

Copyright

Contributing editors

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



2018

GETTING THE
DEAL THROUGH

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

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Preface

Copyright 2018

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Copyright*, which is available in print, as an e-book and online at 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 the Bahamas and Vietnam.

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.

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

GETTING THE
DEAL THROUGH 

London
June 2018

Global overview

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

Jenner & Block LLP

Copyright law around the world continues to evolve to address advances in technology and adoption of new communications media. Judicial decisions, 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.

In the European Union, legislation concerning cross-border portability of online services throughout the single market came into effect in early 2018. Subscribers to paid content services will now be able to access those services throughout the European Union on the same basis as in their country of residence, with transmissions to them being treated for copyright purposes as if they occurred in the subscriber's country of residence.

In the United Kingdom, copyright owners can now obtain injunctions against internet service providers to block access to unauthorised live streaming of copyrighted works. China's influential Beijing Intellectual Property Court recently published Guidelines for the Trial of Copyright Infringement Cases that are expected to lead to more consistent procedures and greater certainty as to case outcomes. These Guidelines include specific provisions for addressing online infringement. Legislation is pending in Switzerland that would impose heightened obligations on internet service providers and web-hosting companies to avoid online infringement. And Japan is considering legislation to permit the unauthorised use of copyrighted works in big data services, such as a book search service. Meanwhile, the courts in Brazil have held that unauthorised streaming of copyrighted works over the internet infringes the public performance right.

Various countries have ongoing legislative efforts to update and modernise their copyright laws more generally. In the United States, a wide range of copyright policy issues have been under review for several years. The first fruit of those efforts is the Music Modernization Act, a bill that will make dramatic changes in the provisions of the US Copyright Act concerning licensing of musical compositions and sound recordings, including collective licensing. As of mid-2018, a version of the bill has passed in the House of Representatives and seems to be gaining momentum for enactment by the end of the year. Collective licensing is being examined legislatively in other countries as well. For

example, new rules for collective licensing of digital content are under discussion in Switzerland. Germany recently adopted legislation to free authors from exclusive 'buy out' contracts covering their works. Vietnam is considering criminal infringement legislation.

The 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled focuses on copyright exceptions relating to the creation and dissemination of materials accessible to the blind and other print-disabled persons. It entered into force in 2016, and 37 countries have now ratified or acceded to that treaty. The treaty has not yet been ratified by either the European Union or the US, but that is looking increasingly likely. In the European Union, adoption of implementing legislation in late 2017 should enable ratification by the end of 2018. In the United States, implementing legislation was introduced in Congress in early 2018 and seems to be gaining momentum.

Two other important treaties relating to copyright are pending. The 2012 Beijing Treaty on Audiovisual Performances is a multilateral treaty that will, for the first time, comprehensively bring audiovisual performers into the international copyright framework. As of mid-2018, 19 countries have ratified or acceded to that treaty; it will become effective when ratified by 30 countries.

In early 2016, 12 Pacific Rim countries signed the Trans-Pacific Partnership (TPP), which contained significant copyright provisions. The United States withdrew from the TPP in early 2017, and consequently, the treaty could not go into effect in accordance with its terms. However, in early 2018, the other 11 countries signed a new Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which incorporates most of the provisions of the original TPP. In this process, some of the original TPP's significant copyright provisions were omitted, including the requirement member nations provide a copyright term that is the life of the author plus 70 years and the requirement that member nations provide legal protection against the circumvention of technological measures used to protect copyrighted works.

Older copyright treaties continue to gain adherents as well. For example, Vietnam – one of the TPP countries – may soon accede to the WIPO Copyright Treaty and Performances and Phonograms Treaty.

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

Austria

Sonja Dürager

bpv Hügel Rechtsanwälte OG

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 (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 seized is situated. However, given that the protection of copyright and rights related to copyright granted by the member state of the court seized is limited to the territory of that member state, a court seized on the basis of the place where the alleged damage occurred has jurisdiction only to rule on the damage caused within that member state.

Agency

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

Austria does not have a copyright agency, because 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.

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 the following:

- Copyright shall not prevent the use of works as evidence in proceedings before courts or other authorities or for the purposes of administration of criminal justice and public safety (section 41).
- Temporary acts of reproduction, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right of the copyright holder (section 41a).
- Any person may make single copies of a work on paper or a similar data carrier for their own use (including for professional use), and on any other data carrier (particularly digital copies) only for personal use and neither for direct nor indirect commercial use. Schools and universities may make and distribute copies for purposes of teaching or training in the quantities required for a specific class or lecture (reproduction by schools for own use).
- According to section 42c of the Copyright Act, works that become 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 from publication of the recording.

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

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.

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) is concerned. There is minimal case law regarding the assessment of the exact amount of the royalty rate to be paid. The licence fees to be paid usually are assessed on the commonly paid licence fees.

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

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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 Berne Convention);
- the Universal Copyright Convention;
- the Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement);
- the World Intellectual Property Organization Copyright Treaty (WCT);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;

- the 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 a member state of the European Union and, hence, had to transpose a number of directives concerning copyright matters into the national copyright law. The most important directives that are already transposed into national law are the Directive on the harmonisation of certain aspects of copyright and related rights in the information society, the Directive on the legal protection of databases, the Directive on satellite broadcasting and cable retransmission, and the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

Bahamas

Rodger S Outten

OuttenIP

Legislation and enforcement

1 What is the relevant legislation?

The Copyright Act 1999, Chapter 323 of the Statute Laws of the Bahamas (the Act) as amended by The Copyright (Amendment) Act 2015 (Amendment Act) and the related Copyright Regulations are the relevant legislations for copyright provisions in The Commonwealth of The Bahamas.

2 Who enforces it?

The rights and protections afforded under the Act are enforced by the Supreme Court of the Commonwealth of The Bahamas (Supreme Court) and the Intellectual Property Office (IPO).

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?

Although there are no specific sections of the Act that address digital exploitation of works, the Act extends protection of copyright to literary, dramatic, musical, choreographic, artistic or architectural, motion pictures, audio visual, architectural works and sound recordings, where a broadcast is transmitted or distributed or made available to the public without the consent of the copyright owner. The Act defines the term 'transmit' in relation to a performance or display, as a 'means to communicate it by any device or process whereby images or sound are received beyond the place from which they are sent'. It also defines the term 'distribution' as meaning distribution to the public for commercial purposes, of copies or phonorecords of a work by way of rental, lease, hire, loan or similar arrangement.

