

Copyright 2019

Contributing editors

Andrew H Bart, Steven R Englund, Susan J Kohlmann and Andrew J Thomas
Jenner & Block LLP



MORE TALK ABOUT JENNER & BLOCK

Chambers USA and Legal 500

Chambers USA writes that Partner Steven R. Englund, a contributing editor of this publication, is “a go-to-practitioner. Sources highlighted his prowess in the field, with one asserting that ‘he **KNOWS THE US COPYRIGHT ACT BETTER THAN ANYONE.**’” Legal 500 has also described Mr. Englund as “**A COPYRIGHT GURU.**”

Legal 500 – Leading Lawyers

Partners Andrew H. Bart and Susan J. Kohlmann, contributing editors of this publication, are recognized as “**LEADING LAWYERS**” in copyright law—two of just eight lawyers to make the elite nationwide list.

Law360 – Media & Entertainment MVP

Partner Andrew H. Bart was recognized among Law360’s 2017 and 2018 “**MVPs IN MEDIA AND ENTERTAINMENT.**

The National Law Journal – Intellectual Property Trailblazer

Partner Susan J. Kohlmann was named an “**INTELLECTUAL PROPERTY TRAILBLAZER**” in 2017.

California Lawyer – Attorney of the Year (CLAY) Award

Partner Andrew J. (A.J.) Thomas, a contributing editor of this publication, received a 2018 **CLAY AWARD** in the intellectual property category.

The American Lawyer – Litigator of the Week

Partner Susan J. Kohlmann was recognized as a 2017 “**LITIGATOR OF THE WEEK**” for leading the team that secured a \$13.15 million jury verdict after a week-long trial over the rights to writer John Steinbeck’s works.

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Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent

adam.sargent@gettingthedethrough.com

Dan White

dan.white@gettingthedethrough.com

Published by

Law Business Research Ltd

87 Lancaster Road

London, W11 1QQ, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

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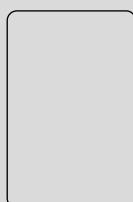
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Contributing editor

**Andrew H Bart, Steven R Englund, Susan J Kohlmann
and Andrew J Thomas**

Jenner & Block LLP

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Copyright*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Indonesia.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Andrew H Bart, Steven R Englund, Susan J Kohlmann and Andrew J Thomas, of Jenner & Block LLP, for their continued assistance with this volume.

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Global overview

Andrew H Bart, Steven R Englund, Susan J Kohlmann and Andrew J Thomas

Jenner & Block LLP

Copyright law around the world continues to evolve to address advances in technology and adoption of new communications media. Judicial decisions, national legislation in various countries, and international treaties all reflect efforts to strike the appropriate balance between encouraging creativity by providing meaningful protection of intellectual property rights and encouraging continued growth and development of new technologies.

Courts continue to confront copyright issues raised by new technologies. For example, a court in China recently decided, for the first time, that short online videos are protected by copyright. In the United States, courts continue to decide a steady stream of cases involving unauthorised online use of copyrighted works. Following a decision by the Court of Justice of the European Union, it appears that certain subject matter, such as video games, that do not fit neatly into the traditional categories of copyrighted works in the UK's copyright legislation may be eligible for protection.

In April 2019, the EU adopted the Directive on Copyright and Related Rights in the Digital Single Market. This directive addresses a wide variety of topics, including exceptions and limitations to copyright restrictions for new technological techniques, such as data mining, and digital educational uses, use of out-of-commerce works by cultural heritage institutions, extended collective licensing, and, controversially, the online use of press publications and use of works by online content-sharing services. The focus now shifts to national legislatures, which have two years to transpose the directive into their national law. For example, in Austria, there have already been calls to provide start-up service providers relief from the directive's provisions concerning use of works by online content-sharing services. It is not clear whether the UK will need or want to implement the directive if it leaves the EU.

Collective licensing has been a topic of legislation elsewhere as well. In the US, the Music Modernization Act will permit digital music service providers to obtain blanket licences for the use of musical works in their services through a centralised collective. Legislation pending in Spain and Switzerland also addresses collective licensing organisations. Meanwhile, Greece established a new musical work collective,

and the Supreme Court of Brazil upheld the right of Brazil's national government to legislate concerning collective licensing of musical works. Music legislation proposed in Indonesia is taking a different tack. It would regulate the creation and distribution of music, including requiring competence tests for musicians.

Other aspects of the proposed Swiss legislation would improve anti-piracy enforcement with measures such as a 'stay down' requirement for certain internet hosting providers, extend the term of 'neighbouring rights' protection for performances and provide broader protection for photographs. Like the EU, Japan has adopted legislation to facilitate use of copyrighted works in machine learning.

Various countries are implementing specialised tribunals to hear intellectual property disputes. China has had specialised intellectual property courts for a number of years, and more recently has introduced internet courts that will hear internet-related copyright disputes. Ukraine is in the process of implementing a specialised intellectual property court. In the US, interest is building for legislation to create a statutory alternative dispute resolution programme for small copyright claims.

The 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled focuses on copyright exceptions relating to the creation and dissemination of materials accessible to the blind and other print-disabled persons. It entered into force in 2016, and at the time of writing, 55 countries have ratified or acceded to that treaty. The US implemented the treaty in 2018 and ratified it in 2019. EU member states are moving forward on national legislation to transpose a directive implementing the treaty. For example, the treaty has been implemented in Austria, and implementing legislation is pending in Greece and Spain. In Switzerland, the treaty has been implemented and a ratification proposal is pending.

As the digital world continues to evolve, so do copyright laws around the world. We hope that you find our analysis helpful and informative as you navigate the ever-changing copyright landscape in your practice or business. We look forward to hearing from you and welcome any comments that you may have.

Austria

Sonja Dürager

bpv Hügel Rechtsanwälte GmbH

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

In Austria, the Federal Law on Copyright in Works of Literature and Arts and on Related Rights (the Copyright Act), in the current version of the Federal Gazette I No. 99/2015, provides for the protection of the intellectual property of the author and therefore defines the terms 'author' and 'co-author', the requirements of a protected work, and the author's moral rights. Further, the law prescribes the exclusive exploitation rights of an author and the exemptions from it.

The Federal Law on Collecting Societies 2016, in the current version of the Federal Gazette I No. 27/2016, particularly provides for the operational requirements of a collecting society, as well as for their rights and duties towards copyright owners and users.

Enforcement authorities

2 | Who enforces it?

The civil law provisions of the Copyright Act regarding infringement of exploitation rights and moral rights are enforced by the author of a work or the exclusive licensee, who is entitled to legal enforcement according to the licence agreement, through remedies before the ordinary civil courts.

Criminal law provisions are enforced by a public prosecutor upon a prosecution request from the injured rights holder.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The digital exploitation of works is considered in Austrian copyright law. Section 18a of the Copyright Act provides for the protection of an author's 'making available' right. It is prescribed that the author has the exclusive right to make his or her works available to the public by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

This provision transposes article 3 of 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.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Austrian copyright laws do not have extraterritorial application. Additionally, on 22 January 2015, the European Court of Justice ruled in the *Hejduk* case (C-441/13) that copyright owners are entitled to file an action before a court in the jurisdiction in which the damage arising out of an alleged infringement of copyright occurs or is likely to occur. The occurrence of damage or the likelihood of its occurrence arises from the accessibility of a website in the respective member state of the court; it is, however, irrelevant whether the website is directed at a member state in which the court seised is situated. However, given that the protection of copyright and rights related to copyright granted by the member state of the court seised is limited to the territory of that member state, a court seised on the basis of the place where the alleged damage occurred has jurisdiction only to rule on the damage caused within that member state.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

Austria does not have a copyright agency, because copyright originates from the creation of a work and no formal requirements (eg, registration in public registers) need to be fulfilled in order for copyright to be acknowledged.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

The Copyright Act protects original intellectual productions in the fields of literature, music, art and cinematography.

Works of literature include works of language of any kind, including computer programs; theatrical works expressed by gestures or other movements of the body (works of choreography and pantomime); as well as works of a scientific or didactic nature which consist of two-dimensional or three-dimensional pictorial representations, unless they constitute works of art.

Works of art include works of photography (photographic works), architecture and applied art (commercial art).

Cinematographic works (films) are motion pictures in which the events and actions that form the subject of the work are presented either by images only or simultaneously by images and sounds, irrespective of the nature of the process employed in the production or performance of the work.

The Copyright Act does not legally define 'musical art'. However, it is understood in the prevailing literature that musical art includes the supply of tones as a whole, including the melody.

Rights covered

7 | What types of rights are covered by copyright?

The Copyright Act covers exploitation rights and moral rights (see question 13).

Exploitation rights grant the author the exclusive right to exploit his or her work in the manner reserved to him or her in sections 14 to 18a of the Copyright Act. This definitive catalogue comprises of the following rights:

- the right to adapt and translate the work (section 14, paragraph 2);
- the right to communicate to the public of the contents of a work of literature or cinematography for the first time (section 14, paragraph 3);
- the right of reproduction (section 15);
- the right of distribution (section 16);
- the right of rental and lending (section 16a);
- the right of broadcasting (section 17);
- the right of recitation, performance and presentation (section 18); and
- the right to make a work available (section 18a).

The exploitation rights ensure that the author can decide for him or herself if, and to what extent, his or her work shall be exploited. In general, the use of a work is not admissible without the author's consent (except for limitations of copyright that are determined by law). Note that only a certain type of use that can be subsumed under the exploitation rights shall be exclusively reserved to the author. Any new and unclassifiable types of use are not bound by the exploitation rights, and, hence, a work could be used in this manner freely without consent of the author.

Excluded works

8 | What may not be protected by copyright?

The Copyright Act only protects works that are peculiar and intellectual creations. According to court practice the creation of a human mind is deemed peculiar and intellectual if the work is the result of creative mental activity, which has obtained its peculiarity (ie, that which makes it distinguishable from other works) from the personality of the creator, who expresses his or her innermost nature in the respective creation and these personal elements make it unique. Hence, the creation must stand out from ordinary and popular works.

Thoughts as such (eg, ideas) are not protected under Austrian law. Only the specific form of the content is subject to protection. Hence, ideas must be brought in a tangible form of expression in order to be protected by copyright.

A distinction has to be made between protectable ideas and free content (public domain). For instance, any inspiration from nature or the chronology of historical events is in the public domain, hence, anybody can bring this material into a certain form. Only the peculiar form into which the author has transformed the free content shall then be protectable.

Further, according to section 7 of the Copyright Act, laws, orders, official decrees, public notices and decisions, or official works produced exclusively or mainly for official use, shall not enjoy copyright protection.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

The Copyright Act does not include a fair use doctrine. Austrian law expressly determines the rights of the users to freely (ie, without the consent of the author) use a work and hence, prefers specific statutory exemptions from copyright infringement to the general concession that any use of a work could be fair depending on certain factors (eg, purpose of use, effect of the use).

Chapter VII of the Copyright Act contains several provisions stipulating limitations to the exploitation rights of the rights holder. The most relevant are the following:

- Copyright shall not prevent the use of works as evidence in proceedings before courts or other authorities or for the purposes of administration of criminal justice and public safety (section 41).
- Temporary acts of reproduction, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right of the copyright holder (section 41a).
- Any person may make single copies of a work on paper or a similar data carrier for their own use (including for professional use), and on any other data carrier (particularly digital copies) only for personal use and neither for direct nor indirect commercial use.
- Schools and universities may make and distribute copies for purposes of teaching or training in the quantities required for a specific class or lecture (reproduction by schools for own use).
- According to section 42c of the Copyright Act, works that become perceptible to the public during the reporting of current events may, to the extent warranted by the purpose of information, be reproduced, distributed, broadcast or used for public lectures, performances or presentations.
- Works may be reproduced, distributed, broadcasted, made available to the public and used for public recitation, performance and presentation, provided that they are only used coincidentally and in passing without reference to the primary object of the exploitation action (inessential attachment).
- Generally speaking, reproduction and distribution, as well as public recitation and broadcasting, shall be permissible when citing individual passages of a work of language that has been published, provided that the use in its certain extent is legitimated by the specific purpose (section 42f of the Copyright Act). Among other things, citation from works of literature as well as from musical and visual art works shall be admissible.
- According to section 43 of the Copyright Act, 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, distributed, publicly delivered and broadcast for the purpose of reporting.
- Individual articles contained in a newspaper or periodical concerning current economic, political or religious issues may be reproduced and distributed in other newspapers and periodicals (section 44). This shall not apply, however, where reproduction is expressly prohibited by the author (with wording such as 'reprinting only with permission of the publisher' or similar terms).

Architectural works

10 | Are architectural works protected by copyright? How?

According to section 3 of the Copyright Act, 'works of art' also include works of architecture. In order to be protectable, the elected work must not only be functional but also an artistic interpretation. Solely technical solutions are not protectable. Hence, whether an architectural work can be granted protection will depend on whether the form elements rely only on technical aspects or whether they have also been included simply for reasons of taste, beauty and aesthetics, and hence, the artist has decided on the elements by use of creative exploitation of a certain margin.

In addition, models, plans, designs and drawings of buildings can be protected as works, provided that the particular technical task can be solved in different ways and that the concrete selected execution is not only functional, but can be qualified as artistic interpretation (see Austrian Supreme Court, Case No. 4 Ob 26/00b).

Performance rights

11 | Are performance rights covered by copyright? How?

Performance rights in the sense of the rights granted to performers (eg, musicians, actors or dancers, or any person reciting or performing a work of literature or music) and to promoters are protected by the Copyright Act as 'neighbouring (or related) rights'.

Performers are granted moral and exploitation rights. Hence, a performer shall have the exclusive right to fix his or her recitation or performance, including broadcasting thereof, on a video or audio recording medium, and to reproduce or distribute such recording. At the request of the performer, his or her name (or pseudonym) shall be shown on the video or audio media. This may not be done without his or her consent. Further, it is illegal to use a performance in an amended version, if these amendments are of a nature that harms the reputation of the performer (section 68, paragraph 1a of the Copyright Act). The same applies to the distribution and reproduction for the purpose of distribution of audio media on which the performance is fixed.

Unless an exception is permitted by law, recitation and performances given on the instructions of a promoter may be recorded on video or audio media only with the consent of the promoter. Video or audio media produced in violation of this provision may not be reproduced or distributed (section 66, paragraph 5 of the Copyright Act).

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

Photographs

The Copyright Act acknowledges the protection of photographs (ie, images produced by a photographic process, in contrast to photographic works) in the chapter about neighbouring rights. The photographer shall have the exclusive right to reproduce, distribute, publicly present by means of optical devices and broadcast such photographs.

In the case of photographs produced commercially, the owner of the enterprise shall be deemed the producer. Where the producer has marked his or her name (including their pseudonym or trade name) on a photograph, copies thereof made by other persons and intended for distribution shall also bear the corresponding reference to the photographer.

Copyright protection in respect of photographs terminates 50 years after they were taken or, where the photograph is made public before the expiry of that term, 50 years after publication.

Audio recordings

Any person who fixes acoustic phenomena on an audio medium for the purpose of repeatable communication (the producer) shall enjoy the exclusive right to reproduce and distribute the audio medium. Reproduction shall be deemed to include the use of an audio medium for reproduction on another audio medium.

In the case of commercially produced audio media, the owner of the enterprise shall be deemed the producer.

Protection of audio recordings shall terminate 50 years after their production, but if the recording is made public before the expiry of such term, the term shall be 50 years after publication.

Broadcastings

Any person who transmits sounds or images by broadcasting or similar means shall have the exclusive right to transmit the broadcast simultaneously over another transmitter, to fix the broadcast on a video or audio medium (in particular, in photographic form) and to reproduce and distribute such medium.

Protection of broadcasts shall terminate 50 years after the broadcast.

Databases

A database shall enjoy protection under granted neighbouring rights if the obtaining, verification or presentation of its contents have required qualitatively or quantitatively a substantial investment. Therefore, the content of the database and not the structure itself, which could only be protected as copyrightable work, is subject to these provisions, and hence, these provisions more or less implement a protection of the investment.

Any person who has made such an investment shall have the exclusive right to reproduce, distribute, broadcast and publicly communicate the database as a whole or a qualitatively or quantitatively substantial part of the database.

The repeated and systematic reproduction, distribution, broadcasting and public communication of non-substantial parts of the database shall be deemed equivalent to these acts of exploitation where such acts conflict with the normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

The rights in databases shall expire 15 years after the completion of the database; however, if the database is published before the end of that period, the term shall be 15 years after publication.

Moral rights

13 | Are moral rights recognised?

The Copyright Act recognises moral rights of authors in the following ways.

Protection of authorship (section 19)

Where the authorship of a work is contested or the work is attributed to a person other than its creator, the latter shall be entitled to claim authorship. This right would be infringed if a third party wrongly attributes a work to him or herself. Waiver of this right shall be without effect.

Designation of the author (section 20)

The author shall determine whether and in what manner the work is to bear a designation of the author (eg, his or her full name or a pseudonym), or if the work shall be published anonymously.

Protection of works (section 21)

Any abridgements, additions or other alterations to the work itself, its title or the designation of the author must only be made with the author's consent thereto, unless the law permits such alteration. Such

alterations, in particular, shall be permissible if they are in accordance with the accepted practices of fair trading, that is to say, alterations necessitated by the manner or purpose of the authorised use of the work (eg, the adaption to new orthographic rules).

However, there are certain alterations that are under no circumstances admissible, because they infringe the moral interests in the works (protection from distortion of a work). This would be, for instance, the change of the fundamental character of a work.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

There is no requirement of copyright notice in Austria.

However, it is recommended for authors to mark their work as their own in some way, because according to section 12 of the Copyright Act, the person designated in the usual manner as the author on the copies of a work that has been published or on the original of a work of art shall be presumed to be the author, provided the designation gives his or her true name or a pseudonym known to be used by the author – or in the case of works of art, the artist's known mark – failing proof to the contrary.

Hence, if a work is not marked respectively, this presumption of authorship is not applicable, and hence, considering that it is not possible to determine a certain author, the protection period cannot follow the death of the author.

15 | What are the consequences for failure to use a copyright notice?

Not applicable.

Deposit

16 | Is there a requirement of copyright deposit?

No, there is no such requirement.

17 | What are the consequences for failure to make a copyright deposit?

Not applicable.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

No, there is no copyright registration in Austria.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

Not applicable.

20 | What are the fees to apply for a copyright registration?

Not applicable.

21 | What are the consequences for failure to register a copyrighted work?

Not applicable.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The creator of a work is the owner of a copyrighted work. Because of the legal requirement for a work to be a unique, intellectual creation an author can only be a natural person, not a legal entity. For the authorship, it does not matter whether the author has legal capacity or not; therefore, children and mentally disabled people can be authors.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

The Copyright Act only regulates the allocation of rights between employer and employee in copyrightable works for certain cases (eg, software). In all other cases, the general rule would apply whereby the copyright remains with the author (the employee) and the employer can only be successor in exploitation rights.

Section 40b of the Copyright Act provides that if a computer program is created by an employee in the performance of his or her employment duties, the employer shall enjoy an unlimited right of utilisation in the work unless the employer has agreed otherwise with the author of the program. This provision only applies to software; however, there are several legal opinions that would also apply these rules by analogy to other works that have been created by employees in the performance of their employment duties.

In addition, the Austrian Supreme Court has concluded, from the employment of employees in certain functions with the purpose of creating of works (eg, marketing departments) for the benefit of the employer, that the implicit granting of exclusive exploitation rights in the works that have been created in the performance of the employment duties can be assumed, unless an agreement to the contrary exists.

24 | May a hiring party own a copyrighted work made by an independent contractor?

The hiring party does not acquire the copyright in a certain work, considering that this is not transferable, however, he or she is granted (implicitly) certain exploitation rights, if the respective commission makes this necessary. The Austrian Supreme Court has stated that according to sections 26 and 33 of the Copyright Act, the scope of the rights that are granted to the hiring party (the licensee) cannot be broader than required for the purpose of the intended use of the work.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Co-ownership is admissible under section 11 of the Copyright Act. The author, who has created a work together with a third party, and thus, who has worked together consciously with the purpose of creating a work, is qualified as co-author. Further, the respective work must form an indivisible whole. Joint authors share copyright. Hence, any alteration or exploitation of the work requires the consent of all co-owners.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Copyright and moral rights cannot be transferred or be subject of a legal succession. Exploitation rights, however, can be subject to licence

agreements, which assign the right to use the copyright protected work in a certain manner.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Exploitation rights can be licensed to another individual person or a legal entity. There are two types of licensing according to law: section 24 of the Copyright Act regulates that the author may authorise others to non-exclusively use the work by some or all of the methods of exploitation reserved to the author under sections 14 to 18a (authorisation to use); further, he or she may also grant to other persons the exclusive right so to do (right to use), which entitles the licensee to prevent the rights holder, as well as third parties, from using the work in the licensed scope.

28 | Are there compulsory licences? What are they?

A compulsory licence only exists for audio recording (section 58 of the Copyright Act). Where the entitled person has permitted another person to reproduce and distribute a musical work on an audio medium, any manufacturer of such medium may require the entitled person, once the work has been published, to grant him or her the same uses of the work for equitable payment; where the manufacturer has his or her place of residence or principal place of business abroad, this shall apply, subject to international treaties, only on condition that manufacturers having their place of residence or principal place of business in Austria are treated, in the country concerned, in approximately the same way, or at least in the same way as manufacturers having their place of residence or principal place of business in that country. This provision also applies to works of language combined with a musical work, where the rights holder has permitted another person to reproduce and distribute the work of language, so combined, on audio media.

29 | Are licences administered by performing rights societies? How?

Some types of exploitation rights of certain works (depending on the scope of the collecting society's permission) are administered by collecting societies (performing rights societies) upon explicit request of the author. Hence, there is no obligation of an author to license a work through a collecting society (membership is not mandatory).

Their main task is to collect remuneration for the rights holders and distribute it to them. Collecting societies make rights to works and related rights in the sense of copyright law available that provide users with the necessary authorisations against consideration or make other claims under the Copyright Act. The collecting societies conclude, with the rights holders at their request under appropriate and consistent conditions, a contract for the perception of the rights and claims that belong to their field of activity (management agreements).

On this basis, the collecting societies grant permission to use the works under appropriate conditions and for an adequate fee.

Termination

30 | Is there any provision for the termination of transfers of rights?

With regard to the granting of a licence on exploitation rights, the parties are free to agree on the duration of the licence (an indefinite term is possible) and the reasons for terminating the agreement. The parties can agree on a termination at will (a good cause must justify the extraordinary termination), but also on a termination without cause but under adherence to a certain notice period.

Further, the Copyright Act provides certain rules concerning the termination of exploitation rights. Where the right to use a work is not exercised in accordance with the purpose for which it was granted, or is exercised only to an extent so inadequate as to prejudice important interests of the author, the latter, provided he or she is not at fault, may rescind the contract prematurely insofar as it relates to such right to use. The right to rescind the contract for these reasons may not be waived more than three years in advance.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

Not applicable.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Protection starts with the creation of the work.

Duration

33 | How long does copyright protection last?

In Austria, section 60 of the Copyright Act provides for a protection period of 70 years following the death of the author with regard to literary and artistic works, and musical art. In the case of a co-authorship, the protection period ends 70 years after the death of the last surviving co-author. If the speech or performance has been recorded on an audio-visual carrier or an audio carrier, the term of copyright protection lasts for 70 years from publication of the recording.

The neighbouring right for photos lasts for 50 years from the taking of the photo, or where the photograph is made public before the expiry of that term, 50 years after publication.

34 | Does copyright duration depend on when a particular work was created or published?

The protection period for anonymous and pseudonymous works shall run for 70 years after its creation. But when the work is published before the expiry of that period, copyright shall run for 70 years after publication.

Renewal

35 | Do terms of copyright have to be renewed? How?

The terms for copyright protection are not renewable.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

Prior to 1933, copyright protection expired 30 years after the death of the author. On 15 December 1933, the Austrian legislator extended the term, to 50 years after the death of the author. In 1953, the protection term was further increased up to 57 years. The increase was conditioned by the circumstances of the Second World War. It was required that the work was created before 1 January 1949 and that the work was still protected in 1953 (thus the respective creator must have died after 31 December 1902). With an amendment to the Copyright Act on 16 December 1972 (Federal Law Gazette 492/1972), Austria increased the protection term again up to 70 years in accordance with the changes in

Germany in 1965. Since then, the general protection term for copyright protectable works has not changed.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

In general, any use of a work that fulfils the criteria for a protectable work under the Copyright Act in a manner that is comprised by the types of exploitation mentioned in sections 14 to 18a of the Copyright Act without the consent of the author (or co-authors) constitutes a copyright infringement, unless the use falls under the limitations to copyright.

Additionally, if a user has been granted a licence to use the work, and he or she disregards the scope of this licence, this also constitutes an infringement of the exploitation rights of the rights holder (apart from the breach of contract between the parties).

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Claims under the Copyright Act can also be asserted against indirect perpetrators (eg, the instigator), not only against the direct offender.

In particular, a specific liability of the entrepreneur is prescribed. An action for injunction may also be brought against the owner of an enterprise where such infringement has been committed or is likely to be committed within the activities of the enterprise by one of his or her employees or agents. Further, where the infringement giving rise to equitable remuneration is committed by an employee or agent in the course of the activities of an enterprise, the owner of the enterprise shall be liable to pay such remuneration. The owner of the enterprise shall also be liable to compensate damages if he or she was aware or should have been aware of the violation.

Further, a rights holder can also apply for an injunction against an intermediary whose services are used by a third party to infringe a copyright or related right, provided that the intermediary is aware of the copyright infringement and hence, liable under the rules of the Austrian E-Commerce Act.

Available remedies

39 | What remedies are available against a copyright infringer?

The author is entitled to bring a forbearance claim (section 81 of the Copyright Act). Such a cease-and-desist obligation would also include an obligation to remove the source of the infringement and the infringing products. However, this would only be admissible if the infringer is legally entitled to remove such products (section 86).

Preliminary injunctions may be granted, among other things, to secure such cease-and-desist claims (section 87c). With regard to preliminary injunctions, Austrian law focuses on the questions of infringement and validity. According to a lower evidentiary standard in interim proceedings, it is generally sufficient to convince the court that a copyrighted work is valid and that the occurrence of an infringement is more likely than the opposite.

Any person required to pay equitable remuneration or equitable compensation, or to pay damages (see question 41) shall also be required to render accounts to the rights holder and to have their correctness verified by an expert as a first step (section 87a).

The author is also entitled to be furnished with correct and complete information on the producer, content, country of origin and quantity of copies distributed by the offender. The right to information shall belong

to the person to whom the right to distribute copies in Austria belonged at the time of exhaustion (section 87b).

Limitation period

40 | Is there a time limit for seeking remedies?

Claims for equitable remuneration, for equitable compensation, for surrender of profits and for information become time-barred within three years. Forbearance claims and claims for removal become time-barred after 30 years.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Under section 86 of the Copyright Act the owner of a work is entitled to be paid an adequate compensation for the use of the work without his or her consent. The monetary compensation is assessed on the basis of a royalty as far as the adequate compensation (and not damages in case of intentional or negligent behaviour) is concerned. There is minimal case law regarding the assessment of the exact amount of the royalty rate to be paid. The licence fees to be paid usually are assessed on the commonly paid licence fees.

In the event of negligent or intentional behaviour, damages may be awarded instead of an adequate compensation. The author is entitled to either damages, including the own lost profits, or the surrender of profits made by the infringer. In order to facilitate the bringing of evidence, the author is also entitled to assert lumped damage claims. The amount of a lump damage claim is calculated on the basis of double the amount for adequate compensation.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

In Austria, attorneys' fees can be claimed by the winning party from the losing party. The calculation basis for this is laid down in the Attorneys' Tariff Act. Based on a determined amount in dispute, which for intellectual property proceedings is €43,200, the fees for all the required court actions (eg, hearings and written pleading) are calculated. Hence, in Austria, the losing party must reimburse the winning party for the costs of court proceedings calculated on these principles.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Any person who commits an infringement of the kind referred to in section 86, paragraph 1; section 90b; section 90c, paragraph 1; or section 90d, paragraph 1 of the Copyright Act shall be liable to imprisonment not exceeding six months or to a fine not exceeding 360 times the daily rate; 'daily rate' means the unit for the calculation of the fine on a certain daily basis. Therefore, Austrian verdicts determine a certain number of such daily rates and the respective amount for these rates. For instance, if the defendant is sentenced to 180 daily rates at €70, the fine in total amounts to €12,600. The infringement shall not, however, be punishable if it only involves the unauthorised reproduction or an unauthorised recording of a recitation or a performance for personal use or for the personal use of another person, effectively free of charge.

The offender shall be prosecuted only at the request of the person whose right has been infringed, and hence, the prosecutor does not initiate investigations ex officio.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

Section 87b, paragraph 3 of the Copyright Act allows information claims of the rights holder against the internet access provider to identify infringing users if there is an obvious rights infringement.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

There is no fail-safe method of preventing copyright infringement. It depends on the circumstances of the case which measures can prevent or help to prevent copyright infringement. Hence, the respective strategy must always be a tailor-made solution that recognises the specific risks and understands the financial, technical and organisational circumstances of the rights holder to provide the best protection.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

The most important international copyright-related treaties of which Austria is a member are:

- the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention);
- the Universal Copyright Convention;
- the Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement);
- the World Intellectual Property Organization Copyright Treaty (WCT);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT); and
- the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

Further, Austria has been a member of the European Convention relating to questions on copyright law and neighbouring rights in the framework of transfrontier broadcasting by satellite since 11 May 1994.

47 | What obligations are imposed by your country's membership of international copyright conventions?

Austria has transposed the provisions of the most important conventions for copyright law (ie, the Berne Convention, the TRIPS Agreement, and the WCT) into its own domestic law. As the National Assembly declared the accession of these three treaties with no reservations under Austrian constitutional law, there was no necessity for the issuance of further implementing laws. Therefore, all these treaties are directly applicable.

Austria is also a member state of the European Union and, hence, had to transpose a number of directives concerning copyright matters into the national copyright law. The most important directives that are already transposed into national law are the directive on the harmonisation of certain aspects of copyright and related rights in the information society, the directive on the legal protection of databases, the directive

bpv HÜGEL RECHTSANWÄLTE

Sonja Dürager

sonja.duerager@bpv-huegel.com

Donau-City-Straße 11
1220 Vienna
Austria
Tel: +43 1 260 50 0
Fax: +43 1 260 50 133
www.bpv-huegel.com

on satellite broadcasting and cable retransmission, and the directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

UPDATE AND TRENDS

Emerging trends and new legislation

48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

With the amendment of the copyright law as of 13 June 2018 (BGBL I Nr. 63/2018), the free use of works for the benefit of disabled persons was adapted to the mandatory provisions of the European Directive 2017/1563 (EU) by amending section 42d with regard to blind, visually impaired or otherwise reading impaired persons. In section 43 the free use of public speeches was clarified thereby that it shall be admissible for any information purposes (instead of 'for the purpose of media coverage').

The Council of the European Union adopted the new EU Directive on Copyright on 15 April 2019 (Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2016/0280 (COD); COM/2016/0593 final). After publication of this directive in the Official Journal of the EU, the member states will have 24 months to transpose the new Directive into their national law. There are already political voices in Austria, that there shall be exemptions for start-ups from the provision about the 'best effort' obligation of online platforms to prevent unauthorised uploading of content by users (article 13 of the Directive).

Brazil

Attilio Jose Ventura Gorini, Rodrigo Borges Carneiro and Fernando de Assis Torres

Dannemann Siemsen

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

Copyright is regulated in Brazil by Law No. 9,610 of 19 February 1998 (the Copyright Act). Software, though listed in the Copyright Act, is covered in more detail by a separate piece of legislation: Law No. 9,609 of 19 February 1998 (the Software Law). However, the Copyright Act is applicable to software when the Software Law does not address a specific issue.

The Brazilian Criminal Code (Decree-Law No. 2,848 of 7 December 1940) also contains particular provisions about copyright.

Enforcement authorities

2 | Who enforces it?

The Ministry of Culture is the primary government body responsible for the enforcement of copyright statutes and regulations. It is formed of:

- three boards of directors, including the intellectual rights board that supports, creates, implements and evaluates policies related to copyright in Brazil;
- three independent bodies – the National Agency of Film (ANCINE), the Brazilian Museums Institute (IBRAM) and the National Institute of Historic and Artistic Patrimony Heritage (IPHAN);
- five foundations, including the National Library Foundation, which are responsible for registering works protected by copyright;
- six secretariats; and
- local representations throughout the country.

The Public Prosecutor's Office also enforces the law since it is an independent entity responsible for supervising compliance with laws and respect for social and individual rights. Brazil also has police precincts specialising in intellectual property-related matters that carry out investigations whenever a copyright infringement is detected.

Civil disputes involving copyright are decided by the state courts while criminal cases are held by criminal state courts.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The Copyright Act has few particular provisions about digital exploitation of works.

The definition of 'reproduction' in section 5 item VI encompasses making one or more copies of works in any permanent or temporary storage by electronic means or any other means of fixation that may be devised in the future.

The definition of intellectual works in section 7 encompasses creations of the mind whatever their mode of expression or the medium, tangible or intangible, known or that may be devised in the future.

In broad terms, section 29 states that the express prior authorisation of the author of a literary, artistic or scientific work shall be required for any kind of use, including complete or partial reproduction, publication, distribution and transmission, among others, of the author's work.

In item VII of article 29 the law defines distribution for the purposes of offering works or productions by cable, optic fibre, satellite, electromagnetic waves or any other system enabling the user to select a work or production and receive it at the time and place of his choice, provided that the access to the works or productions is made through any system requiring payment on the part of the user.

Item 1 of section 30 contains an exclusion, regarding digital exploitation in that the exclusive right of reproduction shall not be applicable where the reproduction is temporary and done for the sole purposes of making the work, phonogram or performance perceptible by means of an electronic medium, or where it is transitory or incidental, provided that the reproduction is done in the course of the use of the work that has been duly authorised by the owner.

Section 184, paragraph 3 of the Brazilian Criminal Law deals more closely with the concept of digital exploitation, as it classifies copyright infringement as a crime and fixes a penalty of two to four years imprisonment and a fine if:

[T]he violation consists of offering to the public by cable, fibre optics, satellite, radio waves or any other system that allows the user to select a work or production to receive it at a time and place previously determined by those who make the demand, for profit, directly or indirectly, without the express authorisation, as appropriate, from the author, performer, producer, or those who represent them.

Law 12,965, from 23 April 2014, which regulates the internet environment, excluded copyright from the scope of the Law while addressing the civil liabilities of internet service providers (ISPs) and establishing a judicial notice-and-takedown proceeding, since there is a pre-draft bill being discussed regarding copyright reform in Brazil (see 'Update and trends'). Therefore, digital exploitation of copyrighted works in Brazil still lacks proper and specific legislation.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

There is no such express provision in Brazilian copyright legislation. However, if the acts of infringement are considered to have been performed in Brazil's national territory, local courts applying rules

regarding jurisdiction under the Civil Procedure Code may decide that they have jurisdiction, even if the website is foreign-owned or foreign-operated.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

There is no centralised agency. As mentioned in question 2, the Ministry of Culture and its boards of directors, independent bodies, foundations, secretariats, and local representations are the bodies that are primarily responsible for enforcing copyright in Brazil.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

A 'protected work', or more accurately a 'protected intellectual work', is defined in section 7 of the Brazilian Copyright Act as 'creations of the spirit, expressed by any means or fixed in any support, tangible or intangible, known or which may be invented in the future'.

Section 7 continues with a 13-point non-exhaustive list of examples of 'protected intellectual works', which are as follows:

- literary, artistic and scientific texts;
- conferences, speeches, sermons and other works of the same nature;
- dramatic and dramatic-musical works;
- choreographic and pantomime works, whose scenic performances are fixed in writing or by any other means;
- musical compositions, with or without lyrics (the lyrics can also be protected separately as a literary work);
- audiovisual works, with or without sound, including cinematographic works;
- photographic works and those created by any process that is analogous to the photographic process;
- drawings, paintings, pictures, sculpture, lithography and kinetic art;
- illustrations, geographical charts and other works of the same nature;
- projects, sketches and plastic works concerning geography, engineering, topography, architecture, landscaping, scenography and science;
- adaptations, translations and other transformations of the underlying works, presented as new intellectual creations;
- computer programs (software); and
- collections, compilations, anthologies, encyclopaedias, databases, dictionaries, and other works which, owing to the selection, organisation and disposition of their content, constitute an intellectual creation.

Performance of a pre-existing work by individuals (neighbouring rights) is also protected by the Copyright Act. Further, the neighbouring rights of producers of phonograms and of broadcasting organisations are expressly protected (sections 89 to 100), as is software (the Software Law).

Copies of works of art made by the author have the same protection as the original work (section 9). In addition, the protection of intellectual works includes the protection of their titles when related to a specific intellectual work if they are original and cannot be confused with the titles of prior works of the same type (section 10).

Rights covered

7 | What types of rights are covered by copyright?

Section 29 of the Copyright Act includes a non-exhaustive list of types of use of a copyrighted work that require the prior authorisation of the work's owners, which are as follows:

- complete or partial reproduction;
- publication;
- adaptation, setting to music or any other transformation;
- translation into any language;
- incorporation in a phonogram or in an audiovisual production;
- distribution not provided for in a contract signed by the author with third parties for the use or exploitation of the work;
- distribution for the purpose of offering works or productions by cable, fibre optics, satellite, electromagnetic waves or any other system enabling the user to select a work or production and receive it at the time and place of his or her choosing, provided that access to the works or production is made through any system requiring payment on the part of the user;
- direct or indirect use of the literary, artistic or scientific work in one of the following forms:
 - performance, recitation or declamation;
 - musical performance;
 - use of loudspeakers or comparable systems;
 - radio or television broadcasting;
 - reception of a radio broadcast in places frequented by the public;
 - provision of background music;
 - audiovisual, cinematographic or equivalent presentations;
 - use of man-made satellites;
 - use of optical systems, telephone or other lines, cables of all kinds, and such comparable means of communication as may be devised in the future;
 - exhibition of works of three-dimensional and figurative art;
- incorporation in databases, storage in a computer, microfilm and any other means of archiving of that kind; and
- any other form of use that exists at present or might be devised in the future.

Excluded works

8 | What may not be protected by copyright?

The Brazilian Copyright Act expressly excludes a number of works from protection in an exhaustive list (section 8). Thus, the following works are not protected by copyright:

- ideas, normative proceedings, systems, methods, projects or mathematical concepts;
- schemes, plans or rules for mental acts, games or business;
- blank forms to be filled in with any type of information, scientific or otherwise, and instructions for filling in such forms;
- texts of treaties, conventions, laws, decrees, regulations, court decisions and other official acts;
- information which is in common use, such as calendars, agenda, registrations and subtitles;
- isolated names and titles; and
- the industrial or commercial use of ideas contained in works.

Fair use and fair dealing

- 9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

As a civil law country, Brazil does not have provisions akin to those of fair use or fair dealing. Rather, there is an exhaustive list with limitations on the rights of the authors that can be raised as a defence in litigation.

According to section 46 of the Copyright Act, the following do not constitute copyright infringement:

- the reproduction:
 - of news in the daily or periodical press, or of an informative article published in a daily or periodical publication, including the name of the author (if the work is signed) and title of the publication from where the work was taken;
 - in daily or periodical publications of speeches made in public meetings of any nature; and
 - of portraits, or of any other representation or image, made for hire, when reproduced by the person who hires the artist, provided there is no opposition by the person in the portrait or his or her heirs;
- the reproduction, in a single copy, of short extracts from a work for the copier's private use, provided that it is done without a profit motive (changing the format and time-shifting, even if for private purposes and of the entire work, would, in principle, be an infringing act);
- the citation in books, newspapers, magazines or any other means of communication of extracts of any work, for the purposes of study, criticism or controversy, to an extent that is justified to achieve the given purpose, indicating the name of the author and the origin of the work;
- notes taken in teaching facilities by the people at whom the teaching is aimed, provided the full or partial publication has the prior and express authorisation of the person who taught;
- the use of literary, artistic or scientific works, phonograms or radio and television broadcasts in commercial establishments, exclusively for demonstration to clientele, provided these commercial establishments commercialise the support or equipment which permit their utilisation (eg, stores that sell CDs and DVDs are allowed to play the musical or audiovisual works contained in these media inside their establishments without any prior authorisation);
- stage representations (theatrical works) and musical executions when made in the family circle or with a didactic purpose at teaching establishments, provided they are made without a profit motive;
- the use of all copyrighted works for the purposes of producing evidence before the courts or before an administrative entity; and
- the reproduction, in any works, of short extracts of pre-existing works of any nature or of the entire work, when of visual art, whenever the reproduction in itself is not the main objective of the new work and when the normal exploitation of the reproduced work is not impaired nor is unjustified damage caused to the author's legitimate interests.

In addition, paraphrases and parodies can be freely made so long as the original work is not reproduced and they do not cause discredit to the author (section 47). Works permanently situated in public spaces can be reproduced by paintings, drawings, photographs and audiovisual proceedings (section 48).

Finally, copyright on software is subject to a different set of limitations. Section 6 of the Software Law stipulates that the following will not be deemed to be infringement:

- the reproduction in a single copy of a legitimately acquired copy, for backup purposes;
- the partial quotation of the program, for didactic purposes, so long as the author is identified;
- a similarity between two programs when this is due to the functional characteristics of their application, obedience to normative or technical precepts, or the limitation in the number of alternative forms of expression; and
- the integration of a program, maintaining its essential characteristics, to an operational or application system which is technically indispensable to the needs of the user, provided it is for the exclusive use of the person who performed the integration.

Architectural works

- 10 | Are architectural works protected by copyright? How?

According to section 7, item X of the Copyright Act, architectural works are protected by copyright. The treatment given to architectural works is the same as that given to any other work covered by this section.

The author of an architectural project can repudiate authorship if it is altered without his or her consent, during or after completion of the construction (section 26). Where this occurs, the proprietor of the modified construction will have to pay damages caused to the author if the author's name is mentioned (by the proprietor) as being the author of the project (section 26).

Performance rights

- 11 | Are performance rights covered by copyright? How?

According to the Copyright Act, performers have the right to allow (royalty-free or otherwise) or prohibit the following acts:

- the fixation of their interpretations or executions;
- the reproduction, public performance or rental of their interpretations;
- the making available to the public of their interpretations in a manner that any person can access at a time and place of their choice; and
- any other mode of utilisation of their interpretations.

Neighbouring rights

- 12 | Are other 'neighbouring rights' recognised? How?

The Copyright Act also recognises the so-called 'neighbouring rights' for phonogram producers (section 93) and broadcasting organisations (section 95).

Phonogram producers have the exclusive right to authorise or prohibit, either for a consideration or free of charge, the reproduction, distribution, communication to the public, or any other form of use of their phonograms.

Broadcasting organisations, in turn, have the exclusive right to authorise or prohibit the retransmission, fixation and reproduction of their broadcasts, and the communication of those broadcasts to the public by television in places frequented by the said public, without prejudice to the rights of the owners of the intellectual property embodied in the programmes.

Moral rights

- 13 | Are moral rights recognised?

Moral rights are very important components of copyright legislation in Brazil. Because intellectual works are considered to be 'creations of the spirit' (section 7), they are treated as an extension of the personality of the author and must, therefore, be carefully protected.

In light of the above, moral rights cannot be assigned or waived (section 27). As a consequence, they cannot be owned by a legal entity in any circumstances, even in cases where the legal entity is the initial owner of the relevant work.

The moral rights of the author (section 24) are as follows:

- (i) the right at any time to claim authorship of the work;
- (ii) the right to have the author's name, pseudonym or agreed-upon sign or symbol indicated or announced, as being the author, in the exploitation of the work;
- (iii) the right to keep the work unpublished;
- (iv) the right to maintain the integrity of the work, by opposing any modifications or the practise of an act which may in any way affect him or her as the author, or his or her reputation or honour;
- (v) the right to modify the work, before or after it is used;
- (vi) the right to withdraw the work from circulation or to suspend any form of already authorised exploitation, when the circulation or exploitation may adversely affect his or her reputation and image; and
- (vii) the right to have access to a single and rare original or copy of the work for the purposes of preserving the work's memory by means of photographic or similar process, in a way that causes the least inconvenience to the owner of the work who, in any event, will be indemnified of any damages caused.

After the death of the author, the rights referred to under points (i) to (iv) above will pass to his or her heirs who, in turn, will have the right to enforce them (section 24, first paragraph).

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

There is no such requirement.

15 | What are the consequences for failure to use a copyright notice?

Taking into account that copyright notice is not a legal requirement in Brazil, there are no consequences for not displaying a copyright notice.

Deposit

16 | Is there a requirement of copyright deposit?

No. A deposit is not mandatory for copyright purposes. Literary works which must be deposited before the National Library, but this is for the purposes of controlling Brazilian literary heritage and the defence and preservation of the national language and culture (Law No. 10,994 of 14 December 2014). This law also includes foreign works published in Brazil.

17 | What are the consequences for failure to make a copyright deposit?

A deposit is not mandatory for copyright purposes.

Law No. 10,994 of 14 December 2004 establishes that not depositing a work with the National Library may lead to a fine of 100 times the current price of the work, or the seizure of a sufficient number of samples required to fulfil the legal deposit.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

Section 19 of the Copyright Act says that any author may register his or her work with the public body defined in the introduction and in paragraph 1 of article 17 of Law No. 5,988 of 14 December 1973.

There is no central entity for the registration of works. Therefore, they will have to be registered before different entities, depending on the nature of the work. Musical works will be registered at the School of Music; works of visual art at the School of Beaux-Arts of the Federal University of Rio de Janeiro; and engineering and architectural works at the Federal Council of Engineering, Architecture and Agronomy.

Literary works can be registered before the National Library, which, more recently, has also been accepting the registration of all other works, not just those of a literary nature. Given that the structure provided by the National Library is usually considered to be that which is best suited to receive such registrations, it is advisable to attempt to use this system first.

In order to register a work before the National Library, the author must fill in a comprehensive form with his or her qualifications and submit copies of the work and other documentation.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

No. Copyright protection is independent of any registration or formality (section 18), and registration serves as a mere declaration.

20 | What are the fees to apply for a copyright registration?

Currently, the fee charged by the National Library is approximately 80 Brazilian reais per work. The other registration entities mentioned above have similar requirements and fees.

21 | What are the consequences for failure to register a copyrighted work?

There are none, as registration is not mandatory in Brazil.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

As a rule, initial ownership of all works will be vested in the individuals who created them (section 11). Therefore, authorship and initial ownership will be one and the same in most cases. There are only two exceptions to this rule: software created under employment and collective works. The latter are created by the initiative, organisation and responsibility of an individual or a legal entity, which publishes the work under its name or mark, and which consists of the participation of different authors whose contributions merge into an autonomous creation (section 5, item VIII, sub-item h).

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

The concepts of commissioned works and works made in the course of employment (or works made-for-hire) do not exist in Brazil. When the current Copyright Act passed through congress (see 'Update and trends'), the draft provisions dealing with these concepts were

excised and not replaced. Therefore, in principle (and unless a given work can be categorised as a collective work), the employer or the commissioner will only become the owner of a work by virtue of an assignment of rights. The only exception to this rule is in the case of software.

Section 4 of the Software Law stipulates that, unless an agreement is made to the contrary, the employer or commissioner of a work will be the exclusive owner of economic rights to a work created by an employee or commissioned person if the work was created in the course of a contractual relationship which is expressly related to research and development of the software; and when the creation of the software is expressly foreseen in the contract or when the nature of the contractual relationship so determines.

Compensation for the creation of the work will be considered to be included in the regular contractual compensation or salary, unless the contract stipulates otherwise (Software Law, section 4, first paragraph).

24 | May a hiring party own a copyrighted work made by an independent contractor?

Except for in the case of the software (see question 23) there is no automatic assignment of copyright by virtue of the hiring relationship, so the assignment has to be expressly agreed in writing.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Co-authorship is expressly foreseen in the Copyright Act in section 15, and it may apply to both persons and entities. However, it is important to note that merely revising, updating or managing the process of publishing literary, artistic or scientific works does not create co-authorship, unless the contribution goes beyond these concepts and actually results in the creation of an original work (section 15).

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

With the exception of an author's moral rights, all economic rights can be fully assigned to a third party. In view of the fact that the concept of works made-for-hire does not exist in the Copyright Act, assignment of rights is the norm in the various industries that deal with copyrighted works in Brazil. The economic rights of the authors can be assigned, but this must always be by means of a written instrument. Moral rights, however, cannot be assigned.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

The comments made concerning assignments also apply to licensing.

28 | Are there compulsory licences? What are they?

There are no compulsory licences in Brazilian copyright legislation.

29 | Are licences administered by performing rights societies? How?

Licences for public performance are administered by performing rights societies.

The public performance right is one of the economic rights and is currently regulated by sections 5, 29 and 31 of the Copyright Act.

Brazil has associations of owners that form the Central Office for the Collection and Distribution of Copyrights (ECAD). ECAD is the national copyright collection agency in Brazil that collects and passes the rights to the associations.

Termination

30 | Is there any provision for the termination of transfers of rights?

