

**LIDC 2017****Question B**

**“To what extent do current exclusions and limitations to copyright strike a fair balance between the rights of owners and fair use by private individuals and others?”**

**Austria****Valerie Eder**

Valerie Eder

Gassauer-Fleissner Rechtsanwälte GmbH, Vienna

Email: v.eder@gassauer.com

Austria's Copyright Law is determined in a relatively large amount by EU legislation, and is therefore limited with regard to the possibility to autonomously create exclusions and limitations to copyright. The Austrian legislator is first and foremost limited by the closed system of exceptions and limitations of Directive 2001/29/EC<sup>1</sup> (in the following: “InfoSoc Directive”). National copyright law can accordingly only provide for exceptions beyond the list of exceptions in Art 5 InfoSoc Directive list if covered by the grandfather clause.

**1. Overview of the Austrian System**

Exceptions to copyright law are only permissible in Austria if encompassed by a specific provision providing for this exception. The Austrian Copyright Act<sup>2</sup> does not include a catch-all clause comparable to the "fair-use" regime known from the Anglo-American area.

The exceptions in the Austrian Copyright Act can be categorized into so-called *free uses*, *legal licenses* and *compulsory licenses*. While free uses (freie Werknutzungen) have to be tolerated by the rights holder without remuneration (see Sections 41 et seqq Austrian Copyright Act), other uses, so-called legal licenses, do entitle the rights holder to remuneration. The Austrian Copyright Act further provides for compulsory licenses, granting the user an enforceable claim to conclude a license with the rights holder where the law does not already provide for the right to use the work without the consent of the right holder), also entitling the rights holder to remuneration.

*Remuneration* claims can usually only be asserted by the competent collecting society for the respective type of works for and in the name of the copyright holder. The compensation is regulated in a highly differentiated

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<sup>1</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 200, L 167, p. 10 -19.

<sup>2</sup> Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz).

manner. In most cases, tariffs are negotiated by the collecting societies with the relevant user representatives, providing for a balance of interests. Where such negotiations fail, an arbitration committee can be called upon.

Some of these exceptions *apply uniformly to all categories of works* (literature, music, fine arts), e.g. the free uses for official use, own or private use, persons with disabilities, or reporting of daily events, and *uses*, including the reproduction, dissemination, or making available to the public. Other exceptions distinguish in a very detailed manner in both regards.

- For example, pursuant to Section 41 of the Austrian Copyright Act, titled “free uses in the interest of justice and administration”, works protected by copyright may be used without the consent of the copyrights holder for the purposes of public security or to ensure the proper conduct of administrative, parliamentary or court proceedings. The scope of this provision covers, in principle, all types of works and extends to all types of use, including the availability on the Internet. Also, courts, authorities and legislative bodies may use (for example, copy or publish) copyright-protected works without regard for possible limitations provided by the Copyright Act and without consent of the rights holder, if and as long as this is necessary in the course of their activity.
- As another example, Section 42d Austrian Copyright Act, titled “persons with disabilities”, permits the non-commercial use of a published work without the consent of the copyright for the reproduction and the dissemination as well as making available to the public for persons with disabilities in a form suitable for them, to the extent that their access to the works is considerably impeded or made impossible. As apparent from the wording of the provision, the permitted uses according to this exemption are the reproduction, the dissemination, and the making available to the public to persons with disabilities.

The Austrian system of free uses, legal licenses and compulsory licenses therefore provides for a very detailed and differentiating system of exceptions to copyright. The list of exceptions of the Austrian Copyright Act is a closed list; however, limitations to copyright also arise from other areas:

- Some works are *expressly excluded* from copyright protection by Section 7 Austrian Copyright Act, titled “free works”, which reads in English translation as follows: “Laws, orders, official decrees, public notices and decisions, or official works produced exclusively or mainly for official use of the kind specified in Section 2 items 1 [works of language of any kind, including computer programs] or 3 [works of a scientific or didactic nature which consist of pictorial representations in two or three dimensions, unless they constitute works of art], shall not enjoy copyright protection.”
- As the exclusive exploitation rights of the copyrights holder in Sections 14 et seq ff of the Austrian Copyright Act are also worded as a closed list, *uses outside of this list* also constitute limitations of the copyright holder’s right, if the term limitation is understood in a broad manner. Uses that are not reserved for the copyrights holder include most importantly the mere consumption of the work, but also the exhibition a published work, and other uses.
- A further limitation of the copyright owner’s right is the principle of *exhaustion* restricting the author's distribution right. According to Section 16 Paragraph 3 Austrian Copyright Act, works that have been

put into circulation by transfer of ownership in a Member State of the EU or the EEA with the consent of the rights holder are not subject to the exclusive right of distribution of the rights holder.

- Lastly, limitations of copyright can arise from *antitrust laws*. In exceptional circumstances, the use of the exploitation rights exclusively reserved for the rights holder or the refusal to grant authorizations for use may constitute an abuse of a dominant position according to Section 5 Paragraph 1 of the Austrian Cartels Act<sup>3</sup> or Section 102 of the TFEU.<sup>4</sup> As a consequence, the rights holder in such cases could not rely on his/ her right of exclusion, but would be obliged to conclude a contract for the use of the work in return for an appropriate remuneration.<sup>5</sup>

## 2. Moral rights

Moral rights are generally not affected by the exceptions to copyright. The relationship between the author's moral rights and free uses is regulated in Section 57 Austrian Copyright Act. According to this provision, reductions, additions and other changes to the work itself, to the title of the work, or to the author's designation must be assessed in line with the provision safeguarding moral rights, i.e. Section 21 Austrian Copyright Act, even if the user can rely on an exception. The meaning and essential nature of the work is not to be distorted in any event.

