

# Copyright

*Contributing editors*

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



2017

GETTING THE  
DEAL THROUGH 

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## Copyright 2017

*Contributing editors*

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

Copyright 2017

Twelfth edition

**Getting the Deal Through** is delighted to publish the twelfth edition of *Copyright*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**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 **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 new chapters on Bulgaria and Denmark.

**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.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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.

**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, Andrew J Thomas, Steven R Englund and Susan J Kohlmann, of Jenner & Block LLP, for their continued assistance with this volume.

GETTING THE   
DEAL THROUGH 

London  
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# 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, international treaties and proposed national legislation in various countries 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.

The unauthorised dissemination of copyrighted works over the internet continues to raise new questions for copyright owners worldwide, and has been the subject of proposed legislation as well as judicial decisions in various countries. For example, in 2015, Australia enacted legislation to provide for blocking of access to infringing overseas sites, and, in December 2016, the Federal Court issued the country's first site-blocking injunction, applicable to SolarMovie, the Pirate Bay, isoHunt, Torrentz, and other sites providing unauthorised online streaming of films and television shows. A proposal for legislation imposing heightened obligations on internet service providers and web-hosting companies is also pending in Switzerland. China and Spain have recently adopted new penalties for internet-related copyright infringement, including expanded criminal liability in Spain for facilitating online infringement by circumventing technical protection measures and by linking to copyrighted works in a manner that aids the systematic location of infringing content. Meanwhile, the courts in Brazil have held that making copyrighted content available on the internet constitutes a public performance, and proposed legislation in China would give explicit copyright protection to 'audiovisual works'.

Two major international copyright treaties remain pending. The 2012 Beijing Treaty on Audiovisual Performances is a multilateral treaty that would, for the first time, comprehensively bring audiovisual performers into the international copyright framework. Eleven countries have now ratified or acceded to that treaty; it will become effective when ratified by 30 countries. 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. Seventeen countries have now ratified or acceded to that treaty. Both treaties are yet to enter into force. In addition, on 4 February 2016, 12 Pacific Rim countries signed the Trans-Pacific Partnership (TPP), which contains significant copyright provisions. The United States withdrew from the TPP on 23 January 2017 but, in May 2017, the other 11 signatories indicated they were considering how to go forward without the United States.

Various countries have ongoing legislative efforts to update and modernise their copyright laws. In the United States, a wide range of copyright policy issues have been under review for several years. In the European Union, the Commission is considering a copyright modernisation initiative to address the Digital Single Market. Another issue being examined legislatively in multiple countries is management of collective licensing. Implementation of the 2014 EU Directive on Management of Copyright and Related Rights has been proceeding. Efforts to implement it are noted in the chapters concerning Germany and Greece. Other collective licensing proposals are under evaluation in India, Mexico and Switzerland.

Finally, a number of countries have proposed or enacted legislation to protect the unauthorised use of copyrighted works for certain purposes - including, for example, education and science under proposed legislation in Germany, online educational use under proposed amendments in Japan, and caricature, parody and pastiche under legislation enacted in 2014 in the United Kingdom to implement the EU Copyright Directive.

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

bvp Hügel Rechtsanwälte OG

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## Legislation and enforcement

### 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, co-author, 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 on the one hand and users on the other hand.

### 2 Who enforces it?

The civil law provisions of the Copyright Act regarding infringement of the exploitation rights and the 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 right holder.

### 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.

### 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 (No. C-441/13) that copyright owners are entitled to file the 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 arise 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.

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## Agency

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

Austria does not have a copyright agency, because the 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.

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

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.

### 7 What types of rights are covered by copyright?

The Copyright Act covers exploitation rights and moral rights (see question 14).

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 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 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 the limitation of copyright that is 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

type of use is not bound by the exploitation rights, and, hence, a work could be used in this manner freely without consent of the author.

### 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, that 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 ('ideas') are not protectable 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 become copyrightable.

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.

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

The Copyright Act does not include a fair use doctrine. Austrian law expressly determines the rights of the users to freely (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, the purpose of use, effect of the use, etc).

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

- 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 perceivable 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). Inter alia, 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).

### 10 What are the standards used in determining whether a particular use is fair?

Considering that the Copyright Act does not include a fair use doctrine, there are no standards that determine fair use of a work.

Austrian law prescribes the requirements of use of a work without the consent of the author for certain exemptions individually (see, for example, the right of citation or use by schools). Further, all limitations to copyright have to recognise borders, where they infringe moral interests of the author (section 57 of the Copyright Act). Hence, there are certain principles that have to be adhered to in order to perpetuate the right of integrity of works and the recognition or designation of authorship. According to section 57, paragraph 1 of the Copyright Act, the permissibility of abridging, adding to or otherwise altering a work itself, its title or the designation of the author shall also be determined in accordance with the right of integrity in the case of free uses. In no event may the meaning and essential nature of the work be distorted. Further, in general the author also has to be denominated.

### 11 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 would not be protectable. Hence, whether an architectural work can be granted protection will depend on whether the form elements only rely 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 moreover be qualified as artistic interpretation (see Austrian Supreme Court, Case No. 4 Ob 26/00b).

### 12 Are performance rights covered by copyright? How?

Performance rights in the sense of the rights granted to performers, such as musicians, actors or dancers, or any person reciting or performing a work of literature or music, on the one hand and to promoters on the other hand 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).

### 13 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 photograph. 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 (pseudonym, 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 implement more or less 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.

#### 14 Are moral rights recognised?

The Copyright Act recognises moral rights of the authors:

- 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

##### 15 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.

##### 16 What are the consequences for failure to display a copyright notice?

Not applicable.

##### 17 Is there a requirement of copyright deposit?

No, there is no such requirement.

##### 18 What are the consequences for failure to make a copyright deposit?

Not applicable.

##### 19 Is there a system for copyright registration?

No, there is no copyright registration in Austria.

##### 20 Is copyright registration mandatory?

Not applicable.

##### 21 How do you apply for a copyright registration?

Not applicable.

##### 22 What are the fees to apply for a copyright registration?

Not applicable.

##### 23 What are the consequences for failure to register a copyrighted work?

Not applicable.

#### Ownership and transfer

##### 24 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.

##### 25 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.

#### **26 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.

#### **27 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.

#### **28 May rights be transferred?**

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.

#### **29 May rights be licensed?**

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 right holder as well as third parties from using the work in the licensed scope.

#### **30 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 right holder has permitted another person to reproduce and distribute the work of language, so combined, on audio media.

#### **31 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 (no mandatory membership).

Their main task is to collect remuneration for the right 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 right 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 to the users under appropriate conditions and an adequate fee.

#### **32 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.

#### **33 Can documents evidencing transfers and other transactions be recorded with a government agency?**

Not applicable.

#### **Duration of copyright**

##### **34 When does copyright protection begin?**

Protection starts with the creation of the work.

##### **35 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 audiovisual carrier or an audio carrier, the term of copyright protection lasts for 70 years as of the publication of the recording.

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

##### **36 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.

##### **37 Do terms of copyright have to be renewed? How?**

The terms for copyright protection are not renewable.

##### **38 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 by 20 years, 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.

### Update and trends

The Austrian Copyright Act was last amended in 2015 (amendment published in the Federal Gazette I No 99/2015). The next update will follow as consequence of changes in the European Copyright law. The European Commission started its intention to harmonise and modernise the European Copyright law with the Regulation on cross-border portability of online content services as of December 2015 (2015/0284 (COD)), whose purpose is to allow EU residents to travel with the digital content they have purchased or subscribed to at home. This proposal was already agreed in the dialogues between the Commission, the European Parliament and the Council in February 2017, and will after its entry into force be applicable directly in Austria.

Further, in September 2016, the European Commission published a Communication for promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market (COM(2016) 592 final). This Communication included the proposal for a Directive on copyright in the Digital Single Market, COM(2016) 593, which inter alia wants to introduce a right of the press publishers for the exploitation of their publications in the digital environment, what is highly criticised in Austria. Further, the European Commission issued a proposal for a Regulation (COM(2016) 594) that aims at creating favourable conditions for new online ways of cross-border distribution of television and radio programmes comparable to those applicable to the more traditional transmissions via satellite and retransmissions via cable. Finally, two legislative proposals were adopted for the implementation in EU law of the Marrakesh Treaty, these are the proposal for a Regulation COM(2016) 595, and the proposal for a Directive COM(2016) 596.

## Copyright infringement and remedies

### 39 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 right holder (apart from the breach of contract between the parties).

### 40 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 right 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.

### 41 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 still legally entitled to remove such products (section 86).

Preliminary injunctions may be granted, inter alia, 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 43) shall also be required to render accounts to the right 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).

### 42 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.

### 43 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) are 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 lumped damage claim is calculated on the basis of double the amount for adequate compensation.

### 44 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 the court proceedings calculated on these principles.

### 45 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, effected 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.

### 46 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 right holder against the internet access provider to identify infringing users if there is an obvious rights infringement.

**47 How may copyright infringement be prevented?**

There is no failsafe 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 right holder to provide the best protection.

**Relationship to foreign rights****48 Which international copyright conventions does your country belong to?**

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

- the Berne Convention for the Protection of Literary and Artistic Works,
- 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 WIPO 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.

**49 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 (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 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 on satellite broadcasting and cable retransmission and the Directive on collective management of copyright and related rights and multi-territorial licensing.

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# Belgium

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## Legislation and enforcement

### 1 What is the relevant legislation?

In Belgium, the main copyright statute is the Act of 30 June 1994 on copyright and related rights. With effect from 1 January 2015, the Act has been integrated into the Belgian Code of Economic Law (CEL) as Book XI, Title V. This integration is part of the legislator's aim to modernise Belgian economic law by re-grouping all relevant laws into one national code, rather than having a dispersed set of rules. Save for a limited number of changes, which mainly serve the purpose of rendering collective management of copyright more transparent, the new text carries forward the provisions from the former Copyright Act.

The protection of computer programs and databases were initially governed by two separate Acts: the Act of 30 June 1994 implementing Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (the Computer Programs Act) and the Act of 31 August 1998 implementing Directive 96/9/EC of 11 March 1996 on the legal protection of databases (the Database Act). Both Acts have also been integrated in the Code of Economic Law as Book XI, Titles VI (computer programs) and VII (databases).

In addition to the provisions contained in the CEL, there are a considerable number of royal decrees, which include the following:

- Royal Decree of 6 April 1995 on collecting societies;
- Royal Decree of 18 October 2013 on the remuneration payable in the event of private copying;
- Royal Decree of 15 October 2006 on the designation of the society charged with the collection and distribution of the remuneration payable in the event of private copying;
- Royal Decree of 13 December 2012 on the remuneration payable to authors in the event of public lending;
- Royal Decree of 15 December 2006 on the designation of the society charged with the collection and distribution of the remuneration payable in the event of public lending;
- Royal Decree of 30 October 1997 on the remuneration payable in the event of reprography;
- Royal Decree of 15 October 2006 on the designation of the society charged with the collection and distribution of the remuneration payable in the event of reprography; and
- Royal Decree of 16 June 2016 on the financing and transparency of on the collection societies for copyright and neighbouring rights.

The royal decrees have been adopted under the former Copyright Act, Computer Act and Database Act but remain in force under the new legal regime.

### 2 Who enforces it?

Copyright enforcement mainly occurs through lawsuits initiated before the civil and criminal courts. For specific infringements relating notably to collecting societies, a complaint may also be filed with the Directorate-General Enforcement and Mediation at the Federal Public Service Economy, SMEs, Self-employed and Energy.

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### 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?

Article XI.291 of the CEL provides that the circumvention of technical protection measures (eg, decoders, set-top boxes for digital television, technical applications such as video-on-demand, and copy control mechanisms) and the provision of means to circumvent such measures is tantamount to a copyright infringement and may be subject to criminal sanctions including imprisonment of up to three years or a fine of between €600 and €600,000 (doubled in case of a repeat offence within five years of the first infringement).

A Belgian case involves a claim brought before the Antwerp Commercial Court by three Flemish broadcasters against RBI, the provider of an internet-based DVR (digital video recording) service called Bhaalu. Bhaalu allows its users to record television programs shown on channels that are part of their television subscription with a Belgian distributor. Subscribers to the Bhaalu recording service must, in order to benefit from this service, buy a receptor box. The recordings are stored in the cloud and can be watched via streaming by subscribers.

According to the broadcasters, the service offered through Bhaalu boils down, *inter alia*, to an illegal reproduction of their broadcasting signal and communication to the public (violation of article 44, paragraph 1, b and d, of the former Copyright Act – now article XI.215, b and d, CEL). The court agreed that the Bhaalu service constitutes a reproduction which required the broadcasters' consent, but that the reproduction was made by the subscribers, rather than the Bhaalu service provider RBI. It added however that the Bhaalu devices could not function without the interventions made by RBI and that these were inextricably linked to the copyright infringement (RBI used the private smartcard of subscribers to the Bhaalu service to decrypt the broadcasting signal, however, the making available of a television subscription to third parties is prohibited by the broadcasters' general terms and conditions). Since the reproduction was accordingly not lawfully obtained, the private copy exception cannot be successfully relied upon.

Finally, the court held that by making the broadcasts available to subscribers of the Bhaalu service at their convenience, in a place and time of their choosing, RBI violates the broadcasters' right to communication to the public of their broadcasting signal. In this respect, it noted that it is immaterial whether or not the communication reaches a new public. According to the court, the requirement of a new public only applies under specific circumstances. What counts is the fact that the technical means used by RBI to communicate the broadcasts differs from the ones used for the original broadcasts (Antwerp Commercial Court, 4 November 2014, IRDI, 2014/4, 673).

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

The laws governing copyright do not contain any specific rules that address this particular issue. Belgian courts will have jurisdiction with respect to foreign-owned or foreign-operated websites that infringe copyright in Belgium but only in relation to the damage caused in Belgium (see also CJEU, 22 January 2015, C-441/13, *Pez Hejduk*). There have been developments in cases regarding the role of intermediaries (internet service providers (ISPs)) that are relied upon for online infringing activities. Whereas certain ISP services fall within the scope

of the so-called 'safe-harbour' provisions that limit the liability of ISPs in an online environment (mere conduit, caching and hosting services as set forth by the E-Commerce Directive 2000/31/EC), these provisions are without prejudice to the right of injunction against an ISP.

In a case brought before the Court of Justice of the European Union (CJEU) between the Belgian collecting society SABAM and Scarlet, an ISP, the CJEU reminded that article 15(1) of the E-Commerce Directive prohibits national authorities from adopting measures which would require an ISP to carry out general monitoring of the information that it transmits on its network. This includes national measures that would require ISPs to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual property rights. It also noted that the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights, such as the freedom to conduct business. The court concluded that an injunction, by virtue of which an ISP would be ordered to put in place, as a preventive measure, at its sole expense and for an indefinite period of time, an electronic communications filtering system with a view to identifying the circulation of files containing allegedly copyright-protected material and subsequently blocking the transfer of such files, would result in a serious infringement of the freedom of the ISP concerned to conduct its business. Any such injunction would accordingly not respect the requirement that a fair balance be struck between the fundamental rights at stake (CJEU, 24 November 2011, C-70/10, *SABAM v Scarlet*, see also CJEU, 12 July 2011, C-324/09, *L'Oréal v eBay*, CJEU, 16 February 2012, C-360/10, *SABAM v Netlog NV and CJEU*, 29 January 2008, C-275/06, *Promusicae*).

In its decision of 27 March 2014, the CJEU mitigates this view somewhat, by stating that an ISP that allows its customers to access protected subject matter made available to the public on the internet by a third party may be ordered to block its customers' access to such copyright-infringing websites. As in the previous case, the court recalls that, within the framework of such an injunction, copyrights and related rights primarily enter into conflict with the freedom to conduct a business, which economic agents such as ISPs enjoy, and with the freedom of information of internet users. Accordingly, it is for the courts of the member states to ensure that a fair balance is struck between the injunction and its enforcement and those fundamental rights (CJEU, 27 March 2014, C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*).

## Agency

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

There is no centralised copyright agency. This can be explained by the fact that copyright protection is not subject to any particular formalities such as registration.

## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

Article XL165 paragraph 1, CEL grants protection to the author of a 'literary or artistic work', which is to be interpreted broadly to include all types of works in the broadest sense. In its decision of 16 July 2009, the Court of Justice of the European Union defined a work as any subject matter that is original in the sense that it is the author's own intellectual creation (CJEU, 16 July 2009, C-5/08, *Infopaq*).

A copyright protectable work must meet two criteria. The first is originality and, secondly, a work must further be expressed in a particular form. Mere ideas, concepts or methods are not protected. According to the CJEU, the criterion of originality is satisfied when the author expresses his or her creative ability by making free and creative choices and thus stamping his or her 'personal touch' (CJEU, 1 December 2011, C-145/10, *Painer* and 1 March 2012, C-604/10, *Football Dataco*).

Artistic value or novelty are not a prerequisite for protection. What is new is not necessarily original. Elements that are not new can be brought together to form an original composition (Comm. Gand, 19 April 2017, general docket No. A/16/05774)..

Provided the conditions set out above are met, any production in the literary, artistic or even scientific domain is eligible for copyright protection. Categories of protected works include writings, lectures, dramatic or musical works, choreographic works, musical compositions,

cinematographic works, works of drawing, painting, architecture, sculpture, engraving and lithography, photographic works, works of applied art, illustrations, maps and plans. The protection of advertising slogans and leaflets, book titles and user manuals has also been accepted in case law to the extent that these items meet the requirement of originality.

Models and designs, regardless of whether they are registered, can also be protected under the Copyright Act. Computer programs are treated as literary works in accordance with the Computer Programs Act (now Book XI, Title 6, CEL). The protection extends to preparatory design materials and the expression of the program in any form, with the exclusion, however, of the ideas and principles underlying the computer program.

It is for the party claiming copyright protection to demonstrate that the conditions are met. In its decision of 20 January 2015, the Brussels Court of Appeal held that there was no material evidence to support the claim that the cover of the Mexican classic song 'La Malagueña' made by Los Trios Paraguayos, and in particular the contribution to that cover by the band's harpist Digno Garcia, would be eligible for copyright protection. According to the court, the mere assertion that Mr Garcia's typical 'refined and striking harp compositions' would be immediately recognisable is insufficient to this end (Brussels Court of Appeal, 20 January 2015, general docket No. 2011/AR/726).

### 7 What types of rights are covered by copyright?

The rights conferred by copyright are twofold and include both economic and moral rights.

Economic rights relate to the exploitation of the work which, as a matter of principle, is the exclusive prerogative of the author. Economic rights include (i) the right to reproduce the work, which entitles the author to prohibit direct or indirect, temporary or permanent, material or intellectual, reproduction or copying of the work by any means, in any form, in whole or in part, in an identical manner or with differences, including translations and adaptations, (ii) the right to distribute the work, and (iii) the exclusive right to broadcast or communicate the work to the public.

Authors of graphic and plastic work moreover have a so-called 'tag along' or resale right. The purpose of this right is to ensure that these authors, or their heirs of beneficiaries, share in the economic success of their original works of art, by granting them a percentage of the resale price of a work each time it is sold on. With the entry into force of the CEL, the legislator switched from a system of optional to a compulsory system of collective management. As such, authors of a graphic or plastic work are no longer able to exercise their tag along right on an individual basis and resellers are no longer entitled to pay resale rights directly to the authors. The intervening collecting society in Belgium will be either SABAM or SOFAM.

See also question 14 regarding moral rights.

### 8 What may not be protected by copyright?

According to article 2(2) of the Berne Convention, mere ideas or concepts cannot be protected by copyright. This is in line with, among other provisions, article 9(2) of the TRIPS Agreement, which states that 'copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'. The news of the day or miscellaneous facts with the character of mere items of press information are equally excluded in accordance with article 2(8) of the Berne Convention.

Also excluded are forms that are merely functional or technical. In a case brought by Dutch company Friesland Brands against the Belgian manufacturer of, inter alia, whipped cream dispensers, the Brussels Court of Appeal held that the spraying nozzle of the dispenser marketed by Friesland is not eligible for copyright protection. According to the court, the characterising element of the nozzle is determined solely by its technical function. The other elements also lacked originality, whether taken separately or as a whole (Brussels Court of Appeal, 4 November 2014, joined cases 2011/AR/950 and 2012/AR/2401).

In the same way, in a recent judgment concerning a dispute between Jean Cassegrain SAS (Longchamp) and a Belgian reseller of leather handbags, the Ghent Court of Appeal denied copyright protection to Jean Cassegrain's handbag 'Le Pliage', on the basis that the characteristics of a style or fashion trend cannot be copyright protected, given that such protection could constitute an obstacle to the freedom

of expression of other potential creators (Ghent Court of Appeal, 20 October 2014, Ing.-Cons., 2014, 739). The decision of the Ghent Court of Appeal runs counter, however, to the position taken previously by Brussels and Liège Court of Appeal that handbags are eligible for copyright protection (Brussels Court of Appeal, 16 November 2004, RAGB, 2005, 1837; Liège Court of Appeal, 28 December 2006, IRDI, 2007, 26).

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

As is the case in most other continental EU member states, the Copyright Act does not contain a general exception for fair dealing or use. The Brussels Court of Appeal confirmed that, in contrast with the Anglo-Saxon legal system, there is no room for a general exception in the public interest (Brussels Court of Appeal, 5 May 2011, *Google News*, IRDI, 2011/3, 265). Instead, the balance between the interest of the author in having his or her work protected and that of the public in using a copyright-protected work is achieved through a limited number of exceptions that prevent the author from opposing the use of his or her work by others. According to article XI.190, CEL once the work has been (lawfully) disclosed for the first time, the author may no longer prohibit:

- the reproduction and communication to the public, for the purposes of information, of short fragments of the work (eg, in news reports);
- short quotations for the purpose of criticism, polemic, teaching or scientific works, whereby the quotation shall not be longer than what is justified by its purpose. The source and author should also be mentioned. In a case brought by Belgian collecting society Copiepresse against Google's Google News and Google Cache services, the Brussels Court of Appeal reminded that, since Google News only consists of extracts of press articles sorted automatically, without these articles being subjected to any kind of criticism, polemic, review or other legitimate purpose, Google could not rely on the quotation exception. Moreover, the quotation cannot form the main object of the comment, analysis or critical review and must be ancillary (Brussels Court of Appeal, 5 May 2011, *Google News*, IRDI, 2011/3, 265)
- the use of works exhibited in public places. This exception typically covers the accidental use of copyright-protected works found in public areas, such as, for instance, taking a photo of a person near a protected building or statue, where that building or statue is not the actual subject of the image;
- the panorama exception: reproduction of works of architecture or sculptures intended for permanent placement in public places, provided the reproduction is made on an 'as is' (no adaptations allowed);
- the performance of a work in the family circle and for educational purposes, whereby it is accepted that the term 'family circle' should not be taken too literally and that it is sufficient that the performance takes place in an intimate, private setting (eg, a retirement home or, in some cases, even a closed workshop). The exception for use for educational purposes does not apply if the performance takes place in a different context that is unrelated to teaching, the attainment of targets or pedagogic objectives, such as a school party;
- the use of a work as parody, caricature or pastiche, provided that such use complies with fair trade practices and is accordingly limited to what is necessary to allow or intend a humorous effect with no risk of confusion with the original work. The CJEU reminded the essential characteristics to be met by a work of parody in the *Deckmyn* case. According to the Court, a parody shall (i) evoke an existing work, while being noticeably different from it, and (ii) constitute an expression of humour or mockery. On the assumption that the essential requirements of parody are fulfilled, the Court noted that the application of the exception must still strike a fair balance between the interests and rights of both parties (notably between the freedom of expression of the user relying on the parody exception and the holder of copyrights on the original work (CJEU, 3 September 2014, C-201/13, *Deckmyn*). These principles have been recently applied by the Antwerp Court of First Instance in respect of a painting titled 'A Belgian Politician' made by a visual artist based on a photograph of a Belgian politician. The painting formed a key piece in the artist's collection and was exhibited during an exposition held in Nice and Las Vegas and subsequently sold to a private art collector. According to the photographer, the painting infringes his exclusive reproduction and moral rights to

the original work. The court rejected the artist's defence that his painting would constitute a form of 'appropriation art', has a different format and colour pattern than the original picture and that he could rely on the exception parody. According to the court, the painting takes on the various original elements of the original picture, including the incomplete image of the politician's face, position, angle, lighting and expression on the politician's face. There is no indication that it would constitute a parody (Antwerp Court of First Instance, 15 January 2015, *Juristenkrant* 2015, 2);

- the compilation of selected extracts from or fragments of works for teaching purposes, provided the compilation will not be used to pursue commercial gain;
- reproductions for the benefit of the disabled;
- reproductions during public exams to evaluate the performer with a view to granting or obtaining a certificate or diploma from an officially recognised educational institution. Private schools cannot rely on this exception;
- the making of a limited number of copies of works by public libraries, museums and archives to preserve cultural or scientific heritage;
- the use of a work for the purpose of promoting public exhibitions or sales events of artistic works; and
- the reproduction and communication of works for internal use by certain non-profit social institutions, such as hospitals, prisons and institutions for juveniles and the disabled.

Furthermore, and in accordance with article 5.5 of the Information Society Directive 2001/29/EC, all exceptions to the right holder's exclusive reproduction right are subject to the so-called three-step test. According to this provision, the exceptions shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder).

Finally, the exclusive rights of performing artists and producers are limited by the so-called legal licence for secondary use, which prevent performers or producers from objecting to any of the two following types of exploitation of a performance that has been lawfully reproduced or broadcasted:

- public performance in a public space for purposes other than entertainment and on the condition that no entrance fee is charged; and
- any subsequent broadcasting of the performance.

Secondary use does, however, give rise to payment to the competent collecting society of an equitable remuneration, the amount of which is determined by various royal decrees.

### 10 What are the standards used in determining whether a particular use is fair?

See question 9.

### 11 Are architectural works protected by copyright? How?

Works of architecture and sculptures are protected by copyright like all other works. The single condition that needs to be met is that of originality. The scope of protection granted to architectural works is, however, limited somewhat by the exception for the accidental use of works exhibited in a public place, for instance, where a picture is taken in front of a protected building but the building itself is not as such the subject of the picture. A concrete assessment will, however, need to be made to assess whether the exception may be lawfully relied upon.

### 12 Are performance rights covered by copyright? How?

Performance rights (also referred to as neighbouring rights) are granted to performing artists (singers, musicians, dancers, actors, etc), phonogram and film producers (the natural person or legal entity that financed the realisation of and bears the risk in relation to the 'master tape', ie, the first fixation of the film or phonogram) and broadcasting organisations. Their purpose is to protect an artistic contribution or financial investment in literary or artistic works by any of these three categories of performers. Performance rights include:

- the exclusive right to authorise or prohibit the communication to the public of their performance, phonogram, film or broadcasting, whether directly or indirectly and regardless of the technical means used (eg, the internet);

- the right to reproduce their performance, master tape or broadcasting, whether permanently or temporarily, in whole or in part and regardless of the reproduction technique; and
- the right to distribute, loan or rent (copies of) the protected performances, phonograms, films or broadcasting, in any form.

In addition to these exploitation rights, only performing artists are granted moral rights, particularly the right to paternity and integrity of their performance. Producers and broadcasting organisations are not.

Copyright and performers' rights protection apply cumulatively, meaning that authorisation of the copyright holder to communicate a work to the public does not excuse the user from also requesting the authorisation of the holder of any neighbouring rights, at least insofar as their performance or fixation is used, and vice versa.

### 13 Are other 'neighbouring rights' recognised? How?

There are no specific neighbouring rights other than those mentioned in question 12.

### 14 Are moral rights recognised?

Moral rights are described in article XI.165, paragraph 2, CEL and include the following:

- the right to disclose the work to the public for the first time;
- the right to be identified as the author of the work, known as the paternity right. This also includes the right of the author to refuse to have his or her name associated with a work and to remain anonymous; and
- the right to preserve the integrity of the work, which entitles the author to object to any distortion, mutilation or other modification of the work that would be prejudicial to his or her honour or reputation.

There is a notable difference in the scope of such rights in respect of computer programs, which does not include the moral right to disclose the work to the public for computer programs. Also, the right to integrity is limited to the right to object to certain modifications and actions only to the extent they are prejudicial to the developer's honour and reputation, whereas this is much broader for other copyright-protected works.

## Copyright formalities

### 15 Is there a requirement of copyright notice?

It is not necessary to use a copyright notice for the work to enjoy protection. However, using a copyright notice does offer certain advantages, as third parties are made aware of the fact that they may not freely use the work concerned. A copyright notice may also serve as a (rebuttable) presumption of ownership of copyright.

### 16 What are the consequences for failure to display a copyright notice?

There are no consequences if no copyright notice is displayed.

### 17 Is there a requirement of copyright deposit?

As is the case for the use of copyright notice, depositing a work is not a legal requirement but can be used to demonstrate that a work for which protection is claimed already existed on a certain date. A deposit does not, however, give rise to the creation of copyright or offer legal protection.

### 18 What are the consequences for failure to make a copyright deposit?

There are no consequences if a deposit is not made.

### 19 Is there a system for copyright registration?

No.

### 20 Is copyright registration mandatory?

Since Belgium is a signatory of the Berne Convention, copyright protection is not subject to any formalities.

### 21 How do you apply for a copyright registration?

Not applicable.

### 22 What are the fees to apply for a copyright registration?

Not applicable.

### 23 What are the consequences for failure to register a copyrighted work?

There are no consequences if no registration is made of a copyright protected work. The rights originate by the mere creation of an original work, if it fulfils the conditions for copyright protection.

## Ownership and transfer

### 24 Who is the owner of a copyrighted work?

As a general rule, copyright inures to the author of the work. Article XI.170, CEL provides for a rebuttable presumption of ownership in favour of the person or company whose name or identifying sign is mentioned on the work. The presumption also applies to legal persons but may be refuted by the natural person who created the work.

### 25 May an employer own a copyrighted work made by an employee?

Article XI.167 paragraph 3, CEL provides that, for works other than computer programs developed by employees, there is no automatic transfer of an employee's copyright to the employer. This must be expressly agreed upon. However, when a design is also protectable by copyright, under the Benelux Convention on Intellectual Property (BCIP), the design rights and the copyright shall belong to the employer if the design has been developed by an employee in the execution of his duties, unless otherwise agreed.

With regard to computer programs, there is a rebuttable presumption that the economic rights to the computer programs automatically vest in the employer, unless explicitly agreed otherwise (article XI.296, CEL). The presumption only applies to the object and source code and not to documentation and manuals related to the computer program and computer programs created by non-employees (eg, self-employed persons).

Please see question 28 regarding the scope of assignment.

### 26 May a hiring party own a copyrighted work made by an independent contractor?

The same rules apply to works made by an independent contractor as to those made by an employee (see question 25). Any assignment shall, accordingly, be expressly agreed upon between the parties. Except when a design is also protectable by copyright, the BCIP provides that if the design has been created on commission, the commissioning party shall, unless otherwise specified, be deemed the designer and owner of the copyright, provided that the commission was given with a view to commercial or industrial use of the product in which the design is incorporated.

### 27 May a copyrighted work be co-owned?

If several natural persons have collaborated on a copyright-protected work, it is subject to co-ownership. According to article XI.169, CEL, where the contributions of each author can be individualised, these authors may not, unless otherwise agreed, use their works with new collaborators. Nevertheless, they have the right to exploit their contribution separately, provided that such exploitation does not prejudice the common work.

### 28 May rights be transferred?

Whereas economic rights may be freely transferred, this is not the case for moral rights. Their exercise may, however, be restricted or waived by contract, subject to the following restrictions:

- a general waiver of the future exercise of these rights is not possible; and
- the author shall at all times reserve the right to object to any mutilation, distortion, or other modification of his or her work that would adversely affect his or her honour or reputation (article XI.165 paragraph 2, 1° and 7°, CEL).

According to certain legal authors, the foregoing does not apply to computer programs, so that the developer may freely assign his or her moral rights to the program. Express provision should be made for the assignment of these moral rights. For instance, where a computer program is created by an employee in the performance of his or her duties or pursuant to instruction given by the employer, moral rights shall in principle remain with the employee, unless they have been expressly assigned to the employer. The majority of legal literature, however, is in favour of the general inalienability of software developers' moral rights. As under the Copyright Act, developers should accordingly be able to waive the exercise of their rights under the same conditions as those that apply to other works, but they may not be assigned.

As for the transfer of economic rights, this must in principle be agreed upon in writing. The duration and geographic scope, as well as the price to be paid, shall further be specified for each manner of use or exploitation. Any right granted in respect of methods of exploitation unknown at the time the contract is entered into is invalid. The foregoing does not apply to an employer and employee or a customer and contractor in the non-cultural sector.

Rights to future works may also be transferred, provided the nature of the work is specified and the transfer is limited in time. According to the preparatory works to copyright legislation, this simply means that the expiry date of the transfer should be certain but not fixed and may, for instance, be linked to a future event.

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### 29 May rights be licensed?

Copyrights may be licensed subject to the same conditions as those that apply to the transfer of rights (see question 28).

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### 30 Are there compulsory licences? What are they?

Under Belgian law, compulsory licences only exist in respect of neighbouring rights of performing artists and producers (see the explanations in question 9 regarding the legal licence for secondary use). In all other cases, the exclusive rights of the author are limited mainly by those exceptions also discussed in question 9.

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### 31 Are licences administered by performing rights societies? How?

Performing artists are free to adhere to any relevant performing rights society that will collectively manage their rights in respect of any public exploitation of their performance or work.

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### 32 Is there any provision for the termination of transfers of rights?

See question 28.