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

Although there are no specific sections of the Act that address the extraterritorial application of copyright law, the Act does extend protection of copyright where a broadcast is transmitted from a transmitter in another country that is a member of the Rome Convention for the Protection of Performers of Phonograms and Broadcasting Organizations as signed at Rome on 26 October 1961.

Further, where a foreign owned or operated website infringes the recording rights of a person having recording rights in relation to a performance, the Bahamas shall grant national treatment to producers of phonorecord where the producer of the phonorecord is a national of a country that is a member of the World Trade Organization; or where the first fixation of the sound was made in a country that is a member of the World Trade Organization; or where the phonorecord was first published in a country that is a member of the World Trade Organization.

Agency

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

Currently there is no centralised copyright agency in the Bahamas.

Subject matter and scope of copyright

6 What types of works are copyrightable?

The Copyright Act 1999 protects literary, musical, dramatic, artistic, choreographic, architectural works, motion pictures and other audio visual and sound recordings.

7 What types of rights are covered by copyright?

Copyright protection under the Act provides the exclusive owner the right to produce, reproduce, distribute by public sale or otherwise, transmit, transfer ownership, rent, loan, license, publicly perform, broadcast or prepare a derivative work of the copyrighted work.

The Copyright Act also provides protection for moral and other related rights such as the author's right to be identified with the work, the author's right to object to derogatory treatment of the work (in the case of visual art), the right not to have the literary, dramatic, musical, choreographic, artistic or architectural work falsely attributed to him or her.

8 What may not be protected by copyright?

Any idea or creation that is not fixed in space or time will not be eligible for copyright protection under the requirements of the Act.

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

Provisions for fair dealing exceptions are made under section 106 of the Act. This section addresses the statutory exceptions for acts done in relation to a copy or phonorecord which will not constitute an infringement of copyright. This provision creates exceptions to the infringement of copyrighted material and permits acts in relation to performances for research, private study or education, for the purpose of criticism and review of that or another copy or phonorecord of a performance or of a work, and for the purpose of reporting current events.

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

Section 60 of the Act specifies the relevant considerations to be made in determining whether a particular use is fair, and these include considerations of the nature, amount and substantiality of the work affected by the infringing act in relation to the whole of the work; the purpose and character of the use (ie, whether it is of a commercial nature or non-profit education purposes); and the effect of the Act upon the potential market for, or the commercial value of, the work.

11 Are architectural works protected by copyright? How?

Generally, architectural works are afforded the same copyright protection, economic and moral rights as the other categories of work under the Act.

12 Are performance rights covered by copyright? How?

Part 10 of the Act addresses the rights of performers and persons having recording rights in live performances. Section 97(1) of the Act confers rights in live performances and requires the consent of the performer or any person having recording rights of the live performance, prior to any fixation of the live performance by recording, copies or otherwise. Any reproduction, including reproduction in copies, public

display or transmission of the live performance, without the consent of the performer, constitutes an infringement of the performer's rights.

13 Are other 'neighbouring rights' recognised? How?

The protection of integrated circuit layouts (topographies) and other related integrated circuit matters are recognised under the Integrated Circuits Act, 2015. The rights of protection conferred under this Act prohibits any person from reproducing by integrated circuit or otherwise, protected layout-design or any part thereof or importing, selling or otherwise distributing for commercial purposes, the protected layout, design or integrated circuit without the express consent of the right holder.

14 Are moral rights recognised?

The Copyright Act also provides protection for moral and other related rights such as the author's right to be identified with the work, the author's right to object to derogatory treatment of the work (in the case of visual art), the right not to have the literary, dramatic, musical, choreographic, artistic or architectural work falsely attributed to him or her as the author; and the right to privacy (in the case of commissioned photographic or audio-visual works).

Copyright formalities

15 Is there a requirement of copyright notice?

Although a copyright notice is not required where the copyright owner publishes a protected work in the Bahamas or elsewhere, it is a requirement that if such copyright notice appears, it should consist of the copyright symbol or an abbreviation thereof, the first year of publication of the work and the name or the owner of copyright in the work, or an abbreviation by which the name can be generally recognised. The notice of copyright should be affixed on the work so that it is visible on all copies.

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

There are no statutory consequences for failure to display a copyright notice.

17 Is there a requirement of copyright deposit?

Unless a category of material is exempted by regulation, section 32 of the Act requires the copyright owner or the exclusive right of publication in a work published in the Bahamas to deposit two complete copies of the best edition or sound recording together with any printed material in the Registry within three months of the date of publication.

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

The Registrar may make a formal demand for the deposit on any person obligated to make a deposit. Subject to certain exceptions, where a deposit is not provided within three months, the person or entity upon whom the formal request was served and has failed to make the deposit, will be liable for fines assessed of not more than BS\$250 for each work; and may also be liable to pay the total retail price of the copies or phonorecords demanded or the reasonable cost of the Registry acquiring them; and to pay a fine of not more than BS\$2,000, in addition to any fine imposed, if such person wilfully or repeatedly fails or refuses to comply with such a demand.

19 Is there a system for copyright registration?

There is no formal system for copyright registration; however, copyright registration in general should be made by the owner of the copyright or of any the exclusive right in the work together with the application and the applicable fee for examination and consideration.

20 Is copyright registration mandatory?

For the owner of the copyright or of any of the exclusive rights in the work to claim the copyright protection and the benefits of several related rights, the owner's exclusive right should be registered.

21 How do you apply for a copyright registration?

An application for copyright registration is made by submitting in writing several particulars to the Registry along with payment of the prescribed fees and providing any additional information that may be prescribed by the minister or any relevant regulation in place at the time.

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

The government filing fees associated with applying for copyright registration range from BS\$30 filing fees to BS\$50 on a per-item basis. On average, the cost for applying for copyright registration is fairly minimal and is about BS\$60; however, the costs of the application will vary depending on several factors. Additionally, special copyright services attract government filing fees from BS\$50 to BS\$330 for special handling fees where applicable. Legal fees for services associated with copyright filings will vary between local offices.

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

Generally, all creative works are automatically protected by copyright because copyright protection subsists in works of authorship by a qualified author, provided the work is fixed in space and time. However, greater protection is afforded by statute and under the provisions of the Act where works are registered with the IPO. Where an individual or corporate body fails to register a copyrighted work, they fail to provide the public at large with the opportunity to obtain actual or constructive notice of the fact that the individual (or corporate body) is the exclusive copyright owner of the work or series of works in question. Failure to register a copyrighted work will prevent a plaintiff from obtaining statutory damages against a defendant where, in an action for infringement, the defendant can show that, at the time of the infringement, he or she did not know or had no reason to believe that copyright subsisted in the work to which the action relates. The plaintiff will not be entitled to claim statutory damages from such an action. The details of exclusive ownership and title would be generally be recorded in the Register of Copyright and the act of registering copyrighted works generally rebuts any such claim by a potential infringer.