Section 57 of the Austrian Copyrights Act regulates the moral rights very precisely for certain exceptions, e.g. stipulating that the source of the quoted work must always be stated clearly in the use of works for churches and schools, for recording, for inclusion in a program, for quoting parts of a work or for use in the context of the panorama exception. In these cases, the source and the title of the work to be used must be indicated in accordance with Section 21 Paragraph 1 Austrian Copyright Act. In other cases, which are not expressly regulated, the general rule of Section 57 Paragraph 4 applies, according to which the source of the goods is to be determined according to bona fide and the established practices of the trade customs.

Moral rights conferred by the Austrian Copyright Act are set out in Sections 19 to 21, and include the protection of authorship (“Schutz der Urheberschaft”), the right of affirmation (“Schutz der Urheberbezeichnung”) and the right to the protection of works (“Werkschutz”). Moral rights of the author are not transferable.

The right to claim authorship pursuant to Section 19 Austrian Copyright Act is indispensable. Other rights can be excluded by contract within certain limits. However, the disclosure of authorship is not mandatory, and it can therefore be agreed upon in a contract that the authorship will not be affixed (e.g. with ghostwriters).<sup>6</sup>

The protection of works pursuant to Section 21 safeguards the integrity of the work by restricting the possibility to alter the work after it is no longer in the right holder's control. According to Paragraph 1 of this provision, where a work is used in a manner which makes it available to the public, or where it is reproduced for the purpose of dissemination, no abridgements, additions or other alterations to the work itself, its title or the

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<sup>3</sup> Bundesgesetz vom 22. November 1972, mit dem Bestimmungen über Kartelle und Vorschriften zur Erhaltung der Wettbewerbsfreiheit erlassen werden (Kartellgesetz).

<sup>4</sup> See i.a. ECJ, case C-241/91 and C-242/91, RTE and ITP v Commission, ECR 1995 I-00743, CFI, case T-201/04, *Microsoft v Commission*, ECR 2007 II-03601.

<sup>5</sup> See i.a. OGH [Austrian Supreme Court] 09 April 2002, 4 Ob 17/02g, “*EDV-Firmenbuch*”.

<sup>6</sup> Walter, Österreichisches Urheberrecht. Handbuch. I. Teil, 893.

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. Such alterations, in particular, are permissible if necessitated by the manner or purpose of the authorized use of the work.

The provisions of Paragraph 1 apply 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.

According to Paragraph 3 of the said provision, the fact of having given his consent to alterations which are not specifically designated do not prevent the author from opposing distortions, mutilations or other alterations of the work which seriously violate his moral interests in the work.

In summary, as mentioned above, according to Section 57 Austrian Copyright Act, moral rights are to be observed also in the case of exceptions to copyright. In the absence of any special regulation in Section 57 Austrian Copyright Act, whether or not the designation of origin can be omitted is governed according to bona fide and the established practices of the trade customs. In the absence of a contractual agreement or a two-way trade agreement, this will have to be examined very carefully by any user and will be at the discretion of the courts. In connection with official use (Section 41 Austrian Copyright Act as discussed above under Section 1), the author's name must be provided, if not for insuperable difficulties.

The Austrian Copyright Act therefore carries out a balance of interests between the author's moral rights and the practical requirements for exceptions, whereby the former is granted adequate protection without unduly restricting the practice.

### **3. Objectives**

The exceptions in the Austrian Copyright Act (free uses, legal licenses and compulsory licenses) are the result of a balancing of interests of the rights holder and those of the general public. The InfoSoc Directive contains no obligation for Member States to integrate these exceptions in their national legislation other than the exception for temporary acts of reproduction, which is mandatory. Therefore, EU law does not contain a final balance of interest binding the EU Member States, leaving this to the national level. The Austrian Copyright Act as a result of this balance of interests includes exceptions taking into account several fundamental rights and objectives including education, research and access to culture and knowledge, freedom of expression and right to receive and disseminate information, privacy and private use, needs of people with a disability, preservation of cultural heritage, public security, and freedom of panorama.

### **4. Fundamental rights**

Other than having been taken into account by the Austrian legislator and in that regard leading to the exceptions explicitly listed in the Austrian Copyright Act, fundamental rights in themselves can in certain circumstances prevail above copyright so that ultimately the use of a work is permitted without the consent of the copyright owner. The Austrian Supreme Court repeatedly recognized that the fundamental right of freedom of expression protected by Article 10 of the ECHR can restrict copyrights in the individual case, rejecting applications for an

injunction according to the Copyright Act based on this fundamental right.<sup>7</sup> Restrictions could also be based on other fundamental rights, e.g. the freedom of science or the right to artistic freedom. The Supreme Court however emphasizes that restrictions of the rights of the copyrights holder based on fundamental rights may only be applied in extreme cases.

Whether the fundamental right is given priority over copyright is to be decided on the basis of a balance of interests. The right of the author to decide how and if his/her work is used and to demand remuneration for such uses is weighed against the interest of the person who through the use of the work wishes to communicate facts or express opinions. The basic prerequisite for any justification for an interference with copyright by the fundamental right of freedom of expression is that the economic interests of the author are not affected and the fundamental right cannot be exercised without interference with the copyright or the right to protection of rights.<sup>8</sup>

In this respect, the restrictions on exclusive copyrights must be limited to certain special cases which do not affect the normal exploitation of the work or unduly violate the legitimate interests of the author or copyrights holder. The right to freedom of expression is intended to restrict the copyright only where use of the protected text would otherwise be impossible or only inadequately possible and would not prejudice the author's interest in the use or a "normal" exploitation of the work of the use.