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### 33 Can documents evidencing transfers and other transactions be recorded with a government agency?

Contrary to other intellectual property rights such as trademarks, models and designs and patents, no registration formalities apply in order for a licence granted in respect of copyright to be enforceable against third parties. In accordance with the general law of contract, third parties shall recognise their existence as a matter of pure fact.

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## Duration of copyright

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### 34 When does copyright protection begin?

Copyright protection begins from the moment of creation of the work.

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### 35 How long does copyright protection last?

Copyright protection extends for a period of 70 years from the author's death. In case of multiple authors, protection expires 70 years after the death of the last surviving author. For cinematographic or audiovisual works, the term of protection expires 70 years after the death of the last of the following persons to survive: the principal director, the author of the screenplay and the dialogue or the composer of music created specifically for the cinematographic or audiovisual work. For anonymous or pseudonymous works, the 70-year period commences from the date the work has been made available to the public.

With the Code of Economic Law, the Belgian legislator also implemented Directive 2011/77/EU on the protection of copyright and certain related rights and extended copyright terms on recordings from

50 to 70 years. The purpose of the extension is to align the protection granted to certain holders of neighbouring rights, particularly performing artists and phonogram producers, with that already given to authors. According to article XI.208, CEL, the term of protection of a performance fixed on a phonogram is extended from 50 years to 70 years from the date of the first publication or communication to the public, whichever event occurred first.

However, in case of fixation of the performance other than in a phonogram, the duration of neighbouring rights remains limited to 50 years from the date of first such publication or communication, as was the case before. In the same way, the term of protection granted to phonogram producers is equally extended from 50 to 70 years from the first lawful communication to the public. The terms shall be calculated from 1 January of the year following the event that triggers the term. The new, extended terms of protection to all fixations of performances and phonograms that are still protected on 1 November 2013 and to those that come into being after that date. The new legal regime is without prejudice to acquired rights of third parties by virtue of contract or the law prior to 1 November 2013.

For all other categories, the duration of neighbouring rights is limited to 50 years from the first transmission of the broadcast, the first fixation of a film, etc.

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### 36 Does copyright duration depend on when a particular work was created or published?

The duration of copyright protection is the same for all types of works, irrespective of when they have been created or made available to the public. The single exception to this rule relates to anonymous or pseudonymous works, for which the term of protection shall expire 70 years after the work is lawfully made available to the public. If the work has not been lawfully made available to the public within 70 years from their creation, protection shall also terminate. See also question 35 regarding fixations of performances and phonograms.

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### 37 Do terms of copyright have to be renewed? How?

Copyright does not need to be renewed.

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### 38 Has your jurisdiction extended the term of copyright protection?

In 1994, the term of existing copyrights was extended from 50 years to 70 years through the application of Directive 93/98/EEC of 29 October 1993.

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## Copyright infringement and remedies

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### 39 What constitutes copyright infringement?

Copyright is infringed if a work is used in violation of the author or right holder's exclusive rights. The Copyright Act does not provide for specific rules on the assessment of copyright infringement by way of reproduction, but the following criteria can be distilled from case law:

- the allegedly infringing work should contain all or some of the original and protected elements of the original work, thereby creating a similar overall impression in the mind of the normal, non-technical and non-artistically educated person;
- likelihood of confusion is not a requirement as such but may be taken into consideration as an additional indication of copyright infringement;
- more attention is paid to the similarities than to the differences, however, if the differences outnumber the similarities and confer a different overall impression, no infringement will be found; and
- finally, the partial reproduction of an original work in a later work with new, original elements not contained in the original work can also be considered to be a copyright infringement if the copied elements are original and protected.

In the *Google News* case referred to above, the Brussels Court of Appeal considered that there was a digital reproduction from the moment that the material was stored and Google was the author of that reproduction. Google made that reproduction available on its own website via the 'cached' link. Unlike with hyperlinks that referred to the site of origin, by consulting the 'cached' link the user was consulting the document on the Google website. Google's role was consequently not limited simply to providing facilities but had reproduced and made available



to the public a copy of the original documents stored in its own memory (Brussels Court of Appeal, 5 May 2011, *Google News*, IRDI, 2011/3, p 265).

However, in February 2014, the CJEU held that the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public' and therefore is not a copyright infringement. This is different where a clickable link circumvents restrictions on the site on which the protected work appears or where the work is no longer available to the public on the site on which it was initially communicated. Users are considered a new public when the link constitutes an intervention without which those users would not be able to access the works transmitted. The Court also held that EU member states do not have the right to give wider protection to copyright holders by legislating that authorisation for hyperlinking to freely available content on a website is required (CJEU, 13 February 2014, C-466/12, *Svensson*; CJEU, 21 October 2014, C-348/13, *Best Water*).

The Belgian Supreme Court came to a similar conclusion regarding the provision on a Facebook page of a download link for copyright protected content, even for personal purposes, is a communication to the public. The Court held that this communication requires the authorisation of the copyright holder, except if the work is freely accessible on another website (Cass. 24 June 2015, A&M 2015, liv. 3-4, 277).

Finally, reference is made to the decision of 19 November 2015 of the CJEU following a request for a preliminary ruling regarding the definition of communication to the public. The request was filed by the Brussels Court of Appeal in the framework of proceedings brought by the Belgian collecting society SABAM against SBS Belgium, a Dutch language broadcasting organisation. SBS Belgium broadcasts its programmes using the 'direct injection' technique, consisting of a two-step process by which SBS transmits its programme-carrying signals 'point to point' via a private line to its distributors. At that stage, those signals cannot be received by the general public. The distributors then send the signals, which may or may not be in encrypted form, to their subscribers so that they can view the programmes on their television sets, whether or not with the help of a decoder made available by the distributor. SABAM takes the view that SBS makes a communication to the public by transmitting via the direct injection method and that accordingly, the authorisation of the copyright holder is required. The CJEU reminded that the term 'public' refers to an indeterminate number of recipients, potential television viewers, and implies, moreover, a fairly large number of persons. It concluded that SBS does not carry out a communication to the public as it only transmits the programme-carrying signals to specified individual distributors without potential viewers being able to have access to those signals. The actual communication is made by the distributors themselves. That said, the Court observed the subscribers of the distributors in question could be considered to be the public in relation to the original transmission of the broadcasting organisation if the intervention of the distributors in question is just a technical means of ensuring or improving reception of the original broadcast in its catchment area. According to the Court, however, the distribution of the work broadcast by a professional distributor amounts to the supply of an autonomous service performed with the aim of making a profit, the subscription fee being paid by those persons not to the broadcasting organisation but to that professional, and being payable not for any technical services, but for access to the communication in question and, therefore, to the copyright-protected works. A transmission made in these circumstances is not just a technical means of ensuring or improving reception of the original broadcast in its catchment area, unless the distributor finds itself in a position that is not independent in relation to the broadcasting organisation and where its distribution service is purely technical in nature. This is for the national court to decide (CJEU, 19 November 2015, C-325/14, *SBS v SABAM*).

#### 40 Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Secondary liability for copyright infringement is dealt with in articles XVII.14 paragraph 3 and 4, XVII.18, XVII.19 and XVII.20, CEL. These provisions enable right holders to apply for an injunction against intermediaries whose services are being used by a third party to infringe their industrial property rights or who are found to be providing, on a commercial scale, services used in infringing activities, regardless of whether a fault can be imputed to the intermediary. It is generally understood and accepted that the definition of intermediary covers both online service providers as well as providers of physical services, such as the carrier of counterfeit products. Particularly as regards ISPs,

reference is made to what is mentioned in question 4 regarding the scope of an injunction and the need to strike a fair balance between the fundamental rights at stake.

#### 41 What remedies are available against a copyright infringer?

Remedies may include the following:

- compensation for the prejudice suffered as a result of the infringement. Compensation may consist of the award of monetary damages (see question 43) but also the surrender to the right holder of the infringing products as well as, in appropriate cases, the materials and implements principally used in the manufacture of those goods that are still in the infringing party's possession;
- an injunction ordering the infringing party to cease the infringement and to refrain in future from infringing the rights at stake, subject to penalties;
- an injunction ordering the infringing party to provide the right holder with all information available concerning the origin and distribution networks of the goods and services which have infringed copyright and to provide him or her with all the data relating thereto, insofar as this measure seems justified and proportionate. This order may be issued against the actual infringing party as well as anyone who is in possession of the infringing goods on a commercial scale, who has used the infringing services on a commercial scale or who has provided, on a commercial scale, services used in infringing activities;
- the recall from the channels of commerce, the definitive removal from the channels of commerce or the destruction of the infringing goods, as well as, in appropriate cases, materials and implements principally used in the manufacture of those goods. In considering this measure, the proportionality between the seriousness of the infringement and the remedies ordered, as well as the interests of third parties, shall be taken into account;
- in case of bad faith infringement, the forfeiture of the infringing products and, where appropriate, all materials and tools principally used in the manufacture of those goods that are still in the infringing party's possession. If he or she no longer disposes of these goods, the copyright holder may claim compensation equalling the price the defendant received for said goods; and
- publication of judgment.

#### 42 Is there a time limit for seeking remedies?

The statute of limitations for bringing a copyright claim depends on the type of claim and amounts to 30 years for actions in rem (eg, reclaiming ownership of copyright), 10 years for personal claims (recovery of royalties or other contractual claims), five years for claims based on non-contractual liability (eg, piracy) and three years for actions based on the author's resale right.

#### 43 Are monetary damages available for copyright infringement?

Monetary damages are available for copyright infringement. These can, as a matter of principle, not exceed the actual prejudice suffered and only to the extent proven by the injured party. The concept of punitive damages does not exist in Belgium. All appropriate aspects, such as the negative economic consequences, including lost profits and the damage sustained by the right holder, shall be taken into consideration.

As regards the lost profits, the question that needs answering is whether the infringement had any impact on the products or services the injured party had otherwise been able to provide him or herself. If the right holder does not commercialise the products, the damages for infringement will consist of the royalties or fees the right holder should have received, had there been a licence agreement in place with the infringer.

Compensation for sustained damages may include elements other than economic factors, such as the moral prejudice caused to the right holder, his or her commercial image and repute.

In case of a bad faith infringement, the right holder may also claim the surrender of the profits generated by the infringing party.

The Belgian Supreme Court recently confirmed that if no concrete data is available to determine the magnitude of the damage sustained, the amount of compensation may be determined on an *ex aequo et bono* basis (ie, in equity, according to what is just and fair) (Cass., 24 June 2015, A&M 2015, liv. 3-4, 277).

#### 44 Can attorneys' fees and costs be claimed in an action for copyright infringement?

Under Belgian law, the injured party may claim compensation for the costs of the proceedings, including legal expenses, incurred to put an end to the infringement. The amount that may be claimed is fixed depending, inter alia, on the value of the claims made and the complexity of the case, with a maximum of €33,000 for claims exceeding €1 million. As regards claims that cannot be expressed in monetary terms, the contribution is limited to €1,320, capped at €11,000. In the case, *United Video Properties v Telenet*, the CJEU ruled that the flat rate scheme for the reimbursement of costs for the assistance of a lawyer, which is applied in Belgium, is not contrary to article 14 of the Enforcement Directive, provided that those rates ensure that the costs to be borne by the unsuccessful party are reasonable. Such rates are contrary if the maximum amount it contains is too low and do not ensure that a significant and appropriate part of the reasonable costs incurred by the successful party are borne by the unsuccessful party (CJEU, 28 July 2016, case C-57/15).

#### 45 Are there criminal copyright provisions? What are they?

Copyright infringement amounts to a criminal offence if it is committed with malicious or fraudulent intent (article XI.293, CEL). Fraudulent intent is the intent to obtain for oneself or another an illicit advantage, even an indirect, non-pecuniary advantage, whereas malicious intent is the intent to damage the right holder's material interests.

Punishment may consist of imprisonment for up to three years or a fine of at least €600, up to a maximum of €600,000. In certain cases, the sanctions may be doubled in the event of a repeat offence within five years of the first infringement.

Finally, revenue generated through the illegal exploitation may be confiscated.

#### 46 Are there any specific liabilities, remedies or defences for online copyright infringement?

Online copyright infringement is remedied in the same way as any other type of infringement, but differences may occur as regards the scope of certain measures that can be taken, particularly injunctions against ISPs (see question 4).

#### 47 How may copyright infringement be prevented?

Preventive measures may consist of using a copyright notice or implementing technical protection measures.

#### Relationship to foreign rights

#### 48 Which international copyright conventions does your country belong to?

Belgium is a signatory to the following international copyright treaties and conventions:

- Universal Copyright Convention of 6 September 1952 (UCC), ratified by Belgium on 31 May 1960, with entry into force on 31 August 1960;

- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961 (the Rome Convention), with entry into force on 2 October 1999;
- Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (the Berne Convention), ratified by Belgium on 5 September 1887, with entry into force on 5 December 1887 (latest amending act signed in Paris on 24 July 1971, ratified by Belgium on 29 June 1999, with entry into force on 29 September 1999);
- World Intellectual Property Organization (WIPO) Copyright Treaty of 20 December 1996 (WCT), ratified by Belgium on 30 May 2006, with entry into force on 30 August 2006;
- WIPO Performances and Phonograms Treaty of 20 December 1996 (WPPT), ratified by Belgium on 30 May 2006, with entry into force on 30 August 2006; and
- Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994, with entry into force on 1 January 1995.

#### 49 What obligations are imposed by your country's membership of international copyright conventions?

The main obligation imposed by the membership of the various international copyright conventions is to afford copyright protection to non-Belgian nationals under the same conditions as those that apply to Belgian nationals. This principle, known as the principle of reciprocity, is enshrined in article XI.289 CEL, which requires that the holders of foreign copyright and related rights are put on an equal footing with Belgian copyright holders. This principle relates both to the duration as well as the scope of protection afforded under copyright.

As regards duration, the period of validity of foreign copyright shall, in principle, not exceed 70 years from the author's death. If, according to the laws of the country of origin, the foreign rights expire earlier, the shorter period will apply in Belgium as well.

Turning to the scope of protection granted to foreign copyright holders, this will be paired to the level of protection granted by the relevant foreign law to Belgian copyright holders. If this level is inferior to what a Belgian copyright holder can claim under the Copyright Act, the scope of protection afforded to the foreign copyright holders in Belgium will be restricted accordingly.

There is one exception to this principle, in that EU member states may not adopt any legislation that would prevent a national of another member state from enforcing his or her rights under the same conditions as those that apply to its own nationals, in accordance with the principle of non-discrimination between nationals of the various EU member states (CJEU, 20 October 1993, joined cases C-92/92 and C-326/92, *Phil Collins v Imtrat*).



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# Brazil

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## Legislation and enforcement

### 1 What is the relevant legislation?

The main statute on copyright in Brazil is Law No. 9,610 of 19 February 1998 (the Copyright Law). Other laws also regulate copyrights in specific situations, such as:

- Law No. 9,609 of 19 February 1998, which regulates protection of intellectual property and commercialisation of computer programs (the Software Law), along with the Copyright Law;
- Law No. 6,533 of 24 May 1978, which provides for regulation on the professions of artists and amusement show technicians (the Artists' Law);
- Law No. 6,615 of 16 December 1978, which provides for regulation on the profession of radio broadcaster (the Broadcasters' Law);
- Law No. 5,988 of 14 December 1973, article 17 of which regulates the registration of intellectual works. Law No. 5,988 was entirely replaced by the Copyright Law, except for article 17, which still remains in force;
- Law No. 12,378 of 31 December 2010, which regulates architecture and urbanism practice (the Architecture and Urbanism Law); and
- Decree-law No. 2,848 of 7 December 1940, which establishes the Brazilian Criminal Code and provides for sanctions upon the violation of copyrights.

### 2 Who enforces it?

According to article 7, item XIII of Decree No. 7,743 of 31 May 2012, the Board of Intellectual Rights of the Ministry of Culture is responsible for overseeing compliance with the Copyright Law – as amended – by associations of copyrights collective management, by collecting agents and by users.

Any individual or legal entity that has claims under the Copyright Law may bring action before the Brazilian judicial system. As a general rule, state courts have jurisdiction over copyright infringement actions. Federal courts will only become involved when the federal government is the accused infringer.

### 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?

There are no separate statutory provisions addressing digital exploitation of works. According to article 29, item VII of the Copyright Law, the author's prior approval shall be required for: distribution for the purpose of offering works or productions by means of cable, optic fibre, satellite, electromagnetic waves or any other system which enables the user to select the work or production in order to receive it at a time and place previously determined by whom demands it, and in situations in which access to the works or productions is made through any system which requires payment on the part of the user.

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

There is no specific provision for extraterritoriality under the Copyright Law. However, the Brazilian Criminal Code states exceptions to the general rule of no jurisdiction outside the territory and recognises

extraterritorial rights to apply Brazilian law to crimes committed abroad in cases such as:

- crimes against the property of the union, federal districts, states, municipalities, public companies, mixed-capital companies, authorities or foundations established by the government, which may include copyrights;
- crimes that, by treaty or convention, Brazil has undertaken to fight; or
- crimes perpetrated by Brazilian citizens outside of Brazil.

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## Agency

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

There is no centralised copyright agency in Brazil. As mentioned above (see question 3), the Ministry of Culture, by its different boards and bodies, is the primary authority responsible for regulating and enforcing copyrights. Depending on its nature, the intellectual work involved shall be filed for registration before the relevant governmental entity, as follows:

- literary works should be filed before the Copyright Office of the National Library Foundation;
- musical works should be filed before the National School of Music of the Federal University of Rio de Janeiro;
- visual art works should be filed before the School of Beaux-Arts of the Federal University of Rio de Janeiro;
- audiovisual works should be filed before the National Cinema Agency (ANCINE); and
- projects, concepts and visual art works concerning geography, engineering, topography, architecture, landscaping, scenography and science must be filed with the Council of Brazilian Architecture and Urbanism (CAU).

Collection and distribution of copyright royalties owed from the public performance of national and foreign music are incumbent on the Central Bureau for Collection and Distribution (ECAD), a not-for-profit private institution, known as the Brazilian copyright management organisation.

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

The Copyright Law protects intellectual works stemming from the human creative spirit, expressed by any means and recorded in any form, whether tangible or intangible, currently known or to be invented in the future. Article 7 of the Copyright Law sets an open list of copyrightable intellectual works, constantly expanded by case law, which includes:

- texts of literary, artistic or scientific works;
- speeches, short talks, sermons and other works of a similar nature;
- drama and musical-drama works;
- choreographic and pantomimic works, the scenic performances of which are recorded in writing or in any other format;
- musical works, whether with lyrics or instrumental;
- sound or soundless audiovisual works, including cinematographic ones;

- photographic works and those produced by any process similar to photography;
- drawings, paintings, engravings, sculptures, lithography and kinetic art works;
- illustrations, geographical maps and other works of a similar nature;
- projects, drafts and visual works concerning geography, engineering, topography, architecture, landscaping, scenography and science;
- adaptations, translations and other transformations of original works, presented as new intellectual creations;
- computer programs; and
- collections or compilations, anthologies, encyclopedias, dictionaries, databases and other works that constitute an intellectual creation due to their selection, organisation or placement of their content.

The Copyright Law also ensures protection of:

- copies of the artistic work, made by the author him or herself, on the same basis of the protection granted to the original (article 9); and
- titles of intellectual works (including newspapers and other periodic publications), provided that the title is original and cannot be confused with the title of a work of a similar nature, previously published by another author.

### 7 What types of rights are covered by copyright?

The Copyright Law covers patrimonial rights (article 28) and moral rights (article 24). Patrimonial rights afford the owner the right to use, enjoy and dispose of his or her work; in other words, to obtain financial results from the economic use and exploitation thereof. Moral rights, in turn, are personal non-economic rights, which stem from the author's personality and belong exclusively to the creator of the copyrightable asset. Accordingly, except for those listed from (i) to (iv) below, which are inheritable by the author's successors upon his or her death, moral rights are non-transferrable and include the following privileges:

- claiming authorship at any time;
- having his or her name, pseudonym or conventional symbol indicated or announced upon use of the work, as belonging to him or her;
- keeping the work unpublished;
- ensuring the integrity of the work by opposing to any modification or act which may, by any means, harm the work or hurt his or her reputation or honour;
- modifying the work before or after it is used;
- withdrawing the work from the market or suspending any previously authorised means of use, whenever the circulation or use implies offence to his or her reputation and image; and
- having access to a unique and rare issue of the work rightfully in possession of someone else, with the purpose of preserving the memory thereof, by photographic or similar process, or audiovisual means, so that the least inconvenience is caused to the holder of the work who, in any event, shall be indemnified for any damage or loss incurred.

### 8 What may not be protected by copyright?

Only concrete expressions are protectable; not ideas. According to article 8 of the Copyright Law, the following shall be excluded from copyright protection:

- ideas, normative procedures, systems, methods or mathematical projects or concepts as such;
- schemes, plans or rules for performing mental acts, playing games or conducting business;
- blank forms intended to be filled out with any kind of information, whether scientific or not, and the instructions appearing thereon;
- texts of treaties or conventions, laws, decrees, regulations, court decisions and other official enactments;
- general use information such as those contained in calendars, diaries, registers or legends;
- names and titles per se; and
- the industrial or commercial exploitation of ideas embodied in works.

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

Brazil has a civil law system and, as such, does not have 'fair use' and 'fair dealing' doctrines as compared to common law jurisdictions. As a general rule, all forms of use of intellectual works are subject to the author's prior written authorisation, unless the law permits otherwise. In this respect, the Copyright Law, under articles 46, 47 and 48, expressly provides for situations that are considered exceptions to copyright infringement and that might, *mutatis mutandis*, be considered 'fair use' events for Brazilian legal purposes, for example:

- news or informative articles published in daily or periodic vehicles, reproduced in the daily or periodical press with a reference to the name of the author – if the piece of news or article is signed – and to the publications from which they were extracted;
- speeches given at public meetings of any kind, reproduced in daily or periodic vehicles;
- portraits or other forms of representation of a likeness produced on commission, reproduced by the owner of the commissioned work, and provided that the person represented or his or her heirs have no objection thereto;
- literary, artistic or scientific works reproduced for the exclusive use of the visually handicapped, provided it is not for profit, either in Braille or by means of another process on any medium designed for such users;
- short extracts reproduced in a single copy for the private use of the copier, as long as it is made by the latter and is not for profit;
- quotation of parts of any work with a reference to the author and origin thereof, in books, newspapers, magazines or any other means of communication for study, review or debate purposes, to the extent justified by the intended aim;
- notes taken in the course of lessons given in teaching establishments, by the persons for whom such lessons are intended (the full or partial publication of such notes being prohibited without the express prior authorisation of the teacher or speaker);
- literary, artistic or scientific works, phonograms and radio and television broadcasts used in commercial establishments for the sole purpose of demonstration to customers of the relevant reproduction equipment (ie, radio, TV and other sets) marketed at such establishments;
- stage and musical performances carried out in the family circle or in educational establishments, for teaching purposes exclusively, and without profit intent;
- literary, artistic or scientific works used as proof in judicial or administrative proceedings;
- short extracts from existing works, regardless of their nature – or of the entire work in case of three-dimensional works of art – reproduced on the condition that the reproduction is not itself the main subject of the new work and does not harm the normal exploitation of the reproduced work, nor causes unjustified loss to the legitimate interest of the authors; and
- paraphrases and parodies, as long as they are not reproductions of the original work and are not in any way derogatory thereto.

As specifically regards computer programs, article 6 of the Software Law provides that the following situations shall not characterise copyright infringement:

- reproduction of one single copy used as a backup or electronic storage copy;
- partial quotes of the program, for teaching purposes;
- similarity of the program with another pre-existing program, when this occurs by virtue of the functional characteristics of the application, compliance with normative and technical precepts thereof, or alternative limitation on the expressions of the pre-existing software; and
- integration of a program, maintaining its essential characteristics, with an application or operational system technically indispensable for the users' needs, provided it be for the exclusive use of the person who performed the integration.

### 10 What are the standards used in determining whether a particular use is fair?

As mentioned above (see question 9), the Copyright Law and Software Law list the events that may be considered 'fair use' of works protected by copyright for Brazilian legal purposes.

**11 Are architectural works protected by copyright? How?**

Architectural works are protected under the Copyright Law (see question 6) pursuant to the same general protection principles afforded to other copyrightable creations. According to article 26, modifications in architecture, urbanism and landscape design works shall be subject to the author's prior authorisation. Pursuant to the Architecture and Urbanism Law – as well as to relevant infra-legal regulations – architectural works are subject to mandatory registration before the CAU.

**12 Are performance rights covered by copyright? How?**

Performance rights are covered by copyright. Article 68 of the Copyright Law provides that the use of theatrical works, music or literary-musical compositions and phonograms in public representations and performances are subject to prior authorisation of the holder of the relevant rights. For the purposes of the Law:

- public representations are the use of theatrical works in their various natures with the participation of artists, whether remunerated or not, at public venues, or via broadcast or cinematographic transmission or exhibition;
- public performances are the use of musical or literary-musical works with the participation of artists, whether remunerated or not, or the use of phonograms and audiovisual works at public venues, by any process, including broadcast or transmission by any means and cinematographic exhibition; and
- public venues are theatres, cinemas, dance halls or concert halls, night clubs, bars, clubs or societies of any nature, stores, commercial and industrial establishments, sports arenas, circuses, fairs, restaurants, hotels, motels, clinics, hospitals, public offices, rail stations, docks or airports, or wherever literary, artistic or scientific works are presented, performed or transmitted.

Any public venues where copyrighted works are represented or performed – whether or not for profit – shall pay royalty fees to the holders of the relevant rights. As mentioned in question 5, ECAD is the entity responsible for the collection and distribution of such royalties.

**13 Are other 'neighbouring rights' recognised? How?**

The Copyright Law recognises neighbouring rights, applying mutatis mutandis the same rights granted to authors, to phonograms' producers and broadcasting organisations. Phonograms' producers have the exclusive right to authorise or prohibit:

- the direct or indirect, total or partial, reproduction of the phonograms;
- the distribution by sale or rental of copies of phonograms; and
- the communication of their phonograms to the public by public performance, including broadcasting.

Broadcasting organisations shall 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 attended by the public, without prejudice to the rights of the owners of the intellectual property embodied in the programmes.

**14 Are moral rights recognised?**

Yes. See question 7.

**Copyright formalities****15 Is there a requirement of copyright notice?**

The Copyright Law does not require the use of a copyright notice © to protect such rights. As a general rule, however, the author has the right to have his or her name, pseudonym or conventional symbol indicated or announced upon use of the work, as belonging to him or her (see question 7). As also previously mentioned (see question 9), most of the events provided in the Law as non-infringing to copyrights do require that reference to the author or publication, or both, be properly made. Notwithstanding the foregoing, it is worth noting that the Copyright Law (article 113) also provides that 'phonograms, books and audiovisual works shall bear a seal or any other identifying mark, which the producer, distributor or importer shall be responsible for affixing, without additional cost to the consumer, in order to attest compliance with the legal provisions in force, as provided in the regulations.'

**16 What are the consequences for failure to display a copyright notice?**

Failure to mention the author's or performer's name, pseudonym or conventional mark shall hold the infringer liable for moral damages and obligated to display the author's or performer's identity as follows (article 108):

- (i) in the case of a broadcasting organisation, for three consecutive days at the same time as when the infringement occurred;
- (ii) in the case of a graphic or phonographic publication, by the inclusion of an erratum in the copies not yet distributed, without prejudice to the conspicuous publication of a notice on three consecutive occasions in a major newspaper at the place of residence of the author, the performer and the publisher or producer; and
- (iii) in the case of any other form of use, in the press according to the procedure referred to in (ii) above.

**17 Is there a requirement of copyright deposit?**

Law No. 10,994 of 14 December 2004 regulates the mandatory legal filing of literary works before the Copyright Office of the National Library Foundation. According to the Law (article 5), the legal deposit shall be done by those responsible for printing the publication, within 30 days of the date of publication. Foreign works that indicate an editor or seller domiciled in Brazil shall also be subject to this obligation.

**18 What are the consequences for failure to make a copyright deposit?**

The legal deposit of literary works before the Copyright Office of the National Library Foundation aims at ensuring the registration and protection of Brazilian intellectual productions, as well as enabling control, elaboration and propagation of the current Brazilian bibliography, and defence and preservation of the national language and culture. Failure to comply with the deposit obligation will be subject to a penalty of up to 100 times the market value of the respective work, and seizure of a number of issues sufficient to meet the purposes of the legal deposit.

**19 Is there a system for copyright registration?**

As mentioned above, there is no centralised agency in Brazil. As registration may be filed before different entities depending on the type of work, registration requirements and procedures vary.

**20 Is copyright registration mandatory?**

According to the Copyright Law, protection of authorship rights shall not depend on registration. Registration is optional for protection purposes and, although not mandatory, is advisable for evidence of authorship.

**21 How do you apply for a copyright registration?**

As already mentioned, there is no centralised agency to concentrate copyrights in Brazil. Therefore, registration is filed before different entities depending on the type of work. Also as a consequence of that, there is no uniform rule for applying to such registration, and procedures vary from entity to entity. For registration at the National Library, the applicant must file a form, pay a fee and provide certain documents. According to the National Library, a software for online registrations is yet to be implemented.

**22 What are the fees to apply for a copyright registration?**

Amounts vary depending on the entity before which the work is to be registered. Registration fee at the National Library is approximately 50 reais.

**23 What are the consequences for failure to register a copyrighted work?**

There is no specific consequence for failure to register a copyrighted work.

**Ownership and transfer****24 Who is the owner of a copyrighted work?**

As a general rule, the owner of the copyrighted work is the individual who created it. According to the Copyright Law (article 28), 'the author

### Update and trends

There are some bills currently being discussed in Congress regarding copyrights. In 2013, the Copyright Law was amended as one of such bills was approved by Congress. It is not possible to predict, however, when or if the other proposed bills will be enacted.

As Brazil does not yet have clear provisions on exploitation of copyrights in digital environment, courts have been pushed to deal with this issue. At the end of 2015, the Superior Court of Justice sponsored a public hearing to discuss the use of streaming to transmit music over the internet, and whether such transmission should be considered public performance that would give rise to collection of public performance fees by ECAD.

In a recent decision, the Superior Court of Justice took the stand that the public performance is characterised by the mere fact that the work is made available on the internet, which is deemed a public environment.

has the exclusive right to use his or her literary, artistic or scientific work, to derive benefit from it and to dispose of it.' However, there are a few exceptions to this rule. The Software Law contains a work for hire provision transferring the rights to the employer or the person hiring the software development services.

#### 25 May an employer own a copyrighted work made by an employee?

As mentioned above, in the case of software, the patrimonial rights of a work created by the employee will belong to the employer. The Copyright Law does not contain a similar provision. Therefore, there will not be an automatic transfer of such rights and a written assignment must be executed to that effect.

#### 26 May a hiring party own a copyrighted work made by an independent contractor?

As mentioned above, in the case of software, the patrimonial rights of a work created by the independent contractor will belong to the hiring party except if otherwise provided by the parties. The Copyright Law does not have such provision; therefore, there will not be an automatic transfer of such rights and a written assignment must be executed to that effect.

#### 27 May a copyrighted work be co-owned?

A copyrighted work may be co-owned, whether by a person or entities, provided that the moral rights shall only be vested in persons, not entities. Co-authors are all those who contributed to the creation of the works. Further, according to the Copyright Law, those who merely assisted the author in producing the literary, artistic or scientific work by reviewing it or bringing it up to date or by supervising or directing its publication or presentation in whatever form, shall not be considered co-authors. For audiovisual works, the author of the scenario or literary, musical or dramatic-musical subject matter and the director shall be considered co-authors.

#### 28 May rights be transferred?

Rights, other than moral rights, may be assigned in whole or in part to third parties. Any assignment must be in writing.

#### 29 May rights be licensed?

Rights may be licensed.

#### 30 Are there compulsory licences? What are they?

There are no compulsory licences. However, as discussed in question 9, there are situations in which the use does not constitute infringement of copyrights.

#### 31 Are licences administered by performing rights societies? How?

Licences for public performance are administered by performing rights societies. ECAD, as mentioned above, is a not-for-profit private institution, responsible for the collection and distribution of royalties related to copyright and related rights from the public performance of national

and foreign music. ECAD is formed by eight performing rights societies. The owner of the music shall, once he or she becomes a member of one of those societies, indicate his or her works to allow further distribution of royalties.

#### 32 Is there any provision for the termination of transfers of rights?

According to the Copyright Law, in the absence of a contractual provision in writing stipulating the term of the assignment, the assignment will be valid for a maximum period of five years (article 49, item III).

#### 33 Can documents evidencing transfers and other transactions be recorded with a government agency?

Documents evidencing the assignment or licensing may be recorded with competent authorities where the relevant work was registered. If such work is not registered, it is also possible to record the transaction documents before the applicable notary of deeds and documents.

### Duration of copyright

#### 34 When does copyright protection begin?

The Copyright Law provides that protection is independent of registration (article 18) and, as a general rule, starts upon creation of the work.

#### 35 How long does copyright protection last?

The length of the protection varies depending on the type of work as follows:

- literary, dramatic, musical, artistic, typographical arrangements and databases shall be protected for 70 years from 1 January of the year following the death of the author or of the last-surviving co-author, as applicable;
- audiovisual and photographic works shall be protected for 70 years counted from 1 January of the year following publication;
- sound recordings shall be protected for 70 years counted from 1 January of the year following fixation;
- broadcasting shall be protected for 70 years counted from 1 January of the year following transmission;
- titles of periodicals shall be protected for one year counted from publication of the last issue of the periodical;
- titles of annual periodicals shall be protected for two years counted from the publication of the last issue of the periodical; and
- performances shall be protected for 70 years counted from 1 January of the year following the public performance of execution.