If there is no contractual stipulation regarding the term of duration of an assignment, section 49, item III of the Copyright Act says that, the assignment rights will expire after a five-year term.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

An assignment or licensing of rights can be recorded before competent authorities such as the National Library. The authority responsible for the recording may vary according to the nature of the work but, in most of the cases, the recording is performed upon the filing of an application and payment of an official fee.

It is also possible to register a contract before the Registry of Titles and Deeds. This is not mandatory, but can be useful for evidential purposes.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Protection begins with the creation of the work, with a few exceptions, as described in question 33.

Duration

33 | How long does copyright protection last?

See table overleaf.

34 | Does copyright duration depend on when a particular work was created or published?

Yes. It may vary according to the nature of the work (see table above).

Renewal

35 | Do terms of copyright have to be renewed? How?

No. There is not possibility of renewal.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

It has not extended the term of copyright protection since the current copyright law of 1998 was enacted.

Duration of copyright protection in Brazil		
Type of work	Duration	Comments
Literary	Life plus 70 years	Term counted from 1 January of the year following the death of the author, or of the last-surviving co-author in cases of joint authorship
Dramatic	Life plus 70 years	Term counted from 1 January of the year following the death of the author, or of the last-surviving co-author in cases of joint authorship
Musical	Life plus 70 years	Term counted from 1 January of the year following the death of the author, or of the last-surviving co-author in cases of joint authorship
Artistic	Life plus 70 years	Term counted from 1 January of the year following the death of the author, or of the last-surviving co-author in cases of joint authorship
Sound recordings	Fixation plus 70 years	Term counted from 1 January of the year following fixation
Films	Publication plus 70 years	Term counted from 1 January of the year following publication
Typographical arrangements	Life plus 70 years	Term counted from 1 January of the year following the death of the author, or of the last-surviving co-author in cases of joint authorship
Databases	Life plus 70 years	Term counted from 1 January of the year following the death of the author, or of the last-surviving co-author in cases of joint authorship
Photographic	Publication plus 70 years	Term counted from 1 January of the year following publication
Broadcasting	Transmission plus 70 years	Term counted from 1 January of the year following transmission
Software	Publication plus 50 years	Term counted from 1 January of the year following publication (and if there is no publication, the term is counted from creation)
Titles of periodicals	Last issue plus one year	Term counted from the publication of the last issue of the periodical
Titles of annual periodicals	Last issue plus two years	Term counted from the publication of the last issue of the periodical
Performances	Public performance of execution plus 70 years	Term counted from 1 January of the year following publication

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

In Brazilian law, infringement acts can be considered both civil torts and crimes. The crimes are set out in section 184 of the Criminal Code. Generally, civil torts and crimes have the same features.

The restricted acts (modes of utilisation), which, if performed without the author's prior consent, constitute acts of infringement, are listed in section 29 of the Copyright Act (see question 7).

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Whoever sells, exposes to sell, hides, acquires, distributes, stocks or uses illegally reproduced works with the purpose of selling, in order to obtain a direct or indirect gain, advantage or profit will be considered as jointly responsible with the infringer. An importer and distributor will also be deemed to be jointly responsible for the infringement when reproduction has been carried out abroad.

Available remedies

39 | What remedies are available against a copyright infringer?

The remedy available is the filing of an indemnification court action with a preliminary injunction to cease the infringement. Section 102 expressly foresees this possibility and says that any owner of rights whose work is fraudulently reproduced, disclosed or used in any other way may apply for the seizure of the copies or originals made or the stoppage of the disclosure, without prejudice to whatever indemnification may be applicable.

It is also possible to deliver cease-and-desist letters, but this is not mandatory.

Limitation period

40 | Is there a time limit for seeking remedies?

One of the biggest problems of the Brazilian Copyright Act is the presidential veto to section 111, which dealt with the statute of limitations concerning filing court actions due to copyright infringement. In the case of a lack of specific regulations, the general rules of the Civil Code are applicable.

According to article 206, paragraph 3, item V, the statute of limitations is three years.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Section 103 of the Copyright Act deals with monetary damages for copyright infringement. Any person who publishes a literary, artistic or scientific work without the authorisation of the owner of the copyright shall forfeit to the latter the copies that are seized and shall pay him or her the price of those that have been sold.

The legislation also contains a rule that may be applied in case it is not possible to determine the exact number of infringing copies. It says that 'where the number of copies constituting the fraudulent edition is unknown, the offender shall pay the value of 3,000 copies in addition to the copies seized'.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

As a general rule foreseen in the Civil Procedure Code, attorneys' fees and court expenses will be due in all court actions, with the exception of the cases in which the party requested and obtained free access to the judiciary system.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Section 184 of the Criminal Code is the only provision that deals with copyright. It provides three different classifications of copyright infringement:

- if the violation consists of total or partial reproduction, aiming to profit directly or indirectly, by any means or process, from an intellectual work, interpretation, performance or phonogram, without the express permission of the author, performer or producer, as appropriate, or from whom they are represented;
- if the person, for the purpose of direct or indirect profit, distributes, sells, exposes for sale, rents, introduces into the country, acquires, conceals or has on deposit an original or copy of an intellectual work or phonogram reproduced in violation of copyright, the rights of the performer or the rights of the producer of a phonogram, or who rents the original or a copy of an intellectual work or phonogram, without the express permission of the rights holders or those who represent them; and
- if the violation consists of offering to the public by cable, fibre optics, satellite, radio waves or any other system that allows the user to select a work or production to receive it at a time and place previously determined by those who make the demand, for profit, directly or indirectly, without the express authorisation, as appropriate, from the author, performer, producer, or those who represent them.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

No Brazilian legislation is still very incipient regarding online infringement and, in particular, regarding online copyright infringement, and there are no specific provisions in the legislation.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

Regarding online copyright infringement, an alternative and preventive measure may be reaching agreements with ISPs and search engines or stimulating the federal and state public ministries to reach such an agreement as an attempt to curb the dissemination of such illegal activities on the internet.

Copyright infringement is also avoided through campaigns and police measures aimed at ensuring access to content.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

Brazil is a party to the following main international treaties and conventions involving copyright:

- the Berne Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations – Brazil has been a member since 9 February 1922;
- the 1971 Paris Revision of the Berne Convention – entered into force on 6 May 1975 by means of Decree No. 75,699;
- the Universal Copyright Convention – entered into force on 4 July 1960 by means of Decree No. 48,458;



Attilio Jose Ventura Gorini

gorini@dannemann.com.br

Rodrigo Borges Carneiro

rcarneiro@dannemann.com.br

Fernando de Assis Torres

ftorres@dannemann.com.br

Rua Marquês de Olinda

70, Botafogo

22251-040

Rio de Janeiro

Brazil

Tel: +55 21 2237 8988/8946

Fax: +55 21 2237 8922

www.dannemann.com.br

- the Rome Convention – entered into force on 19 October 1965 by means of Decree No. 57,125;
- the Phonograms Convention – entered into force on 24 December 1975 by Decree No. 76,906;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – entered into force on 30 December 1994 by means of Decree No. 1,355; and
- the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, Washington Revision (1946) – entered into force by means of Decree No. 26,675 of 18 May 1949.

Following ratification before the relevant international bodies, the text of treaties is translated into Portuguese by local diplomatic bodies (*Itamaraty*) and submitted for presidential approval and sanction by means of a presidential decree, which reproduces the entire text of the treaty making it enforceable as regular legislation.

47 | What obligations are imposed by your country's membership of international copyright conventions?

Formal reciprocity, that is, granting nationals of other designated countries the same level of protection and rights as extended to one's own nationals.

Ensuring exclusive rights is also one of the most important international obligations accepted by Brazil, as required by the Berne Convention, as well as fixing limitations following the parameters of section 13 of TRIPS, which says that limitations must be confined to certain special cases, not conflict with a normal exploitation of the work, and not unreasonably prejudice the legitimate interests of the rights holder.

UPDATE AND TRENDS

Emerging trends and new legislation

- 48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

A bill to update the current Brazilian Copyright Law has been under discussion for several years, but in the last year no developments have occurred in the legislative congress in respect to it.

The main recent developments in copyright law are linked to the public performance right, payments linked to which are collected and distributed in Brazil by ECAD the Central Office of Collection and Distribution.

On 8 May 2019, the Supreme Court, in the judgment of the Direct Action of Unconstitutionality (ADI) 5800, filed by ECAD, unanimously ruled unconstitutional the Law 92/2010 of the State of Amazonas. This law barred associations, foundations or philanthropic institutions and state public utilities from collecting copyright payments for the public performance of musical works.

In his vote for ADI, Minister Luiz Fux, rapporteur, explained that it is the exclusive responsibility of Brazil's Union to legislate on civil law and property rights and establish rules of intervention in the economic field, and thus states have no power to legislate in this area.

Chile

Claudio Magliona, Nicolás Yuraszeck and Carlos Araya

Magliona Abogados

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation is Law No. 17,336 on Intellectual Property (the Law). Among other matters, the Law regulates the nature, duration, ownership and exceptions of copyrighted works and permitted acts in relation to such works, including moral rights, and provides for:

- civil remedies and criminal offences for copyright infringement;
- neighbouring rights of artists, interpreters and performers of phonogram producers and broadcasters; and
- limitation of liability of collective copyright organisations and internet service providers.

Enforcement authorities

2 | Who enforces it?

Civil and criminal courts are in charge of copyright enforcement, depending on the nature of the infringement.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The digital exploitation of copyrighted works is not addressed in a separate section but throughout the Law. For example, when dealing with exceptions and limitations, infringements, digital rights management information violations, and internet service providers' limitation of liability.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

There is no special rule in the Law dealing with foreign-owned or foreign-operated websites that infringe copyright, therefore general rules are applied. The Law covers the rights of all Chilean authors, performers, producers of phonograms, and Chilean and foreign broadcasting organisations domiciled in Chile. The rights of foreign authors, performers, producers of phonograms and broadcasting organisations who or which are not domiciled in the country shall enjoy the protection afforded under the international conventions that Chile has signed and ratified (eg, the Universal Copyright Convention, the Berne Convention, the Rome Convention, and the Trade-Related Aspects of Intellectual Property (TRIPS) Agreement; see question 46).

Agency

5 | Is there a centralised copyright agency? What does this agency do?

There is a copyright agency called the Department of Intellectual Rights, which has fairly limited competencies. It is mainly limited to managing the Intellectual Property Registry, which is a public registry where copyright and neighbouring rights are recorded, in addition to the assignment of said rights.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

The Law protects the rights that the authors of intellectual works in the literary, artistic and scientific domains acquire through the sole fact of their creation, whatever their form of expression, and the neighbouring rights it establishes.

The following, among others, are especially protected:

- books, brochures, articles and written documents, whatever their form and nature, including encyclopaedias, guidebooks, dictionaries, anthologies and compilations of all kinds;
- conferences, speeches, lectures, memoirs, comments and works of the same kind, both in their oral as well as in their written or recorded versions;
- dramatic, dramatic-musical and theatrical works in general, and likewise choreographic and pantomimic works, whose development has been set down in writing or in another form;
- musical compositions, with or without lyrics;
- radio or television adaptations of any literary production, works originally produced by radio or television, and the corresponding librettos and scripts;
- newspapers, magazines or other publications of the same kind;
- photographs, engravings and lithography;
- cinematographic works;
- architectural projects, sketches, models and mapping systems;
- geographical or armillary spheres, as well as plastic works related to geography, topography or any other science and, in general, audiovisual material;
- paintings, drawings, illustrations and similar works;
- sculptures and similar figurative works of art, even though they may be applied to industrial uses, provided their art value may be assessed separately from the industrial character of the object to which they are incorporated;
- scenographic sketches and the respective sceneries, if the author is the sketch artist;

- adaptations, translations and other transformations, if they have been authorised by the author of the original work if it does not belong to the public domain;
- videograms and slide shows;
- computer programs, whatever their mode or form of expression, and source programs or object programs, including their preparatory documents, technical descriptions and user manuals;
- data collection or collection of other materials, in typewritten form or any other form, which, due to the selection or disposition of their contents, constitute creations of an intellectual nature. (This protection does not include the data or materials themselves, and is to be understood as notwithstanding any subsisting copyright in connection with the data or material included in the collection); and
- textile designs or models.

Rights covered

7 | What types of rights are covered by copyright?

Copyright comprises patrimonial and moral rights, which protect the use, authorship and integrity of the work.

Moral rights

The author, as the exclusive holder of the moral right, has the following powers for life:

- to claim the authorship of the work, associating it with his or her name or known pseudonym;
- to oppose any deformation, mutilation or any other modification performed without his or her express and previous consent. Works of preservation, reconstitution or restoration of works that have suffered damages that may alter or reduce their artistic value will not be considered as such;
- to maintain the work unpublished;
- to authorise third parties to finish the unfinished work, with the prior consent of the publisher or assignee, if any; and
- to demand that his or her wish that the creator of the work remains anonymous or pseudonymous be respected, provided the work does not belong to the public domain.

Patrimonial rights

The copyright holder, or whoever is expressly authorised by him or her, will be entitled to use the work in any of the following forms:

- to publish (ie, a public offer of a work) by editing, recording or broadcasting it on radio or television, performing, executing, reading, reciting, exhibiting and, generally, through any other public communication means that is currently known or may be known in the future;
- to reproduce it through any process;
- to adapt it to another genre, or to use it in any other way implying a variation, adaptation or transformation of the original work, including its translation;
- to perform it publicly by means of radio or television broadcasting, phonographic records, cinematographic films, tape recordings or any other material support that may be used on sound and voice reproduction apparatus, with or without images, or through any other means; and
- to distribute tangible copies to the public by means of its sale, or any other property transfer of the original work or the copies that have not been the object of a sale or any other property transfer authorised by him or her or pursuant to this law.

Excluded works

8 | What may not be protected by copyright?

The following are excluded from the Law's scope of protection.

Ideas without formal expression

Generally, although it is not expressly indicated in the Law, said rule stems from international treaties ratified by Chile, the essential regulations of which are incorporated into domestic laws (see questions 46 and 47). Thus, in accordance with article 2 of the World Intellectual Property Organization (WIPO) Copyright Treaty, copyright protection includes expressions but not ideas, procedures, operating methods or mathematical concepts themselves.

Works in the public domain

Public domain works (eg, works of folk heritage by unknown authors, such as songs, legends and dances) may be used by anyone, provided the work's authorship and integrity are respected (moral rights).

Public domain works include:

- works where the protection term has expired;
- the work of an unknown author;
- works whose holders have disclaimed protection;
- works by foreign authors who live outside the country and are not protected by international treaties ratified by Chile; and
- works that have been expropriated by the state, unless the Law specifies a beneficiary.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

In Chile, there are no fair use nor fair dealing doctrines, but a similar exception to the doctrine of fair use was introduced by the 2010 copyright amendment. This exception allows the incidental and exceptional use of copyrighted works for the purpose of criticism, commentary, caricature, teaching, academic interest or research, as long as such use does not constitute a covert exploitation of the work. This exception is not applicable to audiovisual works of a documentary nature.

Architectural works

10 | Are architectural works protected by copyright? How?

The Law provides that such works are protected by copyright, but includes a series of exceptions related to these kinds of works. Thus, their reproduction and publication are permitted by means of photography, cinema, television and any other similar procedure, without the copyright holder's previous authorisation and without having to pay for it. The owner may make any modification to the works, and the architect may only oppose his or her name being mentioned as author of such a project.

Performance rights

11 | Are performance rights covered by copyright? How?

The Law acknowledges a series of neighbouring rights to copyright to artists, interpreters and performers (ie, actors, singers, dancers and musicians, among others), empowering them to authorise or forbid broadcasting of a work in which they feature, and to receive payment for the work's public use, notwithstanding copyright.

With regard to the interpretations and performances of artists, the following acts are prohibited without their express authorisation, or that of their heirs or assignees:

- the recording, reproduction, transmission or retransmission by broadcasting or television companies, or the use by any other means, for profit, of said interpretations or performances;
- non-established interpretations or performances being recorded in a phonogram and the reproduction of said recordings;
- broadcasting through wireless media or public communication of their live interpretations or performances; and
- public distribution through sale or any other property transfer of the original or copies of their interpretation or performance that have not been the object of a sale or other property transfer authorised by the artist, or his or her assignee, in accordance with this Law.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

Together with the neighbouring rights of artists, interpreters and performers over their interpretations and performances, the Law acknowledges neighbouring rights to phonogram producers and to broadcasters.

Phonogram producers are entitled to authorise or prohibit the reproduction, renting, loan and other uses of their phonograms, including their broadcasting through wireless media or on-demand modalities. With regard to broadcasters, radio and television companies have the exclusive right to authorise or prohibit the recording of their broadcasts and their reproduction, and also the right to fees for the retransmission of said broadcasts or their public communication in places of free access.

Likewise, broadcasters may perform ephemeral recordings of interpretations or performances of an artist to simplify their transmission, which constitutes a right, from the point of view of the broadcaster, and from the point of view of the artist, of an exception to, or limitation of, his or her exclusive right to authorise the reproduction of his or her interpretation or performance.

Moral rights

13 | Are moral rights recognised?

See question 7.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

A copyright notice is not a requirement for copyright holders to enjoy protection. As stated in question 6, copyright holders enjoy protection by the mere fact of having created the work.

15 | What are the consequences for failure to use a copyright notice?

As previously stated, copyright notice is not a requirement for copyright protection. Nevertheless, if the copyright notice is not displayed, the copyright holder will not qualify for the copyright presumption granted by the Law when the copyright notice is used. (See question 18.)

Deposit

16 | Is there a requirement of copyright deposit?

No, the deposit of a copy of the work is not necessary for the rights holders to enjoy the protection assigned by the Law. However, it is a

requirement for the recording of the work, exclusively for the purposes stated in question 18.

17 | What are the consequences for failure to make a copyright deposit?

The Department of Intellectual Property Rights will not process the registration according to the terms indicated in question 18.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

There is a registration system managed by the Department of Intellectual Property Rights where copyright and neighbouring rights can be registered. Registration is performed by supplying a deposit copy of the work without involving third parties – there are no publication requirements or opposition proceedings. The function of the deposit is an essentially probative one and administrative acknowledgement of the fact of creation.

Notwithstanding the aforesaid, the registration administrator, who is the head of the Department of Intellectual Property Rights, may oppose the registration of a work when, due to its nature, it is not, in the administrator's opinion, within the framework of the works protected by copyright, notwithstanding the right of the affected party to file a claim before the competent civil court.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

Copyright registration is not mandatory. However, a work's registration establishes a presumption of ownership of the rights with respect to the person to whom, according to the respective registration, the copy being registered belongs; it is therefore advisable to register a work and to make reference to the number assigned by the Department of Intellectual Property Rights when making the work known to the public.

20 | What are the fees to apply for a copyright registration?

The registration of a work is subject to the payment of a fee calculated in percentages of a monthly tax unit (UTM), which is an accounting unit used for tax payments and certain administrative fines, the value of which is updated according to inflation levels. Its value, to date, is about US\$74. The following fees are applied according to each work:

- engineering and architecture projects and computer programs: 35 per cent UTM (approximately US\$26);
- cinematographic films: 40 per cent UTM (approximately US\$28); and
- any other registration: 10 per cent UTM (approximately US\$8).

21 | What are the consequences for failure to register a copyrighted work?

Failure to register a copyrighted work does not deprive the holder of the acknowledgement of his or her rights.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The author of the work is the primary owner of its copyright, and the person acquiring said rights, in any capacity, is the secondary owner.

Notwithstanding the aforesaid, the Law has certain special rules about rights' ownership regarding certain works, some of which are:

- anthologies and compilations: the organiser is the copyright holder, but he or she is obligated to obtain authorisation and to pay the copyright holders of the works being used;
- cinematographic films: the producer is considered the holder of the copyright of the film itself and the authors of the plot, music, lyrics of the songs and dubbing are holders of the rights over the literal elements of said work, which are independently considered for protection purposes, maintaining the right to use, separately, their respective contributions, provided they have not agreed their exclusive use for the film's production, in which case the rights are considered as assigned to the producer (see question 24);
- public entities: works produced by public officials while performing their duties belong, accordingly, to the state, municipalities, official corporations, semi-public or autonomous institutions and other government entities for which they are working; and
- computer programs: there are special regulations concerning their ownership (see question 23).

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

There is no work-for-hire regulation in Chile. Rights over work created by employees while performing their duties resulting from a work relationship belong to the employees.

Only in special circumstances will the employer own the copyright of a work made by an employee, such as the following:

- computer programs: the Law makes an exception by stating that the holders of the respective copyright are the natural persons or legal entities whose employees, while performing their duties, have produced them, unless it is otherwise stipulated in writing;
- works produced by public officials while performing their duties: such works belong, accordingly, to the state, municipalities, official corporations, semi-public or autonomous institutions and other government entities for which the officials work; and
- works produced by employees of a newspaper company, radio and TV stations, and information agencies: the company holds the right to publish in the newspaper, review, periodical, radio or TV station for which the authors provide their services, articles, drawings, photographs, or other productions provided by the authors under a labour agreement, ensuring the authors' other rights as those protected by the Law.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Both the Law and general provisions concerning contracts say nothing with respect to works commissioned by a third party and, therefore, following general rules, the respective rights are not considered as assigned to the party commissioning the works.

Notwithstanding the aforesaid, there are some presumptions of transfer of rights established in the Law:

- cinematographic films: the contract between the authors of the literal elements of the film and the producer, provided they have agreed on their exclusive use for the film production, entails all the rights over the work to the producer, including all of its elements, and authorises him or her to broadcast it to the public, show it on television, reproduce it in copies, rent and transfer it;
- computer programs: in the case of software produced by commission of a third party, the rights of the developer to whom the work has been commissioned are considered as assigned;

- photographs: the photographer has the exclusive right to reproduce, exhibit, publish and sell his or her photographs, except those done by virtue of a contract, in which case the publication right belongs to the party commissioning said work; and
- productions commissioned by a newspaper company, radio and TV stations, and information agencies: the company holds the exclusive right to the publication in the first edition published following their delivery, unless they have been expressly commissioned for a later edition. Once the corresponding period has expired, the author shall be free to dispose of them as he or she chooses.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

The Law considers the existence of 'works in collaboration' (ie, jointly produced by two or more natural persons whose contributions may not be separated). The powers inherent to proprietary equity and pecuniary benefits of the work in collaboration correspond to their co-authors as a whole, and may be published at the request of any one of them. Those co-authors who oppose publication may only demand the exclusion of their name while retaining their economic rights.

Concerning cinematographic films, notwithstanding the producer's rights, to whom the respective rights have been assigned (see question 22), the authors of the plot, staging, adaptation, script and music especially composed for the work, and the director, are considered as co-authors of the film made in collaboration.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

The Law expressly authorises the authors, and copyright and neighbouring rights holders, to transfer the totality or a part of their rights over the work. The party acquiring said rights, in any capacity, is called a 'secondary holder' of the copyright. A transfer is only possible in the case of patrimonial rights (reproduction, publication, etc), and is not possible in the case of moral rights (authorship, rights over unpublished material, etc), which are only transferable through succession in the case of death.

The total or partial transfer of copyright or neighbouring rights, in any capacity, must be done through a contract executed in a public instrument or private instrument authorised by a public notary, which must be registered in the Intellectual Property Registry within 60 days, as of the date of execution of said act or contract.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes. The permit granted by the copyright holder is the authorisation granted by him or her, in any contractual manner, to use the work in accordance with the manner and through the media established by the Law.

The authorisation or licence must specify the rights granted to the authorised party, stating the period of duration, the remuneration and form of payment, the minimum or maximum number of authorised shows or copies or, if they are unlimited, the territory of application and all other limiting clauses imposed by the copyright holder.

The licence holder is not granted any rights other than those stated in the authorisation, except for those inherent to the same according to their nature.

28 | Are there compulsory licences? What are they?

The Law considers the existence of certain licences mandatory in matters of collective management. (See question 29.)

29 | Are licences administered by performing rights societies? How?

Collective management of copyright and neighbouring rights may be conducted in Chile by non-profit corporations that have the sole purpose of managing collectively copyright and neighbouring rights, and that have obtained authorisation to operate from the Ministry of Education. Said entities are obliged to accept the management of copyright and other intellectual property rights that have been entrusted to them.

There are a series of licences of a mandatory nature associated with the work carried out by performing rights societies, which must always be granted by said entities. The licence holder may also receive the respective authorisation directly from the copyright holder.

Thus, every owner, concessionaire, user, entrepreneur, lessee or person operating any showroom, public premises, or broadcasting or television station in which plays, films or musical shows are performed or represented, or phonograms or videograms containing said works, of national or foreign authors, may obtain the authorisation through a non-exclusive licence from the corresponding performing rights society. Performing rights societies are obliged to contract, with whoever requests it, the concession of non-exclusive authorisations of copyright and related rights they manage, and may only refuse to grant said authorisations if the applicant does not offer sufficient guarantees for the payment of the corresponding fee.

In the case of using phonograms or their reproduction for radio or television broadcasts, or any other public form of communication, the user is obliged to pay a remuneration to the artists, interpreters or performers and to the producers of phonograms, and the collection of the phonogram performance rights must be carried out by the performing rights society representing them, but in no event may the authorisations granted by said performing rights society limit the power of the copyright holders to manage their works individually in the case of single uses.

The Law establishes that the fees for licences granted by performing rights societies are established by the entities through the management body envisaged in their by-laws and will govern as of the date of its publication in the Official Gazette. Notwithstanding the aforesaid, performing rights societies may enter into contracts of special fees with user associations, which will be applicable to the members of said organisations, and any user requesting it may be entitled to said special fees. The 2010 copyright amendment introduced a mandatory mediation and arbitration panel on royalties to resolve controversies arising due to the royalties set by performing rights organisations for the use of their works. Only a legal entity or association with legal status may act as counterpart of a performing rights organisation in these proceedings, which is not individually available to companies.

Termination

30 | Is there any provision for the termination of transfers of rights?

There is no provision for the termination of transfers of rights.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

As mentioned in questions 26 and 30, total or partial transfer of copyright or related rights, in any capacity, must be recorded in the Intellectual Property Registry within 60 days as of the date of execution of the respective act or contract. The resolution of the contract that gave rise to the transfer must also be recorded within the same period.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

As previously stated, the protection assigned by copyright begins with the sole fact of the work's creation. There are special rules concerning computer programs and related rights of phonogram producers, and also those of artists and interpreters, which will be analysed in question 34.

Duration

33 | How long does copyright protection last?

The protection granted by the Law lasts for the life of the author and extends for 70 years from the date of his or her death. In the case of works in collaboration, the term of 70 years is to be counted from the death of the last co-author.

With respect to the following works, certain special rules have been established regarding the beginning of the terms of duration of the protection:

- anonymous or pseudonymous works: 70 years from the first publication and in the event of there being no such publication, within a term of 50 years from its creation (the terms begin at the end of the civil year in which the work was created);
- computer programs: if the holder is a legal entity, the protection lasts 70 years as of the first publication;
- phonograms: 70 years starting from 31 December of the year of its publication, and should there be no such publication, within a term of 50 years since its recording; the protection is for 70 years following the end of the civil year of its recording;
- recorded interpretations and performances: 70 years from its publication, and should there be no such publication within 50 years since its recording, the protection will be for 70 years following the end of the civil year of its recording;
- non-recorded interpretations and performances: 70 years from the date of said performance; and
- radio and television broadcasts: 50 years from 31 December on the year of the broadcast.

34 | Does copyright duration depend on when a particular work was created or published?

Duration rules are very straightforward without transitory rules to apply. Any extension of time applies automatically to copyright works that are not already in the public domain.

Renewal

35 | Do terms of copyright have to be renewed? How?

No.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

Yes. In 2003, the Law was amended to increase the term of protection from life plus 50 years to life plus 70 years; in all other cases, protection has changed from 50 years to 70 years.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Copyright infringement is the public use of a work belonging to the private domain, without having obtained the express authorisation of the copyright holder, giving rise to civil liability and, in certain cases, criminal liability. Infringement may likewise be, in certain cases, the use of works belonging to the public domain, whenever they are published or exhibited under a name that is not that of the real author.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

There is no secondary liability, but the 2010 copyright amendment introduced a new chapter to the Law, by which internet service providers will not be obliged to compensate the damage derived from third-party copyright infringements committed through systems or networks controlled or operated by a service provider, provided that the service provider complies with the specific conditions requested (internet service providers may only be subject to the remedies established in the Law, which in all cases will require a previous resolution issued by a court); and internet service providers must forward to their users the infringement notices sent by copyright holders (forward of infringement notice system). Service providers fulfil their obligation by simply forwarding infringement notices, without being compelled to take content down or being authorised to provide their users' personal data to copyright holders without a court resolution.

This system establishes requirements that infringement notices of copyright holders must comply with to guarantee that they are sent by responsible entities, with representation in Chile. In this way, the new provision deprives legal validity of infringement notices sent automatically from different parts of the world.

Available remedies

39 | What remedies are available against a copyright infringer?

Within the framework of proceedings for copyright infringement, the court may, at the plaintiff's request, decree one of the following measures.

Injunctions

The court may, at any stage during the proceedings, order the following injunctions:

- immediately suspend the sale, circulation, display, performance, representation or any other form of allegedly infringing exploitation;
- prohibit executing or performing any acts and contracts on certain properties, including the prohibition to advertise or promote the products or services that are the subject matter of the alleged infringement;
- retain allegedly unlawful copies;
- retain or seize any materials, machinery and implements that have been used for the production of allegedly unlawful copies or for

the allegedly infringing activity, where necessary to prevent further infringement;

- remove or dispose of any devices used in the unauthorised public communication, unless the alleged infringer guarantees that he or she shall not resume the infringing activity;
- appoint one or more inspectors; or
- attach the product of recitation, representation, reproduction or performance, until reaching such applicable copyright amount as reasonably established by the court.

Damages

The court may sentence the infringer to pay damages.

Additional penalties

The court, upon making effective the payment for damages, may order, at the request of the affected party, the delivery, sale or destruction of the copies of the work that have been manufactured or put into circulation infringing his or her rights, and likewise that of the material that serves exclusively for the illegal manufacture of copies of the work and the seizure of the product of the recitation, representation, reproduction or performance.

Publication

The court may order, at the request of the affected party, the publication of the decision, with or without stating the grounds for it, in a newspaper of the affected party's choice, at the expense of the infringer.

Criminal actions

Copyright infringement can also be pursued with criminal actions being sanctioned with imprisonment and fines.

Limitation period

40 | Is there a time limit for seeking remedies?

The exercise of the respective actions prescribes, according to general proceedings rules, a five year time limit, in the case of civil action for damages.

The exercise of the criminal action (see question 42), according to the penalty established for copyright crimes, prescribes a five-year time limit in the case of simple offences (the majority of cases) and 10 years in the case of crimes (only with respect to fraud committed in connection with the publishing contract).

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, there are monetary damages available for copyright infringement, including statutory damages introduced by the 2010 copyright amendment. In determining property damages, the court shall consider, among other factors, the legitimate retail value of the goods that are the subject matter of the infringement. The court may, likewise, order the infringer to pay any profits that are attributable to the infringement and not already taken into account in determining the damages. In addition to property damage, the court may impose moral damages and, in these cases, the court shall consider the circumstances of the infringement, the gravity of the injury, the impairment caused to the author's reputation and the extent to which the work has been unlawfully made available, from an objective point of view.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

If the defendant is convicted, he or she must pay the costs, both of the process (court costs) and personal costs (lawyers' fees), pursuant to general rules. The court may exempt him or her from said payment by means of a substantiated resolution. If the defendant is not convicted, the court may require the defeated party to pay the costs.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Unauthorised use

A fault or offence is committed against intellectual property by any person who, without being expressly empowered for such purpose, uses somebody else's works protected by the Law, either unpublished or published, or uses the protected performances, productions and broadcasts of the holders of related rights. Periods of imprisonment and fines (or both) will vary depending on the range of damages, from one day to 540 days and from US\$368 to US\$74,000.

Counterfeiting

Any person who forges a work protected by the Law, or whoever edits, reproduces or distributes it by falsely showing the name of the authorised editor, by deleting or changing the name of the author or the title of the work, or by maliciously altering its text, shall be subject to imprisonment from 61 days to 540 days and fines of US\$740 to US\$74,000.

Piracy

Any person who, for profit, manufactures, imports, brings into the country, has or acquires for their commercial distribution illegal copies of copyright material, shall be subject to imprisonment from 541 days to five years and fines of US\$7,400 to US\$74,000.

Public domain

Anyone who knowingly reproduces, distributes, makes available or communicates to the public a work belonging to the public domain or to the common cultural heritage under a name which is not that of the true author, shall be subject to fines of US\$1,900 to US\$37,000.

Repeat offenders

In cases of repeat offenders, the maximum penalties contemplated for each of the offences shall apply. In these cases, the fine may not be lower than twice the prior fine, and for an amount of up to US\$148,000. Additional penalties are applied when the infringements are committed by people who are part of an association or group of persons engaged in committing such offences.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

See question 38 for internet service providers' limitation of liability.

On remedies and defences for online copyright infringements, the Law sets forth special preliminary and permanent injunctions.

Regarding the functions of transmission, routing or supply, the court may order the adoption of reasonable measures to disable access to particular illegal content clearly identified by the petitioner, provided that the blocking does not disable access to other legal content.

Regarding the functions of caching carried out through an automatic process, storage at the direction of a user of material residing on a

system or network controlled or operated by or for a provider, or referring or linking users to an online location by using information location tools (including hyperlinks and directories), the court may order the removal or disabling of access to the infringing material clearly identified by the petitioner; and the terminating of specified accounts of repeat infringers, clearly identified by the petitioner, whose holders are using the system or network to perform an activity infringing copyright and related rights.

When the injunctions are requested before the lawsuit is served (pre-judicial) and when there are serious motives for it, the injunctions may be ordered by the court without hearing the other party but, in this case, the petitioner must post a bond to secure the outcome of the injunction. The court will order the removal or disabling of the infringing content without further delay. The respective service provider will be notified of the resolution by letter and the petitioner will be notified through a public publication board at the court. The affected content provider may, notwithstanding other rights, request that the court issuing the order disregard the measure of restraining access or removing the material.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

It is not possible to prevent copyright infringement, but the following measures may be taken to diminish or control infringement:

- clearly identifying in the works the author or copyright holder who enjoys said presumption;
- recording the works in the Intellectual Property Registry to facilitate the evidence in cases of infringements; and
- monitoring the market and being prepared to deliver a strong message to the market to the infringers, using and filing all available remedies against them.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

The principal international treaties ratified by Chile regarding intellectual property matters are the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (the WIPO Treaties).

On 4 February 2016, Chile signed the Trans-Pacific Partnership Agreement (TPP), which had a particular chapter dedicated to intellectual property, but it was not ratified by its signatories. In January 2018, Chile signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). It became active on 30 December 2018, but Chile has not yet ratified this agreement.

47 | What obligations are imposed by your country's membership of international copyright conventions?

The Berne Convention sets a basic framework for the protection of copyright ownership, which must be considered by member states, and also the suggestion of a regime of copyright exceptions and limitations, principally based on the three-step rule, with respect to reproduction rights.

The TRIPS Agreement sets an updated framework of copyright protection according to the standards established for the states that become members of the World Trade Organization. Thus, for instance, it is expressly established that computer programs, both expressed in

source code and in object code, will be protected by copyright (a situation that continued to be a matter for debate at the beginning of the 1990s).

The WIPO Treaties establish requirements for protection of the works, interpretations, performances and phonograms protected by copyright and neighbouring rights, in the digital and online environment, regulating for the first time the level of protection that must be provided not only to the works, but also to the technological measures of protection and digital rights management information with which the holders have endowed their works to limit their access and reproduction, and also to control their use.

Finally, Chile has signed several free trade agreements that have strengthened, to a certain point, the commitment of the country to adapting copyright regulations concerning the aforesaid matters.

MAGLIONA

ABOGADOS

Claudio Magliona
cmagliona@magliona.cl

Nicolás Yuraszeck
nyuraszeck@magliona.cl

Carlos Araya
caraya@magliona.cl

Av. Andrés Bello 2687, 24th floor
Las Condes, Santiago
Chile
Tel: +56 2 32100030
www.magliona.cl

China

Xie Guanbin, Zhang Bin and Li Chun

Lifang & Partners

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The primary legislation is the Copyright Law of the People's Republic of China. Other important parts of the legal framework include:

- the Regulations for Implementation of the Copyright Law of the People's Republic of China;
- the Regulations on Protection of Information Network Transmission Right;
- the Regulations on Collective Administration of Copyrights; and
- the Regulations on the Protection of Computer Software.

Also important are:

- the Interpretation of the Supreme People's Court Concerning Several Issues on the Application of Law in Adjudication of Civil Cases Involving Copyright (2002);
- the Interpretation of the Supreme People's Court Concerning Several Issues on the Application of Law in Adjudication of Internet Copyright Disputes (2006);
- the Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of Cases by Internet Courts (2018); and
- the Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedures for Cases Involving Patents or Intellectual Property (2018).

Enforcement authorities

2 | Who enforces it?

The National Copyright Administration of China is responsible for the administration of copyright nationwide. The various provinces, autonomous regions and centrally administered municipalities will also have administrative authorities that administer copyright matters within respective geographic regions. The Copyright Law can also be enforced by the General Administration of Customs.

Normally, copyright will be enforced by the copyright owner, an exclusive licensee or a non-exclusive licensee under authorisation from the copyright owner, in criminal or civil proceedings.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

Information network transmission rights are covered by the Copyright Law. Moreover, the Regulation on Protection of Information Network Transmission Right specifically addresses this issue.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Yes, so long as infringement or the results of infringement occur in China.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

The National Copyright Administration of China provides the following services:

- manages the use of works belonging to the nation;
- supervises copyright registration and statutory licensing;
- handles copyright issues involving Hong Kong, Macao, Taiwan, and abroad;
- investigates serious or foreign criminal copyright issues; and
- enhances the protection of copyrighted software.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

The Implementation of the Copyright Law defines 'works' as original intellectual creations capable of being reproduced in certain tangible forms. The Copyright Law offers a non-exhaustive list of 'works' and enumerates some examples, such as:

- written works;
- oral works;
- musical, dramatic, quyi (traditional art forms of China), choreographic and acrobatic works;
- fine art and architectural works;
- photographic works;
- cinematographic works and works created by a process analogous to cinematography;
- graphic works, such as drawings of engineering designs and product designs, maps and sketches, and model works; and
- computer software.

Rights covered

7 | What types of rights are covered by copyright?

Rights covered by copyright can be divided into personal rights and property rights. Personal rights, also known as moral rights, are composed of:

- the right of publication, which is the right to decide whether to make a work available to the public;

- the right of authorship, which is the right to claim authorship in respect of and to have the author's name mentioned in connection with a work;
- the right of revision, which is the right to revise or authorise others to revise a work; and
- the right of integrity, which is the right to protect a work against distortion and mutilation.

Property rights include:

- the right of reproduction, which is the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound or video recording, duplicating a recording, or duplicating a photographic work, or by other means;
- the right of distribution, which is the right to sell or donate the original copy or reproductions of a work to the public;
- the right of rental, which is the right to authorise others to temporarily use a cinematographic work or a work created by a similar process, or computer software, except where the software itself is not the essential object of the rental;
- the right of exhibition, which is the right to publicly display the original copy or reproductions of fine art or photographic work;
- the right of performance, which is the right to publicly perform a work, and to publicly communicate the performance of a work by any means or process;
- the right of presentation, which is the right to publicly present a work of fine art, a photographic work, a cinematographic work or work created by a similar process, or other works, with a slide projector or any other technology or instrument;
- the right of broadcasting, which is the right to broadcast a work or disseminate it to the public by any wireless means, to communicate the broadcast of a work to the public by wire or by rebroadcasting, and to publicly communicate the broadcast of a work by loudspeaker or any other similar instrument capable of producing signs, sounds or images;
- the right of communication through information networks, which is the right to make a work available to the public by wired or by wireless means, so that people may have access to the work at a place and time chosen by them;
- the right of cinematography, which is the right to make a cinematic adaptation of a work using cinematography or a similar process;
- the right of adaptation, which is the right to change a work into a new one with originality;
- the right of translation, which is the right to change the language in which the work is written; and
- the right of compilation, which is the right to compile, by selection or arrangement, pre-existing works or passages into a new work.

Excluded works

8 | What may not be protected by copyright?

Copyright protects the original expression of ideas but not the ideas themselves. Further subjects excluded from copyright protection are:

- laws and regulations, resolutions, decisions and orders of state organs, other documents of a legislative, administrative or judicial nature and their official translations;
- current affairs news; and
- calendars, numerical tables or forms of general use, and formulas.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

A work may be used without permission and without payment, so long as the personal and other rights of the copyright owner are not prejudiced, under the following conditions:

- use of another person's published work for purposes of the user's own personal study, research or appreciation;
- appropriate quotation from another person's published work in one's own work for the purpose of introducing or commenting on a certain work, or explaining a certain point;
- unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical or radio or television programme, for the purpose of reporting current events;
- publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc on current political, economic or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted;
- publishing or broadcasting by the media, such as a newspaper, periodical, radio station or television station, of a speech delivered at a public gathering, except where the author declares that such publishing or broadcasting is not permitted;
- translation, or reproduction in a small quantity of copies, of a published work by teachers or scientific researchers for use in classroom teaching or scientific research, provided that the translation or the reproductions are not published for distribution;
- use of a published work by a state organ to a justifiable extent for the purpose of fulfilling its official duties;
- reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc for the purpose of display, or preservation of a copy, of the work;
- gratuitous live performance of a published work, for which no fees are charged to the public, nor payments are made to the performers;
- copying, drawing, photographing or video recording of a work of art put up or displayed in an outdoor public place;
- translation of a published work of a Chinese citizen, legal entity or other organisation from Chinese into languages of minority ethnic groups for publication and distribution in the country; and
- transliteration of a published work into Braille for publication.

Under the Copyright Law there are two criteria for use to be fair. The use shall satisfy certain scenarios declared in the detailed and exhaustive list of statutory limitations on copyright. Moreover, the use shall not jeopardise the personal and other legitimate rights of the copyright owner. For example, the name of the author and the title of the work shall be mentioned when it is used; otherwise, the user would infringe the right of authorship. Also, the use shall not jeopardise the market value of the works.

Architectural works

10 | Are architectural works protected by copyright? How?

Architectural works are specifically protected under the Copyright Law. The Regulations for Implementation of the Copyright Law states that 'architectural works are aesthetic works, which are, and can be, expressed in architectural or constructional form'.

Since the Copyright Law lists 'architecture' and 'graphic works and model works' as different kinds of works, only three-dimensional

buildings and structures rather than graphic construction designs or architectural models could be regarded as architecture. Architectural plans that embody the aesthetic appearance of architectural works can be protected as artworks. Moreover, the originality test might be stricter than that for other works because such protection if granted would overlap with other intellectual property rights.

Architecture may be appreciated aesthetically. However, when the function and the aesthetic of the architectural design cannot be separated, then 'architecture' cannot be protected.

Performance rights

11 | Are performance rights covered by copyright? How?

The right of performance enjoys copyright protection as 'the right to publicly perform a work, and to publicly communicate the performance of a work by any means or processes'. Based on this definition, performance rights might occur in two scenarios: live performance and broadcast performance by varied means. Performing the work live, with no permission from the copyright owner, will usually infringe the owner's performance rights unless it is a gratuitous live performance. A typical broadcast performance would include background music in places of business such as supermarkets, clubs, restaurants, airports, among others, for which the consent of the copyright owner must be obtained.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

Yes. Neighbouring rights include the rights of publishers' typographical designs, the rights of performers, the rights of producers of sound or video recordings, and the rights of radio stations or television stations. Neighbouring rights owners are expected to refrain from jeopardising the statutory interests of copyright owners. For instance, the copyright owner should be remunerated when their works are performed, recorded or broadcasted. The neighbouring rights owners have similar property rights, while only the performer has personal rights.

Integrated circuit layouts are not protected by neighbouring rights under the Copyright Law. However, they are protected by the Regulations for the Protection of the Layout Design of Integrated Circuits.

Moral rights

13 | Are moral rights recognised?

Yes. They are known as 'personal rights' in China. Authors' personal rights include:

- the right of publication, which is the right to decide whether to make a work available to the public;
- the right of authorship, which is the right to claim authorship in respect of and be named in connection with a work;
- the right of revision, which is the right to revise or authorise others to revise a work; and
- the right of integrity, which is the right to protect a work against distortion and mutilation.

For neighbouring rights, only performers have personal rights that allow them:

- to claim performance; and
- to protect the image inherent in his performance from distortion.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

There is no requirement of notice under the legal framework for protecting copyright. However, in practice, copyright notices are often used by rights holders. Chinese courts would protect an author's rights regardless of any formality and will, in the absence of evidence to the contrary, presume that the person named in connection with a work is the author.

15 | What are the consequences for failure to use a copyright notice?

It is not necessary to display or use a copyright notice since the author's rights exist automatically from the moment the work is created. However, displaying a copyright notice is often an easy method of proving ownership, especially in litigation.

Deposit

16 | Is there a requirement of copyright deposit?

There is no requirement of copyright deposit in China, rather, it is an optional approach to prove authorship. Copyright deposits can be made at the Copyright Protection Centre of China. In keeping with the needs of works creation, commercial operations, and to secure and deposit evidence, the Centre provides applicants with creation certificates after sealing off their works, semi-finished works or creative designs. Works deposits are not subject to any censorship or any restrictions.

17 | What are the consequences for failure to make a copyright deposit?

Copyright deposit is neither mandatory nor the only method for authors to protect their copyright in an active and timely manner. However, copyright deposit is an easy method

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

Yes. The registration service is provided by the Copyright Protection Centre of China. Specifically, the Centre provides professional services in relation to copyright including:

- computer software registration;
- works copyright registration;
- copyright transfer;
- exclusive licensing contract registration and filing;
- pledge contract registration;
- copyright law publicity and consulting;
- copyright authentication;
- copyright certification;
- third-party investigation and evidence collection;
- works deposit;
- copyright dispute mediation; and
- other copyright public services and tasks assigned by the National Copyright Administration of China.

To register a work, a rights holder should submit a completed application form, a non-returnable copy or copies of the work to be registered and related documentary evidence, such as identification of the applicant and the agent, proof of copyright attribution, etc.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

Copyright registration is not mandatory. Nonetheless, it is always advisable for authors to register their works with the Copyright Protection Centre of China. This registration process provides a legal record of copyright ownership as well as additional legal benefits in cases of infringement.

20 | What are the fees to apply for a copyright registration?

The fee for copyright registration of one work varies from 100 yuan to 2,000 yuan, depending on the kind of work. For the registration of several works, the fee ranges from 50 yuan to 400 yuan per work from the second work.

21 | What are the consequences for failure to register a copyrighted work?

Usually, there are no consequences since copyright registration is not mandatory. However, a copyright registration certificate is a convenient proof of copyright ownership.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The initial owner is the author, which may be a natural person, a legal entity or an organisation. The author's successors or assignees may also own the property rights to a work. However, personal rights can only belong to the author because they cannot be assigned or inherited (see question 26 for exceptions).

If the identity of the author of a work is unclear, the legal bearer of the original work shall have the right to exercise all copyright claims, except the author's right of acknowledgement. Upon establishment of the author's identity, the author or his or her successor shall exercise the copyright claims.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

Yes. Although, not all works made by an employee during the period of employment are owned by the employer. Usually, a work created by an employee in the fulfilment of tasks assigned to him or her by his or her employer is a work created in the course of employment. The copyright in such work shall be enjoyed by the author. However, the employer shall have priority to exploit the work within the scope of its professional activities.

However, in any of the following cases, the author of a work created in the course of employment shall enjoy the right of authorship, while the employer shall enjoy the other rights included in the copyright and may reward the author:

- engineering designs and product designs drawings, maps, computer software and other works which are created in the course of employment, mainly with the material and technical resources of the employer and for which the employer bears responsibility. In this scenario, no written contract is required; and
- works created in the course of employment for which copyright is vested in the employer in accordance with laws, administrative regulations or contracts.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Yes. Normally, the ownership of the copyright in a commissioned work shall be agreed upon in a contract between the commissioning and the commissioned parties. In the absence of such a contract or an explicit agreement in such a contract, the copyright in the work shall belong to the commissioned party.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. Where a work is created jointly by two or more authors, the copyright in the work shall be jointly owned by the co-authors. No co-authorship may be claimed by anyone who has not participated in the creation of the work.

Where a work of joint authorship can be separated into parts and exploited separately, each co-author may be entitled to independent copyright in the part that he or she created, provided that the exercise of such copyright does not prejudice the copyright of the joint work as a whole.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Property rights may be transferred in full or in part with a written contract.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes. Anyone who exploits another person's work must conclude a copyright licensing contract with the copyright owner, except where no permission is required.

28 | Are there compulsory licences? What are they?

Yes. A user might defend its use by claiming a compulsory licence during certain situations. If such situations do exist, then the user will not need the author's permission but must remunerate the author.