Ownership and transfer

24 Who is the owner of a copyrighted work?

The author of a protected work is the first owner of the copyright of that work.

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

Subject to the terms of a written instrument stating otherwise, generally in both the cases of a work made for hire and in an employee/employer relationship, the person for whom the work was prepared is considered the author of the work.

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

A hiring party will own the copyrighted work made by an independent contractor where there has been an agreement, expressly made in writing, and signed by both parties, permitting the copyrighted work to be owned by the hiring party.

27 May a copyrighted work be co-owned?

Generally, the author of a work is the first owner of any copyright in that work. Where there is joint authorship of a work, the authors shall be co-owners of the copyright in that work.

28 May rights be transferred?

Section 20(1) of the Act provides that the ownership of a copyright may have be transferred in whole by any means of conveyance or by operation of law, and may bequeathed by will or pass as personal property by intestate succession.

Section 20(2) provides that any of the exclusive rights (see question 7) may be transferred and separately owned.

29 May rights be licensed?

The owner of copyright may license the rights to any person or entity of choice by non-exclusive licence or by exclusive licence.

30 Are there compulsory licences? What are they?

Section 80 of the Act provides for the granting of the exclusive rights to make and distribute phonorecords subject to compulsory licences. Where phonorecords of non-dramatic musical work has been distributed to the public in the Bahamas under the authority of the copyright owner, any other person may obtain a compulsory licence to make and distribute phonorecord of the work if such person's primary purpose in making phonorecords is to distribute them to the public for private use and that person notifies the copyright right owner of his or her intention to obtain a compulsory licence; pays the prescribed royalties; and complies with the notice, timing of payment requirements and any other matters that might be imposed by the copyright owner.

31 Are licences administered by performing rights societies? How?

Licences are administered by performing rights societies upon application and payment of the associated estimated royalties which are due annually and are payable at the beginning of the year.

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

Currently, there are no statutory provisions for the termination of transfers of rights, however, the terms of these terms can be contractually determined.

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

A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a memorandum of the copyright transfer, is in writing and signed by the owner of the rights conveyed or by such owner's duly authorised agent. A certificate of acknowledgment is prima facie evidence of the execution of transfer and may be recorded in the Register of Copyright with the Intellectual Property Office.

Duration of copyright**34 When does copyright protection begin?**

Provided the work of authorship meets the categories as required by section 6 of the Act (specifically, works that are literary, musical, dramatic, artistic, choreographic and architectural, motion picture and other audio-visual and sound recordings), the author's copyright will subsist in the work when it is fixed in time and space. Design copyright protection for registered design shall subsist for a period of five years from the date of registration and can be extended for a period of five years from the date of the expiration of the original application.

35 How long does copyright protection last?

Generally, copyright in any work expires at the end of the period of 70 years from the end of the calendar year in which the author dies.

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

Yes, in the cases of anonymous or pseudonymous authors, or works made for hire, copyright in these particular works expire at the end of the period of 70 years from the date of the first publication. In the case of live performances, duration and transmission of rights in live performances expires at the end of 70 years from the end of the calendar year in which the live performance takes place.

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

Generally, the terms of copyright expire at the end of 70 years from the first date of publication.

38 Has your jurisdiction extended the term of copyright protection?

Under the current Act, there is no provision for the extended term of copyright protection.

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

Section 40(1) of the Act provides that copyright in a work is infringed by any person who, without the license of the copyright owner, does, or authorises in relation to that work or any substantial part of that work, any of the acts (see question 7) which the owner has the exclusive right to do.

Section 40(2) provides that copyright in a work is infringed by a person who, without the license of the copyright owner, imports into the Bahamas for any purpose other than for his private and domestic use, a copy of phonorecord which he knows or has reason to believe is an infringing copy or the phonorecord of the work. Copyright in a work is also infringed by a person who, without the license of a copyright owner, possesses in the course of a business, sells or rents or offers or exposes for sale or rent, displays or distributes in the course of business a copy or phonorecord which he knows or has reason to believe is a phonorecord of the work (section 40(3)).

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

Secondary liability exists for indirect copyright infringement of literary, dramatic, choreographic or musical work where these works are performed at a place of public entertainment. Where copyright in a work is infringed by a public performance of the work by means of a machine or device for performing sound recording or motion pictures and other audio visual works or receiving visual images or sounds conveyed by electronic means, any person who supplies the apparatus or any substantial part of it, and knew or had reason to believe that the machine



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or device was likely to be used to infringe copyright or who supplies copies of phonorecords to infringe copyright and had reason to believe what he supplied, or a reproduction of it would be used to infringe copyright, will also be liable for secondary copyright infringement.

41 What remedies are available against a copyright infringer?

Section 41(1) of the Act provides the following remedies for copyright owners against a copyright infringer which include all such relief by way of damages, injunctions, accounts or otherwise and these remedies shall be made available and are actionable at the suit of the copyright owner.

42 Is there a time limit for seeking remedies?

Generally, the time limit for seeking remedies for copyright infringement is six years from the date of the infringing act or breach.

43 Are monetary damages available for copyright infringement?

Monetary damages are available for copyright infringement and an infringer of copyright is liable for either the copyright owner's actual damages and any additional profits of the infringer or statutory damages.

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

In any civil action under the Act, a claim in an action for the recovery of full cost against any party may be granted and this includes an award for reasonable counsel and attorneys' fees claimed by the prevailing party.

45 Are there criminal copyright provisions? What are they?

Section 118(1) of the Act specifies that any person who without sufficient consent, reproduces for sale of hire; imports into the Bahamas otherwise than for private and domestic use; possess in the course of a business with a view to doing any act; sells or lets for hire; offers or exposes for sale or hire or distributes a copy of a phonorecord which he or she knows or has reason to believe is an illicit copy of phonorecord commits an offence.

Section 118 (2) of the Act also states that it is an offence where a person causes a copy or phonorecord of a live performance fixed without sufficient consent to be displayed or performed publicly if he or she knows or has reason to believe that those rights are being infringed.

Any person who is found guilty of an offence under either of the subsections above shall be liable on summary conviction to a fine of BS\$25,000 or to imprisonment for one year, and on conviction on information to a fine of BS\$50,000 or to imprisonment for two years.

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

The Act does not provide specific liabilities, remedies or defences for online copyright infringement.