#### 36 Does copyright duration depend on when a particular work was created or published?

See question 35.

#### 37 Do terms of copyright have to be renewed? How?

As protection under Brazilian law is not dependent upon registration, there is no requirement to renew the terms of copyright.

#### 38 Has your jurisdiction extended the term of copyright protection?

No. The term of protection remains unchanged.

### Copyright infringement and remedies

#### 39 What constitutes copyright infringement?

The Copyright Law establishes the main events of copyright civil infringement as follows:

- fraudulent reproduction, disclosure or use of copyrighted work;
- publication of literary, artistic or scientific work without authorisation of the copyright owner;
- transmission and retransmission by any means or process, and communication to the public of literary, artistic or scientific works, performances and phonograms, carried out in violation of the rights of the owners.

Other than civil sanctions, copyright infringement may also be punished as a crime. The Brazilian Criminal Code regulates crimes against

copyrighted works, and the Software Law also regulates crimes on the violation of software rights.

#### 40 Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

According to the Copyright Law (article 104), secondary civil liability applies to any person who, for the purposes of sale or the securing of direct or indirect gains, advantages or profits for himself or for another, sells, displays for sale, receives and conceals, acquires, distributes, keeps on deposit or uses a fraudulently reproduced work or phonogram shall be jointly liable with the infringer in terms of the foregoing Articles; if the reproduction has been carried out abroad, the importer and the distributor shall answer for the infringement.

From a criminal standpoint, the Criminal Code provides that the same penalties that apply to those who infringe copyrights will also apply to those who, with direct or indirect profit intent, distribute, sell, offer for sale, rent, introduce in the country, acquire, hide, hold in deposit, original or copy of intellectual work or phonogram reproduced in violation of author's right, of interpreter's or performer's right, or of phonogram producer's right or, still, rent the original or copy of intellectual work or phonogram without the express permission of the holder of the rights or the representatives thereof.

The Software Law, in turn, contains similar provisions with respect to criminal secondary liability.

#### 41 What remedies are available against a copyright infringer?

It is possible to file a lawsuit against a copyright infringer requesting a preliminary injunction for faster protection.

#### 42 Is there a time limit for seeking remedies?

The Copyright Law does not specify a time limit for seeking copyright infringement remedies. In the absence of such, general Civil Code provisions shall apply (ie, three years).

#### 43 Are monetary damages available for copyright infringement?

Yes, the owner of the infringed copyrighted work may claim monetary compensation for such infringement. The Copyright Law expressly indicates the amounts to be compensated in case of unauthorised publication of literary, artistic or scientific works as follows:

*Article 103. 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 the price of those that have been sold.*

*Sole Paragraph. 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.*

#### 44 Can attorneys' fees and costs be claimed in an action for copyright infringement?

General civil procedure rules shall apply for copyright infringement cases. According to Brazilian law, the losing party will be responsible for attorneys' fees and costs in the amount varying from 10 to 20 per cent of the lawsuit value or the reward amount.

#### 45 Are there criminal copyright provisions? What are they?

Yes. According to article 184 of the Brazilian Criminal Code, violating authors' and neighbouring rights is a crime subject to penalties of imprisonment ranging from three months to four years plus a fine. The Software Law also describes violation of computer program copyright as a crime subject to imprisonment ranging from six months to four years plus a fine.

#### 46 Are there any specific liabilities, remedies or defences for online copyright infringement?

No. So far there are no specific provisions under Brazilian law to deal with online copyright infringement per se. General rules shall apply in such cases. In 2012, Brazil enacted the Cybercrime Law and included as a crime the act of invasion of third parties' IT apparel, connected or not to the internet, with the aim of obtaining, altering or destroying data or information without authorisation of the owner.

#### 47 How may copyright infringement be prevented?

It is very difficult to prevent copyright infringement. While Brazilian law does provide for ex post mechanisms to combat infringement once the actual or potential breach is identified (cease and desist notices, seizure of infringing material, among others), and case law has recognised relevant damages on copyright infringers, other preventive measures are not necessarily as effective as might be desired in creating an efficient disincentive to violations ex ante. That notwithstanding, there still are some measures that may discourage the infringement and also facilitate an efficient and fast reaction, such as:

- including notice of copyrights in all materials, which although not mandatory by law, allows third parties to be aware of the potential infringement;
- having the work registered before the competent authority in order to facilitate evidence of authorship; and
- employing technical measures and tools to try to monitor and prevent potential infraction.

Working with authorities to react quickly and also reacting strongly (eg, by filing lawsuits and criminal charges) may also help to prevent further infractions.

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**Relationship to foreign rights**


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**48 Which international copyright conventions does your country belong to?**

The following international treaties and conventions on copyright were ratified by Brazil and incorporated into the Brazilian legal system:

- Decree No. 1,355 of 30 December 1994 – Promulgation of the Final Act of the Uruguay Round (Agreement on Trade-Related Aspects of Intellectual Property Rights);
- Decree No. 76,905 of 24 December 1975 – Promulgation of the Universal Convention on Copyright;
- Decree No. 76,906 of 24 December 1975 – Promulgation of the Phonograms Convention;
- Decree No. 75,699 of 6 May 1975 – Promulgation of the Berne Convention;
- Decree No. 75,572 of 8 April 1975 – Promulgation of the Paris Convention;
- Decree No. 75,541 of 31 March 1975 – Promulgation of the WIPO Convention;
- Decree No. 57,125 of 19 October 1965 – Promulgation of the Rome Convention; and
- Decree No. 26,675 of 18 May 1949 – Promulgation of the Inter-American Copyright Convention.

**49 What obligations are imposed by your country's membership of international copyright conventions?**

The obligations imposed by the treaties vary and each provide for different requirements.

Nevertheless, it is possible to say that a usual requirement found in such treaties is to ensure reciprocity (ie, granting the same copyright protection to non-Brazilians as those granted to its citizens). Treaties also usually set the limitations and minimum protection.

The TRIPS Agreement as well as setting the framework for copyright protection, requests member states to ensure that enforcement procedures are available under their law.

The Berne Convention sets out that all the member states undertake to adopt, in accordance with its constitution, the measures necessary to ensure the application of the Convention.



# Bulgaria

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## Legislation and enforcement

### 1 What is the relevant legislation?

The protection of intellectual property is generally stated in the Constitution of the Republic of Bulgaria. The main legal act is the Bulgarian Copyright and Neighbouring Rights Act (CNRA).

### 2 Who enforces it?

Authors and other copyright holders, artists-performers and other neighbouring rights holders, collective management organisations, the court, the customs (in case of border measures), the Minister of Culture, the Ministry of Culture and the Ministry of Internal Affairs.

### 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?

There are no specific provisions in that regard. What may be of relevance is the transposition into the CNRA of the Orphan Works Directive.

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

There are no specific provisions in that regard. Any such application should be substantiated based on general rules and the particular facts of any case.

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## Agency

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

No, there is no such agency. The Ministry of Culture has certain competencies in respect of collective management, exercise of rights of deceased authors with no successors, administrative-penal measures, etc.

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

An object of protection by copyright is any work of literature, art and science which is the result of a creative endeavour and is expressed in any way or in any objective form.

The CNRA suggests a non-exhaustive list of copyrightable works:

- literary works, including works of scientific and technical literature, of publicity and computer software;
- musical works;
- stage works: dramatic or dramatico-musical works, mime, choreographic, etc;
- films and other audiovisual works;
- works of fine art, including works of applied art, design and folk art crafts;
- realised works of architecture and implemented spatial plans;
- photographic works and works created in a process analogous to photography;

- approved architectural projects, approved spatial planning projects, maps, schemes, plans and others related to architecture, urban planning, geography, topography, museum research and any other area of science and technology;
- graphic design of publications;
- cadastral maps and state topographical maps.
- translations and adaptations of existing works and works of folklore;
- arrangements of musical works and works of folklore;
- periodicals, encyclopedia, collections, anthologies, bibliographies, databases and suchlike which include two or more works or materials.

Objects of copyright protection may also be parts of works referred above, preparatory sketches, plans, etc.

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### 7 What types of rights are covered by copyright?

It should be noted that the more appropriate legal term under Bulgarian law is 'author's right'. For consistency, however, here we shall use the term 'copyright'.

Copyright comprises economic and moral rights. The author has essentially one economic right: the exclusive right to use the work and respectively to authorise its use by third parties unless otherwise provided for by law. The author has also the right to compensation for each type of use of the work and for each time of use of the same type of use. According to the case law of the Bulgarian Supreme Court of Cassation, the compensation is payable even if it has not been agreed upon. This implies that the right to compensation is of imperative nature and may not be avoided by contract (ie, a clause saying that the author waives their (agrees to no) compensation should be void).

Moral rights are expressly listed in the law. The most important of them are the author's right to be recognised as the author of the work and the right to require their name, pseudonym or other identifying sign to be indicated in the respective manner upon each use of the work. Those rights are inalienable from the personality of the author and any contractual clause to the contrary shall be void.

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### 8 What may not be protected by copyright?

Normative and individual acts of government authorities; acts of courts; ideas and concepts; folklore works; news, facts, information and data are not protected by copyright.

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### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

Under Bulgarian law, the doctrine of 'free use' applies, which means use without the copyright holder's permission (but not necessarily without payment of compensation). By express reference in the law, it also applies to neighbouring rights.

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### 10 What are the standards used in determining whether a particular use is fair?

The general principle is that the 'free use' is only permitted in a limited number of situations expressly listed in the law and under the conditions that (i) it does not impede the normal use of the work and (ii) it does not prejudice the copyright holder's legitimate interests.

Generally, there are two types of 'free use': without payment of compensation (not applicable for computer programs); and with payment of fair compensation (not applicable for computer programs and architectural works). Any 'free use', however, has to be made without removal, damaging, destroying or disruption of the technical measures (as defined in the CNRA) for protection without the copyright holder's consent.

In certain situations of 'free use' expressly listed in the law, users who want to benefit from the 'free use', but are prevented by technical measures of protection, may request from the holder of the copyright the relevant access to an extent justified by the purpose. However, that does not apply to situations where works or other protected objects have been made available on a contractual basis to an unlimited number of persons in a way allowing access from a place and at a time individually chosen by each of them.

#### 11 Are architectural works protected by copyright? How?

Yes, they are. However, their protection somewhat steers away from the fundamental principle established in article 5(2) of the Berne Convention and taken over in Bulgarian copyright law that the enjoyment and the exercise of the copyright shall not be subject to any formality. In 2011, some very controversial amendments were introduced in respect of architectural works that have attracted a lot of criticism.

According to the legal definition of 'works of architecture' those are 'projects of buildings and facilities, spatial plans and schemes, approved under the effective legislation, buildings and other facilities and their elements, permanent objects representing the synthesis of architecture with other arts, as well as the layouts of interiors of permanent nature registered by a [collective management] organisation under Article 40.' It is apparent that the legal definition itself provides for certain formalities of approval and registration in the absence of which no copyright should arise.

The situation is also confusing and controversial with regard to 'architectural projects'. Following the amendments in 2011, 'architectural projects' have been stated as a separate category of works outside architectural works (see question 6). In addition to that, they need to be approved, which also appears as a formality to the arising of copyright.

#### 12 Are performance rights covered by copyright? How?

Performance rights are not covered by copyright. They are protected as one of the categories of neighbouring rights. Under Bulgarian law, the official legal term is 'rights of artists-performers' whereby the legal definition is natural persons who perform works (ie, anyone who presents, plays (music; a role; a variety, puppet, illusionistic show), dances, recites, conducts, comments, etc).

#### 13 Are other 'neighbouring rights' recognised? How?

Neighbouring rights under Bulgarian law are expressly listed. They cover the following categories: (i) rights of artists-performers regarding their performances; (ii) producers of phonograms regarding their phonograms; (iii) producers of the initial recording of a film or another audio-visual work regarding the original and copies obtained as a result of such recording.

#### 14 Are moral rights recognised?

Yes, they are recognised both in respect of copyright and neighbouring rights. Their scope, however, is different for copyright and neighbouring rights, on the one hand, and for each category of neighbouring rights on the other hand.

### Copyright formalities

#### 15 Is there a requirement of copyright notice?

Copyright notice is just a legal possibility rather than a legal requirement or obligation.

#### 16 What are the consequences for failure to display a copyright notice?

The copyright arises, exists and is subject to proof irrespective of any copyright notice. The use of copyright notice or information is, however, not entirely without any legal consequences.

Generally, the copyright holder or the person who is granted the exclusive right to exploit the work is entitled to use the © mark before their own name or the name of the work or the date the work is made available to the public.

In addition, there is a rebuttable presumption that the author is the person whose name or other identifying sign is indicated in the customary manner on the original, copies or duplicates of the work or its packaging.

A pseudonym or anonym may also be used. If they do not disclose the author's identity the copyright is exercised by the natural or legal person who or which has for the first time communicated the work to the public with the author's consent.

#### 17 Is there a requirement of copyright deposit?

No, there is no such requirement.

#### 18 What are the consequences for failure to make a copyright deposit?

Not applicable.

#### 19 Is there a system for copyright registration?

No, generally there is no such system. As an exception, there is a highly controversial reference contained in the legal definition of architectural works that implies the need for registration in the absence of which no copyright should arise (see question 11).

#### 20 Is copyright registration mandatory?

No, generally it is not mandatory. As an exception, it appears that registration is mandatory for architectural works only.

#### 21 How do you apply for a copyright registration?

The registration of architectural works is made by collective management organisations.

#### 22 What are the fees to apply for a copyright registration?

The fees are determined by the respective collective management organisation.

#### 23 What are the consequences for failure to register a copyrighted work?

It appears that in the absence of registration of an architectural work, no copyright should arise.

### Ownership and transfer

#### 24 Who is the owner of a copyrighted work?

Under Bulgarian copyright, the 'owner' is considered as the person who has the right in rem over the material carrier. Rights in rem are not relevant for copyright. Rights in rem and copyright do not interfere except in certain cases expressly provided for by law (eg, the exhaustion of the right of distribution, transfer of ownership over works of fine art and works created in a process analogous to photography, etc).

The relevant figures for copyright purposes are the author and other copyright holders.

By law, the author is always the natural person as a result of whose creative endeavours the work is created. The author is always a natural person (ie, they may never be a legal entity).

As a general rule, the author is by law the only one who may originally hold the entire copyright (the complete set of economic and moral rights). As an exception to that rule, the entire copyright may originally be held by holders of copyright (including legal entities) other than the author only in cases expressly provided by law (eg, the employer for computer programs and the (natural or legal) person responsible for the creation and publication of a periodical).

#### 25 May an employer own a copyrighted work made by an employee?

The copyright in a work created in the context of employment vests with the author unless otherwise provided for by law (eg, computer programs). However, by law, the employer has the exclusive right to use the work for its own purposes without the author's permission and

without compensation (unless otherwise agreed in the employment agreement). The employer is entitled to exercise this right to the extent it corresponds to its usual activity.

The employment agreement must be in writing.

## **26 May a hiring party own a copyrighted work made by an independent contractor?**

The statutory provision in the CNRA regarding commissioned works has probably caused more debate than any other provision.

That provision states that the copyright in commissioned works vests with the author unless otherwise agreed and adds that, unless otherwise agreed, the hiring party may use the work without the author's permission (but not without compensation) for the purposes it was ordered.

The debate has been focused on whether 'agreed otherwise' allows the parties to agree that the entire copyright may originally arise for or vest with the hiring party. Practitioners often use clauses to that effect. On the other hand, some commentators have openly criticised and are opposed to that, because who may originally hold the entire copyright may only be determined by an imperative statutory provision (ie, as a general rule it is always the author; and other than that - only in exceptional cases provided for by law, eg, in the case of computer programs and periodicals) and it is not possible for the parties to determine that by way of contract.

Some light has been shed in a recent case before the Bulgarian Supreme Court of Cassation where one of the questions that was considered concerned the scope of 'unless agreed otherwise'. The court made it clear that in the case of commissioned works, the hiring party enters into the agreement in order to use the work that will be created and that the author retains the copyright (ie, the copyright arises in the same way as when the work is created at the author's own initiative) implying that it may not be specified by contract that the entire copyright shall vest with the hiring party.

What the court went on to say, however, raises certain questions. The court held that, by law, the hiring party was entitled to the exclusive use of the work. Two things must be noted in this respect - first, the law makes no reference to such 'exclusivity', implying that this should be subject to express agreement between the parties (as opposed to the case of employment relations where 'exclusivity' is expressly referred in the law); and second, the court did not mention that the use must be 'for the purposes it [ie, the work] was ordered' (perhaps that could be taken to be self-explanatory and the court did not need to mention it).

The court explained that 'unless agreed otherwise' might relate to the possibility for the parties to agree other parameters of the exclusive use (eg, non-exclusive use, term of use, territory of use, etc).

The agreement does not need to be in writing (ie, it may be oral).

## **27 May a copyrighted work be co-owned?**

Yes, it may. Co-authorship is generally possible between natural persons, but theoretically is not entirely excluded between legal entities or even between a natural person and a legal entity in exceptional circumstances.

## **28 May rights be transferred?**

Once it arises, the copyright may not be subject of translatative succession; that is, copyright may not be subject to purchase-and-sale transactions, exchange (barter), donation, contribution in kind, etc.

The only legally provided exception is upon the author's death when the copyright may be succeeded by the author's successors (either by will or by law) save for two moral rights which by law may not be exercised by successors (ie, the right to modify the work, provided that this does not infringe rights acquired by other persons; and the right to stop the use of the work due to changes in beliefs).

## **29 May rights be licensed?**

Under Bulgarian law, the legal terms 'a licence' and 'to license' formally (ie, by law) refer only to industrial property objects (eg, trademarks, patents, industrial designs, etc). It is incorrect to use those terms for copyright (and neighbouring rights). The proper terms regarding copyright under Bulgarian law are 'use' or 'exploit'.

Having regard to the above, the formal answer is that rights may not be 'licensed' in the strict sense of the term. What may be granted is the right of use.

In respect of the grant of the right of use, there are certain imperative limitations that may not be avoided by contract (eg, an agreement whereby the author grants the right of use of all author's works to be created in future is void; the use may be granted for a maximum of 10 years (except for architectural works where this does not apply), etc).

It is also important to note that those limitations generally apply in cases where the author has created the work at the author's own initiative and subsequently decides to grant the right of use of the ready-made work to a third party. As opposed to that, the scope of rights conferred by law (ie, not by contract) on employers and hiring parties (see questions 25 and 26) are not subject to time limitation unless otherwise agreed.

## **30 Are there compulsory licences? What are they?**

Not applicable.

## **31 Are licences administered by performing rights societies? How?**

The legal terms used under the CNRA are 'collective management' and 'collective management organisations'.

Collective management is possible both for copyright and neighbouring rights. Collective management organisations are registered with the Ministry of Culture.

Authors and holders of neighbouring rights are free to form collective management organisations. A collective management organisation may generally negotiate and conclude agreements with users and collect the compensation for its members.

In certain cases, the collective management of copyright or neighbouring rights may be mandatory by law; that is, individual management is excluded (eg, in certain situations of transmission over an electronic communication network, etc). In those cases, collective management organisations may also act on behalf of authors (and other neighbouring right holders) who are not their members.

## **32 Is there any provision for the termination of transfers of rights?**

If a contract granting exclusive rights does not specify a deadline by which the user should start the use of the work, the author may rescind the contract if the use has not started within two years as of its conclusion, or as of the date of delivery of the work if it occurs after the conclusion of the contract.

In the case of publishing contracts and unless agreed otherwise, the author may unilaterally terminate the contract by a written notification when it is concluded for more than one publication and the total print of the last publication is sold out and within one year the publisher fails to reproduce and distribute the next publication, provided that within the same term the author requests the publisher to do so.

In the case of contracts for public presentation, the author may terminate the contract if the user suspends the public presentation of the work for a period longer than one year.

## **33 Can documents evidencing transfers and other transactions be recorded with a government agency?**

No.

## **Duration of copyright**

### **34 When does copyright protection begin?**

The general rule is that copyright protection begins as of the moment of creation of a work subject to no further formalities whatsoever.

Following some controversial amendments introduced in 2011, it seems that in certain cases an approval (for architectural projects and spatial planning projects) or registration (for architectural works) may be required. It is unclear whether such an approval or registration is the moment as of which copyright protection actually begins or only serves as a requirement for the arising of copyright protection as of the creation of the work, or is simply an administrative requirement.

The beginning of neighbouring rights protection depends on the particular category of neighbouring rights.

**35 How long does copyright protection last?**

The general rule is that copyright lasts during the author's lifetime and 70 years after the author's death. In terms of the relevant event that conditions the beginning of the 70 years, some special rules exist for co-authorship, musical works with words, musical-dramatic works, computer programs created in an employment context, anonymous and pseudonymous works and films and collection works. The 70 years in any case are deemed to begin on 1 January of the year following the year in which the relevant event occurred (eg, author's death, etc).

There are two moral rights, which, by exception, are not limited in time – the right for the author's name, pseudonym or other identifying sign to be indicated in the respective manner upon each use of the work; and the right to preserving the integrity of the work and to object to any modifications of or any derogatory action in relation to the work which would be prejudicial to the author's legitimate interests and personal dignity. After the duration of the copyright has elapsed, those two moral rights may be exercised by the Ministry of Culture or the respective collective management organisation (if during the author's lifetime the author (or their successors) was a member of such an organisation).

Neighbouring rights protection generally lasts for 50 years. However, under certain circumstances, the term of protection for some of the categories (rights of artists-performers and producers of phonograms) may be extended to 70 years (based on transposition of Directive 2011/77/EU). The relevant event differs depending on the category of neighbouring rights and the 50 or 70 years are deemed to begin on 1 January of the year following the year in which the relevant event occurred.

**36 Does copyright duration depend on when a particular work was created or published?**

The copyright protection for a computer program created in an employment context, and anonymous and pseudonymous works not disclosing the author's identity, is 70 years as of the moment the work is first lawfully made available to the public.

**37 Do terms of copyright have to be renewed? How?**

No.

**38 Has your jurisdiction extended the term of copyright protection?**

The term of copyright protection is 70 years.

The term of neighbouring rights protection is 50 years and under certain circumstances may be extended to 70 years for some of the categories of neighbouring rights.

**Copyright infringement and remedies****39 What constitutes copyright infringement?**

There is no legal definition of 'copyright infringement'. Generally speaking, it is the use of an object protected by copyright (or neighbouring

right) without the consent of the right holder save for cases of free use expressly provided for by law.

**40 Does secondary liability exist for indirect copyright infringement? What actions incur such liability?**

There is no such legal concept under Bulgarian copyright law.

**41 What remedies are available against a copyright infringer?**

Generally speaking, remedies in civil, administrative (including border measures) and criminal proceedings are possible.

**42 Is there a time limit for seeking remedies?**

There is no special time limit particularly regarding copyright (ie, general rules regarding time limitation apply). Depending on the type of claim, the time limit may be up to five years or there could be no time limit.

**43 Are monetary damages available for copyright infringement?**

Yes, they are.

**44 Can attorneys' fees and costs be claimed in an action for copyright infringement?**

Yes, they can.

**45 Are there criminal copyright provisions? What are they?**

Yes, there are. The main provisions concern intellectual piracy, plagiarism and cases of imposed co-authorship (ie, anyone who, by abusing their official position, includes themselves as a co-author of a work of science, literature or arts, without participating in the creative process for its elaboration).

**46 Are there any specific liabilities, remedies or defences for online copyright infringement?**

No, there are not.

**47 How may copyright infringement be prevented?**

It is not possible to give a general answer to this question and the approach should be case-specific.

**Relationship to foreign rights****48 Which international copyright conventions does your country belong to?**

A list may be found here: [www.wipo.int/wipolex/en/profile.jsp?code=BG](http://www.wipo.int/wipolex/en/profile.jsp?code=BG).

**49 What obligations are imposed by your country's membership of international copyright conventions?**

It is impracticable to answer this question in this format.

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# Chile

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## Legislation and enforcement

### 1 What is the relevant legislation?

The relevant legislation is Law No. 17,336 on Intellectual Property (the Law). The Law regulates (among other matters): the nature, duration, ownership and exceptions of copyrighted works, 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; copyright collective organisations and internet service provider (ISP) limitation of liability.

### 2 Who enforces it?

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

### 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 addressed not in a separate section but throughout the Law; for example, when dealing with exceptions and limitations, infringements, digital rights management information violations and ISP limitation of liability.

### 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 shall be 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 (for example, the Berne Convention; the Rome Convention and the TRIPS Agreement, among others).

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## Agency

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

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

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

The Law protects the rights that the authors of intellectual works of 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 work 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, the 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 and models and mapping systems;
- geographical or armillary spheres, as well as plastic works related to geography, topography or any other science and, in general, audio-visual material;
- paintings, drawings, illustrations and similar works;
- sculptures and similar figurative works of art, even though they may be applied to industry, 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.

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### 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 for life the following powers:

- 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 (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.

#### 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 whose essential regulations are incorporated into domestic laws (see questions 47 and 48). Thus, in accordance with article 2 of the 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 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.

Public domain works may be used by anyone, provided the work's authorship and integrity are respected (moral rights).

#### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

There is a similar exception to the doctrine of fair use in the Chilean Law. It was introduced by the 2010 copyright amendment. This exception allows the incidental and exceptional use of copyrighted works for the purpose of critic, 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.

#### 10 What are the standards used in determining whether a particular use is fair?

There is a three-prong test: incidental and exceptional use; purpose of critic, commentary, caricature, teaching, academic interest or research; and no covert exploitation of the work. This is a provision that has yet to be tested in court.

#### 11 Are architectural works protected by copyright? How?

The Law provides that such works are protected by copyright; however, the Law includes a series of exceptions related to these kind 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 the project.

#### 12 Are performance rights covered by copyright? How?

The Law acknowledges a series of neighbouring rights to copyright to artists, interpreters and performers (actors, singers, dancers and musicians, among others), empowering them to authorise or forbid their broadcasting and to receive payment for their public use, notwithstanding copyrights.

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 re-transmission 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 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.

#### 13 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.

#### 14 Are moral rights recognised?

See question 7.

#### Copyright formalities

##### 15 Is there a requirement of copyright notice?

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

##### 16 What are the consequences for failure to display 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.

##### 17 Is there a requirement of copyright deposit?

No, the deposit of a copy of the work is likewise not necessary for the 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 19.

##### 18 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 19.

**19 Is there a system for copyright registration?**

Yes, there is a registration system managed by the Department of Intellectual Property Rights where copyrights and neighbouring rights can be registered. Registration is performed by simply supplying a deposit copy of the work without involving third parties – there are no publication or opposition proceedings – and its function is an essentially probative one and administrative acknowledgement of the creative fact. 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 his or her 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.

**20 Is copyright registration mandatory?**

No, 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 it and to make reference to the number assigned by the Department of Intellectual Property Rights when making the work known to the public.

**21 How do you apply for a copyright registration?**

Registration is carried out by simply supplying a deposit copy of the work, filing an application form and paying the respective fee and is automatic, with no publication or a period of opposition by third parties being required. The application may be filed through the form maintained for said purpose by the Department of Intellectual Property Rights, in accordance with the Law and its regulations.

**22 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 account unit used for tax payments as well as for certain administrative fines, and its value is updated according to inflation levels. Its value, to date, is around US\$50. The following fees are applied according to each work:

- engineering and architecture projects and computer programs – 35 per cent UTM (approximately US\$24);
- cinematographic films – 40 per cent UTM (approximately US\$27); and
- any other registration – 10 per cent UTM (approximately US\$7).

**23 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****24 Who is the owner of a copyrighted work?**

The author of the work is the primary owner of the copyrights, 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 26);
- 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 25.

**25 May an employer own a copyrighted work made by an employee?**

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

Only in special circumstances will the employer own a copyright work made by an employee:

- in the case of 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;
- in the case of works produced by public officials while performing their duties, which belong, accordingly, to the state, municipalities, official corporations, semi-public or autonomous institutions and other government entities for which they are working; and
- in the case of 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 in which the authors provides their services, the articles, drawings, photographs, or other productions provided by the staff under a labour agreement, ensuring the authors the other rights as those protected by the Law.

**26 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.

**27 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 24), 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.

**28 May rights be transferred?**

The Law expressly authorises the authors, and copyright and neighbouring right holders, to transfer the total 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. 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 copyrights or neighbouring rights, in any capacity, must be done through a contract executed in a public instrument or private instrument authorised by a notary public, which must be registered in the Intellectual Property Registry within a term of 60 days, as of the date of execution of said act or contract.

### 29 May rights be licensed?

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 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.

### 30 Are there compulsory licences? What are they?

The Law considers the existence of certain licences of a mandatory nature in matters of collective management. See question 31.

### 31 Are licences administered by performing rights societies? How?

Collective management of copyrights and neighbouring rights may be conducted in Chile by non-profit corporations that have the sole purpose of managing collectively copyrights and neighbouring rights, and that have obtained authorisation to operate from the Ministry of Education. Said entities are obliged to accept the management of copyrights 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 right 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 right society. Performing right societies are obliged to contract, with whoever requests it, the concession of non-exclusive authorisations of copyrights 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 use of 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 right society representing them, but in no event may the authorisations granted by said performing right 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 right 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 right 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 performance right organisations for the use of their works. Only a legal entity or association with legal status may act as counterpart of a performance right organisation in these proceedings, which is not individually available to companies.

### 32 Is there any provision for the termination of transfers of rights?

No, there is no provision for the termination of transfers of rights.

### 33 Can documents evidencing transfers and other transactions be recorded with a government agency?

As has been previously mentioned in questions 28 and 32, total or partial transfer of copyrights or related rights, in any capacity, must be recorded in the Intellectual Property Registry within a term of 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

#### 34 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 36.

#### 35 How long does copyright protection last?

The protection granted by the Law lasts for the life of the author and extends itself for another 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 term is 70 years following 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;
- interpretations and performances – 70 years from its publication, and should there be no such publication, within a term of 50 years since its recording; the protection will be for 70 years following the end of the civil year of its recording. In the case of non-recorded interpretations or performances, the term of 70 years will start to count from the date of said performance; and
- radio and television broadcasts – 50 years from 31 December of the year of the broadcast.

#### 36 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.

#### 37 Do terms of copyright have to be renewed? How?

No.

#### 38 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

#### 39 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.

#### 40 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 authorised to provide personal data from their users 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.

#### 41 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.

#### 42 Is there a time limit for seeking remedies?

The exercise of the respective actions prescribes, according to general proceedings rules, five years, in the case of civil action for damages. The exercise of the criminal action (see question 44), according to the penalty established for copyright crimes, prescribes five years 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).

#### 43 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.

#### 44 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.

#### 45 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\$356 to US\$71,270.

##### 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\$713 to US\$71,270.

##### 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\$7,128 to US\$71,270.

##### 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\$1,785 to US\$35,700.

##### 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\$143,000. 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.

**46 Are there any specific liabilities, remedies or defences for online copyright infringement?**

See question 40 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 a 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 of or the disabling of access to the infringing material clearly identified by the petitioner; and terminating specified accounts of repeat infringers, clearly identified by the petitioner, whose holders are using the system or network to perform an activity infringing copyrights 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 contents 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.

**47 How may copyright infringement be prevented?**

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****48 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 Trade-Related Aspects of Intellectual Property (TRIPS) Agreement, and the World Intellectual Property Organization (WIPO) Treaties concerning Copyrights (WCC), and Performances and Phonograms (WPPT), known as the WIPO Treaties. In addition, on 4 February 2016, Chile signed the Trans-Pacific Partnership Agreement (TPP), which has a particular chapter dedicated to intellectual property.

**49 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.

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# China

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## Legislation and enforcement

### 1 What is the relevant legislation?

The primary legislation is the Copyright Law of the People's Republic of China. Other important statutes include the 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) and the Interpretation of the Supreme People's Court Concerning Several Issues on the Application of Law in Adjudication of Internet Copyright Disputes (2006).

### 2 Who enforces it?

The copyright administrative authorities of the State Council are responsible for administration of copyright nationwide; and the copyright administrative authorities of the People's Governments of all provinces, autonomous regions and centrally administered municipalities are responsible for administration of copyright matters within their administrative region.

The copyright law is also enforced by certain courts that have jurisdiction over copyrights.

### 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 right is provided in the Copyright Law. Moreover, the Regulation on Protection of Information Network Transmission Right specifically addresses the issue.

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

Yes, so long as the place where infringements or the results of infringement take place is in China.

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## Agency

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

The National Copyright Administration of China (NCAC) provides the following services:

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

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

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

- written works;
- oral works;
- musical, dramatic, quyi, 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.

### 7 What types of rights are covered by copyright?

Copyrights are divided into personal rights and property rights. Personal rights, also known as moral rights, are composed of:

- the right of publication, that is, the right to decide whether to make a work available to the public;
- the right of authorship, that 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, that is, the right to revise or authorise others to revise a work; and
- the right of integrity, that is, the right to protect a work against distortion and mutilation.

Property rights include:

- the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work, or by other means;
- the right of distribution, that is, the right to sell or donate the original copy or reproductions of a work to the public;
- the right of rental, that is, the right to authorise others to use temporarily 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, that is, the right to publicly display the original copy or reproductions of fine art or photographic work;
- the right of performance, that 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, that is, the right to publicly present a work of fine art, a photographic work, a cinematographic work and work created by a similar process, or other works, by projector, slide projector or any other technology or instrument;
- the right of broadcasting, that 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 transmitting signs, sounds or images;

- the right of communication through information network, that is, the right to make a work available to the public by wire 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, that is, the right to make a cinematic adaptation of a work using cinematography or a similar process;
- the right of adaptation, that is, the right to change a work into a new one with originality;
- the right of translation, that is, the right to change the language in which the work is written; and
- the right of compilation, that is, the right to compile, by selection or arrangement, pre-existing works or passages into a new work.

