of infringing intellectual property rights. Confiscation is admissible upon application by the private prosecutor. Preliminary proceedings do not take place. Civil claims may be requested on criminal proceedings.

1.5. If not, is any such legislation under consideration?

No, not at the moment.

## **Question 2**

Does your country have specific legislation dealing with:

2.1. Trademark

Yes, the Trademark Act. See answer 1.2.

2.2. Patent

Yes, the Patent Act, see above.

2.3 If so, do these laws include specific punitive measures?

Yes, as mentioned above in reply to question 1.3.

## **Question 3**

Does your country have specific legislation dealing with:

3.1. The protection of copyrights based on the use of internet?

No, the general provisions of the Copyright Act apply, for example Art 18a (the originator's right to make their work accessible to the public in wired or wireless manner), 42 (the right of reproduction for one's own and private use) and 87b (the right of the copyright owner of gaining information about the circumstances of the infringement).

Whether the use of file sharing networks is illegal or not, is currently under discussion. Up to now, the Supreme Court has not finally decided on this topic (decision dated May 11<sup>th</sup>, 2012, 4 Ob 6/12d). According to Art 42 of the Copyright Act, the reproduction of copyright-protected works (with the exception of computer programs, Art 40d) is allowed for private

use, even in a digital form, whereas no difference is made as to whether the original was achieved legally or not. However, it is beyond dispute that file sharing is no criminal offence according to Art 91 of the Copyright Act.

3.2. If so, could you specify and give a concrete example?

See explanations above.

#### **Question 4**

Does your country have specialized agencies to investigate and identify the violation of copyrights and other intellectual property rights, especially through the use of the internet?

No.

#### **Question 5**

5.1. To what extent does your country have jurisdiction over issues of, for instance, intellectual property theft?

The general rules of Art 62, 65 and 67 of the Criminal Code apply. Therefore, Austrian Courts have jurisdiction if criminal acts were committed on Austrian territory (e. g. if the provider has their seat in Austria, or, if the unauthorized use of protected rights takes place there), or, if the offender is an Austrian citizen and the act is seen as a criminal offence at the place of committal.

5.2 Should the principle of universality apply for specific types of cybercrime relating to the infringement of copyright and other intellectual property rights?

No, because in our opinion, the infringement of intellectual property rights cannot be regarded as so severe that Austria should be obliged to prosecute these offences beyond its national borders.

5.3. Is there a need to establish rules of international criminal law to regulate these aspects of cybercrime?

No, but there is a great need to improve the cooperation between national authorities.

5.4. Should there be an international authority to handle the violation of copyright and other intellectual property rights through the use of the internet?

No, for reasons see answer to question 5.3.

#### **Question 6**

6.1. Did your country sign and/or ratify international agreements or treaties relating to the violation of copyright and other intellectual property rights through the use of the internet?

Yes, Austria has signed the following agreements or treaties :

The Berne Convention for the protection of literary and artistic works (1920), the Universal Copyright Convention (1957), the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations (1973), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS; 1995), the WIPO Copyright Treaty (2009) and several legislative documents within the European Union.

6.2 Does your country participate in any other form of international cooperation relating to this subject?

The Anti-Counterfeiting Trade Agreement (ACTA) was recently rejected by the European Parliament.

### **Question 7**

7.1. Is it your opinion that your country could and/or should be more active in dealing with this issue?

No, the current legal measures are sufficient. Austria has recently ratified all mayor international treaties and, as a member of the European Union, incorporated all European legislation concerning these topics.

### **Question 8**

8.1. Is it your opinion that you could and/or should be more active in dealing with this issue as a judge?

This is not a matter of personal or individual choice, because the legislation on these issues is clear.

8.2. Do you have sufficient means – instruments and qualifications – to address the violation of copyright and other intellectual property rights through the use of the internet?

Yes, on the one hand through the structure of the legislative and executive bodies in the country and through our academic and professional qualifications, although the human and financial resources provided by the government are currently too limited.

8.3. Is addressing this issue in Court considered to be a specialisation?

Within the Austrian system, specialised judges and administrative authorities (such as the Patentamt/Patent Office and the Oberster Patent- und Markensenat/Supreme Patent and Trademark Senate) deal with the various aspects of infringement of intellectual property rights, for civil claims as well as for criminal charges.

The Courts of Appeal and the High Court have established Boards that exclusively deal with such matters. Those measures ensure a high level of professionalism and conformism in decisions.

### **Question 9**

Is there any other comment on the subject that you would like to make?

All essential information has been provided above. Thank you.

On behalf of the Austrian Association of Judges (Vereinigung der österreichischen  
Richterinnen und Richter)

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