47 How may copyright infringement be prevented?

Generally, the owner of the copyrighted work should take all reasonable steps to put the public at large on notice of their ownership and exclusive right to perform all proprietary acts conferred by the grant of Certificate of registration of copyright. This includes affixing a visible notice of copyright to the work wherever and however it is displayed or published. Education of the public at large as to the acts which constitute copyright infringement is also an essential element to preventing infringing acts. Obtaining the consent of the copyright owner to use the copyrighted work, or any derivatives thereof, is a vital step to avoid uses or acts that may constitute copyright infringement.

Relationship to foreign rights

48 Which international copyright conventions does your country belong to?

The Commonwealth of the Bahamas is a party to the following copyright conventions:

- the Berne Convention for the Protection of Literary and Artistic Works as revised in Paris on 24 July 1971;
- the Universal Copyright Convention as revised on 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI (27 December 1976); and
- the Universal Copyright Convention of 6 September 1952, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI (13 July 1976).

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

Not applicable.

Brazil

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Legislation and enforcement

1 What is the relevant legislation?

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

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

2 Who enforces it?

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

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

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

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

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

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

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

It says very broadly in section 29 that the express prior authorisation of the author of a literary, artistic or scientific work shall be required for any kind of use, including complete or partial reproduction, publication, distribution and transmission, among others.

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

There is an exclusion of the economic rights in item I of section 30 which applies to digital exploitation as the exclusive right of reproduction that is not applicable where the reproduction is temporary and done for the sole purposes of making the work, phonogram or performance perceptible by means of an electronic medium, or where it is transitory or incidental, provided that it is done in the course of the use of the work that has been duly authorised by the owner.

Section 184, paragraph 3 of the Brazilian Criminal Code deals more closely with the concept of digital exploitation, as it classifies copyright infringement as a crime and fixes a penalty of imprisonment of two to four years and a fine 'if the violation consists of offering to the public by cable, fibre optics, satellite, radio waves or any other system that allows the user to select a work or production to receive it at a time and place previously determined by those who make the demand, for profit, directly or indirectly, without the express authorisation, as appropriate, from the author, performer, producer, or those who represent them'.

Law No. 12,965, in force since 23 April 2014, which regulates the internet environment, excluded copyrights from the scope of the law while addressing civil liability of internet service providers and establishing a judicial notice and takedown proceeding, since there is a pre-draft bill being discussed for copyright reform in Brazil. Therefore, digital exploitation of copyrighted works in Brazil still lacks proper and specific legislation.

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

There is no such express provision in Brazilian copyright legislation. However, if the acts of infringement are considered to be performed in the national territory, local courts applying rules regarding jurisdiction under the Civil Procedure Code may decide that they have jurisdiction even if the website is foreign owned or foreign operated.

Agency

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

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

Subject matter and scope of copyright

6 What types of works are copyrightable?

A protected 'work', or more accurately a 'protected intellectual work', is defined in section 7 of the Brazilian Copyright Act as 'creations of the spirit, expressed by any means or fixed in any support, tangible or intangible, known or which may be invented in the future'. Section 7 continues with a 13-point non-exhaustive list of examples of 'protected intellectual works', which are as follows:

- literary, artistic and scientific texts;
- conferences, speeches, sermons and other works of the same nature;
- dramatic and dramatic-musical works;
- choreographic and pantomime works, whose scenic performances are fixed in writing or by any other means;

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

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

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

7 What types of rights are covered by copyright?

Section 29 of the Copyright Act includes a non-exhaustive list of examples of types of use involving a copyrighted work that necessarily demand the previous authorisation of its owners, which are as follows:

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

8 What may not be protected by copyright?

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

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

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

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

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

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

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

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

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

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

11 Are architectural works protected by copyright? How?

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

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

12 Are performance rights covered by copyright? How?

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

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

13 Are other 'neighbouring rights' recognised? How?

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

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

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

14 Are moral rights recognised?

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

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

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

- (i) the right at any time to claim authorship of the work;
- (ii) the right to have the author's name, pseudonym or agreed-upon sign or symbol indicated or announced, as being the author, in the exploitation of the work;
- (iii) the right to keep the work unpublished;
- (iv) the right to maintain the integrity of the work, by opposing any modifications or the practise of an act which may in any way affect him or her as the author, or his or her reputation or honour;
- (v) the right to modify the work, before or after it is used;

- (vi) the right to withdraw the work from circulation or to suspend any form of already authorised exploitation, when the circulation or exploitation may adversely affect his or her reputation and image;
- (vii) the right to have access to a single and rare original or copy of the work for the purposes of preserving the work's memory by means of photographic or similar process, in a way that causes the least inconvenience to the owner of the work who, in any event, will be indemnified of any damages caused.

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

Copyright formalities

15 Is there a requirement of copyright notice?

There is no such requirement.

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

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

17 Is there a requirement of copyright deposit?

No. A deposit is not mandatory for copyright purposes. Literary works, which must be deposited before the National Library for the purposes of controlling Brazilian literary heritage and the defence and preservation of the national language and culture (Law No. 10,994 of 14 December 2004). The law also encompasses foreign works published in Brazil.

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

A deposit is not mandatory for copyright purposes.

Law No. 10,994 of 14 December 2004 establishes that the lack of a deposit may lead to a fine of one hundred times the current price of the work, or the seizure of a sufficient number of samples in order to attend to the purposes of the legal deposit which is the controlling of the Brazilian Literary heritage and the defence and preservation of the national language and culture.

19 Is there a system for copyright registration?

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

20 Is copyright registration mandatory?

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

21 How do you apply for a copyright registration?

There is no central entity for the registration of works. Therefore, they will have to be registered before different entities, depending on the nature of the work. Musical works will be registered at the School of Music; works of visual art at the School of Beaux-Arts of the Federal University of Rio de Janeiro; and engineering and architectural works at the Federal Council of Engineering, Architecture and Agronomy. Literary works can be registered before the National Library, which, more recently, has also been accepting the registration of all other works, not just those of a literary nature. Given that the structure provided by the National Library is usually considered to be that which is best suited to receive such registrations, it is advisable to attempt to use this system first.

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

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

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

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

There are no consequences as registration is not mandatory in Brazil.

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

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

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

The concepts of commissioned works and works made in the course of employment (or works made for hire) do not exist in Brazil. This is due to the fact that, when the current Copyright Act passed through Congress, the draft provisions dealing with these concepts were excised and not replaced. Therefore, in principle (and unless a given work can be categorised as a collective work), the employer or the commissioner will only become the owner of a work by virtue of an assignment of rights. The only exception to this rule is in the case of software.