### 8 What may not be protected by copyright?

Copyright protects the original expression of ideas, but not the ideas. 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 and forms of general use, and formulas.

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

The following use would be legally permitted without the copyright owner's consent or payment of remuneration, provided that the personal rights and other rights of the copyright owner are not jeopardised:

- 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 and 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.

### 10 What are the standards used in determining whether a particular use is fair?

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.

### 11 Are architectural works protected by copyright? How?

Architecture is specifically protected under the Copyright Law. The Implementation of the Copyright Law further provides its definition 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 two different kinds of works, only three-dimensional buildings and structures rather than graphic construction designs or architectural model could be regarded as architecture. Moreover, the originality test might be stricter than that for other works. Architecture is not only an intellectual creation but may also be appreciated with a certain aesthetic sense. However, when the function and the aesthetic of the architectural design cannot be separated, then 'architecture' cannot be protected.

### 12 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 be considered in two scenarios: live performance and broadcasting performance by varied means. Performing the work live, with no permission from the copyright owner, could infringe the owner's performance rights, except the gratuitous live performance defined in the limitations clause. A typical broadcasting performance would be classed as background music in places of business such as supermarkets, clubs, restaurants, airports, etc, for which the consent of the copyright owner must be obtained with a view to remuneration.

### 13 Are other 'neighbouring rights' recognised? How?

Neighbouring rights include the rights of publishers on typographical design, the rights of performers, producers of sound recordings or video recordings and 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 shall 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 as neighbouring rights under the Copyright Law, but by the Regulations for the Protection of the Layout Design of Integrated Circuits and administrated by the State Intellectual Property Office (SIPO).

### 14 Are moral rights recognised?

Yes. Authors' personal rights include:

- the right of publication, that is, the right to decide whether to make a work available to the public;
- the right of authorship, that 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, that is, the right to revise or authorise others to revise a work; and
- the right of integrity, that is, the right to protect a work against distortion and mutilation.

For the neighbouring rights, only the performers have personal rights:

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

### Copyright formalities

#### 15 Is there a requirement of copyright notice?

There is no requirement of notice under copyright laws, even though copyright notice is often used by right holders. In practice, the courts would protect an author's rights regardless of any formality, as long as the citizen, legal entity or other organisation whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work.

### 16 What are the consequences for failure to display a copyright notice?

It is not necessary to display a copyright notice since the author's right to protection is triggered automatically by a work's creation. However, copyright notice is often an easy proof of ownership, especially in litigation.

### 17 Is there a requirement of copyright deposit?

There is no requirement of copyright deposit in China. As an optional approach to prove authorship, a works deposit is available at the Copyright Protection Centre of China. In keeping with the needs of works creation and commercial operation and in order to secure and deposit evidence, the Centre provides the applicants with creation certificates by sealing off their works, semi-finished works or creative designs. Works deposit is not subject to any censorship or any restriction.

### 18 What are the consequences for failure to make a copyright deposit?

Copyright deposit is neither mandatory nor the only approach for authors to protect copyrights actively and in timely fashion. However, copyright deposit is often an easy proof of copyright.

### 19 Is there a system for copyright registration?

Yes. The registration service is provided by the Copyright Protection Centre of China. Specifically, the Centre provides professional services in the fields of copyright-related social services, 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.

### 20 Is copyright registration mandatory?

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

### 21 How do you apply for a copyright registration?

To register a work, right holders 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.

### 22 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 from the second work.

### 23 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 an easy proof of copyright.

## Ownership and transfer

### 24 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 heirs 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 even inherited (for exceptions, see question 28).

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 inheritor shall exercise the copyright claims.

### 25 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:

- drawings of engineering designs and product designs, 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 the copyright which is vested in the employer in accordance with laws, administrative regulations or contracts.

### 26 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 of an explicit agreement in such a contract, the copyright in the work shall belong to the commissioned party.

### 27 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 enjoyed jointly 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 in the joint work as a whole.

### 28 May rights be transferred?

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

### 29 May rights be licensed?

Yes. Anyone who exploits another person's work shall conclude a copyright licensing contract with the copyright owner, except where no permission need be obtained under this Law.

### 30 Are there compulsory licences? What are they?

Yes. A user might defend its use by compulsory licences when the use satisfies certain situations; then the user does not need the author's permission but must remunerate him or her. There are five kinds of statutory licences designated in the Copyright Law and two kinds 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 newspaper or periodical, 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 station or television station broadcasts a published work;
- a radio station or television station broadcasts a published sound recording;
- a short extract from published works is compiled in textbooks for the nine-year compulsory education and for national education planning;

- a short extract from published works is used to produce courseware for nine-year compulsory education or the plan of national education through the 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.

**31 Are licences administered by performing rights societies? How?**

Yes. Licences of varied copyright and related rights would be administered by five performing rights societies – the Music Copyright Society of China (MCSC), China Audio-Video Copyright Association, China Written Works Copyright Society, Images Copyright Society of China and China Film Copyright Association (Collective). Their administrative systems for licensing are similar. The MCSC, 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. MCSC must collect royalties from users to remunerate the music copyright owners. The MCSC would also take legal action against infringement of music copyright, administered by the MCSC if necessary.

**32 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 shall be equal to the protective period of the rights.

**33 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 shall complete the online application form first and then submit the materials requested for recording to the Centre personally or by its hired 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 of the registration of the rights, if available. After the application fee is paid, the applicant receives a receipt. The process lasts 10 working days during which the applicant may be requested to supply further supporting documents. Details of the transfer record may then be tracked online and the applicant should receive the certificate of the record after three working days.

**Duration of copyright**

**34 When does copyright protection begin?**

Copyright protection begins automatically at the moment when works are created.

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

**36 Does copyright duration depend on when a particular work was created or published?**

In respect of the work of a legal entity, organisation or work which is created in the course of employment, the copyright (except the right of authorship) which is enjoyed by a legal entity or other organisation such work shall no longer be protected under copyright if it is not published within 50 years after the completion 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.

**37 Do terms of copyright have to be renewed? How?**

No.

**38 Has your jurisdiction extended the term of copyright protection?**

No.

**Copyright infringement and remedies**

**39 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 elements when judging a direct infringement, whether: the acts committed are controlled under copyright; the acts are not allowed by the right holder; and the acts cannot be admitted as exceptions and limitations by the Copyright Law. The infringement would be actionable if these three elements are all established.

Whether the acts are committed on purpose or not shall only influence the amount of the damages rather than the determination of the infringement.

**40 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 Dispute provides for secondary liability for indirect infringement in network. In addition, this secondary liability shall also be actionable under China's Tort Law. Article 9 of the Tort Law regulates 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 a direct copyright infringement.

In practice, courts seem to believe a preparatory act that would lead to a direct infringement or an act that would expand the damages of the infringement may also incur secondary liability.

**41 What remedies are available against a copyright infringer?**

China has a two-track protection system. In one approach, the copyright owner may file a complaint to the local copyright regulatory and enforcement department, requesting the enforcement of regulatory measures against the infringer, including an order to stop infringement and imposition of a fine. Alternatively, the injured party may bring a suit against the copyright infringer with requirement of ceasing the infringement, eliminating the adverse effects of the act, making an apology and/or paying compensation for damages.

The right owner may, before taking legal proceedings, apply to a court for measures to order discontinuation of the infringement and to preserve property where he or she can present evidence to prove that another person is committing, or is about to commit, an infringement of his or her right which, unless prevented promptly, is likely to cause irreparable harm to his or her legitimate rights and interests.

Further, if criminal liability is involved, the infringed party may also report it to the police for criminal investigation.

**42 Is there a time limit for seeking remedies?**

Yes. The Supreme People's Court interpretation announces that the time limit for actions of copyright infringement is two 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 two years and the infringement still continues when the lawsuit is initiated, the court shall, within the protection period of the

### Update and trends

Although the latest draft amendment to the Copyright Law is still pending, reinforcing copyright protection is a trend that has never been reversed. In 2016, the State Council of China promulgated The Plan on Protection and Implementation of Intellectual Property under the 13th Five-Year National Plan, which, for the first time, makes intellectual property a key national strategy. It represents a commitment made at the national level. Additionally, the General Principles of the Chinese Civil Code, enacted in March 2017, gives IP rights protection equal to that of the right in rem. The above recent progress corresponds to China's national ambition to build a knowledge-based economy, demonstrating the determination of the Chinese authority to protect IP rights by policy support as well as improved legal system.

Moreover, following the establishment of the specialised IP Courts in Beijing, Shanghai and Guangzhou, the Supreme Court announced in January 2017 the establishment of four specialised IP tribunals in the Intermediate Courts of Wuhan, Nanjing, Suzhou and Chengdu. These tribunals will have cross-regional jurisdiction in first instance IP cases, governing civil, administrative, and criminal actions.

In the last year, the most notable copyright law practice is in the online game industry: a number of debates are ongoing relating to the copyright subject matters. One debate is on whether game

frames should be protected by copyright. Some case law gives positive answers for role-playing games (RPGs) in which the game frames represent a process of character development. The rationale behind this is that game players acting out certain roles within a narrative will reach one of the endings designed by the game developer following certain pre-set rules and guidelines. So, the story development drives the changing of game screen images of which the distribution via computers or smart phones is similar to that of cinematographic works or works created by a process analogous to cinematography. Another issue raised in the industry is whether the frames of e-sport games qualify for copyright protection. Chinese courts have generally found that frames of e-sport contests were unprotectable because contests are not subject to scripts or plans prepared in advance and developed according to a set of rules leading to one or more fixed endings. The process of the e-sport contests is almost random and non-reproducible. The above disputes are expected to be resolved by the law. The draft third amendment to the Copyright Law has listed 'audiovisual works' as a new subject matter of copyright, which are defined as 'any work that consists of a series of fixed related images, with or without accompanying sound, susceptible of being made visible'. Based on this definition, frames of online games might be protected as 'audiovisual works' with the development of case law in the future.

copyright, order the defendant to stop the infringements, and the compensation amount for infringement shall be calculated two years from the date when the copyright holder initiated the lawsuit with the court.

#### 43 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 right owner, or the amount of the unlawful gains of the infringer when the actual losses are difficult to calculate. Where the actual losses of the right owner or the unlawful gains of the infringer cannot be determined, the court shall, in light of the circumstances of the infringement, decide on compensation amounting to not more than 500,000 yuan.

#### 44 Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes. Compensation shall include the reasonable expenses that the right owner has paid for putting a stop to 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.

#### 45 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 of the following acts of 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 of not more than three years or criminal detention and shall also, or shall only, be fined; if the amount of illegal gains is huge or if there are other especially serious circumstances, he or she shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined:

- reproducing and distributing a written work, musical work, motion picture, television programme or other visual works, computer software or other works without permission of the copyright owner;
- publication of books for which another party has exclusive publication rights;
- reproducing and distributing an audio or video recording produced by another person without permission of the producer; or
- producing or selling a work of fine art with the forged signature of another painter.

#### 46 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 procedure has been introduced into this Regulation.

Where a rights holder is of the opinion there has been an infringement, he or she may notify the network service provider in writing and request the network service provider deletes 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 shall forthwith delete the allegedly infringing content or remove the links to the allegedly infringing content and would not then bear the compensation liability.

#### 47 How may copyright infringement be prevented?

Rights holders may legally be allowed to adopt technical measures to prevent their information network transmission rights from being infringed. Any organisation or individual shall not intentionally avoid or destroy technical measures and shall 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

#### 48 Which international copyright conventions does your country belong to?

WIPO-administered treaties include:

- the Beijing Treaty on Audiovisual 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 (WTO);
- the World Trade Organization (WTO) - 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.

**49 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 protection of copyright.



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# Denmark

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## Legislation and enforcement

### 1 What is the relevant legislation?

The main relevant legislation is the Danish Act on Copyright (the Copyright Act). Pursuant to the Copyright Act, and whereas Denmark has acceded to all WIPO administered conventions (and the TRIPS Agreement as well), the extension of the protection under the Copyright Act to persons who are nationals of or have their habitual residence in another contracting state is established in the Executive Order on the Application of the Act on Copyright in Relation to Other Countries. Regarding collective management, the Act on Collective Management of Copyright and Related Rights was passed in 2016, implementing parts of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

### 2 Who enforces it?

Generally, copyrights are enforced through the civil courts. In addition, the Minister for Culture has set up the Copyright Licence Tribunal, a board making final administrative decisions according to extended collective licences, compulsory licences and certain claims for remuneration, according to specified rules laid down in the Copyright Act.

### 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, digital exploitation of works is covered in line with non-digital exploitation. However, the Copyright Act's exemption regarding reproduction for private use differs between copies in digital and copies in non-digital form.

Further, the Copyright Act contains a specific provision on the copyright holder's exclusive right of making a digital work available to the public through on-demand services, including the internet.

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

The Copyright Act is applicable to and deals with foreign-owned or foreign-operated websites as well as native Danish websites, provided that the infringing content of the websites is available in Denmark and intentionally addressed to Danish users. The specific domain (eg, a .dk domain), the language of the content, the design or links to other Danish website as well as the currency used are all relevant indicators as to the intention of the owner or operator to address Danish users.

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## Agency

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

There are no formal requirements to obtain copyright protection and thus there is no centralised copyright agency in Denmark. However, a certain kind of 'centralisation' is given by the collective management organisations (KODA, Gramex, COPYDAN), all collecting licence fees on behalf of their members.

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

Literary and artistic works are copyrightable, be it expressed in writing or in speech as a fictional or a descriptive representation or whether it be a musical or dramatic work, cinematographic or photographic work, or a work of fine art, architecture, applied art, or expressed in some other manner. Computer programs are explicitly mentioned in the Copyright Act and are considered as literary works. This enumeration of different categories of works in the Copyright Act is non-exhaustive; all kinds of literary or artistic works are protected, irrespective of the form in which the work is expressed. The concepts 'literary' and 'artistic' are to be interpreted broadly, covering categories of functional works, modern information technology, television show formats and similar expressions, all far from the common perception of the said terms. In that sense, the Copyright Act is dynamic.

The fundamental requirement of copyright protection is originality. This is not stated explicitly in the Copyright Act but is derived from the interpretation of the terms 'literary and artistic works'. The case law regarding originality is huge, at least concerning works of a mainly functional character. For decades, it has been discussed whether the originality threshold was 'high' or 'low', whether the threshold differed, depending on the different categories of works, etc. These discussions may now have come to an end, due to the EU harmonised definition of originality as 'the author's own intellectual creation', derived from different copyright directives and associated case law from the European Court of Justice.

### 7 What types of rights are covered by copyright?

Copyright implies the exclusive right to control the work by reproducing it and by making it available to the public, whether in the original or in an amended form, in translation, adaptation into another literary or artistic form or into another technique. In order to understand the actual scope of rights covered by copyright, this wide-ranging scope of protection must be read together with the limitations to the exclusive rights set out in an independent chapter of the Copyright Act. In other words, authors have, except as permitted by law, the exclusive right to authorise or prohibit any reproduction and any 'communication to the public' of their works.

Copyright also implies moral rights; that is, the right to be identified by name as the author, and the right to prohibit any alteration or making the work available to the public in a manner or in a context which is prejudicial to the author's literary or artistic reputation or individuality (see question 14).

### 8 What may not be protected by copyright?

Public documents such as acts, administrative orders, legal decisions and similar official documents are not subject to copyright.

The idea/expression dichotomy is a fundamental doctrine in Danish copyright, even though not expressed explicitly in the Copyright Act. Thus, ideas and similar abstract phenomena are not protected, while the tangible expression is.

One interface is made to the other intellectual property rights such as patents and trademarks. However, figurative trademarks, for example, are not excluded from copyright protection, provided that they are original artistic works. With respect to design rights, it is specifically

stated in the Copyright Act that protection under the Act of Designs does not preclude copyright.

Pursuant to the Copyright Act, layout designs (topography) of semiconductors cannot enjoy copyright protection, but may be protected under the provisions in the Act on Protection of the Design (Topography) of Semiconductor Products.

#### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

The doctrine of 'fair use' does not exist as such but a number of different limitations regarding the scope of protection, some stated in the Copyright Act, others deduced from case law, are de facto providing a scheme similar to the 'fair use' doctrine known from other jurisdictions. Reproduction for private use, reproduction within educational activities or by hospitals, quotations in accordance with proper usage and to the extent required for the purpose are some of the limitations in the Copyright Act.

Freedom of speech including freedom of artistic expression is seen as an argument in order to balance the scope of copyright protection as well. There is a long and firm tradition of exceptions or limitations to the copyright law regarding caricature, parody or pastiche as well.

In general, the Danish copyright regulation is in tune with and corresponding to the scope of exceptions and limitations enumerated in the 'InfoSoc' Directive (Directive 2001/29/EC). Accordingly, the three-step test, originating in the Berne Convention, is applicable to all provided exceptions and limitations.

#### 10 What are the standards used in determining whether a particular use is fair?

The variety of sources regarding 'fair use', see question 9, means that general standards as such for 'fair use' have not been developed in Danish copyright law.

#### 11 Are architectural works protected by copyright? How?

Architectural works are protected as artistic works as long as the work meets the requirement of originality. The protection includes both the final work in three-dimensional form and the drawings, including the architectural drawings that underlie the finished works. Thus, it constitutes an infringement if a house is built based on an architectural drawing without consent.

This does not apply to maps and drawings and other works of descriptive nature (ie, technical drawings). Although considered as literary works and thus protected against copying, the protection does not include the technical end product. Here, the patent legislation takes over.

#### 12 Are performance rights covered by copyright? How?

Performance rights are covered as one of a number of 'other rights', ie, 'neighbouring rights'. The performance rights only apply to the performance of literary or artistic works; other kinds of performances are not protected. That excludes in general the performance of clowns, acrobats and similar circus performers, as well as the performance of athletes. The performance rights are reproduction rights, thus, so-called 'sound alike' are not covered. Originality is not required with regard to the performance as such, however a mechanical recitation of a text without any individual choices made by the reader (eg, a news reader) with the sole purpose of providing information is probably not protectable, hence the lack of 'performance'. The duration of the rights is 50 years after the end of the year in which the performance took place.

#### 13 Are other 'neighbouring rights' recognised? How?

Apart from the performance rights mentioned in question 12, producers of sound recordings and producers of recordings of moving pictures are protected with regard to copying and making the recordings available to the public. Protection is granted irrespective of the quality and character of the sounds recorded or the moving picture. It is the technical or the economical contribution of the producer or both in making the recording that is the protectable subject matter.

Broadcasters are protected against rebroadcasting and reproduction.

Producers of photographic pictures, irrespective of the quality and character (ie, originality) of the pictures, shall enjoy the exclusive right to make copies of the pictures and make them available to the public.

This neighbouring right is closely connected to the regular copyright protection of original photographic works.

The person who produces a catalogue, a database or the like, in which a great number of items of information has been compiled, or which is the result of a substantial investment, shall have the exclusive right to control the product in question as a whole or an essential part thereof by making copies of it and by making it available to the public.

News as such, whether hot or not, is not protected. However, press releases supplied under contract from foreign news agencies or from correspondents abroad, may not without consent of the recipient be made available to the public through press, the radio or in any other similar manner until 12 hours after they have been made public in Denmark. This seems to be a rather outdated regulation without much – if any – practical importance.

#### 14 Are moral rights recognised?

Moral rights are a part of Danish copyright protection. The regulation is divided into two: (i) the right of paternity (ie, the author of a work has the right to be identified by name as the author in accordance with the requirements of proper usage, on copies of the work as well as if the work is made available to the public); and (ii) the right of integrity (ie, the work must not be altered or made available to the public in a manner or in a context which is prejudicial to the author's literary or artistic reputation or individuality). The scope of right of paternity differs from one category of work to another and from one kind of exploitation to the next, hence the concept 'proper usage'. In general, the right of paternity is rather limited in relation to works of a mainly functional character.

The rights of paternity and integrity of the author cannot be waived except in respect of a use of the work which is limited in nature and extent.

#### Copyright formalities

#### 15 Is there a requirement of copyright notice?

There are no formal requirements and registration or notice of a copyright protected work is not possible. Copyright occurs at the creation of the work. A copyright notice (©) may serve the interest of the author to apply on copies of his or her work, indicating the authorship and in addition indicating an intention to enforce the rights. At least the © has some informative value.

Even though there are no formalities required, it is advisable to establish evidence as to the identity of the author. If not otherwise stated, the person whose name or generally known pseudonym or signature is indicated in the usual manner on copies of the work, or where the work is made available to the public, shall be deemed to be the author.

#### 16 What are the consequences for failure to display a copyright notice?

There are no consequences. It is, however, advisable that the author can prove the copyright for the purpose of future disputes.

#### 17 Is there a requirement of copyright deposit?

There is no requirement of copyright deposit.

#### 18 What are the consequences for failure to make a copyright deposit?

Given the fact that there is no requirement of copyright deposit, there are no consequences for failure to make a copyright deposit.

#### 19 Is there a system for copyright registration?

There is no system for copyright registration in Denmark.

#### 20 Is copyright registration mandatory?

Copyright registration is neither mandatory nor possible.

#### 21 How do you apply for a copyright registration?

It is not possible to register a copyright, see question 19.

#### 22 What are the fees to apply for a copyright registration?

Since it is not possible to apply for a copyright registration, there are no fees.

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**23 What are the consequences for failure to register a copyrighted work?**

As it is not possible to register a copyright, there is no consequences in this connection.

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**Ownership and transfer**


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**24 Who is the owner of a copyrighted work?**

Copyrights to a work always originate in the natural person(s), who is/are the creator(s) of the work. A company or other legal person may get the copyrights to a work transferred to it but the copyrights cannot originate in it.

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**25 May an employer own a copyrighted work made by an employee?**

Yes, however, the employer will have to get the copyrights transferred from the employee who has created the work, as copyrights cannot originate in a company or other legal person (see question 24).

It may be agreed in the employment contract or by separate agreement at a later time that the copyrights to a work created by an employee are transferred to the employer. Such transfer will not include the employee's moral rights to the work, as these rights may as a general rule not be transferred. It is not a requirement that the agreement is in writing but this is recommended. If the employer and employee do not have, or make, such agreement, it is the general rule that only the rights necessary for the purpose of the employer's ordinary business are transferred to the employer (eg, a newspaper will have the right to print articles made by the journalists employed by the newspaper). In practice, this transfer of rights to a large extent resembles an exclusive licence for the employer to use the work in the employer's ordinary course of business.

The Copyright Act contains a specific exception to the above with regard to computer programs created by employees. Unless otherwise agreed, all copyrights, including moral rights, to a computer program created by an employee are automatically transferred to the employer upon creation. This exception to the general rule only covers the computer program's machine code, source code and preparatory design material. It does not cover other kinds of copyright-protected works included in a computer program (eg, images, text, sound, video, the graphical interface, etc).

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**26 May a hiring party own a copyrighted work made by an independent contractor?**

Yes, however, the hiring party will have to get the copyrights transferred to it, as the copyrights will originate with the independent contractor, or if the independent contractor is a legal person, one or more of its employees. It is not a requirement that a transfer agreement is in writing but this is recommended.

If a company hires an independent contractor to create a work, as a general rule, the company will only obtain rights to the specific copy or copies of the work that it purchases. No copyrights will be granted. This starting point may be modified depending on the purpose for which the company has hired the independent contractor, provided that this purpose is known to the independent contractor. If, for instance, the company has informed the independent contractor that the work shall be developed for the purpose of the company's further production and distribution of the work, the company will likely be considered to have been granted an exclusive licence to use the copyrights for this purpose. However, in this case, the independent contractor will still be the owner of the copyrights.

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**27 May a copyrighted work be co-owned?**

Yes. A work may originate as a co-owned work or it may by transfer change to be co-owned at a later time.

If two or more people jointly create a work, these people will have a co-ownership of the copyrights to the work. Each of them is, however, allowed to enforce the rights. It should be noted that the mere assistance with the creation of a work is not sufficient to obtain a share of the copyrights. To obtain a share in the ownership, a person will need to have contributed creatively to the work.

Furthermore, co-ownership to copyrights may occur as a result of transfer (eg, by heritage or acquisition).

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**28 May rights be transferred?**

Yes, copyrights may be transferred (eg, by heritage or acquisition). It is not a requirement that there is a written transfer agreement, but this is recommended. Notwithstanding, unless explicitly agreed, even the transfer of the full copyrights to a work does not grant the assignee the rights to alter the work or reassign the rights to others, unless such alteration or such transfer must be considered usual or obviously presumed.

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**29 May rights be licensed?**

Yes, pursuant to the Danish Copyright Act, the copyrights to a work may be transferred in whole or in part. Licences are considered transfers of part of the copyrights.

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**30 Are there compulsory licences? What are they?**

There are today only a few compulsory licences left in the Danish Copyright Act.

The first of these compulsory licences entails that sound recordings of published literary works may be used and distributed for use by visually impaired people and those with learning difficulties if this is not done for commercial purposes. The owner of the copyrights to the work is entitled to remuneration for such use.

A second compulsory licence grants the right to use minor portions of literary works and musical works or such works of small proportions in composite works compiling contributions by a large number of authors for use in educational activities. It is, however, a requirement that at least five years have elapsed since the year when the work was published. The owner of the copyrights to the work is entitled to remuneration for such use.

Finally, there is a compulsory licence that grants the right to use published sound recordings in broadcasts on radio and television and for other public performances. The compulsory licence does not apply to use of on-demand services.

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**31 Are licences administered by performing rights societies? How?**

To ensure that copyright holders get their rightful compensation and to make it easier for users to use copyright protected works, a series of different rights under the Danish Copyright Act, including performance rights, are being administered through collective rights management.

For copyright holders, this entails that they – on a continuing, automatic and more or less mandatory basis – transfer the administration of certain of the rights to their works to collective rights management societies, who then claims compensation from users of the works. For users, this system makes it easier for them to use copyright protected works, as they will not have to contact each right holder of a work directly for permission to use the work.

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**32 Is there any provision for the termination of transfers of rights?**

The assignee of the copyrights to a work has an obligation to exploit the copyrights. On this basis, the Danish Copyright Act grants the assignor a right to terminate the assignment of the right with six months' notice, if the assignee has not exploited the assigned copyrights within three years after the assignment. The assignee may avoid such termination, by initiating exploitation of the copyrights before the expiry of the notice. It is not possible to derogate from this termination right, except with regard to the time limits, which may be agreed amended within reason.

Furthermore, the Danish Copyright Act grants a performing artist the right to terminate an agreement pursuant to which the artist has assigned its rights to a sound recording to a producer, when 50 years have passed after the publication of the sound recording or, if the sound recording has not been published, when 50 years have passed after the sound recording was communicated to the public, if the producer does not (i) offer copies of the sound recording for sale to a sufficient extent and (ii) make the sound recording available on an on-demand basis. In this case, the performing artist may terminate the agreement by giving one year's notice, following which the agreement will be terminated, if the producer does not perform both of the acts of exploitation prior to the expiry of the notice period.

Besides this, there is no provisions for the termination of transfers of rights in the Danish Copyright Act. However, the assignor and

### Update and trends

Apart from the Act on Collective Management of Copyright and Related Rights that was passed in 2016 and which implements parts of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, the focus has been on the Proposal for a Directive on Copyright in the Digital Single Market (COM(2016) 593).

This directive's article 11 on protection of press publications concerning digital use (ie, establishing a neighbouring right for publishers of press publications with a 20-years duration, is discussed. The proposal is called a 'snippet-tax' and is criticised for undermining competition and access to knowledge.

Furthermore, the proposed directive's article 13 on 'Certain uses of protected content by online services' is controversial, requiring information society service providers that store and provide to the public access to large amounts of works or other subject matter uploaded by their users to take measures to ensure the functioning of agreements concluded with right holders for the use of their works or other subject matter or to prevent the availability of their services of works or other subject matter identified by right holders through the cooperation with the service providers. The concern is related to the use of effective content recognition technologies and the risk of undermining access to legal content. Moreover, the technology is an economic burden, especially with regard to small and medium-sized providers.

assignee may have, in a transfer agreement in respect of copyrights, agreed to additional termination provisions.

### 33 Can documents evidencing transfers and other transactions be recorded with a government agency?

It is not possible to record the transfer of copyrights with a government agency in Denmark.

However, copyrights are assets that may be used for collateral (eg, by pledging it separately or as part of a floating charge). In some instances, the use of such collateral requires registration through the Danish Registration Court in order to become valid.

### Duration of copyright

#### 34 When does copyright protection begin?

Copyright to a work automatically arises, as soon as the work fulfils the requirements for copyright protection. A work may thus obtain protection before it is finalised.

#### 35 How long does copyright protection last?

Regular copyright protection to a work lasts until 70 years after the death of the creator. With respect to the related rights and neighbouring rights, the protection period varies but is in general shorter. The duration of moral rights is, in principle, infinite.

#### 36 Does copyright duration depend on when a particular work was created or published?

General copyright duration depends only on the death of the original creator. With respect to the related rights and neighbouring rights, the duration depends on when the work was created or, in some cases, on when it was first published.

#### 37 Do terms of copyright have to be renewed? How?

No. Copyrights are unregistered rights, which it is not possible to renew.

#### 38 Has your jurisdiction extended the term of copyright protection?

When implementing Directive 93/98/EEC (harmonising the term of protection of copyright and certain related rights) in 1995, the term of copyright protection was extended from 50 to 70 years from the death of the author. Pursuant to the Copyright Act, a sound recording may not without the consent of the producer be copied or made available to the public until 50 years have elapsed after the end of the year in which the recording was made. If the sound recording is published during this period the protection shall, however, last until 70 years have elapsed

after the end of the year of the first publication. If a sound recording is not published but is made public in any other manner, the protection shall, however, last until 70 years have elapsed after the end of the year in which it was made public. These 70-year protection periods were extended in 2013 from previously 50 years' protection.

### Copyright infringement and remedies

#### 39 What constitutes copyright infringement?

Any use of the copyright holder's exclusive rights pursuant to the Copyright Act, without consent, which is not covered by any of the limitations set out in the Copyright Act or elsewhere will constitute an infringement, see questions 6 to 14.

#### 40 Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Yes, secondary liability does exist for indirect copyright infringement. The regulation for secondary liability for copyright infringements follows the regular regulation on complicity in the Danish Penal Code. According to case law, intermediaries whose services are being used by a third party to infringe a copyright or who are found to be providing services used in infringing activities may on certain conditions be secondarily liable, provided that they are not service providers covered by the exemptions in the Danish Act on e-Commerce (implementing the e-Commerce Directive (2000/31/EC)).

#### 41 What remedies are available against a copyright infringer?

The following legal remedies are available against a copyright infringer:

- award of damages, compensation or remuneration;
- impoundment or confiscation of infringing copies, imitations, computers, hard disks or similar;
- removal, withdrawal, handover or destruction of infringing copies;
- injunction to prohibit the continuing infringement;
- publication of the judgment; and
- criminal sanctions in case of wilful or grossly negligent infringement.

#### 42 Is there a time limit for seeking remedies?

Copyright infringements are subject to a three-year statute of limitation period calculated from the time where the copyright holder first became aware or ought to have become aware of the copyright infringement.

A copyright holder's right to enforce against a specific copyright infringement may, however, also be forfeited before the lapse of this three-year statute of limitation if the copyright holder over a long period of time (usually at least a year, possibly longer) because of passivity is found to have tacitly accepted the infringement.

#### 43 Are monetary damages available for copyright infringement?

Yes. Anyone who with intent or by negligence infringes another party's copyright shall pay (i) reasonable remuneration to the infringed party for the exploitation, and (ii) damages to the copyright holder for any additional damage caused by the infringement. When setting the damages, consideration shall among others be given to the copyright holder's loss of profits and the infringer's unfair profits.

In addition to reasonable remuneration and damages, compensation can be awarded for non-financial damage that the infringement has given rise to. This is primarily used in cases that regard infringements of moral rights.

#### 44 Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes. The losing party in a regular litigation case or a case for a preliminary injunction must pay to the prevailing party legal costs at an amount fixed by the courts. The rewarded amount depends on the subject matter and complexity of the case and varies from case to case. However, the legal costs rewarded by the court usually do not cover the prevailing party's actual attorney's fees.

#### 45 Are there criminal copyright provisions? What are they?

Yes. Anyone who wilfully or by gross negligence violates another party's copyrights may be liable to a fine. In case of intentional violation, the penalty may under particularly aggravating circumstances be

increased to imprisonment for 18 months or, in rare cases of extremely aggravating circumstances, even to imprisonment for six years. A fine is the main criminal remedy for copyright infringement as imprisonment is reserved for very rare cases of severe infringements. Criminal cases for copyright infringement are subject to private prosecution. Criminal prosecution for copyright infringements is primarily used in piracy cases.

#### 46 Are there any specific liabilities, remedies or defences for online copyright infringement?

The remedies specified in question 41 apply in full to online copyright infringement.

In addition, a remedy that is often used in cases of copyright infringement is (DNS-)blocking of domain names. In these cases, the copyright holders file an action against one or more internet service providers with a claim that they shall block their users' access to the infringing websites. The Danish internet service providers have entered into an agreement, pursuant to which all Danish internet service providers will block a domain name, if a court in a case against one of the internet service providers decides that this internet service provider shall block the domain name.