There are five kinds of statutory licences specified in the Copyright Law and two in the Regulation on Protection of the Right to Network Dissemination of Information:

- a newspaper or periodical publisher reprints work that is published by other newspapers or periodicals, prints an abstract of it, or prints it as reference material;
- a producer of sound recordings, in making a sound recording, exploits musical work of which a lawful sound recording has already been made;
- a radio or television station broadcasts a published work;
- a radio or television station broadcasts a published sound recording;
- a short extract from published works is compiled in textbooks for a nine-year compulsory education syllabus and national education planning;
- a short extract from published works is used to produce courseware for a nine-year compulsory education syllabus or national education planning through an information network; and
- for the purpose of aiding poverty stricken areas, a published work is available, free of charge, to the public in rural areas through the information network.

29 | Are licences administered by performing rights societies? How?

Yes. Licences for various types of copyright and related rights would be administered by the five performing rights societies, namely:

- the Music Copyright Society of China;
- the China Audio-Video Copyright Association;
- the China Written Works Copyright Society;
- Images Copyright Society of China; and
- the China Film Copyright Association.

These societies' administrative systems for licensing are similar. The Music Copyright Society of China, for example, would negotiate with potential users of registered musical works on rates of royalties for the purpose of collective administration then issue licences to the users. Music Copyright Society of China must collect royalties from users to remunerate the music copyright owners. The Music Copyright Society of China would also take legal action against music copyright infringers, if necessary.

Termination

30 | Is there any provision for the termination of transfers of rights?

The Copyright Law does not stipulate any right of termination, so any termination must be contractually agreed in writing. Normally, without any termination clause in a transfer contract, the duration of the transfer is equal to the remaining protective period of the rights.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

Yes. The Copyright Protection Centre of China can provide such services. The applicant must first complete an online application form and then submit the materials requested for recording to the Centre personally or through its agent. Materials include the application form, the transfer contract, the identification certificate of the applicant, the registration certificate of the rights and the search results for the registration of the rights, if available. After the application fee is paid, the applicant receives a receipt. The process usually lasts 10 working days during which time the applicant may be requested to supply further supporting documents. After recording is complete, details of the transfer record may be found online and the applicant should receive a certificate of the record within three working days.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection begins automatically at the moment when a work is created.

Duration

33 | How long does copyright protection last?

The protection term of the rights of authorship, revision and integrity is permanent. For the right of publication and property rights, the duration is the author's lifetime and 50 years after his or her death. The following points should be noted:

- the term of a work of joint authorship shall expire on 31 December of the 50th year after the death of the last surviving author;

- in respect of the work of a legal entity or other organisation or a work that is created in the course of employment for which the copyright (except the right of authorship) is enjoyed by a legal entity or other organisation, the term of protection for the right of publication and property rights shall be 50 years, expiring on 31 December of the 50th year after the first publication of such work; and
- in respect of a cinematographic work or work created by a similar process, or a photographic work, the term of protection for the right of publication and property rights shall be 50 years, expiring on 31 December of the 50th year after the first publication of such work.

Neighbouring rights have the same duration as copyright.

34 | Does copyright duration depend on when a particular work was created or published?

In respect of work created by a legal entity, organisation or work that is created in the course of employment, copyright (excluding the right to authorship) will not be protected if the work is not published within 50 years of its creation. It is the same with the rights to films or motion pictures, works created using a process similar to films and photographic works.

Renewal

35 | Do terms of copyright have to be renewed? How?

No.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

No.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

The Copyright Law offers a non-exhaustive list of specific acts of infringement. In practice, the court would consider the following when judging a direct infringement: whether the acts committed are controlled under copyright; whether the acts are prohibited by the rights holder; and whether the acts cannot be admitted as an exception or limitation by the Copyright Law.

An infringement would be actionable if these three elements are all established.

Whether the acts are committed deliberately will only influence the amount of the damages but not infringement liability.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Although there is no secondary liability for indirect copyright infringement clearly laid down in the Copyright Law, the Interpretation of the Supreme People's Court Concerning Several Issues on Hearing Cases in Internet Copyright Disputes provides for secondary liability for indirect infringement over a network. In addition, this secondary liability is also actionable under Chinese Tort Law. Article 9 of the Tort Law states that, 'One who abets or assists another person in committing a tort shall be liable jointly and severally with the tortfeasor.' Thus, secondary liability

for indirect copyright infringement would be incurred when one abets or assists in direct copyright infringement.

In practice, courts seem to believe that a preparatory act leading to a direct infringement or an act that would increase infringement damages may also incur secondary liability.

Available remedies

39 | What remedies are available against a copyright infringer?

China has a two-track protection system. On one track, the copyright owner may file a complaint with the local copyright administration and enforcement department, requesting the enforcement of administrative measures against the infringer, including an order to stop infringement and the imposition of a fine.

Alternatively, the injured party may bring a lawsuit against the copyright infringer that includes a request for the cessation of infringement, the elimination of adverse effects, an apology, and compensation. When filing legal proceedings, the rights owner may request an order for the cessation of infringement and the preservation of property, if they can present preliminary evidence to prove that the defendant is committing or is about to commit copyright infringement that will likely cause the rights owner irreparable harm unless prompt action is taken.

Further, if criminal liability is involved, the rights owner may also make a report to the police.

Limitation period

40 | Is there a time limit for seeking remedies?

Yes. The General Principles of Civil Law of the People's Republic of China provide that the period of limitation of actions for the protection of civil rights is two years. Accordingly, the Interpretation of the Supreme People's Court Concerning Several Issues on the Application of Law in Adjudication of Civil Cases Involving Copyright states that the time limit for seeking remedies in copyright infringement actions is two years.

The General Rules of the Civil Law of the People's Republic of China effective on 1 October 2017 changed the time limit for seeking remedies from two years to three years. Therefore, the time limit for copyright infringement actions is also three years starting from the date when a copyright holder knows or should have known of the infringement. In cases where the copyright holder initiates a lawsuit after three years and infringement is still ongoing, the court will, within the protection period of the copyright, order the defendant to stop its infringement and pay damages that covers the three years preceding the date when the copyright holder initiated the lawsuit.

Furthermore, in some circumstances general limitation periods for civil cases in China can be reset. Those circumstances include:

- the rights holder requesting a performance;
- the obligor agreeing to fulfil its obligations; or
- the rights holder suing or seeking arbitration, or other similar circumstances arise.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes. Article 49 of the Copyright Law stipulates that monetary damages shall be paid in terms of the actual losses suffered by the rights owner, or the amount of the unlawful gains of the infringer when the actual losses are difficult to calculate.

Damages are based on a combination of the level of fault exhibited by an infringer, the rights holder's losses, the infringer's proceeds and other factors. The order of application for methods of assessing damages is:

- the actual loss suffered;
- illegal proceeds; and
- statutory damages.

If losses or illegal proceeds cannot be accurately proven, the court may determine damages on a discretionary basis, which may be higher than the maximum statutory damages. If losses or illegal proceeds cannot be accurately proven, and they cannot be determined, statutory damages will apply. Statutory damages are capped at 500,000 yuan.

Damages are not generally available for infringing moral rights. However, in circumstances where severe moral damages are sustained that cannot be remedied by the cessation of infringement, the courts may award compensation

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes. Compensation shall include the reasonable expenses that the rights owner has paid for stopping the infringement, which would include reasonable attorneys' fees and costs such as notarisation fees. The court usually exercises discretion on how much is deemed reasonable to cover attorneys' fees.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Yes. Article 48 of the Copyright Law states that criminal liabilities shall be investigated in accordance with law where a crime is constituted. In the Criminal Law, Article 217 declares that whoever, for the purpose of making profits, commits any infringement on copyright shall, if the amount of illegal gains is relatively large, or if there are other serious circumstances, be sentenced to fixed-term imprisonment or criminal detention and shall also, or shall only, be fined.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

Yes. The Regulation on Protection of Information Network Transmission Right focuses on the online copyright infringement issue. Specifically, notice-takedown procedures have been introduced in this Regulation.

Where a rights holder believes there has been online infringement, he or she may notify the network service provider in writing and request that network service provider to delete his or her copyrighted works, performances, audio and video products or to remove the links to such works, performances, audio and video products. Upon receipt of the notice from the rights holder, the network service provider should immediately delete the allegedly infringing content or remove the links to the allegedly infringing content, or they may be held liable for infringement.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

Rights holders may adopt technical measures to prevent their information network transmission rights from being infringed. It is forbidden to intentionally avoid or destroy such technical measures. Entities may not intentionally manufacture, import or provide devices or parts used principally for the avoidance or destruction of technical measures, and shall not provide technical services for others to avoid or destroy technical measures.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

The treaties administered by World Intellectual Property Organization (WIPO) include:

- the Beijing Treaty on Audio-visual Performances;
- the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled;
- the WIPO Copyright Treaty (9 June 2007);
- the WIPO Performances and Phonograms Treaty (9 June 2007);
- the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (30 April 1993);
- the Berne Convention for the Protection of Literary and Artistic Works (15 October 1992); and
- the Convention Establishing the World Intellectual Property Organization (3 June 1980).

Copyright-related multilateral treaties include:

- the Agreement on the Importation of Educational, Scientific and Cultural Materials;
- the Convention and Statute on Freedom of Transit;
- the Convention Relating to the Status of Stateless Persons;
- the United Nations Convention on Jurisdictional Immunities of States and Their Property;
- the United Nations Convention on the Use of Electronic Communications in International Contracts;
- the Convention on the Rights of Persons with Disabilities;
- the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005;
- the Convention for the Safeguarding of the Intangible Cultural Heritage;
- the Agreement establishing the World Trade Organization;
- the World Trade Organization – Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994); and
- the Convention for the Protection of Cultural Property in the Event of Armed Conflict (5 April 2000).

Universal Copyright Convention:

- the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;
- the United Nations Convention on Contracts for the International Sale of Goods; and
- the Convention concerning the Protection of the World Cultural and Natural Heritage.

47 | What obligations are imposed by your country's membership of international copyright conventions?

China accords national treatment to nationals from other member states with regard to copyright protection.

UPDATE AND TRENDS

Emerging trends and new legislation

48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

Updates of laws

The draft amendments to the Copyright Law of the People's Republic of China were not passed in 2018. However, some local courts in China have promulgated their own guidelines on the handling of copyright infringement cases. For instance, Beijing High Court issued Guidelines on the Hearing of Copyright Infringement Cases by Beijing High People's Court on 20 April 2018, specifying that the hearing of copyright cases shall follow the principles of 'enhancing protection, encouraging innovation, promoting communication and balancing benefits of all parties'. This provides guidance on the handling of internet copyright infringement cases for the Beijing Internet Court and guidance on the general copyright infringement cases to other courts in Beijing.

Tianjin High Court and Sichuan High Court have also issued their own respective guidelines on the hearing of information network transmission right infringement cases.

Special courts

In 2014, intellectual property courts were established in Beijing, Guangzhou and Shanghai. Those courts were widely regarded as an outstanding success. Since then, the trial of intellectual property cases have become more specialised and more intellectual property courts have been established throughout China. These newer intellectual property courts are mainly located in regions with developed economies and an appreciation for strong intellectual property rights. These intellectual property courts often have interregional jurisdiction over certain intellectual property-related cases.

In 2017, the Hangzhou Court of the Internet was established. Because it was regarded as a success, the Beijing Internet Court and Guangzhou Court of the Internet were established in 2018. In accordance with the Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of Cases by Internet Courts, intellectual property cases that are under the jurisdiction of internet courts include:

- copyright infringement disputes related to works first published online;
- neighbouring right disputes of works first published online;
- online infringement disputes of the copyright or neighbouring right of works published or distributed online; and
- ownership, infringement and contract disputes over internet domain names.

Internet courts are known for disposing of cases rapidly and the copyright owners can protect their rights conveniently.

Appeal courts for intellectual property cases

On 26 October 2018, the Decision on Several Issues Concerning Litigation Procedures for Cases Involving Patents or Intellectual Property (the Decision) was adopted at the sixth session of the Standing Committee of the 13th National People's Congress. The Decision provides that, as of 1 January 2019, the Intellectual Property Tribunal of the Supreme People's Court will accept appeals from any parties unsatisfied with first-instance judgments or decisions from civil or administrative cases relating to highly technical and specialised intellectual property such as patents, computer software and other things. Essentially, China has established a national-level mechanism for hearing appeals in intellectual property disputes. This will optimise the legal environment

for technological innovation, establish unified judgment standards, increase legal certainty and strengthen the judicial protection of intellectual property.

Highlights

In 2018, the protection of online videos received the most judicial attention within the larger field of copyright law. With live video streams and short video clips now being watched on a massive scale, an online video industry has emerged along with an increase in the copyright infringement of such video streams and short video clips. Recently, Beijing Haidian People's Court heard the first dispute over short video clips and decided that such clips are similar to movies and therefore protected under the Copyright Law.

Administrative enforcement agencies, such as the National Copyright Administration and other relevant departments, jointly carried out the 'Shield Net 2018' programme from July to December 2018 to fight copyright infringement and piracy in the burgeoning short video industry.



Xie Guanbin

guanbinxie@lifanglaw.com

Zhang Bin

binzhang@lifanglaw.com

Li Chun

chunli@lifanglaw.com

A1105, Nanxincang Business Building

A22, Dongsi Shitiao St

Beijing 100007

China

Tel: +86 10 6409 6099

Fax: +86 10 6409 6260/+86 10 6409 6261

www.lifanglaw.com/en

France

Olivia Bernardeau-Paupe

Hogan Lovells (Paris) LLP

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

Copyright in France is mainly governed by two laws: the Law of 11 March 1957 and the Law of 3 July 1985. These laws and all other relevant legislation are codified in the first part of the French Intellectual Property Code (from articles L 111-1 to L 343-7) (IPC).

The copyright law applicable in France also derives from international conventions to which France is a party, such as:

- the Berne Convention for the Protection of Literary and Artistic Works of 1886;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961;
- the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty of 20 December 1996 (WPPT);
- the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), notably on copyright and related rights; and
- the WIPO Copyright Treaty of 1996.

The law of the European Union is also part of the French copyright law where it is implemented into national law. In particular, the 2006 Law on Copyright and Neighbouring Rights in the Information Society (DADVSI) on authors' rights and related rights in the information society was adopted in France in order to implement EU Directive 2001/29/EC, which itself implemented the WIPO Copyright Treaty of 1996.

Also, Law No. 2015-195 dated 20 February 2015 results from the implementation into French law of Directive 2011/77/EU on the term of protection of copyright and certain related rights.

Enforcement authorities

2 | Who enforces it?

Civil courts

Only a few specifically designated courts throughout France have jurisdiction to hear copyright cases.

Criminal courts

Copyright infringement may also be a criminal offence, so that criminal courts also have jurisdiction to hear copyright cases.

French Customs

Copyright owners may request French Customs to detain goods that infringe their copyright. French Customs detain allegedly infringing goods for up to 10 days. After that deadline, the goods are released unless legal proceedings are brought by the copyright owner.

HADOPI

The High Authority for the Dissemination of Works and Protection of Copyrights on the Internet (HADOPI) is a French governmental agency that enforces copyright law in France. The agency was created in 2009 in order to protect the interests of intellectual property right owners on the internet and implements the method of gradual response to copyright infringement.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The Order of 12 November 2014 has adapted the IPC to the digital era. Indeed, the digital aspects of the exploitation of a work have been taken into consideration and introduced to the Code. Notably, Article L 132-1 of the IPC, defining the edition contract now specifically reads that:

A publishing contract is a contract by which the author of a work of the mind or his successors in title assign under specified conditions to a person referred to as the publisher the right to manufacture or have manufactured a number of copies of the work, or to create it or have it created in a digital form.

Once completed, the Digital Single Market reform currently ongoing at the EU level will have a great impact on French provisions relating to the digital exploitation of works (see 'Update and trends').

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Copyright provisions per se do not provide for extraterritorial application of French copyright law. However, further to article 7.2 of Council Regulation (EC) No. 1215/2012, 'a person domiciled in a Member State may, in another Member State, be sued: in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred or may occur'.

Based on this article, and in three different decisions handed down on 22 January 2014, the French Supreme Court ruled that the mere accessibility of the website from the French territory was sufficient to consider that French courts have jurisdiction to hear online copyright infringement cases.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

There is no centralised copyright agency in France.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

As a matter of principle, all creations are protected by copyright provided they are original. Considerations such as the merit of the author or the purpose of the work, the type of work or the form of expression are irrelevant.

'Originality' has been defined by French case law as the expression of the personality of the author. This definition is in line with European case law, which has validated the French broad conception of originality. Therefore, the mere display of skill, labour and judgement is not sufficient; creativity on the part of the author is required.

Article L 112-2 of the IPC provides for a non-exhaustive list of the works that may be protected by copyright law: books and other writings; speeches; musical works; works of fine art such as paintings, drawings or sculptures; photographic and cinematographic works; and plans, maps and sketches.

Rights covered

7 | What types of rights are covered by copyright?

Copyright covers both economic and moral rights.

Pursuant to Article L 122-1 of the IPC, economic rights relate to representation rights as well as reproduction rights.

Representation rights consist of the communication of the work to the public by any means and reproduction rights consist of the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way.

Acts of representation or reproduction of the work carried out without the authorisation of the owner of the rights constitute acts of infringement.

Excluded works

8 | What may not be protected by copyright?

Mere ideas or concepts cannot be the subject of copyright protection and thus may be used freely. It is only the form in which the idea is expressed that can be protected.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

There is no doctrine of fair use or any equivalent general open norm in France. However, Article L 122-5 of the IPC lists exceptions to the exclusive right of the author to reproduce his or her work. Indeed, once a work has been disclosed, the author may not prohibit, for instance:

[Private] and gratuitous performances carried out exclusively within the family circle, parody, pastiche and caricature, observing the rules of the genre or acts necessary to access the contents of an electronic database for the purposes of and within the limits of the use provided by contract.

Architectural works

10 | Are architectural works protected by copyright? How?

As long as their work is original, architects own the copyright. Indeed Article L 112-2 12 of the IPC expressly mentions the plans, sketches and three-dimensional works relative to architecture. For instance, reproduction of a plan without authorisation, in order to build a new building, constitutes infringement.

Law No. 2016-1321 provides for a new exception to copyright infringement pursuant to which individuals are allowed to reproduce or represent architectural works and sculptures located permanently in public places for non-commercial purposes.

Performance rights

11 | Are performance rights covered by copyright? How?

Performance rights are the rights granted to a performer, such as a musician, a dancer or any other person who acts, sings, recites or otherwise performs. In France, these rights are referred to as 'neighbouring rights'.

Pursuant to Article L 212-3 of the IPC, performers have the exclusive right to authorise all recording, reproduction or communication to the public of their performance. Furthermore, the performer's permission is required in case of any separate use of the sounds or images of his or her performance where both the sounds and images have been fixed.

There is, however, an exception concerning audiovisual works: the contract concluded between a performer and a producer for the performance of an audiovisual work implies authorisation by the performer to fix, reproduce and communicate this performance to the public.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

The IPC lists two other 'neighbouring rights' that are only economic rights:

- the rights of the phonogram producers; and
- the rights of the videogram producers.

Alongside those 'neighbouring rights', producers of databases benefit from a *sui generis* right. Databases are protected for 15 years following their establishment.

Moral rights

13 | Are moral rights recognised?

Moral rights are recognised in France. They are perpetual, inalienable and imprescriptible, and therefore may not be transferred, may not be renounced by the author and must be respected even after the work has entered the public domain. After the death of the author, moral rights are transferred to his or her heirs.

As a result, moral rights belong to the author, even though he or she may have transferred the economic rights to someone else.

Moral rights cover the following prerogatives:

- The right for the author to divulge his or her work.
- The right for the author to have the integrity of his or her work respected. This right allows the author to oppose any modification of his or her work (cuts, for instance) as well as to oppose any modifications that would alter the spirit of his or her work.
- The right for the author to have his or her name indicated on any representation or reproduction of the work. It is called the right of authorship. It should be noted, however, that the author is entitled to remain anonymous or to use a pseudonym.

- The right for the author to reconsider or to withdraw his or her work from the market even after publication, provided that he or she indemnifies the assignee for any harm suffered as a result of the reconsideration or the withdrawal.

Any violation of the moral right of the author constitutes an act of infringement.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

There is no requirement of copyright notice in France. The protection afforded by copyright is granted automatically from the date of creation of the work.

15 | What are the consequences for failure to use a copyright notice?

See question 14.

Deposit

16 | Is there a requirement of copyright deposit?

Every publisher, printer, producer, distributor or importer of documents must deposit copies of all published materials in one of the following institutions:

- the French National Library (BNF);
- the National Audiovisual Institute (INA), which manages radio and television;
- the National Cinema Centre (CNC), which is responsible for films; and
- any library authorised by order of the Ministry of Culture.

17 | What are the consequences for failure to make a copyright deposit?

Pursuant to Article L 133-1 of the French Heritage Code, the fine for not complying with the legal deposit is €75,000.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

There is no system for copyright registration in France.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

See question 18.

20 | What are the fees to apply for a copyright registration?

See question 18.

21 | What are the consequences for failure to register a copyrighted work?

See question 18.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The owner of a copyrighted work is its author, in other words, the person who created the work. However, the economic rights may be transferred either through inheritance or by a contract, in which cases the beneficiary or the assignee becomes the owner of the copyright.

Under a French legal presumption, the name of the person under which the work was published is deemed to be its author.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

Under French law, without regard to the employment contract that may be in force between an employer and his or her employee, the employee remains the author of his or her work and therefore the owner of the copyright.

The exception to this rule is the collective work. A 'collective work' is defined by Article L 113-2 subsection 3 of the IPC as:

[A] work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under its direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created.

Therefore, the name under which the collective work is published being that of the employer, the employer becomes the owner of the copyright, even though he or she is not the author of the work. The employees will be vested of the moral rights that ensue from the individual part of their creations.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Under French law, without regard to the employment contract that may be in force between an employer and an independent contractor, the creator of a work remains the author and therefore the owner of the copyright, without having to comply with any further formality.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

A work may be co-owned whenever it results from the collaboration between two persons.

Article L 113-2 subsection 1 of the IPC defines works of collaboration as works 'in the creation of which more than one natural person has participated'. In this case, the copyright is co-owned by several natural persons.

Article L 113-3 of the IPC provides that a work of collaboration shall be the joint property of its authors. The authors shall exercise their rights by common accord.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Moral rights are inalienable and may not be transferred.

However, the economic rights of a copyright are transferable either through inheritance or contract.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

The economic rights of copyright may be licensed under French law. Under French contract law, licence may not be concluded for a perpetual term and licences with an indefinite duration have been cancelled by French courts.

Whenever the contract is not clear, it will be interpreted in favour of the author by French courts.

28 | Are there compulsory licences? What are they?

The IPC provides for compulsory licences where a phonogram has been published for commercial purposes. Neither the performer nor the producer may oppose its broadcasting or the simultaneous and integral cable distribution of such broadcast, as well as the reproduction of such phonogram strictly reserved for those purposes, carried out for or on behalf of an audiovisual communication enterprise with a view to inclusion in the soundtrack of its own programme broadcast on its own channel or on any channels of audiovisual communication enterprises which pay equitable remuneration (Article L 214-1 of the IPC).

Law No. 2016-925 of 7 July 2016 has extended said regime of compulsory licence to internet radio services.

In compensation, the same provision confers performers and producers rights to remuneration.

29 | Are licences administered by performing rights societies? How?

Performers are free to join any performing rights societies but are under no obligation to. In France, various societies exist, such as:

- SACEM, for musical works;
- SACD, for drama and audiovisual works; and
- SCAM, for multimedia works.

Termination

30 | Is there any provision for the termination of transfers of rights?

Under French law, perpetual agreements are prohibited. Therefore, copyright transfer can only be temporary. The transfer agreement has to specify precisely whether the transfer is valid for the whole legal duration of the protection of the copyrighted work or a shorter period.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

There is no agency specific to copyright formalities in France.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection starts from the date of creation of the work.

Duration

33 | How long does copyright protection last?

Moral rights have no time limit.

Economic rights last for the whole life of the author and shall subsist for his or her successors in title for 70 years. The starting point is 1 January of the calendar year following the death of the author.

In the case of collaboration works, protection is provided for the authors' entire lives plus 70 years from the death of the last contributor.

Published pseudonymous, anonymous or collective works are protected for 70 years from 1 January of the calendar year following that in which the work was published.

When the protection expires, the work is said to enter the public domain, which means that it can be freely used.

34 | Does copyright duration depend on when a particular work was created or published?

Copyright protection is identical for all types of work and starts from the date of creation of the work.

Renewal

35 | Do terms of copyright have to be renewed? How?

Terms of copyright do not have to be renewed.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

Law No. 2015-195 of 20 February 2015, implementing into French law various provisions of Directive 2011/77/EU on the term of protection of copyright and certain related rights, increased the duration of performers' rights to 70 years after the communication of the performance to the public or from the publication of the performance.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Copyright is infringed by a person who, without the authorisation of the author or the rights holder, represents or reproduces the work partially or totally.

The same applies to the translation, adaptation or transformation, arrangement or reproduction by any technique or process.

Copyright may be infringed when the moral right of the author is altered (disclosure, integrity, paternity, withdrawal – see question 13).

Civil liability is strict; there is no requirement for the infringer to have any knowledge or intent to commit the infringement.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

The provision that most closely approximates contributory liability is Article L 335-2-1 of the IPC. Thus, the editing, making available to the public or communicating to the public of a piece of software obviously intended to make sound recordings available to the public without authorisation is prohibited and is a criminal offence. The Criminal Code also includes the concept of complicity, which is equivalent to the figure of contributory infringement. The accomplice of a criminal offence (including felonies against copyright) stands for anyone who knowingly

abets, facilitates or by means of a promise, threats or abuses of authority, provokes the offence or gives instructions to commit the offence.

Available remedies

39 | What remedies are available against a copyright infringer?

Several remedies are available against a copyright infringer, including in particular:

- award of monetary damages (see question 41);
- injunction (final or preliminary) to refrain from infringing;
- precautionary seizure order of the capital assets and real estate of the alleged infringer (at the pretrial stage);
- injunction to disclose all the information regarding the distribution networks and the quantities of infringing products;
- recall from the trade circuits, destruction or confiscation for the benefit of the victim, of the following elements: the objects made or manufactured in breach of the rights of the victim, the media used to extract unlawfully data from a database, and the equipment predominantly used for the manufacture;
- publication of the judgment (in whole or in part) at the defendant's costs; and
- award of legal costs.

Limitation period

40 | Is there a time limit for seeking remedies?

The statute of limitations for bringing a copyright infringement claim is five years from the date on which the claimant became aware or ought reasonably to have become aware of the infringing act.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Monetary damages are available for copyright infringement. The court must take into account, separately:

- the negative economic consequences of the infringement, including loss of profits and loss suffered by the injured party;
- the moral prejudice caused to the rights holder; and
- the profits made by the infringer, including savings in intellectual investment, equipment and promotion, which the infringer made through the infringing acts.

French law also offers an alternative to the assessment of the damages. Indeed, upon request of the claimant, the court may award damages in a lump sum. This amount shall exceed the amount of royalties that would have been due if the infringer had requested the authorisation to use the right that was infringed. This amount is not exclusive of compensation for the moral prejudice caused to the injured party.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Attorneys' fees and costs may be claimed in an action for copyright infringement. Usually, the attorney will provide the court with an affidavit of the fees invoiced for the whole proceedings. However, in practice and despite the aforementioned affidavit, the sums discretionarily allocated by French courts are low.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Copyright infringement amounts to a criminal offence when committed with malice.

In addition, specific criminal offences exist. For instance, the following are criminal offences:

- For the owner of an access to online public communication service not to have implemented security measures to ensure that such access is not used for the reproduction or communication to the public of works protected by copyright without the consent of the copyright owners, provided that the owner of such access has been advised by HADOPI to implement a security system following a first infringement having taken place less than one year before (articles L 336-3 and R 335-5 of the IPC).
- The editing, making available to the public or communicating to the public of a piece of software obviously intended to make sound recordings available to the public without authorisation (see question 38).
- To hold for private use or use a technological application, device or service aimed at infringing digital rights management (DRM) which protects a work (Article R 335-3 of the IPC).

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

Several provisions were created to deal with online copyright infringement. Examples follow.

The graduated response regime from the HADOPI

The HADOPI Laws No. 2009-669 of 12 June 2009 and No. 2009-1311 of 28 October 2009 and Decree No. 2013-596 of 8 July 2013 define the mission of HADOPI and provide, among other things, a graduated response regime.

It is a criminal offence for the owner of an access to online public communication service not to have implemented security measures to ensure that such access is not used for the reproduction or communication of works protected by copyright to the public, without the consent of the copyright owners, provided that the owner of such access has been advised by HADOPI to implement a security system following a first infringement having taken place less than one year before (articles L 336-3 and R 335-5 of the IPC).

For internet users who continue to show evidence of infringing activity, HADOPI then selects the files to be reviewed and may ask the relevant internet user to participate in a hearing. Only professionals and legal entities are required to attend said hearing.

HADOPI then renders its decision. It can also send files to the public prosecutor for sanctions if the graduated response regime has not led the illicit acts to be put to an end (fine of up to €1,500).

Prevention of illegal downloading and offer

The presiding judge of the court of first instance can order, under penalty, any measure necessary for the protection of copyright where software is being used mainly to offer copyright-protected works illegally (article L 336-1 of the IPC).

Article L 336-2 of the IPC also provides that, in case of copyright and related rights infringement occasioned by the content of an online communication service to the public, rights holders can ask courts to order 'all appropriate measures to prevent or stop a copyright infringement against any person who may be likely to contribute to such prevention or termination'.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

Copyright infringement may be prevented by using a copyright notice or implementing technical protection measures.

Article L 331–5 of the IPC provides that DRM consists in technical technologies or devices aiming at preventing or limiting the unauthorised uses. DRM must not prevent the users from benefiting from the exception for private copying and users shall be informed of their use.

Moreover, it is a criminal offence to hold for private use or use a technological application, device or service aimed at infringing a useful DRM which protects a work (fine of up to €750) (article R 335–3 of the IPC).

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

France is signatory of the following international copyright conventions:

- the Berne Convention for the Protection of Literary and Artistic Works of 1886 (the Berne Convention);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961;
- the World Intellectual Property Organization Performances and Phonograms Treaty of 20 December 1996;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1995, notably on copyright and related rights; and
- the World Intellectual Property Organization Copyright Treaty of 1996.

47 | What obligations are imposed by your country's membership of international copyright conventions?

International copyright conventions impose the obligation of national treatment, which is a rule of non-discrimination requiring France to extend copyright protection to non-French nationals on the same terms as it does to its nationals.

The Berne Convention provides that the enjoyment and the exercise of copyright shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. There are also consequences in terms of duration of protection. Indeed, pursuant to the Berne Convention, if a contracting state provides for a longer term than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.

UPDATE AND TRENDS

Emerging trends and new legislation

48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

The Directive on copyright in the Digital Single Market (the DSM Directive) was adopted by the EU Council on 15 April 2019, after almost three years of legislative procedure between the three EU parliamentary bodies.



Olivia Bernardeau-Paupe

olivia.bernaerdeau-paupe@hoganlovells.com

17 Avenue Matignon

75008 Paris

France

Tel: +33 1 53 67 47 47

Fax: +33 1 53 67 47 48

www.hoganlovells.com

The DSM Directive creates new exceptions to copyright, which are not optional, such as data mining for scientific research purposes (article 3), use for teaching purposes (article 5) and copying by cultural heritage institutions (article 6). It also provides that, for out of commerce works, member states will have to choose between to-be-created exceptions and licensing mechanisms through collective management organisations (article 7).

A new mediator shall also be appointed for negotiations of licensing agreement regarding video-on-demand platforms (article 13).

Furthermore, the DSM Directive creates a new neighbouring right for press publishers regarding online uses of their publications (article 15). Press publishers will retain the right to authorise the representation and reproduction of the works they publish for two years from the publication thereof. This new neighbouring right does not apply to hyperlinking.

Notwithstanding the limited liability regime provided for in the Information Society Directive for web hosting service providers, the DSM Directive provides that in giving access to copyright-protected works through their platforms, online content-sharing service providers perform an act of communication to the public which shall be authorised by the copyright holder. The only way for platforms not to be held liable is by concluding licensing agreements or by demonstrating they have made their best efforts to obtain authorisation, ensured the unavailability of the works, and acted expeditiously upon notice or made their best efforts by setting up automated recognition tools which shall be subject to human review (article 17).

As soon as the DSM Directive is published with the Official Journal, member states will have two years to implement it. In France, the implementation has already begun. Senate members have already proposed a bill implementing article 15. The National Assembly has started examining the same on 9 May 2019.

Regarding the implementation of article 17, the French Ministry for Culture has appointed a committee aiming at assessing the efficiency and relevance of automated recognition tools for protected contents available through online content-sharing service providers. The article is likely to be implemented quickly since a similar provision has been discussed in the context of the adoption of the Law for a Digital Republic (dated 7 October 2016).

Germany

Oliver Nilgen

Meissner Bolte Patentanwälte Rechtsanwälte Partnerschaft mbB

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The relevant German statutes in the copyright area are:

- the Act on Copyright and Neighbouring Rights of 9 September 1965 (the Copyright Act), governing the requirements for the protection of works and contributions by performing artists and other contributions enjoying neighbouring rights protection, as well as the scope and infringement of such rights;
- the Act on Copyright for Works of Fine Arts and Photography of 9 January 1907; and
- the Act on the Administration of Copyright and Related Rights by Collecting Societies of 24 May 2016, governing the legal framework for the operation of collection societies under German law.

Enforcement authorities

2 | Who enforces it?

German copyright law grants the author exclusive rights to exploit his or her work.

The exclusive rights protected by the German copyright law will be enforced by the responsible civil courts.

As far as the German copyright law also deals with criminal offences, the public prosecution department and the criminal courts are responsible for enforcement.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The Copyright Act does not explicitly address the digital exploitation of works. However, it provides that the author has the exclusive right to exploit his or her work in any tangible form or to communicate his or her work to the public in any intangible form. For instance, the right of making works available to the public shall constitute the right to make the work available to the public, either by wire or wireless means, in such a manner that members of the public may access it from a place and at a time individually chosen by them.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

According to settled German case law, in the case of an alleged infringement of copyright or related rights by making a work available via a

website, a copyright infringement in Germany was committed if the content of the website was addressed to German users. The criteria are whether the websites provide their content in German language, using a '.de' domain, or whether the entire appearance of the website is addressed to German users.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

There is no centralised copyright agency or office available in Germany where works can be registered, as is the case in the United States.

Contrary to industrial property rights, copyright arises with the creation of the work. There are no formal requirements to be met. A registration in an official register is neither required nor possible in order to obtain copyright protection.

The German Patent and Trademark Office (DPMA) is responsible for the Register of Anonymous and Pseudonymous Works and the Register of Out-of-Commerce Works. The DPMA is also involved in tasks in connection with the European Orphan Works Database. The DPMA does not have any further duties in the field of copyright.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

Section 2 of the German Copyright Act provides a catalogue of protectable types works, including:

- literary works, such as written works, speeches and computer programs;
- musical works;
- pantomimic works, including works of dance;
- artistic works, including works of architecture and of applied art and drafts of such works;
- photographic works, including works produced by processes similar to photography;
- cinematographic works, including works produced by processes similar to cinematography; and
- illustrations of a scientific or technical nature, such as drawings, plans, maps, sketches, tables and three-dimensional representations.

The list is exemplary and non-exhaustive. All works meeting these criteria will be protected.

To be copyright protected, the works need to be personal intellectual creations. They need to be creative and individual, but need not to be novel or unique.

Rights covered

7 | What types of rights are covered by copyright?

German copyright law grants the author exclusive rights to exploit his or her work which includes, in particular:

- the right of reproduction;
- the right of distribution;
- the right of exhibition;
- the right of public performance;
- the right to make a work available to the public;
- the right to broadcast; and
- the right to publish and exploit derivative works.

These exclusive rights specifically mentioned in the Copyright Act are examples only.

Apart from these exploitation rights, German copyright law also provides for moral rights for authors, which can also be the object of infringement proceedings. These include, in particular, the right of publication, the right to be credited as the author, and the right to prohibit distortions or other impairments of the author's work which could endanger his or her justified intellectual or personal interests with respect to the work.

Excluded works

8 | What may not be protected by copyright?

Mere ideas, events, motifs, and scientific theories and discoveries are not protectable under German copyright law.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

German copyright law does not recognise a general 'fair use' doctrine. Rather the Copyright Act contains a chapter including several specific provisions limiting the scope of rights for the copyright owner with respect to lawfully permitted uses. For instance, such lawfully permitted uses refer to collections for religious use, newspaper articles and broadcast commentaries and, most importantly, the reproduction for private and other personal uses.

Architectural works

10 | Are architectural works protected by copyright? How?

Yes. Artistic works, including works of architecture and of applied art and drafts of such works, are explicitly mentioned in the Copyright Act.

Performance rights

11 | Are performance rights covered by copyright? How?

A performer, namely a person who performs, sings, acts or in another manner, presents a work or an expression of popular art or who participates artistically in such a presentation is also protected under German copyright law. The performer shall have the right in relation to his or her performance to be recognised as such and the performance can be separately exploited by television or radio broadcast among others. Consequently, the Copyright Act provides for ample protection of performing artists and their moral rights. A performer shall have the right to prohibit any distortion or other derogatory treatment of his or her performance of such nature as to jeopardise his or her standing or reputation as a performer.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

German copyright law protects neighbouring rights that concern artistic, entrepreneurial, scientific and other efforts. These neighbouring rights usually grant the holders similar exclusive rights to those of a copyright owner.

Moral rights

13 | Are moral rights recognised?

German copyright law provides for moral rights for authors. These include, in particular, the right of publication, the right to be credited as the author and the right to prohibit distortions or other impairments of the author's work that could endanger his or her justified intellectual or personal interests with respect to the work.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

There is no requirement of copyright notice in Germany. The person designated as the author on the work, or copies of a released work, or on the original of an artistic work shall be regarded as the author of the work in the absence of proof to the contrary. The same shall apply to any designation that is known to be a pseudonym or stage name of the author.

15 | What are the consequences for failure to use a copyright notice?

Where the author has not been named, it shall be presumed that the person designated as the editor on the copies of the work is entitled to assert the rights of the author. Where no editor has been named, it shall be presumed that the publisher is entitled to assert such rights.

Deposit

16 | Is there a requirement of copyright deposit?

No. Under German copyright law, there are no formal requirements for copyright protection.

17 | What are the consequences for failure to make a copyright deposit?

As there is no requirement for copyright deposit, there are no consequences for failure.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

No. There is no registration requirement for either copyright protection or to facilitate copyright enforcement.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

No.

20 | What are the fees to apply for a copyright registration?

As there is no copyright registration system available in Germany, no fees occur.

21 | What are the consequences for failure to register a copyrighted work?

As there is no copyright registration system available in Germany, no consequences for failure occur. In fact, copyright protection arises automatically with the mere creation of the work.

OWNERSHIP AND TRANSFER**Eligible owners****22 | Who is the owner of a copyrighted work?**

The creator – that is, the author, composer, architect or photographer – is the owner of the work.

In Germany, only individuals can be the owner of a copyrighted work – companies cannot.

Employee and contractor work**23 | May an employer own a copyrighted work made by an employee?**

German copyright law does not recognise the 'work made for hire' doctrine. Even when an employee creates a work in the course of his or her employment, the company will not become the owner of the copyright.

However, employers are privileged in the sense that where the author has created the work in the fulfilment of obligations resulting from an employment or service relationship, unless otherwise provided in accordance with the terms or nature of the employment or service relationship. For instance, the Copyright Act provides that where a computer program is created by an employee in the execution of his or her duties or following the instructions of his or her employer, the employer shall be exclusively entitled to exercise all economic rights in the computer program, unless otherwise agreed.

24 | May a hiring party own a copyrighted work made by an independent contractor?

An independent contractor will remain the owner of the copyright. However, the independent contractor can grant licences to other persons authorising the use of his or her works.

An agreement does not have to be in writing, but it is recommended as proof may be needed later on.

Joint and collective ownership**25 | May a copyrighted work be co-owned?**

Where several persons have jointly created a work without it being possible to separately exploit their individual shares in the work, they are joint authors of the work.

The right of publication and of exploitation of the work accrues jointly to the joint authors; alterations to the work shall be permissible only with the consent of the joint authors. However, a joint author may not refuse his or her consent to publication, exploitation or alteration contrary to the principles of good faith. Each joint author shall be entitled to assert claims arising from violations of the joint copyright; he or she may, however, demand performance only to all of the joint authors.

Where several authors have combined their works for the purpose of joint exploitation, each may require the consent of the others to the publication, exploitation or alteration of the compound works if the consent of the others may be reasonably expected in good faith.

Transfer of rights**26 | May rights be transferred? If so, what rules and procedures apply?**

Unlike in some other countries, copyright as such cannot be transferred from the creator to a third party except by inheritance.

Licensing**27 | May rights be licensed? If so, what rules and procedures apply?**

Yes. The author can grant licences or rights to use to individuals or legal entities. Such rights can be exclusive or non-exclusive, limited or unlimited in time, content or territory.

28 | Are there compulsory licences? What are they?

The Copyright Act stipulates a compulsory licence for the production of audio recordings. That means that if a producer of audio recordings has been granted a right of use in a musical work entitling him or her to transfer the work onto audio-recording mediums and to reproduce and distribute these for commercial purposes, the author shall be required upon release of the work to also grant a right of use with the same content on reasonable conditions to any other producer of audio recordings whose main establishment or whose place of residence is located in the territory to which this Act applies.

29 | Are licences administered by performing rights societies? How?

Collective management organisations generally manage the rights of creative people collectively.

Collective management organisations are associations of creative people organised under private law. They grant licences for the works managed by them, monitor the use of these works, collect royalties in order to subsequently distribute the revenues to the rights holders on the basis of distribution schemes.

At present, 13 collective management organisations have the authorisation to conduct business in Germany. Since collective management organisations often have a monopoly position and act in a fiduciary capacity, they are subject to the government supervision, which is exercised by the DPMA.

Termination**30 | Is there any provision for the termination of transfers of rights?**

As the copyright itself is non-transferable, there is also no provision for the termination of rights.

In the event of death of the author, the copyright passes to their beneficiary.

Recordal**31 | Can documents evidencing transfers and other transactions be recorded with a government agency?**

No. There is no government agency available where such documents can be recorded.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection begins with the date of creation.

Duration

33 | How long does copyright protection last?

The term of protection in Germany is the life of the author and another 70 years after his or her death. If the copyright is shared by several co-authors, it will expire 70 years after the death of the longest surviving co-author.

With respect to cinematographic works, the term of protection is the life and 70 years after the death of the longest surviving of a group of authors consisting of the main director, the author of the film script, the author of the dialogue, and the composer of any music created for the film.

In the case of anonymous and pseudonymous works, the term of protection will generally end 70 years after publication, unless the author reveals his or her identity within this term or registers his or her true name with the register at the DPMA.

34 | Does copyright duration depend on when a particular work was created or published?

No. The duration is always the life of the author and another 70 years after his or her death.

Renewal

35 | Do terms of copyright have to be renewed? How?

Terms of copyright may not be renewed.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

No.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

German copyright law protects all rights holders defined in the Copyright Act equally. It does not make a difference whether an infringer violates an exclusive right of an author, an author's moral right, or a neighbouring right protected under the Copyright Act.

Infringements of any of these protected rights could lead to civil law claims for injunctions, damages, unjust enrichment as well as destruction, recall or restitution of infringing goods.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Under German copyright law, not only is the direct infringer liable, but also other persons involved in the infringement, such as instigator or assistants. Further, and according to settled case law, liability requires actual and specific knowledge of the respective infringing acts, the legal and factual possibility of preventing the direct infringement, as well as

the violation of a reasonable duty of care to prevent such infringements. The resulting liability is limited to injunctive relief and not to damages. One of the main situations refers to platform operators. Once they have been informed about a specific infringement on their platform, they are required to remove the specific infringing content and to implement measures in order to prevent future violations.

Available remedies

39 | What remedies are available against a copyright infringer?

The rights holder is mainly entitled to the following relief against a copyright infringer:

- To eliminate or, where there is a risk of repeated infringement, to cease-and-desist from committing infringing acts (intent or negligence of the infringer is not required). The entitlement to prohibit the infringer from future infringement shall also exist where the risk of infringement exists for the first time.
- Any person who intentionally or negligently performs such an act shall be obliged to pay the injured party damages for the prejudice suffered as a result of the infringement.
- To destroy the unlawfully produced or distributed copies or copies that are intended for illegal distribution that are in the injuring party's possession or are his or her property.
- To recall unlawfully produced or distributed copies or copies intended for unlawful distribution or to definitively remove them from the channels of commerce or, as an alternative, the injured party may require that the copies which are the injuring party's property be released against payment of an equitable remuneration which may not exceed the production costs.
- Rendering of information about the distribution chain of the infringing products, accounting for turnover and profits made with infringing acts.
- Entitlement to present documents and to permit inspection of an object in the possession of the infringer if this is necessary in order to substantiate the claims.

Limitation period

40 | Is there a time limit for seeking remedies?

The statutory limitation period for legal action against copyright infringements is three years from the end of the year in which the rights holder became aware of the infringing acts. If the rights holder does not learn about the infringing acts, the statutory limitation period will be 10 years starting from the date on which the rights holder first incurred damages based on the infringement. The absolute limitation period, that is, without knowledge of the infringement and regardless of damages incurred, is 30 years starting from the infringing act.

An application for a preliminary injunction must be filed within a certain time period, which is usually one month after having gained knowledge of the infringement and the infringer.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes. The infringer is liable for actual damages sustained by the rights holder.

When setting the damages, any profit obtained by the infringer as a result of the infringement of the right may also be taken into account.

Entitlement to damages may also be assessed on the basis of the amount the infringer would have had to pay in equitable remuneration if the infringer had requested authorisation to use the rights infringed.

Authors, writers of scientific editions, photographers and performers may also demand monetary compensation for damage

which is non-pecuniary in nature provided and to the extent that this is equitable.

This means that there are three different ways of calculating damages:

- lost profits due to the infringement;
- reasonable royalties in relation to the infringement (licence analogy); or
- surrender of the actual profits generated by the infringer.

In copyright infringement matters, the licence analogy seems to be the most commonly used way to calculate damages.

There is no basis for punitive damages in German law.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes. As a rule, the losing party has to reimburse the winning party for all court fees paid. Furthermore, the losing party has to reimburse the winning party's lawyer's fees. However, the amount of fees and costs that can be claimed is limited by the German Code of Lawyers' Fees.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Copyright infringements under German law also constitute criminal acts, which are punishable by fines or up to three years imprisonment. If the infringement is done on a commercial basis, the maximum punishment is five years in prison.

According to German copyright law, unlawful exploitation of copyrighted works, unlawful affixing of the designation of an author and the infringement of related rights are subject to imprisonment of not more than three years or a fine. Also any attempt shall be punishable.

The unlawful exploitation on a commercial scale is subject to an imprisonment of not more than five years or a fine.

The infringement of technological measures and rights management information is subject to imprisonment of not more than one year or a fine.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

No. The liabilities, remedies and defences for online copyright infringement are identical to the ones in the 'real world'.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

Copyright may be prevented by establishing a digital rights management system, which is a set of access control technologies for restricting the use of proprietary hardware and copyrighted works.

MEISSNER BOLTE

Oliver Nilgen

o.nilgen@mb.de

Widenmayerstr 47

80538 Munich

Germany

Tel: +49 89 2121860

Fax: +49 89 21218670

www.meissnerbolte.de

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

Germany signed and is therefore a member of the following conventions:

- the Revised Berne Convention for the Protection of Literary and Artistic Works (1952);
- the Universal Copyright Convention (1952);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961);
- the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (1994);
- the World Intellectual Property Organization Copyright Treaty (1996); and
- the World Intellectual Property Organization Performances and Phonograms Treaty (1996).

47 | What obligations are imposed by your country's membership of international copyright conventions?

The membership of international copyright conventions implies the minimum standards of protection, which each signatory country then implements within the bounds of its own copyright law.

The established minimum standards relate to, for instance:

- the types of works protected;
- the duration of protection; and
- the scope of exceptions.

Germany grants and respects copyright of non-citizens.

Greece

Pigi Konstantinou

Souriadakis Tsibris

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The main Greek copyright law is Law No. 2121/1993 'on Copyright, Related Rights and Cultural Matters' (most recently amended with Law No. 4531/2018). Furthermore, Law No. 4481/2017 'on the collective management of copyright and related rights, multiterritorial licensing in musical works for online use and other issues falling within the scope of the Ministry of Culture and Sport', regulates issues in relation to collective management of copyright and related rights.

Enforcement authorities

2 | Who enforces it?

Greek copyright law is enforced by courts and certain administrative authorities.

Civil claims are filed before the competent civil courts throughout the country while criminal suits are filed before the competent criminal courts.

The Unit of Special Controls, the police, port and customs authorities, are charged with enforcing copyright law and imposing administrative fines in certain cases of copyright infringement. Furthermore, a special administrative Committee for the Notification of Copyright and Related Rights Infringement on the Internet (Committee for Online Infringement), formed by the Minister of Culture and Sports, may hear cases of copyright or related rights infringement on the internet and rule on the removal of the infringing content from a website where it has been illegally posted or on blocking access to the content.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

While all the provisions apply to both digital and analogue exploitation of works, the provisions that specifically address digital exploitation are mainly related with:

- the making available right, where the authors and the rights holders of certain related rights are granted with a right to make their works available to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them; and
- the management of copyright in musical works intended for multiterritorial online use, both in terms of simultaneous transmission (simulcasting) and webcasting (articles 33 to 41 of law 4481/2017, incorporating articles 24-31 of the EU Directive 2014/26).