Article 4 of the Software Law stipulates that, unless an agreement is made to the contrary, the employer or commissioner of a work will be the exclusive owner of economic rights to a work created by an employee or commissioned person if the work was created in the course of a contractual relationship which is expressly related to research and development of the software, when the creation of the software is expressly foreseen in the contract, or when the nature of the contractual relationship so determines. Compensation for the creation of the work will be considered to be included in the regular contractual compensation or salary, unless the contract stipulates otherwise (Software Law, article 4, first paragraph).

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

If the independent contractor creates software and the relevant work is not carried out using the resources, technological information, industrial or business secrets or material of the hiring party, the software will be owned exclusively by the independent contractor.

27 May a copyrighted work be co-owned?

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

28 May rights be transferred?

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

29 May rights be licensed?

The comments made concerning assignments also apply to licensing.

30 Are there compulsory licences? What are they?

There are no compulsory licences in Brazilian copyright legislation.

31 Are licences administered by performing rights societies? How?

Licences for public performance are administered by performing rights societies. The public performance right is one of the economic rights and is currently regulated by sections 5, 29 and 31 of the Copyright Act. Brazil has associations of owners that form the Central Office for the Collection and Distribution of Copyrights (ECAD). ECAD is the national copyright collection agency in Brazil that collects and passes the rights to the associations.

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

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

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

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

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

Duration of copyright**34 When does copyright protection begin?**

Protection begins with the creation of the work, with a few exceptions, as described in question 35.

35 How long does copyright protection last?

Type of work	Duration	Comments
Literary	Life plus 70 years	Term started from 1 January of the year following the death of the author or of the last-surviving co-author in cases of joint authorship
Dramatic	Life plus 70 years	Term started from 1 January of the year following the death of the author or of the last-surviving co-author in cases of joint authorship
Musical	Life plus 70 years	Term started from 1 January of the year following the death of the author or of the last-surviving co-author in cases of joint authorship
Artistic	Life plus 70 years	Term started from 1 January of the year following the death of the author or of the last-surviving co-author in cases of joint authorship
Sound recording	Fixation plus 70 years	Term started from 1 January of the year following fixation
Films	Publication plus 70 years	Term started from 1 January of the year following publication
Typographical arrangements	Life plus 70 years	Term started from 1 January of the year following the death of the author or of the last-surviving co-author in cases of joint authorship
Databases	Life plus 70 years	Term started from 1 January of the year following the death of the author or of the last-surviving co-author in cases of joint authorship
Photographic	Publication plus 70 years	Term started from 1 January of the year following publication

Update and trends

While there is no legislation regulating digital exploitation of works, ECAD, the institution responsible for the collection and distribution of rights related to the public performance of music, understands that new technologies such as streaming would require the payment of royalties for public performance.

In a court action filed by ECAD, the Superior Court of Justice rendered a groundbreaking decision in February 2017 determining that streaming is covered by the concept of public performance.

The above decision was grounded on the following arguments:

- streaming is a technology which allows the continuous transmission of packets of data and information without the need for the user to download the files to be executed;
- there are various types of streaming, among which are simulcasting and webcasting. The first involves the simultaneous transmission of a certain content by different channels (over the air and on the internet), while webcasting involves only the transmission over the internet, which can happen with or without the intervention of the user (interactive or not);
- according to sections 5, II and 68, paragraphs II and III of the Copyright Act, it is possible to affirm that streaming is one of the types under our law in which the works are transmitted and the internet is a place of public attendance and thus streaming can be characterised as a public performance;
- according to the Copyright Act, the number of persons in the place where the public performance is taking place is irrelevant in order for the place to be considered a place of public attendance. What

is relevant is the inclusion of works in the reach of a collective public which attends the digital ambient which will be able at any time to access the works made available there. Therefore, what characterises the public performance of the musical work on the internet is its making available due to the transmission in view of the potential reach of an indeterminate number of persons;

- our law has recognised a broad right of communication to the public in which the simple making available of the work already qualifies its use as a public execution, encompassing therefore, the interactive digital transmission (section 29, vii, of the Copyright Act) or any other form of transmission which enables the collection of royalties by ECAD;
- the criteria used to determine the need for authorisation of use by the copyright owner is related to the mode of exploration and not to the content. Therefore, in the case of simulcasting, even if the transmitted content is exactly the same, the channels of transmission are not the same, and therefore are independent, (Copyright Law, section 31, prescribes that the authorisation granted to one mode of exploration does not extend automatically to any of the others as they should be considered independent); and
- ECAD has the power to fix the amounts to be collected according to its regulations and the decision of the societies which are members of ECAD during its general assembly.

In other words, interactive streaming services (such as Spotify and YouTube) or non-interactive streaming services (such as online radio), will have to pay royalties to ECAD.

Type of work	Duration	Comments
Broadcasting	Transmission plus 70 years	Term started from 1 January of the year following transmission
Software	Publication plus 50 years	Term started from 1 January of the year following publication (and if there is no publication, the term is counted from creation)
Title of periodical	Last issue plus one year	Term started from the publication of the last issue of the periodical
Title of annual periodical	Last issue plus two years	Term started from the publication of the last issue of the periodical
Performances	Public performance of execution plus 70 years	Term started from the publication of the last issue of the periodical

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

Yes. It may vary according to the nature of the work (see question 35).

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

No. There is not possibility of renewal.

38 Has your jurisdiction extended the term of copyright protection?

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

Copyright infringement and remedies

39 What constitutes copyright infringement?

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

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

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

Whoever sells, exposes to sell, hides, acquires, distributes stocks or uses illegally reproduced works with the purpose of selling, in order to obtain a direct or indirect gain, advantage or profit will be considered

as jointly responsible with the infringer. An importer and distributor will also be deemed to be jointly responsible for the infringement when reproduction has been carried out abroad.

41 What remedies are available against a copyright infringer?

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

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

42 Is there a time limit for seeking remedies?

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

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

43 Are monetary damages available for copyright infringement?

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

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

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

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

45 Are there criminal copyright provisions? What are they?

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

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

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

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

47 How may copyright infringement be prevented?

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

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

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

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

- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- the 1971 Paris Revision of the Berne Convention – entered into force on 6 May 1975 by means of Decree No. 75,699;
- the Universal Copyright Convention – entered into force on 4 July 1960 by means of Decree No. 48,458;
- the Berne Convention;
- the Phonograms Convention – entered into force on 24 December 1975 by Decree No. 76,906;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – entered into force on 30 December 1994 by means of Decree No. 1,355; and
- the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, Washington Revision (1946) – entered into force by means of Decree No. 26,675 of 18 May 1949.