#### 47 How may copyright infringement be prevented?

A copyright holder may reduce the risk of infringement by printing a copyright notice on the protected work or in close proximity of the work or by implementing technical protection measures on the media containing the work. Under Danish law, a copyright notice (©) does not have any legal effect. It merely has an informative value, indicating that the work is considered copyright protected and that the copyright holder has an intention to enforce the rights. To some extent, this may have a preventive effect in regard to infringements.

### Relationship to foreign rights

#### 48 Which international copyright conventions does your country belong to?

Denmark is signatory to the following international copyright conventions:

- the Berne Convention of 1886;
- the Universal Copyright Convention of 1952;
- the Rome Convention of 1961;
- the Phonograms Convention of 1971;
- the TRIPS Agreement of 1994;
- the WIPO Copyright Treaty of 1996; and
- the WIPO Performances and Phonograms Treaty of 1996.

#### 49 What obligations are imposed by your country's membership of international copyright conventions?

The international copyright conventions impose a number of obligations, the most important being the following:

- the principle of non-discrimination, which implies that works created by authors in other countries enjoy the same protection as works created in Denmark and are not subject to further obligations than works created in Denmark;
- a minimum protection duration period;
- copyright protection shall not be subject to any formal requirements; and
- a three-step test of determining limitations and exceptions.



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# France

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## Legislation and enforcement

### 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 Organisations of 1961;
- WIPO Performances and Phonograms Treaty of 20 December 1996 (WPPT);
- the TRIPS Agreement of 1995, notably on copyrights and related rights; and
- the WIPO Copyright Treaty of 1996.

The law of the European Union is also part of the French copyright law when it is implemented into national law. In particular, the 2006 DADVSI law, 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 EU Directive 2011/77 relating to the term of protection of copyright and certain related rights.

### 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.

#### The HADOPI

The HADOPI is a French governmental agency that also participates in enforcing 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.

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### 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').

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### 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 the 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 of online copyright infringement cases.

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## Agency

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

There is no centralised copyright agency in France.

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

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, plans, maps and sketches.

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## 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.

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## 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.

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## 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

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.'

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## 10 What are the standards used in determining whether a particular use is fair?

See question 9.

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## 11 Are architectural works protected by copyright? How?

As long as their work is original, architects own copyrights. 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.

Act 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.

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## 12 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, those 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.

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## 13 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.

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## 14 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; and
- 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.

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## Copyright formalities

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### 15 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.

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### 16 What are the consequences for failure to display a copyright notice?

See question 15.

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### 17 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.

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### 18 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.

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### 19 Is there a system for copyright registration?

There is no system for copyright registration in France.

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### 20 Is copyright registration mandatory?

See question 19.

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### 21 How do you apply for a copyright registration?

See question 19.

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### 22 What are the fees to apply for a copyright registration?

See question 19.

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### 23 What are the consequences for failure to register a copyrighted work?

See question 19.

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## Ownership and transfer

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### 24 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.

### 25 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.

### 26 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.

### 27 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.

### 28 May rights be transferred?

Moral rights are inalienable and may not be transferred.

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

### 29 May rights be licensed?

The economic rights of copyrights 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.

### 30 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 and/or on any channels of audiovisual communication enterprises which pay equitable remuneration (article L 214-1 of the IPC).

Act No. 2016/925 dated 7 July 2016 has extended said regime of compulsory licence to web-radio services.

In compensation, the same provision confers the performer and producers a right to remuneration.

### 31 Are licences administered by performing rights societies? How?

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

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

### 32 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.

### 33 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

### 34 When does copyright protection begin?

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

### 35 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.

### 36 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.

### 37 Do terms of copyright have to be renewed? How?

Terms of copyright do not have to be renewed.

### 38 Has your jurisdiction extended the term of copyright protection?

Act No. 2015-195 of 20 February 2015, aiming at the implementation into French law of various provisions of the 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

### 39 What constitutes copyright infringement?

Copyright is infringed by a person who, without the authorisation of the author or the right 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 14). Civil liability is strict; there is no requirement for the infringer to have any knowledge or intent to commit the infringement.

### 40 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.

#### 41 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 43);
- 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.

#### 42 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.

#### 43 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 right 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.

#### 44 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 allocated by French courts are low.

#### 45 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 the 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 40); and
- to hold for private use or use a technological application, device or service aimed at infringing a useful DRM (digital right management) which protects a work (article R 335-3 of the IPC).

#### 46 Are there any specific liabilities, remedies or defences for online copyright infringement?

Several provisions were created to deal with online copyright infringement.

In this respect we can mention, for example, the following:

##### 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 the HADOPI authority and provide, inter alia, 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 the 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, the 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.

The 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, right 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'.

#### 47 How may copyright infringement be prevented?

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

#### 48 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 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961;
- WIPO Performances and Phonograms Treaty of 20 December 1996 (WPPT);
- the TRIPS Agreement of 1995, notably on copyrights and related rights; and
- the WIPO Copyright Treaty of 1996.

**49 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 copyrights 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.



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# Germany

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## Legislation and enforcement

### 1 What is the relevant legislation?

The Act on Copyright and Related Rights (the Copyright Act) serves as the main source regarding statutory legal regulations in Germany. Further legislation includes the Publishing Act as well as the German Art Copyright Act regarding copyrights of the arts and photography. With respect to the collection of licensing fees, the Collecting Societies Act has been passed.

### 2 Who enforces it?

Generally, the civil courts enforce the rights of the author. Cases with respect to all legal disputes of a licensee on account of a legal relationship regulated under the Copyright Act will also be enforced by the civil courts. Copyright litigation matters with respect to claims for payment of remuneration standing in connection with or resulting out of employment or service relationships are enforced by labour courts or administrative courts.

In cases where criminal Copyright Acts statutes are affected, the criminal prosecution authorities and the criminal courts are responsible for the respective enforcement.

### 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?

Generally, the provisions of the Copyright Act cover digital as well as non-digital works. Specific provisions that address the digital exploitation of works are, for example, contained in section 19a of the Copyright Act, which relates to the right of making works available to the public, especially via the internet.

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

The Copyright Act is also applicable with respect to foreign-owned or foreign-operated websites that infringe copyright, provided that the website's content is available in Germany and intentionally addressed to German users. Indications for the intention to address German users might be the domain, the language of content, the website's design or links to other websites in German language or addressed to German recipients.

## Agency

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

Currently, no centralised copyright agency exists. Copyright protection begins with the creation of the work. In order to obtain copyright protection, an entry of the work in a register is neither necessary nor possible. Notwithstanding the above, the German Patent and Trademark Office maintains a register of anonymous and pseudonymous works. This database does not serve to register all existing copyright works but is used to extend the term of protection of published anonymous or pseudonymous works. Besides, currently a total of 13 collecting agencies exist for the collection of licence fees and protection of rights

of authors, such as the society for musical performing or mechanical reproduction rights (GEMA) or VG Wort.

## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

The Copyright Act generally includes works of literature, science and art as copyrightable works (section 1 of the Copyright Act). Section 2 of the Copyright Act provides a list of examples including literary works (writings, computer programs), musical, pantomime, artistic works (including architectural and applied arts) and their drafts, photographic, film works and representations of a scientific or technical nature (including drawings, blueprints, maps, drafts, tables and three-dimensional presentations).

Any copyright protection always requires a personal intellectual creation, having been developed personally by one or more individuals.

### 7 What types of rights are covered by copyright?

Exploitation rights and moral rights are covered by copyright. Exploitation rights are the rights to exploit the work in material form which especially includes the right of reproduction, the right of distribution and the right of exhibition. The exploitation rights also encompass the right to communicate the work to the public in non-material form, which especially includes the right of recitation, performance and presentation, the rights of making the work available to the public, broadcasting, communication by video or sound carrier and communication of broadcasts and works made available to the public.

Furthermore, the Copyright Act grants moral rights (see question 14) to the author, according to which, among others, the creator is to be recognised and identified as the author of the work. Under the Copyright Act, copyright owners are protected against the unauthorised use of their works. Provided certain criteria are met, measures in case of infringement of a copyright establish various types of claims for the owner, including forbearance, information, and damage claims. In addition, infringers of copyright may be charged under criminal law if certain prerequisites are fulfilled and if the infringer has acted wilfully and knowingly.

### 8 What may not be protected by copyright?

Protection under copyright law only covers creations that are in a tangible medium of expression. Ideas, findings, and methods are not copyrightable. The work does not have to be developed in its entirety, a creation to the extent that will allow it to be individually recognised will suffice.

In addition, official works such as statutes, decrees, and ordinances, as well as official head notes of court decisions and any other official works published in the public interest, are not protected by copyright.

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

Despite the fair use doctrine not having been adopted as such, the Copyright Act contains numerous sections on limitations. Accordingly, statutory provisions in sections 44a to 63a of the Copyright Act allow for the use of copyrighted works in enumerated cases – provided the specific criteria expressly outlined are met. The limitations comparable to a fair use doctrine encompass the following examples: the duplication of works in specific cases of educational, scientific or private use;

the distribution or reproduction of public speeches by broadcasting companies or newspapers; and the display of works in public libraries.

#### 10 What are the standards used in determining whether a particular use is fair?

The standards regarding the threshold of a fair use differ and are laid down as specific criteria in the section 44a et seq of the Copyright Act. Among other requirements, standards may broadly be outlined as follows:

- private and personal use: a duplication within the private use requires that copies will exclusively be used within the personal sphere and are not related to commercial use;
- citations: quotations require that only parts of the work be used. Citations may be more extensive within scientific works as opposed to citations within musical or literary works;
- freedom of report: public speech, publications, and broadcasted commentary and reports on daily news may be used (partly subject to payment of fees) in the interest of informatory rights and the public interest in communication;
- cultural industry: recordings if used by broadcasting organisations for preparatory or demonstrating purposes; and
- education and science: duplication, collection of and making available to the public parts of works, if restricted to educational use in educational or ecclesiastical institutions with no commercial intention.

#### 11 Are architectural works protected by copyright? How?

Architectural works are protected as a type of art as expressly itemised under section 2, No. 4 of the Copyright Act. Provided the threshold of individuality has been met, copyright protection may encompass family houses as well as, for example, factory or office buildings, churches, museums, bridges, memorials, places, gardens or interior design. Sketches, blueprints, and drafts of such architectural works are protected if they have been developed to an extent of individual creation. Should such sketches overcome the threshold of individual character in terms of drafting, a copyright protection may additionally come into play in view of the example rule of section 2, No. 7 of the Copyright Act (scientific or technical presentation).

#### 12 Are performance rights covered by copyright? How?

Performance rights are part of related rights. Performers are protected by moral rights and exploitation rights (section 73 et seq of the Copyright Act). The moral rights encompass the right to be recognised as performer and to determine whether and how to be named as well as to interdict any detriment of the performance which might jeopardise the performer's reputation, to record the performance on a picture or sound carrier, to reproduce and distribute those records, and the right of communication to the public in different manners. Furthermore, the performer is granted the right to be remunerated.

#### 13 Are other 'neighbouring rights' recognised? How?

The Copyright Act recognises as neighbouring rights the protection of editions of non-copyrighted works or texts, photographs, performing artists, producer of sound carriers, broadcasting organisations, database producers, press publishing companies or in connection with films or other types of moving images.

#### 14 Are moral rights recognised?

Moral rights, which are not subject to transfer, are focused in sections 12 to 14 of the Copyright Act. The author of a work is protected with respect to the right of disclosure, namely, the right to decide when and in what form the work will be presented to the public. Further, the author holds the right to be acknowledged as the author of the work and to prevent others from naming anyone else as the creator (right of attribution) and the right to insist that the work not be mutilated or distorted (right of integrity).

### Copyright formalities

#### 15 Is there a requirement of copyright notice?

Copyright protection as such does not require any formal act such as copyright notice. For purposes regarding the future protection in a

potential dispute, it is, however, helpful to consider means of establishing evidence at the time of creation of the work. Section 10 of the Copyright Act stipulates a rebuttable presumption that the person identified as the copyright owner is to be regarded as the author of a work, until evidence is presented otherwise.

Section 13 of the Copyright Act grants any author the right to be named as the author of his or her work. Accordingly, the author has to be named in the customary manner each time his or her work is used.

#### 16 What are the consequences for failure to display a copyright notice?

An author will not benefit from the rebuttable presumption outlined in section 10 of the Copyright Act in case of failure to display a copyright notice.

Should a third party have failed to name the author, the author can claim that his or her work must no longer be used without its rightful name, even if he or she permitted the use in principle. In case further requirements are met, the author can demand for payment of damages as well.

#### 17 Is there a requirement of copyright deposit?

No requirement for copyright deposit exists.

#### 18 What are the consequences for failure to make a copyright deposit?

Owing to the lack of a respective legal requirement, the failure of copyright deposit remains without consequence.

#### 19 Is there a system for copyright registration?

In Germany, a system for copyright registration does not exist. One exception consists of the German Patent and Trademark Office's register of anonymous and pseudonymous works (see question 5).

#### 20 Is copyright registration mandatory?

Copyright registration is not mandatory.

#### 21 How do you apply for a copyright registration?

In order to apply for registration in the register of anonymous and pseudonymous works, an author has to file a written application with the German Patent and Trademark Office indicating the author's name, place and date of author's birth and the title of the work or other designation. In addition, the application must encompass the date and nature of the first publication of the work. If applicable, the application has to include the date of author's death, the pseudonym under which the work was published, and the publishing company.

#### 22 What are the fees to apply for a copyright registration?

The fee for registration in the register of anonymous and pseudonymous works is €12 for one single work, €5 for the second to tenth work, and €2 for the eleventh and following works, if filed simultaneously.

#### 23 What are the consequences for failure to register a copyrighted work?

As no requirement for copyright registration exists, failure of registration does not lead to any legal consequences. For purposes regarding the future protection in a potential dispute, it is, however, helpful to consider means of establishing evidence at the time of creation of the work.

In case of anonymous and pseudonymous works, a registration in the respective register leads to an extension of the term of copyright protection to 70 years after the death of the author. Should the author decide against registration, the term of protection will expire 70 years after the publication of the work or, if not published, after its creation.

### Ownership and transfer

#### 24 Who is the owner of a copyrighted work?

The creator of a work is the owner of the copyright. As the creation of a copyrighted work is required to be a personal intellectual creation of a human individual, only natural persons may be authors.

**25 May an employer own a copyrighted work made by an employee?**

German law does not permit the assignment or transfer of a copyright itself. Accordingly, an author is limited to the granting of exploitation rights with respect to the copyrights owned by him or her. Therefore, an employer does not automatically own a copyrighted work made by an employee. But an employee is obliged to grant exploitation rights to the employer if this is agreed in the employment contract or – in case of the lack of such an agreement – if such an obligation results out of the employment's nature or purpose. Within an employment relationship – whether under a public, private or freelance employment relationship – generally, the creator principle is applicable. The relations between authors and their employers or clients are guided by the contractual provisions agreed.

If a respective contract contains no provision regarding copyrights, German courts will presume that the rights to exploit the work within the boundaries of the purpose of the contract have been granted by the employee or contractor. Beyond that, an employer will be forced to contractually acquire and respectively agree with the author to be granted further exploitation rights.

Courts distinguish between 'compulsory works', which are created in carrying out the employment duties and 'free works', which are created 'on occasion' of employment or completely outside the same. The distinction may have an impact on remuneration.

Section 69b of the Copyright Act provides special provisions for employed authors of computer programs who create the program, in either carrying out the duties or following the employer's instructions. Unless otherwise agreed, the employer is exclusively entitled to exercise all economic rights in the computer program. The German Federal Court of Justice held that section 69b excludes the additional remuneration of the author.

**26 May a hiring party own a copyrighted work made by an independent contractor?**

A hiring party will not own a copyright in the work of the author as the copyright itself is not transferable. The scope of usage rights held by the hiring party is subject to the agreement between the hiring party and the independent contractor. In order to avoid uncertainties about the scope of exploitation rights, and for evidentiary purposes, it is advisable to stipulate respective details between the parties in writing.

**27 May a copyrighted work be co-owned?**

Copyrights in a work are held by various authors as a joint ownership if created mutually and not exploitable in divided parts. However, as dissolution of such joint ownership is not possible, the co-authors may stipulate the legal relationship between them in a respective agreement. Term of the co-owned copyright is calculated on the basis of the longest living author.

**28 May rights be transferred?**

Copyright itself always stays with the author and cannot be transferred, with the exception of legal succession at the time of the death of the author because the copyright is inheritable.

In order for the work to be used, authors may grant exploitation rights, which are transferable and licensable.

**29 May rights be licensed?**

Copyrights may be licensed either for particular forms of exploitation or for all usage rights. The grant may be exclusive or non-exclusive and may be limited in respect of territory, time or content. The holder of a non-exclusive exploitation right is entitled to use the work within the authorised scope without excluding third parties, whereas the holder of an exclusive exploitation right is not only entitled to prevent third parties and the author himself from the use of the work but also to grant exploitation rights.

**30 Are there compulsory licences? What are they?**

Under special circumstances which are laid down in section 42a of the Copyright Act, an author who has granted an exploitation right in a musical work to a producer of sound carriers, is obliged to grant an exploitation right to the same extent on reasonable conditions to any other producer of sound carriers.

**31 Are licences administered by performing rights societies? How?**

Some types of exploitation rights, as well as claims for remunerations, are administered by performing rights societies upon the request of authors and holders of related rights. It is applicable where collective exploitation is practical or prescribed by statutory law. The activities of the performing rights societies are subject to the Collecting Societies Act. The most important principles with regard to activities of the performing rights societies include, among others, the obligation to administer the author's rights upon his or her request (section 9), the obligation to grant to anyone upon request exploitation rights on reasonable terms and conditions (section 34), the obligation to establish tariffs on remuneration which it demands in return for the grant of exploitation rights (section 38), the distribution of revenues to the authors according to a fixed distribution plan (section 27), and the settlement of rate disputes (section 92 et seq). The performing rights societies are required to hold an official licence and are supervised by the German Patent and Trademark Office.

**32 Is there any provision for the termination of transfers of rights?**

Not applicable as the copyright is not transferable itself (see question 28).

With respect to exploitation rights, the author and the holder of the exploitation rights may agree on the duration of time for which the exploitation rights are granted.

An author is generally entitled to revoke an exploitation right in case the holder of an exclusive exploitation right either does not exercise the right at all or exercises it inadequately and thereby affects the author's legitimate interests detrimentally. The author is further entitled to revocation if his or her conviction is no longer represented by the work and thus a further exploitation cannot be expected. The revocation is subject to certain prerequisites and the author normally has to adequately compensate the exploitation rights holder. The Publishing Act contains special provisions relating to the termination of exploitation rights.

**33 Can documents evidencing transfers and other transactions be recorded with a government agency?**

This is not possible.

**Duration of copyright****34 When does copyright protection begin?**

Copyright protection begins with the creation of the work by the author.

**35 How long does copyright protection last?**

Copyright protection lasts for the lifetime of the author and 70 years thereafter (section 64, Copyright Act). In case of anonymous and pseudonymous works, which are not registered, copyright protection will expire 70 years after the publication of the work or, if not published, after its creation (see question 23).

Different statutory law protection periods are applicable with respect to related rights. The terms range from one year up to 70 years depending on the nature of the related right; the calculation is always based upon certain events specified in the respective provisions such as release or publication. For example, the protection for a photograph generally expires 50 years after the photograph was first released.

**36 Does copyright duration depend on when a particular work was created or published?**

The copyright term begins with the creation of the work by the author. As no registration process is required, the time of creation is decisive for the duration. The publication of the work might be relevant for anonymous and pseudonymous works, as well as related rights. For example, the rights of a database's producer generally expire 15 years after its publication.

**37 Do terms of copyright have to be renewed? How?**

No renewal of copyright protection exists once the initial time period for protection has lapsed.

### Update and trends

At the end of 2016, the 'Act for improved enforcement of the authors' and performing artists' claim for appropriate remuneration and for regulating questions of the publishers' participation' among others partially reformed contractual copyright law. Authors and holders of related rights are, for example, now entitled to claim from a licensee information on the use of the work and the generated income thereof once a year. In addition, an author who has granted an exclusive exploitation right in return for a lump-sum remuneration is now entitled to otherwise use his or her work after the expiry of a period of 10 years. The original licensee is still entitled to use the work for the agreed licence period but only in the form of a non-exclusive exploitation right.

A current draft of the legislation establishes new rules regarding the use of copyright protected works in the area of education and science legally permitted without the consent of the author ('Act for the adaptation of copyright to the current requirements of the knowledge society').

### 38 Has your jurisdiction extended the term of copyright protection?

The copyright term of 70 years after the death of the author was established in 1965 and since then has not been extended. The terms of the related rights of performers and producers of audio recordings were recently partially extended to 70 years.

### Copyright infringement and remedies

#### 39 What constitutes copyright infringement?

Briefly summarised, any exploitation of a copyrighted work which is carried out without the prior consent of the author constitutes an infringement, provided it does not fall under the limitations of copyright. Besides, if a holder of an exploitation right exceeds the rights granted to him or her by the author, he or she also infringes copyright unless the use falls under the limitations of copyright. The violation of 'absolute rights', which are effective against anyone, is penalised – such absolute rights are the author's exploitation rights and moral rights.

#### 40 Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Under German Copyright law, not only the offender is liable but also instigators and accomplices. Further, the principle of *Stoererhaftung* (which constitutes a form of liability for a breach of duty of care) is acknowledged: if someone who – without being an offender, instigator or accomplice – has been involved in the unlawful interference in a deliberate and appropriately causal manner, he or she may be held liable for the infringement, provided it was legally and practically possible and reasonable to prevent the violation of the law.

#### 41 What remedies are available against a copyright infringer?

Provided certain criteria are met, measures in case of infringement of a copyright establish various types of claims for the owner, including forbearance, disclosure of information, and damage claims as well as destruction of the unlawfully produced or distributed copies and the recall of these copies from the channels of commercial distribution (sections 97, 98 and 101 of the Copyright Act).

The author or, under certain circumstances the holder of an exclusive exploitation right, is entitled to send a cease and desist letter to the infringer requesting a declaration regarding forbearance of the infringing behaviour possibly accompanied by additional claims (eg, declaration to provide detailed information with respect to the infringing use and the obligation to reimburse damages and attorneys' fees) stipulating an equitable contractual penalty for any further breach. The entitlement to send a cease and desist letter requires that the threat of repetition of the infringement exists.

Instead, or following such a cease and desist letter the infringed party may file an application for a preliminary injunction at court requesting the forbearance of the infringing behaviour. Such application is restricted to being filed within a certain time after the right holder has received knowledge about the infringement and the identity of the infringer.

Instead of a preliminary injunction, the infringed party may bring an action to court, requesting forbearance. Such action may further encompass claims with respect to the provision of detailed information, damages, destruction and recall of the unlawfully produced copies.

A damage claim requires, among others, that the infringer has acted intentionally or negligently.

The claim may further be extended to reimbursement for the legal costs of the proceedings such as court fees and attorneys' fees calculated on the basis of respective statutory law.

Upon report of the infringed party, the criminal prosecution authorities will commence criminal investigation and possibly prosecution in case criminal statutes are applicable. Criminal copyright prosecution partially requires application of the infringed party, unless the criminal prosecution authorities regard it to be necessary on account of a particular public interest.

#### 42 Is there a time limit for seeking remedies?

Generally, the time limit for civil remedies in cases of copyright infringement is subject to the provisions of the German Civil Code. Accordingly, claims are normally time-barred within the standard statute of limitations of the German Civil Code stipulating a time period of three years.

An application for a preliminary injunction needs to be filed within a certain time period after having acquired knowledge of the infringement and the identity of the infringer. Statutory law does not provide a time limit; it is subject to the jurisdiction of the courts and may differ from district to district. Some courts will not allow the preliminary injunction to be filed later than one month after having acquired knowledge.

Criminal prosecution that is not in the public interest requires the infringed party to file a respective application within three months of obtaining knowledge of the infringement and the identity of the infringer.

#### 43 Are monetary damages available for copyright infringement?

Section 97, paragraph 2 of the Copyright Act provides a claim for monetary damages. The injured party is entitled to choose between three types of calculation.

- Type 1: The damages are calculated based on a fictive licence analogy. Accordingly, the infringer is obligated to pay a royalty which reasonable parties would have agreed upon, being aware of the true legal situation and the circumstances of the individual case. Whether or not the injured party had been willing to grant a licence and whether or not the infringer would have acquired such a licence is irrelevant. If no licence practice of the author has been established (which would prevail), the damages are calculated on the basis of branch or industry tariffs.
- Type 2: The party whose rights have been infringed is entitled to claim any profit generated by the infringer as a result of the infringement. Whether the injured party would have generated this amount of profit is irrelevant. The infringer cannot argue that the profit exceeds the usual royalties.
- Type 3: The party whose rights have been infringed is entitled to claim the actual loss caused by the infringement such as incurred sales decrease or verifiable loss of profit.

As long as the claim is not extinct by performance or has not been subject to a final judgment, the calculation basis is subject to determination by the injured party.

#### 44 Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes, the Copyright Act (section 97a) and section 91 et seq of the German Code of Civil Procedure provide a claim for reimbursement, especially of attorneys' fees. The fees will only be reimbursed in accordance with the calculation standards under specific German statutory law.

#### 45 Are there criminal copyright provisions? What are they?

The Copyright Act contains criminal and regulatory fine provisions.

Section 106 of the Copyright Act stipulates that the reproduction, distribution or communication to the public of a work or an adaptation of a work without the consent of the author in a way other than

approved by law is punished by imprisonment of up to three years or a fine. Any attempt is punishable. The same is applicable in similar cases such as the event of the affixing of a designation of the author to the original artistic work without the author's consent.

Section 108 of the Copyright Act criminalises the infringement of related rights, for example, special kinds of exploitation of a photograph without the right holder's consent in a way other than approved by law. Any attempt is punishable.

Further, the Copyright Act stipulates an enhancement of imprisonment in case of the acts having been committed on a commercial scale or when circumventing technological measures without the consent of the right holder in order to get access to the copyright protected work.

#### **46 Are there any specific liabilities, remedies or defences for online copyright infringement?**

In cases of online copyright infringement, the party whose rights have been infringed is entitled to claim disclosure of information about the identity of the infringer including the traffic data from the access provider. With regard to the principle of data protection, the disclosure requires a prior judicial order, which must be applied for by the infringed party.

#### **47 How may copyright infringement be prevented?**

The author or right holder can use either technical measures in order to prevent third parties from infringing his or her rights, for example, protection systems which prevent the reproduction of a DVD, or provide electronic information which identify works or their authors or the conditions for use in order to serve the rights' management.

### **Relationship to foreign rights**

#### **48 Which international copyright conventions does your country belong to?**

Germany is a signatory to, among others, the Trade Related Aspects of Intellectual Property Agreement, the Berne Convention for the Protection of Literary and Artistic Works, the Copyright Treaty and the Universal Copyright Convention.

#### **49 What obligations are imposed by your country's membership of international copyright conventions?**

The most important obligations include:

- the obligation to grant protection to foreign authors to the same extent that German authors are protected;
- minimum standards of duration of copyright protection;
- the provision of certain exploitation rights;
- the so-called 'three-step test' to determine limitations and exceptions; and
- to provide legal remedies against the circumvention of technological measures.

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# India

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## Legislation and enforcement

### 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.

### 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.

### 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 upto 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 46.

### 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.

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## 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 Copyright Board has, however, not been functional for the last five years. The government of India has recently passed the



Finance Bill, 2017 which proposes to merge the Copyright Board with the Intellectual Property Board. The Intellectual Property Board was previously constituted to hear appeals from the decisions of the Trademark Registry and Patent Office.

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### Subject matter and scope of copyright

#### 6 What types of works are copyrightable?

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).

#### 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).

#### 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 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.

#### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

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.

#### 10 What are the standards used in determining whether a particular use is fair?

Fair dealing under Indian law is an exhaustive provision for each kind of copyright work specified under section 52 of the Copyright Act. It is not open-ended as under the US concept of 'fair use'.

#### 11 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.

#### 12 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, ie, 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 prevented on behalf of Indian Singers' Rights Association [CS(OS) No. 3958 of 2014]. The suit was decreed in favour of ISRA on 30 September 2016.

#### 13 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.

#### 14 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 amendment, 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

##### 15 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, 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.

##### 16 What are the consequences for failure to display a copyright notice?

There are no adverse consequences.

##### 17 Is there a requirement of copyright deposit?

There is no requirement of copyright deposit.

##### 18 What are the consequences for failure to make a copyright deposit?

Not applicable.

##### 19 Is there a system for 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 copyrights 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.

##### 20 Is copyright registration mandatory?

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.

##### 21 How do you apply for a copyright registration?

A prospective registrant may apply for registration of copyright in the following manner:

- an application is to be made to the Registrar of Copyrights in accordance with Form IV in triplicate along with the prescribed fee;
- the person applying for registration shall give notice of the application to every person who claims or has interest in the subject of the copyright;

- if no objection to such registration is received by the Registrar within 30 days, the Registrar shall enter the particulars;
- if the registration receives any objection, the Registrar may enter such particulars in the register after holding an inquiry; and
- the Registrar of Copyrights shall send a copy of the entries to the parties concerned.

##### 22 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.

##### 23 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

##### 24 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.

### 25 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.

### 26 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.

### 27 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.

### 28 May rights be transferred?

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.

### 29 May rights be licensed?

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 granting 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.

### 30 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.

### 31 Are licences administered by performing rights societies? How?

Yes. Performing rights societies, such as the Indian Performing Right Society Limited (IPRS) and Phonographic Performance Limited (PPL) and Indian Singer's Rights Association (ISRA), are forms of 'copyright societies' for collection, licensing, administration and enforcement of rights, and these have been registered as 'copyright societies' with the government of India. 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 copyright society for singers as performers called the Indian Singers' Rights Association (ISRA), which were registered in 2013.

### 32 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.

### 33 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

### 34 When does copyright protection begin?

Copyright protection begins the moment a work comes into existence (ie, date of creation).

### 35 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.

### 36 Does copyright duration depend on when a particular work was created or published?

In certain cases, as mentioned in question 35.

### 37 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.

### Update and trends

The Copyright Board is proposed to be merged with the Intellectual Property Appellate Board leading to speedier resolution of disputes.

The Supreme Court of India gave its decision in *International Confederation of Societies of Authors and Composers v Aditya Pandey & Ors* on 20 September 2016 dealing with the underlying rights of authors and composers in a sound recording post- and pre-copy-right (2012 Amendment to the Copyright Act).

The Appellate Bench of the Delhi High Court laid down the scope of the safe harbour defence available to internet intermediaries in its *Myspace Inc. v Super Cassettes Industries Limited* judgment dated 23 December 2016.

The Appellate Bench of the Delhi High Court also confirmed the view of the single judge in the *DU Photocopy* case (*The Chancellor Masters & Scholars of University of Oxford & Ors. v Rameshwari Photocopy Service & Ors.*) dealing with scope of fair dealing with respect to reproduction of course materials on the instructions of education institutions to students.

### 38 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 sixty year post-publication term, copyright in photographs now effectively subsists till sixty 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 35 for different works), was increased from 50 years to 60 years.

### Copyright infringement and remedies

#### 39 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.

#### 40 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 UK.

#### 41 What remedies are available against a copyright infringer?

- 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 copyrights of a person with the assistance of the customs authorities of India.

#### 42 Is there a time limit for seeking remedies?

Yes. The period of limitation for filing a suit for damages for infringement of copyrights is three years from the date of such infringement.

#### 43 Are monetary damages available for copyright infringement?

Yes, besides damages the copyright owner can also claim rendition of account of profits.

#### 44 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.

#### 45 Are there criminal copyright provisions? What are they?

Yes. The Copyright Act, 1957 has provided for enforcement of copyrights through a series of penal provisions under Chapter 13 of the Act. The following are the principal penal provisions under the Act:

- 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.
- 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, copyrights, 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.
- 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.
- Section 63A provides for enhanced penalty on second or subsequent convictions under section 63 (see point (i)).
- 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.

#### 46 Are there any specific liabilities, remedies or defences for online copyright infringement?

Yes. The amendment of 2012 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 which 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 right 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 seen 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 recent copyright amendment of 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.

#### 47 How may copyright infringement be prevented?

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;
- 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

##### 48 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 Universal Copyright Convention;
- the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms (Phonograms Convention); and
- the TRIPS Agreement.

##### 49 What obligations are imposed by your country's membership of international copyright conventions?

Having ratified the Berne Convention and the Universal Copyright Convention, 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.



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# Japan

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## Legislation and enforcement

### 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.

### 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.

### 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).

### 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.*

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## 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 program works, which are registered at the Software Information Centre (SOFTIC).

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

Works in which thoughts or sentiments are expressed in a creative way, and that fall within the literary, scientific, artistic or musical domain, 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 diagrammatical works of a scientific nature, such as drawings, charts and models;
- cinematographic works;
- photographic works; and
- computer programs.

### 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.

### 8 What 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 may not be protected by copyright.

Ideas without any creative expression may not be protected by copyright, 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.

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

While there is no general doctrine of 'fair use' in Japan, there are 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.

#### 10 What are the standards used in determining whether a particular use is fair?

As there is no general 'fair use' doctrine in Japan, rather than applying general standards, specific special exemptions set out the terms under which a work may be used legally.

#### 11 Are architectural works protected by copyright? How?

Yes. Architectural works in which thoughts or sentiments are expressed in a creative way, and which 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 14), 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.

#### 12 Are performance rights covered by copyright? How?

Yes. A performer has the moral right to indicate his or her name and to preserve integrity; the right to make sound or visual recordings; the right to broadcast and to wire-broadcast; the right to make his or her performance transmittable; the right to transfer ownership; and the right to 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).

