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# INTELLECTUAL PROPERTY FOR CREATIVE COLLABORATIONS

## LEGAL ASPECTS THAT EVERY CREATIVE SHOULD KNOW

by CREATIVE REGION Linz & Upper Austria
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Usually there are no limits to creativity. Except in law. If you - as a creative professional - are regularly collaborating with companies from different industries, you should be aware of the legal framework and statutory provisions for intellectual property.

In this guideline, attorneys Katharina Bisset and Michael Lanzinger, collectively known as the **Nerds of Law**, explain - from an Austrian perspective - what you should know in terms of copyright, trademark and patent law when it comes to cooperative ventures.

## The origins of copyright

> *„Essentially, copyright has been around since letterpress printing: that‘s when it was first possible to distribute books or „content“ in faster and larger quantities. Until the printing of books, „piracy“ wasn‘t really an issue; after all, it was a bit of a hassle to copy works by hand.“ “*

says attorney Michael Lanzinger, when he introduces the topic. In its early days, copyright was held by publishers, not by authors. In Austria, the Copyright Act was enacted in 1936, last comprehensively reformed in 2015 and amended in 2018. More recently, the **European Union‘s major copyright reform** was passed. As a result, digital issues such as snippets or upload filters will be increasingly taken into account in the future.

## Copyright does not equal intellectual property rights

**The World Intellectual Property Organization** (WIPO) is keen to standardize many aspects of intellectual property internationally. While the basic principles of intellectual property are similar throughout the world, they are ultimately a matter for national legislation. Particularly in the online world, this can cause practical challenges.

Michael Lanzinger elaborates on what this means in concrete terms:

> *„As soon as we turn on the computer and go online, we quickly find ourselves in a different legal system. Even though some attempts have been made to standardize intellectual property rights, national laws and different legal traditions exist.“*

One example: the copyright symbol ©.

This symbol is widely known in Austria, and originated in the Anglo-American world. However, it actually has no meaning in Austria, explains Lanzinger:

> *„Up until the late 20th century, copyright had to be actively registered in the USA. This approach is more reminiscent of trademark protection in our country than of copyright. In our legal system, the work is automatically established once it is created.“*

Katharina Bisset - attorney colleague of Michael Lanzinger - adds:

> *“The © symbol, however, implies at least a presumption of authorship. This means that if, for example, a work is marked © 2021 Katharina Bisset, the presumption is that the intellectual property is located there. The opposing side would first have to prove the opposite.”*

## What is protected by intellectual property rights?

Intellectual property rights protect an idiosyncratic intellectual creation. „Idiosyncratic“ in this case means „creative“ and not „peculiar“ or „strange“. Works are protected for up to 70 years after the death of the author. If there are multiple authors, it ends 70 years after the death of the last co-author.

Particularly the use of images and photos, e.g. on the Internet or as a design element for graphic implementations, often poses the question of whether it is permitted to use copyrighted material without further ado. As a general rule, the interests of the person depicted must not be infringed. In most cases, commercial use already violates these interests. Particular caution is required in the case of images of children. An infringement of intellectual property rights or the violation of distribution rights may result in both civil law and competition law and may even lead to criminal law charges.

However, that does not mean that only pictures and photos are works within the scope of intellectual property rights. Works in the sense of intellectual property right can be, alongside photos, literature, sound art, visual arts, film art, adaptations, collective works, computer programs, etc. As such, the work in an intellectual property right must be something that is not part of common knowledge and new. Katharina Bisset further explains:

> *„Intellectual property rights come into existence as soon as an idea is manifested. The idea alone cannot be protected. If the idea exists only in my head, it is not yet protectable by an intellectual property right. The moment I turn the idea into an image, a text, etc., it is a creation and therefore protected.“*

Michael Lanzinger continues:

> *„The basic structure of intellectual property rights is such that it has no „type constraint“ and is technology-neutral. It does not define things like literature or what it has to look like in order for it to be recognized as such. Instead, it focuses on the concepts behind it, and these can be developed. In principle, intellectual property rights name certain types and forms of works, but essentially everything can be accommodated in these categories,“*

This makes intellectual property very resilient - despite ongoing digitalization. As a result, the core of the law does not need to be changed much in order to remain up to date in a fast-moving digital world. Nevertheless, problems arise when it comes to the use of works, because nowadays there are existing types of uses of works that were not anticipated in intellectual property law at the time, e.g., snippets on the Internet.

