

2.2.1 Austria

Austria has not implemented a national Open Access/Open Science policy yet but it is planned to establish such a national policy. General RDM policies were developed by several research performing institutions in the country, mainly universities.

Open access publications receive support from the highest level of the Austrian political landscape: The latest Austrian government programme¹⁵ (January 2020) includes a commitment regarding Plan S. A cornerstone of Plan S is that publications relying on public funding have to be openly accessible.¹⁶ In the government programme, the government states that also research performing organisations “should” implement Plan S. However, as a survey among universities and universities of applied science in 2019 shows, binding regulations on open access publications are not yet standard at Austrian research performing organisations: half of the twelve participating universities and universities of applied sciences indicated to have written regulations or policies on open access publications in place. Comparable regulations are much less common for other aspects related to open science (research data management, open research data, long-term availability of research data, compliance of data to the FAIR principles, publication of data in a (certified) repository).¹⁷

Development of RDM policies was supported by the e-Infrastructures Austria project¹⁸. Also, the Infrastructure Austria plus project had the goal to produce Research Data Management policies for each Austrian University. In August 2020 a policy was adopted by 5 universities out of 14 (a sixth one developed instead a “Regulation” on RDM).

Concerning open archives, Austria currently (as of July 2021) counts 46 national multidisciplinary and discipline-specific repositories, which are listed in OpenDOAR¹⁹.

Even if no national policies are yet in place in Austria, the country counts several networks aiming for and working on the development of Open Science and its regulations.²⁰ Amongst those, the Open Science Network Austria (former called Open Access Network Austria OANA²¹ and created in 2012) plays an important role especially through setting of recommendations by several thematic working groups as well as their strategic paper including recommendations for a national Open Science Policy - which is currently in planning. Another important national initiative is the Austrian Transition to Open Access (AT2OA)²² project, aiming to contribute to the transformation from Closed to Open Access of scholarly publications.

¹⁵ <https://www.bundestkanzleramt.gv.at/bundestkanzleramt/die-bundesregierung/regierungsdokumente.html>

¹⁶ <https://www.coalition-s.org/>

¹⁷ Bodlos, A., Hönegger, L., Kaczmirek, L., Beckmann, V., Breton, V., Romier, G., van Wezel, J., Streit, A., Stevanovic, U., Galeazzi, F., Tanlongo, F., van Nieuwerburgh, I. (2020a). “Summary report of the EOSC-Pillar ‘National Initiatives’ Survey”. Version 1.1, Zenodo. doi: 10.5281/zenodo.3937318, p.A28-A31.

¹⁸ <https://e-infrastructures.univie.ac.at/das-projekt/>

¹⁹ Directory of Open Access Repositories <http://www.opendoar.org/find.php>

²⁰ <https://www.bmbwf.gv.at/Themen/Hochschule-und-Universitaet/Hochschulgovernance/Leitthemen/Digitalisierung/Open-Science.html>

²¹ <https://oana.at/en/>

²² <https://www.researchgate.net/project/Austrian-Transition-to-Open-Access-AT2OA>

6.2.5.1 Austria

6.2.5.1.1 Authorship

According to the Austrian *Urheberrechtsgesetz* (öUrhG),¹¹⁰ the author is who creates the original work. The definition applies also to heirs and legatees unless proved otherwise (§10 öUrhG). Also the Austrian act contains a presumption of authorship, which attributes the qualification of author to the natural person who is indicated as such, unless proven otherwise (§12 öUrhG). In case of missing indication of the author, the editor or, if missing, the publisher is to be considered as an authorized representative of the author (§13 öUrhG).

As to co-authorship, all co-authors hold copyright jointly, if their contributions are indistinguishable contributions. If contributions are of different nature (e.g. literary, audio, visual works) no co-authorship can exist (§11 öUrhG).

6.2.5.1.2 Subject matter

The Austrian Copyright Act contains a long list of protected works (§§1 to 6 öUrhG), which is still deemed to be only exemplificative. It excludes from protection legislative acts, ordinances, government reports, court decisions, with the exception of geographical maps issued by government institutions, which enjoy copyright protection (§7 öUrhG).