#### 13 Are other 'neighbouring rights' recognised? How?

Yes. Producers of phonograms, broadcasting organisations and wire-broadcasting organisations all have neighbouring rights.

#### 14 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

#### 15 Is there a requirement of copyright notice?

No. However, many authors do put copyright notices on their works to help prevent copyright infringement.

#### 16 What are the consequences for failure to display a copyright notice?

Not applicable.

#### 17 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.

#### 18 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.

#### 19 Is there a system for copyright registration?

Yes. 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 it 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, the publisher of an anonymous or pseudonymous work, may have registered 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 have the date of the creation of his or her work registered within six months of the work's creation.

#### 20 Is copyright registration mandatory?

No.

#### 21 How do you apply for a copyright registration?

With the exception of computer software, the author or right holder of a work applies for copyright registration to the ACA, using the forms designated by the Agency. For computer software, the author or creator, or other person provided in the Act, such as the holder of copyright, may apply for copyright registration by application to the SOFTIC.

#### 22 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.

#### 23 What are the consequences for failure to register a copyrighted work?

The right holder or author may not assert his or her rights against a third party unless registered.

### Ownership and transfer

#### 24 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 25) 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 cinematographic work.

#### 25 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

**Update and trends**

The government intends to amend the Copyright Act to allow schools to distribute text books online upon the payment of some compensation but without requiring the schools to obtain the consent of copyright holders. This amendment bill will be submitted to the Diet of Japan in 2017, and the amendments therein will be implemented in 2018.

Additionally, the government issued a report regarding future amendments of the Copyright Act in April 2017. The report suggests introducing the fair use doctrine into the Copyright Act as has been done in the US. This suggestion will soon bring contentious debates.

computer program work that, on the initiative of a juridical person 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 such employer unless otherwise stipulated by contract, work regulations or the like at the time of the making of the work.

**26 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.

**27 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.

**28 May rights be transferred?**

Yes.

**29 May rights be licensed?**

Yes.

**30 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.

**31 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 in 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.

**32 Is there any provision for the termination of transfers of rights?**

No.

**33 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****34 When does copyright protection begin?**

Copyright protection begins at the time of the creation of the work.

**35 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. The protection period will be 70 years in compliance with the Trans-Pacific Partnership agreement.

**36 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).

**37 Do terms of copyright have to be renewed? How?**

No.

**38 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****39 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.

**40 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.

**41 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.

**42 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.

**43 Are monetary damages available for copyright infringement?**

Yes.

**44 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.

**45 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 investigate copyright infringements and bring charges against offenders only if the copyright holders have filed complaints against the authorities. After the amendment of the Copyright Act occurs in order to comply with the Trans-Pacific Partnership agreement, in relation to certain copyrighted works, the authorities will be able to investigate copyright infringements and bring charges against offenders even if the copyright holders have not filed complaints as well as allowing right holders to seek statutory damages for infringements.

#### 46 Are there any specific liabilities, remedies or defences for online copyright infringement?

Yes. When copyright is infringed by information distribution through the internet, a person alleging that his or her copyright has been infringed may request a telecommunications service provider, such as an internet service provider:

- to prevent such infringed information from being transmitted to unspecified persons in practice (under civil laws); and
- to 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 right holder demanding the above disclosure to exercise his or her right to claim damages, and there is justifiable ground for the right 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.

#### 47 How may copyright infringement be prevented?

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); 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

#### 48 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 WIPO Performances and Phonograms Treaty (WPPT); the Agreement on Trade-Related Aspects of Intellectual Property Rights; and the Beijing Treaty on Audiovisual Performances.

#### 49 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 (Paris Act), the Universal Copyright Convention (Paris Act), and the Principle of Reciprocity in accordance with the Berne Convention (Paris Act) are imposed.

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# Mexico

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## Legislation and enforcement

### 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 copyrights for conduct in which the alleged infringer obtains direct or indirect profits from the commercial use of a work, which is a so-called 'trade-related infringement'.

### 2 Who enforces it?

The National Copyright Institute is the competent authority to enforce the 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 into Mexican territory.

### 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.

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### 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 copyrights must be based in Mexico to support an infringement action under Mexican law.

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## Agency

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

The National Copyright Institute is the centralised 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 to give them publicity. 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.

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

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 encyclopedias, anthologies and works or other elements like 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.

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### 7 What types of rights are covered by copyright?

Copyright in Mexico covers moral and economic rights.

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### 8 What may not be protected by copyright?

The Federal Copyright Law expressly excludes from copyright protection:

- ideas, formulas, 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.

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

The Federal Copyright Law regulates fair use of works that have been published by their authors or economic copyright holders in a casuistic manner in article 148. See question 10.

### 10 What are the standards used in determining whether a particular use is fair?

There are exceptions that may apply to the exclusive right of the authors or the copyright owner to use, reproduce, distribute, communicate and exploit their works. They are foreseen in article 148 of the Federal Copyright Law which establishes that literary and artistic works that have already been disclosed or published can be used without the consent of the copyright owner and without remuneration, provided that the normal exploitation of the work is not affected and provided also that the source is invariably mentioned and that no alteration is made to the work, only in the following cases:

- quotation of texts, provided that the amount quoted may not be considered a substantial or simulated reproduction of the contents of the work;
- reproduction of articles, photographs, illustrations and comments relating to current events that have been published in the press or broadcast by radio or television, or any other medium of communication, if this has not been expressly prohibited by the owner of the rights;
- reproduction of parts of the work for the purposes of scientific, literary or artistic criticism and research;
- reproduction of a literary or artistic work once, and in a single copy, for the personal and private use of the person doing it, unless intended for profit; a legal entity may not avail itself of the provisions of this subparagraph except where it is an educational or research institution, or is not devoted to trading activities;
- reproduction of a single copy by archives or a library for reasons of security and preservation where the work is out of print, no longer catalogued and liable to disappear;
- reproduction for the purposes of evidence in a judicial or administrative proceeding;
- reproduction, communication and distribution in drawings, paintings, photographs and audiovisual material of works that are visible from public places; and
- publication of a literary or artistic work for people with disabilities, without the intention of benefiting commercially.

The Copyright Law thus regulates the fair use of works that have been published by their authors or copyright owners. However, in

some cases, it remains difficult to know whether the use of a work is permitted, since no parameters have been established by the law or its regulations.

### 11 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.

### 12 Are performance rights covered by copyright? How?

Performance rights are protected by copyright in Mexico for actors or performing artists for their public performances.

Actors and performing artists are granted by law 'neighbouring rights', which afford them the right to be recognised with their names in their respective performances and provide them with the ability to: (i) authorise or oppose the public communication of his or her performances; (ii) authorise or oppose the fixation of their performances and further reproduction thereof and; and (iii) 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.

### 13 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.

### 14 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;
- inalienable;
- irrevocable; and
- cannot be waived.

The author is the sole, original and perpetual owner of the moral rights of his or her works. The authors cannot assign moral rights, because moral rights are closely linked to the author of a work and protect the author's reputation.

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### Copyright formalities

#### 15 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: (i) the initials 'D.R.' or the indication 'Derechos Reservados'; (ii) the copyright symbol '©'; (iii) the name and address of the copyright owner; and (iv) the year of first publication.

#### 16 What are the consequences for failure to display 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 2017, one UMA is equivalent to 75.49 pesos.

#### 17 Is there a requirement of copyright deposit?

The Federal Copyright Law does not foresee 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. For obtaining 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.

#### 18 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.

#### 19 Is there a system for 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 20.

#### 20 Is copyright registration mandatory?

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.

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#### 21 How do you apply for a copyright registration?

To obtain a copyright registration from the National Copyright Institute, it is necessary to submit an application form duly filled out with information about the author, the copyright owner and a brief description of the work. Together with the application, it is necessary to attach two copies of the work and the bank receipt showing the payment of the government fees charged by the National Copyright Institute. If the copyright registration is handled through an attorney, one original copy of a power of attorney must be filed. If the work is registered on behalf of an individual or a company different from the author, it is necessary to file originals of documents showing how the copyright owner acquired the ownership of the economic copyrights from the author.

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#### 22 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.

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#### 23 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).

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### Ownership and transfer

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#### 24 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.

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#### 25 May an employer own a copyrighted work made by an employee?

For an employer to be the owner of the economic copyrights 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 the provision mentioned in former paragraph, 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.

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#### 26 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 copyrights 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 so-called producer to the author and, in the second, an author develops a work and transfers the economic copyrights to another party for a limited time (see question 28).

### 27 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.

### 28 May rights be transferred?

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 26), or through an employer-employee relationship (see question 25).

For a transfer of the economic rights to be enforceable in Mexico through an assignment agreement, the agreement must be in writing; it must contain a provision reflecting the consideration paid to the author; and it must have a clause to stipulate the duration of the copyright transfer.

As a general rule, the transfers of copyrights 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 copyrights 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 article 43 and 103 of the Federal Copyright Law, the transfer of economic rights for them is not limited in time.

### 29 May rights be licensed?

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.

### 30 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 copyrights, 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.

### 31 Are licences administered by performing rights societies? How?

Collective management organisations in Mexico have the main purpose of managing copyrights 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.

### 32 Is there any provision for the termination of transfers of rights?

The transfers of economic copyrights are 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 28).

### 33 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

### 34 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 copyrights on behalf of the copyright owner.

### 35 How long does copyright protection last?

Moral copyrights belong to the author perpetually (see question 14) and economic copyrights are 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.

### 36 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 copyrights are 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.

### 37 Do terms of copyright have to be renewed? How?

Copyrights in Mexico do not need to be renewed.

### 38 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 copyrights protection term has been

extended from 75 years to 100 years after author's death, as described in question 35.

### Copyright infringement and remedies

#### 39 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 copyrights, 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.

#### 40 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.

#### 41 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. The UMA 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 2017, one UMA is equivalent to 75.49 pesos.

#### 42 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.

#### 43 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.

#### 44 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.

#### 45 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. The UMA 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 2017, one UMA is equivalent to 75.49 pesos.

#### 46 Are there any specific liabilities, remedies or defences for online copyright infringement?

No, they are the same for all forms of copyright infringement.

#### 47 How may copyright infringement be prevented?

It is advisable to implement the following:

- use of a copyright notice as is foreseen in the Federal Copyright Law (see question 15);
- obtaining 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.



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**Relationship to foreign rights**


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**48 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 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 Brussels Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms;
- the trade-related aspects of Intellectual Property Rights;
- the WIPO Copyright Treaty (WCT);
- the WIPO 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.

**49 What obligations are imposed by your country's membership of international copyright conventions?**

The most important obligation, mainly derived from the Berne Convention for the Protection of Artistic and Literary Works, 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 WIPO 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.

# Spain

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## Legislation and enforcement

### 1 What is the relevant legislation?

The main legislation is the Copyright Act (CA) approved by Royal Decree-Law No. 1 of 12 April 1996, which was reformed by Law No. 21 of 4 November 2014. The following are also relevant:

- Royal Decree of 14 September 1992, which approves the Criminal Procedure Act;
- Organic Law No. 10 of 23 November 1995 (the Criminal Code);
- Law No. 5 of 6 March 1998, incorporating the Spanish Legislation Council Directive 96/9/EEC of 11 March 1996, on the Legal Protection of Databases;
- Law No. 1 of 7 January 2000 (the Civil Procedure Act);
- Law No. 34 of 12 July 2002, on Information Society Services and E-Commerce;
- Royal Decree No. 281 of 7 March 2003, which approves the Regulations on the General Registry of the Copyright;
- Law No. 3 of 23 December 2008, regarding the resale right for the benefit of the author of an original work of art;
- Law No. 2 of 5 March 2001, on Sustainable Economy;
- Royal Decree 1889/2011 of 30 December, which approves the Regulations on the functioning of the Copyright Commission; and
- Royal Decree 624/2014 of 18 July, which develops the remuneration to the authors for lending their works in certain publicly accessible establishments.

### 2 Who enforces it?

The copyright owner can file a lawsuit on copyright matters before the commercial courts, which are the specialised courts within the civil jurisdiction (also competent in other matters such as patents, trademarks, unfair competition, etc).

The competent courts to deal with crimes committed against copyright are the criminal courts.

The central courts of the contentious administrative jurisdiction will be competent to authorise the execution of the resolutions to interrupt the provision of information, or to withdraw content which violates copyrights issued by the Second Section of the Copyright Commission (an administrative body belonging to the Ministry of Culture). The section enforces some provisions of the CA regarding online copyright infringement (see question 46).

### 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 general provisions of the CA are applicable to the digital exploitation of works.

There are some provisions that specifically address digital use such as the limitation to the author's economic rights known as the 'Google tax', which is a measure applicable to news aggregators (article 32.2, CA), and the role in digital rights protection of the Second Section of the Copyright Commission against information society service providers that infringe copyright (article 158-ter, CA).

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

The CA does not have any specific provision regarding the extraterritorial application of the law to deal with foreign-owned or foreign-operated websites that infringe copyright.

However, under Spanish law, the principle *lex loci protectionis* is applicable; therefore, a claim against a foreign-owned or foreign-operated website that infringes copyright can be filed before the Spanish courts, and the CA would be applicable as long as the infringement is carried out in the Spanish territory or the effects of the infringement are also produced in Spanish territory even if the infringement is carried out abroad.

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## Agency

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

No. There is a General Registry of Copyright and there are different collecting societies but no centralised copyright agency.

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

The subject matter of copyright shall comprise all original literary, artistic or scientific productions expressed in any mode or form, whether tangible or intangible, known at present or that may be invented in the future, such as books, writings, musical compositions, dramatic and choreographic works, audiovisual works, sculptures, paintings, drawings, models, maps, projects of architectural works and works of engineering, photographs, computer programs and databases (articles 10 and 12, CA). It also protects artistic interpretations, phonograms, audiovisual recordings, broadcasts, ordinary photographs and specific editorial productions (article 105 et seq, CA).

Regardless of the copyright in the original work, derived works such as translations and adaptations, revisions, updated editions and annotations, compendiums, summaries and extracts or musical arrangements are also subject to copyright (article 11, CA).

The result of creative activity is also protected by copyright when it generates new original works.

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### 7 What types of rights are covered by copyright?

The CA confers moral rights and economic rights.

Regarding moral rights, the author has (article 14, CA):

- the right to disclose the work and how it has to be done;
- the right to decide if the disclosure has to be made in his or her name, under a pseudonym or sign, or anonymously;
- the right to demand the recognition of his or her status as the author of the work;
- the right to demand respect for the integrity of the work and prevent any deformation, modification, alteration or attack on the work that implies harm to his or her legitimacy or detriment to his or her reputation;
- the right to modify the work, respecting the rights acquired by third parties and the requirements of protection of the cultural interest;



- the right to withdraw the work from circulation, due to a change of his or her intellectual or moral convictions, following compensation of the damages caused to the owners of the economic rights; and
- the right to access a unique or rare specimen of the work when it is possessed by another person, to exercise the right of disclosure or any other right of the author.

The economic rights include the right to reproduce (article 18, CA), distribute (article 19, CA), communicate to the public (article 20, CA) and transform the work (article 21, CA).

### 8 What may not be protected by copyright?

Works that do not fulfil the originality requirement or that are in the public domain because their term of protection has ended are not protected. In the same way, copyright protects only the form of expression of ideas but not the underlying ideas themselves.

Article 13 of the CA expressly provides a list of exclusions: legal or regulatory provisions and the drafts thereof, judgments of jurisdictional bodies and acts, resolutions, discussions and rulings of public bodies, and official translations of all such texts shall not be subject to copyright.

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

In Spain, as in other civil law jurisdictions, the doctrines of 'fair use' and 'fair dealing' are not applicable; instead, there are certain legal limitations to the author's economic rights.

The following do not require the authorisation of the copyright owner, without prejudice to the payment of economic compensation in some cases:

- temporary acts of reproduction, with no independent economic significance, which are transient or incidental and an essential part of a technological process whose sole purpose is to enable the transmission in a network between third parties by an intermediary and lawful use (article 31, CA);
- reproduction for private copying (article 31, CA);
- the use for purposes of public security or to ensure the proper performance of administrative, parliamentary or judicial proceedings (article 31-bis, CA);
- uses for the benefit of people with a disability (article 31-bis, CA);
- the quotation of short fragments of disclosed works for teaching or research purposes, mentioning the source and the author (article 32, CA);
- making available to the public non-significant fragments of content from periodical publications or websites regularly updated for informative purposes, or for the creation of public opinion or entertainment (article 32, CA);
- the reproduction, distribution and communication to the public by the media of those studies and articles on current topics disseminated by other media, as long as the source and the author are mentioned, and in cases where such use is not expressly reserved (article 33, CA);
- the performance, by the legitimate user of a copyrighted database, of all the acts needed for access to the content of the database and to its normal use, although they are subject to an exclusive copyright (article 34, CA);
- the reproduction, distribution and communication to the public in the measure justified by the informative purpose of any work capable of being seen or listened to in the reporting of current events (article 35, CA);
- the free reproduction, distribution and communication to the public of works permanently located in public places (article 35, CA);
- those technical acts related to the transmission by cable, satellite or wireless emissions needed to perform the communication to the authorised public (article 36, CA);
- the reproduction of works made without financial gain by museums, libraries or other cultural or scientific organisations for investigation or conservation purposes, and loans made between these institutions (article 37, CA);
- the performance of musical works in official state or public administration events and religious ceremonies, as long as the public may attend for free and the artists are not specifically remunerated for those performances (article 38, CA); and

- the parody of a work, as long as it does not imply likely confusion with the original, or damage to a copyrighted work or to its author (article 39, CA).

### 10 What are the standards used in determining whether a particular use is fair?

Despite not applying the doctrines of 'fair use' or 'fair dealing', the main standard for the limitations to the author's economic rights is that the exceptions: (i) are limited to certain special cases (see question 9), (ii) cannot cause unjustified harm to the legitimate interests of the author, or (iii) adversely affect the normal exploitation of the works to which they refer (article 40-bis, CA).

### 11 Are architectural works protected by copyright? How?

Yes, architectural works are protected by copyright just like any other original creation, in particular, as a work of applied art. The CA does not expressly mention architectural works as works subject to copyright but it mentions projects, plans, mock-ups and designs of architectural and engineering works.

### 12 Are performance rights covered by copyright? How?

Yes, performance rights are covered by copyright as 'neighbouring rights'. Performers are those who represent, sing, read, recite, interpret or perform a work in any way.

Performers have the exclusive right to authorise the fixation of their performances. They also have the economic rights of reproduction, communication to the public and distribution over their performances. The duration of such rights is, as a rule, 50 years from the beginning of the year after the performance takes place. Moreover, performers' moral rights are also recognised.

### 13 Are other 'neighbouring rights' recognised? How?

Yes, apart from the rights of the performers (article 105 et seq, CA), the right of the phonogram producers (article 114 et seq, CA), the right of the audiovisual recorder producers (article 120 et seq, CA) and the rights of the broadcasting organisations (articles 126, 127, CA) are also recognised.

These 'neighbouring rights' also contain economic rights and their duration is 50 years from the beginning of the year after the performance, recording or broadcasting take place or from the disclosure of the performance or recording.

In addition, the protection of the ordinary photograph (article 128, CA), the protection of specific editorial productions (articles 129, 130, CA) and the sui generis right over the databases (article 133 et seq, CA) are also recognised.

### 14 Are moral rights recognised?

Yes, moral rights are recognised in the CA. See question 7.

## Copyright formalities

### 15 Is there a requirement of copyright notice?

Copyright notice is not mandatory, according to Spanish legislation. Notwithstanding, said possibility is foreseen in the law, since it allows the exclusive copyright owner to insert the sign of © before his or her name, expressing the place and year that the work was disclosed (article 146, CA).

### 16 What are the consequences for failure to display a copyright notice?

There are no legal consequences for failure to display a copyright notice. However, it could be misinterpreted that the work is not copyrighted.

### 17 Is there a requirement of copyright deposit?

No, copyright deposit is not required. The copyright of a work rests with the author due to the mere fact of its creation (article 1, CA).

### 18 What are the consequences for failure to make a copyright deposit?

Since copyright is not mandatory, the failure to make a copyright deposit has no consequences.

**19 Is there a system for copyright registration?**

The General Registry of Copyright is intended for the registration of works protected by copyright and for the registration or annotation of the acts or contracts of constitution, transmission, modification or extinction of the rights or any other fact, act or title that affect any right which may be registered. The General Registry of Copyright is composed of the central and the territorial registries.

**20 Is copyright registration mandatory?**

No, copyright is an automatic right.

**21 How do you apply for a copyright registration?**

An application can be filed by the owner of the copyright before the territorial registries or their delegated offices, if any.

With an application, the following information and documentation has to be provided:

- the identification of the registrant;
- the object of the copyright;
- the type of work;
- the title of the work;
- if applicable, the date of disclosure of the work;
- a copy and description of the work;
- the place and date of the filing of the application;
- the signature of the registrant; and
- receipt of payment of the corresponding fee.

Additional information and documentation may be required in some cases.

**22 What are the fees to apply for a copyright registration?**

The standard fee of the General Registry of the Copyright for an application of record entry for a copyright work amounts to €13.20.

**23 What are the consequences for failure to register a copyrighted work?**

Since the registry is not constitutive but declarative, there are no consequences for not registering the work. The registration just means a rebuttable presumption of the existence of the registered rights and their owner.

**Ownership and transfer****24 Who is the owner of a copyrighted work?**

The CA categorises the owner as the person who has created any literary, artistic or scientific work. The aforesaid category may be enjoyed by legal persons in cases specifically provided by the Act (computer programs and collective works).

According to article 6 of the CA, there is a rebuttable presumption of ownership in favour of the individual who is identified as such in the work by the inclusion of his or her name, signature or identification mark. In addition, whether the work is disclosed anonymously or under a pseudonym or sign, the exercise of the copyright shall be vested in the individual or legal person who discloses such work with the author's consent, provided that they do not reveal his or her identity.

In the event that a work is the collaboration of two or more authors, the copyright shall pertain to them jointly and the communication and alteration of the work shall require the consent of all the co-authors. Unless agreed otherwise, they may exploit their contribution separately insofar as the joint exploitation is not thereby prejudiced.

Only economic rights can be transferred, not moral ones, which always remain the property of the intellectual creator of the work (see question 28).

**25 May an employer own a copyrighted work made by an employee?**

As a rule, transfer to the employer of the work's economic rights, by virtue of the employment relationship, shall be governed by what was agreed in the contract, which has to be in writing. In the absence of a written agreement, it shall be presumed that the economic rights have been granted exclusively and with the necessary scope for the exercise of the normal activity of the employer (article 51, CA).

However, regarding computer programs, the natural person or group of people who create the computer program or the legal person who appears as the copyright owner shall be considered the author. In addition, when an employee creates a computer program, in the exercise of the functions entrusted or following the instructions given by his or her employer, the economic rights belong exclusively to the employer, unless otherwise agreed (article 97, CA).

**26 May a hiring party own a copyrighted work made by an independent contractor?**

The CA has no specific provisions regarding work made by an independent contractor hired by someone.

Despite this, an author can be hired to create a work for a third party. The moral rights shall rest with the author and the transfer of the economic rights shall be governed by what has been agreed in the hiring contract.

**27 May a copyrighted work be co-owned?**

Yes, a copyrighted work can be co-owned. For instance, regarding a collaborative work, the rights over a work resulting from the collaboration of several authors vest in all of them (article 7, CA).

**28 May rights be transferred?**

The economic rights of the work shall be transferred *mortis causa* by any of the means recognised at law (eg, by heritage) or assigned by *inter vivos* transactions.

Some of the moral rights can be transferred, but only *mortis causa* (such as the right to demand respect for the integrity of the work and prevent any deformation, modification, alteration or attack on the work that implies harm to the author's legitimacy or detriment to the author's reputation).

Copyrights may be transferred partly or completely, the assignment being limited to the economic right or rights assigned, to the means of exploitation expressly provided for and the time and territorial scope specified.

In case of failure to mention the time of the assignment, it shall be limited to five years, and failure to mention the territorial scope shall limit it to the country in which it is effected. When the conditions governing the exploitation of the work are not mentioned specifically and in detail, the assignment shall be limited to such exploitation as is necessarily deduced from the contract itself and is essential to the fulfilment of the purpose of thereof.

In accordance with copyright law, it is mandatory that any assignment is formalised in writing (article 45, CA) and the transfer of the economic rights on an exclusive basis shall be expressly agreed.

Although the economic rights may be freely transferred, their exercise is subject to the following restrictions:

- any general assignment of economic rights in all the works that the author may create in the future will be null and void; and
- any stipulations whereby the author undertakes not to create any work in the future will also be considered null and void.

In addition, the assignment of economic rights shall not cover methods of use or means of dissemination that did not exist or were unknown at the time of the assignment.

The remuneration for the transfer of the copyrights has to consist, as a rule, of a percentage of the operating revenues. However, a fixed remuneration could be agreed in some cases.

**29 May rights be licensed?**

Yes. In order to make lawful use of a third-party copyrighted work, a licence should be granted (see question 28), except in those situations subject to the limitations to the author's economic rights, as explained in question 9.

**30 Are there compulsory licences? What are they?**

In Spain, there are no compulsory licences. As explained in question 9, there are certain limitations to the author's economic rights that permit the use of the work without the authorisation of the author or copyright owner, without prejudice to the payment of an economic compensation in certain cases.

**31 Are licences administered by performing rights societies? How?**

Licences may be administered by whomever the copyright owner chooses. Collecting societies are usually the ones in charge of the administration of the licences.

**32 Is there any provision for the termination of transfers of rights?**

The time limit for the copyright assignment must be agreed between the parties, as explained in question 28.

**33 Can documents evidencing transfers and other transactions be recorded with a government agency?**

Yes, every right, fact, act or title regarding a work can be recorded before the General Registry of Copyright.

**Duration of copyright****34 When does copyright protection begin?**

Copyright protection of a literary, artistic or scientific work begins from the moment of creation of the work by the author, with the exceptions explained in question 36.

**35 How long does copyright protection last?**

As a rule, copyright protection applies until 70 years after the death of the author (except for the 'neighbouring rights' explained in question 13). Notwithstanding, for those authors who died before 1987, the copyright protection lasts 80 years from his or her death (see question 38).

**36 Does copyright duration depend on when a particular work was created or published?**

The copyright duration is typically calculated from the date of death of the author. The exceptions to this rule are the following:

- Collective works and anonymous or pseudonymous works, for which the term of protection expires 70 years after the work is lawfully made available to the public. If the anonymous or pseudonymous work has not been lawfully made available to the public within 70 years from their creation, protection shall also be terminated.
- The term of the economic rights for a computer program where the author is a legal person, shall run for 70 years from the lawful communication of the program or from the moment of its creation, if it has not been made available to the public.
- This is also the case for neighbouring rights since the duration of the copyright depends on the date of performance, the first recording by the phonogram, video or film producer, first broadcast or date of the making of the ordinary photograph.
- The sui generis rights on databases shall run for 15 years from the date on which the process of making the database was completed.

**37 Do terms of copyright have to be renewed? How?**

No, there is no possibility that the term of copyright is extended and there is no need to renew it periodically.

**38 Has your jurisdiction extended the term of copyright protection?**

From 1879 to 1987, the term of copyright protection in Spain was 80 years after the date the copyright owner died and, from 1987 to 1997, the term was reduced to 60 years. Through the application of Directive 93/98/EEC of 29 October 1993, the term was extended to 70 years after the copyright owner died.

**Copyright infringement and remedies****39 What constitutes copyright infringement?**

Any non-authorised use of the work, in particular, the reproduction, distribution, communication to the public and transformation of the work, which cannot be covered by any of the limitations to the author's economic rights (explained in question 9), shall be deemed infringement.

**40 Does secondary liability exist for indirect copyright infringement? What actions incur such liability?**

Regarding indirect copyright infringement, whoever performs the following shall be considered an infringer:

- intentionally inducing infringing conduct;
- cooperating, being fully aware or having reasonable evidence that the infringing conduct is taking place; or
- by having a direct economic interest in the outcome of the unlawful conduct, is able to control that conduct.

**41 What remedies are available against a copyright infringer?**

The owner of the copyright can request that the illicit activity cease (article 139, CA), the compensation of damages (article 140, CA), the adoption of interim injunctions measures (article 141, CA) and the publication of the judgment.

Ceasing the illicit activity may include the adoption of measures to avoid the resumption of the infringement; the withdrawal and destruction of the illicit specimens and the disablement or destruction of the devices, equipment, tools, etc destined to perform the infringement, with the infringer being charged, or the cessation of the services provided by intermediaries to third parties who use them to infringe copyrights.

**42 Is there a time limit for seeking remedies?**

The statute of limitations to claim for damage for copyright infringement in Spain is five years from the time at which they could legitimately have been filed (article 140, CA).

However, the statute of limitations to claim for the cessation of the unlawful activity is not clear in Spanish legal doctrine, as it is not expressly set forth within the CA.

**43 Are monetary damages available for copyright infringement?**

Yes. Compensation of damages shall include the actual loss, the loss of profits, the moral damages and the investigation costs (article 140, CA).

The actual loss includes those damages directly caused by the infringement, which are usually proved through the corresponding documentation (invoices, bills, etc).

The loss of profits shall be set at the choice of the owner, taking into account: (i) the negative economic consequences, such as the loss of profits suffered by the owner as a consequence of the infringement or the profits obtained by the infringer from the infringement, or (ii) the amount that the owner would have received if the infringer had requested a licence to use the copyrighted work.

The moral damages shall be compensated, even though the existence of economic damage has not been proved. To calculate the moral damages, the circumstances of the infringement, the severity of the harm caused and the extension of the illicit diffusion of the work shall each be taken into account.

The investigation costs are those incurred by the copyright owner that exercise the judicial action to obtain the means of evidence to prove the infringement, generally, the private investigators' costs.

Punitive damages are not available.

**44 Can attorneys' fees and costs be claimed in an action for copyright infringement?**

As a rule, attorneys' fees and costs will be paid by the unsuccessful party in the infringement action. Thus, if a claim for copyright infringement is granted by a Spanish court, the court is likely to impose an obligation on the respondent to bear the costs of the proceedings (ie, attorneys' fees, which are determined for these purposes following the rules and calculations set forth by the different Spanish bar associations).

**45 Are there criminal copyright provisions? What are they?**

Yes. Article 270 of the Criminal Code establishes that a punishment of imprisonment of six months to four years and penalty consisting of a fine, in euros, of a court-determined amount payable to the Spanish Treasury over a period of from 12 to 24 months, will be given to those who, with the aim of obtaining economic profit, either directly or indirectly, and to the detriment of a third party, reproduce, plagiarise, distribute, publicly disclose or in any other way economically exploit, all or part of a literary, artistic or scientific work, or its transformation, interpretation or performance fixed in any medium, or communicated

to the public by any medium, without authorisation of the copyright owner or their assignees.

The same sentences shall be applied to those who:

- with the aim of obtaining economic profit, directly or indirectly, and to the detriment of a third party, establish links on the internet to works protected by copyright which facilitate the active and systematic location of these copyrighted works illegally offered on the internet, in particular, providing sorted and classified listings of links;
- intentionally export or store the referred works, including digital copies of the works, without the consent of the owner;
- intentionally import the referred works without the consent of the owner, regardless of whether the source of the said goods is lawful or unlawful in the country of origin. Nevertheless, importing the said goods from a member state of the European Union shall not be punishable where the goods have been acquired directly from the right holder in the said State, or with his or her consent; and
- promote or facilitate the distribution, marketing, reproduction, plagiarism, access or public display of works protected by copyright, deleting, modifying or circumventing, or facilitating the circumvention of the technological measures used to prevent it.

As regards to those who manufacture, import or put into circulation any device, equipment, tool, etc destined to avoid the technological protection measures, they will be punished by imprisonment of six months to three years.

According to article 271 of the Criminal Code, the punishment of imprisonment shall be raised from two years to six years when the profit obtained or that could have been obtained has particular economic significance, or depending on the seriousness of the facts or when the infringer belongs to an organisation with copyright infringement purposes or when persons under 18 years old are used to commit the infringement.

#### **46 Are there any specific liabilities, remedies or defences for online copyright infringement?**

The general civil law and criminal law remedies mentioned in questions 40, 41, 43 and 45 are also available against online copyright infringement cases.

For online copyright infringement, the Criminal Code establishes in articles 270(2) and (3) that the punishment of imprisonment of six months to four years and penalty consisting of a fine, in euros, of a court-determined amount payable to the Spanish Treasury over a period of from 12 to 24 months, will be given to those who, with the aim of obtaining economic profit, either directly or indirectly, and to the detriment of a third party, establish links on the internet to works protected by copyright which facilitate the active and systematic location of these copyrighted works illegally offered on the internet, in particular, providing sorted and classified listings of links.

Besides which, and regardless of the applicable civil or criminal actions, the second section of the Copyright Commission has been

created; this is an administrative body belonging to the Ministry of Culture, whose main purpose is to safeguard copyright online. This section can prosecute websites that facilitate, en masse, links to unlawful content, depending on the number of users in Spain and the number of works accessible through the allegedly infringing service. Offenders that breach the requirements for removal of infringing content will face fines of up to €600,000.

The second section of the Copyright Commission tries to improve regulation of the activity of those websites where hyperlinks are made available to the public to download works that are shared in P2P networks, or on other third-party websites where the work can be directly downloaded (article 158, CA). Please note that these measures can be reviewed by the central courts of the contentious administrative jurisdiction.

#### **47 How may copyright infringement be prevented?**

The implementation of copyright notice may help in some cases, notwithstanding that, as most copyright infringement is done in the full knowledge that it is infringement, it could be prevented by the implementation of technological protection measures.