## 5. The “triple test”

In international conventions like the Berne Convention<sup>9</sup>, the triple test is generally designed as a directive and a limitation for the national legislator. However, it also has an indirect effect on national law, since works, whose country of origin is a country other than Austria that is party to the Berne Convention can rely directly on the minimum protection rights conferred therein, one of it being the triple test. In this context, the Austrian Supreme court held that the (meanwhile amended) private use exception in the Austrian Copyright Act regarding sheet music was not in line with the Art 9 Paragraph 2 Berne Convention prior to the introduction of the remuneration for reprographic reproductions (regulated in Section 42b Austrian Copyright Act, and discussed in more detail below under Section 6.c).<sup>10</sup>

The TRIPs Agreement extended the triple test to all objects and exploitation rights (Art. 13), which also has been adopted by the WIPO Copyright Treaty (Art. 10) and applies to the performance rights regulated by the WIPO Performances and Phonograms Treaty as well (Art 16).

On the level of EU law, exceptions to copyright are mainly regulated in Article 5 of the InfoSoc Directive. The exceptions listed therein are mostly facultative, and therefore give EU Member States the possibility, but not the obligation, to transpose such exceptions in national legislation. All exceptions therein are subject to the triple step test. As some of the exceptions provided in Art 5 InfoSoc Directive are worded in a very general manner

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<sup>7</sup> OGH 12 June 2001, 4 Ob 127/01g “*Medienprofessor*”, OGH 12 September 2001 4 Ob 194/01k “*Wiener Landtagswahlkampf*”, OGH 02 July 2002, 4 Ob 135/02k “*Soziales Netz*”, OGH 14 March 2005, 4 Ob 266/04b “*Afrikadorf*”, OGH 11 August 2005, 4 Ob 146/05g “*Smith Freunde*”, OGH 21 November 2006, 4 Ob 195/06i “*unsachliche Berichterstattung*”.

<sup>8</sup> OGH 24 June 2003, 4 Ob 105 / 03z – “*Foto des Mordopfers*”.

<sup>9</sup> Berne Convention for the Protection of Literary and Artistic Works (1886).

<sup>10</sup> OGH 31 January 1995, 4 Ob 143/94, “*ludus tonalis*”.

while other are set out in great detail, the triple test serves not only as a limitation for national legislators but also as a general guideline.

The Austrian Copyright Act does not provide for a specific provision implementing the triple test, which led to some criticism. In addition to the above described indirect effect on national law, limitations to copyright will have to comply with the triple test as the provisions of the Austrian Copyright Act have to be interpreted in conformity with Article 5 of the InfoSoc Directive.

## **6. Exceptions in the Austrian Copyright Act**

As mentioned above, the Austrian Copyright Act *inter alia* includes exceptions for uses for education, research, access to culture and knowledge, freedom of expression, the right to receive and disseminate information, privacy and private use, needs of persons with a disabilities, preservation of cultural heritage, public security and freedom of panorama. Some of the exceptions in the Austrian Copyright Act are discussed below in more detail.

### **a. Exceptions for Temporary Acts of Reproduction**

The Austrian Copyright Act provides for an exception allowing temporary acts of reproduction which are necessary to enable a lawful use. The exception was introduced in the Austrian Copyright Act with the Amendment Act 2003 based on the almost identical provision in a Section 5 Paragraph 1 of the InfoSoc Directive. It is the only mandatory exception of this Directive and has no equivalent in international Conventions. The provision is tailored for the online context, but not limited thereto, and also applies to all services of the information society, e.g. the mobile network UMTS. The exception can be found in Section 41 a Austrian Copyright Act and reads as follows:

“Temporary reproduction is permissible,

1. if it is transient or incidental, and
2. if it is an integral and essential part of a technological process and
3. if its whose sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use
4. and if it has no independent economic significance.”

### **b. Exceptions for Specific Content**

The Austrian Copyright Act does not provide for a list of exceptions for specific contents. Some exceptions do however relate to a specific content. These exceptions can be found in different parts of the Austrian Copyright Act. One example is the exception for political speeches according to Section 43 Austrian Copyright Act, which reads in Paragraph 1 as follows:

“Speeches made in an assembly responsible for the conduct of public affairs, or in the course of proceedings before a court of law or other public agency, as well as political speeches given in public, may be reproduced, disseminated, publicly delivered and broadcast for the purpose of reporting.”

Where a speech of such nature has been reproduced on an audio medium, such medium may however only be distributed with the consent of the author. The reproduction and distribution of such speeches in compilations is reserved to the author.

The rights holder cannot prohibit the free uses described in Paragraph 1, and is not entitled to remuneration. If the speech is used, the source and the name of the author, the title and the time and date of the speech have to be cited.

The Austrian Copyright Act also provides for an exception for news of the day. Individual sections contained in a newspaper or periodical concerning current economic, political or religious issues may be reproduced and disseminated in other newspapers and periodicals. This does not apply where reproduction is expressly prohibited. A statement reserving the rights accompanying the section or in the heading of the newspaper or periodical is sufficient in this regard.

Mere items of press information that simply report mere facts and statements without further commentary are not considered to be “works” due to their simple nature and therefore do not enjoy copyright protection. In order for a press section to be considered a work, it has to reflect an “individual intellectual performance”, e.g. by using several different sources for the drafting of the article.

However, even though such mere items of press information are excluded from copyright protection, some protection is conferred by Section 79 Austrian Copyright Act (titled “Protection of News”- Nachrichtenschutz), protecting such sections for 12 hours from the time of publication.