6.2.5.1.3 Exceptions

Illustration for teaching and scientific research. While Article 5 CDSM Directive on the exception for digital teaching has yet to be implemented, Austrian law provides a number of exceptions in the field of illustration for teaching and scientific research. § 42g öUrhG allows schools, universities and education institutions to reproduce and communicate public works to a certain closed-number audience of students or participants for the purpose of teaching and education, within extent necessary and for non-commercial purposes. Works specifically intended for education markets are excluded from the provision, while audio-visual works can be used only starting from 2 years after their first publication. The exception is subordinated to the payment of fair compensation. A similar exception is provided for reproduction and material distribution, having identical constraints but for the lack of fair compensation. (§42(6) öUrhG). Schools, universities and other education institutions are also allowed to display music and audio-visual works for teaching purposes, and with the exclusion of certain movies that are specifically intended for education. Also in this case the exception is subordinated to the payment of fair compensation (§56c öUrhG). §71(3) öUrhG authorizes the use of a performance for non-commercial research or teaching purposes, requesting the indication of source unless it is proven impossible.

¹¹⁰ Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz). StF: BGBl. Nr. 111/1936 (StR: 39/Gu. BT: 64/Ge S. 19.) as last amended by BGBl. I Nr. 105/2018 (VfGH) (hereinafter öUrhG).

Private use for non-commercial purposes. Under §42(2) öUrhG, anyone can reproduce a private copy on paper or other similar support for purpose of research and with non-commercial aim, with the exclusion of books and journals in full version and music sheets (§42(8) öUrhG).

Text and data mining. Austrian law does not contain any provision adequate to address TDM needs. Articles 3 and 4 CDSMD are yet to be implemented.

Public lecture. Under § 43 öUrhG, public speeches delivered in public or in public institutional settings or political assemblies can be reproduced, communicated, distributed for the purpose of information without the authorization of the rightsholder. If the speech has been fixed by means of an audio-recorder, the distribution requires consent of the author. The provision does not make any specific mentioning of public lectures/academic speeches.

Quotation. According to § 42f öUrhG, a published work can be used for quotation in the extent justified by the purpose. The provision mentions in particular the quotation of a work in a scientific work, but it is not limited to that. § 71(3) öUrhG adds to the general clause that performances can be freely used for non-commercial quotation purposes.

Uses in libraries and other CHIs. Cultural institutions can reproduce copies of the works in their collection for the non-commercial purpose of archiving, and also use such reproduced copies for the purpose of making available, lending, displaying the works in their collections (§42(7)(1) öUrhG). Under §56b öUrhG, libraries and cultural institutions can make available a maximum of two terminals per establishment to enable the access to works via screen or audio, for non-commercial purposes, and upon payment of fair compensation. The exception for digitisation of library collection provided by Article 6 CDSMD Directive has yet to be implemented.

Marrakesh (accessibility for visually impaired individuals). §42d öUrhG implements the Marrakesh Directive by following consistently definitions and regulatory options of the EU text, particularly with regard to obligations imposed on entities (§6) and the scope of the exceptions for entities and beneficiaries (§7). Compared to the EU text, the Austrian act articulates in more details the description of “authorized entities” (§2) and copy in accessible format (§3), and decides to opt for the provision of financial compensation of authors “for the reproduction, distribution, broadcasting, making available to the public, public communication in accordance with § 40g as well as use for lectures, performances and presentations by an authorized entity for visual and reading disabilities with its registered office in Austria”, to be managed only by collecting society. The compensation should be calculated on the basis of “the special circumstances of the individual case and the fact that the activities of authorized entities for visual and reading disabilities are not for profit (...), as well as the objectives pursued by this provision which are in the public interest, the interests of people with visual or reading disabilities, the possible damage to authors and the need to ensure the cross-border distribution of reproductions in barrier-free formats.” The exception cannot be overridden by contract (§9).

Orphan works. The provisions (§56e öUrhG) are fully in line with EU law, with the specification of the purpose of access to cultural and political content, preservation and restoration.

Out-of commerce works. Although Article 8(2) CDSMD has yet to be implemented, §42(7)(2) öUrhG already states that cultural institutions can reproduce and make available copies of the out-of-commerce works.