There are also digital-oriented provisions that refer to specific preventive measures and other remedies against copyright infringement (see questions 44 and 45) and to exceptions and limitations of copyright (eg, temporary acts of reproduction which are transient or incidental and integral and essential parts of a technological process, and the private use exception, which states an equitable remuneration is due to the author and the respective rights holders when a reproduction is made using digital means).

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Greek copyright law per se does not provide for extraterritorial application. The only relative reference is to websites which are hosted on servers outside Greece and is made in relation to the Committee for Online Infringement, where it is stated that, when the committee substantiates that copyright or related rights are infringed, it shall notify the respective parties and ask them to remove the infringing content from the website where it has been illegally posted or it shall block access to it. Where the content is hosted on a website whose server is within the Greek territory, the committee shall ask those that are notified to remove the content. Where the website is hosted on a server outside the Greek territory, the committee shall ask the internet access provider to block access to this content.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

No, there is not. See question 29 for details about collecting societies.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

Greek copyright law protects any intellectual literary, artistic or scientific creation which is original and expressed in any specific form.

The notion of 'originality' is not defined in law – except in regard to computer programs (see below). However, according to established Greek case law, this notion is defined on the basis of the theory of 'statistical uniqueness', which argues that a work is original when, under similar circumstances and with the same goals, no other author would be in a position to create a similar work, or in combination with the criterion that a work presents an individual specificity or a minimum threshold of 'creative height' so as to stand out and differentiate from the daily (common) works or from other similarly known works.

The law provides for an indicative list of works, which, if considered original, can be protected by copyright. This list includes:

- written and oral texts;
- musical compositions with or without words;
- theatrical works accompanied or unaccompanied by music;
- choreographies and pantomimes;
- audiovisual works;
- works of fine art, including drawings, works of painting and sculpture, engravings and lithographs;
- works of architecture;
- photographs; and
- works of applied art, illustrations, maps and three-dimensional works relative to geography, topography, architecture or science.

Furthermore, the following types of works may also be protected by copyright:

- derivative works such as translations, adaptations, arrangements and other alterations of works or of expressions of folklore; and
- collections of works or collections of expressions of folklore or of simple facts and data, such as encyclopaedias and anthologies, provided that the selection or the arrangement of their contents is original.

Moreover, databases which, by reason of selection or arrangement of their contents, constitute the author's intellectual creation, as well as computer programs and their preparatory design material that are original, in the sense that they are the author's personal intellectual creation, are also protected by copyright.

Rights covered

7 | What types of rights are covered by copyright?

Greek copyright law covers both economic as well as moral rights and provides for an indicative list of these rights. The main economic rights of the authors are the following:

- the fixation and the reproduction right;
- the translation right;
- the arrangement, adaptation or other alteration right;
- the distribution right;
- the rental or public lending right;
- the public performance right;
- the broadcasting and rebroadcasting right;
- the communication to the public right, including the making available to the public right; and
- the importation right, in relation to the works produced abroad without the author's consent or the importation of copies from a country outside the European community, when the right over such importation in Greece had been retained by the author through contract.

For the main moral rights, see question 13.

Excluded works

8 | What may not be protected by copyright?

Greek copyright law does not apply to any work that cannot be considered as an original intellectual literary, artistic or scientific creation or which is not expressed in a specific form. Therefore, mere ideas, methods, artistic styles, and scientific theories are not protected. Furthermore, the law does not apply to official texts expressive of the authority of the state, notably to legislative, administrative or judicial texts, nor it applies to expressions of folklore, news information or simple facts and data.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

No. Greek copyright law only provides for certain specific exceptions to and limitations of the economic rights (exhaustive list). This means that in order for a person to legally use a protected work, without the licence of the rights holder and without any payment, the respective use has to be covered by a specific exception and all the requirements of this exception must be met. These exceptions cover, among other things, uses in relation to quotations of short extracts, reproduction for personal use, for teaching purposes, by libraries and archives, for judicial or administrative purposes, for information purposes, for the benefit of people with disabilities, etc.

Architectural works

10 | Are architectural works protected by copyright? How?

The law specifically includes the architectural works among the works that can be protected, if the work is considered to be original (for the concept of originality, see question 6). Both two-dimensional works, namely drafts, plans, studies, and three-dimensional works (eg, building mock-ups and integrated constructions), both in their exterior and interior design, and interior fittings, can be protected, while the purpose of these works, their scale and dimension and their construction materials are indifferent for the purposes of copyright protection.

Performance rights

11 | Are performance rights covered by copyright? How?

Greek copyright law grants performers – namely the persons who in any way whatsoever act or perform works, such as actors, musicians, singers, chorus singers, dancers, puppeteers, shadow theatre artists, variety performers or circus artists – with neighbouring rights, which consist of both economic and moral rights.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

Greek copyright law recognises certain neighbouring (related) rights – of economic nature only – to the following categories of persons:

- producers of phonograms;
- producers of visual or sound and visual recordings;
- radio and television organisations;
- publishers; and
- persons who, after the expiry of copyright protection, for the first time lawfully publish or lawfully communicate to the public a previously unpublished work.

Moral rights

13 | Are moral rights recognised?

Yes. Greek copyright law grants to the authors the following moral rights (indicative list):

- the right of publication;
- the right of attribution;
- the right to prohibit any distortions, mutilations or other modifications of their works and any other offence due to the circumstances of the presentation of these works in public;
- the right to access their works, even when the economic right in these works or the physical embodiment of these works belongs to another person; and

- in the case of a literary or scientific work, the right to rescind a contract transferring the economic right or an exploitation contract or licence in relation to a work, when the author considers such action to be necessary for the protection of his or her personality because of changes in his or her beliefs or in the circumstances.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No, there is not.

15 | What are the consequences for failure to use a copyright notice?

Not applicable. See question 14.

Deposit

16 | Is there a requirement of copyright deposit?

No, there is not.

17 | What are the consequences for failure to make a copyright deposit?

Not applicable. See question 16.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

Greek copyright law does not recognise any system for copyright registration. In practice, authors may seek to formulate evidence in order to prove that their work existed under a specific form on a specific date. This can be mainly achieved by either filing their work to a notary public or by using the time-stamping services, recently entered into force by the Hellenic Copyright Organization (HCO), which provide certified dates in relation to works.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

No. See question 18.

20 | What are the fees to apply for a copyright registration?

Not applicable. See question 18.

21 | What are the consequences for failure to register a copyrighted work?

Not applicable. See question 18.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The initial holder of both the economic and the moral right in a work is always the author of that work. Under Greek copyright law only natural persons – and not legal entities – can be considered as authors of a work.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

The initial holder of both the economic and the moral rights in a work is always the author of the work, even in case that a work is created by an employee in the execution of his or her employment contract.

The employer may only become a subsequent owner of all or of certain economic rights in a work (the moral rights always remain with the author) through a transfer of these rights made either automatically, by virtue of the employment relationship, or expressly agreed between the parties in a written contract. More specifically:

- When a work is created by an employee working in the private sector, unless otherwise provided for in the employment contract, only such economic rights as are necessary for the fulfilment of the purpose of the contract shall be exclusively transferred to the employer.
- When a work is created by an employee working in the public sector in execution of his or her duties, then all the economic rights are automatically (*ipso jure*) transferred to the employer, by virtue of the employment relationship, unless otherwise provided for in the employment contract.
- As far as computer programs are concerned, all the economic rights in a computer program created by an employee in the execution of an employment contract or following instructions given by his or her employer shall be automatically transferred to the employer, unless otherwise provided for in the employment contract.

24 | May a hiring party own a copyrighted work made by an independent contractor?

The initial holder of both the economic and the moral rights in a work is always the author of the work, even in case that a work is created by an independent contractor by virtue of a hiring relationship. A hiring party may only become a subsequent owner of all or of certain economic rights in a work (the moral rights always remain with the author) through a transfer of these rights expressly agreed between the parties in a written contract.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

A copyrighted work may be co-owned either by persons or by entities. More specifically, two or more persons can co-own both the moral and the economic rights in a work, in case of joint authorship (collaborative works) or of a composite work, while two or more persons or entities can co-own the economic rights in a work in case of transfer of these rights by the author(s).

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Only the economic rights may be transferred between living persons or as mortis causa. The moral rights are not transferable between living persons, while after the death of an author, the moral rights pass to his or her heirs, who have to exercise the rights in compliance with the author's wishes, provided that such wishes have been explicitly expressed.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

The author of a work may either:

- conclude contracts, by which he or she entrusts economic rights to another contracting party (the 'exploitation contracts') and in which case the other party undertakes the obligation to exercise the rights thus entrusted; or
- authorise another person to exercise certain economic rights (the 'exploitation licenses'), in which case the other party has the right, but not the obligation, to exercise the rights thus licensed.

Exploitation contracts and licences may be exclusive or non-exclusive. These contracts or licences may in no circumstance refer to all the future works of the author and shall never be deemed to refer to forms of exploitation that were unknown on the date of the contract.

28 | Are there compulsory licences? What are they?

Greek copyright law provides for the following compulsory licences:

- in case that technical means (such as audio or video recorders, magnetic tapes or other material suitable for the reproduction of sound or images, including digital reproduction devices and media) are used for the reproduction of a work for private use (which is permitted by Greek copyright law without the consent of the author), a reasonable remuneration is due to the author of the respective works and to the rights holders of certain involved related rights; and
- when sound recordings are used for a radio or television broadcast by any means, such as wireless waves, satellite or cable, or for communication to the public, the user shall pay a single and equitable remuneration to the performers whose performances are carried on the recordings and to the producers of the recordings.

29 | Are licences administered by performing rights societies?

How?

The authors or the rights holders of related rights have the right to authorise a performing rights society (collecting society) of their choice to manage or to protect their economic right or certain powers deriving therefrom in relation to certain or to all of their works or other protected material, for the territories of their choice. This authorisation is voluntary, however, there are cases for which the law introduces an obligatory collective management or obligatory exercise of rights by a collecting society, as in the case of the collection of equitable remuneration deriving from private reproduction or when sound recordings are used for a radio or television broadcast by any means, such as wireless waves, satellite or cable, or for communication to the public (see question 28).

The authorisation may be granted by transfer of the right or of the relevant powers, for the purpose of management, either by power of attorney or by any other contractual agreement and is made in writing and for a certain period of time that cannot exceed three years.

The management of authors' rights and related rights in Greece can be carried out collectively, through collective management organisations (CMOs) and independent management entities (IMEs) and the protection of these rights can be carried out by collective protection organisations (CPOs). At present, there are 17 CMOs (eight representing authors and nine representing holders of related rights) in Greece and two CPOs that are all licensed by the Minister of Culture and Sports and supervised by HCO.

The licensing of the use of the works is subject to the payment of a percentage fee, which is calculated based on tariff tables adequately

communicated to the public by CMOs. When formulating and implementing their remuneration, CMOs must apply objective criteria, act without arbitrariness and avoid abusive discrimination. CMOs and representative user associations may also enter into agreements regulating the remuneration payable by the user to each category of rights holders as well as any other matter relating to parties' relations.

Termination

30 | Is there any provision for the termination of transfers of rights?

There are no such special provisions (only in relation to the duration of the transfer, the law states that, if the duration of the transfer of the rights is unspecified, it shall be deemed to be limited to five years). However, it is argued that the general rules of termination of an agreement may apply.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

No, there is not any such agency.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection begins with the creation of the work.

Duration

33 | How long does copyright protection last?

Copyright protection lasts for the whole of the author's life and 70 years after his or her death (calculated from 1 January of the year after the author's death).

After the expiry of the period of copyright protection, the state, represented by the Minister of Culture, may exercise the moral rights relating to the acknowledgment of the author's paternity and the rights relating to the protection of the integrity of the work.

With respect to collaborative works, copyright lasts as long as the life of the last surviving author and 70 years following his or her death.

The term of protection of audiovisual works expires 70 years after the death of the last of the following persons to survive: the principal director, the author of the screenplay, the author of the dialogue, and the composer of the music specifically created for use in the audiovisual work.

In case of anonymous or pseudonymous works, the term of copyright lasts for 70 years computed from 1 January of the year after that in which the work is lawfully made available to the public. However, if during the above period the author discloses his or her identity or when the pseudonym adopted by the author leaves no doubt as to his or her identity, then the general rules apply.

34 | Does copyright duration depend on when a particular work was created or published?

The publication of a work is relevant, in terms of copyright duration, only in case of anonymous or pseudonymous works (see question 33). In all other cases, copyright duration is calculated from the date of death of the respective author(s).

Renewal

35 | Do terms of copyright have to be renewed? How?

The term of copyright is specifically determined in law and cannot be renewed.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

The copyright protection was extended to 70 years after the death of the author in 1993 and in 1997, when the Greek law was updated to complied with Directive 93/83/EEC of 27 September 1993, an amendment was also made in relation to the calculation of copyright duration, and from then it has been calculated from 1 January of the year after the author's death, instead from the end of the year of the author's death.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Any use of a protected work which falls within the scope of any economic or moral right, is made without the consent of the author or of the respective rights holder, and does not fall under any exception or limitation provided by law, constitutes a copyright infringement.

A copyright infringement may occur even in case that a party who has entered into a licence or exploitation agreement with the author or the respective rights holder for certain uses or exploitations of a work, acts outside the defined scope of these agreements.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

A specific reference to a secondary liability for indirect infringement is made in Greek copyright law in relation to:

- the intermediaries (eg, internet service providers) whose services are used by a third party to infringe a copyright or related right or the sui generis right of a database maker, where the law states that the rights holders may also apply for an injunction against these intermediaries; and
- the circumvention of technological measures, where the law states that the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which are promoted, advertised or marketed for the purpose of circumvention of, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures are prohibited. The perpetrator has both civil and criminal liability, while administrative penalties may also be imposed.

Furthermore, the general civil law provisions on tort liability also apply for copyright infringements. Thus in case that an infringing act was committed by a person who either works as an employee or is the legal representative of an entity, then both this person as well as the respective entity will be considered liable for this infringement or in case that a person acts under the instructions of another person or for the benefit of this other person, then both these persons may be considered liable for the same infringement.

Available remedies

39 | What remedies are available against a copyright infringer?

The law provides for several remedies against a copyright infringer, including the following.

Preliminary measures

The rights holder may file for preliminary measures (and also obtain a temporary injunction until the issuance of the decision regarding the preliminary measures) requesting, among other things:

- precautionary seizure of items in the possession of the alleged infringer that constitute means of commission or product or evidence of the infringement;
- detailed description of such items, including the taking of photographs; or
- any other measure intended to prevent any imminent infringement of the rights or to forbid, on a provisional basis, continuation of the infringement of that right.

In case of an infringement committed on a commercial scale, court may order the precautionary seizure of the property of the alleged infringer, including the blocking of his or her bank accounts.

Civil action

The rights holder may file a civil action to claim:

- recognition of his or her rights (being infringed);
- discontinuation of the infringement and its omission in the future (which may include recall from the channels of commerce of goods that they have found to be infringing rights, definitive removal from the channels of commerce or destruction); and
- indemnification for moral damages and to seek damages of not less than twice the legally required or normally payable remuneration for the form of exploitation which the infringing party made without licence, in case of an infringement committed by intent or negligence of the infringing party. Instead of seeking damages, and regardless of whether the infringement was committed by intent or negligence, the rights holder may demand either the payment of the sum accrued by the infringing party from the unlicensed exploitation of a work or the profit gained by the infringing party from such an exploitation.

Administrative fines

The law provides also for the imposition of special administration fines to the following categories of persons:

- persons who reproduce, sell or otherwise distribute to the public or possess with the purpose of distributing a computer program;
- street vendors or standing persons (outside a shop) caught to distribute to the public by sale or by other means, or to possess with the intention of distributing sound recordings on which a work protected by copyright or related rights law has been recorded; and
- persons who reproduce phonograms stored on any technical storage media.

The law also provides for an administrative procedure before the Committee for Online Infringement, in cases of copyright infringement on the internet (see question 44).

Criminal sanctions

The law provides also for specific criminal sanctions (see question 43).

Publication of Decisions of civil or criminal courts

Decisions of civil or criminal courts concerning copyright infringement may order the appropriate measures to be taken for the propagation of

information relating to the decision, including the posting of the decision, as well as its publication, in summary or in its entirety, in the mass media or the internet.

Application for evidences

The rights holder may request for the court to order that specified evidence which lies in the control of the opposing party to be presented in the court by this opposing party and in case of an infringement committed on a commercial scale, the court may also order the communication of banking, financial or commercial documents under the control of the opposing party. The court may also order information on the origin and distribution networks of the goods or services which infringe a copyright to be provided by the infringer.

Limitation period

40 | Is there a time limit for seeking remedies?

A compensation claim or a claim for moral damages (in case of an infringement committed by intent or negligence) is barred five years after the claimant became aware of the damage and the person liable for the damage. In any case these claims are barred 20 years after the infringing act. The 20-year statute of limitation also applies to claims that are based on unjustified enrichment and to cease-and-desist claims.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes. See question 39.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

In Greece, the losing party is obliged to reimburse the winning party for certain legal costs of the court proceedings. In case of an action for copyright infringement, such legal costs and other expenses shall obligatorily include any pertinent expenditure, such as witness costs, attorney fees, fees of experts and technical consultants of the parties and expenses made for the discovery of the infringers reasonably incurred by the winning party.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

The law provides for specific criminal sanctions for any persons violating copyright, related rights and database rights, circumventing technical measures and make unauthorised use of computer programs.

As far as the violation of copyright is concerned, any person who, in contravention of the provisions of Greek copyright law or of lawfully ratified multilateral international conventions on the protection of copyright, infringes any of the economic or certain of the moral rights of the author, is liable to imprisonment of no less than a year and to a fine from €2,900 to €15,000. If the financial gain sought or the damage caused by the perpetration of an act referred to above, is particularly great, the sanction shall be not less than two years imprisonment and a fine of €6,000 to €30,000.

If the guilty party has perpetrated any of the aforementioned acts by profession or at a commercial scale or if the circumstances in connection with the perpetration of the act indicate that the guilty party poses a serious threat to the protection of copyright, the sanction shall be imprisonment of up to 10 years and a fine of €6,000 to €30,000, together with the withdrawal of the trading licence of the undertaking that served as the vehicle for the act.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

In general, all the provisions referring to liabilities, remedies and defences for copyright infringement apply in both the analogue and digital worlds.

The law provides further for a specific administrative procedure before the Committee for Online Infringement in cases of copyright infringement on the internet. In particular, the rights holder may submit to this committee a pro forma application for termination of infringement along with all the relevant evidences, which is admissible only in case that the rights holder has previously made use of the corresponding procedure which the provider had determined, and which was concluded within reasonable time but with no result. Where the committee substantiates that copyright is infringed, it shall notify respectively the involving parties and ask from those that are notified to remove the infringing content from the website where it has been illegally posted or to block access to it. In case of non-compliance with the dictum of the decision, the committee shall impose a fine of €500 to €1,000 for each and every day of non-compliance.

Furthermore, the law grants the rights holders with a right to apply for an injunction against the intermediaries (eg, internet service providers) whose services are used by a third party to infringe a copyright or related right or the sui generis right of database maker.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

The law provides for several measures for the prevention of copyright infringement, including:

- Imposition of technological measures, meaning any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts in respect of protected works, which are not authorised by the respective rights holder. The circumvention of these technological measures is prohibited, while the infringer also faces criminal charges.
- Where there is a clear intention of a third party to offer an unlawful public performance of a theatrical or cinematographic or a musical work, the rights holder may request from the competent local police authority to prohibit the infringing act.
- In any case of threat of infringement of copyright, the rights holder may file for preliminary measures in order to prevent the infringement or claim the recognition of his or her right and the discontinuation of the threatened infringement and its omission in the future.

The law also provides for several other measures (such as the imposition of certain specifications for the equipment and other materials used in the making of reproductions of works, use of control systems which permit the designation of reproduced or used works and the extent and frequency of the reproduction or use, control labelling in visual or sound recordings) that have not been entered into force yet.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

Greece is a party to the following main treaties referred to copyright and related rights:

- the Berne Convention for the Protection of Literary and Artistic Works;
- the Universal Copyright Convention;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights;
- the World Intellectual Property Organization Copyright Treaty; and
- the World Intellectual Property Organization Performance and Phonograms Treaty.

47 | What obligations are imposed by your country's membership of international copyright conventions?

Greece has ratified all the above-mentioned treaties with national laws without any reservations and therefore is bound by all the obligations provided for in these treaties.

UPDATE AND TRENDS

Emerging trends and new legislation

48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

During last year, a Special Service of Emergency Rights Management (EYED) was established, with the competence to carry out the actions necessary for the emergency management of the copyright of rights holders who were members of CMOs or IMEs that had their licences withdrawn, and:

- conclude new assignment and representation agreements with the rights holders;
- collect, distribute and pay their royalties;
- monitor the legitimate use of copyright protected works; and
- update the rights holders as to the progress of the emergency management of their copyrights.

EYED is supervised directly by the board of directors of HCO and is currently assigned with the emergency management of copyright of the rights holders (music composers and lyricists) who were members of the independent management entities (IME) with the distinctive title 'AEPI SA', whose licence was withdrawn (relative legislation laws No. 4531/2018 and 4605/2019 and Ministerial Decisions No. 262844/18408/13772/689/04.06.2018 and No. 224747/4952/15.05.2018).

Furthermore, a legislative bill for the implementation of the Directive 2017/1564 of the European Parliament and of the Council of 13 September 2017 'on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society' has been drafted and is to be submitted before the Greek parliament.

SOURIADAKIS TSIBRIS

LAW PARTNERSHIP

Pigi Konstantinou

pkonstantinou@souriadakistsbris.gr

6 Kriezotou Street
Athens
Greece
Tel: +30 210 3626888
Fax: +30 210 3613631
www.souriadakistsbris.gr

India

Pravin Anand and Nishchal Anand

Anand and Anand

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

Copyright law in India is governed by the Copyright Act, 1957, which has been amended six times, with the last amendment in 2012. It is a comprehensive statute providing for copyright, moral rights (known as author's special rights) and neighbouring rights (rights of broadcasting organisations, performers and *droit de suite*). The Act provides for exhaustive economic rights (copyright) in various works that are transferable. Moral rights exist in perpetuity and are vested in the authors and their legal representatives, being non-transferable and enforceable by the authors and legal representatives even when the copyright in the work has been assigned.

The Copyright Rules, 2013 came into force from 14 March 2013 and provide for the procedure to be adopted for relinquishment of copyright, compulsory licences, statutory licences, voluntary licences, registration of copyright societies, membership and administration of affairs of copyright societies and performers' societies.

Enforcement authorities

2 | Who enforces it?

Copyright can be enforced in civil courts and criminal courts. Civil remedies for the copyright owner include injunction, damages and a rendition of accounts. Infringement of copyright is also an offence under the Act and may incur imprisonment of up to three years and a fine of up to 200,000 rupees. The Copyright Act provides an enhanced penalty on second and subsequent conviction.

The Copyright Board constituted under the Act provides an alternative forum for resolving certain limited disputes, such as those pertaining to assignments and payment of royalties. The Act also provides for border enforcement of copyright and other rights and provides for the confiscation of infringing copies of copyright works as prohibited goods, which is carried out by the customs department under the supervision of the Commissioner of Customs provided there is an order within 14 days from the date of detention from the court that has jurisdiction.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

Amendments to the Copyright Act, 1957 up until 2012 have ensured that, with the advent of satellite television and the internet, the definitions of rights are such that all digital platforms and formats are covered. The last amendment to the Copyright Act by the Copyright (Amendment) Act, 2012 introduced specific provisions for dealing with

the circumvention of technological measures pertaining to copyrighted works and provides solutions at par with that for infringement of copyright. This addition to the Act is specifically to deal with digital piracy and amending digital protection measures used to check piracy. By virtue of the newly inserted section 65A of the Act, any person who circumvents an effective technological measure applied for the purpose of protecting rights conferred under the Act, with the intention of infringing such rights, shall be punished with imprisonment that may extend to two years and would also be liable to a fine. Similarly, section 65B provides that any person who removes or participates in the removal of rights management information or the dissemination of copies of works from which rights management information has been removed shall be punished with imprisonment of up to two years and shall also be liable to pay a fine. The Copyright Rules, 2013 also provide for maintaining of records by a person permitted to circumvent technological measures as per the Act.

These provisions are described in question 44.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Yes. The Copyright Act, 1957 provides jurisdiction to a copyright owner to sue if he or she is conducting business in India.

Additionally, the courts have jurisdiction to adjudicate upon disputes arising within the territories of India. Hence, a website based outside India that facilitates infringement of copyright by providing infringing copies of a work to users in India will confer jurisdiction on the courts in India to adjudicate the matter.

The courts may block complete access to a website by ordering that all internet service providers (ISPs) refrain from providing access to specific websites and block access to the infringing copies by the users of the ISP. Courts in India continue to block several infringing websites and other file-sharing websites that facilitate infringement through ISPs in India. Civil action against regular pirate websites by geo-blocking them within the territories of India has become a popular measure to counteract infringement. Such actions are often being taken by the motion picture producers of Bollywood and by sports broadcasters. Recently, the Delhi High Court has also issued orders to the government departments (Department of Telecommunications and Department of Electronics and Information Technology) to monitor and hence prevent URLs with infringing content from resurfacing under a different URL, despite an injunction order restraining the former URL.

Agency

- 5 | Is there a centralised copyright agency? What does this agency do?

Yes. There are two centralised copyright agencies in India: the Copyright Office and the Copyright Board. The Copyright Board does not have jurisdiction over civil copyright litigation.

The Copyright Office is headed by the Registrar of Copyrights. The function of the Copyright Office is to maintain the Register of Copyrights. The Registrar also has certain regulatory functions in relation to copyright societies, serves as a registry and provides secretarial support to the Copyright Board.

The Copyright Board is a quasi-judicial tribunal that is empowered to rectify errors in the Register of Copyrights, to grant compulsory licences, and to fix the rates of licence fees in cases of statutory and compulsory licences; it also provides an alternative forum for the resolution of certain disputes between assignors and assignees. The chairman of the Copyright Board is a person who has been a judge of a high court or is qualified for appointment as a judge of a high court. It has been clarified by the High Court that despite no expressed statutory provision for review powers, the Copyright Board has the power to review its own decision if it is to correct procedural infirmities.

The government of India has recently passed the Finance Bill, 2017 by virtue of which the Copyright Board has been merged with the Intellectual Property Appellate Board (IPAB). The IPAB was previously constituted to hear appeals from the decisions of the Trademark Registry and Patent Office and will now hear appeals and references from the Copyright Registrar as well.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

- 6 | What types of works may be protected by copyright?

The Copyright Act provides a closed list of protected works under section 13. These works are original literary, dramatic, musical, artistic, sound recordings and cinematographic works. Copyright law in India also protects neighbouring rights (ie, broadcast reproduction rights and performers' rights).

Rights covered

- 7 | What types of rights are covered by copyright?

The Copyright Act, 1957 sets out the following rights of copyright to the copyright owners:

- In the case of literary, dramatic or musical works – the exclusive right to reproduce including storage in any medium by electronic means, issue copies, public performance, make any film or sound recording in respect of that work, to translate and to adapt the work and the right of communication to the public (which is defined widely enough to cover dissemination over the internet).
- In the case of computer programs – all rights as mentioned for literary works in addition to selling or giving on hire, or offering for sale or hire for commercial rental any copy of the computer program.
- In the case of artistic works – to reproduce the work in any material form. This may include storing it in any medium by electronic or other means or depicting a two-dimensional work in three dimensions or vice versa. Copyright in an artistic work also includes the exclusive right to communicate the work in public, issue copies of it, include it in a cinematograph film, and translate or adapt the work in any way.
- In the case of cinematograph films – to make copies of the film (on any medium, electronic or otherwise) including copies in the form

of photographs that form a part of the film, sell or give on hire, or offer for sale or hire any copy of the film, to sell, give or offer for sale on commercial rental copies of the film and communicate the film to the public.

- In the case of sound recordings – to make any other sound recording embodying it on any medium including storing of it on any medium, to sell or give on commercial rental or offer for sale such rental and to communicate the sound recording to the public.

The author enjoys moral rights independent of copyright, being the right to paternity and integrity, which exists despite assignment of copyright. However, this does not extend to adaptation of a computer program for fair dealing purposes. It is also specifically stated that violation of moral rights (specific to the right to integrity) is judged objectively.

Moral rights can be enforced by the legal representatives of the author. The 2012 amendments to the Act provide that a legal representative of an author can exercise both paternity as well as integrity rights in a work. The 2012 amendments also consciously omit the previous co-extensive term of moral rights with copyright by specifically removing the copyright term restriction on a claim for right to integrity by the legal representative. Moral rights are not assignable (although on general principles as it is a civil right and not a fundamental right under the Indian constitution, moral rights can be waived).

Excluded works

- 8 | What may not be protected by copyright?

The 'idea/expression' dichotomy is applied generally, as in other common law jurisdictions, as is now required under article 9.2 of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Any work that is made substantially from the infringement of any other work does not enjoy any copyright protection.

As per section 15 of the Copyright Act, a design (which may be the reproduction of an original artistic work) does not get copyright protection if the same is registered under the Designs Act, 2000. Additionally as per section 15(2) of the Copyright Act, 1957, copyright in any design ceases to have copyright protection if the same is capable of being registered under the Designs Act, 2000 but has not been and more than 50 copies of the work have been made by any industrial process. However, in a recent judgment in 2015 by the Delhi High Court, it has been held that in order to be a subject matter registrable as a design for the operation of section 15(2), the said work should be 'novel' and this is the sole condition for operation of section 15(2) in order to deny copyright protection to artistic works not registered as designs.

Fair use and fair dealing

- 9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

The Copyright Act contains an exhaustive list of non-infringing uses. The doctrine of 'fair dealing' applies to the extent and nature of such uses as specifically delineated in section 52 of the Copyright Act.

Architectural works

- 10 | Are architectural works protected by copyright? How?

Yes. Architectural works are protected as a form of artistic work. However, an injunction cannot be taken out against a structure that has already been erected. Also, no order for demolition of the structure can be granted.

Performance rights

11 | Are performance rights covered by copyright? How?

Performance rights are protected under the Copyright Act, 1957 as special rights that are separate from copyright. These exclusive rights of a performer are independent of and without prejudice to the rights conferred on authors of works that are performed.

The exclusive rights of a performer consist of the following:

- the right to make sound recordings or visual recordings of the performance including reproduction of it in material form including storing of it any medium by electronic or other means and issuance of copies to the public; communication of it to the public and selling or giving it on commercial rental or offer for sale or for commercial rental; and
- the right to broadcast or communicate the performance to the public, except where the performance is already broadcast.

Once a performer has, by way of a written agreement, given his or her consent for incorporation of his or her performance in a cinematograph film, he or she cannot object to the producer enjoying the exclusive performer's rights, provided that there is no contract to the contrary.

Performers are entitled to the unalienable right to royalties from commercial exploitation of a performance that is, the right to receive royalties (R3 right). This right is unaffected by a performer's written consent to allow his or her performance to be incorporated in a film. Hence, the right to royalties of performers would have to be dealt with separately from other performers' rights when parties negotiate upon how the performance will be incorporated in a film and the mutual considerations between them.

With the passing of the Copyright (Amendment) Act, 2012, the concept of performers' rights has been cemented and exclusive rights have been granted to a performer akin to copyright in original works. This is in accordance with provisions of the WIPO Performances and Phonograms Treaty and the 2012 amendments to the Copyright Act have also granted moral rights to performers giving them extra protection. The rules accompanying the Copyright Act further provide the setting up of a separate 'performers' society' for each class of 'performers'.

The Indian Singers' Rights Association (ISRA) has been registered with the government of India as a copyright society for singers as a class of performers. The purpose of the copyright society is to administer the rights of the singers who are its members and collect royalty on their behalf for their exclusive rights as per the Copyright Act. The Delhi High Court has passed an injunction order dated 19 December 2014 restraining a club in Delhi from infringing the performers' rights of singers in a lawsuit filed on behalf of the ISRA [CS(OS) No. 3958 of 2014]. The suit was decreed in favour of the ISRA on 30 September 2016.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

Yes. The Copyright Act provides for broadcasting reproduction rights and rights of performers over their performances under Chapter 8 of the Act. *Droit de suite* is recognised under section 53A of the Act.

Moral rights

13 | Are moral rights recognised?

Yes. The Copyright Act provides for protection of moral rights of authors in their works and of performers in their performances. Performers' moral rights were provided by the Copyright (Amendment) Act of 2012.

Moral rights of an author consist of the following:

- the right to claim authorship of the work (paternity right); and
- the right to claim damages in respect of any distortion, mutilation, modification or other acts in relation to the work if such distortion, etc, would be prejudicial to his or her honour or reputation (integrity right). (Prior to the 2012 amendments, such remedy was available only against mutilation, modification, etc, of a work during the term of the copyright in the work. However, this moral right is now a perpetual right of the author and his or her heirs.)

Moral rights of a performer consist of the following:

- the right to claim to be identified as the performer of his or her performance except where omission is dictated by the manner of the use of the performance; and
- the right to restrain or claim damages in respect of any distortion, mutilation or other modification of his or her performance that would be prejudicial to his or her reputation. (Mere removal of a portion of a performance for the purpose of editing, or to fit a recording of a performance within a limited duration, or any other modification required for purely technical reasons, is not deemed to be prejudicial to the performer's reputation.)

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No. There is no legal requirement. The © mark was considered useful to protect copyright in those countries that were members of the Universal Copyright Convention (UCC) but not of the Berne Convention for the Protection of Literary and Artistic Works, but after the TRIPS Agreement, the UCC is of little practical importance.

In practice, some form of notice such as '©', or a longer notice such as '©, name of owner, date', is often displayed on or next to the copyrighted work.

15 | What are the consequences for failure to use a copyright notice?

There are no adverse consequences.

Deposit

16 | Is there a requirement of copyright deposit?

There is no requirement of copyright deposit.

17 | What are the consequences for failure to make a copyright deposit?

Not applicable.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

Yes. A register in the prescribed form called the Register of Copyrights is available at the Copyright Office with the names or titles of registered works, and the names and addresses of authors, publishers and owners of copyright and other such particulars as prescribed. The author, or publisher or owner of, or another person interested in, the copyright in a work, may apply for its registration.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

No. Copyright subsists in a work for its entire term and there is no formal requirement of registration in order to be entitled to copyright protection. However, the Register of Copyrights, wherein registrations are recorded, serves as *prima facie* proof of the particulars therein. Hence, registration is useful due to its initial evidential value.

20 | What are the fees to apply for a copyright registration?

The fees that are to be paid to the Registrar of Copyrights along with a prescribed application for registration of copyright in a work are as follows:

- for literary, dramatic, musical or artistic works – 500 rupees per work;
- for literary or artistic works used in relation to any goods – 2,000 rupees per work;
- for a cinematograph film – 5,000 rupees per work; and
- for a sound recording – 2,000 rupees per work.

21 | What are the consequences for failure to register a copyrighted work?

Since registration is not mandatory, there are no adverse consequences for failure to register a work. However, it is advisable to own a registration as enforcement agencies in India, including the police and customs, do not take action without the existence of a copyright certificate.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

As a general rule, the author of a work is the first owner of copyright in a work. For an original literary, musical, dramatic and artistic work, it is the person who created or composed such work and for a sound recording and cinematograph film, it is the producer of such a work. In case of a photograph, it is the photographer. For computer-generated works, the author (ie, first owner of copyright) is the person who causes the work to be created.

The exceptions to this rule are covered in section 17 of the Copyright Act, as summarised below:

- In the case of literary, dramatic or artistic works made by the author in the course of his or her employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship for the purpose of publication in the newspaper, magazine or periodical, then the proprietor of the publication shall be the first owner of the work for the purposes of its publication in a newspaper, magazine or similar periodical. In all other respects, the author is the first owner.
- In the case of a work that is a photograph, painting, portrait, engraving or cinematograph film that has been created at the instance of any person for valuable consideration, then such person is the first owner of the copyright in the work. However, this does not affect the rights of an author in any original literary, dramatic, musical or artistic work that is incorporated in a cinematograph film.
- In the case of *Indian Heritage Society & Anr v Meher Malhotra & Anr* [CS(OS)No. 2717 of 2011], the Delhi High Court granted a permanent injunction in favour of the plaintiff who was not the photographer, but was held to be the first owner of copyright in the photographs. This was because it was at the plaintiff's instance that the photographs were taken for a valuable consideration paid to the photographer.

- In the case of a work created by an author in the course of his or her employment under a contract of service or apprenticeship, then the employer is the first owner of the work. However, this does not affect the rights of an author in any original literary, dramatic, musical or artistic work that is incorporated in a cinematograph film as has been clarified by the 2012 amendments to the Copyright Act.
- In the case of any address or speech delivered, the person making the address or delivering the speech, or the person on whose behalf he or she does so, is the first owner of the work.
- In the case of a government work, the government is the first owner of the work.
- In the case of a work made or first published by a public undertaking, the public undertaking will be the first owner of the work.
- In the case of works created by international organisations, the international organisation would be the first owner of the work.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

If a person in the course of his or her employment under a contract of service or apprenticeship creates any work, his or her employer becomes the first owner of the copyright in the work so long as there is no contract to the contrary. Hence, an employer's ownership is automatic by virtue of the employer–employee relationship. However, for any literary, musical, artistic and dramatic works that are incorporated in a film, the employer does not become the first owner of the copyright and the employee author retains the first ownership. A specific assignment of copyright in such a case is required by the employer.

24 | May a hiring party own a copyrighted work made by an independent contractor?

In the absence of an assignment in favour of the hiring party, the first owner of the copyright is the independent contractor. The hiring party would have only an equitable right to use the material created for the purpose of hiring or commission, and possibly against any assignment detrimental to such use.

To own the copyright, the hiring party would have to obtain an assignment in writing from the independent contractor.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. Work of joint authorship is established only when the work is produced by the collaboration of two or more authors where the contribution of one author is not distinct from the contribution of the other author or authors.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Yes. Copyright and neighbouring rights can generally be transferred by assignment, by testamentary disposition or by inheritance.

However, moral rights are not assignable. Furthermore, with the amendment of the Copyright Act in 2012, authors of literary or musical works that are included in cinematographic films or sound recordings have the inalienable right to receive royalties for exploitation of their works, and this right to receive royalties cannot be assigned by the author to anyone except his or her own legal heirs or to a copyright society for the purpose of collection and distribution of royalties. Additionally, apart

from other specific requirements listed in the Copyright Act for a valid assignment (eg, identifying the work, right assigned, territory, duration), it is also necessary to specify both the royalty and other consideration payable in the assignment agreement and this may also be applicable for licence agreements.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes, the owner of a copyright may either license the entire copyright or the licence may be confined to one or more interest in the copyright. The copyright may be licensed to more than one person non-exclusively. However, a licence would not result in change of ownership in a work. Like assignment, the grant of any licence is also required to be in writing and the details of work, territory and term should be specified. If it is not specified, the term shall be presumed to be five years and the territory shall be presumed to be restricted to India only. A licence agreement needs to be in writing. However, there is no requirement for it to be signed as is mandatory for assignment agreements.

28 | Are there compulsory licences? What are they?

Yes. The Copyright Board is empowered to grant compulsory licences with regard to Indian and foreign works. Some of the purposes for which compulsory licences may be granted are:

- when a work has been withheld from the public because the owner of the work has refused to grant a licence to republish or perform the work;
- a work or a translation thereof has been withheld from the public because the author of the work is dead or cannot be found, or because the copyright owner cannot be found; and
- a compulsory licence is required for making a work available to persons with disabilities.

The Copyright Act also provides for statutory licences to broadcasters and statutory licences for cover versions.

29 | Are licences administered by performing rights societies? How?

Yes. Performing rights societies (ie, the Indian Performing Right Society Limited (IPRS), the Phonographic Performance Limited (PPL) and the ISRA) are forms of 'copyright societies' for collection, licensing, administration and enforcement of rights. Such copyright societies are required to be registered as such under section 33 in order to legally continue the business of granting licences and collecting royalties. In the absence of valid registration, Courts have struck down the licences granted by such societies (see *Leopold Café Stores v Novex Communications Pvt Ltd*). Further, post the 2012 Amendments, the newly inserted section 33(3A) required all previously registered copyright societies to re-register themselves. However, a few music-collecting societies refused to do so and, as a result, the legality of their business was under question. After some investigations, one of the societies re-registered itself as a copyright society, although a few enquiries related to its management. These societies collect performance royalties for literary and musical works and for sound recordings and cinematograph film. There are two other copyright societies, namely the Indian Reprographic Rights Organisation (IRRO) and the copyright society for singers as performers, the ISRA, which was duly registered in 2013.

Termination

30 | Is there any provision for the termination of transfers of rights?

A copyright may be transferred in one of two ways, namely by assignment or by licensing; licences may be exclusive or non-exclusive.

Assignments can be in part or in full in a future or existing work subject to statutory presumptions such as the term, unless specified otherwise in the agreement or unless the agreement provides a contingency. Rights not utilised in a work within a period of one year from the date of assignment or license are deemed to lapse back to the assignor.

An assignment more than five years old can be revoked by the Copyright Board if the author can show that it is, or has become, onerous. Transfers of rights might also, conceivably, be held to be unlawful under the law of contract. Again, a licence would normally be liable to termination if the licensee failed to comply with the conditions of the licence.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

Yes. If the copyright in a work has been registered with the Copyright Office and its particulars have been recorded in the Register of Copyrights, then transfer of ownership may be recorded in the Register pursuant to an application to the Registrar of Copyrights in a prescribed form, along with a prescribed fee.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection begins the moment a work comes into existence (ie, date of creation).

Duration

33 | How long does copyright protection last?

The term of copyright depends on the nature of the work:

- literary, dramatic, musical or artistic work – throughout the life of the author and 60 years from the beginning of the year following the year in which the author dies;
- anonymous or pseudonymous work – 60 years from the beginning of the year following the year when the work is published;
- posthumous works – 60 years from the beginning of the year following the year when the work is first published;
- cinematograph films, government work, work of a public undertaking, or work of an international organisation – 60 years from the beginning of the year following the year of first publication;
- broadcast reproduction rights – 25 years from the beginning of the year following the year in which the broadcast is made; and
- performers' rights – 50 years from the beginning of the year following the year in which the performance is made.

34 | Does copyright duration depend on when a particular work was created or published?

In certain cases, as mentioned in question 33.

Renewal

35 | Do terms of copyright have to be renewed? How?

No. There is no renewal of copyright under Indian law as neither registration nor renewal are required for subsistence of copyright in a work for its entire term.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

It has done so in the case of:

- Photographs – pursuant to the Copyright (Amendment) Act, 2012, photographs are co-terminus with other artistic works. Therefore, instead of enjoying a 60-year post-publication term, copyright in photographs now effectively subsists till 60 years after the death of the photographer.
- The term of protection of performers' rights was also extended in 1999 from 25 years to 50 years.
- The term of protection for all works, whether calculated after the death of the author or from the date of publication (as specified in question 33 for different works), was increased for a period of 10 years from 50 years to 60 years.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Copyright infringement occurs when any of the following occur:

- unauthorised use of the exclusive rights of the owner of a copyright whether in relation to the whole or a substantial part of the copyright work;
- permitting a place to be used for infringing purposes on a profit basis; and
- displaying or exhibiting in public by way of trade or distributing for the purpose of trade or importing infringing copies of a work.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

The terms 'indirect', 'secondary', 'vicarious' and 'contributory' infringement are not mentioned in Indian copyright law, although they are sometimes used. The acts referred to would generally amount to infringement under Indian law, as in the case of jurisdictions that have similar wording in their copyright statutes, such as Australia or the United Kingdom.

Available remedies

39 | What remedies are available against a copyright infringer?

The remedies provided by the Copyright Act, 1957 against infringement of copyright are:

- civil remedies – these provide for injunctions, damages, rendition of accounts, delivery and destruction of infringing copies and damages for conversion;
- criminal remedies – these provide for imprisonment, fines, seizure of infringing copies and delivery of infringing copies to the owner; and
- border enforcement – the Act also provides for prohibition of import and destruction of imported goods that infringe the copyright of a person with the assistance of the customs authorities of India.

Limitation period

40 | Is there a time limit for seeking remedies?

Yes. The period of limitation for filing a suit for damages for infringement of copyright is three years from the date of such infringement.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, besides damages the copyright owner can also claim rendition of account of profits.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes. Litigation costs are a standard request in infringement suits, but the decision to award such costs is at the discretion of the court. Costs awarded seldom cover actual legal expenses. However, the Commercial Courts, Commercial Division and Commercial Division Appellate Division of High Courts Act 2015 (Commercial Courts Act), which was enacted recently, had brought forth amendments in the Code of Civil Procedure and specifically provides for payments of costs, lays down scenarios in which costs are to be paid and the method of calculation of costs. Since the Commercial Courts Act was introduced very recently, the effects of these amendments will be seen in the near future.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Yes. The Copyright Act, 1957 has provided for enforcement of copyright through a series of penal provisions under Chapter 13 of the Act. The following are the principal penal provisions under the Act:

- (i) Under section 63, where any person knowingly infringes or abets infringement of the copyright in a work and any other right as covered by the Copyright Act, 1957 (broadcast reproduction rights, performers' rights, moral rights, etc), such person may be punished with imprisonment of a minimum term of six months and a maximum term of three years, and a fine of between 50,000 and 200,000 rupees.
- (ii) Section 65A penalises circumvention of effective technological measures that may be applied to copies of a work with the purpose of protecting any of the rights conferred under the Act (ie, copyright, performance rights). The punishment under this provision is imprisonment that may extend to two years and payment of a fine. Section 65A was inserted by the Copyright (Amendment) Act, 2012.
- (iii) Section 65B makes unauthorised removal or alteration of 'rights management information' punishable with imprisonment of up to two years and payment of a fine. The provision makes the unauthorised distribution, broadcast or communication to the public of copies of the work punishable in the same manner if the person is aware that electronic rights management information in the copy has been removed or altered. Section 65B was inserted by the Copyright (Amendment) Act, 2012.
- (iv) Section 63A provides for enhanced penalty on second or subsequent convictions under section 63 (see point (i)).
- (v) Other provisions in the chapter provide penalties for offences such as using infringing copies of a computer program, making or possessing plates for the purpose of making infringing copies of works, and making false entries in the Register of Copyrights.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

Yes. The 2012 amendments to the Act introduced certain provisions that are specifically relevant to copyright infringement and the internet.

Under the fair use provisions of the Act, section 52(1)(b) provides that transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public does not constitute infringement of copyright. This provision provides safe harbour to internet service providers that may have incidentally stored infringing copies of a work for the purpose of transmission of data.

Section 52(1)(c) further provides that transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration that is not expressly prohibited by the rights holder would not be infringement of copyright, unless the person responsible is aware of infringement or has reasonable grounds for believing that such storage is that of an infringing copy.

Under section 52(1)(c), if the owner of a copyright work, in a written complaint to the person responsible for digitally storing an infringing copy of the work, complains that such transient or incidental storage is an infringement, then the person responsible would have to refrain from facilitating access to the infringing copy of the work for a period of 21 days. If within 21 days, the person responsible does not receive an order from a competent court that directs the person responsible to refrain from providing access, then access may be resumed at the end of that period.

Therefore, if A, the owner of a short story, finds that his or her short story has been published on the website of B, he or she may write a complaint to B declaring that B must refrain from providing the public with access to A's short story. B would then have to remove A's short story from visibility or accessibility on his or her website for 21 days, within which time A must persuade a competent court that it should order the complete removal of the infringing version or copy of the work. If the court does not issue such an order within that period of time, then B may resume making the short story available to the public on his or her website. This provision was inserted in the Act by the Copyright (Amendment) Act, 2012 which came into force on 21 June 2012. It is yet to be used in practice.

Apart from the above-mentioned provisions, the entire scheme of the Copyright Act makes it amply clear that all the provisions of the Act must be applied to electronic and digital media in the same manner they are applied to conventional media. The Copyright (Amendment) Act, 2012 has also clarified this in many places. Remedies against copyright infringement on the internet are not dealt with separately under that Act as the provisions sufficiently cover all forms of exploitation of works, including exploitation over the internet, and the remedies for copyright infringement would apply to the internet as they would to any other medium or platform.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

No degree of vigilance can guarantee an 'infringer-free' environment, but certain deterrent measures must be adhered to by copyright owners, for instance:

- documentation of instances of use;
- registration of copyright;
- proper notice of copyright;
- monitoring the activities of habitual infringers;



Pravin Anand

pravin@anandandanand.com

Nishchal Anand

nishchal@anandandanand.com

First Channel Building
Plot 17-A, Sector 16-A
Film City, Noida 201301 (UP)
India
Tel: +91 120 4059 300
Fax: +91 120 4243 056/058
www.anandandanand.com

- making independent contractors and employees subject to confidentiality;
- having proper licensing agreements incorporating a proper control mechanism; and
- publicising a successful infringement trial (if resources allow).