As mentioned above, some works are expressly excluded from copyright protection by Section 6 Austrian Copyright Act due to their content and nature. Paragraph 1 of the provision in its English translation reads as follows:

“Laws, orders, official decrees, public notices and decisions, or official works produced exclusively or mainly for official use of the kind specified in Section 2 items 1 [works of language of any kind, including computer programs] or 3 [works of a scientific or didactic nature which consist of pictorial representations in two or three dimensions, unless they constitute works of art], shall not enjoy copyright protection.”

Cartographic works produced or adapted by the Federal Standards and Survey Office and intended for distribution are excluded from the scope of this exception.

### **c. Exceptions for Private Copies**

Art 42 Austrian Copyright Act titled “Reproduction for own and private use” provides for exceptions for the reproduction of individual copies of a work for the private, i.e. non-commercial use, or a person’s own use.

According to Art 42 Paragraph 5 Austrian Copyright Act, the exception for a person’s own or private use is not applicable if the original used was obviously produced or made available to the public illegally. This wording was introduced by the amendment of the Copyright Act of 2015. The terms “obviously illegally” and “made available to the public” are not specified any further in the statutory provisions and so far have also not been defined any further by case law.

There is no further guidance in the provision regarding the term “individual copies” that is used in several Paragraphs. The meaning of this term has to be determined according to the circumstances of each specific case. The Austrian Supreme Court in a case from 1998 allowed for 19 copies of a magazine dummy to be made in preparation for an editorial meeting. In contrast, German case law suggests a maximum of 7 pieces to satisfy the requirement of making only “individual copies”.

The provision i.a. encompasses the following exceptions:

*Reproduction on paper or similar material for a person’s own use* (Paragraph 1): Every person, i.e. natural and legal persons, may make individual copies and paper or similar material for his/her own use. It is not limited to private use, individual copies on paper or similar material can therefore also be made for commercial uses, as long as the copies are not made available to the public.

*Reproduction on other material for a person’s own use for research* (Paragraph 2): Individual copies on material other than paper or similar materials can be made by every person for the purposes of research to the extent that this is justified for the purpose of pursuing non-commercial purposes. For the purpose of non-commercial use for research (only), individual copies can therefore be made on digital storage media as well.

*Media monitoring* (Paragraph 3): Every person may produce individual copies of works published in the context of the reporting of daily events for their own use, provided that the use is only analogous. Paragraph 3 does not use the wording “on paper or similar material”. The exact meaning of this differentiation is unclear.

*Reproduction on other material for a natural person’s private use* (Paragraph 4): Any natural person may produce individual copies on a medium other than paper or similar materials for private use if it does not directly or indirectly serve commercial purposes.

The requirements and the scope of the exceptions are therefore different regarding the reproduction on paper or similar material compared to reproduction on other, e.g. digital or electronical, materials. The provision also differentiates between a person’s own use and private use and provides for a number of special of special rules e.g. for research purposes, schools and universities and media monitoring, as well as exceptions e.g. for entire books, sheet music, or the construction of a building according to a plan.

The provision used to have a broader scope, allowing the current exception for reproduction on paper or similar materials for reproduction on all materials, but was restricted with the amendment of the copyright act of 2003 to be in line with Art 5 Paragraph 2 lit a and b of the InfoSoc Directive.

The private use exception is therefore restricted in some areas, especially regarding digital copies, which is however at least partly due to the legislative limitations conferred by the InfoSoc Directive. Due to this issue and the generally highly complex structure, the provision is unclear and leads to legal uncertainty.

*Compensation for a person’s own or private use* (Section 42b Austrian Copyright Act)

The copyright owner is entitled to reasonable remuneration, if it is to be expected that a work that is broadcast by radio, made available to the public or stored on a storage medium manufactured for commercial purposes will be duplicated for a person’s own or private use according to Art 42 Paragraph 2 to 7 Austrian Copyright Act, when

storage media of any kind suitable for such duplications are commercially marketed in Austria (storage media remuneration).

If a work of its kind is to be expected to be duplicated by means of reprographic or similar procedures for a person's own use, the copyright owner is entitled to an appropriate remuneration (reprographic remuneration), (1) if a device intended for the purpose of performing such reproductions is commercially marketed (remuneration for equipment) in Austria, or (2) if a reproduction device is operated in schools, colleges, facilities for vocational training or other education and training, research facilities, public libraries or in facilities which provide reproducing equipment for remuneration (operator remuneration).

Both the storage media remuneration and the reprographic remuneration cannot be claimed by the copyright owners themselves, but only by collecting societies (Verwertungsgesellschaften). Tariffs for the reprography are set by agreements between the competent collecting societies and the competent bodies of the chamber of commerce.

#### **d. Exceptions for Education**

Section 42 Paragraph 6 Austrian Copyright Act provides for an exception for schools and other educational institutions for educational purposes that is broader than the general own and private use exception regulated in Section 42. According to this provision, schools, universities and other educational establishments may, for the purpose of education or teaching, reproduce and disseminate copies of a work to the extent necessary for a particular class or course; this also applies to sheet notes. On materials other than paper or similar materials, this is however only permissible for non-commercial purposes. This right does not apply to works which, according to their nature and design, are intended to be used in schools and/or teaching purposes.

In general, the copyright owner is entitled to reasonable remuneration, if it is to be expected that his work will be broadcast, made available to the public or stored on a storage medium manufactured for commercial purposes, or duplicated for a person's own or private use according to this exception, when storage media of any kind suitable for such duplications are commercially marketed in Austria (storage media remuneration).