Other software exceptions. §40d öUrhG excludes the applicability to computer programs of the private copy exception, and it implements the Software Directive's exceptions - not overridable by contract - of backup, study and test of the program functioning and lawful use. §40e öUrhG is devoted to decompilation and follows closely the text of the EU Directive.

Other database exceptions. §40h excludes the applicability of the private copy exception to database works, and it implements the Database Directive's exceptions for private use and lawful uses, excluding their waiver, but admitting agreements on the scope of the intended use.

Open repository right. Author of a scientific work who is affiliated to a research institute financed at least 50% by public funding, which appeared in a journal with at least 2 issues a year, who has licensed the rights to the publisher, retains the right to a second publication of the final accepted version for non-commercial purposes, after an embargo of 12 months for every scientific field. The provision cannot be overridden by contract and requires the mandatory indication of source of first publication (§37a öUrhG).

6.3.5.1 Austria

Relevant legislative initiatives

- Federal law on general matters according to Art. 89 GDPR and the research organization (Research Organization Act - FOG) StF: BGBl. No. 341/1981 as amended by BGBl. No. 448/1981 (DFB) (NR: GP XV RV 214 AB 778 p. 81. BR: p. 413).
- Federal law for the protection of natural persons in the processing of personal data (Data Protection Act - DSGVO) StF: Federal Law Gazette I No. 165/1999 (NR: GP XX RV 1613 AB 2028 S. 179. BR: 5992 AB 6034 S. 657).

Issues

- Field of application Art. 2b: it includes private and public universities and other research institutes.
- Confidentiality obligations and data secrecy are required under Art. 2d: "Verantwortliche und Auftragsverarbeiter, die personenbezogene Daten auf Grundlage dieses Abschnitts verarbeiten und ihre Mitarbeiterinnen und Mitarbeiter - das sind Arbeitnehmerinnen und Arbeitnehmer (Dienstnehmerinnen und Dienstnehmer) und persons in einem arbeitnehmerähnlichen (dienstnehmerähnlichen) Verhältnis - haben personenbezogene Daten, die ihnen ausschließlich auf Grundlage dieses Abschnitts anvertraut wurden oder zugänglich geworden sind, unbeschadet sonstiger gesetzlicher Verschwiegenheitspflichten, geheim zu halten, soweit kein rechtlich zulässiger Grund für eine Übermittlung der anvertrauten oder zugänglich geogeniswordenen".
- Organizational safeguards under Art. 2d include:
 - o Use and legal basis of the data processing shall be available on internet.
 - o Pseudonymization or data publicly are information that shall be available (section 2 §7 DSGVO).
 - o DPO appointment is required.
 - o Internal and external governance shall be designed and implemented.
 - o Training, instructions before authorizing the access to data shall be performed.
 - o DPIA under article 35 shall be performed.
- Legal basis section 2 §7 DSGVO
 - o Personal data can be processed for research purposes if data are publicly accessible, the data controller has legitimately determined means and purposes for previous research and data are pseudonymized.
 - o Special regulations may provide a legal basis, with the consent of data subject, otherwise under the approval of data protection authority after DPIA has been performed. Before the authority, the data controller shall prove to be credible, obliged to confidentiality, and reasons why the data subject's consent cannot be collected.

- In the context of big data, personalized medicine, biomedical research, biobanks, art. 2d specifies that:
 - Pseudonymization is required.
 - Results publication shall exclude any pictures, names, addresses.
 - No disclosure agreement to any third party.
 - Re-use under article 89 GDPR art. 2d does not envisage any temporal limits for data retention.
- Data subjects' rights under art. 2d, can be limited as far as the rights to access, correction, erasure/be forgotten, restriction of processing, portability, and objection are concerned.
- Biological sample and data collections for reasons of public interest in the area of public health under art. 2f can be processed implementing the following safeguards:
 - the fastest possible pseudonymization, if purposes of the research allow it.
 - compliance with the data security measures required in accordance with article 32 GDPR.
- In the context of knowledge technology transfer art. 2i in case of open science and citizenship science projects specifies that:
 - Data shall be based on observations or measurements in public space or they shall be pseudonymized;
 - Deletion could be provided only if it meets goals, methodology, and purposes of the project.