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

India is a member of the following conventions and agreements that concern its copyright regime:

- the Berne Convention;
- the UCC;
- the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention); and
- the Agreement on Trade-Related Aspects of Intellectual Property Rights.

47 | What obligations are imposed by your country's membership of international copyright conventions?

Having ratified the Berne Convention and the UCC, works first published outside India in any of the convention countries enjoy protection in India at par with the protection granted to Indian works with the exception that if the term specified in the country of origin is shorter than that in India, the work will be protected for the shorter term in India.

Indonesia

**Dewi Soeharto, Nalendra Wibowo, Albertus Agung Dimaz Prayudha Prandhita
and Achmad Faisal Rachman
Assegaf Hamzah & Partners**

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The current legislation for copyright in Indonesia is Law Number 28 of 2014 on Copyright (the Copyright Law).

Enforcement authorities

2 | Who enforces it?

The Indonesian government, mainly through the Directorate General of Intellectual Property (DGIP) under the Ministry of Law and Human Rights of the Republic of Indonesia (MOLHR).

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

No. Moreover, the applicable law pertaining to electronic information, namely Law No. 11 of 2008 on Electronic Transaction and Information, strictly states that any electronic information or documents compiled to be an intellectual work, website or any intellectual work contained thereof are protected as an intellectual property based on the relevant prevailing laws and regulations.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

No.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

The DGIP is the centralised intellectual property agency that deals with all administrative work with respect to the recordation, assignment and licensing of copyright. Within the DGIP, the Directorate of Copyright and Industrial Design deals specifically with copyright, and its duties are as follows:

- to prepare the drafting and implementation of policies;
- to provide technical assistance and supervision; and

- to evaluate and report the application, publication, examination, certification, documentation, and provision of customer service for copyright, neighbouring rights and industrial design.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

Under the Copyright Law, copyright protects any work in the field of science, art and literature. The Copyright Law then further specifies the specific types of work that are protected by copyright in Indonesia:

- books, pamphlets, typographical arrangement (namely, the artistic aspect with respect to the composition and shape of literary works), and all other literary works;
- public talks, lectures, speeches and other similar works;
- visual aids made for educational and scientific purposes;
- songs and music with or without lyrics;
- dramatic works, musical dramas, dances, choreography, puppet shows and pantomimes;
- fine art works in all forms such as paintings, drawings, engravings, calligraphy, sculptures, statues or collages;
- applied art works;
- architectural works;
- maps;
- batik art works or other pattern and motive arts;
- photographic works;
- portraits;
- cinematographic works;
- translations, interpretations, alterations, anthologies, databases, adaptations, arrangements, modifications and other works resulting from a transformation;
- translations, adaptations, arrangements, transformations or modifications of traditional cultural expressions;
- compilation of work or data, whether in a format that can be read by a computer program or by any other media;
- compilation of traditional cultural expressions provided that the compilation is an original work;
- video games; and
- computer programs.

Rights covered

7 | What types of rights are covered by copyright?

The Copyright Law protects three types of rights: moral, economic and neighbouring rights.

Moral rights are the inherent right given to the creator of the work to:

- put or omit his or her name in the copies of the work with respect to the use of his or her work in public;
- use his or her alias or pseudonym;
- change his or her work in accordance with public propriety;
- change the title and sub-title of the work; and
- defend his or her right in the case of any distortion, mutilation, or modification, or any other actions that harm his or her reputation.

Economic right is the exclusive right of a creator or copyright holder to obtain economic benefit from his or her work by:

- publishing his or her work;
- duplicating his or her work into any shape, form and format;
- translating his or her work;
- making adaptations, arrangements or transformations of his or her work;
- distributing his or her work or the copies thereof;
- displaying/showing his or her work;
- announcing his or her work;
- communicating his or her work; and
- leasing out his or her work.

Meanwhile, neighbouring rights are the rights related to copyright, which constitute exclusive rights including the moral and economic right of a performer, and the economic right of a phonogram producer and broadcasting institutions.

Excluded works

8 | What may not be protected by copyright?

There are three types of work that cannot be protected by a copyright:

- any work that has not been manifested in a concrete form;
- any idea, procedure, system, method, concept, principal, invention or data, even though it has been disclosed, stated, described, explained, or incorporated into a work; and
- any tools, objects or products that are created solely to solve technical problems or those that are formed only to meet functional needs.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

Under the Copyright Law, there are specific articles on limitation of copyright use and anything that falls within such limitations would not be considered as copyright infringement. The standards used to determine whether a particular use is considered as fair is governed under the Copyright Law.

Architectural works

10 | Are architectural works protected by copyright? How?

Yes, architectural works are protected under the Copyright Law. 'Architectural works' include the:

- physical form of the building;
- placement of the building location;
- designs and technical sketches of the building; and
- models or miniatures of the building.

The procedure for protecting architectural works is the same as the procedure to protect other works; that is, protection is automatically obtained based on a declaration by the owner of the work.

There is a limitation on the protection of architectural works under the Copyright Law, whereby any alteration to architectural works would not be deemed as copyright infringement if it is conducted based on technical considerations. Technical considerations include, among other things, any change in the measurement of the land due to insufficient acreage, non-symmetrical position, composition of different materials and a change in architectural model due to natural factors.

Performance rights

11 | Are performance rights covered by copyright? How?

Yes, performance rights are covered by copyright under the Copyright Law. Performance rights – commonly known as 'performers' rights' – also consist of moral and economic rights.

The moral rights of a performer are the inherent rights of a performer, which cannot be eliminated or abolished for any reason whatsoever, even if the accompanying economic right has been assigned or transferred. Moral rights include the rights to have his or her name listed as a performer (unless agreed otherwise) and to not be subjected to any distortion, mutilation, modification of the work or any other actions that may harm his or her honour or reputation (unless agreed otherwise).

Whereas, economic rights of a performer include the rights to:

- permit or prohibit another party from broadcasting or communicating his or her performance;
- fixating his or her performances that have yet to be fixated;
- duplicating, distributing or leasing his or her fixated performance; and
- providing access to his or her fixated performance to the public.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

Yes, neighbouring rights are recognised under the Copyright Law. These include the moral and economic rights of performers, the economic rights of phonogram producers and the economic rights of broadcasting institutions.

With respect to moral and economic rights of performers, see question 11.

With respect to the economic right of a phonogram producer, it includes the right to permit or prohibit other parties from duplicating their phonogram in any form whatsoever, distributing their original phonogram or copies thereof, leasing copies of their phonogram to the public, and providing access of their phonogram to the public.

With respect to the economic right of a broadcasting institution, it includes the right to permit or prohibit other parties from rebroadcasting, communicating, fixating or duplicating fixation of broadcasts.

Moral rights

13 | Are moral rights recognised?

Yes, moral rights are recognised under the Copyright Law. (See question 7.) Furthermore, moral rights are not assignable or transferable during the creator's lifetime. If the creator has passed away, the enforcement of the moral rights may be assigned or transferred to his or her lawful heir via a written testament or will.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No.

15 | What are the consequences for failure to use a copyright notice?

Not applicable.

Deposit

16 | Is there a requirement of copyright deposit?

No.

17 | What are the consequences for failure to make a copyright deposit?

Not applicable.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

Yes, the term provided in the Copyright Law is 'recordation of copyright' and not 'registration of copyright'.

The application for the recordation of copyright is submitted to the DGIP by completing a standard form along with the required documents (including a sample of the relevant work). If the applicant is not the creator, then the applicant must also provide a copy of the transfer of the copyright over the relevant work.

Upon receipt of the complete application, the examiner at the DGIP will examine the relevant application to determine whether the relevant work or product of neighbouring rights is the same as any other works that have been recorded in the General Records of Copyright or with other intellectual property objects. If the application is accepted, the DGIP will then issue an official recordation letter.

Under the Copyright Law, a fine art painting in the form of a logo or a distinctive sign used as a mark in the trading of goods or services or as a symbol of an organisation, business entity, or legal entity cannot be recorded as a copyright with the DGIP.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

Copyright recordation is not mandatory. The protection for a copyright automatically begins when the work is first published and manifested into a concrete form.

Nevertheless, it is prudent to file a recordation of copyright in order for the DGIP to validate the protection under a copyright, as well as to gain commercial value. This is because in practice, the purchaser or licensee of a copyrighted work will usually ask for an official statement pertaining to the ownership of such copyright from the seller or licensor.

20 | What are the fees to apply for a copyright registration?

The fees to apply for a copyright recordation will depend on the type of work that is the subject of the application and whether the application is submitted manually or electronically.

For almost all types of work, the application fee is 400,000 rupiah (electronic submission) and 500,000 rupiah (manual submission). For

a computer program or software, the application fee is 600,000 rupiah (electronic submission) and 700,000 rupiah (manual submission).

21 | What are the consequences for failure to register a copyrighted work?

As mentioned in our answer to question number 19 above, copyright recordation is not mandatory. However, recordation of a copyright licence is mandatory and one of the requirements in applying for the recordation of a copyright licence is the proof of copyright ownership in the form of a copy of the relevant copyright recordation letter issued by the DGIP. Failure to record a copyright licence may result in such a licence not having a legal effect against third parties, which means that if there is an infringement upon such licensed copyright by a third party, the licensee is not authorised to take any legal action against such infringement.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

Unless proven otherwise, the owner of a copyrighted work (creator) is any person whose name is:

- mentioned in the work;
- stated as the creator of a work;
- mentioned in the copyright recordation letter issued by the DGIP; or
- stated in the General Record of Copyright as the creator.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

Yes, an employer may own a copyrighted work made by an employee. However, such ownership is not automatic by virtue of the employment relationship as the Copyright Law mandates that the creator of a work (in this case, the employee) will be the automatic owner of the copyrighted work created by him or her, unless agreed otherwise between the employer and the employee. Usually the agreement regarding the transfer of ownership of a copyrighted work from an employee to the employer is stipulated in the relevant employment agreement between them or the company regulation.

In relation to the procedure for copyright recordation as mentioned in question 18, a copy of the transfer of the copyright ownership is required if the applicant for the copyright recordation is not the creator. As such, it is advisable to have the agreement in writing.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Yes, a hiring party may own a copyrighted work made by an independent contractor. The arrangement for such ownership is the same as the arrangement between an employer and employee as referenced in question number 23 above. It is advisable for the agreement to be in writing. (See question 23.)

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes, a copyrighted work may be co-owned.

If a work comprises separate parts created by two persons or more, the person who will be regarded as the creator is the person who leads and oversees the completion of the entire creation. However, if

there is no such person, then the person who compiles the entire creation will be regarded as the creator without diminishing other people's copyright over each separate part of such creation.

Co-ownership of a copyright may also happen by virtue of a partial assignment of the economic right from the copyright holder to any other party (or parties).

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Yes, ownership rights over a copyrighted work are transferable, either in part or whole, by way of inheritance, grant, endowment, will, written agreement, or any other means as provided under the prevailing laws and regulations. However, a creator or copyright holder may not assign or transfer the same copyright twice to a different person or entity.

In addition, the Copyright Law stipulates that a copyright over books and other literary works, songs and music (with or without lyrics) that has been assigned/transferred by virtue of an outright buyout agreement (sold flat), or timeless assignment, shall be returned to the creator or original copyright holder when the relevant arrangement has reached 25 years. The same will also apply to the performers' economic right over songs and music in which he or she performed.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes. A copyright holder or neighbouring rights holder is authorised to grant a licence to use his or her work when the protection period of the relevant work is still effective.

With regard to the licensing of a copyright, please note that there is a requirement to record a copyright licence at the DGIP. (See question 21.)

28 | Are there compulsory licences? What are they?

Yes, compulsory licences are stipulated under the Copyright Law. However, a compulsory licence is limited to the licence to translate and duplicate works in the field of science and literature for educational or scientific purposes, as well as for research and development.

The application for a compulsory licence shall be submitted to and granted based on the DGIP's approval. Upon receiving such application, the DGIP may:

- (i) require the copyright holder to translate or duplicate the relevant work by himself or herself in the territory of the Republic of Indonesia and within a specified period;
- (ii) require the copyright holder to grant authorisation to other parties to translate or duplicate the relevant work in the territory of the Republic of Indonesia within a specified period in the event that the copyright holder is unable to conduct such action himself or herself; or
- (iii) appoint other parties to translate or duplicate the relevant work in the event that the copyright holder is unable to carry out the actions as mentioned in point (ii).

A compulsory licence shall only be granted if three years has passed from the announcement of the relevant work and no translation or duplication of such work has been made in the territory of the Republic of Indonesia.

29 | Are licences administered by performing rights societies? How?

Yes, pursuant to the Copyright Law, a creator, copyright holder or neighbouring rights holder must be a member of a collective management institution in order to collect their economic right and receive fair compensation from any party that uses his or her copyright and neighbouring right in a commercial manner.

Moreover, specifically for the management of royalty from songs and music, there are two national management institutions that have been formed to represent the interest of the creators and the neighbouring rights holders. These national management institutions are authorised to charge, collect and distribute royalties from the commercial users.

Termination

30 | Is there any provision for the termination of transfers of rights?

There are no specific provisions for the termination of the transfer of right under the Copyright Law. However, there is a time limitation for copyright over books and other literary works, songs and music (with or without lyrics) that has been transferred by virtue of an outright buyout agreement or timeless assignment. (See question 26.)

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

Yes. The DGIP organises the recordation of assignment of copyright and neighbouring rights products. However, before applying for recordation of a copyright assignment, the applicant must first record the relevant copyrighted work with the DGIP, as one of the requirements for the recordation of copyright assignment is proof of ownership of the relevant copyright in the form of a copy of the copyright recordation letter issued by the DGIP.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection over a work will automatically begin when the relevant work is first published and manifested into a concrete form.

Duration

33 | How long does copyright protection last?

As mentioned in question 7, copyright protection consists of moral and economic rights.

The term of protection for the creator's moral right is indefinite. Whereas, the term of protection for the creator's economic right would depend on the type of work and number of creators or owners of such work.

The table overleaf presents the term of protection for the creator's economic right under the Copyright Law.

34 | Does copyright duration depend on when a particular work was created or published?

Yes. See question number 33.

Terms of copyright protection

Type of work	Duration
<ul style="list-style-type: none"> • Books, pamphlets, and all other literary works; • talks, lectures, speeches and other similar works; • visual aids made for educational and science purposes; • songs or music with or without lyrics; • dramatic works, musical dramas, dances, choreography, puppet shows, pantomimes; • fine art works in all forms such as paintings, drawings, engravings, calligraphy, carvings, sculptures, or collage; • architectural works; • maps; and • batik art works or other pattern/motive arts. 	If there is only one creator, the copyright protection will be valid up to 70 years after the creator's death, calculated from 1 January of the following year. If there are more than one creators, the copyright protection will be valid up to 70 years after the last death of the creators, calculated from 1 January of the following year. If the copyright holder is a legal entity, then the copyright protection will remain effective up to 50 years as of the first publication of the related work.
<ul style="list-style-type: none"> • Photographic work; • portrait; • cinematographic; • video game; • computer program; • typographical arrangement; • translation, interpretation, alteration, anthology, database, adaptation, arrangement, modification, and other works resulting from transformation; • translation, adaptation, arrangement, transformation, or modification of traditional cultural expression; • compilation of works or data, whether in a readable format by computer program or by other media; and • compilation of traditional cultural expressions so long as the compilation is an original work. 	The copyright protection will remain effective up to 50 years as of the date of the first announcement of the relevant work.
<ul style="list-style-type: none"> • Applied arts works. 	The copyright protection will remain effective up to 25 years as of the date of the first announcement of the relevant work.

Renewal

35 | Do terms of copyright have to be renewed? How?

No, they are not renewable.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

Yes. The current Copyright Law has extended the term of copyright protection from the previous copyright law, specifically on the term of protection for books, talks, visual aids, songs, choreographies, drawings, architectural works, maps, and batik art, from 50 years after the creator's death to 70 years after the creator's death.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

A copyright infringement means:

- any party that violates the moral right of the creator;
- any party that exercises the economic right of the copyright holders or neighbouring rights holder without obtaining prior authorisation or permission from such holder or without paying any royalty to the collective management institution; or
- any party that uses, duplicates, performs, distributes, or communicates photos or portraits of any persons for a commercial purpose without obtaining any authorisation from the relevant persons.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

There is no provision in the Copyright Law that specifically stipulates secondary liability. However, there is a provision stipulating that the operator of a commercial establishment is not permitted to sale or duplicate any goods resulting from the infringement of copyright or neighbouring rights in the place of establishment.

Furthermore, the Indonesian Criminal Code also stipulates that a party may be liable if he or she knowingly or intentionally provides an opportunity, assistance or effort, or information to commit a crime (such as a copyright infringement).

Available remedies

39 | What remedies are available against a copyright infringer?

A party may seek legal remedy over a copyright infringement by filing a police report and seeking settlement through an alternative dispute resolution, arbitration or commercial court. Apart from an infringement of copyright or neighbouring rights in the form of piracy, as long as the domicile of the disputing parties are known or if they are located within the territory of the Republic of Indonesia, then they must enter into a mediation to achieve settlement before filing a criminal claim to the court.

The legal remedies that are available against a copyright infringer are as follows:

- filing a claim for compensation against the infringer if the creator, copyright holder, or neighbouring rights holder suffers any loss or damages;
- filing a claim for injunction to the commercial court to:
 - request for the confiscation of any work that was announced or duplicated, or confiscation of the duplication instrument used to produce works resulting from infringement of copyright; or
 - cease the announcement, distribution, communication, or duplication of works resulting from infringement of copyright;

Summary of the criminal copyright provisions stipulated in the Copyright Law		
No.	Criminal action	Punishment
1	Removing, altering or damaging any copyright management information and copyright electronic information for commercial purposes without authorisation.	Maximum imprisonment of two years or maximum fine of 300 million rupiah, or both.
2	Violating the economic right of a creator or copyright holder by leasing a copyrighted work for commercial purposes without authorisation.	Maximum imprisonment of one year or maximum fine of 100 million rupiah, or both.
3	Violating the economic right of a creator or copyright holder by translating, adapting, arranging, transforming, showing or exhibiting, or communicating a copyrighted work for commercial purposes without authorisation.	Maximum imprisonment of three years or maximum fine of 500 million rupiah, or both.
4	Violating the economic right of a creator or copyright holder by publishing, duplicating, distributing or announcing a copyrighted work for commercial purposes without authorisation.	Maximum imprisonment of four years or maximum fine of 1 billion rupiah, or both.
5	Fulfilling elements of criminal actions as stated in point 4 in the form of piracy.	Maximum imprisonment of 10 years or maximum fine of 4 billion rupiah, or both.
6	Operating a commercial place, in any form, while intentionally and knowingly letting the sale or duplication of products derived from copyright infringement action.	Maximum fine of 100 million rupiah.
7	Commercially using, duplicating, publishing, distributing, or communicating a photo or portrait of a person for advertisement purposes without authorisation of the related person or his or her rightful heir, whether via electronic or non-electronic media.	Maximum fine of 500 million rupiah.
8	Violating the economic right of a performer by leasing his or her fixated show or its copy for commercial purposes without authorisation.	Maximum imprisonment of one year or maximum fine of 100 million rupiah, or both.
9	Violating the economic right of a performer by broadcasting and communicating his or her show, fixating his or her show that has not been fixated, or providing his or her fixated show for commercial purposes without authorisation.	Maximum imprisonment of three years or maximum fine of 500 million rupiah, or both.
10	Violating the economic right of a performer by duplicating his or her fixated show, or distributing his or her fixated show or its copy for commercial purposes without authorisation.	Maximum imprisonment of four years or maximum fine of 1 billion rupiah, or both.
11	Fulfilling elements of criminal actions as stated in point 10 above in the form of piracy.	Maximum imprisonment of 10 years or maximum fine of 4 billion rupiah, or both.
12	Violating the economic right of a phonogram producer by leasing a copy of the copyrighted phonogram to the public for commercial purposes without authorisation.	Maximum imprisonment of one year or maximum fine of 100 million rupiah, or both.
13	Violating the economic right of a phonogram producer by duplicating a phonogram by any means, distributing an original phonogram or its copy or making a phonogram to be accessible by the public, with or without cable, for commercial purposes without authorisation.	Maximum imprisonment of four years or maximum fine of 1 billion rupiah, or both.
14	Fulfilling elements of criminal actions as stated in point 13 above in the form of piracy.	Maximum imprisonment of 10 years or maximum fine of 4 billion rupiah, or both.
15	Violating the economic right of a broadcasting institution by rebroadcasting, communicating, fixating, duplicating a broadcast for commercial purposes without authorisation.	Maximum imprisonment of four years or maximum fine of 1 billion rupiah, or both.
16	Fulfilling elements of criminal actions as stated in point 15 in the form of piracy.	Maximum imprisonment of 10 years or maximum fine of 4 billion rupiah, or both.
17	Collective Management Institution that collects royalties but does not hold a business licence from the DGIP.	Maximum imprisonment of four years or maximum fine of 1 billion rupiah, or both.

The commercial court may also issue an injunction to:

- prevent the entry of any goods suspected to be the result of an infringement of copyright or neighbouring rights into the commercial trade routes;
- withdraw from distribution and confiscate, as well as keep as evidence, goods that are suspected to be the result of an infringement of copyright or neighbouring rights;
- secure as evidence and prevent the disappearance of evidence by the infringer; and
- cease the infringement to stop further loss and damage.

The commercial court issues decisions on copyright infringement claims within 90 working days of a claim's filing date.

Limitation period

40 | Is there a time limit for seeking remedies?

No.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, the Copyright Law provides that a creator, copyright holder, or neighbouring rights holder, or their rightful heir, who suffers damages is entitled to receive compensation. The compensation shall be given based on a final and binding decision of a civil or criminal court.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

No, based on the Indonesian Civil Procedural Law, attorneys' fees and costs will be imposed on the party that receives the legal service from the relevant attorney.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Yes. The table above provides a summary of the criminal copyright provisions stipulated in the Copyright Law.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

The only specific remedy or defence for an online infringement is to make a report of such infringement to the DGIP. In this regard, the DGIP will then examine the report to verify its validity. If there is sufficient evidence based on the verification, then the DGIP, upon the request of the applicant, will make a recommendation to the Ministry of Technology and Information to block the content or access to the perpetrator's website.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

Although it is difficult to prevent copyright infringement in its entirety, there are steps that can be taken to minimise it, such as to conduct socialisation and provide education to the public regarding copyright. Hopefully the public's understanding and awareness on copyright will increase through socialisation and education, which in turn, will make them appreciate other people's intellectual property.

Another action is to increase the level of enforcement under the Copyright Law, specifically the provisions on copyright infringement to cause a deterrent effect in society. Strict enforcement will encourage the public against committing copyright infringement in the future.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

Indonesia is a member of the agreement to establish the World Trade Organization (WTO Agreement), which includes the Trade Related Aspects of Intellectual Property (TRIPS).

Indonesia then ratified the Berne Convention for the Protection of Artistic and Literary Works (Berne Convention) and the World Intellectual Property Organization Copyright Treaty in 1997 (the Copyright Treaty).

Lastly, in 2004, Indonesia also ratified the World Intellectual Property Organization Performances and Phonograms Treaty (the Phonograms Treaty).

47 | What obligations are imposed by your country's membership of international copyright conventions?

As a member of the WTO Agreement, Indonesia must give effect to the provisions of the TRIPS and may, but is not obliged to, implement more extensive protection in their local law than what is required by the TRIPS, provided that such protection does not contravene the provisions of the TRIPS.

As a country that ratified the Berne Convention, Indonesia must adopt, in accordance with its constitution, the measures necessary to ensure the application of the Berne Convention. Taking into consideration the prevailing legislation and constitution, Indonesia does not consider itself to be bound by the provision of article 33 (1) of the Berne Convention.

Since Indonesia also ratified the Copyright Treaty, it must also abide by the rights and obligations under the Copyright Treaty.

As a member of the Phonograms Treaty, Indonesia must:

- provide adequate legal protection and effective legal remedies against the circumvention of technological measures by

ASSEGAF HAMZAH & PARTNERS

Dewi Soeharto

dewi.soeharto@ahp.id

Nalendra Wibowo

nalendra.wibowo@ahp.id

Albertus Agung Dimaz Prayudha Prandhita

dimaz.prayudha@ahp.id

Achmad Faisal Rachman

achmad.rachman@ahp.id

Capital Place

Level 36-38

Jalan Jenderal Gatot Subroto Kav. 18

Jakarta 12710

Indonesia

Tel: +62 21 2555 7800

Fax: +62 21 2555 7899

www.ahp.id

performers or producers of phonograms in connection with the exercise of their rights under this Treaty and which restrict acts, in respect of their performances or phonograms, that are not authorised by the performers or the producers of phonograms concerned or permitted by law;

- provide adequate and effective legal remedies against any person who knowingly perform any of the following acts:
 - remove or alter any electronic rights management information without any authority; and
 - distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

UPDATE AND TRENDS

Emerging trends and new legislation

48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

In early 2019, the House of Representatives released a draft of a law governing music (the Draft Music Law) for socialisation purpose and to request feedback from the stakeholders and the public in general. The Music Law Draft was met with a lot of resistance and backlash due to certain provisions that were seen to limit freedom of creation and creativity and negatively affect musicians. Some of these concerns included:

- Article 5 stipulating that during the creation process, every person involved is prohibited from:
 - encouraging the public to engage in violence, gambling or the use of drugs;
 - including pornographic, sexually violent and child exploitation content;

- provoking conflicts in society between groups, ethnic groups, races and classes;
 - defaming, harassing or tarnishing any religion;
 - encouraging the public to commit unlawful or illegal acts;
 - introducing and spreading negative influences of foreign cultures; and
 - degrading humanity's dignity.
- Article 10 paragraph (2) stipulating that the distribution of music must be done by record labels or specific service providers for distribution of musical products in a physical form, or content providers for digital music. The Draft Music Law does not provide opportunities for the distribution of music by independent parties or the musicians themselves.
 - Article 20 stating that competency in the field of music must be obtained through formal education or from self-learning. Furthermore, article 32 stipulates that to be acknowledged as a professional, musicians coming from an educational or self-taught background must take a competency exam. These provisions are very restrictive towards musicians because not everyone has the same skill level or qualification in music.

Fortunately, the government and members of the House of Representatives were open to the input and feedback, and will review the Draft Music Law and discuss and revise it further before enacting it.

Japan

Takashi Nakazaki

Anderson Mōri & Tomotsune

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

Relevant legislation includes:

- the Copyright Act (Act No. 48 of 1970);
- the Act on Registration of Program Works (Act No. 65 of 1986);
- the Act on Management Business of Copyright and Neighbouring Rights (Act No. 131 of 2000);
- the Intellectual Property Basic Act (Act No. 122 of 2002);
- the Act for Improvement of Creation, Protection and Utilisation of Contents (Act No. 81 of 2004);
- the National Diet Library Act (Act No. 5 of 1948); and
- relevant regulations relating to these statutes.

Enforcement authorities

2 | Who enforces it?

Copyright-related legislation is enforced by the district courts, the Intellectual Property High Court (for civil cases), other high courts (for criminal cases and civil cases having jurisdiction other than the Tokyo High Court) and the Supreme Court of Japan. The Intellectual Property High Court was established on 1 April 2005 as a special branch of the Tokyo High Court that exclusively hears intellectual property cases.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

Yes. There are some specific provisions addressing the digital exploitation of works under the Copyright Act that have been amended and expanded to keep up to date with digital society, for example:

- rights of public transmission (article 23);
- compensation for private sound and visual recording (article 30, section 2);
- copying by the National Diet Library for the collection of internet material (article 42-2);
- ephemeral reproduction for maintenance or repairs on reproducing machines with built-in memory (article 47-4); and
- copying for information analysis (article 47-7).

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

While there is no specific provision addressing extraterritorial application to deal with foreign-owned or foreign-operated websites, protected works (such as works of Japanese nationals, works first published in this country (including those first published outside Japan but subsequently published in Japan within 30 days thereof) and works that Japan has the obligation to grant protection to under international treaties) are protected under the Copyright Act. If the infringed work is protected in this way, then the Act will generally apply to a foreign-owned or operated website that infringes copyright; however, there is some controversy in relation to extraterritorial application. Some guidance is provided by judicial precedents accepting application of the Copyright Act of Japan, in accordance with article 5, section 2 of the Berne Convention for the Protection of Literary and Artistic Works:

The enjoyment and exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his or her rights, shall be governed exclusively by the laws of the country where protection is claimed.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

The Agency of Cultural Affairs (ACA) is the primary agency for handling copyright-related issues. The ACA registers copyrighted works – although registration is not mandatory in Japan – with the exception of computer programs, which are registered at the Software Information Centre (SOFTIC).

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

Works in which thoughts or sentiments are expressed in a creative way, and that fall within the literary, scientific, artistic or musical domains, are copyrightable. The following are all copyrightable:

- novels;
- play or film scripts;
- dissertations, lectures and other literary works;
- musical works;

- choreographic works and pantomimes;
- paintings, engravings, sculptures and other artistic works;
- architectural works;
- maps and diagrammatic works of a scientific nature, such as drawings, charts and models;
- cinematographic works;
- photographic works; and
- computer programs.

Rights covered

7 | What types of rights are covered by copyright?

Rights of reproduction, performance, screen presentation, public transmission, recitation, exhibition, distribution, ownership transfer, rental, translation and adaptation are covered by copyright.

Excluded works

8 | What may not be protected by copyright?

The following works may not be protected by copyright:

- the Constitution and other laws and regulations;
- public notices, instructions, circular notices and the like issued by public entities;
- judgments, decisions, orders and decrees of courts;
- rulings and judgments made by government agencies;
- translations and compilations prepared by public entities;
- current news reports and miscellaneous reports having the character of mere communication of fact;
- ideas without any creative expression, even if the idea is unique.

In addition, utility articles, applied arts and designs for utilities in which thoughts or sentiments are not expressed in a creative way and that fall within the literary, scientific, artistic or musical domains may not be protected by copyright.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

While there was no general doctrine of 'fair use' in Japan prior to the amendment in 2018, there have been some equivalent exemptions provided by the Copyright Act, such as:

- quoting from and exploiting a work already made public fairly and to the extent justified by the purpose of the quotations;
- private use, to a limited extent;
- consequent copy of copyrighted work, to a limited extent;
- use of copyrighted work for consideration before licence, to a limited extent;
- test use of publicised work, to a limited extent;
- reproduction in libraries;
- reproduction in school textbooks, schools and other educational institutions;
- use for those with disabilities; and
- reproduction for judicial proceedings.

In addition to those exemptions, the amendment in 2018 introduced the following new exemptions:

- certain actions that are usually considered not to harm copyright owners' interests (articles 30-4 and 47-4); and
- certain actions that may cause only minor harm to copyright owners (article 47-5).

The amendment in 2018 aims to extend the scope of rights restriction provisions to balance the fair use of copyrighted works and the proper protection of copyright to correspond with the move towards digitisation and networking.

Article 30-4 of the Copyright Act permits the free use of copyrighted works to the extent considered necessary where the intended use of such works is not the enjoyment of the ideas or emotions expressed therein. In such circumstances, the works' use would usually not impair the copyright owner's interests. Therefore, these circumstances have been added to the exclusive list of rights restriction provisions. In addition to the general framework for determining whether a certain unlicensed use is permitted, article 30-4 states that the unlicensed use of copyrighted works is permitted where it is required to:

- test the development of technology for the use of copyrighted works or similar;
- analyse information; or
- process information using electronic computers without human recognition.

Article 47-4 permits the use of copyrighted works without the copyright owner's authorisation to the extent necessary to ensure the smooth or efficient use of the copyrighted works in computers or to maintain or restore their state of use. As with article 30-4, article 47-4 provides a list of circumstances in which the use of works would usually not impair the copyright owner's interests. Article 47-4 provides some specific applicable circumstances and the general framework for determining whether a certain unlicensed use is permitted. As a consequence, creating a cache for speeding up information processing through a network and the temporary copying of data to media from a portable audio player during its exchange to another party can be performed without the copyright owner's authorisation under article 47-4.

Article 47-5 permits the unlicensed use of copyrighted works where the use is minor and forms part of information processing by computers and the provision of the results thereof. Article 47-5 provides circumstances in which the use of works could cause only minor harm to the copyright owner's interests. Unlike articles 30-4 and 47-4, article 47-5 identifies only specific applicable circumstances where a person searches for or analyses information and provides the results thereof, although the government can add certain circumstances to this category by a Cabinet order to meet future needs. Notably, under article 47-5, the extent of the use must be minor. For example, locating a certain book using specific keywords and displaying a part thereof with the keywords can be done without the copyright owner's authorisation.

Architectural works

10 | Are architectural works protected by copyright? How?

Yes. Architectural works in which thoughts or sentiments are expressed in a creative way and that fall within the literary, scientific, artistic or musical domains are protected by copyright.

Architectural works protected by copyright have the same general rights as copyright (see questions 7 and 13), except the right to maintain integrity. The author of an architectural work is required to accept modification of an architectural work by way of extension, rebuilding, repairing or remodelling. In addition, exploiting of architectural works located permanently in open space shall be permissible except for the (imitative) reproduction of an architectural work and the offering of such reproduction to the public by transferring ownership of it.

Performance rights

11 | Are performance rights covered by copyright? How?

A performer has the moral right to:

- indicate his or her name and to preserve integrity;
- make sound or visual recordings;
- broadcast and to wire-broadcast;
- make his or her performance transmittable;
- transfer ownership; and
- offer his or her performance to the public by rental as neighbouring rights.

In addition, a performer has the right to receive secondary use fees from broadcasting organisations or wire-broadcasting organisations using commercial phonograms incorporating a sound recording of the performance through designated organisations (this right is not deemed to be a neighbouring right).

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

Yes. Producers of phonograms, broadcasting organisations and wire-broadcasting organisations all have neighbouring rights.

Moral rights

13 | Are moral rights recognised?

Yes. An author shall have the right to make the work and derivative work thereof public; to determine how the author's name is shown (whether it is his or her true name or a pseudonym); and to maintain the integrity of his or her work and its title, without distortion, mutilation or other modification against the author's will.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No. However, many authors do put copyright notices on their works to help prevent copyright infringement.

15 | What are the consequences for failure to use a copyright notice?

Not applicable.

Deposit

16 | Is there a requirement of copyright deposit?

No. However, there is a similar requirement to deposit a copy of a publication in the National Diet Library in order to maintain the publication as public property for public use and record in accordance with the National Diet Library Act. If a governmental institute publishes a piece of work, then that institute deposits multiple copies to be used for the discussion of national issues and international cooperation.

17 | What are the consequences for failure to make a copyright deposit?

When a publisher fails to make a deposit within 30 days after publishing without reasonable cause, an administrative fine of not more than five times the price of the book may be imposed.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

A work may be protected by copyright without any copyright registration. However, the transfer (other than by inheritance or other succession) of copyright or a restriction on the disposal of the copyright, and the establishment, transfer, modification or termination of a pledge on a copyright, or a restriction on the disposal of a pledge established on the copyright, may not be asserted against a third party unless the work has been registered.

In addition, the author of a work that is made public, anonymously or pseudonymously, may have his or her true name registered with respect to said work, regardless of whether he or she actually owns the copyright therein; the copyright holder of any work, or the publisher of an anonymous or pseudonymous work, may register the said work's date of first publication or the date when the work was first made public.

Furthermore, the author of a computer program may register the date of the creation of his or her work within six months of the work's creation.

In practice, the copyright registration system is used for very limited situations, such as attachment security on musical copyright work in a financial transaction.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

No.

20 | What are the fees to apply for a copyright registration?

The fee for registration of the date of first publication and the date of creation is ¥3,000. The fee to register the true name of a work (including computer software) is ¥9,000. The fee for registration of transfer of copyright is ¥18,000. The fee for registration of transfer of neighbouring rights is ¥9,000. The fee for establishment of the right of publication is ¥30,000. In addition to the above, a registration fee of ¥47,100 per software applies in the case of computer software.

21 | What are the consequences for failure to register a copyrighted work?

The rights holder or author may not assert his or her rights against a third party unless registered.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The author of a copyrighted work is its owner. Since copyright may be transferred, the assignee may become the owner of the work; this excludes moral rights, which may not be transferred.

Exemptions to this principle are authorship of a work made by an employee (see question 23) and authorship of a cinematographic work.

Authorship of a cinematographic work shall be attributed to those who, by taking charge of producing, directing, filming, art direction, etc, have creatively contributed to the creation of such cinematographic work as a whole, with the exception of authors of novels, play and film scripts, music or other works adapted or reproduced in such a cinematographic work.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

Yes. With the exception of computer programs, the authorship of a work that, on the initiative of a juridical person (such as a company) or other employers, is made by an employee in the course of the performance of his or her duties in connection with the employer's business and is made public by the employer as a work under its own name, shall be attributed to the employer, unless there are contract or work regulations that provide that the work should be attributed to the employee who created the work. As for computer programs, the authorship of a computer program work that, on the initiative of a juridical person (such as a company) or other employers, is made by an employee in the course of his or her duties in connection with the employer's business, shall be attributed to the employer unless otherwise stipulated by contract, work regulations or the like at the time of the making of the work.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Yes. Such ownership must be expressly agreed to. Although it is not strictly necessary to have a written agreement, it is customary to have one in order to prevent copyright disputes.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. A co-holder of a copyright in a work of joint authorship or of any other co-owned copyright may not transfer or pledge his or her share without the consent of the other co-holders.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Yes.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes.

28 | Are there compulsory licences? What are they?

Yes. When, despite reasonable efforts, it is not possible to contact the copyright holder because his or her identity is unknown or for other reasons, then it shall be possible to exploit, under authority of a ruling for compulsory licence issued by the ACA and upon depositing, for the benefit of the copyright holder, compensation of the amount fixed by the Commissioner.

29 | Are licences administered by performing rights societies? How?

Yes. Japanese performing rights societies include the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC), the Japan Writers' Association, the Writers Guild of Japan, and the Japan Writers Guild.

Owners of copyrighted works may either entrust administration of their copyright to the entity of their choice, or manage their rights personally in whole or in part. If a copyright owner chooses to entrust

his or her copyright to an administrator, this entity and the owner will execute an entrustment agreement.

Termination

30 | Is there any provision for the termination of transfers of rights?

No.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

If the transfer and other transactions are registered, yes. The ACA or SOFTIC requires such documents in order to register the transfer or transaction and to summarise the fact in the registration.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection begins at the time of the creation of the work.

Duration

33 | How long does copyright protection last?

Protection will last for 50 years after the death of the author or, in the case of a jointly authored work, for 50 years after the death of the last surviving co-author (in principle). The copyright in a work that bears the name of a juridical person or other corporate body as its author shall continue to subsist until the end of the 50-year period following the work being made public. The copyright in a cinematographic work shall continue to subsist until the end of the 70-year period following the work being made public; or, if the work was not made public within the 70-year period following its creation, until the end of the 70-year period following the work's creation. Since the end of December 2018, the protection period has been amended to 70 years, to comply with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

34 | Does copyright duration depend on when a particular work was created or published?

Yes. There are special copyright durations, pursuant to the Act on Special Provisions of Duration of Copyright of the Allies, for works created during World War II (this time frame runs from 8 December 1941 to the day before each peace pact).

Renewal

35 | Do terms of copyright have to be renewed? How?

No.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

Yes. Protection for 30 years after death was extended to 38 years, and then to 50 years in 1970, in accordance with the Brussels Amendment of the Berne Convention (1948). With respect to cinematographic works, protection for a 50-year period following the copyright work being made public was also extended to 70 years (or, if the work was not made

public within the 70-year period following its creation, until the end of the 70-year period following the work's creation).

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Reproduction, performance, screen presentation, public transmission, recitation, exhibition, distribution, rental, translation or adaptation without the copyright owner's approval constitute copyright infringement.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Yes. A representative, an agent, an employee or any other worker of a juridical person (such as a company) or a person (individual) who commits copyright infringement in connection with the business of that person shall be jointly or vicariously liable for the infringement under the Copyright Act and civil law, and may have criminal liability in accordance with the Copyright Act.

Available remedies

39 | What remedies are available against a copyright infringer?

Remedies available include injunction, compensation, measures for the restoration of honour and reputation such as a public apology and the collection of unjust enrichment.

Limitation period

40 | Is there a time limit for seeking remedies?

Compensation in accordance with the Civil Code must be sought within three years of the infringement and infringer becoming known, or within 20 years of the infringement.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes, although it is rare that the amounts awarded in a judgment will cover attorneys' fees and the costs of an action.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Yes. A person who infringes copyright, right of publication or neighbouring rights (excluding some exemptions provided in the Act) shall be punished by imprisonment with work for a term not exceeding 10 years, a fine of not more than ¥10 million, or both. A person who infringes the author's moral rights, a person who, for profit-making purposes, causes a machine that has a reproduction function (provided in the article) to be used to reproduce works or performances (eg, automated bulk video copying) or a person who commits an act deemed to constitute copyright infringement shall be punished with penal labour for up to five years, a fine of up to ¥5 million, or both. A person who infringes an author or performer's moral rights after the author or performer's death shall be

punishable by a fine of up to ¥5 million. There are also criminal provisions against the illegal reproduction of a computer program; circumvention of technological protection measures; illegal reproduction of a person's true name or widely known pseudonym; and the reproduction, distribution or possession of a commercial phonogram without any authority, etc.

The authorities may not investigate copyright infringements and bring charges against offenders unless the copyright holders have filed complaint against the authorities, or the following three requirements are met:

- the alleged offenders intend to financial benefit or to harm the copyright holders;
- the alleged offenders assign, publicly transmit or duplicate paid copyrighted works in their original language; and
- the copyright holders' prospective benefit arising from offering paid copyrighted works is unjustly infringed.

If the preceding requirements are met, the authorities may investigate copyright infringements and bring charges, even if the copyright holders have not filed complaints.

In addition, selling devices to circumvent access control is subject to criminal sanctions.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

Yes. When copyright is infringed by information distributed through the internet, a person alleging that his or her copyright has been infringed may request that a telecommunications service provider, such as an internet service provider prevent such infringed information from being transmitted to unspecified persons in practice (under civil laws); and disclose the identification information of the sender pertaining to the infringement, if there is evidence that the copyright was infringed by distribution through the internet, since the identification information of the sender is necessary for the rights holder demanding the above disclosure to exercise his or her right to claim damages, and there is justifiable ground for the rights holder to receive the disclosed identification information of the sender in accordance with the Act on the Limitation of Liability for Damages of Specified Telecommunication Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (Act No. 137 of 2001).

When a telecommunication service provider has received a request to prevent the infringement, the service provider shall be liable for loss incurred from such infringement if:

- it is technically possible to take measures for preventing such information from being transmitted to unspecified persons;
- the service provider knew that the infringement was caused by the information distribution through the telecommunications provided by the provider; or
- the service provider had knowledge of the information distribution by its service or there are reasonable grounds to find that the service provider could know the infringement was caused by information distribution through its service.

On the other hand, if a service provider takes measures to block transmission of information, such provider shall not be liable for any loss incurred by a sender of such information allegedly infringed insofar as measures are taken within the limit necessary for preventing transmission of the infringement to unspecified persons and there is a reasonable ground to believe the infringement, or there is no notice of acceptance of blocking the information from the infringer who receives an enquiry from the service provider within seven days after the above inquiry is made.

Prevention measures

- 45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

Copyright infringement may be prevented in Japan by putting a copyright notice on the work; education; appropriate measures against infringement, such as issuing a warning immediately after infringement is recognised; and legal action against the infringer.

Japanese copyright holders have suffered a number of copyright infringements by individuals and corporations based in foreign countries (eg, counterfeit software and cartoon books being translated and printed without approval); therefore government-level action against countries in which many copyright infringers exist should be a critical factor in helping to prevent future copyright infringement.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

- 46 | Which international copyright conventions does your country belong to?

Japan belongs to:

- the Berne Convention for the Protection of Literary and Artistic Works (Paris Act);
- the Universal Copyright Convention (Paris Act);
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations;
- the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights; and
- the Beijing Treaty on Audiovisual Performances.

- 47 | What obligations are imposed by your country's membership of international copyright conventions?

Principles of national treatment in accordance with the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, and the Principle of Reciprocity in accordance with the Berne Convention are imposed.

UPDATE AND TRENDS

Emerging trends and new legislation

- 48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

The artificial intelligence and machine learning industry in Japan highly favours the amendment in 2018 (see question 9) since the amendment would advance and support the business circumstances for the artificial intelligence and machine learning industry as follows.

New article 30-4

This exemption permits all users to analyse and understand copyrighted works for machine learning. This means accessing data or information in a form where the copyrighted expression of the works is not perceived by the user and would therefore not cause any harm to the rights holders. This includes raw data that is fed into a computer programme to carry out deep learning activities, forming the basis of artificial intelligence.

ANDERSON MŌRI & TOMOTSUNE

Takashi Nakazaki

takashi.nakazaki@amt-law.com

Otemachi Park Building
1-1-1 Otemachi
Chiyoda-ku
Tokyo 100-8136
Japan
Tel: +81 3 6775 1086
Fax: +81 3 6775 2086
www.amt-law.com

New article 47-4

This exemption permits electronic incidental copies of works, recognising that this process is necessary to carry out machine learning activities but does not harm copyright owners.

New article 47-5

This exemption enables searchable databases, which are necessary to carry out data verification of the results and insights obtained through text and data mining.

Korea

Tae Uk Kang, Susan Park, Tae Kwon Kim, Hye Won Shin and Jae Young Seol

Bae, Kim & Lee LLC

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation includes:

- the Copyright Act;
- the Content Industry Promotion Act;
- the Act on the Layout-Designs of Semiconductor Integrated Circuits;
- the Unfair Competition Prevention and the Trade Secret Protection Act; and
- the regulations relating thereto.

Enforcement authorities

2 | Who enforces it?

Copyright-related legislation is enforced by the judiciary, the designated administrative agencies and the law enforcement authorities. The Korea Copyright Commission (KCC) serves as the non-judiciary dispute resolution body, while the Korea Copyright Protection Agency administers the enforcement of copyright, such as the monitoring and examination of infringement and issuance of corrective measures.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The Copyright Act provides for the digital exploitation of works, such as the provisions governing digital transmission, and the safe harbour applicable to online service providers. Further, the Act on Prohibition of Circumvention of Technological Protection Measures, and the Content Industry Promotion Act concern the online exploitation of copyrighted works.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

While there is no specific provision addressing extraterritorial application to deal with foreign-owned or foreign-operated websites, the copyrighted works of Korean nationals, works created in Korea, and the works which Korea has the obligation to grant copyright protection under international treaties are protected under the Copyright Act.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

This role is performed by KCC and the Ministry of Culture, Sports and Tourism (MCST). KCC is delegated by the MCST to handle various tasks related to copyright protection, including mediation of copyright disputes, registration of copyright, issuance of corrective measures, conduct of education and research on policy, etc, whereas the MCST sets the policies and standards for applying the Copyright Act and designates and authorises the relevant organisations.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

Creative works which express human thoughts and emotions can be protected by copyright. As examples, article 2 of the Copyright Act states that the following can be protected by copyright: novels, play or film scripts, dissertations, musical works, choreographic works, paintings, architectural works, maps, cinematographic works, photographic works, and computer programs.

Unless provided otherwise, all provisions referenced herein refer to the Copyright Act.

Rights covered

7 | What types of rights are covered by copyright?

There are seven economic rights:

- right of reproduction;
- public performance;
- transmission;
- exhibition;
- distribution;
- rental; and
- production of derivative works.

Excluded works

8 | What may not be protected by copyright?

Mere ideas are not protected. In addition, laws, public notices, judgments, the translations thereof by the central or local governments, or news reporting that delivers simple facts are not protected (article 7).

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

Yes. In determining whether a person can avail of the fair use defence, the following factors are considered:

- the purpose and characters of use, including whether such use is for-profit or not-for-profit;
- the nature of work;
- the amount and substantiality of portion used in relation to the entire work; and
- the effect of use of works on the current or potential market.

Architectural works

10 | Are architectural works protected by copyright? How?

Yes. Architectural works including buildings, architectural models and designs are protected (article 4). In the case of architectural structures, the 'reproduction' includes carrying out construction of the works in accordance with the design plans.

Performance rights

11 | Are performance rights covered by copyright? How?

Yes. The copyright owner has the right to publicly perform the work, whereas performers' rights are protected as neighbouring rights comprising the economic rights and moral rights.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

Yes. While performances are protected under the Copyright Act as 'Performers' Right', integrated circuit layouts and hot news are protected by the Act on the Layout-Designs of Semiconductor Integrated Circuits and the Unfair Competition Prevention and Trade Secret Protection Act.

Moral rights

13 | Are moral rights recognised?

Yes. The rights to make the work public, right of authorship, and right of integrity are protected as moral rights.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

While there is no prescribed requirement for copyright notice, the use of the © symbol is typical and recommended.

15 | What are the consequences for failure to use a copyright notice?

Not applicable.

Deposit

16 | Is there a requirement of copyright deposit?