Further, schools, universities and other educational institutions may, for the purpose of education or teaching, reproduce and make available to the public published works for the purpose of illustration in the classroom for a clearly defined circle of subjects or course participants, to the extent that this is justified by the respective purpose and for pursuing non-commercial purposes (Section 42g Austrian Copyright Act). As this exception is only applicable if the works are reproduced or made available for a clearly defined circle of subjects, the publication on online platforms requires access restrictions. Although this exception applies to all uses, it does not apply to works which, according to their nature and design, are intended for school or teaching purposes. As a further exception from the rule, cinematographic works may only be used if at least two years have elapsed since the first performance of the film work in Austria, in German or in a language of a national group recognized in Austria. The copyrights holder is entitled to remuneration, which can be claimed by collecting societies.

The Austrian Copyright Act also provides for a specific exception for the public rendition of cinematographic works and connected musical works (Art 56c Austrian Copyright Act), allowing this use to an extent justified by

the purpose of education. The copyrights holder is again entitled to reasonable remuneration which can be claimed by collecting societies.

These provisions do not cover all aspects of distance learning, although the scope of the provision was extended considerable in regard to this purpose with the Amendment of the Copyright Act in 2015. As the exceptions as far as reproduction on materials other than paper or similar materials is concerned only applies to educational establishments that pursue non-commercial purposes, it excludes other educational establishments and makes it more difficult to provide high quality distance learning. Further, wording like “to the extent that this is justified by the respective purpose” leads to considerable legal uncertainty for teachers. It is not sufficiently clear how this wording is to be interpreted – a narrow interpretation would lead to a situation where additional reading material that should help to understand the material and provide further and deeper insight in a subject, but is not discussed in the lecture itself, might not be covered by the exception. This results in a situation where teachers are very restrictive in providing such materials to avoid liability. Another factor deterring teachers from providing these materials to students is the complexity of the whole provision and the differentiation between many – very similar – situations, adding to the legal uncertainty.

#### **e. Exceptions for Research**

Section 42 Paragraph 2 Austrian Copyright Act provides for a broader exception for the purpose of research compared to the general own and private use exemption regulated in Section 42. Pursuant to this regulation, everyone may produce individual copies of the work, including on materials other than paper for purposes of research, to the extent that this is justified for pursuing non-commercial purposes.

As discussed in more detail below under question 19, there is no further guidance in the Austrian Copyright Act regarding the term “individual copies”. How many copies still can be considered as “individual copies” therefore has to be determined in each individual case according to the specific circumstances.

As mentioned above, the copyright owner is entitled to reasonable remuneration, if it is to be expected that his work will be broadcast, made available to the public or stored on a storage medium manufactured for commercial purposes, or duplicated for a person’s own or private use according to this exception, when storage media of any kind suitable for such duplications are commercially marketed in Austria (storage media remuneration).

There is a further exception in Section 42a Austrian Copyright Act, which generally provides for the possibility to produce individual copies for another person’s own use free of charge or - under very restricted circumstances - for a fee, most importantly when the reproduction is carried out by means of reprographic or similar procedures. Paragraph 2 of this provision allows public facilities which collect work pieces to produce individual copies on request free of charge for a school’s own use, or for a person’s own or private use for the purpose of research on all materials (and therefore not only by using reprographic or similar procedures, but also by scanning the work).

A further exception for own and private use allows publicly accessible facilities that collect workpieces to make a reproduction for the inclusion in their own archive, if and to the extent that the reproduction is justified by this purpose. This is only permissible on materials other than paper (or similar materials) if the user does neither

directly nor indirectly pursue a commercial purpose (Section 42 Paragraph 7 Austrian Copyright Act). Based on this exception, such facilities are allowed to digitalize their whole collection.

The Austrian Copyright Act currently does not contain a data mining exception.

#### **f. Exceptions for the Freedom of Expression**

The exception for quotations of Section 42f Austrian Copyright Act is one of the most important exceptions allowing for freedom of expression. It reads in English translation as follows:

“(1) A published work may be reproduced, disseminated, broadcast, made available to the public and used for public lectures, performances and screenings for the purpose of the quotation, provided that its use is justified in its scope by this special purpose. This is particularly permissible if:

1. individual works, after their publication, are included in a scientific work which forms the principal object; A work of the kind referred to in Section 2 item 3 [works of a scientific or didactic nature which consist of pictorial representations in two or three dimensions, unless they constitute works of art] or a work of the visual arts may only be included for the purpose of explaining the content;
2. published works of the visual arts in a scientific or instructional lecture, which form the principal object, are merely publicly presented for the purpose of explaining the contents, and the duplicating pieces required for this purpose are produced;
3. individual points of a published work of literature in a self-sufficient new work;
4. the individual passages of a published work of music are given in a work of literature;
5. the individual parts of a published work are listed in a separate, new work.

(2) For the purposes of this provision, a work which has been made available to the public in a manner which is accessible to the general public is to be regarded as equivalent to a published work.”

Accordingly, all published works can be produced, disseminated, broadcast, made available to the public and used for public lectures, performances and screenings for the purpose of quotation, provided that its use is justified in its scope by this purpose. The provision in Paragraph 1 lists a number of examples where such use would be justified. The rights holder is not entitled to remuneration for uses based on this exception.

Further, the exception for the reporting of current events in Section 42c Austrian Copyright Act safeguards the freedom of expression as well, permitting that works that become perceivable to the public during the reporting of current events to be reproduced, disseminated, broadcast or used for public lectures, performances or presentations to the extent justified by the purpose of information.