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

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

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

Ensuring exclusive rights is also one of the most important international obligations accepted by Brazil, as required by the Berne Convention, as well as fixing limitations following the parameters of section 13 of the TRIPS Agreement, which says that limitations must (1) be confined to certain special cases, (2) not conflict with a normal exploitation of the work, and (3) not unreasonably prejudice the legitimate interests of the rights holder.

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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, Universal Copyright Convention, the Berne Convention; the Rome Convention and the TRIPS Agreement, among others).

Agency

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

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

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, audiovisual 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.

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. In addition, the work cannot be an audiovisual work of a documentary nature. 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?

No, 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; it 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 about US\$50. The following fees are applied according to each work:

- engineering and architecture projects and computer programs – 35 per cent UTM (approximately US\$28);
- cinematographic films – 40 per cent UTM (approximately US\$32); and
- any other registration – 10 per cent UTM (approximately US\$8).

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, such as the following:

- 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 rights societies, which must always be granted by said entities. The licence holder may also receive the respective authorisation directly from the copyright holder.

Thus, every owner, concessionaire, user, entrepreneur, lessee or person operating any showroom, public premises, or broadcasting or television station in which plays, films or musical shows are performed or represented, or phonograms or videograms containing said works, of national or foreign authors, may obtain the authorisation through a non-exclusive licence from the corresponding performing right society. Performing rights 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 rights society representing them, but in no event may the authorisations granted by said performing rights society limit the power of the copyright holders to manage their works individually in the case of single uses.

The Law establishes that the fees for licences granted by performing rights societies are established by the entities through the management body envisaged in their by-laws and will govern as of the date of its publication in the Official Gazette. Notwithstanding the aforesaid, performing rights societies may enter into contracts of special fees with user associations, which will be applicable to the members of said organisations, and any user requesting it may be entitled to said special fees. The 2010 copyright amendment introduced a mandatory

mediation and arbitration panel on royalties to resolve controversies arising due to the royalties set by performing rights organisations for the use of their works. Only a legal entity or association with legal status may act as counterpart of a performing rights organisation in these proceedings, which is not individually available to companies.

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\$393 to US\$78,306.

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\$783 to US\$78,306.

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\$7,831 to US\$78,306.

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\$1,960 to US\$40,000.

Repeat offenders

In cases of repeat offenders, the maximum penalties contemplated for each of the offences shall apply. In these cases, the fine may not be lower than twice the prior fine, and for an amount of up to US\$156,611.

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 content without further delay. The respective service provider will be notified of the resolution by letter and the petitioner will be notified through a public publication board at the court. The affected content provider may, notwithstanding other rights, request that the court issuing the order disregard the measure of restraining access or removing the material.

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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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 parts of the legal framework include:

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

Also important are:

- the Interpretation of the Supreme People's Court Concerning Several Issues on the Application of Law in Adjudication of Civil Cases Involving Copyright (2002); 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 National Copyright Administration of China is responsible for the administration of copyright nationwide. The various provinces, autonomous regions and centrally administered municipalities will also have administrative authorities that administer copyright matters within respective geographic regions. The Copyright Law can also be enforced by the General Administration of Customs.

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

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

Information network transmission rights are covered by the Copyright Law. Moreover, the Regulation on Protection of Information Network Transmission Right specifically addresses 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 infringement or the results of infringement occur in China.

Agency

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

The National Copyright Administration of China provides the following services:

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

Subject matter and scope of copyright

6 What types of works are copyrightable?

The Implementation of the Copyright Law defines '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?

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

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

Property rights include:

- the right of reproduction, which is the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work, or by other means;
- the right of distribution, which is the right to sell or donate the original copy or reproductions of a work to the public;
- the right of rental, which is the right to authorise others to temporarily use a cinematographic work or a work created by a similar process, or computer software, except where the software itself is not the essential object of the rental;
- the right of exhibition, which is the right to publicly display the original copy or reproductions of fine art or photographic work;
- the right of performance, which is the right to publicly perform a work, and to publicly communicate the performance of a work by any means or process;
- the right of presentation, which is the right to publicly present a work of fine art, a photographic work, a cinematographic work and work created by a similar process, or other works, with a slide projector or any other technology or instrument;
- the right of broadcasting, which is the right to broadcast a work or disseminate it to the public by any wireless means, to communicate the broadcast of a work to the public by wire or by rebroadcasting, and to publicly communicate the broadcast of a work by

loudspeaker or any other similar instrument capable of producing signs, sounds or images;

- the right of communication through information networks, which is the right to make a work available to the public by wired or by wireless means, so that people may have access to the work at a place and time chosen by them;
- the right of cinematography, which is the right to make a cinematic adaptation of a work using cinematography or a similar process;
- the right of adaptation, which is the right to change a work into a new one with originality;
- the right of translation, which is the right to change the language in which the work is written; and
- the right of compilation, which is the right to compile, by selection or arrangement, pre-existing works or passages into a new work.

8 What may not be protected by copyright?

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

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

11 Are architectural works protected by copyright? How?

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

- use of another person's published work for purposes of the user's own personal study, research or appreciation;
- appropriate quotation from another person's published work in one's own work for the purpose of introducing or commenting on a certain work, or explaining a certain point;
- unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical or radio or television programme, for the purpose of reporting current events;
- publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc on current political, economic or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted;
- publishing or broadcasting by the media, such as a newspaper, periodical, radio station 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 assessing fair use. First, the use must satisfy certain criteria detailed in an exhaustive list of statutory limitations on copyright and, second, the usage must 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 must be mentioned when it is used, otherwise, the user would infringe

the right of authorship. Also, the user must not jeopardise the market value of the works.

11 Are architectural works protected by copyright? How?

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

Since the Copyright Law lists 'architecture' and 'graphic works and model works' as different kinds of works, only three-dimensional buildings and structures rather than graphic construction designs or architectural models could be regarded as architecture. Architectural plans that embody the aesthetic appearance of architectural works can be protected as artworks. Moreover, the originality test might be stricter than that for other works because such protection if granted would overlap with other IP rights.

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

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 occur in two scenarios: live performance and broadcast performance by varied means. Performing the work live, with no permission from the copyright owner, will usually infringe the owner's performance rights unless it is a gratuitous live performance. A typical broadcast performance would include background music in places of business such as supermarkets, clubs, restaurants, airports, among others, for which the consent of the copyright owner must be obtained.