No. There are no particular formalities that are required for a work to be copyrighted. To register a copyright, however, a copy of the copyrighted work must be submitted.

17 | What are the consequences for failure to make a copyright deposit?

Not applicable.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

Yes. The copyright to the work can be registered through registering with the MCST by recording the work in the copyright register (article 55).

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

No. Although copyright registration is not mandatory to effectuate the copyright, registration is required in order to claim statutory damages in a copyright infringement action.

20 | What are the fees to apply for a copyright registration?

In applying for a copyright registration, it costs 20,000 won for online applications, or 30,000 won for offline applications, in each case excluding the registration tax of 3,600 won per copyrighted material. For registering the copyright of computer programs, the fees are 60,000 won for online applications or 50,000 won for offline applications, excluding a registration tax of 3,600 won per program.

21 | What are the consequences for failure to register a copyrighted work?

The owner of an unregistered copyright cannot claim statutory damages in an infringement action.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The author, or the creator of the work, holds both the economic and moral rights in the work. Since copyright may be assigned, the assignee can become the owner of the work, except for the moral rights which are inalienable, personal rights of the original author.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

Yes. A work created by an employee during the course of performing the employee's duties will be deemed a work-made-for-hire, and the rights in such work are owned by the employer unless otherwise stipulated in a contract or employment policy (article 9).

24 | May a hiring party own a copyrighted work made by an independent contractor?

Yes. However, work-made-for-hire in a non-employment context is more difficult to be recognised than in an employment context. It is therefore highly recommended to execute an agreement that expressly provides for the assignment of the copyright in the work created by the outside consultant to the party commissioning the work.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. A copyrighted work may be co-owned, and the co-owner may be an individual or a legal entity.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Yes. The author's economic right can be assigned in whole or in part. Even where an author's economic right is assigned in whole, the right of the production and use of derivative works is not presumed to be included in the transfer unless otherwise expressly agreed. Moral rights are unassignable but can be waived (ie, the author may agree not to exercise the moral rights in the work).

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes. The author's economic rights can be licensed in whole or in part. The licensee will be entitled to exploit the work in the manner and within the scope provided by the licence. The licence cannot be transferred to a third party without the consent of the holder of author's economic rights. The scope of a copyright licence is restricted to those explicitly written in the licence agreement and is construed very narrowly. Therefore, a copyright licence must include a clear scope for the licence.

28 | Are there compulsory licences? What are they?

Where the party wishing to use a copyrighted work is unable to identify the rights holder, such person may exploit the work after obtaining the approval from the MCST (article 50). In such case, the compensation set by the MCST must be deposited with the MCST and the intent to use and the date of use need to be specified.

29 | Are licences administered by performing rights societies? How?

Yes. The Korean Music Copyright Association and the Korean Society of Composers, Authors, and Publishers collect the royalties from music copyright, whereas the Recording Industry Association of Korea and the Federation of Korean Music Performers administer the rights of the record labels and music performers, in each case, pursuant to the collection guidelines approved by the MCST.

Termination

30 | Is there any provision for the termination of transfers of rights?

No.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

Yes. Documents evidencing transfers and other transactions can be recorded with the KCC and such application for recordation must be filed with the application form, identification documents, list of the copyrighted works, copy of the contract, consent or affidavit from the assignor if the applicant is the assignee, etc.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection begins at the time of the creation of the work.

Duration

33 | How long does copyright protection last?

Protection will last for 70 years after the death of the author or, in the case of a jointly owned work, for 70 years after the death of the last surviving co-author (in principle). The copyright in works-made-for-hire and cinematography continues to subsist until 70 years following the publication of the work; or, if the work is not made public within the first 50 years of its creation, then until 70 years following the work's creation.

34 | Does copyright duration depend on when a particular work was created or published?

Yes. From 1 July 2013, the copyright protection period has been increased from 50 to 70 years from the date of the death or the publication of the author. However, for works whose copyright term expired prior to 1 July 2013, the extended term for 70 years does not apply. The work of an author who died before 31 December 1962 is protected until 50 years after the death, while the work of a writer who died after 1 January 1963 is protected until 70 years after the death according to Copyright Act revised by statute no. 10807.

Renewal

35 | Do terms of copyright have to be renewed? How?

No.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

Yes. The Copyright Act was revised effective from 1 July 2011, thereby extending the term of the copyright from the author's lifetime plus 50 years to the author's lifetime plus 70 years.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Reproduction, performance, screen presentation, public transmission, recitation, exhibition, distribution, rental, translation or adaptation without the copyright owner's approval constitutes copyright infringement.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

While the Copyright Act itself does not expressly provide for an indirect infringement theory for copyright, the case law has recognised such a concept which carries both civil and criminal liability in certain circumstances. As to what constitutes indirect infringement, the Korean Supreme Court has held that the crime of aiding and abetting copyright infringement includes any direct and indirect acts of facilitating or accommodating illegal reproduction activities, and indirect infringement

does not require actual or specific knowledge as to the timing, location or identity of the infringer.

Available remedies

39 | What remedies are available against a copyright infringer?

The available remedies include: injunction, compensation for damages, measures for the restoration of honour and reputation (such as a public apology), and disgorgement of unjust enrichment.

Limitation period

40 | Is there a time limit for seeking remedies?

Yes. Compensation for damages must be claimed within the earlier of 10 years from when the infringement took place, or three years from when the copyright owner became aware of the damage caused by the infringement and the identity of the infringer.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes. Attorney's fees and costs may be claimed within certain limits set by the court.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Yes. An infringer of another's economic rights or other proprietary rights by means of reproduction, performance, public transmission, exhibition, distribution, rental, or production of derivative works can be subject to imprisonment of up to five years or a fine of not more than 50 million won, or both.

A person who defames the author or performer by infringing on the moral rights can be punished by imprisonment of up to three years or a fine of not exceeding 30 million won, or both.

In addition, the act of illegal reproduction of database, filing for false registration, failure to indicate the source of authorship is each criminally actionable.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

Yes. A person who infringes on the business interests of a content creator and a person who, without the authorisation, provides, imports, manufactures, transfers, leases, forwards or exhibits for transfer or lease technologies, services, devices or main parts thereof with the main purpose of neutralising the technological protection measures is punishable by imprisonment of up to two years or by a fine of not exceeding 20 million won.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

Monitoring of newly released works can be an effective way to avoid infringement. Prior to using a copyrighted work, the user must ascertain all rights holders of the work. For example, a musical work involves various rights holders, including the composer, lyricist, performers and record labels. In the case of musical works, copyright administration is usually entrusted with the collecting societies making the clearance of the copyright easy.

Copyright notice can also deter infringement. Although a copyright notice is not required for the work to be protected for copyright, indicating the notice can discourage unlawful use of the work by reminding the user of the need to seek permission before using the work. Copyright registration, while not required for copyright protection, is required in order to claim statutory damages in copyright infringement action and the registration also serves as constructive notice to the public.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

South Korea became the signatory to the Universal Copyright Convention in 1987, and joined other the copyright-related international treaties and conventions as follows:

- Convention Establishing the World Intellectual Property Organization;
- Universal Copyright Convention;
- Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms;
- Agreement on Trade-Related Aspects of Intellectual Property Rights;
- Berne Convention for the Protection of Literary and Artistic Works;
- World Intellectual Property Organization Copyright Treaty;
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- World Intellectual Property Organization Performances and Phonograms Treaty;
- Convention Relating to the Distribution Of Programme-Carrying Signals Transmitted by Satellite;
- Beijing Treaty on Audiovisual Performances; and
- Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

47 | What obligations are imposed by your country's membership of international copyright conventions?

South Korea is bound by the principle of the most favoured nation treatment in accordance with the Berne Convention for the Protection of Literary and Artistic Works (Paris Act), the Universal Copyright Convention (Paris Act), and the principle of reciprocity in accordance with the Berne Convention (Paris Act).

UPDATE AND TRENDS**Emerging trends and new legislation**

- 48 Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

Under article 29, Section 2 of the Copyright Act, performances (or playing) of commercial phonorecords without benefit in return (ie, playing of music at business establishments) generally do not require a licence from the copyright owner, unless the establishment is one of the types of venue specifically designated under article 11 of the Enforcement Decree to the Copyright Act as being subject to the copyright owner's performance rights. This practice, however, has come under criticism for being an excessive restriction on the performance right of copyright owners, and this was particularly pertinent when compared with the relevant practices in other countries. Accordingly, article 11 of the Enforcement Decree to the Copyright Act was amended in 2018 to include additional types of establishment that are subject to such performance licences.

The Recording Industry Association of Korea will cease to exist as of 30 June 2019 and will be replaced by its successor performing rights society.

**Tae Uk Kang**

taeuk.kang@bkl.co.kr

Susan Park

susan.park@bkl.co.kr

Tae Kwon Kim

taekwon.kim@bkl.co.kr

Hye Won Shin

hyewon.shin@bkl.co.kr

Jae Young Seol

jaeyoung.seol@bkl.co.kr

133 Teheran-ro

Gangnam-gu

Seoul

06133

Korea

Tel: +82 2 3404 0000

Fax: +82 2 3404 0001

www.bkl.co.kr

Mexico

Carlos Trujillo

Uhthoff, Gómez Vega & Uhthoff SC

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

Copyright protection and the copyright legal system in Mexico derives from article 28 of the Federal Constitution. The Federal Copyright Law, which was enacted on 24 December 1996 and took effect as of 24 March 1997, is the main statutory law governing copyright and neighbouring rights. It affords copyright protection, constitutes the Public Copyright Registry and determines the causes of infringement against the copyright. Section 26 of the Federal Criminal Code contains a list of conduct to be considered as crimes against copyright and related rights, and establishes the applicable penalties for the offenders. Other relevant legislation is found in the Industrial Property Law.

This statutory law, which is focused on protecting industrial property rights, is applicable to the copyright field since it governs the proceedings to enforce copyright for conduct in which the alleged infringer obtains direct or indirect profits from the commercial use of a work, which is referred to as a 'trade-related infringement'.

Enforcement authorities

2 | Who enforces it?

The National Copyright Institute is the competent authority to enforce copyright for cases in which the conduct by the offender is not intended to obtain a profit with the use of a work and in which the infringement relates more to omissions in observing certain obligations foreseen in the Federal Copyright Law. For cases in which the infringement constitutes conduct focused on obtaining direct or indirect profits, the competent authority to take action against the alleged infringer is the Mexican Institute of Industrial Property.

The Office of the Mexican Attorney General is the competent authority to initiate a criminal action for a copyright criminal offence. Civil courts, with either federal or local jurisdiction, will be competent to hear a claim for damages against a copyright infringer. By an order coming from any of the mentioned administrative or judicial authorities, the Mexican Customs can seize illegitimate works at the border to prevent them from entering Mexican territory.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

In general terms, there are no provisions in the Federal Copyright Law specifically dealing with the unauthorised use of digital works. But from the interpretation of the concepts foreseen in the aforementioned law,

there can be causes of action against the unauthorised use, copying, distribution and public communication of digital works.

Article 112 of the Federal Copyright Law contemplates some general anti-circumvention measures by prohibiting the importation, manufacture, distribution or use of devices or the delivery of services that aim to eliminate technical protections of software or decode broadcasting signals. In addition, the Federal Criminal Code considers the unauthorised decoding of satellite signals to be an offence.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Mexican law does not have extraterritorial application. The owner of the website infringing copyright must be based in Mexico to support an infringement action under Mexican law.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

The National Copyright Institute is the central agency for copyright in Mexico. Among its different activities, it acts as the Public Copyright Registry where authors and copyright owners can register their works and documents before making them public. Although copyright registration is not required for obtaining copyright protection, this formality proves to be very helpful since it constitutes proof of the existence of the work, and establishes presumption of copyright ownership. This facilitates the performance of commercial actions using the work and facilitates enforcement proceedings against infringers.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

The copyright referred to in the Federal Copyright Law is recognised in respect of works in the following categories:

- literary works;
- musical works (lyrics and notes);
- dramatic works;
- dances;
- pictorial works or works of drawing;
- sculptures and works of plastic nature;
- works of caricature and short stories;
- architectural works;
- cinematographic and other audiovisual works;
- radio and television programmes;

- software;
- photographic works;
- works of applied art, including works of graphic or textile design; and
- works of compilation, consisting of collections of works such as encyclopaedias, anthologies and works or other elements such as databases, provided that they constitute intellectual creations by reason of the selection or arrangement of their content or subject matter.

Other works, which by analogy may be considered literary or artistic works, shall be included in the category that most closely corresponds to their nature.

Rights covered

7 | What types of rights are covered by copyright?

Copyright in Mexico covers moral and economic rights.

Excluded works

8 | What may not be protected by copyright?

The Federal Copyright Law expressly excludes the following from copyright protection:

- ideas, formulae, solutions, concepts, methods, systems, principles, discoveries, processes and inventions of any kind;
- the industrial or commercial exploitation of the ideas embodied in works;
- schemes, plans or rules for performing mental acts, playing games or doing business;
- letters, digits or colours in isolation, except where they are stylised to such an extent that they become original designs;
- names and titles or phrases in isolation;
- mere layouts or blank forms for completion with any kind of information, and related instructions;
- unauthorised reproductions or imitations of coats of arms, flags or emblems of any country, state, municipality or equivalent political subdivision, or the names, abbreviated names, symbols or emblems of inter-governmental or non-governmental international organisations, or those of any other officially recognised organisation, and the verbal designation thereof;
- legislative, regulatory, administrative or judicial texts, and official translations thereof; where they are published, they must conform to the official text, and they shall confer no exclusive right of publication; nevertheless, protection shall be available for parallel texts, interpretations, comparative studies, annotations, commentaries and other similar works that entail on the part of their author, the creation of an original work;
- the information content of news, whereas the form of expression thereof is protected; and
- information in everyday use, such as proverbs, sayings, legends, facts, calendars and scales of measurement.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

The Federal Copyright Law foresees certain limitations to the exercise of economic copyright through which fair use situations are foreseen for certain conduct. These exceptions are based on the 'three-step test' of the Berne Convention for the Protection of Artistic and Literary Works. In this connection, artistic and literary works in Mexico may freely be

used, without an authorisation from the owner of the economic rights, provided that the use does not affect the normal use of the work, in the following cases:

- text quotation, provided that the quoted portion is not a simulated reproduction of the complete work;
- reproduction of texts, photographs, drawings and comments related to present events that have been published on printed news or broadcasted by any media, except if the reproduction has expressly been prohibited by the copyright owner;
- partial reproduction of the work for criticism or for scientific, literary or artistic research;
- reproduction of works for a private use and without looking forward to obtain a profit (only applicable for individuals);
- backup copies of a work made by an archive or library for preservation purposes;
- reproduction of works for judicial or administrative proceedings;
- reproduction communication and distribution of paintings, photographs, drawings or audiovisual materials containing works that are viewable in public places; and
- publication of works without a lucrative purpose for persons with disabilities.

Architectural works

10 | Are architectural works protected by copyright? How?

Architectural works are protected by copyright on the same basis as other artistic or literary works. Protection extends to the architectural plans.

As part of the fair use of works, architectural works that are visible from public places can be reproduced, communicated and distributed in drawings, paintings, photographs and audiovisual materials, without the consent of the copyright owner and without remuneration.

Performance rights

11 | Are performance rights covered by copyright? How?

Performance rights are protected by copyright in Mexico for actors or performing artists for their public performances.

The law grants actors and performing artists 'neighbouring rights', which afford them the right to be recognised with their names in their respective performances and provide them with the ability to: authorise or oppose the public communication of his or her performances; authorise or oppose the fixation of their performances and further reproduction thereof; and authorise or oppose any alteration to a performance in a manner that affects his or her prestige or reputation.

The mentioned rights are extinguished if an authorisation to the fixation of the performance exists, provided that the titleholder of the resulting material support has fulfilled the payments as agreed with the actor or performing artist in question.

Aside from the above capabilities, actors and performing artists have the right to receive royalties for the public communication of their performances. This right can be exercised directly by the concerned individual or through a collective management organisation empowered to represent an actor's or a performing artist's interests.

The rights of actors and performers last for 75 years from the first performance; the first fixation of the performance in a phonogram, if the performance can be recorded; and the first broadcasting of the performance in any available media.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

In addition to the performance rights, the Federal Copyright Law recognises protection through neighbouring rights to the following:

- book publishers;
- producers of phonograms;
- producers of videograms; and
- broadcasting organisations.

The protection provided in no way affects the protection of the copyright in literary and artistic works.

In Mexico, there is *sui generis* protection under the Federal Copyright Law called 'reservation of rights', which grants to its holder the right to use on an exclusive basis any of the following:

- names of serial publications;
- names of TV, radio or internet websites;
- original characteristics (physical and psychological) of characters;
- artistic names; and
- original advertisement mechanisms.

This protection is constituted by obtaining a reservation of rights certificate from the National Copyright Institute and is similar to trademark protection. The names, characters or mechanisms must not be identical or confusingly similar with others that were previously 'reserved' on behalf of other people.

Moral rights

13 | Are moral rights recognised?

The Federal Copyright Law recognises moral rights to be an expression of the author's personality. Moral rights are a set of rights or prerogatives related to the honour, prestige and reputation of the author and they are mainly focused on protecting the authorship and the integrity of the work.

According to the Federal Copyright Law, the author of any work has the following moral rights:

- to determine the method of disclosure and whether their work should be disclosed or remain undisclosed (right of publication);
- to demand the recognition of its authorship and to order publication as an anonymous or pseudonymous work (right of paternity);
- to demand respect for its work, opposing any deformation or modification, as well as any action or attempt that causes demerit or prejudice to the author's reputation (right of integrity);
- to modify their work (right of paternity);
- to withdraw its work from circulation (retirement right); and
- to oppose any attribution of a work that he or she did not create.

Moral rights in Mexico:

- are perpetual;
- are inalienable;
- are irrevocable; and
- cannot be waived.

The author is the sole, original and perpetual owner of the moral rights of his or her works. An author cannot assign moral rights, because moral rights are closely linked to the author of a work and protect the author's reputation.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

According to article 17 of the Federal Copyright Law, all works to be published must display a copyright notice with the following information:

- the initials 'DR' or the indication 'Derechos Reservados';
- the copyright symbol '©';
- the name and address of the copyright owner; and
- the year of first publication.

15 | What are the consequences for failure to use a copyright notice?

Failure to display a copyright notice does not imply loss of copyright or the inability to enforce actions against infringers. However, in the event that a published work does not include the copyright notice, this action is considered a copyright infringement and the National Copyright Institute can fine the publisher an amount equivalent from 5,000 up to 15,000 UMAs.

The UMA (translated in English as 'unit of measure and update') substitutes references in Mexican federal and local laws made in connection to the daily minimum wage in Mexico City, which was previously taken as the economic value to calculate fines and other economic obligations foreseen in them. For 2019, one UMA is equivalent to 84.49 Mexican pesos.

Deposit

16 | Is there a requirement of copyright deposit?

The Federal Copyright Law does not require a deposit of works as a condition to achieve or maintain copyright protection, or to avoid the imposition of a fine for not performing this action. It is possible though to register a literary or an artistic work before the National Copyright Institute and for this it is necessary to file copies of the work. To obtain the registration from the mentioned institute, it is necessary to file copies of the work. There are also other documents and information that have to be filed to obtain the registration. The filing of the work confirms in a public registry the existence of the work in case this is required at any time by the author or copyright owner.

17 | What are the consequences for failure to make a copyright deposit?

As indicated in the previous question, a deposit of works is not contemplated in Mexican law.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

Yes. Although not mandatory, it is highly recommended. The National Copyright Institute is the Mexican authority in charge of the Copyright Public Registry. See question 19.

In order to obtain a copyright registration for a work in Mexico from the National Copyright Institute, a written application based on an official format has to be filed, complying with certain formal requirements and documents.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

Mexico follows the international trend of copyright protection. The Berne Convention for the Protection of Artistic and Literary Works is in force in our country and the provisions of this international treaty are incorporated into our national legislation. Therefore, artistic or literary works are protected at the time they are fixed into a material form and a copyright registration, in theory, is not necessary to achieve copyright protection.

20 | What are the fees to apply for a copyright registration?

Government fees charged by the National Copyright Institute for a copyright registration of an artistic or literary work are the equivalent of approximately US\$20.

21 | What are the consequences for failure to register a copyrighted work?

Not obtaining copyright registration for a literary or artistic work should have no negative impact for the work or for the copyright owner, since as indicated in the former questions, copyright protection is achieved at the very same time the work is fixed into a material form. In practice, however, obtaining copyright registration from the National Copyright Institute is highly advisable. The certificate of copyright registration issued by the National Copyright Institute is an official document that establishes proof of existence of the work and a presumption about the copyright ownership on behalf of the registrant. It facilitates the exercise of commercial actions with the registered work and helps to expedite the initiation of enforcement proceedings before the Mexican Institute of Industrial Property or the Office of the Mexican Attorney General (depending on whether the action is of an administrative or criminal nature).

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

Moral and economic rights by operation of law pertain to the author (individual) by virtue of its creation. Moral rights belong to the author perpetually and cannot be transferred. Economic rights may be subject to transfer or licensed to a different person or to a company.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

For an employer to be the owner of the economic copyright of a work made by an employee, it is necessary that an employment agreement between them exists, which must include a provision stipulating that all economic rights over artistic or intellectual works created by the employee during his or her work will vest in the employer.

In accordance with Federal Copyright Law, if an employment agreement does not include this provision, it shall be presumed that the economic rights are shared equally between the employer and the employee.

In the absence of an individual employment agreement executed in writing, the economic rights belong to the employee.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Yes. A natural person or legal entity may enter into a 'work-for-hire' contract with an author. In this case, the natural person or the legal entity shall enjoy the ownership of the economic copyright therein for the duration allowed by law, and the rights relating to the disclosure and integrity of the work and the making of collections involving this type of creation shall accrue to him or her.

The person who takes part in the making of the work against remuneration shall have the right to the express mention of his or her status as author or performer of the part or parts in the creation of which he or she has been involved.

According to Mexican law and practice, a 'work-for-hire' relationship is different to that of an assignment. In the first, there is a production of a work by virtue of a commission by the 'producer' to the author and, in the second, an author develops a work and transfers the economic copyright to another party for a limited time (see question 26).

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes, it is possible that a copyright work be co-owned either by natural persons or entities under a co-ownership agreement.

According to article 81 of the Federal Copyright Law, unless otherwise agreed, the copyright in a work with music and words shall belong in equal shares to the author of the literary part and to the composer of the musical part. Each may freely exercise the rights in the part attributable to him or her or in the whole work and, in the latter case, shall unmistakably notify the other co-author, mentioning that co-author's name on the publication and, in addition, shall pay the co-author the share to which he or she is entitled when the rights are exercised for profit-making purposes.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Economic rights can be subject to transfer or licence. Taking this into consideration, a third party, either an individual or a company different from the author, can be the owner of the economic rights over a work only if the author had transferred such rights by executing a formal assignment document complying with applicable requirements or if the author recognises that the work was made under a work-for-hire relationship (see question 24), or through an employer–employee relationship (see question 23).

For a transfer of the economic rights to be enforceable in Mexico through an assignment agreement, the agreement:

- must be in writing;
- must contain a provision reflecting the consideration paid to the author; and
- must have a clause to stipulate the duration of the copyright transfer.

As a general rule, the transfers of copyright have a limited duration. Once the term has expired, the rights transferred are deemed to revert automatically to the author. The maximum duration for a transfer of copyright is 15 years as of the date of execution of the assignment agreement. This term may only be extended if there are special circumstances justifying an extension, such as the nature of the work and the investment in the development and production of the work. If an agreement does not have a specific disposition providing for the duration of the transfer by operation of law, the duration of the transfer is for five years as of the execution of the agreement.

This general rule has, however, two important exceptions for literary works and software. Pursuant to articles 43 and 103 of the Federal Copyright Law, the transfer of economic rights for them is not limited in time.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Economic rights can be subject to exclusive or non-exclusive licence. The licence will be validly enforceable in Mexico if it is done through written agreement and if the agreement contains a provision reflecting the consideration paid to the author.

Concerning the minimum clauses and formalities for a copyright licence agreement to be valid in Mexico, the following must be observed:

- the agreement must be in writing;
- it must have a clause to indicate whether the licence is exclusive or non-exclusive;
- it must establish the payment of an economic consideration or royalty by the licensee to the licensor for the granting of the licence; and
- it must have a provision regarding the duration of the licence.

28 | Are there compulsory licences? What are they?

According to article 147 of the Federal Copyright Law, there is compulsory licence in Mexico to publish or translate a literary or artistic work due to public interest for the advancement of science and national culture and education. When it is not possible to obtain the authorisation of the owner of the corresponding economic copyright, the federal government may, through the Secretariat of Culture and either ex officio or at the request of a party, license the publication or translation of the work through a payment of compensatory remuneration.

29 | Are licences administered by performing rights societies? How?

Collective management organisations in Mexico have the main purpose of managing copyright and neighbouring rights collectively on behalf of their members, protecting national or foreign authors and owners of neighbouring rights and collecting and delivering to them the royalties derived from the use of their works or performances. It is important to note that pursuant to the Federal Copyright Law, authors and performers have the non-waivable remuneration right to collect royalties for the public use and communication of their works or performances. Collective management organisations may grant licences for the use of works or performances to third parties, provided that their members have granted them the right to perform this activity.

Termination

30 | Is there any provision for the termination of transfers of rights?

The transfers of economic copyright is subject to a term with regard to the duration of the transfer. Once the term has expired, the rights are deemed to revert to the author automatically (see question 26).

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

The registration of a copyright transfer with the National Copyright Institute is necessary for the transfer of rights to produce legal effects

against third parties. The National Copyright Institute applies Mexican law when analysing the application for the registration of a copyright transfer and its corresponding agreement. In this regard, the transfer agreement needs to comply with the provisions of the Federal Copyright Law.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Artistic or literary works are protected from the point of fixation of the work and copyright registration. However, in theory, this is not strictly necessary to achieve copyright protection. Nevertheless, under Mexican practices, the registration of a work with the National Copyright Institute is an action necessary to support the existence of the work and the ownership of the economic copyright on behalf of the copyright owner.

Duration

33 | How long does copyright protection last?

Moral copyright belongs to the author perpetually (see question 13) and economic copyright is in force, as a general rule, for the life of the author plus 100 years. When a copyright work belongs to two or more co-authors, the 100 years shall be counted as from the death of the last co-author.

34 | Does copyright duration depend on when a particular work was created or published?

Copyright protection starts at the moment a work has been fixed in a material form. As mentioned in question 35, as a general rule, the economic copyright is in force for the life of the author plus 100 years. However, when the author is not identified, as in anonymous or pseudonymous works and also for posthumous works, the duration of copyright protection does depend on when the work was published on the basis of 100 years from the disclosure or publication of the work.

Renewal

35 | Do terms of copyright have to be renewed? How?

Copyrights in Mexico do not need to be renewed.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

The term of copyright protection in Mexico has been extended many times. Pursuant to the last amendment of the Federal Copyright Law on 23 July 2003, the economic copyright protection term has been extended from 75 years to 100 years after author's death, as described in question 33.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Copyright infringements are divided into two categories. In the first category are copyright infringements that contravene the regulations established in the Federal Copyright Law. In the second category are trade-related infringements that occur when there is a violation in a trade or commercial scale, mainly to the economic copyright, and that,

by nature, requires highly specialised treatment. Copyright infringements, due to their eminently administrative nature, are attended to by the National Copyright Institute. Trade-related infringements will be attended to by the Mexican Institute of Industrial Property.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

In Mexico, the Federal Copyright Law does not foresee secondary liability for indirect copyright infringement. However, article 231 of the Federal Copyright Law establishes that trade-related infringements are constituted by conduct carried out in order to obtain direct or indirect profit. Activity that results in an advantage or additional attraction to the main activity of the operator in a commercial establishment is considered to have an indirect profit purpose.

Available remedies

39 | What remedies are available against a copyright infringer?

Remedies against a copyright infringer are also divided into two categories.

Copyright infringements are penalised by the National Copyright Institute. The Federal Copyright Law establishes a fine ranging from 5,000 up to 15,000 UMAS. An additional fine of up to 500 UMAS will be applied for every day that the infringement persists.

The trade-related infringements are punished by the Mexican Institute of Industrial Property with a fine ranging from 500 up to 10,000 UMAS. An additional fine of up to 500 UMAS will be applied for every day that the infringement persists.

Limitation period

40 | Is there a time limit for seeking remedies?

Yes. An infringement action has to be filed within five years of knowledge of the infringement or the time that it ceased if, due to the nature of the illegal conduct, it is repetitive or it extends over the time limit. In the case of a criminal action, the term to initiate proceedings is three to five years, depending on the type of violation committed by the offender. Regarding a civil action to claim damages for a copyright violation, it has to be filed within two years of the date the infringement occurred.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, the Federal Copyright Law establishes the possibility of seeking monetary damages. In no case should the indemnification of economic or moral damages be less than 40 per cent of the sale price of the product or service upon which the infringement was declared. Monetary damages should be claimed through a civil law action.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes, both the attorneys' fees and costs can be claimed. However, such claim should also be sought through a civil law action separately from the copyright infringement procedure.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Yes, Chapter 26 of the Federal Criminal Code contains a catalogue of conduct considered copyright offences. This catalogue also establishes the penalties applicable to the offender, which can be imprisonment from six months to three years and fines from 300 to 30,000 UMAS, which are imposed based on the kind of violation and the circumstances of the case. In general terms, a copyright offence implies the unauthorised and wilful use, storage, marketing, distribution or communication of a copyrighted work, with an aim to make a direct or indirect profit by the offender. There are also other forms of conduct in the field of the copyright and neighbouring rights to be considered as a criminal offences, such as the use without authorisation of performances, the use of mechanisms to decode satellite signals with copyrighted contents, and in the field of moral rights, the wilful substitution of the name of an author for a published work.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

No, they are the same for all forms of copyright infringement.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

It is advisable to implement the following:

- use of a copyright notice as is foreseen in the Federal Copyright Law (see question 14);
- obtention of a copyright registration for the work;
- implementation of technological protection measures for digital works;
- monitoring the market to try to find illegitimate copies of works; and
- remittance of a cease-and-desist letter to the alleged infringer, pointing out the existence of protection and copyright registration regarding the allegedly infringed work.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

Mexico is a member of:

- the Literary and Artistic Property Convention (the Buenos Aires Convention);
- the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works;
- the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention);
- the Universal Copyright Convention;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms;
- the trade-related aspects of Intellectual Property Rights;
- the World Intellectual Property Organization Copyright Treaty (WCT);
- the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT);

- the Treaty on the International Registration of Audiovisual Works;
- the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled; and
- various bilateral copyright treaties.

47 | What obligations are imposed by your country's membership of international copyright conventions?

The most important obligation, mainly derived from the Berne Convention, is the recognition of an automatic copyright protection through the fixation of works and without having to comply with additional formalities for this purpose. A regime of limitations and exceptions to the exercise of the copyright is also implemented, based on the three-step rule foreseen in the Berne Convention.

On the other hand, our copyright legal system by virtue of the commitments in the international conventions adopted by Mexico provides for national treatment for authors of other countries, who are granted with the same level of protection as if they were Mexican citizens. Artists, performers and producers of works are afforded protective rights over their collaborations and materials pursuant to the provisions of the different treaties in matters of the neighbouring rights Mexico is a party to.

Based on the World Intellectual Property Organization treaties (WCT and WPPT), Mexico has an obligation to protect authors and works which are in use or whose distribution, marketing or communication is made over the internet or through the use of digital formats and to implement the adoption of adequate anti-circumvention measures.



Carlos Trujillo

ctruillo@uhthoff.com.mx

Hamburgo 260, Col. Juarez

06600 Mexico City

Mexico

Tel: +52 55 5533 5060/1156

Fax: +52 55 5208 8387

www.uhthoff.com.mx

Spain

Santiago Mediano, Sara de Román Pérez and Scarlett Poy

Santiago Mediano Abogados, SLP

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The current relevant legislation is:

- the Royal Legislative Decree 1/1996, dated 12 April, enacting the Consolidated Text of the Intellectual Property Act (SCA), which was last updated by Act 2/2019, of 1 March;
- articles 270 to 272 of the Organic Act 10/1995 enacting the Criminal Code;
- article 122 of Act 29/1998, of 13 July, governing Administrative-Contentious Jurisdiction;
- articles 53 et seq. of the Sustainable Economy Act (Act 2/2011, of 4 March); and
- Law of Services of the Information Society and Electronic Commerce (Act 34/2002 of 11 July).

Enforcement authorities

2 | Who enforces it?

Mercantile Courts enforce civil actions (foreseen in the SCA). Criminal courts enforce criminal actions (foreseen in the Criminal Code). The Intellectual Property Commission (CPI) handles an administrative procedure for the safeguarding of rights in the digital environment, seeking the 'restoration of legality' (ie, the takedown of the illegal copies of the rights holders' works). This administrative procedure is carried out ex officio by the CPI, although it is required that rights holders submit a formal request (denounce) and provide the CPI with reasonable evidence of the copyright infringement committed and the harm caused, upon which the CPI begins a preliminary investigation of the case.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The following examples of the SCA's specific provisions:

Article 20.1.i of the SCA regulates the act of making works available interactively, in such a way that members of the public may access them from a place and at a time individually chosen by them (ie, the public communication of works via the internet).

Articles 170 to 174 of the SCA regulate multi-territorial non-exclusive licensing of rights over musical works for online use in line with Directive 2014/26/EU of 26 February 2014. According to the SCA, collective management organisations (CMOs) that grant multi-territorial licences for online rights in musical works must have sufficient capacity to process electronically, in an efficient and transparent manner,

data needed for the administration of such licences, including for the purposes of identifying the repertoire and monitoring its use, invoicing users, collecting rights revenue and distributing amounts due to rights holders.

Article 24.5 of the SCA includes online resales for the purposes of resale rights that benefit the author of an original work that is resold for at least €800. Prior to the latest SCA update, the author was only entitled to resale rights if the price amounted at least to €1,200.

Article 158-ter of the SCA enables rights holders to initiate the above-mentioned administrative procedure for the safeguarding of rights in the digital environment, seeking the 'restoration of legality' (ie, the takedown of the illegal copies of the rights holders' works). The procedure is aimed against the persons responsible for internet service providers (ISPs) that operate in Spain and infringe copyright on a large-scale basis. The infringing sites can be blocked for a maximum period of one year. Should there be a relapse in the infringement of the same or other works of the same rights holder, significant fines (from €150,001 to €600,000) could also be imposed on the infringing site. Since the SCA's latest amendment (dated March 2019) former article 158-ter is now article 195 and allows the CPI to directly order the blocking of infringing websites (ie, without judicial authorisation, in the case of repeated and serious infringing activities).

In addition to the SCA, there are separate statutory provisions addressing aspects of the digital exploitation of works, such as articles 53 et seq. of the Sustainable Economy Act (Act 2/2011, of 4 March), regarding ownership of copyright arising from scientific research activities, and Law of Services of the Information Society and Electronic Commerce (Act 34/2002 of 11 July), regarding the safeguard of copyright in the online environment.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

No. Our copyright laws do not have extraterritorial application.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

The *Registro de la Propiedad Intelectual* (the Copyright Office or the Intellectual Property Registry) is the entity keeping a registry of the life of a work, from its creation to it entering into the public domain, serving as proof of the existence of a work and the author of the same.

The registration of works is not mandatory, since it does not grant any rights. Rights over the work are granted by its creation.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

All literary, scientific or artistic creations if they are original and expressed by any means.

Rights covered

7 | What types of rights are covered by copyright?

Copyright covers the following rights:

- moral rights (article 14 of the SCA), which include the following rights:
 - to decide how and when the first dissemination of a work will be made and by whom;
 - to be recognised as author of the creation or work (claim of authorship);
 - to demand the conservation of the work's integrity (ie, to impede third parties to hinder, alter, deform or attempt against the work); and
 - to withdraw the work from the marketplace (some requirements must be met in order to execute this right); and
- exclusive (economic or patrimonial) rights (articles 17 to 21 of the SCA), which are:
 - to make or authorise (or prohibit) third parties to make copies;
 - to distribute or commercialise a work (selling or rental);
 - to communicate a work to the public (including the making available to the public); and
 - to transform or let a third party transform or modify a work creating a new work (some limitations to these rights is set out by the law).

Moral rights cannot be waived or assigned, although some of them can be exercised upon the author's death by his or her heirs or the person designated by the author, and in some cases by the government.

Other secondary copyright owners are not entitled to moral rights, but can hold exclusive rights to the extent agreed between the parties or following legal provisions.

Excluded works

8 | What may not be protected by copyright?

Creations that are not original cannot be protected. Copyright does not protect ideas either. There are some creations that may be original but are excluded from the protection of the SCA under article 13, such as:

- legal or regulatory provisions and drafts thereof;
- judgments and decisions of jurisdictional bodies;
- acts, resolutions, discussions and rulings of public bodies; and
- the official translation of all such texts.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

Fair use is not directly included in the SCA as a limitation or an exception to exclusive rights.

Nevertheless, article 40-bis of the SCA contains the 'three-steps rule', which applies to all limitations and exceptions to the exclusive rights. This rule aims to determine the adequacy of an exception by passing it through the following filter:

- it shall be exceptional (*numerus clausus*) and substantiated;
- it should never undermine the normal exploitation of the work; and
- it could never damage the legitimate interest of the author.

Architectural works

10 | Are architectural works protected by copyright? How?

Architectural works included on the exemplary list of works are protected by copyright (article 10 of the SCA). Protection is granted to construction drawings, plans, designs and to the project or building itself.

Performance rights

11 | Are performance rights covered by copyright? How?

No. They are covered by the 'related', 'ancillary' or 'neighbouring rights' (ie, reproduction, distribution and communication to the public).

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

These rights are granted to:

- companies and persons that produce audiovisual and musical recordings over the said recordings;
- photographers over their creations or photographs that do not meet all requirements to be considered as work-for-hire;
- broadcasting companies over their signals;
- publishers over unpublished works that enter the public domain; and
- actors over the fixation of their performances.

Moral rights

13 | Are moral rights recognised?

The authors' moral rights are recognised. (See question 7.)

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No.

15 | What are the consequences for failure to use a copyright notice?

It may be more difficult to prove copyright and its ownership in the event of a dispute.

Deposit

16 | Is there a requirement of copyright deposit?

No. Copyright exists by its mere creation. Without prejudice to this, according to Law 23/2011 on legal deposit, there is an obligation to deposit copies of certain types of literary works in order to be able to commercialise the same. However, this obligation is not a requirement to be granted with rights over a work.

17 | What are the consequences for failure to make a copyright deposit?

See questions 16 and 21.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

Yes. It is set forth at the SCA and the Royal Decree 281/2003, of March 7, approving the Regulation of the General Registry of Intellectual Property or Copyright Office:

- completing the registration form, which can be obtained at the Copyright Office (Intellectual Property Registry) or found on the Copyright Office's official website;
- paying the fees; and
- filing the form, whether in person or by submitting it via the Copyright Office's official website (a digital certificate will be needed in order to be able to proceed online).

Further requirements depending on the type of work, may include: providing a copy of the work, and indicating its genre, the frequency or pitch, and the approximate duration.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

No.

20 | What are the fees to apply for a copyright registration?

General fees are approximately €14. It may vary on the number of documents to be provided.

21 | What are the consequences for failure to register a copyrighted work?

A qualified piece of evidence regarding copyright ownership would not exist.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

Primarily, the author or authors.

Secondarily, by way of assignment or legal provision:

- the legal person which makes the work available to the public; and
- the author's assignees, heirs, licensors, publishers (sub-publishers or co-publishers); and
- producers (or co-producers).

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

Yes. The SCA establishes a presumption in favour of the employer whereby he or she becomes owner of all exploitation rights over works created by employees if the works are created as part of an employment contract and the execution of employees' duties. In these cases the employer is only entitled to exploit the works within the activity of the company.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Yes. However, the hiring party must enter into an agreement with the independent contractor to get all rights over the copyrighted work granted on an exclusive basis.

Exceptionally, there is a case whereby the rights are presumed to pertain to the hiring party, namely works created for promotion or publicity purposes. In this case, according to Law 34/1988, of 11 November, on advertising and publicity, it would be presumably that the hiring party (advertiser) would have all exclusive rights over the works made by an independent contractor (agency), unless otherwise agreed by contract.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. In case of co-ownership, the SCA establishes that the rights pertain to all authors in the proportion determined by them or, in absence of agreement, the proportion will be based on the number of co-authors.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Yes, they can be assigned exclusively to one person or company, for the duration of copyright (ie, life of the author plus 70 years after his or her death).

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes, on both an exclusive and on a non-exclusive basis.

28 | Are there compulsory licences? What are they?

Yes, following the Berne Convention and similar agreements entered by the Spanish government (see question 46), the SCA provides that users must enter into compulsory licences when the right to remuneration is present. For example, article 90.3 of the SCA provides a remuneration right for the authors of cinematographic works, when such work is exhibited in theatres. Consequently, the SCA provides several compulsory licences that shall be granted by CMOs.

29 | Are licences administered by performing rights societies? How?

Yes. CMOs grant licences related to rights subject to mandatory collective management (eg, public communication rights in establishments open to the public) and can also grant licences over exclusive rights (if they are authorised by the corresponding contract with the rights holder).

Termination

30 | Is there any provision for the termination of transfers of rights?

Yes, depending on the type of works.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

Yes, at the Copyright Office. (See question 18.)

DURATION OF COPYRIGHT**Protection start date**

32 | When does copyright protection begin?

When an original work is created and expressed by any means.

Duration

33 | How long does copyright protection last?

As a general rule, the author's life plus 70 years after his or her death (from 1 January of the following year). There are also particular situations, such as the following.

Works of joint authorship

Works that are the result of a collaboration of two or more authors have the same term of protection, but the term of 70 years after the death of the author is counted after the death of the last living author.

Collective works

Those created under the initiative and under the direction of an individual or a legal person, who edits it and publishes it under his or her name. The term of protection of this work is 70 years since the work is made available to the public.

34 | Does copyright duration depend on when a particular work was created or published?

Yes. (See question 33.)

Renewal

35 | Do terms of copyright have to be renewed? How?

No, as a general rule. Exceptionally, there are particular situations in which terms of copyright have to be renewed (eg, in cases where author's remuneration becomes disproportionate in connection with returns of exploitation of the work).

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

Yes. Since the Berne Convention establish a minimum duration of the life of the author plus 50 years after his death, Spanish government has decided to extend such terms by 20 more years (ie, life of author plus 70 years after his or her death).

COPYRIGHT INFRINGEMENT AND REMEDIES**Infringing acts**

37 | What constitutes copyright infringement?

Unauthorised reproduction, distribution, public communication (including making available to the public), and transformation of copyrighted works.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Yes, second liability for indirect infringement was added to the SCA in 2014 (by Law 21/2014) to include those who 'indirectly' infringe copyright via the internet (eg, internet service providers that knowingly provide the means – by providing links or organising content uploaded by users – for their users to share and use illicit content), especially those that:

- knowingly induced the infringing conduct;
- cooperated with the infringer, knowing that the content would infringe the rights of other parties, or having reasonable indications to know it;
- had a direct economic interest in the results of the infringing conduct; and
- had the capacity to control the behaviour of the offender.

Available remedies

39 | What remedies are available against a copyright infringer?

The following remedies are available:

- the publication, in part or in full, of the judicial resolution, at the infringer's expense;
- suspending the infringing exploitation or the infringing activity;
- prohibiting the infringer from developing or resuming the infringing exploitation or activity;
- withdrawing and destroying unlawful copies and equipment used for the infringing activity;
- removing instruments used for unauthorised suppression or neutralisation of any technical device used to protect works; and
- damages for:
 - the loss suffered due to the infringement;
 - loss of profits; and
 - expenses incurred by the rights holder to secure reasonable evidence of infringement.

Limitation period

40 | Is there a time limit for seeking remedies?

Yes. The statute of limitations is five years.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Yes, Criminal Code punishes the following criminal activities against the copyright of exclusive owners:

- The reproduction, plagiarism, distribution, public communication or, in any other way, the economic exploitation, in whole or in part, of a work or performance, fixed in any type of form or communicated through any means, without the authorisation of the intellectual property rights holders or their assignees, with the aim

- of obtaining a direct or indirect economic benefit, and to the detriment of a third party.
- To provide access to, or the location of, intellectual property on the internet in an active and non-neutral way, without the provider limiting itself to a merely technical treatment and without the authorisation of the rights holders or their assignees – in particular, obtaining a direct or indirect economic benefit by offering classified lists of links to the works and contents referred to above, even if said links were provided by the users of its services – all to the detriment of a third party (rights holders).

Online infringement

- 44** | Are there any specific liabilities, remedies or defences for online copyright infringement?

Yes. (See questions 3 and 39.)

Prevention measures

- 45** | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

It may be prevented by requesting an injunction by which the alleged infringed is ordered not to carry out specific acts of copyright exploitation. It also may be prevented by the installation of technical protection measures.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

- 46** | Which international copyright conventions does your country belong to?

Spain is party to the following international agreements:

- the Berne Convention for the Protection of Literary and Artistic Works (5 December 1887);
- the Convention Establishing the World Intellectual Property Organisation (WIPO) (26 April 1970);
- the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms (24 August 1974);
- the Convention concerning the Protection of the World Cultural and Natural Heritage (4 August 1982);
- the Protocol to the European Agreement on the Protection of Television Broadcasts (1983);
- the European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories (11 March 1988);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (14 November 1991);
- the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (26 September 1992);
- the Protocol to the Agreement on the Importation of Educational, Scientific or Cultural Materials (2 April 1993);
- the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (1 January 1995);
- the WIPO Copyright Treaty (14 March 2010); and
- the WIPO Performances and Phonograms Treaty (14 March 2010).



Santiago Mediano

smediano@santiagomediano.com

Sara de Román Pérez

sderoman@santiagomediano.com

Scarlett Poy

spoy@santiagomediano.com

C/Campoamor, 18,
28004
Madrid
Spain
Tel: +34 91 310 6363
Fax: +34 91 310 63 68
www.santiagomediano.com

- 47** | What obligations are imposed by your country's membership of international copyright conventions?

Namely, and among many other things, to apply the minimum rules established in all international conventions and treaties signed by Spain, and more specifically to consider the national treatment rule when dealing with authors and performers belonging to the conventions' member states.

UPDATE AND TRENDS

Emerging trends and new legislation

- 48** | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

Spain has recently been the focus of copyright upheaval because of its newest amending law, Law 2/2019, which modifies the SCA and introduces Directive 2014/26/EU and Directive 2017/1564 EU (the Reform).

This Reform introduces relevant changes, for example to the administrative proceedings before the second Section of the Commission on site-blocking measures (see answer to question 3) and to the functioning of collective management organisations, introducing new entities that will also manage rights and grant licences.

Switzerland

Dirk Spacek

CMS von Erlach Poncet Ltd

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

Swiss copyright legislation essentially consists of the Federal Act on Copyright and Neighbouring Rights of 9 October 1992 (FACN) and the Regulation on Copyright and Neighbouring Rights of 26 April 1993 (RCN). The RCN provides more details on matters not governed specifically by the FACN.

The Swiss Federal Council has expressed a need to modernise Swiss copyright law, making it more suitable for the digital age, and, following this, the FACN is currently subject to a comprehensive revision. The Swiss Federal Office of Justice has drafted a revised version of the FACN (NFACN), which was handed over to the Swiss National Council and the Swiss Council of States for further parliamentary debate. The Swiss National Council completed its consultation on the NFACN in December 2018. Currently, the NFACN is being discussed by the Swiss Council of States' science, education and culture committee. It is expected that the legislative procedure will be completed in summer 2019 and that the revised FACN will come into force by the beginning of 2020.

Enforcement authorities

2 | Who enforces it?

Copyright is enforceable by the respective author of a copyrightable work or by his or her successors or assignees (ie, the rights holders of the respective copyright) by way of a civil law action. Certain copyright claims are only enforceable through 'collective societies'. Collective societies are instructed by law to administer and enforce claims on behalf of authors, in particular remuneration claims for particular types of use of copyrighted works (usually the mass use of works).

The FACN also provides for criminal sanctions such as imprisonment or the payment of fines in cases of intentional infringement of copyright. These remedies are enforced by a locally competent criminal authority (usually a state attorney) either upon a prosecution request of an injured party or, in the case of an infringement with commercial intent, in the own motion of the authority (ex officio).

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The FACN follows a technology-neutral approach. Any forms of reproductions of copyrighted works (physical copies or digital copies as electronic files) and any forms of public performance or 'making available' of copyrighted works (be it physically or by digital means) require the prior permission of the author (article 10, FACN).

The FACN provides for a few explicit provisions on digital technologies, including specific provisions on technical measures to protect copyrighted content from unlawful use (ie, digital rights management (DRM)). The circumvention of DRM tools as well as the possession, production, importation, advertising and introduction of goods or services with the purpose of circumventing DRM are prohibited. The circumvention of DRM tools for the use of duplicating copyrighted works is permitted solely if allowed by law (eg, to use an acquired work in the private sphere (see article 39a, FACN)).