To a certain extent, the exceptions for education and research, discussed in detail below, contribute to the protection of the freedom of expression as well.

### **g. The Panorama-exception**

The Austrian Copyright Act provides for an especially broad panorama exception in Section 54 Paragraph 5, which reads as follows:

“(1) It shall be permissible [...]

(5) to reproduce, disseminate, present in public by means of optical devices and broadcast and make available to the public works of architecture after their construction or other works of art permanently located in a public place; this provision shall not extend to the replication of a work of architecture and the reproduction of a painting or a graphic work for the purpose of placing such reproduction permanently in a place of such kind, or to the three-dimensional reproduction of a three-dimensional work.“

The panorama exception according to Section 54 Paragraph 5 Austrian Copyright Act covers many uses, i.e. to reproduce the works, e.g. by photographing, drawing or sketching, to disseminate the works, to present in public “by means of optical devices”, e.g. by projecting images of the exterior or a building in public, to broadcast them and to make them available to the public. The reconstruction of works of architecture, the reproduction of a work of painting or the graphic arts for a permanent installation in a public place as well as the reproduction of works of the plastic are not exempt.

The panorama exception according to Section 54 Paragraph 4 Austrian Copyright Act is also referred to as "freedom of the image of the road and landscape" (Freiheit des Straßen- und Landschaftsbildes), which gives the impression that only the exterior of a building would be covered by this exception. As the term "works of architecture" is considered to cover the interior architecture of a building as well, the exception actually covers the interior of a building as well, such as stairwells, courtyards, a porch, individual halls, rooms, portals and doors. What is required, however, is that they are reproduced, disseminated, etc in connection with the structure, because their connection with a certain space makes them an integral part of a "work of architecture". If these objects are reproduced on their own, without a recognizable connection with others, or with the space surrounding them, the described uses are not covered by the exception.

The purpose of the reproduction is irrelevant, commercial purposes can therefore be pursued as well. The exception therefore allows the use for example for marketing postcards, calendars, posters etc.

The free use of the work according to Section 54 Paragraph 4 Austrian Copyright Act is neither dependent on the consent of the author or right holder, nor is it remunerated.

### **h. Exceptions for the Preservation of Cultural Heritage**

The central exception for the preservation of cultural heritage in the Austrian Copyright Act is the exception for orphaned works in Section 56e Austrian Copyright Act which implemented Directive 2012/28/EU.<sup>11</sup> Pursuant to this provision, publicly accessible facilities which collect workpieces may under certain circumstances produce works and make them available to the public, if after a diligent search to find its copyright holder(s), the identity or location of the copyright holder(s) is still unknown (orphan works).

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<sup>11</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ 2012, L 299, p. 5–12 (in the following: “Orphan Works Directive”).

Further, Section 53 Austrian Copyright Act provides for the possibility to publicly perform works of music under certain circumstances, including a special provision for folk music.

The use of the work is permitted without the consent of the rights holder where the performance is given by a band composed of non-professional musicians or by a choir that pursues the goal to maintain folk customs as attested to by the competent provincial government, and whose members do not participate for profit, and where such performance consists, at least to a clearly preponderant extent, of folk music, or of music or adaptations of music in the public domain. The provision is difficult to use in practice as it is very complex and quite narrow.

#### **i. Exceptions for Public Security**

Section 41 Austrian Copyright Act, titled “free uses in the interests of the administration of justice and public administration” provides for an exception for works when used as evidence in proceedings before courts or other authorities or for the purposes of administration of criminal justice and public safety.

#### **j. Exceptions for Persons with a Disability**

Section 42d Austrian Copyright Act provides for an exception to copyright for the non-commercial use of a published work. The provision allows for the reproduction and the dissemination as well as making available to the public for persons with disabilities in a form suitable for them without consent of the right holder, if and as far as their access to the works is considerably impeded or made impossible.

### **7. Technological Protection Measures**

According to Section 90b Austrian Copyright Act, the holder of exclusion rights on a computer program based on the Copyright Act that is using technical mechanisms for the protection of a program can claim injunctive relief and removal when means intended to eliminate or circumvent the technical protection mechanisms are placed on the market or possessed for commercial purposes.

Section 90c Austrian Copyright Act on the other hand relates to technical protection measures for works other than computer programs, stipulating that the holder of an exclusion right based on the Copyright Act, using effective technical measures to prevent or limit infringement of this right, can claim injunctive relief and removal,

1. if the person circumventing these measures knows, or has reasonable grounds to know, that he or she is pursuing that objective,
2. if the means are manufactured, imported, distributed, sold, rented and used for commercial purposes,
3. if the means are advertised for sale or rent or
4. if services to circumvent the means are rendered.

It is evident from the wording of the provisions that Section 90b relates only to computer programs whereas Section 90c relates to all (other) categories of works. The provisions are worded differently as they are based on

different Directives, namely Directive 2009/24<sup>12</sup> (in the following: Software Directive) and the InfoSoc Directive.

*Section 90c* Austrian Copyright Act implements Section 6 of the InfoSoc Directive, granting rights holders using technological protection measures to prevent infringements of his/her rights under specified circumstances a claim to injunctive relief and removal. The provision protects against the infringement of the right itself as well as against preparatory measures.

Section 90c of the Austrian Copyright Act relates to the prevention of uses that infringe the exclusive rights of the copyright holder, while Art 6 Paragraph 3 InfoSoc Directive relates to all uses without consent of the right holder. The Austrian provision therefore has a narrower scope than Art 6 of the InfoSoc Directive; for example, it would be permitted to make a copy of a work for private use based on the exception of Section 42 Austrian Copyright Act, however, the copy would be made without the consent of the right holder. In practice, the provision will have to be interpreted in accordance with the Directive. If Section 90c is to be interpreted in accordance with the Directive, such a private copy made by circumventing technical protection measures would be unlawful.