13 Are other 'neighbouring rights' recognised? How?

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

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

14 Are moral rights recognised?

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

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

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

- to claim 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 the legal framework for protecting copyright. However, in practice, copyright notices are often used by right holders. Chinese courts would protect an author's rights regardless of any formality and will, in the absence of evidence to the contrary, presume that the person named in connection with a work is the author.

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 rights exist automatically from the moment the work is created. However, copyright notice is often an easy method of proving ownership, especially in litigation.

17 Is there a requirement of copyright deposit?

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

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

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

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

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. 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 the 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 per work 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 a convenient proof of copyright ownership.

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 successors or assignees may also own the property rights to a work. However, personal rights can only belong to the author because they cannot be assigned or inherited (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 or her successor 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:

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

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 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 jointly owned by the co-authors. No co-authorship may be claimed by anyone who has not participated in the creation of the work.

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

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 must conclude a copyright licensing contract with the copyright owner, except where no permission is required.

30 Are there compulsory licences? What are they?

Yes. A user might defend its use by claiming a compulsory licence during certain situations. If such situations do exist, then the user will not need the author's permission but must remunerate the author. There are five kinds of statutory licences specified in the Copyright Law and two in the Regulation on Protection of the Right to Network Dissemination of Information:

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

- for the purpose of aiding poverty-stricken areas, a published work is available, free of charge, to the public in rural areas through the information network.

31 Are licences administered by performing rights societies?

How?

Yes. Licences for various types of copyright and related rights would be administered by the five performing rights societies, namely, the Music Copyright Society of China (MCSC); the China Audio-Video Copyright Association; the China Written Works Copyright Society; Images Copyright Society of China; and the China Film Copyright Association. 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 music copyright infringers, 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 is equal to the remaining 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 must first complete an online application form and then submit the materials requested for recording to the Centre personally or through its agent. Materials include the application form, the transfer contract, the identification certificate of the applicant, the registration certificate of the rights and the search results for the registration of the rights, if available. After the application fee is paid, the applicant receives a receipt. The process usually lasts 10 working days during which time the applicant may be requested to supply further supporting documents. After recording is complete, details of the transfer record may be found online and the applicant should receive a certificate of the record within three working days.

Duration of copyright

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 his or her death. The following points should be noted:

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

Neighbouring rights have the same duration as copyrights.

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

In respect of work created by a legal entity, organisation or work that is created in the course of employment, copyright (excluding the right to

Update and trends

China has recently had a major development that significantly clarifies many issues within the Copyright Law. Published on 20 April 2018, the Guidelines for the Trial of Copyright Infringement Cases by the Beijing High People's Court provide insight into how the Chinese courts will handle copyright cases in practice. The Guidelines have been split into 10 chapters that cover various issues such as the object of rights; ownership; moral rights; property rights; neighbouring rights; defences; awards and damages; online infringement; cinematographic works infringement; and computer software infringement.

Many would consider the chapter on damages to be the most revealing and significant. Previously, the law was not entirely clear on the calculation of damages and various courts were adopting various approaches in assessing damages. This led to different results for similar cases. The Beijing IP Court has now formulated a systematic and rational approach that complies with China's international obligations, which will lead to greater legal certainty within the Beijing IP Court.

The Guidelines suggest that when calculating damages, one should consider the following and apply them in order:

1. The actual loss suffered;
2. Illegal proceeds; and
3. Statutory damages.

In other words, statutory damages should only be awarded as a last resort and the value of illegal proceeds should only be applied if losses suffered cannot be proven.

The Guidelines also advocate a preliminary burden of proof for claimants. This is advocated mainly to deal with the problem of spoliation. As a practical measure, it will tilt the enforcement process more in favour of claimants.

We strongly suspect that other jurisdictions in China will follow these Guidelines. They are essential reading.

authorship) will not be protected if the work is not published within 50 years of its creation. It is the same with the rights to films or motion pictures, works created using a process similar to films and photographic works.

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 when judging a direct infringement: whether the acts committed are controlled under copyright; whether the acts are prohibited by the right holder; and whether the acts cannot be admitted as an exception or limitation by the Copyright Law. An infringement would be actionable if these three elements are all established.

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

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 Disputes provides for secondary liability for indirect infringement over a network. In addition, this secondary liability is also actionable under Chinese Tort Law. Article 9 of the Tort Law states that: 'One who abets or assists another person in committing a tort shall be liable jointly and severally with the tortfeasor.' Thus, secondary liability for indirect copyright infringement would be incurred when one abets or assists in direct copyright infringement.

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

41 What remedies are available against a copyright infringer?

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

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

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

42 Is there a time limit for seeking remedies?

Yes. The Supreme People's Court has stated that the time limit for copyright infringement actions 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 infringement is still ongoing, the court will, within the protection period of the copyright, order the defendant to stop their infringement and pay compensation that covers the two years preceding the date when the copyright holder initiated the lawsuit.

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.

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

1. The actual loss suffered;
2. Illegal proceeds; and
3. Statutory damages.

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

Damages are not generally available for infringing moral rights. However, in circumstances where severe moral damages are sustained

that cannot be remedied by the cessation of infringement, the courts may award compensation

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 stopping the infringement, which would include reasonable attorneys' fees and costs such as notarisation fees. The court usually exercises discretion on how much is deemed reasonable to cover attorneys' fees.

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 infringement on copyright shall, if the amount of illegal gains is relatively large, or if there are other serious circumstances, be sentenced to fixed-term imprisonment or criminal detention and shall also, or shall only, be fined.

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 procedures have been introduced in this Regulation.

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

47 How may copyright infringement be prevented?

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

Relationship to foreign rights

48 Which international copyright conventions does your country belong to?

WIPO-administered treaties include:

- the Beijing Treaty on Audio-visual Performances;



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- 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 copyright protection.

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 Organizations of 1961;
- the 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 Directive 2011/77/EU on 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.

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').

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

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

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

Agency

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

There is no centralised copyright agency in France.

Subject matter and scope of copyright

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, and plans, maps and sketches.

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.

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.

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'.

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?

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.

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

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.

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.

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.

Copyright formalities**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.

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

See question 15.

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.

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.

19 Is there a system for copyright registration?

There is no system for copyright registration in France.

20 Is copyright registration mandatory?

See question 19.

21 How do you apply for a copyright registration?

See question 19.

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

See question 19.

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

See question 19.

