



AUSTRIA
Dr. Stefan Kofler
Greiter, Pegger, Kofler & Partners



Country Report

AUSTRIA

EALA Meeting – Cannes, France

July 2002

Dr. Stefan Kofler

Greiter, Pegger Kofler & Partner

1.	
Topic:	Trademark Protection
Who:	Sony "Walkman"
When:	January 2002
Where:	Austrian Supreme Court
What happened:	<p>Sony is the trademark holder for the trademark "Walkman" for portable tape recorders. An Austrian retailer used the name "walkman" for portable tape recorders not produced by Sony. Sony started court action against this retailer for infringement of Sony's trademark, as the retailer used the protected trademark for goods from other manufacturers.</p> <p>The Austrian Supreme Court dismissed the claim on the following grounds:</p> <p>Consumers who wish to buy a portable tape recorder ask for a "walkman" even if they know that it is not a Sony portable tape recorder. It is also common practice that retailers in Austria, even if they know about the trademark protection for Sony, offer portable tape recorders from other manufacturers under the name "walkman". Also in dictionaries the name "walkman" is given as a synonym for portable tape recorders. In general language usage no other term has developed to describe such products.</p> <p>Due to the results of the evidence heard during the court procedure the Austrian Supreme Court concluded that the trademark "walkman" has become customary in current language use and in established trade practice to serve generally as a term for portable tape recorders. Consequently Sony cannot claim any trademark protection for this sign.</p>

2.	
Topic:	Use of Voice Imitations in Advertising
Who:	Three Austrian TV actors against the political party FPÖ
When:	November 2001
Where:	Austrian Supreme Court
What happened:	<p>The plaintiffs are the main actors in a television series broadcast weekly on Austrian TV since 1998. The series is a satirical parody about civil servants. In October and November 2000 the defendant, the political party FPÖ, broadcast political advertising. In the advertisements the plaintiffs voices, their dialects, their pronunciation and in general the characteristics of their language were imitated by professional imitators.</p> <p>The plaintiffs started court action against the defendant demanding the immediately refraining from the use of voice imitations of the characters in the TV series featuring the plaintiffs.</p> <p>The Austrian Supreme Court granted the court order on the following grounds:</p> <p>A person's voice, dialect, pronunciation and generally the characteristics of a person's speech are part of the person's personality and protected in the same way as the personality itself. The voices and the characteristics of characters in films or television series are an expression of an actors artistic and professional activity and therefore part of an actor's personality. No-one is allowed to use a person's personality in advertising without obtaining the person's consent. As the plaintiffs did not give their consent for the use of their characteristic voices (the defendant did not even ask for their permission) the defendant was not allowed to use the imitations of these voices. The use of imitations of voices, therefore, violates the actors' personality rights.</p>

3.	
Topic:	Austrian Ban on Advertising for a Bankrupt's Estate; Request for Preliminary Ruling of the European Court of Justice
When:	January 2002
Where:	Austrian Supreme Court
What happened:	The plaintiff as well as the defendant are companies that sell products in public auctions. The defendant purchased machinery and building material from a court appointed public receiver in the bankruptcy proceedings of a construction

	<p>company. The defendant intended to resell the purchased goods and placed an advertisement in a newspaper indicating that these goods had been purchased out of the construction company's bankruptcy proceedings.</p> <p>According to §30 of the Austrian Act Against Unfair Competition it is prohibited to mention in public announcements that goods originate from a bankrupt's estate, if at the time of the public announcement the products do not longer belong to the bankrupt's estate. Even if it is true and correct that the products were originally bought from a bankrupt's estate, it is not permitted to mention this fact in advertising for the products. The reason behind this ban lies in the impression of the consumer that public receivers generally try to sell the bankrupt's assets as quickly as possible and at prices below the actual market price. As the goods originate from a bankrupt's estate the consumer might assume that this may be a very favourable opportunity to buy the products. The Austrian Supreme Court found that this legal ban could establish a measure having equivalent effect to quantitative restrictions according to article 28 EC. The ban prohibits mentioning the origin of the goods out of a bankrupt's estate even if this is true. It is doubtful whether in the light of consumer protection such a ban is necessary.</p> <p>For this reason the European Court of Justice was asked for a preliminary ruling as to whether the national ban on advertising provided for in § 30 of the Austrian Act Against Unfair Competition is enforceable under article 28 EC.</p>
--	---

4.	
Topic:	E-Commerce
When:	Federal Law Gazette I 2001/152
Legislation:	<p>With effect as of January 1st, 2002 Austria enacted the E-Commerce Act. This act implements the E-Commerce Directive 2000/31/EG.</p> <p>With the Austrian E-Commerce Act the general ban on "spamming" as provided for in §101 Telecommunications Act was not modified. Therefore, emails containing advertisements may only be distributed if the prior consent of the receiver has been obtained (opt-in-regulation). In addition the Austrian E-Commerce Act established the duty that lawfully distributed commercial communication must be clearly identifiable as such.</p>