## Who is the author?

The question of all questions in intellectual property law: Who created the work? Creatorship can only be proven or presumed on a purely factual basis, as there is no register of authors in Austria - in contrast to the register of trademarks or the register of patents. Everyone who has created a work is the author. This is especially relevant if a creation was co-created, as might be the case in collaborations between creative industries and manufacturing.

If several persons are involved, they are creators in equal shares. The only exception to this general rule applies to commercial film. Michael Lanzinger emphasizes:

> *„When you start a project, it is important that the partners agree which rights belong to whom, recognizing that in the case of collaboratively created works, everyone is a creator in equal shares.“*

Katharina Bisset illustrates it with a simple example:

> *„When a book is written jointly and each author writes individual chapters, the content of the work can be clearly separated. Each person is thus the author of his or her own part. But if chapters are worked on jointly, and a co-author rewrites or adds parts, then the content of the work can no longer be clearly separated. There is joint authorship of the entire work. The same applies to software or works other than books."*

## Contractual regulations for collaborations

An idea can be stolen faster than you might expect, and this should not be ignored, especially in the case of project pitches or patent ideas.

Basic considerations about collaborations should therefore be contractually regulated, ideally during the „honeymoon phase". It should include the following: what rights do the partners have with regard to use and distribution, what is the objective of the collaboration, and what happens to the proceeds. It is also advisable to have clear exit clauses. If the collaboration is terminated or a partner withdraws, the „divorce" can take place amicably and conflicts can be avoided.

In the case of collaborations or pitches, it makes sense to conclude so-called non-disclosure agreements (NDA). NDAs are non-disclosure agreements that agree to maintain silence about negotiations or documents. These NDAs can be agreed on both sides (Mutual Non-Disclosure Agreement, MNDA) and are particularly advisable in the development stage of products or with regard to patents, so that company secrets are protected.

## Exploitation rights and licenses

Authors have various rights, including the so-called exploitation rights. This often concerns the monetization of the manifested ideas, i.e. the works. Of course, works can also be made available to the public for free use. In this case, the author decides against monetization. Exploitation can be, for example, the basic exploitation, reproduction, distribution and broadcasting, rental or lending, naming or making available (= licenses).

If an author makes a work available, a license agreement is advisable. This should contain some important key elements, for example:

- What is the work?
- For which purposes is the right granted?
- Must the author of the work be named or is naming waived?
- May the work be edited or further developed?
- At what point in time does the licensor grant the right to the licensee (immediately/after payment)?
- Is this right limited or unlimited?
- Is the right granted exclusively or non-exclusively?
- Is it territorially restricted?
- May the work be sold?

## Creative Commons and Open Source

Another form of licenses are **Creative Commons** licenses (CC licenses). Originally from the world of e-learning, these are standardized licenses which, for example, are also used by image databases. Depending on the license type, the work may be edited, shared or monetized under certain conditions. CC licenses are compatible with intellectual property rights worldwide and are therefore very popular in practice. Katharina Bisset explains:

> *„As for the software sector, open-source licenses are more commonly used. In this case, the source code is public. Use is basically free - all open source licenses have that in common - but they differ greatly in the details. Therefore, these types of licenses should also be checked carefully if one wants to use open-source-licensed components for commercial purposes, e.g. in an individually programmed software for a customer."*

## Trademark rights

In contrast to intellectual property rights, trademark rights do not arise automatically. A trademark must be registered, explains Katharina Bisset:

> *„Trademarks are registered limited to countries or regions, e.g. in Austria, the EU or internationally,"*

The most common trademarks are image brands, word brands or word-picture combination brands. Colors and sounds can now also be registered as trademarks. When registering, the purpose of the trademark must be stated.