The FACN also provides for provisions allowing temporary reproduction of copyrighted works as a necessary and integral part of an information technology procedure (article 24a, FACN). It also features a provision allowing the temporary reproduction of certain musical works for broadcasting purposes, provided that the right to permit such reproductions can only be claimed and enforced by the respective collective societies (article 24b, FACN).

Finally, the NFACN addresses various new topics related to copyright enforcement in the digital world (eg, royalties with respect to video-on-demand services and stay-down duties for internet hosting providers).

The NFACN is not yet in force and additional details on it will be provided later.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Swiss copyright law is applicable to foreign-owned or foreign-operated websites if their offerings are considered to infringe authors or rights holders in Switzerland. This is usually the case if the site addresses customers in Switzerland. In this regard, the NFACN has provided for new provisions, under which Swiss access providers could be instructed to block access to infringing content stored by hosting providers outside of Switzerland. The legislator has expressed concerns and wishes to avoid excessive 'overblocking'. So, the concept of blocking obligations has been dropped in the NFACN. This is in line with one of the latest decisions rendered by the Swiss Federal Supreme Court that confirmed that access providers cannot be compelled to block copyright-infringing content uploaded by third parties on online portals (decision of February 8, 2019, FSC 4A_433/2018).

Agency

5 | Is there a centralised copyright agency? What does this agency do?

Switzerland currently has five established copyright collective societies: Suisa, ProLitteris, Suisseimage, Société Suisse des Auteurs and Swissperform.

These collective societies are established and act under governmental permission and supervision. Collective societies enforce specific copyright claims governed under statutory provisions in the FACN and so collect royalties on behalf of the authors. For certain types of copyright claims, enforcement is exclusively reserved to collective societies. For other types of copyright claims, an author may entrust the collective society with such activities on a voluntary basis (a rights administration agreement). Each of the collective societies is in charge of different categories of copyrighted works:

- Suisa acts for non-theatrical musical works;
- ProLitteris acts for works of literature, photography and fine art;
- Suisseimage acts for visual and audiovisual works;
- the Swiss Society of Authors acts for theatrical and musical theatrical works; and
- Swissperform acts for neighbouring rights (rights of performing artists, broadcasters and producers of sound and video recordings).

All Swiss collective societies have undertaken reciprocal agreements with foreign collective societies so as to ensure that members will receive their royalties for the use of their works abroad.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

The FACN provides for protection of literary, artistic intellectual creations with an individual character, irrespective of their value or purpose (article 2, FACN). These include:

- literary, scientific and other works that make use of language;
- musical works;
- fine art, in particular paintings, sculptures and graphic works;
- works with scientific or technical content;
- works of architecture;
- applied art (eg, furniture or jewellery);
- photographic, cinematographic and other visual or audio-visual works;
- choreographic works and works of mime; and
- computer programs (software).

The Swiss Federal Supreme Court has recently held that even a simple chair may enjoy copyright protection if it is sufficiently individual that it clearly differentiates itself from pre-existing forms and shapes (FSC 143 II 373).

The FACN explicitly provides for protection of software as a recognised work category (article 2, paragraph 3, FACN).

The NFACN is expected to introduce a new category of copyrighted works, namely photographic reproductions and three-dimensional images produced similarly to photography, but which do not necessarily have an individual character (article 2, paragraph 3-bis, NFACN).

Rights covered

7 | What types of rights are covered by copyright?

The author or respective rights holder has an exclusive right to use a copyrighted work and to authorise such use by others, in particular the right to publish, reproduce, perform or make available his or her work (article 10, FACN). Further, an author has the exclusive right to allow modifications of his or her work, such as adaptations or derivative works (for example, a film version of a copyrighted novel (article 3, FACN)). Since computer programs enjoy copyright protection under the FACN as well (see question 6), the latter also applies to adaptations made to a particular software code created by a software developing

author. An author of a computer program also has an exclusive right to lease such a program to third parties (article 10, paragraph 3, FACN).

Excluded works

8 | What may not be protected by copyright?

Anything that does not meet the general requirements of a copyrighted work under article 2 of the FACN, that is, anything not qualifying as an intellectual creation or not bearing an individual character (see question 6) is not protected. For instance, products of coincidence or created by nature do not qualify as creations. Or, according to Swiss case law, a telephone book CD or a compendium of medicines does not bear an individual character.

The FACN explicitly provides that official documents of the type including statutes, regulations, treaties and other administrative statutes, means of payment, judicial decisions, protocols and reports of governmental authorities, patent specifications and published patent applications are not protected under copyright (article 5, FACN).

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

No. There is no fair use doctrine or similar (equity-like) limitation under Swiss law. In contrast to the Anglo-American copyright system, Swiss copyright provides for a limited amount of copyright restrictions precisely enumerated in the FACN. Restrictions may apply to the use of published works in the private or domestic sphere, within enterprises or for educational purposes (see article 19, FACN). These restrictions do not abolish copyright protection. The FACN permits a statutory right of use in these areas, but such use might still be subject to the payment of statutory royalties that are collected and distributed by collective societies (see question 5). The FACN also provides for other restrictions, for example, concerning citations (short excerpt references) or news reportings on current events.

A further aspect to be considered a restriction of copyright under Swiss law is the principle of exhaustion (first sale doctrine). It provides that if an author or rights holder has consented to the sale of a copy of his or her work, this copy may be re-sold or re-distributed without the author's or rights holder's consent. Computer programs may only be re-sold 'as is', since an author has an exclusive right to lease computer programs (see question 6). Based on a relatively recent court decision in Switzerland, the principle of exhaustion is also applicable to computer programs distributed online (via download) provided that the acquirer is granted a permanent right to use such file against the payment of a singular one-time fee and in the event of a further re-sale, the original file on the acquirer's computer is irreversibly deleted (see preliminary injunction decision of the court of the canton of Zug, 4 May 2011, Az ES 2010 822).

In the context of computer programs, copyright also allows the decompiling of computer programs (ie, the reverting of machine code into its original source code) if such procedure is necessary to establish interoperability with independent third-party software or systems (article 21, FACN).

Finally, copyrighted works may generally be used for the creation of parodies or similar adaptations of a work (article 11, paragraph 3, FACN).

Architectural works

10 | Are architectural works protected by copyright? How?

Yes, works of architecture are a recognised work category protected by copyright provided that they have an individual character (see question

6). An author (or architect) has a right to object to any distortion or modification of the work if this would be harmful to his or her reputation or personality (article 11, FACN).

Performance rights

11 | Are performance rights covered by copyright? How?

Performance rights as such are protected as 'neighbouring rights' for performing artists under the FACN (see question 12).

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

The FACN provides for separate protection of 'neighbouring rights'. Neighbouring rights consist of rights of performing artists, producers of sound recordings and films, as well as broadcasting organisations (article 33 et seq, FACN).

The protective scope of 'neighbouring rights' is smaller than the claims conferred under copyright. For example, performing artists only have an exclusive right to make their performance available to the public outside of the location in which it originally took place (including to broadcast and transmit or to make recordings and copies and sell them). The producer of a sound recording or audiovisual recording only has an exclusive right to copy and sell the physical carriers (article 35, FACN). Furthermore, broadcasting organisations only have the exclusive right to retransmit their broadcasting programme, make it available to the public, or to produce recordings and copies thereof and to sell it (article 37, FACN). The duration of 'neighbouring rights' is 50 years from 31 December of the year in which the performance, the production of the sound recording, audiovisual recording or the dissemination of the original broadcasting programme took place (article 39, FACN). The NFACN is expected to provide for new duration periods for neighbouring rights (ie, 70 years).

Integrated circuits are not specifically protected under copyright, but under a separate statute, the Swiss Federal Act on the Protection of Semiconductors.

'Hot news' – in the sense of current topicalities – is not protected under copyright law, unless the concrete form of presentation (in terms of language or audiovisual arrangement) amounts to a copyrighted work. The Swiss Federal Act on Radio and Broadcasting (FARB) provides for certain provisions on exclusive reporting. If broadcasters hold exclusive agreements with third parties on the reporting on certain public events, other broadcasters are entitled to short reports on the same topics as well (article 72, FARB).

Moral rights

13 | Are moral rights recognised?

Moral rights are recognised under Swiss copyright law. An author may prohibit any distortion, mutilation or modification of his or her work that is prejudicial or harmful to his or her reputation or personality (article 11, FACN). A further moral right to be considered is the author's rights to be identified as an author and to decide on the manner and date of the first publication of his or her work (article 9, paragraphs 1 and 2, FACN).

Moral rights are non-assignable by nature. They are considered inextricably connected to an author's personality. Nonetheless, frequently authors waive the exercise of their moral rights on a contractual basis. This is permitted under Swiss law as long as such waiver does not appear inequitable, that is, an excessive restriction with regard to the author's own personality (article 27, paragraph 2, Swiss Civil Code).

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

There is no requirement for a work to feature a copyright notice under Swiss law. A copyright notice has no legally binding effect under Swiss law. However, it may sometimes create the assumption of a copyrighted work and its ownership as well as destroy a copyright infringer's good faith.

Switzerland is a member state of the Universal Copyright Convention (UCC) and therefore recognises the marking requirements under article III, paragraph 1 of the UCC. Under this provision, any contracting state which, under its domestic law, requires as a condition of copyright, compliance with formalities (such as deposit, registration, notice, notarial certificates, payment of fees, etc) in that contracting state, shall regard these requirements as satisfied with respect to all works protected in accordance with the UCC and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication.

15 | What are the consequences for failure to use a copyright notice?

There are no legal consequences for failure to display a copyright notice in Switzerland.

Deposit

16 | Is there a requirement of copyright deposit?

No. There is neither a requirement nor an institution in charge of accepting copyright deposits in Switzerland. A deposit of a copyrighted work may, theoretically, be sought with a public notary providing a certain degree of proof with regard to the seniority of a copyrighted work.

17 | What are the consequences for failure to make a copyright deposit?

Since there is no requirement for copyright deposits, there is no consequence for failure to make such deposit.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

There is no system for copyright registration under Swiss law. Copyrights come into existence automatically upon the creation of a copyrighted work (article 6, FACN).

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

No. There is no copyright registration system under Swiss copyright law.
20 | What are the fees to apply for a copyright registration?

Not applicable (see questions 18 and 19).

21 | What are the consequences for failure to register a copyrighted work?

Not applicable (see questions 18 to 20).

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

Copyrights are vested in the author who created the work. An author is always considered to be the natural person who created an individual work (not, for example, a legal entity hiring such authors to work for them; article 6, FACN). If multiple authors have contributed to the creation of the work, the copyright is owned jointly by them. In the latter case, ownership may only be exercised with the consent of all other co-authors, unless they have agreed otherwise. However, if the individual contributions can be separated and the authors have not agreed otherwise, each co-author may use his or her contribution independently (article 7, FACN).

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

In Switzerland, there is no 'work for hire' doctrine. Nor does an automatic transfer of copyright occur within an employment relationship provided under statutory law. Copyrights are only transferred from an employee to the employer by virtue of contractual assignment. A substantial majority of Swiss scholars hold the view that monetary exploitation rights of copyright can sometimes be transferred implicitly to the employer if this is required by the purpose of the employment relationship (purpose assignment theory). However, the theory is controversial. Thus, it is recommended to use explicit assignment language to transfer copyright to the employer.

With regard to computer programs created by employees in the course of their employment and as a part of their contractual duties, article 17, FACN provides that the employer alone is entitled to exercise monetary exploitation rights and the exclusive right of use of any copyright in such computer programs.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Copyrights are always vested in the author who created the work (see question 22). Therefore, a hiring party will not automatically acquire ownership of copyright in a work made by an independent contractor. The copyright must be assigned to the hiring party with respective provisions in the hiring contract. To achieve effectiveness, the hiring contract and assignment need not be in writing. However, a written contract will always provide more certainty and conclusive proof. To the extent that the hiring relationship qualifies as a publishing contract, article 381 of the Swiss Code of Obligations provides that copyright is assigned by law from the author to the publisher to the extent and for the duration necessary to carry out the publishing contract, unless otherwise agreed between the parties.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes, a copyrighted work can be owned by more than one person if multiple authors (natural persons or legal entities) have jointly contributed to one creation (see question 22). Alternatively, this may also come

about if copyright has been assigned to multiple persons or in the event of a legal succession (eg, inheritance of copyright to multiple heirs).

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Yes, copyright is transferable by assignment and by legal succession. Copyrights can also only be transferred partially. However, there is a 'core fragment' of moral rights, which always remains with the author. Moral rights are inextricably connected to an author's personality (ie, the right to be named as an author; the right to prohibit any distortion of his or her work prejudicial or harmful to his or her personality; and the right to decide on the manner and date of the first publication of his or her work (see question 13)).

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes, copyright can be licensed. There are no specific rules or provisions on licensing in the FACN or in the Swiss Code of Obligations generally applicable to contracts. Copyright licence agreements are considered 'contracts' (ie, contracts not governed under a specific statute). Therefore, provisions on various statutory contract types under the Swiss Code of Obligations will apply in a fragmented manner or by analogy. Copyright licences can be exclusive, sole, non-exclusive, complete or partial. The parties to a copyright licence are free to determine the scope they wish to license. Copyright licences are not subject to any prescribed form. However, a written agreement will provide conclusive proof for the existence of a copyright licence.

The NFACN provides for extended collective licences (article 43a, NFACN). Collective societies may be authorised to enter into licensing agreements with users on the mass use of published and copyrighted works in areas that are not subject to collective management by law. Rights holders may, however, object to the use of their works through this channel (and may ask for the exclusion of their rights managed through an extended collective licence (ie, opt out)).

28 | Are there compulsory licences? What are they?

There is one compulsory licence for the manufacturing of phonograms (audio recordings; article 23, FACN). The compulsory licence grants phonogram producers with a place of business in Switzerland the right to claim a licence for recorded musical works that have been offered for sale, transferred or otherwise distributed with the consent of an author in Switzerland or abroad. Unlike the statutory licences (see questions 5 and 9), the compulsory licence does not permit the use of a copyrighted work against the payment of a statutory royalty under a tariff established by a collective society. Instead, the authors or rights holders are required to enter into individual licence agreements with the respective user.

A limited number of restrictions to copyright apply in the form of a right to make specific uses of a copyrighted work under specific circumstances free of charge or against the payment of royalties under a statutory licence (see question 9). Technically, these restrictions are not compulsory licences. Yet factually, their effect can amount to the same.

29 | Are licences administered by performing rights societies? How?

Swissperform, the collective society for performing rights, administers licences for performing artists. It enforces the mentioned neighbouring

rights of performing artists (see question 12) and collects the payment of royalties for the grant of such rights. The enforcement of these rights may be reserved to the collective society by law or may be entrusted to it on a voluntary basis by the performing artists by means of a contract (a 'rights administration agreement').

Termination

30 | Is there any provision for the termination of transfers of rights?

No. There are no provisions on the termination of transfers of rights (in the sense that transfers are terminated by law and copyright is thereby re-assigned to the author).

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

No, there is no government agency in charge of recording copyright transfers in Switzerland. As copyright is not registrable in Switzerland, transfers or similar transactions related to copyright is not registered publicly either.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection begins when a work is created by an author (article 6, FACN). Even parts of a copyrighted work may already enjoy copyright protection if they bear the basic requirements such as a creative act with individuality (article 2, paragraph 4, FACN). Thus, copyright protection may even begin before a work is fully completed by an author.

Fixation of a work in a tangible medium is not a necessary formal requirement, but the work must somehow be perceptible to human senses.

Duration

33 | How long does copyright protection last?

Computer programs are protected until the end of the 50th year following the death of the author. All other types of works are protected until the end of the 70th year following the death of the author (article 29, FACN). For co-authored works where an individual contribution cannot be separated, copyright protection lasts until the end of the 70th year (and, for computer programs, the 50th year) following the death of the last surviving joint author. If the individual contributions are separable, copyright protection of each singular contribution lasts until the end of the 70th or 50th year following the death of the respective author. As for audiovisual works, copyright protection lasts until the end of the 70th year following the death of the sole director or the death of the last joint co-director (article 30, FACN). If an author of a copyrighted work remains unknown, copyright protection lasts until the 70th year following the year of publication or, if the work was published in portions, at the end of the 70th year following the year of the final portion of the work (article 31, FACN). Please note that it is controversial whether this last term also applies to computer programs or whether the appropriate term should rather be 50 years.

The NFACN is expected to introduce a new category of copyrighted work, namely photographic reproductions and three-dimensional images produced similarly to photography, but which do not necessarily have an individual character (article 2, paragraph 3-bis, NFACN). It is envisaged that these works without an individual character will be

protected for 50 years after their production (article 29, paragraph 2, letter a-bis, NFACN).

34 | Does copyright duration depend on when a particular work was created or published?

If an author remains unknown, copyright duration depends on when a particular work was published (see question 33). Aside from this particular case, copyright duration is calculated from the date of death of the author, not when a particular work was created or published (for a detailed analysis, see question 33).

Renewal

35 | Do terms of copyright have to be renewed? How?

Duration of copyright need not and cannot be renewed.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

The current duration of copyright was established with the entering into force of the FACN on 9 October 1992. It has remained unchanged ever since.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

The use of a copyrighted work covered by the exclusive rights of the copyright owner provided under FACN (see questions 6 to 10) not authorised by the author or rights holder, provided that the copyright is still under a valid duration term (see questions 32 and 33), constitutes a copyright infringement. However, an infringement does not exist if such action is covered by the exhaustion principle (first sales doctrine) (see question 9) or if a restriction of copyright applies (see question 9). An author's or rights holder's copyright does not only extend to identical works of an infringer. Imitations that make use of the essential creative features of a copyrighted work can also constitute an infringement.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Yes, the notion of secondary or contributory infringement exists under Swiss copyright law. The FACN provides a claim for injunctive relief against any copyright-infringing acts. In principle, this claim is applicable against anyone who engages in the same infringing activity, including secondary aiders and abettors (article 62, FACN). With regard to monetary compensation claims, the FACN and Swiss liability law principles under the Swiss Code of Obligations provide for damage claims only under specific circumstances. According to article 50 of the Swiss Code of Obligations and Federal Supreme Court practice, the cooperation of multiple parties directly or indirectly causing copyright infringements, each participant subjectively acting with thought (ie, wilfully or negligently), may lead to joint liability of these parties for the damages caused. There are, however, no clear guidelines as to how far the scope of involved persons can reach. Case law provides for various (and also inconsistent) decisions.

In a relatively recent decision, the Swiss Federal Supreme Court held that a hosting provider of a blog platform can be ordered to take down infringing user-generated content and may be ordered

to pay procedural court fees irrespective of his or her knowledge on the infringing content (decision of the Swiss Federal Supreme Court 5A_792/2011 of 14 January 2013; please note, however, that this case is based on the infringement of personality rights and not copyright).

In a more recent decision, the Swiss Federal Supreme Court held that access providers cannot be ordered to block infringing content uploaded by third parties on foreign web portals (decision of the Swiss Federal Supreme Court 4A_433/2018 of 8 February 2019). This decision made clear that the provision of technical infrastructure facilitating internet access alone does not contribute or aid infringement of copyright in a sufficiently causal manner (as required under platform liability principles under Swiss law).

Available remedies

39 | What remedies are available against a copyright infringer?

Swiss copyright law provides for various remedies against copyright infringement.

First, an author or rights holder may seek injunctive relief before the civil courts against an infringer prohibiting an imminent infringement, a judgment ordering the removal of ongoing infringements as well as, in particular cases, a declaratory judgment holding that a particular action infringes the author's or the rights holder's copyright (articles 61 and 62, paragraph 1, letters a and b, FACN). Injunctive relief claims may also be obtained in the form of a preliminary injunction which provides for an accelerated, simplified procedure (article 65, FACN).

Second, an author or rights holder may seek a civil court action for disclosure of the origin of infringing items against any person who is in possession of such items and for the confiscation and destruction of such items (article 62, paragraph 1, letter c, FACN).

Finally, an author or rights holder may claim damages against any infringer before a civil court (article 62, paragraph 2, FACN). Monetary compensation claims may be based on different notions of the law (ie, specific market reputation damages and reasonable attorneys' costs, restitution of (lost) profits, restitution of unjust enrichment or the payment of an adequate licence fee (by analogy)). In addition, a court may always order the publication of the judgment upon request of the claiming author or rights holder (article 66, FACN). Such publication may help to mitigate ongoing effects of a copyright infringement. Please note that Swiss law also provides for criminal law remedies against copyright infringement (article 67, FACN; see also questions 2 and 45).

Limitation period

40 | Is there a time limit for seeking remedies?

There is no statutory time limit for seeking injunctive relief or declarative judgments against copyright infringements. An author's or rights holder's claim may, however, be considered forfeited if he or she has, during an extensive time period, tolerated ongoing infringements (which were known to him or her or which he or she should have known). As for monetary compensation claims linked to copyright infringements, such claims are based on the notion of tort, agency of necessity or unjust enrichment and are therefore subject to a relatively short statute of limitation of one year from the knowledge of the infringing act (articles 60 and 67 of the Swiss Code of Obligations).

As for criminal law remedies, time limits for taking action are considerably longer (ie, usually seven years from the occurrence of an infringement (article 97 of the Swiss Federal Criminal Code; see also questions 2 and 43)).

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, monetary compensation claims are available for copyright infringement (see question 39). In Switzerland, the term 'monetary compensation claims' is used more frequently as it is broader than 'damages'. It comprises all forms of monetary compensation triggered by copyright infringements. The legal basis of such compensation claims can vary from genuine damage claims to restitution of profits or unjust enrichment claims as well as the payment of an adequate licence fee (by analogy).

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes, according to Swiss case law, reasonable attorneys' fees can under particular circumstances be enforced as damage claims to the extent proven that they were necessary for the prevention of an infringement. In addition, court fees and a fragment of the attorneys' fees are awarded to the party who wins on the merits of the infringement action (based on court tariffs).

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

The FACN provides for criminal penalties imposed on copyright infringements. The wilful infringement of copyright is punished with imprisonment of up to five years or a fine, or both. Fines may range from one Swiss franc up to a maximum of approximately 1 million Swiss francs, depending on the degree of fault and the personal and economic circumstances of the infringer (article 67, FACN). In regular practice, the sentences typically imposed are significantly lower.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

There is no specific statute or act addressing liabilities or defences against online copyright infringements. The current Swiss copyright act does not have a provider-specific legislation in place as for example the US (with the Digital Millennium Copyright Act) or the European Union (with the European E-Commerce-Directive 2000/31/EC) providing liability shields for hosting providers. Instead, the general rules and principles of Swiss copyright and liability law apply including the notions on secondary and contributory infringement (see question 38).

All civil law and criminal law remedies listed under questions 39, 41 and 43 are also available against online copyright infringements. However, the strategic enforcement of such claims is more challenging as it requires interaction with internet service providers or similar intermediaries supportive to online copyright infringement. Some internet service providers provide for voluntary, standardised takedown procedures (eg, 'piracy cops') while others do only act on a case-by-case basis. It is noteworthy that large providers (such as Google or Facebook) have a tendency to unify their anti-piracy policies on a regional level. Thus, practices required under EU law for such providers are often also applied in Switzerland as it is easier to administrate them on a broad geographic level even though Switzerland is not a member of the EU.

Since the internet can serve as a suitable tool for anonymity, criminal law remedies gain considerable relevance as they are frequently the only way to enforce the procurement of evidence and reveal an online-infringer's identity. New legislation on copyright is expected in Switzerland and the NFACN provides for additional obligations of

internet hosting providers to take measures against copyright infringements conducted over the internet (article 39d, FACN). (See also 'Update and trends'.) Hosting providers may be obliged to ensure that infringing content removed from their servers stays removed from their servers (stay-down duty).

Prevention measures

- 45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

The use of the copyright notice is not required under Swiss law, but it may be helpful for preventing infringements. Mandating a collective society with the enforcement and collection of copyright fees can also help to prevent infringements as these societies monitor and enforce monetary compensation claims (see question 5). Technical measures (DRM) to administer and control copyrighted digital content may also contribute to prevent infringement (see question 3). In addition, it is also possible to file a request with the Swiss custom authorities to temporarily retain suspected items entering the border which could infringe an author's or rights holder's copyright in Switzerland (article 75, FACN).

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

- 46 | Which international copyright conventions does your country belong to?

Switzerland is a member of most multilateral international conventions on copyright and neighbouring rights law:

- the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, within the establishment of the World Trade Organization, 1994);
- the revised Berne Convention for the Protection of Literary and Artistic Works (Paris version of 1971);
- the UCC (Paris version of 1971);
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome 1961);
- the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva 1971);
- the Convention establishing the World Intellectual Property Organization (WIPO) (Stockholm 1967);
- the WIPO Copyright Treaty (Geneva 1996); and
- the WIPO Performance and Phonograms Treaty (Geneva 1996).

- 47 | What obligations are imposed by your country's membership of international copyright conventions?

Based on the majority of Swiss scholarly opinions, all obligations brought forward in the above-mentioned international treaties are implemented into Swiss national law. There are no obligations pending.



Dirk Spacek

dirk.spacek@cms-vep.com

CMS von Erlach Poncet AG

Dreikönigstrasse 7

PO Box

8022 Zurich

Switzerland

Tel: +41 44 285 11 11

Fax: +41 44 285 11 22

cms.law

UPDATE AND TRENDS

Emerging trends and new legislation

- 48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

The Swiss Federal Council has proposed amending the FACN in various ways. The new proposed legislative draft (NFACN) is primarily aimed at improving anti-piracy strategies. To this effect, the NFACN imposes a 'stay-down duty' (see question 44) on certain internet hosting providers under which they must ensure that copyright-infringing content, once removed, remains off their servers.

The draft also clarifies that rights holders whose copyright is being infringed may process the personal data needed to file a criminal complaint or charge (eg, IP addresses, although there is controversy about whether this constitutes personal data).

The NFACN has refrained from introducing internet blocking obligations for access providers. The new draft does not suggest changing the legality of downloading copyrighted content from the internet for private use.

In addition to anti-piracy measures, the draft contains various reforms for adapting the FACN to the recent technological developments. For instance, researchers and libraries are permitted to use their content inventories without explicit consent of rights holders.

Furthermore, the duration of the protection for performances under 'neighbouring rights' is to be extended from 50 to 70 years, and creative artists are to benefit from broader protection for photography exploitation as well as more efficient management of video-on-demand rights.

Also, new rules on the collective management of copyright is to be introduced in order to facilitate the exchange of copyrighted digital content. Namely, the NFACN provides for extended collective licenses under which collective societies may conclude agreements with users relating to the mass use of copyrighted works, even if such rights are not assigned to the collective societies by law. However, the rights holders have a right to object such use (an opt out).

Finally, the Swiss government has also proposed ratification of the Peking Treaty and the Marrakesh Treaty, both of which are already implemented under the current Swiss legal system.

The NFACN must still be adopted by parliament.

Ukraine

Ilarion Tomarov and Daria Romashchenko

Vasil Kisil & Partners

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation covering copyright issues in Ukraine mainly consists of two laws: the Civil Code of Ukraine (2003) and the Law of Ukraine On Copyright and Related Rights (1993) (the Law).

The other important source of copyright regulations is the Ukraine-European Union Association Agreement (the Agreement), which was ratified by the Ukrainian parliament in 2014. The Agreement is considered to be a part of Ukrainian legislation, the provisions of which can be directly applied unless proscribed by provisions in the Agreement.

The Code of Ukraine on Administrative Offenses and the Criminal Code of Ukraine contains sanctions for copyright offences.

Among other specific acts is the law On Effective Management of the Exclusive Rights of Rightholders in the Field of Copyright and (or) Related Rights, adopted on 15 May 2018, which covers the collective management of copyright and related rights.

In 2017, the Law of Ukraine On State Support of Cinematography in Ukraine introduced a new procedure for out-of-court enforcement of copyright an amendment to the Law. The procedure is similar to the United States' Digital Millennium Copyright Act. (See question 44.)

Copyright legislation also consists of range of subsidiary acts and international agreements, which are mentioned below.

Enforcement authorities

2 | Who enforces it?

The main figures entitled to enforce copyright is the rights holders.

Additionally, copyright legislation may be enforced by collective management societies, which are entitled to protect exclusive rights to works and related rights by the Law, or authorised to do so by the rights holder.

The Ministry of Economic Development and Trade of Ukraine (the Ministry) has the authority to register copyright (registration is optional). The intellectual property inspectors of the Ministry are authorised to investigate the infringement of intellectual property rights and impose administrative fines upon infringers.

The most effective body enforcing copyright is the courts. Ukraine's national courts have developed extensive practices related to a range of copyright issues that are not duly regulated. The intellectual property court announced as a component of Ukraine's judiciary reform in 2016 is in the process of being established.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The digital exploitation of works is only regulated by the Law; but there are almost no specific provisions dedicated to digital exploitation, therefore general rules must be applied. In practice, general rules of copyright are not always applicable to digital exploitation of copyright, partly because of obsolete provisions that do not correspond to current technical developments. Moreover, the Law defines a copy of a work as a physical copy.

A substantial overhaul of Ukraine's copyright legislation is expected to be introduced soon, to harmonise it with EU legislation (as required under the Association Agreement).

However, article 52-1 of the Law provides an out-of-court procedure for filing a claim against the owner of a website or a webpage where copyright infringement has taken place. Such claims can be only filed in the interests of a rights holder by his or her representative, who must be a certified attorney. (See question 44.)

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Yes. With consideration of extraterritorial protection granted by international and national legislation, Ukraine's courts have developed a criterion of accessibility regarding copyright infringements carried out on the internet: as long as the infringing content can be accessed from the territory of Ukraine, the infringement is considered to have occurred in Ukraine, therefore, Ukrainian law will apply.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

The Ministry of Economic Development and Trade of Ukraine:

- enforces state policy on copyright issues;
- controls collective management systems;
- enforces copyright by appointing intellectual property inspectors; and
- provides a service to register copyright (registration is optional).

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

Any work containing author's creative effort is subject to copyright protection. According to the Law, the non-exclusive list of types of works protected by copyright includes:

- verbal and written works (eg, books, brochures, articles, lectures, plays, collections and anthologies, and translations);
- computer programs;
- databases;
- artistic works;
- musical works;
- choreographic works;
- audiovisual works;
- photographs; and
- architecture.

Rights covered

7 | What types of rights are covered by copyright?

The rights which belong to author of work consists of proprietary rights (eg, to use thereof, to allow use thereof, and to prohibit use thereof) and moral rights (ie, rights of authorship, the right of the author's name, and to protect the integrity of the work). (See question 11.)

Excluded works

8 | What may not be protected by copyright?

Ideas, methods, theories, principles, procedures, conceptions, discoveries, systems and manners are not protected by copyright, even if written down.

The Law states the following works do not receive copyright protection:

- news (press information about current events);
- folklore;
- official documents (legislative, political, administrative) and their official translations;
- state and local symbols and emblems;
- banknotes;
- schedules; and
- phone directories and similar databases.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

The doctrine of 'fair use' does not exist in Ukraine. However, the Law provides an exhaustive list of exceptions from copyright to allow free use on the condition that the author's name and the original source are mentioned:

- short quotes, in an amount corresponding to the purpose of quotation;
- illustrative use of works in educational materials;
- reproduction for the communication to the public of already published works related to economical, political and religious issues, unless the author did not expressly prohibit such uses;
- reproduction of works with the purpose of informing about current events;
- representations of works to be presented in exhibitions in events' catalogues;

- reproductions of work for the purpose of administrative or court proceedings;
- parodies, caricatures, or pastiches;
- creating formats to facilitate access to published works for persons who are blind, visually impaired or otherwise print-disabled;
- public performances during official or religious ceremonies;
- reprographic reproduction of works by libraries in amounts limited to that which is required for the purpose of the reproduction;
- reproduction of works for educational purposes, under the condition that such reproduction limited to that which is sufficient for the purpose; and
- copying, modification and de-compilation of computer programs under certain circumstances.

Architectural works

10 | Are architectural works protected by copyright? How?

Architectural works located in Ukraine are protected by the Law. The author has copyright in architectural work separately from the right to a material exemplar of the work.

The owner of a material exemplar of the work is prohibited from destroying it without giving the author the opportunity to buy the work, at a price no higher than the cost of materials used for the creation of work. If the preservation of the work is impossible, the owner of that material exemplar of the work must provide the author with the opportunity to produce a copy of work, or in case of an architectural work to take a photo of it.

The author of architectural work enjoys exclusive rights to participate in the building of the architectural project based on the author's work.

Performance rights

11 | Are performance rights covered by copyright? How?

Performance rights are covered by related rights, which are also regulated by the Law. Performers are granted with:

- moral rights:
 - to demand to be recognised as a performer of work;
 - to be identified as the performer by their name; and
 - to due quality of the recording of performance;
- proprietary rights:
 - to communicate to the public an unrecorded (ie, live) performance;
 - to fixate the performance in phonograms or videograms;
 - to reproduce the recorded performance; and
 - to distribute, lease or communicate the recorded performance to the public.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

Producers of phonograms and videograms have the following proprietary rights:

- reproduction of their phonograms and videograms in any form and any manner;
- distribution of their phonograms and videograms among the public;
- commercial rental of phonograms and videograms, even after they have been distributed by a manufacturer of the phonogram or videogram, if the manufacturer gives their permission;
- broadcast of phonograms and videograms by any means of communication in a way that any person can access them from any place and at any time at their own will;
- to remake the phonograms or videograms; and

- import to the territory of Ukraine phonograms and videograms for the purpose of having them distributed among the public.

Broadcast organisations enjoy the following proprietary-related rights to television programmes:

- communication to the public of their programs by broadcasting and rebroadcasting;
- fixation of their programmes in a medium and its reproduction; and
- public demonstration of their programmes in places where admittance is paid for.

Integrated circuit layouts receive *sui generis* protection by the Civil Code of Ukraine and the Law of Ukraine On Protection of Rights to Integrated Circuit Layouts.

Moral rights

13 | Are moral rights recognised?

The moral rights are recognised in national legislation. According to the Law, an author enjoys the following non-transferable moral rights:

- the right of authorship (ie, the right to be recognised as the author of the work);
- the right of the author's name (ie, having the right to be credited by their full name, to be anonymous, or to have a pseudonym); and
- the right to protect the integrity of their work.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

There is no legal requirement to label works with a copyright notice.

Rights holders can use the copyright notice in order to inform the public about the title. The copyright notice consists of Latin letter 'C' inside a circle (©), the name of rights holder and the year of first publication.

The copyright notice must be presented on the original exemplar of the work and in each copy of it.

15 | What are the consequences for failure to use a copyright notice?

The Law establishes a presumption of authorship: a person claiming authorship should be deemed as author, unless it is proved untrue.

Deposit

16 | Is there a requirement of copyright deposit?

There is no legal requirement to deposit works protected by copyright under the Law.

17 | What are the consequences for failure to make a copyright deposit?

There are none.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

A system of optional copyright registration is used in Ukraine. The registration is optional, since copyright protection is granted upon the creation of a work and not by its registration with the state. Any

author or employer may apply for registration of copyright at any time by submitting a copyright registration application and an exemplar of work, and payment of an official fee. (See question 21.)

All rights holders who receive rights via the transfer of rights on the basis of an agreement can apply for copyright transfer agreement registration by submitting an application (with an exemplar of the transferred work and a copy of agreement itself) and payment of the official fee.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

Copyright registration is optional in Ukraine.

20 | What are the fees to apply for a copyright registration?

The official fee for copyright registration in Ukraine is around €3 for individuals and around €7 for legal entities.

21 | What are the consequences for failure to register a copyrighted work?

There are no legal consequences for failing to register a copyrighted work. A rights holder has same scope of protection and available remedies, regardless of whether they have registered their work or not.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

Initially, the individual whose efforts created the work is considered as the author the work and therefore enjoys all rights to the completed work. However, companies, employers, other individuals and the state, etc, may obtain copyright through agreements or based on the Law (succession).

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

According to the Civil Code of Ukraine (article 429) employees hold all moral rights to work created in relation to their employment. The proprietary rights to works created by an employee are jointly owned the employee and their employer, unless prescribed otherwise in an agreement between them. Such an agreement must be in writing.

The Law contains contradictory provisions assigning all proprietary rights to the employee. However, the Supreme Court of Ukraine in 2009 resolved this conflict by giving priority to the rules introduced by the Civil Code of Ukraine.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Moral rights to a commissioned work belongs to independent contractor as the author. According to the Civil Code of Ukraine (article 430), the commissioner and the contractor jointly own the proprietary rights to a commissioned work, unless otherwise prescribed in a written agreement between them.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

The Law allows co-authorship of a work. Co-authors may manage their rights by entering into an agreement on respective issues of joint co-authorship.

Co-authorship can be separable, when each author makes independent contributions to the work which are clearly identifiable and can be used by the author independently (ie, publish or modify his or her part without requiring the consent of the other co-authors).

Inseparable co-authorship means that contribution of one co-author cannot be clearly distanced from the contributions of the other co-authors.

The exclusive rights to a work may be co-owned by number of persons. Such rights can be obtained by a number of persons simultaneously through a transfer agreement.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Moral rights to a work are not transferable.

Proprietary rights can be assigned using a written agreement.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Proprietary rights to work can be licensed under a licence agreement.

Under an exclusive licence the licensor cannot enjoy the rights constituting the scope of licence or grant licensed rights to third person(s).

Under a non-exclusive licence, the licensor enjoys all rights licensed and can grant the identical scope of rights to third persons.

A single licence allows the licensor to enjoy the rights which are licensed, but the licensor cannot license the identical scope of rights to any other persons.

A licence agreement must be made in writing. The type of licence, term of the licence, the territory, the particular uses the licence permits must be specified in an agreement. Only existing rights can be licensed.

28 | Are there compulsory licences? What are they?

There are no compulsory licences related to copyright.

29 | Are licences administered by performing rights societies? How?

There are no performing rights societies in Ukraine. Collecting rights societies might enforce rights under an agreement with a rights holder or another collecting rights society.

Termination

30 | Is there any provision for the termination of transfers of rights?

There are no specific provisions regarding the termination of transfer of rights to a work, apart from general provisions of the Civil Code of Ukraine regarding the termination of obligations.

Additionally, a transfer agreement is deemed null and void if it is not made in a written form.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

Yes, an assignee might request the registration of a copyright transfer agreement with the Ministry. For this purpose, the copyright holder must submit an application for registration, and provide a copy of the agreement and an exemplar of work.

Additionally, a person requesting registration must pay an official fee.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

An author enjoys copyright to a work from the moment of the work's creation in any form suitable for reproduction purposes.

Registration of the work nor any other special formalisation is needed for a work to be protected by copyright.

Duration

33 | How long does copyright protection last?

Copyright remains in effect throughout an author's lifetime and for 70 years after his or her death. However, there are some specific variations to this in the Law:

- For works published anonymously or under a pseudonym, the period of copyright terminates 70 years after the publication of the work.
- Copyright to works created by co-authorship remain in effect throughout the co-authors' lifetimes and for 70 years after the death of the last surviving co-author.
- If work is published in separate parts, not in its entirety, the period of copyright separately applies to each published part of the work, when it is published.
- The term of protection of copyright with respect to works of posthumously rehabilitated authors shall remain in effect for 70 years after their rehabilitation (ie, acquittal from repression or prosecutions that occurred during the period Ukraine was part of the former Soviet Union, due to lack of due cause, evidence or proof of guilt).
- Copyright to a work that was first published within 30 years from the authors death shall remain in effect for 70 years after the date of the publication.

34 | Does copyright duration depend on when a particular work was created or published?

Yes, according to the general provision of the Law, copyright begins from the moment of the work's creation. The work shall be protected regardless of whether it is published or not.

The publication of a work affects copyright duration in cases where a work is published in parts, anonymously, or under a pseudonym etc. (See question 33.)

Renewal

35 | Do terms of copyright have to be renewed? How?

A term of copyright protection cannot be renewed, according to the Law.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

Generally, the term of copyright cannot be extended. However, there are specific conditions relating to certain works (eg, works created in co-authorship or published post-mortem; see question 33).

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

The following acts are considered as infringements of copyright:

- infringement of moral rights;
- any unauthorised use of a copyrighted work outside of the limitations provided by the articles 21–25 of the Law, namely:
 - piracy (ie, illegal publishing, reproduction or dissemination of a copyrighted work);
 - plagiarism (ie, misappropriation of work by claiming the authorship of a work created by another author);
 - intentional bypassing of technical protection features intended to protect copyright; and
 - falsifying or making material alterations to information about the management of copyright or related rights.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Generally, there are no provisions relating to secondary liability. However, under article 52-1 of the Law, the owner of a website or webpage is liable for copyright infringement if they fail to delete infringing content after being informed about its presence. (See question 44.)

Available remedies

39 | What remedies are available against a copyright infringer?

The infringed party may request the following from the courts:

- restoration of the title by prohibiting infringing activities;
- demand moral damages (a monetary payment for mental suffering caused by the actions of the infringer);
- demand monetary damages;
- demand statutory damages in the amount of double the price a rights holder would charge for a licence to the copied work; or triple if infringement is intentional;
- request the infringer provide information about third parties involved in the infringing activities; and
- prohibit the publication of infringing works or demand confiscation of such works.

Limitation period

40 | Is there a time limit for seeking remedies?

The standard three-year period of limitation of action applies to copyright infringement. An author has an unlimited period for bringing action regarding the protection of their moral rights.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes. Statutory damages are an alternative for occasions where a rights holder cannot calculate the exact amount of damages. These damages

are calculated to be double the price a rights holder would charge for a licence to the copied work; triple if infringement is intentional.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes, according to the procedural legislation of Ukraine.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

The Criminal Code of Ukraine (article 176) prohibits illegal reproduction and distribution of scientific and literary works, works of art, computer programs and databases, phonograms, videograms, and broadcasting programmes in any type of media, and via camcording (recording video and audio using a camcorder or similar device) and cardsharing (the simultaneous use of one legitimate conditional access subscription card), or other intentional breaches of copyright.

The sanctions under article 176 varies from a fine of €115 to imprisonment for up to six years.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

There is a specific out-of-court procedure to protect copyright if an infringement takes place online. The measure is applicable to limited range of protected works:

- audiovisual works;
- musical works;
- computer programs;
- videograms;
- phonograms; and
- broadcasting programs.

Under this procedure the rights holder or his or her representative (who must be a certified attorney) sends a request to the owner of a website or webpage, demanding that the owner deletes the infringing content and provides details of the person responsible for the infringement.

The owner of the website or webpage must undertake certain measures in order to disable the infringing content within 72 hours, or be considered liable for copyright infringement.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

There is no specific effective legal mechanism to prevent copyright infringement.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

Ukraine is a party to the following treaties:

- Berne Convention for the Protection of Literary and Artistic Works (1886);
- Universal Copyright Convention (1952);

- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961);
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971);
- World Intellectual Property Organization Copyright Treaty (1996);
- World Intellectual Property Organization Performances and Phonograms Treaty (1996);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS); and
- the Ukraine–European Union Association Agreement (2014).

47 | What obligations are imposed by your country's membership of international copyright conventions?

Under the above-mentioned agreements, Ukraine is obliged to provide a certain level of protection to copyright and related rights.

By signing the Ukraine–European Union Association Agreement, Ukraine undertook an obligation to harmonise its legislation with EU copyright regulations. Currently, this process and the implementation of the Association Agreement's provisions are ongoing.

UPDATE AND TRENDS

Emerging trends and new legislation

48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

Ukraine is looking forward to the launch of the intellectual property court, where all disputes involving copyright matters will be considered.



VASIL KISIL

Ilarion Tomarov
tomarov@vkp.ua

Daria Romashchenko
romashchenko@vkp.ua

17/52A Bohdan Khmelnytsky Street
Kiev, 01030
Ukraine
Tel: +380 4 4581 7777
Fax: +380 4 4581 7770
vkp.ua

United Kingdom

Robert Guthrie, Anna Rawlings and Douglas Peden

Osborne Clarke LLP

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The main copyright legislation in the UK is the Copyright, Designs and Patents Act 1988 (CDPA), which has been amended by other legislation on numerous occasions since it came into force on 1 August 1989.

The United Kingdom is also currently a member of the European Union and, therefore, UK law should be in accordance with the various European Union directives that impact on copyright, such as the Copyright Directive 2001/29/EC (sometimes called the Information Society Directive) and the Software Directive 2009/24/EC.

Enforcement authorities

2 | Who enforces it?

There are a number of public bodies which have powers of enforcement of relevant criminal offences in the UK, including local weights and measures authorities (Trading Standards), the Office of Fair Trading and the police. Her Majesty's Revenue and Customs also has powers to seize pirated goods entering the UK.

However, in many cases, copyright will need to be enforced by the copyright owner, an exclusive licensee or, in some circumstances, a non-exclusive licensee or representative body, either through a private criminal prosecution or, more usually, civil proceedings.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The reproduction right is defined as copying a work 'in any material form' and is said to include 'storing the work in any electronic means' (section 17(2), CDPA).

Making copyright works available over the internet will infringe UK law which provides for a communication right for all categories of copyright-protected work which includes the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them (sometimes referred to as the on-demand right (section 20, CDPA)).

The Digital Economy Act 2010 also provides for a number of measures to reduce copyright infringement caused by file sharing on the internet.

The role of intermediaries and internet service providers (ISPs), which enable or facilitate the digital exploitation of works, is addressed in the Copyright Directive 2001/29/EC and Electronic Commerce Directive 2000/31/EC. The Copyright Directive provides that rights

holders should be able to apply for an injunction against intermediaries whose services are used by third parties to infringe copyright. The Electronic Commerce Directive states that an ISP or other service provider that stores information provided by a recipient of the service will not be liable for the information stored unless they have knowledge of infringing material and providing that, upon obtaining such knowledge, they act expeditiously to remove the information.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Yes, the UK courts have generally taken the view that foreign-owned or foreign-operated websites that are at least partially targeted to the UK can infringe UK copyright laws, either directly or as a joint tortfeasor. Enforcement of UK laws against foreign-owned and foreign-operated websites can be challenging but the UK courts do have powers to grant website blocking orders that require internet service providers to take steps to block access to the website through its internet access services.

To obtain a website blocking order, the rights holder will need to show that the users or the operators of the websites will infringe. The High Court will consider various factors before relief will be granted such as whether an injunction would:

- be necessary;
- be effective;
- be dissuasive;
- be not unnecessarily complicated or costly;
- avoid barriers to legitimate trade;
- be fair and equitable and strike a 'fair balance' between the applicable fundamental rights; and
- be proportionate.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

There is no centralised copyright agency but there are a large number of licensing bodies that collect royalties or license a range of rights for various industries and categories of rights holders (these include the Phonographic Performance Limited (PPL), the Performing Rights Society (PRS), the Newspaper Licensing Agency and the Copyright Licensing Agency).

A digital copyright exchange called the Copyright Hub has also been set up, which enables copyright owners to offer their rights for licence. In addition, the Copyright Tribunal has powers to resolve certain commercial licensing disputes.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

The categories of work protected by copyright in the UK are:

- original literary, dramatic, musical and artistic works;
- sound recordings, films and broadcasts; and
- typographical arrangements of published editions.

'Literary work' includes:

- a table or compilation other than a database;
- a computer program;
- preparatory design material for a computer program; and
- a database.

'Dramatic work' includes a work of dance or mime.

Rights covered

7 | What types of rights are covered by copyright?

The owner of copyright in a work has the exclusive right to:

- copy the work;
- issue copies of the work to the public;
- rent or lend the work to the public;
- perform, show or play the work in public;
- communicate the work to the public (which includes an 'on-demand' right to make the work available to the public at a time and place chosen by them); and
- make an adaptation of the work.

Excluded works

8 | What may not be protected by copyright?

To be protected by copyright, a work must traditionally fall within one of the categories of work set out in question 6 (following the 2019 *Levola Hengelo* Court of Justice of the European Union (CJEU) case this categorisation system may be incompatible with EU law – see 'Update and trends'). Further copyright law only protects the expression of an idea and not the idea itself. Therefore, although the underlying computer software of video games and other forms of interactive entertainment will be protected by copyright as literary works, it is not clear that the video games themselves, as experienced by the player of the game, are covered by the current categories of work that are protected under UK law (although individual elements of the video game, such as graphics and music, will be protected).

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

There is no general fair use or fair dealing defence to copyright infringement under UK law. However, three specific defences provide that copyright is not infringed by fair dealing with a work for the purposes of:

- non-commercial research or private study (section 29, CDPA);
- criticism or review, quotation or reporting current events (section 30, CDPA); and
- caricature, parody or pastiche (section 30A, CDPA).

In addition, there are defences for:

- certain temporary copies that are an essential part of a technological process (section 28A, CDPA);

- text and data analysis for non-commercial research (section 29A, CDPA); and
- incidental inclusion (section 31, CDPA).

Architectural works

10 | Are architectural works protected by copyright? How?

A work of architecture, being a building or a model for a building, is protected as an artistic work (section 4(1)(b), CDPA). However, the protection afforded to works of architecture is significantly reduced because it is not infringed by making a graphic work representing it, or making a photograph or film of it, or making a broadcast of a visual image of it (section 62, CDPA).

Performance rights

11 | Are performance rights covered by copyright? How?

Performers of dramatic, musical and certain other performances have a number of specific performers' rights. This system of performers' rights is highly complicated in part due to the manner in which the regime has subsequently been amended to take account of the UK's international treaty obligations.