Also, in the event of infringement or when there are good and reasonable grounds to fear that infringement is imminent, the judicial authority may, at the request of the copyright owners, decree interim measures that, according to the circumstances, would be necessary for the immediate protection of the rights concerned, and, in particular, the suspension of the activities of reproduction, distribution and communication to the public, as appropriate, or any other activity which constitutes an infringement, as well as the prohibition of these activities, if they have not been performed yet.

#### **Relationship to foreign rights**

#### **48 Which international copyright conventions does your country belong to?**

The main conventions to which Spain belongs are:

- the Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886 (Berne Convention);
- the Universal Copyright Convention agreed in Paris, 6 September 1952;
- the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Service Organization, 26 October 1961 (Rome Convention);
- the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 29 October 1971 (Geneva Convention);
- the Agreement on Trade Related Aspects of Intellectual Property Rights, 15 April 1994;
- the World Intellectual Property Organization Copyright Treaty, 20 December 1996; and
- the WIPO Performances and Phonograms Treaty, 20 December 1996.

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**49 What obligations are imposed by your country's membership of international copyright conventions?**

Nationals of third countries shall in all cases enjoy the protection available under the international conventions and treaties to which Spain is a party. For works whose country of origin is another country in terms of the Berne Convention and whose author is not a national of a member state of the European Union, the term of protection shall be the same as that granted in the country of origin of work, provided that it may not in any case exceed that granted under the CA for works of authors.

An author's moral rights are recognised, whatever the author's nationality.

# Switzerland

Dirk Spacek

Walder Wyss Ltd

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## Legislation and enforcement

### 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). Furthermore, Swiss legislation provides a 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 FACN is currently subject to a comprehensive revision. The Swiss Federal Council has expressed a need to modernise Swiss copyright law, making it more suitable for the digital age. The Swiss Federal Office of Justice has drafted a revised version of the FACN (NFACN), which is still subject to legislative debate.

### 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 right holders of the respective copyrights) 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 the authors, in particular remuneration claims for particular types of use of copyrighted works (usually mass uses of works).

FACN also provides for criminal sanctions such as imprisonment and/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).

### 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: it contains specific provisions on technical measures to protect copyrighted content from unlawful use '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. Circumventions of DRM-tools are permitted solely for the use of copyrighted works if permitted by law (for example, 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. The NFACN is not yet in force and additional details on it will be provided later.

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### 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 right holders in Switzerland. This is usually the case if the site addresses customers in Switzerland. In this regard, the NFACN provides for new provisions, under which Swiss access providers can be instructed to block access to infringing content stored by hosting providers outside of Switzerland. The mechanics and modalities of this new provision are not yet determined. The legislator has expressed concerns to avoid excessive 'overblocking' and the provision should only apply to websites with 'obviously infringing content'. Refinements of the statutory wording are still expected.

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## Agency

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

Switzerland currently has five established copyright collective societies, namely 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 thereby collect royalties on behalf of the authors. For certain types of copyright claims, the enforcement is exclusively reserved to the collective societies. For other types of copyright claims, an author may entrust the collective society with such activities on a voluntary basis ('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.

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

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, in particular, 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/audiovisual works as well as choreographic works and works of mime. The FACN also explicitly provides for protection of computer programs (software) as a recognised work category (article 2, paragraph 3, FACN).

### 7 What types of rights are covered by copyright?

The author or respective right 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 rent such a program to third parties (article 10, paragraph 3, FACN).

### 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). 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 compendium of medicines does not bear an individual character. The FACN explicitly provides that official documents of the type of statutes, regulations, treaties and other administrative statutes, means of payment, judicial decisions, protocols and reports of governmental authorities as well as patent specifications and published patent applications are not protected under copyright (article 5, FACN).

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

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/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 right 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 right holder's consent. Computer programs may only be re-sold 'as is' since an author has an exclusive right to rent 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 back-tracking of machine-code into the 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).

### 10 What are the standards used in determining whether a particular use is fair?

There is no fair use doctrine in Swiss copyright law. Thus, there is no case law with standards for fair use (see question 9).

### 11 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).

### 12 Are performance rights covered by copyright? How?

Performance rights as such are protected as 'neighbouring rights' for performing artists under the FACN (see question 13).

### 13 Are other 'neighbouring rights' recognised? How?

The FACN provides for separate protection of 'neighbouring rights'. Neighbouring rights consist of (i) rights of performing artists, (ii) producers of sound recordings and films, as well as (iii) broadcasting organisations (article 33 et seq, FACN). The protective scope of 'neighbouring rights' is smaller than the claims conferred under copyrights. For example, performing artists only have an exclusive right to make available their performance to the public outside of the location in which it originally took place (including to broadcast and transmit and/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).

Integrated circuits are not specifically protected under copyright, but under a separate statute, namely the Swiss Federal Act on the Protection of Semiconductors (FAPS).

'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).

### 14 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, it is frequently seen that 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, ie, an excessive restriction with regard to the author's own personality (article 27, paragraph 2, Swiss Civil Code).

### Copyright formalities

#### 15 Is there a requirement of copyright notice?

There is no requirement of 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 and so on) 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.

**16 What are the consequences for failure to display a copyright notice?**

There are no legal consequences for failure to display a copyright notice in Switzerland.

**17 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.

**18 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.

**19 Is there a system for 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).

**20 Is copyright registration mandatory?**

No. there is no copyright registration system under Swiss copyright law.

**21 How do you apply for a copyright registration?**

Not applicable (see questions 19 and 20).

**22 What are the fees to apply for a copyright registration?**

Not applicable (see questions 19 to 21).

**23 What are the consequences for failure to register a copyrighted work?**

Not applicable (see questions 19 to 22).

**Ownership and transfer****24 Who is the owner of a copyrighted work?**

Copyright initially vests with the author who created a copyrighted 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).

**25 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 copyrights 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 copyrights 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 copyrights in such computer programs.

**26 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 24). Therefore, a hiring party will not automatically acquire ownership of copyrights 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 copyrights are 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.

**27 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 24). Alternatively, this may also come about if copyrights have been assigned to multiple persons or in the event of a legal succession (eg, inheritance of copyrights to multiple heirs).

**28 May rights be transferred?**

Yes, copyrights are 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 14)).

**29 May rights be licensed?**

Yes, copyrights can be licensed. There are no specific rules or provisions on licensing in FACN or in the Swiss Code of Obligations generally applicable to contracts. Copyright licence agreements are considered 'innominate 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.

**30 Are there compulsory licences? What are they?**

Yes, 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 right 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.

**31 Are licences administered by performing rights societies? How?**

The collective society for performing rights Swissperform administers licences for performing artists. It enforces the mentioned neighbouring rights of performing artists (see question 13) 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 (so-called 'rights administration agreement').



### 32 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 copyrights are thereby re-assigned to the author).

### 33 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 copyrights are not registrable in Switzerland, transfers or similar transactions related to copyrights are not registered publicly either.

## Duration of copyright

### 34 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 perceivable to human senses.

### 35 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.

### 36 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 35). 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 35).

### 37 Do terms of copyright have to be renewed? How?

Duration of copyright need not and cannot be renewed.

### 38 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

### 39 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 11) not authorised by the author or right holder, provided that the copyright is still under a valid duration term (see questions 34 and 35), 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 questions 9

## Update and trends

The Swiss Federal government has proposed new legislation by amending the FACN in various aspects. The new proposed legislative draft (NFACN) aims to establish further obligations for internet hosting providers and internet access providers to take measures against copyright infringements conducted over the internet. This should primarily occur in the form of notice and takedown procedures and access blocking. Also, the legislative draft provides for a system of 'access provider warning letters' to users committing copyright infringements over the internet. If the user ignores the warning letter and continues to infringe, the author or right holder would be entitled to obtain a disclosure of the user's identity. The new draft does not suggest changing the legality of downloading copyrighted content from the internet for private use. In addition, new rules on the collective exploitation of copyright should be introduced in order to facilitate the exchange of copyrighted digital content. 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. As the legislative draft is still controversial, the final form of the NFACN remains uncertain at present.

and 10). An author's or right 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.

### 40 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 copyrights).

### 41 What remedies are available against a copyright infringer?

Swiss copyright law provides for various remedies against copyright infringement.

First, an author or right 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 right 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 right 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 right 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 right 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).

#### **42 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 right 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 45)).

#### **43 Are monetary damages available for copyright infringement?**

Yes, monetary compensation claims are available for copyright infringement (see question 41). 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).

#### **44 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).

#### **45 Are there criminal copyright provisions? What are they?**

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.

#### **46 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 40).

All civil law and criminal law remedies listed under questions 41, 43 and 45 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. The NFACN provides for additional obligations of internet hosting providers and internet access providers to take measures against copyright infringements conducted over the internet (see 'Update and trends').

#### **47 How may copyright infringement be prevented?**

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 right holder's copyright in Switzerland (article 75, FACN).

#### **Relationship to foreign rights**

#### **48 Which international copyright conventions does your country belong to?**

Switzerland is a member of most multilateral international conventions on copyright and neighbouring rights law:

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- the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, within the establishment of the WTO, 1994);
- the revised Berne Convention for the Protection of Literary and Artistic Works (Paris version of 1971);
- the Universal Copyright Convention (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).

**49 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.

# Turkey

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## Legislation and enforcement

### 1 What is the relevant legislation?

The main legislation is Law on Intellectual and Artistic Works No. 5846 of 5 December 1951 (the Law). There are also the Law on Compilation of Reproduced Intellectual and Artistic Works No. 6279 (Law No. 6279), the Law on Evaluation, Classification and Promotion of Cinema Films No. 5224 and numerous by-laws based on the Law.

### 2 Who enforces it?

Judicial authorities that are specialised in intellectual property are competent to enforce the Law in cases of copyright infringement. Moreover, administrative duties are performed by the Directorate General for Copyright (the Directorate) of the Turkish Ministry of Culture and Tourism (the Ministry).

### 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, the Law includes two provisions with regards to digital exploitation of works. Article 25 regulates the author's exclusive right to communicate the original of a work or its copies to the public by digital transmission and by other means. Additional article 4 covers the notice and takedown procedure in the event of copyright infringement through digital transmission (see question 46).

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

Copyright laws do not have the extraterritorial application. However, additional article 4 of the Law may be applied irrespective of the website's origin or the nationality of the owner. Therefore, in the case of a copyright infringement, it is possible to block the infringing material on a foreign website by blocking the service pursuant to additional article 4 of the Law.

## Agency

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

The Directorate is the central executive body that carries out the administrative procedures in the field of copyright and related rights. The Directorate registers the copyrighted works upon application; provides banderols; issues producer's certificates; issues certificates for the natural and legal persons who or which manufacture materials for fixation or reproduction of works and/or fill, reproduce and sale of such materials.

## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

Scientific and literary works, musical works, works of art and cinematographic works are copyrightable, provided that they bear the characteristic of their author.

### 7 What types of rights are covered by copyright?

Copyright covers the author's moral rights such as the authority to publicise the work and to designate the author's name, prohibition of modification of the work and rights against owner or possessor of the work; economic rights such as the right of adaptation, reproduction, distribution, performance, the right to communicate the work to the public by devices enabling the transmission of signs, sounds and/or images, and the right to obtain a share of resale of works of art.

### 8 What may not be protected by copyright?

In order to protect an intellectual or artistic outcome as a work under the Law, it must bear the characteristic of its author; it must be a type of work that is identified by the Law and created as a result of an intellectual effort. Any outcome that does not meet all these conditions shall not be protected as a work under the Law. In addition to these, ideas, methods and principles on which any element of a computer programme is based shall not be protected by copyright.

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

The Law sets out a number of exceptions for fair use. Under some specific situations which are defined in articles 30 to 38 of the Law, using copyrighted work without the right holder's permission shall not constitute copyright infringement. The exceptions are as follows:

- Public order: use of works by governmental bodies or use of works as evidence in courts.
- General interests: use of legislations, court decisions, speeches at assemblies and courts; use or performance of copyrighted work for educational purposes; quoting from works, newspapers under specific conditions; recording part of a work that has the nature of news.
- Personal use: general standards of the exceptions are defined in question 10.

### 10 What are the standards used in determining whether a particular use is fair?

The author's permission is the main condition which determines that the use of a copyrighted work is fair. However, in case of an exception defined in question 9, various tests shall be applied to determine whether use of a work falls under the scope of related exceptions. While applying such a test, it should generally be considered that use of the work should not prejudice interests of right holders or aim to gain profit and should be compatible with the normal exploitation of the work and its purpose.

### 11 Are architectural works protected by copyright? How?

Yes, architectural works that have aesthetic value may be protected as works of art and those that lack aesthetic value may be protected as scientific and literary works under the Law.

### 12 Are performance rights covered by copyright? How?

According to article 80, performers who originally interpret, introduce, recite, sing, play or otherwise perform a work under permission of its author and without prejudice to moral and economic rights of the author, have economic and moral rights on their performances as

neighbouring rights. The neighbouring rights of performers include the following;

Moral rights:

- to claim to be identified as the performer of his or her performance; and
- to prevent of any distortion and mutilation of the performance that would be prejudicial to his or her reputation.

Economic rights:

- to authorise or prohibit
  - fixation of the performance;
  - reproduction, sale, distribution, performance, rental and lending of such fixation; and
  - communication and re-transmission of such fixation to the public by devices permitting transmission of signs, sounds or images.

### 13 Are other 'neighbouring rights' recognised? How?

Yes, in addition to the performers' aforementioned rights under question 12, the Law also protects phonogram producers' rights on first fixation of sounds and radio-television organisations' rights on broadcasts they produce.

### 14 Are moral rights recognised?

Yes. See question 7.

## Copyright formalities

### 15 Is there a requirement of copyright notice?

No, copyrightable works are automatically protected upon creation of the work without any registration, approval or notice.

### 16 What are the consequences for failure to display a copyright notice?

Since there is no necessity for a copyright notice according to Turkish copyright laws, there is also no sanction for failure to display it.

### 17 Is there a requirement of copyright deposit?

According to Law No 6279 article 4, any work printed or reproduced within the borders of the Republic of Turkey as defined below, shall be compiled and compiled works shall be delivered to the National Library of Turkey, İstanbul Beyazıt Public Library, Department of Library and Archive Services of Grand National Assembly of Turkey and, in some cases, to some other public libraries depending on the kind of the work. Such works are including but not limited to;

- Individually published works, such as books, embossed books, booklets, encyclopedias, albums, atlases and notes
- Periodicals, graphic works
- Any material containing data such as slides, strips, film fragments, spools, cassettes, cartridges, films and microforms
- Works recorded and reproduced in optical and magnetic media containing audio, video and data produced for use in all kinds of computer, music and video devices
- Stamps and paper money
- Maps, plans and sketches
- Works that are printed or reproduced abroad but sold and distributed in Turkey and
- Electronic publications that are produced and used in an electronic environment.

Moreover, under article 5, the works to be compiled outside the borders of the Republic of Turkey are:

- works that foreign natural or legal persons have prepared by using the libraries, museums, archives and documents in Turkey and the works they published and reproduced abroad with regards to the results and methods of the archaeological excavations or investigations in Turkey, in accordance with the legislation in force and bilateral or multilateral agreements; and
- works that are published and reproduced abroad, by the compilers operating in the territory of the Republic of Turkey.

The methods for compilation and the responsibilities of the compilers are defined in articles 6 to 9 of Law No. 6279 and in the Regulation on

Compilation of Reproduced Intellectual and Artistic Works No. 28,388. The compilers are obliged to submit compilation copies to the compilation units and the compilation copies must be the same as the other copies of the work. The compilation copies shall be duly delivered to the compilation department or unit in 15 days following the reproduction process; while the delivery period for the works specified in article 4 (g) and article 5 is 60 days.

### 18 What are the consequences for failure to make a copyright deposit?

Compilers who fail to submit compilation copies to the compilation units or do not duly deliver them to the compilation department or unit within the time limits shall be imposed with an administrative fine from 1,000 to 5,000 liras per compilation copy. While determining the penalty amount, sales amount, number of copies and compilations, production costs and current selling price of the work are taken into account. For the infringing compilers who commit this crime for the first time, the lower administrative fine shall be applied. Paying an administrative fine shall not hinder the obligations related to compilation.

Foreign natural or legal persons who prepare works under the scope of article 5(a) cannot obtain further permit, unless they fulfil their obligations under article 9 of Law No. 6279.

### 19 Is there a system for copyright registration?

As a general principle, registration of a copyright is not a mandatory requirement for the establishment of rights. However, according to the Law and the Regulation on Registration of Intellectual and Artistic Works No. 26,171 (Regulation No. 26,171), registration is a legal requirement for films and phonograms (computer games are also considered within this scope), for the purposes of preventing violation of rights on those works and facilitating proof of ownership in case of a dispute. Yet, such registration is basically for exercising protection and would not create rights on the mentioned works.

Additionally, all authors may, at their own discretion, apply for optional registration to the Ministry, in order to facilitate proof of their ownership.

Further, reproduced copies of cinematographic and musical works and non-periodicals (such as books) shall bear banderols obtained from the Ministry. It is also possible for an author to require banderols on the reproduced copies of works that can easily be copied.

### 20 Is copyright registration mandatory?

Registration of a copyright is not mandatory for the establishment of rights. As mentioned in detail in question 19, film producers making the first fixation of films and phonogram producers making the first fixation of sounds shall have their productions containing cinematographic and musical works registered in order to prevent violation of rights and facilitate proof of their ownership.

In addition to that, there are alternative authentication methods available for authors such as; issuing an undertaking through a notary public stating that he or she is the copyright holder or time-stamping the work electronically through certificate service providers.

### 21 How do you apply for a copyright registration?

In order to make a registration for works subject to compulsory registration, producers or right holders together, with the application file that has been examined by the relevant collective licensing body, shall submit the documents listed in Regulation No. 26,171 with a special undertaking in which the producer claims ownership of the work and assumes all legal and penal liabilities in the event that his or her ownership is disproved. If the author applies for an optional registration, he or she shall pay the related registration fees and submit the documents listed in Regulation No. 26,171 with a special undertaking.

### 22 What are the fees to apply for a copyright registration?

Registration fees are updated in every six months by the Ministry in line with a fee calculation method defined in article 11 of Regulation No. 26,171. As of May 2017, the registration fee for local and imported cinematography or phonograms is 480.50 Turkish liras. The registration fee for local and imported manufactured cinematography or phonogram is 96.50 liras. For phonograms containing up to three works,

the registration fee is 120.50 liras. For optional registration of works, the registration fee is 120.07 liras.

### 23 What are the consequences for failure to register a copyrighted work?

There are no administrative fines or legal sanctions for failing to register a copyrighted work.

## Ownership and transfer

### 24 Who is the owner of a copyrighted work?

The person who creates a work is the author of such work. The ownership of the work is granted automatically with the creation of the work.

### 25 May an employer own a copyrighted work made by an employee?

According to article 18(2) of the Law, unless it is determined otherwise by a special agreement or understood otherwise from the content of the work, rights on the works created by employees in the course of their employment are used by their employers.

The same rule applies to the executive organs of legal persons. Therefore, any person who created a work during the performance of her or his job shall be deemed to have automatically assigned, upon the creation of the work, the right to exercise economic rights to her or his employer. However, the moral rights of such works would still remain vested in the employee since such rights are not transferable under the Law.

In addition to this, it is generally accepted that the employer may exercise such economic rights without paying any additional or specific remuneration, other than the employee's wage. However, in some cases, depending on the significance and/or scope of the work, the wage of the employee may be claimed to be inadequate. Therefore, in order to prevent disputes on alteration of employee's wage, it is advised that the parties sign a written employment agreement incorporating that the employee's wage includes any and all remunerations to be paid for creation of such work.

### 26 May a hiring party own a copyrighted work made by an independent contractor?

In such a case, the independent contractor is the party who creates the work and therefore, according to the Law, the independent contractor shall be the owner of the work. Hence, after creation of the work, economic rights of the independent contractor or author should be assigned to the hiring party.

### 27 May a copyrighted work be co-owned?

A copyrighted work may be co-owned under the Law. In cases where a work is created by several people and it can be divided into different parts, then there will be collective ownership and each part of the work shall be deemed to be the work of the person who created the related part. Collective ownership can also be established where several works that are created individually are brought together by their authors. However, if the work cannot be divided into different parts, the union of persons who created the work shall be deemed to be the author of such work and provisions of simple partnerships shall apply to such unions. Each of the authors can act individually when the copyrights of the union are infringed. If a work created by participation of several persons constitutes an indivisible work, unless otherwise determined under an agreement or law, rights over the joint work will be used by the natural or legal person who brought the authors together, provided that rights on cinematographic works are reserved.

### 28 May rights be transferred?

Moral rights cannot be transferred or assigned by the author. This is a mandatory rule and it is related to public order therefore the parties cannot enter into any agreement that derogates from this rule.

While moral rights shall remain vested in the author, economic rights can be freely transferred with an agreement in writing. It must be emphasised that the parties should clearly and individually specify which economic rights are being transferred in the agreement; otherwise such rights shall not be interpreted as duly transferred.

It is not possible and/or valid to transfer a work that has not yet been created. In such a case, the author can grant an undertaking to a third party for creating a work and after the work is created, the author shall transfer his or her rights. However, such undertakings relating to the works of an author to be created in the future may be terminated by either contracting party by giving one year's notice.

### 29 May rights be licensed?

The use of economic rights may also be granted to third parties by a licence agreement in written form. Such an agreement must contain the scope of the rights which are the subject of the licence. A copyright can be licensed on either an exclusive or non-exclusive basis to a licensee. Licence agreements shall be deemed non-exclusive unless it is stated otherwise in the agreement or the law.

### 30 Are there compulsory licences? What are they?

No, in principle the Law does not envisage a compulsory licence. However, an exceptional application has been made in 2010 and the national anthem of Turkey has been excluded from copyright protection with decision No. 2010/1126 of the Council of Ministers of Turkey. According to the stated decision, no royalties shall be paid for reproduction, dissemination, representation or transmission of the national anthem.

### 31 Are licences administered by performing rights societies? How?

Collective licensing bodies are entitled to manage economic rights of their members. In such a case, authors or copyright holders who are members of a collective licensing body, shall issue an authorisation certificate in accordance with the Regulation on Authorization Certificates Provided by the Owners of Intellectual and Artistic Works No. 19,211. With the powers given by authorisation certificates, collective licensing bodies shall administer economic rights of their members, collect and distribute royalties and act as representatives of members who authorised them.

### 32 Is there any provision for the termination of transfers of rights?

Article 58 of the Law provides a method for the termination of transfer of rights by the author. In case a transferee acquiring a licence does not duly make use of his or her rights within a determined or reasonable period and thus, the interests of the author of the work are neglected, the author may renounce from the agreement. The author shall be obliged to grant the transferee, upon notifying him or her by a notary public, a period of time to sufficiently exercise the rights in the agreement. If it is not possible for the transferee to exercise such right, or if he or she refuses to exercise it, or if the author's interests are jeopardised by granting such a period, the author is not required to grant any period. The notice issued by the notary public shall give effect to the renouncement of the agreement, if the expiry date for the granted period exceeds inconclusively or, if it is not necessary to grant such a period. However, the transferee can file a claim against the renouncement within four weeks from the furnishing of the renouncement notification.

### 33 Can documents evidencing transfers and other transactions be recorded with a government agency?

Any agreement authorising use and transfer of an economic right in relation to a work can be submitted to the Ministry for registration at the related party's request. Such an application shall be submitted with the documents listed in Regulation No. 26,171 and a special undertaking.

## Duration of copyright

### 34 When does copyright protection begin?

Copyright protection is granted automatically upon creation of the work but according to article 26 of the Law, economic rights of the author are limited in time. Upon expiry of the protection term, all persons may exercise the economic rights granted to the author. The protection term does not start to run before the work is made public. The protection term shall be calculated as starting from the first day of the year following the year in which the work was first made public.

**35 How long does copyright protection last?**

Copyright protection shall last during the lifetime of the author and for 70 years following the author's death. In case of more than one author creating the work, the protection shall last for 70 years following death of the last surviving author. If the first author of a work is a legal person, the term of protection shall be 70 years from the date on which the work was made public. Since the Law does not allow legal persons to be 'authors' but allows them to be holders of economic rights, this provision shall be interpreted as applicable for exceptional cases where the legal persons are holders of economic rights of a work.

It should be noted that the protection term for the original work and the derivative work are independent of each other and their protection terms run separately.

The Turkish Constitutional Court has ruled to annul the first phrase of the expropriation provision of the Law. Therefore it is noted that upon this annulment decision, expropriation under the Law is vague and open to interpretation and there is a need for re-regulation.

**36 Does copyright duration depend on when a particular work was created or published?**

Copyright protection is granted automatically when the work is created but the copyright protection term depends on the date when the work was published.

**37 Do terms of copyright have to be renewed? How?**

No, there is no copyright renewal under Turkish law.

**38 Has your jurisdiction extended the term of copyright protection?**

Article 27 of the Law, which regulates the protection term of works, was amended by Law No. 4,110 in 1995. Before this amendment, copyright protection would last during the lifetime of the author and for 50 years following the author's death and, in terms of legal person copyright holders, the protection term was 20 years.

**Copyright infringement and remedies****39 What constitutes copyright infringement?**

Copyright infringement is the violation of economic or moral rights.

Economic rights of the copyright holder are infringed when the work is used without permission by way of reproducing, digital transmitting, distributing, performing, making available, broadcasting, adapting or displaying the work.

Moral rights of the author are infringed when (i) the work which has not been made public is disclosed to public without consent of the author or against his or her wishes; (ii) the author's name is shown on the work against his or her wishes; (iii) the author's name is not shown on the work or is misstated or stated in a way giving rise to confusion; (iv) the source is given in a wrong or incomplete way in case of quotation or other exceptional uses permitted by the Law; or (v) the work is unlawfully adapted or modified.

**40 Does secondary liability exist for indirect copyright infringement? What actions incur such liability?**

In some specific cases, vicarious liability does exist for copyright infringement.

Article 66 of the Law regulates that if the infringement has been committed by representatives or employees of an enterprise during execution of their duties, legal action for cessation of infringement may also be brought against the owner of such enterprise. In order to file such legal action, it is not required for the infringer or the persons referred to above to be at fault.

In article 71, the Law also stipulates criminal liability for persons selling, distributing, importing, exporting, buying for commercial purposes or possessing for non-private use works that are reproduced or adapted unlawfully.

In article 72, producing, putting up for sale, selling or possessing for non-private use programs and technical equipment that aim to circumvent additional programs developed for preventing illegal reproduction of a computer program shall incur criminal liability.

**Update and trends**

Preparatory work is being carried out on a draft law amending the current Law on Intellectual and Artistic Works and the working group is collecting opinions from collecting societies, academics and other relevant parties.

**41 What remedies are available against a copyright infringer?**

The copyright holder may file both civil claims and criminal actions against a copyright infringer. As part of civil claims, copyright holders may file legal action for cessation of infringement, prevention of infringement or claim for damages.

According to article 68 of the Law, when filing a legal action for cessation of infringement, a copyright holder whose permission was not obtained may claim from the copyright infringer:

- compensation up to three times of the amount that would have been paid if the right was granted under a contract; or
- compensation up to three times of current value, which shall be determined according to provisions of the Law; or
- that the reproduced copies, films and similar devices enabling reproduction be destroyed or be handed over to the copyright holder in return for equitable remuneration not exceeding their production cost, in case the reproduced copies have not been put up for sale.

It is disputable under Turkish law whether the cessation of infringement and the above compensation can be requested at the same time.

According to article 70 of the Law, when filing a legal claim for damages, a copyright holder whose economic rights are infringed may claim compensation according to general provisions governing torts. If moral rights of the author are infringed, the author may also claim compensation for moral damages. The special practice of the Law which is different from general tort provisions is that the violation of right is sufficient and incurrence of damage is not required for claiming compensation.

In addition to compensation of damages claimed under article 70, a copyright holder may also claim the profit acquired by the copyright infringer. In such case, the compensation claimed under article 68 of the Law shall be deducted from the profit.

**42 Is there a time limit for seeking remedies?**

The Law does not provide for specific time limit provisions, thus the general time limit provisions of the Turkish Code of Obligations No. 6098 shall apply to copyright claims.

General provisions of the Turkish Code of Obligations stipulate different time limits based on the origins of obligation: contract, tort or unjust enrichment. If the copyright infringement case originates from a contract, the time limit for legal claims shall be 10 years. If the copyright claim originates from tort, the time limit shall be two years from the date on which the injured party became aware of the loss or damage and of the identity of the person liable for it, but in any event 10 years as of the date on which the infringement has occurred. However, if the action for damages is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the civil law claim.

It should be further noted that the time limit does not begin to run as long as the infringement continues.

**43 Are monetary damages available for copyright infringement?**

Yes, as mentioned in question 41, the copyright holder or the author whose moral or economic rights have been infringed may file a legal claim for damages including compensation for moral damages.

**44 Can attorneys' fees and costs be claimed in an action for copyright infringement?**

According to the Turkish Civil Procedure Law, the court shall rule that litigation costs and attorneys' fees of the winning party shall be borne by the defeated party. Attorneys' fees, which are decided by the court, are calculated based on the Minimum Attorneyship Fee Tariff published by the Union of Turkish Bar Associations. Therefore, the actual

attorneys' fees paid by a client to his or her attorney cannot be claimed from the counterparty in a legal action.

#### 45 Are there criminal copyright provisions? What are they?

Yes, there are specific acts which are deemed as criminal offences by the Law. Investigation and prosecution of these offences are subject to complaint by the copyright holder. Upon complaint from competent right holders, the public prosecutor shall carry out an investigation and start the prosecution or adopt a non-prosecution decision.

According to articles 71 and 72 of the Law, the following acts are deemed as criminal offences:

- adapting, performing, reproducing, changing, distributing, communicating to the public by devices enabling the transmission of signs, sounds or images or publishing a work, performance, phonogram or production without written permission of right holders or putting up for sale, selling, distributing by renting or lending or in any other way, buying for commercial purposes, importing or exporting, possessing or storing for non-private use any works adapted or reproduced unlawfully;
- identifying or representing another person's work as their own work;
- quoting from a work without referring to its source;
- disclosing content of a work that has not been made public, without permission of the right holders;
- giving reference to a work in an insufficient, incorrect or misleading way;
- reproducing, distributing, publishing or broadcasting a work, performance, phonogram by using the name of a well-known third person; and
- producing, putting up for sale, selling or possessing for non-private use any programs and technical equipment for circumventing additional programs developed to prevent illegal reproduction of a computer program.

Those who commit these offences shall be sentenced to imprisonment, ranging from six months to five years, or will face a criminal fine.

#### 46 Are there any specific liabilities, remedies or defences for online copyright infringement?

In case of copyright infringement by service or content providers, the infringing content shall be removed upon application of the copyright holder. If the content is not removed by the content provider within three days, the copyright holder may then apply to the public prosecutor and the public prosecutor may rule that the service being provided to the infringing content provider be suspended by the relevant service provider within three days.

#### 47 How may copyright infringement be prevented?

There is no specific prevention method for copyright infringement but there are some precautionary measures defined in the Law which may be requested from the court before or after filing a legal claim.

Provisional seizure at the customs is also applicable according to the Customs Law No. 4,458 during the import or export of the copies which require sanctions in case an infringement of rights is likely to occur.

#### Relationship to foreign rights

#### 48 Which international copyright conventions does your country belong to?

Turkey is party to many treaties including the Berne Convention, the TRIPS Agreement, the Paris Convention, the Geneva Act, the Rome Convention, the WIPO Copyright Treaty, the Madrid Protocol and the European Convention on Cinematographic Co-Production.

#### 49 What obligations are imposed by your country's membership of international copyright conventions?

Upon signing of international conventions and treaties by the Turkish Republic, the Grand National Assembly of Turkey introduces a law to ratify the treaty and this law is published upon approval of the President of the Republic. According to the Constitution, the ratified and published treaties are equivalent to law and they are enforceable in the same way as national legislation. In addition, relevant regulations and provisions are also introduced into national legislation based on provisions of relevant treaties.

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# United Kingdom

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## Legislation and enforcement

### 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 UK 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 (sometimes called the Information Society Directive) and the Software Directive 2009/24/EC.

### 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 & Customs also has powers to seize pirated goods that are 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.

### 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' (s 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 ISPs, which enable or facilitate the digital exploitation of works, is addressed in the Copyright Directive 2001/29 and Electronic Commerce Directive 2000/31/EC. The Copyright Directive provides that right 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.

### 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 and/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 (i) be necessary, (ii) be effective, (iii) be dissuasive, (iv) be not unnecessarily complicated or costly, (v) avoid barriers to legitimate trade, (vi) be fair and equitable and strike a 'fair balance' between the applicable fundamental rights, and (vii) be proportionate.

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## 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 recently 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.

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

The categories of work protected by copyright in the UK are: (i) original literary, dramatic, musical and artistic works; (ii) sound recordings, films and broadcasts; and (iii) typographical arrangements of published editions.

'Literary work' includes (i) a table or compilation other than a database, (ii) a computer program, (iii) preparatory design material for a computer program, and (iv) a database. 'Dramatic work' includes a work of dance or mime.

### 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.

### 8 What may not be protected by copyright?

To be protected by copyright, a work must fall within one of the categories of work set out in the response to question 6. 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).

#### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

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 (i) non-commercial research and/or private study (section 29, CDPA); (ii) criticism or review, quotation and/or reporting current events (section 30, CDPA); and (iii) caricature, parody or pastiche (section 30A, CDPA).