According to Section 6 Paragraph 4 InfoSoc Directive, Member States shall in the absence of voluntary measures taken by right holders, including agreements between rights holders and other parties concerned, take appropriate measures to ensure that rights holders make available to the beneficiary of an exception provided for by national law in accordance with rights conferred by the Directive, the means of benefiting from that exception, to the extent necessary to benefit from that exception and where that beneficiary has legal access to the protected work or subject-matter concerned.

It is therefore only in the event that such voluntary measures are not taken by rights holders that there is some obligation for the national legislature to allow for enforcement. However, the exception for private use (excluding the reproduction on paper) is not covered by this obligation. Member States may, but are not obligated to regulate the enforcement of reproductions for private use against technological protection measures. Unlike the German legislator (see Section 96b of the German Copyright Act), the Austrian legislator has not yet dealt with any remedial measures in the Austrian Copyright Act. The explanatory remarks to the Amendment Act 2003 state that the intention was to wait for the technological development, its practical implementation and the reaction of the rights holders.<sup>13</sup>

Technological protection measures are further strengthened by the 4th sentence of Section 6 Paragraph 4 InfoSoc Directive: In case that works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them, the national legislator is prohibited to introduce provisions restricting technological protection measures. This does not include services that are not on-demand, such as streaming technologies and pay-per-view services.

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<sup>12</sup> Directive 2009/24 of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ 2009 L 111, p. 16.

<sup>13</sup> Explanatory remarks to the Amendment Act 2003 in *Walter*, Austrian Copyrights Act Nov 2003, §90c, 163 with commentary *Walter*, 167, *Dillenz/Gutman, Urheberrechtsgesetz & VerwGesG*, Section 90c Paragraph 63et seqq.

It follows that if the copyrights holder offers works online (Section 18a Austrian Copyright Act), he may circumvent the exceptions to his copyright as provided in the Austrian Copyright Act by requiring users to conclude a contract before accessing the work. Therefore, the national legislator can permit the copying of a work of music purchased on CD for private use even if technological protection measures are circumvented, but not if the work was legally downloaded from the internet. Since this rule is mandatory, these provisions are binding on the national legislator.

The protection conferred by *Section 90b* is in comparison quite narrow; it is (only) directed to the placing on the market and commercial possession of preparatory instruments which facilitate a practical circumvention of technical protection measures. As a result, technical protection measures for computer programs enjoy a more limited legal protection than all other categories of works. The actual use of the computer program would however infringe exclusive exploitation rights of the copyrights holder (if not protected by a free use or other exception) and therefore also allow injunctive relief and removal.

### **5. The principle of Exhaustion**

As mentioned above under Section 1, the principle of exhaustion further limits the exploitation rights of the rights holder. According to Section 16 Paragraph 1 Austrian Copyright Act, the rights owner has the exclusive right to disseminate “workpieces”, excluding others to market them or place them onto the market in a manner which makes the work accessible to the public without his consent. According to Paragraph 3 of this provision, this exclusive right of dissemination does not extend to works that have already been placed onto the market by transfer of ownership with the consent of the copyrights holder in a Member State of the European Community or in a Contracting State of the European Economic Area.

This rule does not apply to leasing and lending according to the provisions of Section 16a; although the copyright owner cannot prohibit non-commercial leasing and lending of his work, he/she is entitled to a financial remuneration. This remuneration can only be claimed by collecting societies.

Following a request for a preliminary ruling by the German Federal Supreme Court (“BGH”), the CJEU has permitted the sale of “second hand software” in its landmark decision *UsedSoft*<sup>14</sup>, affirming the possibility of digital exhaustion under the Software Directive) in relation to computer programs downloaded from the internet.

In more detail, the CJEU has ruled that the principle of exhaustion, as laid down in Article 4 Paragraph 2 Software Directive, applies equally to tangible and intangible copies of software programs, as the wording of the Software Directive does not differentiate in this regard. Accordingly, software distribution by download triggers exhaustion of the distribution right in regard to the downloaded copy. The CJEU argues that online transmission is the “functional equivalent” of the supply of a tangible medium, and further states that the effect of exhaustion also extends to updates and patches provided by the copyrights holder after the download, e.g., on the basis of a maintenance contract. Based on this decision, reselling “used” software programs originally disseminated via download does not infringe the copyright holder’s distribution right, provided that the originally downloaded copy is deleted or rendered unusable.

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<sup>14</sup> CJEU, case C- 128/11, *UsedSoft GmbH v Oracle International Corp.*, ECLI:EU:C:2012:407.

The CJEU confirmed the general principle of *UsedSoft* in its recent decision, C-166/15 *Microsoft*<sup>15</sup>. However, it remains unclear whether and to what extent this conclusion can be extended to works other than computer programs and that fall under the scope of the InfoSoc Directive.

## 8. Flexibility of the Austrian system

As already mentioned the exceptions to copyright are regulated in a very detailed and differentiating manner and are limited to a number of very specific cases that are described in detail in the relevant provisions.

A lot of provisions differentiate with regard to the *categories of works* and with regard to the *purpose of the use* of the work (e.g. commercial or non-commercial purposes, research purposes etc) as well as with regard to the person of the user, providing different scopes of exception for natural and legal persons, but also for specific institutions. For example, as shown above, the exception for own and private use pursuant to Section 42 has a very different scope for individuals (natural persons) and legal persons, and also has a much broader scope for schools, universities and other educational institutions.