The protection period for trademarks is 10 years and can be extended indefinitely. This can make trademarks enormously useful and of significant value to a company. Once a trademark is registered, no one else may use that trademark for the same goods and services in the territory of the application.

Designs can also be registered as a design trademark. In this case, haptics, materials, appearance, colors, ornaments etc. are protected. The term of protection for designs is limited to a maximum of 25 years.

**TIP!**

**If you want to apply for a patent, run a request at the European Union Intellectual Property Office and the Austrian Patent Office for further information.**

## Patent law

A patent protects technical inventions (not business models), e.g. objects (devices, substances, etc.) and processes (manufacturing or work processes). It applies from the date of registration with the patent office for a maximum of 20 years and is limited to a specific territory. A patent must not be obvious, i.e. a skilled person must not be able to deduce it from the state-of-the-art knowledge; it must be commercially applicable and new. And this is when the NDA enters the picture again, says Katharina Bisset:

> *„Under no circumstances should you talk to anyone about something which can be patented. The minute it's no longer secret, meaning there's no NDA, you might as well forget about the patent."*

In three videos, the Nerds of Law, Katharina Bisset and Michael Lanzinger, explain the most important issues regarding copyright and intellectual property in short words.

- **Five epic fails to make in IPR:** In this video, Katharina Bisset shows, how you should **NOT** approach intellectual property rights and copyright - Caution: ironical content!
- **Five important things to think of in IPR:** Michael Lanzinger complements the ironic contribution of his colleague with actual tips in terms of IPR.
- **Things to keep in mind to protect your IPR when cooperating:** Michael Lanzinger gives some more tips about how to collaborate and what to think of to protect your intellectual property.

## Video #1: Five epic fails to make in IPR

www.bit.ly/5epicfailsIPR


## Video #2: Five important things to think of in IPR

www.bit.ly/5thingsIPR


## Video #3: Things to keep in mind to protect your IPR when cooperating

www.bit.ly/IPRandCooperation

## ADDITIONAL LINKS & INFORMATION

Read the german translation of the above text here:
Geistiges Eigentum bei Creative Collaborations

Find out more about IPR for companies in the creative industries in this publication by the KREATIVWIRTSCHAFT AUSTRIA (in german): Die Marke der Kreativen

Visit the Nerds of Law Website and listen to the podcast by Michael Lanzinger and Katharina Bisset: www.nerdsoflaw.com

Inform yourself about the EU copyright legislation here:
www.digital-strategy.ec.europa.eu/en/policies/copyright-legislation

Learn more about IP and patents on the website of the World Intellectual Property Organization: www.wipo.int or the European Union Intellectual Property Office: www.euipo.europa.eu or at the Austrian Patent Office's website:
https://www.patentamt.at/en

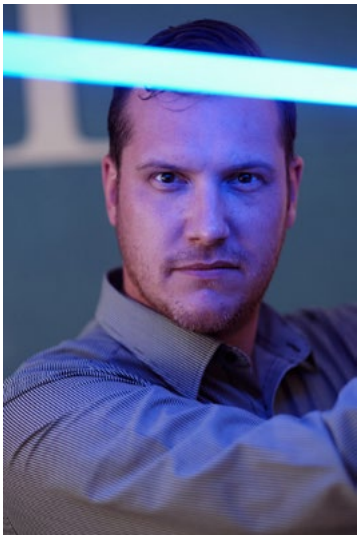
Find out which Creative Commons license fits your project here:
www.creativecommons.org

## About the Nerds of Law

Michael Lanzinger and Katharina Bisset are both lawyers, working in the field of digital law, cybercrime, copyright, media law and legal tech.

As Nerds of Law they are also podcasting together, addressing different topics in that context: www.nerdsoflaw.com/podcast.

Michael is also part of "law busters", a group of lawyers who are explaining legal topics in a comedian, pop-cultural way. Also he published some audio books, one of them about "copyright for creatives", available here: www.audible.de/pd/Urheberrecht-fuer-Kreative-Hoerbuch/3966330415.



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