In addition, there are defences for (i) certain temporary copies that are an essential part of a technological process (section 28A, CDPA); (ii) text and data analysis for non-commercial research (section 29A, CDPA); and (iii) incidental inclusion (section 31, CDPA).

#### 10 What are the standards used in determining whether a particular use is fair?

The UK courts have held that the factors to take into account when judging whether any dealing was fair include: (i) the degree to which infringing use competes with exploitation of the copyright protected work by the owner; (ii) the use and importance of what was taken; (iii) the motive of the infringer; (iv) the purpose of the use; and (v) whether the use was necessary to make the point.

#### 11 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).

#### 12 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).

#### 13 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*).

#### 14 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

#### 15 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 2016.

#### 16 What are the consequences for failure to display a copyright notice?

Not applicable as there is no requirement of a copyright notice. See question 15.

#### 17 Is there a requirement of copyright deposit?

There is no requirement of copyright deposit.

#### 18 What are the consequences for failure to make a copyright deposit?

Not applicable as there is no requirement of copyright deposit.

#### 19 Is there a system for 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 which offer copyright registration services. When using these sites, users should beware that these services are not connected to the UK Intellectual Property Office and the utility of such services is not established.

#### 20 Is copyright registration mandatory?

There is no formal system for the registration of copyright. See question 19.

#### 21 How do you apply for a copyright registration?

Not applicable as there is no formal system of copyright registration. See question 19.

#### 22 What are the fees to apply for a copyright registration?

Not applicable as there is no formal system of copyright registration. See question 19.

### 23 What are the consequences for failure to register a copyrighted work?

Not applicable as there is no formal system of copyright registration. See question 19.

## Ownership and transfer

### 24 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.

### 25 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.

### 26 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.

### 27 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.

### 28 May rights be transferred?

Yes, copyright may be transferred, or 'assigned'. Assignments must be in writing.

### 29 May rights be licensed?

Yes, copyright may be licensed.

### 30 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.

### 31 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 Phonographic Performance Limited (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.

### 32 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.

### 33 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

### 34 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.

### 35 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.

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

### 36 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 34). 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.

### 37 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 35).

### 38 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 recently 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 (see 'Update and trends').

## Update and trends

### Hot topics

A hot topic in the UK at the moment is Brexit and the impact that this will have on UK legislation. Since copyright law is not harmonised in the EU, the impact may be less significant for copyright than for other IP rights. However, the EU is currently proposing a number of legislative changes as part of its Digital Single Market reform. Some of these, in particular, the Portability Regulation, are likely to have come into force in the UK before the UK leaves the EU. Therefore, these changes will apply in the UK at least temporarily.

### New copyright legislation passed Digital Economy Act 2017

The Digital Economy Act 2017 repeals sections 73 and 73A, CDPA which relate to the retransmission of broadcasts by cable. These provisions came into force when cable television was introduced and provided that the copyright in public service broadcasts (PSB) that are retransmitted by cable is not infringed where the broadcast is receivable in the area in which it is retransmitted, and meant that cable television companies did not have to pay retransmission fees for PSB

channels. The scope of section 73 was recently examined by the Court when it was asked to consider whether this also applied to retransmissions over the internet in the *ITV Broadcasting v TVCatchup* case. The Court held that this did not extend to retransmission over the internet, although the repeal of section 73 means that it will no longer be possible for those carrying out retransmissions over the internet to rely on this provision in any event.

Section 107(2A), CDPA, which deals with criminal liability for infringing the copyright in a work by communicating the work to the public, has been amended. The scope of this section has been clarified from applying to infringing use carried out 'in the course of business' to use where a person 'intends to make a [financial] gain for [himself] or another person'. The section also previously applied where it was for non-business use but where the use affected the owner of the copyright 'prejudicially', this has been amended to apply to circumstances where the infringer knows or has reason to believe that communicating the work to the public will cause financial loss to the owner of the copyright or expose them to risk of loss. The maximum prison sentence for this offence has been extended from two to 10 years.

## Copyright infringement and remedies

### 39 What constitutes copyright infringement?

The categories of copyright infringement for some or all categories of copyright 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 – the so-called 'on-demand' right (section 20, CDPA); and
- making of an adaptation of the work to the public (section 21, CDPA).

### 40 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 United Kingdom, 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 United Kingdom, 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 United Kingdom 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).

### 41 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 right holder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement. The UK court has recently 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*.)

### 42 Is there a time limit for seeking remedies?

In England and Wales, the limitation period is six years.

### 43 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.

### 44 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.

### 45 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.

#### 46 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 (i) a transmission of the work in a network between third parties by an intermediary or (ii) 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.

#### 47 How may copyright infringement be prevented?

Copyright infringement can be prevented by using a copyright notice since this can alert a potential infringer to the right 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 & 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

#### 48 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 Organisations 1961 (the Rome Convention);
- the Convention for the Protection of Producers of Phonograms against the Unauthorised Duplication of their Phonograms 1971 (the Phonograms Convention);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (the TRIPS Agreement);
- the WIPO Copyright Treaty; and
- the WIPO Performances and Phonograms Treaty.

The Berne Convention and UCC are the two major copyright conventions. The Berne and Rome Conventions were supplemented and updated by the two WIPO treaties. There are a number of other conventions of lesser importance that have not been incorporated in the above list.

#### 49 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.



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# United States

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## Legislation and enforcement

### 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 also sometimes referred to as the Copyright Act of 1976. It originally took effect on 1 January 1978, and has been amended numerous times since. An important amendment to the Copyright Act was the Digital Millennium Copyright Act of 1998 (DMCA). In addition, 18 USC section 2319 provides for criminal penalties for certain copyright infringement actions.

### 2 Who enforces it?

The copyright laws of the United States are generally enforced through civil lawsuits initiated by copyright owners. In certain circumstances, as described in question 45, the United States 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 also record its rights with US Customs and Border Protection (CBP), which will then seek to stop the infringing products at the border and prevent them from entering the United States.

### 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. Many of these provisions were added by the DMCA.

First, Chapter 12 of the Act, which was added by the 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), as well as for certain violations involving the integrity of copyright management information.

Second, section 512 of the Act, which was also 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.

Third, the DMCA expanded the section 114 statutory licence for sound recording performance to include internet webcasting, and added a related statutory licence for ephemeral copies made in connection with the statutory performance licence (section 112(e)).

Other provisions of the Copyright Act that were not added by the DMCA address additional specialised aspects of digital exploitation. Among others, section 106(6) provides a sound recording performance right limited to performances by means of a digital audio transmission; section 115 provides a statutory licence for 'mechanical' reproduction and distribution of musical works with special provisions for 'digital phonorecord deliveries'; section 117 addresses certain reproduction and adaptation of computer programs; and the Audio Home Recording

Act of 1992 (codified in Chapter 10) addresses certain digital audio recording devices and media.

### 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 copyrights by targeting distribution of infringing copies into the US.

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## 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 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 Executive Branch's 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.

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## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

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. Copyrightable 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).

### 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.

### 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 consisting entirely of information that is common property and containing no original authorship.

### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

US law recognises the doctrine of fair use, which is codified in section 107 of the Copyright Act. See question 10.

### 10 What are the standards used in determining whether a particular use is fair?

Under the fair use provisions of the US Copyright Act, courts are to use four non-exclusive factors in determining whether a particular use is a fair use. The four factors 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);
- 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 apply these factors to particular situations on a case-by-case basis. The outcome of any given question of fair use can therefore be difficult to predict.

### 11 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.

### 12 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).

### 13 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 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:

- sound recordings created before 15 February 1972 are generally protected under a combination of state common law copyright, unfair competition and specialised statutory provisions;
- 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); and
- 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.

### 14 Are moral rights recognised?

Moral rights are protected to some extent, but moral rights are more narrowly defined and of less practical effect in the US than 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 to 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.

State tort, privacy and publicity laws, and the federal Lanham Act also provide certain protections similar to 'moral rights'.

## Copyright formalities

### 15 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, '© 2016 John Smith'). For sound recordings, a copyright notice consists of the symbol '℗', the year of first publication and the name of the copyright owner.

### 16 What are the consequences for failure to display 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.

### 17 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 19 to 23). 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.

### 18 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.

### 19 Is there a system for copyright registration?

Copyright registration can be obtained by following the procedure described in question 21.

### 20 Is copyright registration mandatory?

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.

### 21 How do you apply for a copyright registration?

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 '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 website ([www.copyright.gov](http://www.copyright.gov)), picked up in person or requested by post.

### 22 What are the fees to apply for a copyright registration?

The standard registration fee for simple applications submitted through the eCO online system is US\$35. When there are multiple authors, different claimants, 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.

### 23 What are the consequences for failure to register a copyrighted work?

As noted in question 20, 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 of law, 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

### 24 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 25, 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 28).

### 25 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 its employee.

### 26 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: (i) the parties must expressly agree in a written document signed by them that the work will be considered a work made for hire; and (ii) 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.

### 27 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-owner(s), but would owe the



other co-owner(s) 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. As defined in the statute, the only requirement is that both authors have the intention that the works are to be 'merged into inseparable or interdependent parts of a unitary whole'. 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, credit commensurate with other authors, and contribution to the audience appeal of the work).

### 28 May rights be transferred?

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, however, 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 33.

### 29 May rights be licensed?

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.

### 30 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.

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.

### 31 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 Inc (BMI) and SESAC have traditionally been the principal US performing rights organisations. Global Music Rights has entered the market in recent years.

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.

### 32 Is there any provision for the termination of transfers of rights?

The Copyright Act has several provisions providing 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 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.

### 33 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

#### 34 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.

#### 35 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 36.

#### 36 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 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 37).

### 37 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.

### 38 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 36. While the extension was not applied to copyrights that had already expired, it did extend the terms of existing copyrights.

## Copyright infringement and remedies

### 39 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.

### 40 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.

### 41 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.

### 42 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.

### 43 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.

### 44 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.

### 45 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.

In addition, it is a criminal offence to place a fraudulent copyright notice on any article, or to publicly distribute or import for public distribution any article bearing such fraudulent notice. It is also a criminal

## Update and trends

### Standards for awarding attorneys' fees in copyright cases

The Copyright Act authorises a court to 'award a reasonable attorney's fee to the prevailing party' in a copyright case, which is a departure from the usual rule in the US that each party bears its own costs of litigation. Lower courts in the US have disagreed concerning the standards to be applied when considering an award of attorneys' fees. In June 2016, the Supreme Court explained that, in making such an award, a court should give substantial weight to the objective reasonableness of the losing party's position. However, objective reasonableness is not a controlling factor in assessing a fee application. Courts are directed to take into account other relevant circumstances, which may include matters such as litigation misconduct or a desire to deter repeated instances of copyright infringement or overaggressive assertions of copyright claims.

### Designs of useful articles

In March 2017, the US Supreme Court clarified the standard to be used for determining the scope of copyright protection for pictorial, graphic or sculptural features of the design of a useful article. In a case involving design elements of cheerleading uniforms, the Court held that a design feature of a useful article is protected by copyright only if the feature (i) can be perceived as a work of art separate from the useful article, and (ii) would qualify as a protectable pictorial, graphic, or sculptural work if it were imagined separately from the useful article.

### Scope of protection for pre-1972 sound recordings

In recent years, owners of rights to pre-1972 sound recordings have brought cases in various states to attempt to clarify the scope of state law protection for such recordings when they are performed to the public by means of transmissions such as internet webcasting and satellite radio. In 2016, the highest court of New York held that New York's common law does not protect the public performance of pre-1972 sound recordings. Previously, a court in California found that public performances of pre-1972 recordings are protected in that state, while a court in Florida found the opposite under that state's law. Both of those decisions are on appeal and have been referred to the highest courts of those states.

### Online service provider liability

The responsibility of online service providers for infringements on their services remains an important and controversial topic in

US copyright law. As of the time of writing, the Copyright Office is continuing a multi-year policy study concerning the impact and effectiveness of the safe harbour provisions provided by the DMCA. In 2016, the Office received more than 92,000 written submissions in response to a solicitation of public comments, and also held public roundtables to discuss service provider liability. In response to a further solicitation of public comments, the Office received additional submissions earlier this year.

Meanwhile, in a precedent-setting decision in 2016, the Court of Appeals for the Second Circuit endorsed a broader interpretation than previous courts of what constitutes 'wilful blindness' or 'red flag knowledge' – that in certain cases may limit the application of the DMCA safe harbour provisions for online service providers. It also underscored the importance of demonstrating the actual implementation of a reasonable repeat infringer policy as a condition of obtaining safe harbour protection. In April 2017, the Court of Appeals for the Ninth Circuit decided another potentially important case involving the safe harbours. Because certain infringing photographs on the defendant's service were reviewed by a moderator before being made publicly available, the court found a dispute as to whether the photographs were posted by users of the service or by the service provider itself. The appellate court remanded the case to the trial court for further examination of that question in light of common law principles of agency and guidance concerning the level of knowledge that would be required for a finding of liability.

### Copyright Office modernisation

The House Judiciary Committee has for several years been reviewing the operation of US copyright law. In that process, there has been interest in modernising the operations of the Copyright Office and providing the Office with more autonomy from the Library of Congress in which it is housed. That process gained momentum with the sudden removal of the Register of Copyrights (the head of the Copyright Office) by the Librarian of Congress in October 2016. Currently, legislation has passed in the House, and is being considered in the Senate, to provide for appointment of the Register by the President, with the approval of the Senate, and to eliminate the power of the Librarian to remove the Register. The bill also contemplates that the Copyright Office will have a chief information officer responsible for managing modern information technology systems.

offence to remove or alter any notice of copyright appearing on a copy of a copyrighted work with fraudulent intent. Moreover, it is a criminal offence to knowingly make a false representation of a material fact in an application for copyright registration, or in any written statement filed in connection with the application.

## 46 Are there any specific liabilities, remedies or defences for online copyright infringement?

See question 3.

## 47 How may copyright infringement be prevented?

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 CBP 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 41; and
- in appropriate circumstances (see question 45), 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

### 48 Which international copyright conventions does your country belong to?

The United States 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 Unauthorised Duplication of their Phonograms (1971);
- the Universal Copyright Convention (Geneva 1952 and Paris 1971);
- the World Intellectual Property Organization Copyright Treaty (1996);
- the World Intellectual Property Organization Performances and Phonograms Treaty (1996); and
- various bilateral copyright treaties.

The US has signed the Beijing Treaty on Audiovisual Performances (2012) and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise

Print Disabled (2013). However, at the time of writing, these treaties have not yet been ratified by the US, and the Beijing Treaty has not yet entered into force.

The United States is also a member of the World Trade Organization and a party to various free trade agreements containing copyright-related provisions.

#### **49 What obligations are imposed by your country's membership of international copyright conventions?**

Each of the treaties identified in question 48 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 copyrights of citizens of other treaty parties by affording them copyright protection in the US on the same basis as US citizens.

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# Venezuela

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## Legislation and enforcement

### 1 What is the relevant legislation?

The relevant legislation regulating copyright includes:

- the Constitution of the Bolivarian Republic of Venezuela (1999);
- the Copyright Law, October 1993;
- the Regulations of the Copyright Law;
- the Berne Convention;
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961);
- the World Intellectual Property Organization (WIPO) Copyright Treaty (1966);
- the WIPO Performances and Phonograms Treaty 1996;
- the National Cinematography Law;
- the Statutory Deposit Law;
- the Law on Books (1997);
- the Law on Information Technology (2005); and
- the Law on the Protection and Defence of the Cultural Heritage (1993).

### 2 Who enforces it?

This legislation is enforced by the National Directorate of Copyright (DNAD), the mayors of local municipalities, the courts of first instance and the National Integrated Service of Customs and Tax Administration.

### 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?

Venezuela's Copyright Law does not establish any specific provisions addressing the digital exploitation of works. Although Venezuela has ratified and published in the Official Gazette WIPO's internet treaties, the corresponding documents of approval of those treaties have not yet been filed with said organisation. Nevertheless, the Special Law on Computer Crimes provides that, when the copyright infringement is made through the use of an electronic device, it is considered an appropriation of intellectual property. Those who, without permission of the owner and with the aim of obtaining profits, reproduce, modify, copy, distribute or disclose software, or any other intellectual work obtained through any IT-related means, may be punished with imprisonment of one to five years, and a fine of 100 to 500 tax units.

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

Although Venezuela's Copyright Law has territorial application, article 3 of the Special Law on Computer Crimes provides the following:

*Extraterritoriality. When any of the offences provided in this Law are committed outside the territory of the Republic, the perpetrator will only be subject to its provisions if the offence has an effect within the territory of the Republic and the person responsible has not been judged for said offence, or has evaded prosecution or conviction by foreign courts.*

## Agency

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

There is a centralised agency called the National Directorate on Copyright (DNAD), which is a part of the Intellectual Property Autonomous Service.

The Directorate has the following functions:

- ensuring compliance with the provisions of the Copyright Law and its Regulations;
- keeping a registry of intellectual productions;
- deciding on the criteria required for the registration and deposit of works, products and productions, except in cases already regulated by the Law and its Regulations;
- authorising and supervising the operation of organisations for the collective management of economic rights in accordance with the provisions of the Regulations;
- supervising the persons, natural or legal, who make use of protected works, products and productions insofar as they give rise to the exercise of the rights provided in the law;
- serving as arbitrator, when requested, to those concerned in disputes arising between:
  - owners of rights;
  - collective management organisations;
  - such organisations and their members; and
  - collective management organisations or owners of rights and the users of the works, products or productions protected by the law;
- imposing sanctions provided in the law, except for crimes, in which case the imposition of sanctions rests with the criminal courts;
- operating an information centre on works, products and productions, both national and foreign, that are used in Venezuela; and
- other functions specified in the Copyright Law or its Regulations.

## Subject matter and scope of copyright

### 6 What types of works are copyrightable?

The provisions of the Copyright Law shall protect all creative intellectual works, whether literary, scientific or artistic in character, and whatever their nature, form of expression, merit or purpose. Neighbouring rights shall also be protected.

The protection granted shall apply, in particular, to the following:

- works expressed in writing, namely books, pamphlets and any other kind of work expressed in letters, signs or conventional marks;
- lectures, addresses, sermons and other works of a similar nature;
- musical compositions with or without words;
- dramatic and non-dramatic musical works;
- choreographed and mimed works;
- cinematographic and other audiovisual works expressed by any process;
- works of fine art, including drawings, paintings, sculptures, engravings and lithographs;
- works of architecture;
- photographic works and works expressed by processes related to photography;
- works of applied art;

- illustrations, maps, sketches, plans, diagrams and three-dimensional works related to geography, topography, architecture or science;
- computer programs; and
- anthologies or compilations of assorted works, and also databases, which, by the selection and arrangement of their contents, constitute personal creations.

#### 7 What types of rights are covered by copyright?

Copyright covers moral and economic rights.

Moral rights include, in particular, the following:

- to keep the work unpublished, or to disclose it;
- to claim authorship of the work at any time; and
- to object to any distortion, mutilation or alteration of the work that is detrimental to its integrity or to the reputation of the author.

Economic rights include the exclusive right to carry out, authorise or prohibit the following:

- reproduction of a work by any means or process;
- communication of a work to the public by any means serving to convey words, signs, sounds or images;
- distribution of copies of a work to the public by means of sale, lending or leasing; and
- translation, adaptation, arrangement or other transformation of the work.

They also prohibit importation of copies made without the authorisation of the owner of the rights into the territory of any member country.

#### 8 What may not be protected by copyright?

The ideas contained in literary and artistic works, the ideological or technical content of scientific works, and industrial or commercial exploitation are not eligible for protection. According to the current Copyright Law, legal texts, decrees, official regulations, public treaties, judicial decisions and other official actions are not protected. Nevertheless, there is an exception regarding legislative collections and judicial sentences, which can only be published with the permission of Ministry of People's Power for Domestic Affairs, Justice and Peace, the Ministry of People's Power for Foreign Affairs or the involved court. If permission is not granted, the competent authority may declare the work as unauthorised and as having no official validity.

#### 9 Do the doctrines of 'fair use' or 'fair dealing' exist?

The doctrine of 'fair use' exists. In Venezuelan legislation, it refers to use that does not interfere with the normal exploitation of a work or the unreasonable prejudice of the author's legitimate interests. The rule of the three steps must be followed.

#### 10 What are the standards used in determining whether a particular use is fair?

Fair use is determined pursuant to article 9(2) of the Berne Convention.

#### 11 Are architectural works protected by copyright? How?

Architectural works receive the same protection as any other works. Illustrations, maps, sketches, plans, diagrams and three-dimensional works related to geography, topography, architecture or science are also protected.

#### 12 Are performance rights covered by copyright? How?

Performance rights are covered by copyright. Performers have the exclusive right to authorise or prohibit the fixation, reproduction or public communication of their performances or interpretations through any means or procedure; they may not, however, oppose any communication to the public made on the basis of a fixation which they agreed to and published with commercial purposes.

#### 13 Are other 'neighbouring rights' recognised? How?

Venezuelan law protects performers, audio producers and broadcasting organisations. In the case of audio producers, they have the exclusive right to authorise the reproduction of their recordings, as well as their importation, distribution, rental or any other use, by any other

manner or media. Additionally, the law establishes a remuneration right for public communication of the recordings. Broadcasting organisations have the exclusive right to authorise the fixation, reproduction and rebroadcasting of their transmissions.

Performances are protected by the Copyright Law as acts of public communication, as follows:

- article 40 states that communication to the public shall be understood to mean any act by which the work is made accessible to two or more persons, in particular by means of stage performance, recitation, reading and public enactment of dramatic, dramatic-musical, literary and musical works by any means or process; and
- article 48 defines fair use to include the protection of news of the day in the following terms:

*[...] the reproduction of news of the day or miscellaneous facts that have the character of mere press information, and that are published by the press or broadcasted, shall be lawful, provided that they do not constitute intellectual works by reason of their form, and without detriment to the principles governing unfair competition.*

#### 14 Are moral rights recognised?

Pursuant to Venezuela's Copyright Law, the author shall have the following inalienable, unmatchable, imprescriptible and non-renounceable rights:

- to keep the work unpublished or to disclose it;
- to claim authorship of the work at any time; and
- to object any distortion, mutilation or alteration of the work that is detrimental to the integrity thereof or to the reputation of the author.

In the event of the author's death, the exercise of moral rights shall pass to his or her successors in title for a 60-year period. Once the economic rights have lapsed, the state or designated agencies shall assume the defence of the authorship and integrity of the work.

The domestic legislation of the member countries may grant other rights of moral character.

#### Copyright formalities

##### 15 Is there a requirement of copyright notice?

No requirement of copyright notice exists. However, it is highly recommended to notify of the existence of exclusive rights and to inform of possible consequences.

##### 16 What are the consequences for failure to display a copyright notice?

Since there is no requirement of copyright notice, there are no consequences for failing to display one.

##### 17 Is there a requirement of copyright deposit?

In general, there is no obligation for copyright deposit. Nevertheless, works such as bibliographical productions, serials, non-bibliographical productions, printed on paper or similar material, as well as audiovisual works in a physical format, shall be deposited before the National Library. The deposit is important, however, in order to be able to record contracts before the National Directory.

##### 18 What are the consequences for failure to make a copyright deposit?

As there is no requirement of copyright deposit, there are no consequences for failure to make one.

##### 19 Is there a system for copyright registration?

Yes. The works may be registered before the Intellectual Property Registry of the National Directorate of Copyright. An application for registration is filed along with two copies of the work. The Directorate evaluates the application over a period of approximately six months, and decides whether to grant the registration or not.

##### 20 Is copyright registration mandatory?

Copyright registration is not mandatory; the right arises with the mere creation of the work. Although failure to register or deposit shall not

prejudice the acquisition and exercise of the rights established by law, registration is recommended in order to establish a proof of the existence of the work and its authorship, thus it facilitates all further proceedings within the terms of the Venezuelan documentary system. All assignments, licences or agreements involving any right must be made in writing and recorded before the National Directorate.

#### 21 How do you apply for a copyright registration?

Application for a copyright registration is made by means of the registration process provided by the National Directorate of Copyright.

#### 22 What are the fees to apply for a copyright registration?

The fees applicable for copyright registration are the same as those related to registration forms and registration rights. The cost of having a work registered is about US\$100.

#### 23 What are the consequences for failure to register a copyrighted work?

There are no consequences for failure to register a copyrighted work, but registration gives the advantage of establishing a presumption of authorship in favour of the person who registered the work.

### Ownership and transfer

#### 24 Who is the owner of a copyrighted work?

Primarily, the author is the owner of the copyrighted work, but any person other than the author, whether a natural or a legal person, may own the economic rights to the work according to the provisions of the legislation.

#### 25 May an employer own a copyrighted work made by an employee?

On the one hand, according to the Copyright Law, all economic rights of works made under labour relations are presumed to have been assigned to the employer by the employee, unless otherwise agreed by the parties. This assignment is presumed to be unlimited and for the duration of the right.

In addition, delivery of the work by the employee to the employer is presumed to imply authorisation to the employer to disclose the work made by the employee, to translate it and to perform any changes the employer considers necessary, as well as to use the title of the work and to defend the moral rights as necessary for the exploitation of the work.

On the other hand, the Venezuelan Organic Labour Law establishes two important situations:

- intellectual production generated under a labour relationship in the public sector, or financed through public funds, which originates intellectual property rights, shall be considered of the public domain; and
- in the private sector, it states that authors maintain their rights on an unlimited basis and for the duration of each invention, innovation or improvement, and the employer is authorised to exploit the work only while the labour relationship or the licence granted by the worker to the employer lasts, but the inventor shall be entitled to a share in its benefits when compensation for the work is out of proportion with the magnitude of the results of their invention, innovation or improvement. At the end of the labour relationship, the employer shall have a right of first refusal to acquire it within 90 days of the notification given by the worker through the labour inspector or labour judge.

#### 26 May a hiring party own a copyrighted work made by an independent contractor?

The law establishes a presumption that any work made for hire belongs to the hiring party. In practice, when the registration of a copyright is applied for, the National Directorate of Copyright requires a written declaration from the author of the work recognising that the work was made on behalf of the hiring party.

#### 27 May a copyrighted work be co-owned?

According to Venezuelan legislation, only natural persons can be considered as authors; therefore, co-authorship or works made in collaboration can only be between natural persons.

On the other hand, derived ownership (ownership originating from the assignment of rights by any means, be it *inter vivos* or *mortis causa*) may apply to legal persons.

#### 28 May rights be transferred?

Assignment of exploitation rights and licences may be granted for legal use, but with the provision that they must be in writing.

#### 29 May rights be licensed?

Copyright rights may be licensed.

#### 30 Are there compulsory licences? What are they?

The compulsory licences provided in the legislation may not exceed the limits permitted by the Berne Convention for the Protection of Literary and Artistic Works or by the Universal Copyright Convention (article 11-bis (2)).

#### 31 Are licences administered by performing rights societies?

##### How?

Remuneration rights are administered by the Venezuelan Association of Performers and Producers of Phonograms (AVINPRO). In Venezuela, this association administers performers' and record producers' rights.

#### 32 Is there any provision for the termination of transfers of rights?

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

#### 33 Can documents evidencing transfers and other transactions be recorded with a government agency?

Documents evidencing transfers and other transactions can be recorded with the National Directorate on Copyright. Pursuant to the legislation, contracts for the assignment of exploitation rights and licences for use must be evidenced in writing.

### Duration of copyright

#### 34 When does copyright protection begin?

Copyright protection begins from the creation of the work, even if not concluded. The law provides that the author of a work shall have, by virtue of his or her creative act, a right to the work, including rights of moral and economic character, as specified by the law.

#### 35 How long does copyright protection last?

The term of protection of the rights provided shall be no less than the lifetime of the author, plus 60 years after his or her death.

#### 36 Does copyright duration depend on when a particular work was created or published?

In general terms, copyright has a duration equal to the author's life, plus 60 years after his or her death; however, audiovisual and radio works, as well as software, expire 60 years after their first publication. The 60 years are counted from the first of January of the immediate following year.

#### 37 Do terms of copyright have to be renewed? How?

Terms of copyright do not have to be renewed.

#### 38 Has your jurisdiction extended the term of copyright protection?

No; the term of copyright protection remains the author's life plus 60 years.

### Copyright infringement and remedies

#### 39 What constitutes copyright infringement?

Any use of a work without the specific permission of the copyright owner can result in copyright infringement.

**40 Does secondary liability exist for indirect copyright infringement? What actions incur such liability?**

Venezuelan legislation does not have specific rules for indirect copyright infringement, neither for vicarious nor for contributory liability.

Regarding the subsidiary responsibility of internet service providers, Venezuela ratified and published in the Official Gazette the WIPO's internet treaties, but the corresponding documents of approval of those treaties have not yet been filed with WIPO. Therefore, the process for their entry into force in Venezuela has not been completed.

Notwithstanding the above, there are actions that may apply for the defence of the rights of the operators based on an interpretation of article 15 of the Telecommunications Law, which establishes the following:

*The duly accredited telecommunications service operators have the following rights: 1. To respect the user's rights established in the Constitution and in the law to proper and non-deceitful information about the content and characteristics of the goods and services they consume, to the freedom of choice and to an equitable and dignified treatment.*

Intellectual property rights are constitutionally recognised rights.

Additionally, it is important to consider the provisions of the Special Law on Computer Crimes regarding crimes against the economic order. In particular, it is worth taking into account article 25 of said Law, which establishes the following:

*Those who reproduce, modify, copy, distribute or divulge a software or any other work of the intellect obtained through the access to any system which uses information technologies, without the authorisation of its owner and with the purpose of obtaining some economic profit, shall be punished with imprisonment of one to five years and a fine of 100 to 500 tax units.*

**41 What remedies are available against a copyright infringer?**

The Copyright Law sets forth the possibility of having the existence of a right declared by means of a court decision. Through this authorship decree, the copyright owner may ask a judge for a declaration of his or her rights and request prohibition of the infringing activity. The copyright owner may ask the judge to issue an order to destroy or withdraw the illicit copies. Furthermore, the copyright owner may also sue for damages.

In addition, this Law provides the general measures intended to defend copyright as follows:

- the court may order judicial inspections and expert studies, as well as any other form of proof provided in the Code of Civil Procedure;
- the court may seize everything that constitutes a violation of the exploitation right; and
- the court may order the seizure of the revenue accruing to the owner of the disputed right of exploitation.

Sequestration and seizure shall be ordered only if the request is accompanied by evidence constituting a serious presumption of the alleged infringement, or if such presumption emerges from the production of any of the aforementioned evidence.

Furthermore, the Anti-smuggling Law and the Administrative Decision on IP Rights Compliance regarding the Import and Custom Transit of Goods, issued by the Venezuelan National Integrated Service of Customs and Tax Administration (SENIAT), provide for the taking of border action before, during or after the nationalisation of goods protected by IP regulations.

**42 Is there a time limit for seeking remedies?**

The general provisions of the statute of limitations apply.

**43 Are monetary damages available for copyright infringement?**

The law provides for the possibility of bringing actions for moral and material damages.

**44 Can attorneys' fees and costs be claimed in an action for copyright infringement?**

Attorneys' fees can be claimed through the courts, through an injunction for proceedings fees.

**45 Are there criminal copyright provisions? What are they?**

A term of imprisonment of between six and 18 months may apply if any person, intentionally and without a right to do so:

- makes use of the title of a work in violation of the law;
- communicates, in the original or a developed form, in their entirety or partially, intellectual works, editions of the works of others or of texts, or photographs or products obtained by a process equivalent to photography, or images recorded on cinematographic film, being equivalent to photography; or
- distributes copies of intellectual works protected by the law, including copies of recorded material, or retransmits a broadcast without the consent of the owner of the rights concerned.

A term of imprisonment of between one and four years may apply if any person, intentionally and without a right to do so:

- reproduces in the original or a developed form, in their entirety or partially, intellectual works, editions of the works of others, texts, or photographs or products obtained by a process equivalent to photography, or images recorded on cinematographic film, being equivalent to photography; or
- introduces into the country, stocks, distributes, sells or otherwise brings into circulation unlawful reproductions of the intellectual works or products protected by the law.



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**46 Are there any specific liabilities, remedies or defences for online copyright infringement?**

When copyright is infringed through the use of an electronic device, article 25 of the Special Act against Information Technology-related Crimes considers it an appropriation of intellectual property. This is punishable by imprisonment of one to five years and a fine of 100 to 500 tax units for those who are, without permission of the owner and with the aim of obtaining profits, reproducing, modifying, copying, distributing, or disclosing software or any other intellectual work obtained through any IT-related means.

**47 How may copyright infringement be prevented?**

The law does not provide measures for the prevention of copyright infringement.

**Relationship to foreign rights****48 Which international copyright conventions does your country belong to?**

Venezuela belongs to:

- the Berne Convention for the Protection of Literary and Artistic Works of May 1982;
- the Universal Copyright Convention of April 1966;

- the Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Reproduction of their Phonograms of December 1981;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of September 1995;
- the WIPO Copyright Treaty (WCT) of December 2004 (this treaty has not yet been ratified);
- the WIPO Performances and Phonograms Treaty (WPPT) of January 2005 (this treaty has not yet been ratified);
- the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 (28 August 2013);
- the Convention for the Safeguarding of the Intangible Cultural Heritage (12 July 2007); and
- the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (21 June 2005).

**49 What obligations are imposed by your country's membership of international copyright conventions?**

All obligations derived from the international conventions signed by Venezuela are imposed.







## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Agribusiness  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Automotive  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Commercial Contracts  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation

Equity Derivatives  
Executive Compensation & Employee Benefits  
Financial Services Litigation  
Fintech  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
High-Yield Debt  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Legal Privilege & Professional Secrecy  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans

Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Banking & Wealth Management  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
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