Performers' economic rights (as opposed to moral rights, discussed below) can be classified as non-property rights (the original rights granted under the CDPA) and property rights (additional rights that have been subsequently granted).

A performer's non-property economic rights are infringed:

- if without their consent their performance is recorded or broadcast live, a recording of their performance is copied, or copies of a recording of their performance are issued to the public (section 182, CDPA);
- through the use of a recording made without consent (section 183, CDPA); and
- by the importing, possessing or dealing in an illicit recording (section 184, CDPA).

These rights are termed 'non-property' rights because they cannot be transferred or assigned.

A performer's property rights consist of a reproduction right, distribution right, rental and lending right, and a making available right (sections 182A–182, CDPA).

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

Neighbouring rights in the UK include:

- a publication right for those who publish previously unpublished works;
- artists' resale right; and
- various anti-circumvention rights, which enable rights holders to take action against acts or devices that are designed to get around anti-piracy devices and technological measures.

Although circuit diagrams are not explicitly identified as a protected class of work in the CDPA, the UK courts have held circuit diagrams to be both artistic works and literary works (*Anacon v Environmental Research Technology*).

Moral rights

13 | Are moral rights recognised?

Moral rights of the author are recognised under the CDPA. The main rights are the right to be identified as the author or director; the right

to object to derogatory treatment of a work; and the right not to have a work falsely attributed (sections 77, 80 and 84, CDPA).

Performers also have moral rights, namely the right to be identified and to object to derogatory treatment of the performance.

In addition, a person who, for private and domestic purposes, commissions the taking of a photograph or the making of a film, has the right not to have: copies of the work issued to the public; the work exhibited or shown to the public; or the work communicated to the public.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

There is no requirement to include a copyright notice. Copyright protection arises automatically in the UK on creation of the work and a copyright notice is not required to ensure protection. However, it is often sensible to include such a notice to alert third parties to the existence of the right. It is particularly recommended to use such a notice in relation to content held online, where copyright infringement is commonplace. An example of such a notice would be to include the copyright logo (©), the creator's name and the year the work was made at the bottom of the relevant webpage, for example: © Osborne Clarke LLP 2019.

15 | What are the consequences for failure to use a copyright notice?

Not applicable as there is no requirement of a copyright notice. See question 14.

Deposit

16 | Is there a requirement of copyright deposit?

There is no requirement of copyright deposit.

17 | What are the consequences for failure to make a copyright deposit?

Not applicable as there is no requirement of copyright deposit.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

There is no formal system for the registration of copyright, as copyright arises automatically in the UK on creation of the work. The British Copyright Council recommends self-recording of copyright in certain situations where an owner may require proof of existence of a work at a particular date, for example, to use against potential infringers in the future. An example of self-recording of copyright is for the creator to send a copy of the work by post to themselves and keep the sealed, dated envelope in a safe place, unopened. Alternatively, creators may wish to file a copy of their work with their professional adviser (such as a lawyer) or their industry body. There are also a number of online private companies that offer copyright registration services. When using these sites, users should be aware that these services are not connected to the UK Intellectual Property Office and the utility of such services is not established.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

There is no formal system for the registration of copyright. See question 18.

20 | What are the fees to apply for a copyright registration?

Not applicable as there is no formal system of copyright registration. See question 18.

21 | What are the consequences for failure to register a copyrighted work?

Not applicable as there is no formal system of copyright registration. See question 18.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The creator of the work is the first owner, unless the work is created by an employee in the course of their employment. In that case, their employer is the first owner of copyright in the work. A work may be jointly owned where it is produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.

A film is treated as a work of joint authorship by the producer and principal director (unless they are the same person) and a broadcast is treated as a work of joint authorship in any case where more than one person is to be taken as making the broadcast.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

Yes, if the copyright work is created during the course of the employee's employment then the employer will be the first owner, subject to any agreement to the contrary.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Yes, provided that there is an agreement that assigns ownership of copyright to the hiring party. Assignment of ownership of copyright to the hiring party does not occur automatically by virtue of the hiring relationship.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes, a copyright work can be co-owned by individuals and entities. Co-ownership can, however, lead to complicated issues in relation to further dealings in the copyright and enforcement against infringements.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Yes, copyright may be transferred, or 'assigned'. Assignments must be in writing.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes, copyright may be licensed.

28 | Are there compulsory licences? What are they?

Compulsory licences do not generally exist under English law. There were specific compulsory licence provisions that applied in circumstances where copyright had been revived. However, these provisions were repealed in April 2017 as part of the consultation process relating to the repeal of section 52 CDPA since the UK government did not believe that these provisions were compatible with EU laws which provide that certain acts are exclusive to the author of the work.

29 | Are licences administered by performing rights societies? How?

Yes, licences are administered by performing rights societies in the UK, for example, PRS for music (PRS) and PPL. PRS manages the rights of songwriters, composers and publishers while PPL manages the rights of the record producers and the performers. There is also the British Equity Collecting Society, which is a collective management organisation for audiovisual performers. This organisation was established by the performers' union, Equity, and enforces its members' performance rights in the UK and EU.

Termination

30 | Is there any provision for the termination of transfers of rights?

As a general rule, an assignment of ownership of copyright takes effect and is not terminated by operation of copyright law. It may, however, be able to be terminated by one of the parties depending on what terms they have agreed in the assignment.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

Since the ownership of the copyright in a work is not registrable in itself, it is not possible to record the transfer of the copyright either and so no such agency exists.

Copyright is an asset over which it is possible to take security. For example, copyright can be the subject of a fixed or floating charge or a legal mortgage.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection usually begins automatically when the work is created or published. For example, copyright protection in a photograph starts when the photograph is taken and copyright in a film begins when the film is made.

Duration

33 | How long does copyright protection last?

The length of copyright protection depends on the category of the work. In most cases, copyright protection lasts for a period of 70 years from the end of the calendar year in which the author of the work dies (or the last author in cases of joint authorship).

Please see the table below for the usual length of copyright in particular categories for works that fall under the CDPA. Earlier acts, such as the Copyright Act 1956 and Copyright Act 1911, can still apply to works created or published while the earlier acts were in force.

Length of copyright protection under the Copyright, Designs and Patents Act 1988	
Category of work	Usual length of copyright
Literary, dramatic, musical and artistic works	70 years from the end of the calendar year in which the author dies
Sound recordings	70 years from the end of the calendar year in which the recording is first published
Films	70 years from the end of the calendar year of the death of the director, author of the screenplay, author of the dialogue and the composer of the soundtrack to the film
Broadcasts	50 years from the end of the calendar year in which the work was made
Typographical arrangement of published editions	25 years from the end of the calendar year in which the edition was first published

34 | Does copyright duration depend on when a particular work was created or published?

For most copyright works, copyright duration will be calculated from when the work was created or published (see question 32). There are a few circumstances where works created or published when previous versions of the law applied now have a different length of copyright duration.

Renewal

35 | Do terms of copyright have to be renewed? How?

Terms of copyright do not have to be renewed. In the same way as copyright protection arises automatically, it is also extinguished automatically once the relevant time period lapses (see question 33).

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

The term of copyright protection was extended from life of author plus 50 years to life of author plus 70 years in 1995. The UK also extended copyright protection for sound recordings and musicians' rights in sound recordings from 50 to 70 years in 2013. The change in the law was implemented to allow songwriters and other performers such as session musicians to continue to profit from their work throughout their life. The legislation was coined 'Cliff's Law' as Cliff Richard was a well-known supporter of the changes.

It should also be noted that the UK government has repealed section 52 of the CDPA, which restricted copyright protection for industrial designs or works to 25 years to ensure consistency with the law on registered designs.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

The categories of copyright infringement for some or all categories of copyrighted work are:

- copying of the work (section 16, CDPA);
- issuing copies of the work to the public (section 17, CDPA);
- renting or lending the work to the public (section 18, CDPA);
- the performance, playing or showing of the work in public (section 19, CDPA);
- the communicating to the public of the work, which includes the broadcasting of the work and the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them – known as the 'on-demand' right (section 20, CDPA); and
- making of an adaptation of the work to the public (section 21, CDPA).

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Secondary liability does exist and is incurred when a person, without the copyright owner's permission:

- imports into the UK, other than for his or her private and domestic use, an article which is, and which he or she knows or has reason to believe is, an infringing copy of the work (section 22, CDPA);
- possesses in the course of business an article which is, and which he or she knows or has reason to believe is, an infringing copy of the work (section 23(a), CDPA);
- sells or lets for hire, or offers or exposes for sale or hire an article which is, and which he or she knows or has reason to believe is, an infringing copy of the work (section 23(b), CDPA);
- in the course of a business exhibits or distributes an article which is, and which he or she knows or has reason to believe is, an infringing copy of the work (section 23(c), CDPA);
- distributes other than in the course of a business to such an extent as to affect prejudicially the owner of the copyright an article which is, and which he or she knows or has reason to believe is, an infringing copy of the work (section 23(d), CDPA);
- makes, imports into the UK, possesses in the course of business or sells or lets for hire, or offers or exposes for sale or hire an article specifically designed or adapted for making copies of that work, knowing or having reason to believe that it is to be used to make infringing copies (section 24(1), CDPA);
- transmits the work by means of a telecommunications system (other than by communication to the public), knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in the UK or elsewhere (section 24(2), CDPA);
- gives permission for a place of public entertainment to be used for a performance which infringes copyright unless when he or she gave permission he or she believed on reasonable grounds that the performance would not infringe copyright (section 25 CDPA); or
- supplies apparatus that is used to infringe copyright by a public performance of the work or by the playing or showing of the work in public (section 26, CDPA).

Available remedies

39 | What remedies are available against a copyright infringer?

Remedies would include damages, injunctions, account of profits, delivery up and forfeiture. Interlocutory relief is also available and can include interim injunctions, search orders and freezing orders.

The courts can order additional damages beyond the loss caused to the copyright owner, in particular if the infringement is flagrant or the defendant has accrued a significant benefit by reason of the infringement. Additional damages may also be awarded under article 13(1) of the Directive on the Enforcement of Intellectual Property Rights (2004/48/EC) (the Enforcement Directive) to award the rights holder damages appropriate to the actual prejudice suffered by him or her as a result of the infringement. The UK court has held that damages may be awarded under either the additional damages provisions in the CDPA or under the Enforcement Directive and each might be appropriate in different circumstances (*Absolute Lofts v Artisan Home Improvements; Phonographic Performance Limited v Raymond Hagan t/a Lower Ground Bar and The Brent Tavern and others*).

Limitation period

40 | Is there a time limit for seeking remedies?

In England and Wales, the limitation period is six years.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, damages or an account of profits or a royalty rate if the infringer had taken a licence to use the work from the copyright owner.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes, the defendant is usually liable to a sizeable percentage of the claimant's costs, if the claimant is successful.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

There is criminal liability for certain acts in relation to an infringing copy of a copyright work such as: making it for sale or hire; importing it into the UK other than for private use; distributing it in the course of business; making an article specifically designed for making copies; and causing the copyright work to be performed, played or shown in public.

For criminal liability under the Digital Economy Act 2017, it will be necessary to show that the defendant intended to make a gain for themselves or another, or knew or had reason to believe that their actions would cause loss to the copyright owner or expose the copyright owner to a risk of loss. In addition, it must be shown that the defendant had the relevant knowledge, or reasonable belief, that the copy is an infringing copy. A person found guilty of such an offence can face an unlimited fine and up to 10 years in prison.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

There are specific defences for certain temporary copies that are an essential part of a technological process and the sole purpose of which is to enable a transmission of the work in a network between third parties by an intermediary or a lawful use of the work. The Court of Justice

of the European Union has confirmed that this includes on-screen and cached copies that are produced while browsing the internet.

The Digital Economy Act 2010 also provides for a number of measures to reduce copyright infringement caused by file-sharing on the internet. For example, copyright owners are able to identify infringers' IP addresses and compile reports. They then send a copyright infringement report to the relevant ISP, which reviews the evidence and, if it meets a required standard, can send letters to the infringer. A further list is then created by the ISP of those who do not comply with the letters, which if disclosed to the copyright owner, can allow infringement proceedings to be brought.

Prevention measures

- 45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

Copyright infringement can be prevented by using a copyright notice since this can alert a potential infringer to the rights holder's rights and might dissuade them from infringing the rights in the work. It might also be possible to use technical measures to prevent infringement or to 'seed' or introduce deliberate errors in a work in order to make it easier to enforce any copyright infringement.

It is possible to alert Her Majesty's Revenue and Customs as to copyright infringing material to be detained at border control.

Infringement may be reduced by inserting a copyright notice on the work indicating the date and the owner of a particular work, which will alert third parties to the existence of copyright. Enforcing copyright may deter third parties for attempting to carry out infringing acts.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

- 46 | Which international copyright conventions does your country belong to?

The United Kingdom is party to various international treaties; the following are the most important in relation to copyright:

- the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention);
- the Universal Copyright Convention of 1952 (UCC);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 (the Rome Convention);
- the Convention for the Protection of Producers of Phonograms against the Unauthorized Duplication of Their Phonograms 1971 (the Phonograms Convention);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (the TRIPS Agreement);
- the World Intellectual Property Organization Copyright Treaty; and
- the World Intellectual Property Organization Performances and Phonograms Treaty.

The Berne Convention and the UCC are the two major copyright conventions. The Berne and Rome Conventions were supplemented and updated by the two World Intellectual Property Organization treaties. There are a number of other conventions of lesser importance that have not been incorporated in the above list.



Robert Guthrie

robert.guthrie@osborneclarke.com

Anna Rawlings

anna.rawlings@osborneclarke.com

Douglas Peden

douglas.peden@osborneclarke.com

One London Wall

London

EC2Y 5EB

United Kingdom

Tel: +44 207 105 7000

www.osborneclarke.com

- 47 | What obligations are imposed by your country's membership of international copyright conventions?

Generally, international treaties do not have direct effect in England and Wales, thus domestic legislation must be enacted to give effect to treaty obligations. The Berne Convention ensures that nationals of one contracting state enjoy protection in another contracting state. Each treaty prescribes certain minimum levels of protection that the UK must provide; for example, the minimum term of protection under the Berne Convention is 50 years.

UPDATE AND TRENDS

Emerging trends and new legislation

- 48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

The Copyright in the Digital Single Market Directive text has been approved by the European Parliament and Council of the EU and is likely to enter into force in June 2019. However, member states will have until June 2021 to implement the law. Article 15, the 'press publication right' and article 17 on 'the communication of protected content on content-sharing services' are likely to have the greatest impacts. The press publication right (dubbed a 'link tax') is intended to give publishers greater leverage to negotiate licensing deals with news aggregators, search engines and other online platforms that link to their content. Under the article 17 provision, there will be increased liability for established commercial content-sharing platforms for copyright-protected content uploaded by users of their platforms. It is not clear whether the UK will need or want to implement the new Directive in the event it leaves the European Union.

Following the Court of Justice of the European Union (CJEU) case of *Levola Hengelo* on whether copyright can vest in the taste of spreadable cheese (answer was no), the CJEU have confirmed the position that a copyright 'work' is an autonomous concept of EU law. The UK has traditionally adopted a narrow approach to the definition of 'work' ruling out those creations which do not fit neatly into the categories or

sub-categories of 'work' identified in the UK copyright legislation (CPDA 1988) (see, for example, *Creation Records 1997*). Following the CJEU decision, it appears that certain subject matter previously denied copyright by the UK courts may now be eligible to benefit from protection (eg, video games).

In another example of the expansion of the scope of copyright at the EU level, the AG Opinion in *G-Star* suggests that the UK will no longer be able to deny copyright protection to designs if they do not meet the criteria of being a work of art. If followed by the CJEU, this will open up copyright protection to original fashion designs.

United States

Andrew H Bart, Steven R Englund, Susan J Kohlmann and Andrew J Thomas

Jenner & Block LLP

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The main copyright statute in the United States is the Copyright Act, which is codified in Title 17 of the United States Code (17 USC section 101 et seq), and is referred to as the Copyright Act of 1976. It originally took effect on 1 January 1978, and has been amended numerous times since. In addition, 18 USC section 2319 provides for criminal penalties for certain copyright infringement actions.

Enforcement authorities

2 | Who enforces it?

The copyright laws of the US are generally enforced through civil lawsuits initiated by copyright owners. In certain circumstances, as described in question 43, the US federal government may initiate a criminal copyright enforcement action against an alleged infringer at the request of the copyright owner. Copyrights are also sometimes enforced against imported goods through actions at the US International Trade Commission. A copyright owner can record its rights with US Customs and Border Protection, which will then seek to stop the infringing products at the border and prevent them from entering the US.

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

Various specific provisions of the Copyright Act address digital exploitations, including the following.

Section 106(6) provides a sound recording performance right limited to performances by means of a digital audio transmission, and sections 114 and 112(e) provide statutory licences for certain kinds of digital performances of sound recordings, including noninteractive internet webcast performances, along with ephemeral copies made to facilitate such performances.

Section 115 provides a statutory licence for 'mechanical' reproduction and distribution of musical works with special provisions for 'digital phonorecord deliveries'. In 2018, the Music Modernization Act (MMA) substantially revised section 115 to provide for blanket licensing of musical works to digital music services (see 'Update and trends').

Section 512 of the Act, which was added by the DMCA, creates a conditional safe harbour for online service providers by shielding them from money damages and limiting injunctive relief for certain acts of direct and secondary liability when they meet certain requirements. In particular, safe harbours are provided for transitory digital network

communications, system caching, storage of information at the direction of a user, and the provision of information location tools, subject to detailed requirements for each safe harbour and certain generally applicable requirements.

Chapter 12 of the Act, which was also added by the Digital Millennium Copyright Act (DMCA), provides civil and criminal remedies for certain circumventions of technological protection measures that control access to works or protect works from copying or other infringement (digital rights management (DRM)), as well as for certain violations involving the integrity of copyright management information.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

US copyright law generally does not have extraterritorial effects. However, US law would not view as extraterritorial the enforcement of the Act against infringing transmissions from a foreign-operated website into the US. Accordingly, there has been successful enforcement of the US Copyright Act against foreign-based sites. The US also has applied civil forfeiture provisions to seize US-registered internet domain names associated with foreign-owned and foreign-operated websites that infringe US copyright by targeting distribution of infringing copies into the US.

Agency

5 | Is there a centralised copyright agency? What does this agency do?

The Copyright Office is the centralised copyright agency in the US. It administers various provisions of the Copyright Act and serves as an office of record where private parties' claims to copyright are registered and where documents relating to copyright may be recorded to give notice thereof.

The Copyright Office also:

- furnishes information to the general public about copyright law;
- provides expert assistance to Congress and the executive branch on copyright matters;
- analyses and assists in drafting copyright legislation and undertakes studies for Congress;
- assists the Department of State, the US Trade Representative's Office and the Department of Commerce in negotiating international intellectual property agreements;
- provides advice to Congress on compliance with international agreements; and
- provides technical assistance to other countries in developing their own copyright laws.

Additionally, a separate unit of the Library of Congress, the Copyright Royalty Board, determines royalty rates and terms, and distributes royalties, under statutory licences in the music, cable and satellite television industries.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

US copyright law protects any qualifying 'original works of authorship' that are fixed in a tangible medium of expression so as to be perceptible for more than a transitory duration. The fixation need not be directly perceptible, so long as it may be perceived with the aid of a machine or device. Protected works include the following categories:

- literary works, including characters;
- musical works, including any accompanying words;
- dramatic works, including any accompanying music;
- pantomimes and choreographic works;
- pictorial, graphic and sculptural works;
- motion pictures and other audiovisual works;
- sound recordings created on or after 15 February 1972, as well as certain earlier foreign sound recordings entitled to US protection under international treaties (earlier recordings are generally protected under state law); and
- architectural works created on or after 1 December 1990 (or created but not published or constructed prior to that date, and constructed by 31 December 2002).

In 2018, the MMA added section 1401 to the Copyright Act, which provides specialised protection to sound recordings created before 15 February 1972. (See 'Update and trends'.)

Rights covered

7 | What types of rights are covered by copyright?

The Copyright Act generally gives the owner of a copyright the exclusive right to:

- reproduce the work in copies or phonographic records;
- prepare derivative works based upon the work;
- distribute copies or phonographic records of the work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- perform the work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes and motion pictures, and other audiovisual works;
- display the copyrighted work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work; and
- perform the work publicly by means of a digital audio transmission, in the case of sound recordings.

Excluded works

8 | What may not be protected by copyright?

The following may not be protected by copyright:

- works that have not been fixed in a tangible form of expression;
- words and short phrases such as names, titles and slogans;
- familiar symbols or designs;
- mere variations of typographic ornamentation, lettering or colouring;
- mere listings of ingredients or contents;

- facts, ideas, procedures, processes, systems, methods, concepts, principles, discoveries, as distinguished from descriptions, explanations or illustrations;
- blank forms that are designed for recording information and do not themselves convey information; and
- works containing no original authorship.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

US law recognises the doctrine of fair use, which is codified in section 107 of the Copyright Act. Under section 107, courts are to consider four non-exclusive factors in determining whether a particular use is fair usage. These are:

- the purpose and character of the use (especially whether the use is 'transformative' in nature and, to some extent, whether it is for commercial or for non-profit educational purposes; a use is considered 'transformative' if it does not merely supersede the original work, but instead adds new expression, meaning or message with a further purpose or different character);
- the nature of the copyrighted work;
- the amount and substantiality of the portion taken; and
- the effect of the use upon the potential market for or value of the copyrighted work.

Courts have suggested additional non-statutory factors that may bear on a fair use analysis, such as whether an alleged infringer acted in good faith. Courts apply these factors to particular situations on a case-by-case basis, weighing the factors in light of the purposes of copyright. The outcome of any given question of fair use can therefore be difficult to predict.

Architectural works

10 | Are architectural works protected by copyright? How?

Architectural works are protected by copyright. For this purpose, an architectural work is defined as 'the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings'. Protection extends to 'the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features'. Protection is generally provided on the same basis as for other types of works, except that pictorial representations of constructed buildings are permitted, and building owners are permitted to alter or destroy their buildings without the consent of the author or copyright owner.

As noted in question 6, protection is available for any architectural work created on or after 1 December 1990. In addition, any architectural works that on 1 December 1990 were not constructed, but were embodied in unpublished plans or drawings, and were constructed by 31 December 2002, are eligible for protection. Architectural works embodied in plans published or buildings constructed prior to 1 December 1990 are not protected by copyright.

Performance rights

11 | Are performance rights covered by copyright? How?

The US Copyright Act provides a general right of public performance for literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works. The Act also provides public performance rights for sound recordings, but these are limited to performances by means of a digital audio transmission.

To be a 'public' performance, the work must be performed in a place open to the public or to a 'substantial number' of people outside of a family and its social acquaintances, or be transmitted in such a way that members of the public are capable of receiving it. Thus, a public performance may be accomplished by rendering a work to an audience present in a public or semi-public place or by transmitting a work by radio, television, internet or other means.

Exemptions are provided for various kinds of performances in specialised circumstances. For example, performances of non-dramatic literary or musical works to an audience present where the performance occurs (not performances by means of transmission) are exempted if the performances are not for commercial advantage, no compensation is paid to the performers or organisers, and admission is free (or where the copyright owner has not objected, any proceeds are used for charitable purposes).

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

While US law does not use the term 'neighbouring rights', it recognises various rights similar to ones covered by that term in other countries. Rights of performers and producers of audiovisual works and of sound recordings created on and after 15 February 1972, as well as broadcasters and creators of photographs and many databases, are protected in the US as a matter of federal copyright law. In addition, other provisions of US federal or state law provide protection that might be considered neighbouring rights in some other countries include:

- Until 11 October 2018, sound recordings created before 15 February 1972 were generally protected under a combination of state common law copyright, unfair competition and specialised statutory provisions. Since that date, section 1401 of Title 17 provides specialised protection to sound recordings created before 15 February 1972 (see 'Update and trends').
- Integrated circuit layouts (called 'mask works') are protected under specialised provisions in Chapter 9 of Title 17.
- Unauthorised fixation and trafficking in live musical performances are prohibited by Chapter 11 of Title 17.
- Designs of boat hulls and decks are protected under specialised provisions in Chapter 13 of Title 17.
- Hot news misappropriation is a recognised common law tort in some states, and covers the use of time-sensitive information by a competitor regardless of whether the information is protected by copyright law (although the scope of protection for hot news is likely fairly narrow due to federal copyright law pre-emption).
- A majority of states recognise the right of publicity, which protects the use of a recognisable aspect of an individual's persona (such as his or her image or voice) in advertising or trade.

Moral rights

13 | Are moral rights recognised?

Moral rights are protected to some extent, but they are more narrowly defined and of less practical effect in the US than in many other jurisdictions.

The Copyright Act provides only limited moral rights of attribution and integrity to authors of a narrowly defined class of works of visual art, under the Visual Artist Rights Act (VARA). VARA provides authors of limited edition works of the fine arts and exhibition photographs the right to claim or disclaim authorship in a work; limited rights to prevent distortion, mutilation or modification of a work; and the right, under some circumstances, to prevent destruction of a work that is incorporated into a building. The legislation provides for waiver of these moral rights, but only by a signed, written agreement specifically identifying

the work and the uses of the work to which the waiver applies. The Copyright Act's exclusive right to prepare derivative works protects all types of works against modification, but is freely assignable and also subject to limitations such as fair use. The Copyright Act also prohibits providing false copyright management information (CMI), including the name and identifying information of the author, and removing or altering CMI in certain circumstances.

State laws relating to privacy, publicity, contracts, fraud, misrepresentation, unfair competition and defamation, and the federal Lanham Act also provide certain protections consistent with the concept of 'moral rights'.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

Although US law once required use of a copyright notice as a condition of copyright protection, notice has been optional on copies of works published since 1 March 1989. A copyright notice generally consists of the symbol '©', the word 'copyright' or the abbreviation 'copr', the year of first publication and the name of the copyright owner (for example, '© 2018 John Smith'). For sound recordings, a copyright notice consists of the symbol ' ', the year of first publication and the name of the copyright owner.

15 | What are the consequences for failure to use a copyright notice?

The only current legal consequence of a failure to use a copyright notice is that it makes it easier for an infringer of the work to claim that he or she is an 'innocent infringer'. However, if a work was published without notice before 1 March 1989, the omission may have caused copyright to be lost.

Deposit

16 | Is there a requirement of copyright deposit?

The owner of copyright or of the exclusive right of publication in a work published in the US generally is required to deposit two copies of the best edition of the work in the Library of Congress within three months after the date of publication. Such a deposit is not a condition of copyright protection.

Such a deposit is generally accomplished in connection with copyright registration (see questions 18 to 21). However, copyright registration is optional. If the copyright owner chooses to register his or her work with the Copyright Office, the applicant must submit specified copies of the work along with the application. Upon their deposit in the Copyright Office, all copies and identifying material, including those deposited in connection with applications that have been refused registration, become the property of the US government. The details of the deposit requirement vary depending on the type of work involved.

17 | What are the consequences for failure to make a copyright deposit?

If a mandatory deposit is not made on demand, a fine may be levied, and the relevant person may be required to pay the Library of Congress' cost of buying the copies demanded. In addition, when registration is sought, the underlying work will not be registered unless the required deposit copy or copies are submitted to the Copyright Office.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

The US has a copyright registration system. To apply for a copyright registration, the author must submit a completed application form, a non-refundable filing fee, and a non-returnable deposit copy or copies of the work to be registered. The primary means of registration is to use the Copyright Office online system called Electronic Copyright Office (eCO). When using the online system, the filing fee is paid online, and deposit copies of certain categories of works can be uploaded directly. Otherwise, hard copy deposits are submitted with a shipping slip that allows the Office to associate the deposit with the online registration record. Paper forms can also be used for copyright registration, but require payment of a higher filing fee and involve a longer processing time. Forms can be downloaded from the Copyright Office's website (www.copyright.gov), picked up in person or requested by post.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

There is no requirement that a work be registered. Copyright protection exists from the moment the work is created. However, for 'US works' (generally works first published in the US or unpublished works where all the authors are US nationals), registration is a prerequisite to suing for infringement.

20 | What are the fees to apply for a copyright registration?

The standard registration fee for a simple application submitted through the eCO online system is US\$35. When there are multiple authors, a claimant who is not the author, multiple works, or a work made for hire, the fee for an online application is US\$55. When paper forms are used, the standard fee is US\$85. The fee for expedited service is US\$800.

21 | What are the consequences for failure to register a copyrighted work?

As noted in question 19, a US work must be registered to bring a suit for infringement. In addition, attorneys' fees and statutory damages will be unavailable if the author has not registered the work within certain time requirements.

Registration is also recommended because it gives the public notice that the copyright owner claims copyright protection in the work. Finally, if registration occurs within five years after first publication, the registration certificate is considered *prima facie* evidence of copyright validity and of the facts concerning authorship and ownership stated in the certificate. This presumption is important, because it can greatly simplify proving copyright ownership in a court, particularly when multiple works are at issue or it is necessary to prove authorship or ownership many years after the creation of a work.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The general rule is that the author of the work initially owns the copyright. As discussed in question 23, a corporate entity can be considered the author in the case of a work made for hire. The initial owner of copyright may assign its rights (see question 26).

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

An employer will be considered the author of a work, and will initially own the copyright, when the work is a 'work made for hire'. A work will be considered a work made for hire if it is prepared by an employee within the scope of his or her employment. Traditional common law agency principles are applied to determine who constitutes an employee. As an alternative to the 'work made for hire' doctrine, an employer may own a copyrighted work as the result of an assignment from his or her employee.

24 | May a hiring party own a copyrighted work made by an independent contractor?

A hiring party may own a copyrighted work made by an independent contractor either by assignment, or in some circumstances, as a work made for hire. If a work prepared by an independent contractor is considered a work made for hire, the hiring party will be considered the author of the work. For a work created by an independent contractor to be considered a work made for hire the parties must expressly agree in a written document signed by them that the work will be considered a work made for hire, and the work must be specially ordered or commissioned for use as:

- a contribution to a collective work;
- a part of a motion picture or other audiovisual work;
- a translation;
- a supplementary work;
- a compilation;
- an instructional text;
- a test;
- answer material for a test; or
- an atlas.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Copyrights can be co-owned either in the case of a joint work (described further below) or by assignment or other transfer of ownership (such as inheritance). In either case, unless the co-owners have agreed otherwise, a co-owner can exploit or license the work without seeking permission from the other co-owners, but owes the other co-owners a duty to account for the profits of such exploitation or licensing. A co-owner cannot grant a licence that is exclusive as to the interests of another co-owner without the agreement of the other co-owner.

When one or more people create a single work together, the result is a joint work in which the copyright is initially co-owned by the joint authors. A joint work is defined by the Copyright Act as 'a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.' Under this definition, all the involved authors must intend that their contributions be combined, and this intention must exist at the time the contribution is created. It is not necessary that the contributions be equal in effort or value. Nor is it necessary that the joint authors work in the same physical area or at the same time. If a joint work exists, then both authors are co-owners of equal, undivided interests in the entire work.

However, not everyone who makes any contribution to a work will be considered an 'author' of the work. Whether a contribution rises to the level of authorship generally requires that a person contribute copyrightable expression and play a sufficiently important role in the creation of the work to be considered an author (based on factors such

as an intention shared with other authors of the work to be co-authors, control over the work, receiving credit commensurate with other authors, and contribution to the audience appeal of the work).

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred. However, a transfer of exclusive rights (other than by operation of law) is not valid unless that transfer is memorialised in a writing signed by the owner of the rights conveyed or such owner's duly authorised agent. The writing need not be made at the time of assignment. A letter or other writing confirming the agreement is sufficient. Transfer of a right on a non-exclusive basis does not require a written agreement. A copyright may also be conveyed by operation of law and may be bequeathed by will, or pass as personal property by the applicable laws of intestate succession.

Copyright is a personal property right, and is subject to state laws that govern the ownership, inheritance or transfer of personal property as well as the terms of contracts. Although the recording of a transfer in the US Copyright Office is not required to make the transfer valid between the parties, it does provide certain legal advantages against third parties, as described in question 31.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Copyright rights can be licensed on an exclusive or non-exclusive basis. The holder of an exclusive licence is the owner of the licensed right and as such is entitled to sue any party that infringes the right while the exclusive licensee owns it. A non-exclusive licence gives the licensee the right to exercise one or more of the copyright owner's rights, but does not prevent the copyright owner from giving others permission to exercise the same right or confer standing to sue.

28 | Are there compulsory licences? What are they?

The Copyright Act provides various compulsory licences (sometimes referred to in the US as 'statutory licences'):

- section 111 – secondary transmissions by cable systems;
- section 112 – ephemeral reproductions of sound recordings;
- section 114 – public performance of sound recordings by means of digital audio transmissions;
- section 115 – 'mechanical' reproduction and distribution of musical works;
- section 118 – use of certain works in non-commercial broadcasting;
- section 119 – secondary transmissions by satellite carriers; and
- section 122 – local retransmissions by satellite carriers.

These licences are all very different from each other, and the details of most of them are fairly complicated. The section 122 licence is generally royalty-free. Otherwise, royalty rates under these licences are determined, or subject to adjustment in certain circumstances, by the Copyright Royalty Board. Royalties under sections 111 and 119 are paid into the Copyright Office and distributed to copyright owners under the supervision of the Copyright Royalty Board. Royalties under the other licences are paid directly to copyright owners or to collecting societies representing copyright owners and creators.

In addition to these compulsory licences, section 116 provides special authority for collective negotiations between copyright owners of musical works and operators of coin-operated phonorecord players

(jukeboxes), with the possibility of a rate determination by the Copyright Royalty Board if necessary.

29 | Are licences administered by performing rights societies? How?

In the case of musical works, there is no requirement that licences be administered by performing rights organisations, but songwriters and music publishers generally have chosen to have a performing rights organisation grant and administer voluntary collective licences on their behalf. The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music (BMI), SESAC and Global Music Rights are the principal US performing rights organisations for musical works.

In the case of sound recordings, SoundExchange collects and distributes royalties under the sound recording statutory licences on behalf of the featured artists and copyright owners of such works, and also under some direct licence agreements.

Termination

30 | Is there any provision for the termination of transfers of rights?

The Copyright Act has several provisions for termination of transfers. For transfers or licences executed by an author on or after 1 January 1978, the Act permits termination under certain conditions, generally between 35 and 40 years after first publication, by serving written notice on the transferee within specified time limits. For grants made before 1978 of 'renewal' rights to works under statutory copyright protection before 1978, the statute provides similar rights of termination, generally between 56 and 61 years after the date copyright was originally secured.

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

A document that transfers copyright ownership, and other documents pertaining to a copyright, may be recorded in the Copyright Office. To be recorded, the document filed for recording must bear the actual signature of the person who executed it or be accompanied by a sworn or official certification that it is a true copy of the original signed document. A recordation fee must be paid.

Recording of a document in the US Copyright Office gives all persons constructive notice of the facts stated therein (if the work has been registered), and recording a transfer also provides priority over certain conflicting transfers.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection exists from the time the work is created in fixed form. The copyright in the work of authorship immediately becomes the property of the author who created the work.

Duration

33 | How long does copyright protection last?

The length of copyright protection varies according to when the particular work was created and published, and according to whether the author is an identified natural person, as explained in more detail in question 34.

34 | Does copyright duration depend on when a particular work was created or published?

The duration of copyright protection depends on when a particular work was created and published and on the nature of the author. A work created on or after 1 January 1978 is automatically protected from the moment of its creation and is ordinarily given a term continuing for the author's life plus an additional 70 years after the author's death. In the case of a 'joint work prepared by two or more authors who did not work for hire', the term lasts for 70 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright is 95 years from first publication or 120 years from creation, whichever is shorter.

For works created before 1 January 1978, the duration of copyright depends on whether the work was published, or the copyright in the work was registered, before 1 January 1978. If so, the copyright term is 95 years from the date federal copyright was originally secured (usually the date of publication). Otherwise, the copyright term is generally computed in the same way as for works created on or after 1 January 1978. That is, the term is life plus 70 years, or 95 or 120 years, depending on the circumstances of authorship and publication. However, for works that were unpublished and unregistered on 1 January 1978 but were published on or before 31 December 2002, the term of copyright will not expire before 31 December 2047.

Both the requirements for copyright protection and the US copyright term have changed over time. In the past, the copyright term was shorter, and many pre-1978 works fell into the public domain earlier than the expiry of their full term. Determining whether any particular work created before 1 January 1978 is still under copyright is thus fairly complicated, and depends on factors such as the source country of the work, when the work was created and published, whether the work was published with notice, and whether the copyright was renewed during the 28th year after publication or registration (see question 35).

Similarly, the duration of the specialised protection for sound recordings created before 15 February 1972 depends on when a particular work was published. Such recordings published before 1923 will enter the public domain at the end of 2021. Unpublished pre-1972 recordings, and pre-1972 recordings published in 1923 or later, have varying periods of protection, with the last of them entering the public domain on 15 February 2067.

Renewal

35 | Do terms of copyright have to be renewed? How?

Renewal does not apply to works created on or after 1 January 1978, or to earlier works that were not published or registered before 1 January 1978. Works first published or registered up until 1963 had to be formally renewed, through a renewal registration in the US Copyright Office, to maintain protection. Failure to renew placed the work in the public domain. However, copyright protection was later restored to certain works of foreign origin that had fallen into the public domain due to failure to renew. For works first published or registered between 1964 and 1977, renewal was automatic, but obtaining a renewal registration provides certain advantages.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

The US term of copyright protection has been extended many times. Most recently, the Sonny Bono Copyright Term Extension Act of 1998 extended copyright terms by 20 years to yield the terms described in

question 34. While the extension was not applied to copyright that had already expired, it did extend the terms of existing copyright.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Copyright infringement occurs when a party violates any of the copyright owner's exclusive rights described in question 7. Assuming ownership of a valid copyright and no applicable authorisation, infringement requires both of the following:

- the alleged infringer, as a factual matter, copied from the copyright owner's work in the alleged infringer's activities of a type that implicates the copyright owner's exclusive rights described in question 7 (eg, reproduction, public performance); and
- the alleged infringer appropriated enough of the copyright owner's original expression to give rise to liability.

Application of these requirements in any particular case can vary widely depending on the nature of the defendant's activity. In a traditional case focused on a single work, where the defendant did not copy the plaintiff's work literally or in its entirety, there may be a substantial factual question as to whether the defendant even knew of the plaintiff's work, and even assuming the fact of copying, as to whether the defendant copied a sufficient amount of the plaintiff's work to consider the works 'substantially similar'. In a case involving the legality of an unlicensed online service, it is typically not disputed that the plaintiff's works were used in their entirety; the questions typically are, instead, whether the service is of a type that implicates the copyright owner's exclusive rights and whether the service provider is legally responsible for the activity.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Secondary liability for indirect copyright infringement has been established by case law, although it is not specifically prescribed by statute. Secondary liability can be found under several theories:

- vicarious liability, when the defendant has the ability to supervise the infringing conduct, and benefits financially from the infringement;
- contributory infringement, when the defendant has knowledge or reason to know of the infringement, and contributes to, authorises or induces the infringement; and
- inducement as discussed in the Supreme Court's *Grokster* decision, when the defendant acts with the object of promoting infringement, as shown by clear expression or other affirmative steps taken to foster infringement.

Available remedies

39 | What remedies are available against a copyright infringer?

Remedies for copyright infringement can include:

- payment to the copyright owner of any profits the infringer received and of any losses suffered by the copyright owner, or 'statutory damages' as an alternative to actual profits and losses;
- a court order restraining the infringer from continuing the infringing activity;
- confiscation and destruction of the infringing items; and
- attorneys' fees.

Limitation period

40 | Is there a time limit for seeking remedies?

The statute of limitations for bringing a civil copyright infringement claim is three years (and five years for criminal actions). It is measured from the time the claim accrued. In most courts, a claim is considered to accrue at the time the plaintiff knew or had sufficient reason to know that the infringement occurred. However, some courts may view a claim as accruing at the time the infringement occurred. If, at the time of suit, the infringement has been ongoing for more than three years since the claim accrued, the copyright owner is able to pursue remedies for the infringements occurring within the past three years. However, where the essence of a copyright claim is a dispute concerning ownership of the copyright, courts have rejected the assertion of an ongoing wrong and have dismissed the claim if it was brought more than three years after it accrued.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Monetary damages are available for copyright infringement. A party found liable for copyright infringement may be found liable for either the copyright owner's actual damages and any additional profits of the infringer, or statutory damages, as provided by the Copyright Act. However, statutory damages are only available if registration for the infringed work was obtained within certain time requirements.

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Both costs and attorneys' fees can be claimed in a copyright infringement action. They may be awarded to a prevailing party at the court's discretion if the work was registered with the US Copyright Office within certain time requirements.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

The Copyright Act has criminal provisions. It is a criminal offence to wilfully infringe a copyright if the infringement was committed:

- for either commercial advantage or private financial gain;
- by the reproduction or distribution, including by electronic means, during a 180-day period, of one or more copies or phonographic records of one or more copyrighted works, which have a total retail value of more than US\$1,000; or
- by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

The Copyright Act specifies various additional criminal offences:

- placing a fraudulent copyright notice on any article, or publicly distributing or importing for public distribution any article bearing such fraudulent notice;
- removing or altering any notice of copyright appearing on a copy of a copyrighted work with fraudulent intent;
- knowingly making a false representation of a material fact in an application for copyright registration, or in any written statement filed in connection with the application; and
- wilfully and for purposes of commercial advantage or private financial gain violating the provisions of the Act concerning circumvention of technological protection measures or those concerning

protecting the integrity of copyright management information (see question 3).

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

See question 3.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

Copyright owners in the US employ a mix of strategies to control copyright infringement, including:

- discouraging infringement by applying to their works a statutory copyright notice and sometimes other warnings against infringement, and by registering their works with the Copyright Office;
- employing technological protection measures to frustrate infringement;
- recording their works with US Customs and Border Protection, as described in question 2, to try to keep infringing copies out of the US market;
- policing the market to identify infringements, including sometimes by hiring specialised contractors to identify online infringements;
- invoking statutory or informal notice and takedown procedures to remove infringing material from online services;
- sending 'cease-and-desist' letters demanding that infringers stop infringing activity;
- bringing civil actions to pursue the remedies described in question 39; and
- in appropriate circumstances (see question 43), working with law enforcement authorities concerning possible criminal enforcement.

Trade associations and collecting societies representing copyright owners also take various measures on a collective basis to control infringement, including:

- supporting programmes to educate and inform the public concerning copyright compliance and legitimate sources of copyrighted material;
- operating telephone 'tip lines' and investigating infringements;
- facilitating collective enforcement action; and
- working with US government trade officials to resolve significant infringement issues abroad.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

The US is a party to:

- the Berne Convention for the Protection of Literary and Artistic Works (1886, as revised);
- the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974);
- the Buenos Aires Convention (1910);
- the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971);
- the Universal Copyright Convention (Geneva 1952 and Paris 1971);

- the World Intellectual Property Organization (WIPO) Copyright Treaty (1996);
- the WIPO Performances and Phonograms Treaty (1996); and
- the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013).

The US has signed the Beijing Treaty on Audiovisual Performances (2012). However, at the time of writing, that treaty has not yet been ratified by the US or entered into force.

The US is also a member of the World Trade Organization and a party to various free trade agreements containing copyright-related provisions.

47 | What obligations are imposed by your country's membership of international copyright conventions?

Each of the treaties identified in question 46 has its own unique requirements. They generally require a certain minimum level of protection in terms of the rights recognised and the duration of protection, and also create an obligation to honour the copyright of citizens of other treaty parties by affording them copyright protection in the US on the same basis as US citizens.

UPDATE AND TRENDS

Emerging trends and new legislation

- 48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?**

Music Modernization Act

On 11 October 2018, President Donald Trump signed the Orrin G Hatch-Bob Goodlatte Music Modernization Act (MMA) into law. This major piece of legislation significantly revised the provisions of the Copyright Act concerning licensing of music, particularly for delivery of downloads and interactive streaming.

The MMA makes five principal sets of changes to the Copyright Act:

- Creation of a blanket statutory mechanical license for digital music service providers, which will make mechanical licence administration for digital uses simpler and more efficient, and will ensure that a higher proportion of usage results in payment of statutory royalties to the proper music publishers and songwriters. The blanket licence will be administered by the Mechanical Licensing Collective, a non-profit organisation that will, among other things, develop and provide a publicly accessible database of current ownership information for musical compositions. Because it will take some time to get the collective up and running, the blanket licence will not be available until 1 January, 2021. To obtain a blanket licence once they become available, a digital music provider will need only submit a notice to the Collective.
- Substantial federalisation of copyright protection for pre-1972 sound recordings, which generally have only been protected under state laws. This specialised protection largely mirrors federal copyright protection, but there are important differences. For example, formalities such as registration do not apply, but there is a special statutory process for rights owners to record claims to works to be eligible to recover statutory damages. There is also a special statutory process for seeking permission for non-commercial uses of pre-1972 recordings that are not being commercially exploited.
- Adoption of a 'willing buyer, willing seller' rate standard to be used when setting rates for musical compositions and sound recordings under statutory licences.

JENNER & BLOCK LLP

Andrew H Bart

abart@jenner.com

Steven R Englund

senglund@jenner.com

Susan J Kohlmann

skohlmann@jenner.com

Andrew J Thomas

ajthomas@jenner.com

919 Third Avenue

New York, NY 10022

United States

Tel: +1 212 891 1600

Fax: +1 212 891 1699

633 West 5th Street

Suite 3600

Los Angeles, CA 90071

United States

Tel: +1 213 239 5100

Fax: +1 213 239 5199

1099 New York Avenue, NW

Washington, DC 20001

United States

Tel: +1 202 639 6000

Fax: +1 202 639 6066

www.jenner.com

- Changes to procedures for 'rate court' proceedings for public performance licenses administered by performing rights organisations ASCAP and BMI.
- Providing statutory procedures for producers, mixers, and sound engineers to receive royalties for the use of sound recordings under a statutory licence.

Circumvention of Technological Protection Measures

In 2018, the US Copyright Office completed a triennial rule-making proceeding to determine whether there are non-infringing uses of copyrighted works that are being unduly constrained by the prohibition on the circumvention of access controls in section 1201 of the Copyright Act, such that exemptions from that prohibition should be granted. In that proceeding, the Office continued all the previously existing exemptions, expanded some and added new exemptions. As a result of the proceeding, exemptions from the prohibition on the circumvention are now available in certain circumstances for:

- excerpts of motion pictures, for various types of criticism and comment;
- motion pictures, for certain uses by disability services offices at educational institutions;
- e-books, for use with assistive technologies for persons with print disabilities;
- compilations of data generated by implanted medical devices; and

- various types of computer programs, to allow:
 - unlocking of cell phones and certain other types of devices (use on alternative wireless networks);
 - jailbreaking of cell phones and certain other types of devices (allowing interoperation with or removal of software applications);
 - diagnosis, repair, or modification of motorised land vehicles;
 - diagnosis, repair, or modification of smartphones, home appliances and home systems;
 - good-faith security research;
 - preservation of computer programs other than video games by libraries and museums;
 - preservation of video games by libraries and museums, and play of certain discontinued games by individual gamers; and
 - use of alternative feedstock in 3D printers.

Supreme Court

For the first time in over a century, the US Supreme Court decided two copyright cases this year, in both unanimously deciding technical but important points of disagreement among lower courts.

In *Fourth Estate Public Benefit Corp v Wall-Street.com*, the Court held that the copyright owner of a US work must actually obtain a registration from the Copyright Office prior to filing an infringement action, rather than merely filing a registration application.

In *Rimini Street v Oracle*, the Court held that when a court awards costs to the prevailing party in a copyright case, it may only award costs in six categories specified in 28 USC §§ 1821 and 1920.

MORE TALK ABOUT JENNER & BLOCK

Chambers USA and Legal 500

Chambers USA writes that Partner Steven R. Englund, a contributing editor of this publication, is “a go-to-practitioner. Sources highlighted his prowess in the field, with one asserting that ‘he **KNOWS THE US COPYRIGHT ACT BETTER THAN ANYONE.**’” Legal 500 has also described Mr. Englund as “**A COPYRIGHT GURU.**”

Legal 500 – Leading Lawyers

Partners Andrew H. Bart and Susan J. Kohlmann, contributing editors of this publication, are recognized as “**LEADING LAWYERS**” in copyright law—two of just eight lawyers to make the elite nationwide list.

Law360 – Media & Entertainment MVP

Partner Andrew H. Bart was recognized among Law360’s 2017 and 2018 “**MVPs IN MEDIA AND ENTERTAINMENT.**

The National Law Journal – Intellectual Property Trailblazer

Partner Susan J. Kohlmann was named an “**INTELLECTUAL PROPERTY TRAILBLAZER**” in 2017.

California Lawyer – Attorney of the Year (CLAY) Award

Partner Andrew J. (A.J.) Thomas, a contributing editor of this publication, received a 2018 **CLAY AWARD** in the intellectual property category.

The American Lawyer – Litigator of the Week

Partner Susan J. Kohlmann was recognized as a 2017 “**LITIGATOR OF THE WEEK**” for leading the team that secured a \$13.15 million jury verdict after a week-long trial over the rights to writer John Steinbeck’s works.

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