There is little room for flexibility, as the list of exceptions in the Austrian Copyright Act is a closed list and additionally is not to be interpreted in an extensive manner.<sup>16</sup> Exceptions restricting the exclusive rights of the copyright owner are - as exceptions to a general rule - to be interpreted closely following the purpose of the specific exception. However, this does not necessarily mean that exceptions have to be interpreted in a strict manner; the analogous application of these provisions is for example not excluded.<sup>17</sup>

However, a somehow more generous approach was taken in regard to parodies in Supreme Court case “*Lieblingshauptfrau*”,<sup>18</sup> effectively leading to a free use of a work, although the decision did not relate to a specific exception, as the Austrian Copyrights Act does not provide for an exception for parodies or caricatures. In order to be permissible, the parody or caricature has to qualify as a “free adaption” of the parodied work. According to Section 5 Paragraph 2 of the Austrian Copyright Act, use made of a work in creating another work shall not make that other work an adaptation requiring the consent of the rights holder of the original, if such work constitutes an independent new work in relation to the work used. This requirement was interpreted very generously by the Supreme Court in the case “*Lieblingshauptfrau*”, accepting that in case of parodies a (significantly) lower threshold can be applied for the requirements that have to be met in order to qualify a work as an independent new work, i.e. a free adaption.

Free uses can theoretically – in the absence of an express provision stating otherwise – be ruled out by contract, provided this is possible according to general civil law, which is however only rarely the case.

## 9. Conclusion

The Austrian Copyright Law is determined in a relatively large amount by EU legislation, and is a complex system of provisions balancing the rights of the copyright owner and the general public. The system is complex not least because of the lack of a catch-all clause; the Austrian Copyright Act – as described above – establishes

<sup>15</sup> CJEU, case C-166/15, *Microsoft*, ECLI:EU:C:2016:762.

<sup>16</sup> Dillenz, Gutman, UrhG & VerwGesG, vor §§ 41 Rz 2 mwN bzw OGH vom 28.11.1978 „Betriebsmusik“, ÖBl 1979, 51.

<sup>17</sup> OGH 19 November 2002, 4 Ob 230/02f “*meischi.at*”.

<sup>18</sup> OGH 13 July 2010, 4 Ob 66/10z “*Lieblingshauptfrau*”.

very detailed exceptions that try to strike a fair balance in specific, and sometimes also quite similar situations, resulting in complicated provisions and inconsistencies. Some of these issues are rooted in EU legislation while others are due to the historic development of Austrian and EU Copyright Law.

As a result, the Austrian Copyright Act is in part quite complicated, leading to some amount of legal uncertainty for the user. This is especially true for the use in online situations, compounded by the fact that there remain some unanswered questions with regard to EU legislation in this area. A consolidation and simplification of the exceptions listed in the Austrian Copyright Act would be desirable, where possible within the framework of EU law.

**LIDC 2017****Question B**

**“To what extent do current exclusions and limitations to copyright strike a fair balance between the rights of owners and fair use by private individuals and others?”**

**Summary of the Austrian Report**

**by Valerie Eder**

The Austrian Copyright Act provides for a complex system of provisions balancing the rights of the copyright owner and the general public. The system is complex not least because of the lack of a catch-all clause.

The Austrian Copyright Law is determined in a relatively large amount by EU legislation. The Austrian legislator is limited by the closed list of exceptions of the InfoSoc Directive, although the directive does not contain an obligation for Member States to integrate these exceptions in their national legislation other than the exception for temporary acts of reproduction, which is mandatory.

Exceptions to copyrights can be found mainly in Sections 41et seqq of the Austrian Copyright Act. Some exceptions have to be tolerated without remuneration (free uses), others do entitle the rights holder to remuneration (legal licenses). Remuneration claims can usually only be asserted by the competent collecting society. The Austrian Copyright Act also provides for exceptions in form of compulsory licenses, granting the user an enforceable claim to conclude a license with the rights holder against remuneration. Some exceptions apply to all categories of works, while other exceptions distinguish between the different types of works in a very detailed manner.

Besides the list of exceptions in the Austrian Copyright Act, the copyright holder's rights are further limited by other provisions in an outside of the Copyright Act, including e.g. the principle of exhaustion restricting the author's dissemination right. Some works, e.g. laws, decisions and other official works produced by authorities, are also expressly excluded from copyright protection. Exceptions to copyrights can further be based on other areas of the legal system, e.g. on fundamental rights. In addition, the exclusive exploitation rights of the copyrights holder are regulated as a closed list, uses outside of this list therefore also constituting limitations of the copyright holder's right. Uses that are not reserved for the copyrights holder include most importantly the mere consumption of the work, but also the exhibition a published work, and other uses. In exceptional circumstances, limitations of copyright can also arise from antitrust laws.

The Austrian Copyright Act establishes a complex system of rights and exceptions in an effort to strike a fair balance in specific situation. However, the detailed provisions are rather complicated and not very user-friendly. In some cases, different exceptions also have quite similar areas of application, resulting in some inconsistencies. Some of these issues may be rooted in EU legislation and case law, while others seem to be due to the historic development of Austrian and EU Copyright Law.

As a result of the described system of the Austrian Copyright Act, it is in part quite complicated leading to some amount of legal uncertainty for the user. The complexity as such therefore has a negative impact on the fair use by private individuals and others. This is especially true for the use in online situations, compounded by the fact that there remain some unanswered questions with regard to EU legislation in this area. A consolidation and simplification of the exceptions listed in the Austrian Copyright Act would be desirable, where possible within the framework of EU law.