Update and trends

Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market came into effect on 1 April 2018. Providers of online content services must now enable subscribers to use their services in the Member State in which they are temporarily present in the same manner as in their Member State of residence. This means that subscribers should have access to online content services offering the same content on equal terms. This provision is compulsory for paid subscription but optional for free services subscription. For the purposes of this regulation, service providers are exempted from obtaining a licence for the provision of protected content.

Ownership and transfer

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).

Law No. 2016-925 of 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?

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

Copyright infringement and remedies**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 discretionarily 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).



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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 Berne Convention);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961;
- the 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.

Germany

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Legislation and enforcement

1 What is the relevant legislation?

The relevant German statutes in the copyright area are:

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

2 Who enforces it?

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

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

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

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

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

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

According to settled German case law, in the case of an alleged infringement of copyright or related rights by making available via a website, a copyright infringement in Germany was committed if the content of the website was addressed to German users. The criteria are whether the websites provide their content in German language, using a ‘.de-Domain’, or whether the entire appearance of the website is addressed to German users.

Agency

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

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

Contrary to industrial property rights, copyright arises with the creation of the work. There are no formal requirements to be met. A

registration in an official register is neither required nor possible in order to obtain copyright protection.

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

Subject matter and scope of copyright

6 What types of works are copyrightable?

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

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

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

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

7 What types of rights are covered by copyright?

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

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

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

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

8 What may not be protected by copyright?

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

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

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

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

As mentioned before, the statutory provisions in sections 44a to 63a of the Copyright Act allow the use of copyright protected works under specific circumstances. That means that the specific requirements as laid down in these provisions must be met.

11 Are architectural works protected by copyright? How?

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

12 Are performance rights covered by copyright? How?

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

13 Are other 'neighbouring rights' recognised? How?

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

14 Are moral rights recognised?

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

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

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

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

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

17 Is there a requirement of copyright deposit?

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

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

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

19 Is there a system for copyright registration?

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

20 Is copyright registration mandatory?

No.

21 How do you apply for a copyright registration?

There is no copyright registration system available in Germany.

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

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

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

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

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

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

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

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

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

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

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

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

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

27 May a copyrighted work be co-owned?

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

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

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

28 May rights be transferred?

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

29 May rights be licensed?

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

30 Are there compulsory licences? What are they?

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

31 Are licences administered by performing rights societies? How?

Collective Management Organisations (CMOs) generally manage the rights of creative people collectively.

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

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

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

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

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

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

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

Duration of copyright**34 When does copyright protection begin?**

Copyright protection begins with the date of creation.

35 How long does copyright protection last?

The term of protection in Germany is the life of the author and another 70 years after his or her death. If the copyright is shared by several co-authors, it will expire 70 years after the death of the longest surviving co-author. With respect to cinematographic works, the term of protection is the life and 70 years after the death of the longest surviving of a group of authors consisting of the main director, the author of the film script, the author of the dialogues and the composer of any music created for the film. In the case of anonymous and pseudonymous works, the term of protection will generally end 70 years after publication, unless the author reveals his or her identity within this term or registers his or her true name with the register at the DPMA.

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

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

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

Terms of copyright must not be renewed.

Update and trends

The German parliament adopted amendments to the Copyright Act which have been effective since 1 March 2017. The main purpose of the amendments is to strengthen the rights of authors of copyright protected works against the industry and their publishers. The new rules focus on 'full buy-out' contracts where rights are granted to the publisher exclusively in consideration of a one-off lump sum payment. Now, after an initial 10-year period, the licence will be deemed non-exclusive and the author will be free to exploit the licensed work and to grant licences to other parties. While existing contracts are not affected, new contracts and possibly amendments to existing contracts will be subject to the new law.

38 Has your jurisdiction extended the term of copyright protection?

No.

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

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

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

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

Under German copyright law, not only is the direct infringer liable, but also other persons involved in the infringement such as instigator or assistants. Further, and according to settled case law, liability requires actual and specific knowledge of the respective infringing acts, the legal and factual possibility of preventing the direct infringement as well as the violation of a reasonable duty of care to prevent such infringements. The resulting liability is limited to injunctive relief and not to damages. One of the main situations refers to platform operators. Once they have been informed about a specific infringement on their platform, they are required to remove the specific infringing content and to implement measures in order to prevent future violations.

41 What remedies are available against a copyright infringer?

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

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

42 Is there a time limit for seeking remedies?

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

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

43 Are monetary damages available for copyright infringement?

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

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

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

Authors, writers of scientific editions, photographers and performers may also demand monetary compensation for damage which is non-pecuniary in nature provided and to the extent that this is equitable.

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

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

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

There is no basis for punitive damages in German law.

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

Yes. As a rule, the losing party has to reimburse the winning party for all court fees paid. Furthermore, the losing party has to reimburse the winning party's lawyer's fees.

However, the amount of fees and costs that can be claimed is limited by the German Code of Lawyers' Fees.

45 Are there criminal copyright provisions? What are they?

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

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

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

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

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

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

47 How may copyright infringement be prevented?

Copyright may be prevented by establishing a Digital Rights Management which is a set of access control technologies for restricting the use of proprietary hardware and copyrighted works.

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

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

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

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

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

The established minimum standards relate to, for instance:

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

Germany grants and respects copyrights of non-citizens.

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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 up until 2012 have ensured that, with the advent of satellite television and the internet, the definitions of rights are such that all digital platforms and formats are covered. The last amendment to the Copyright Act by the Copyright (Amendment) Act, 2012 introduced specific provisions for dealing with the circumvention of technological measures pertaining to copyrighted works and provides solutions at par with that for infringement of copyright. This addition to the Act is specifically to deal with digital piracy and amending digital protection measures used to check piracy. By virtue of the newly inserted section 65A of the Act, any person who circumvents an effective technological measure applied for the purpose of protecting rights conferred under the Act, with the intention of infringing such rights, shall be punished with imprisonment that may extend to two years and would also be liable to a fine. Similarly, section 65B provides that any person who removes or participates in the removal of rights management information or the dissemination of copies of works from which rights management information has been removed shall be punished with imprisonment of up to two years and shall also be liable

to pay a fine. The Copyright Rules, 2013 also provide for maintaining of records by a person permitted to circumvent technological measures as per the Act.

These provisions are described in question 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.

Agency

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

Yes. There are two centralised copyright agencies in India: the Copyright Office and the Copyright Board. The Copyright Board does not have jurisdiction over civil copyright litigation.

The Copyright Office is headed by the Registrar of Copyrights. The function of the Copyright Office is to maintain the Register of Copyrights. The Registrar also has certain regulatory functions in relation to copyright societies, serves as a registry and provides secretarial support to the Copyright Board.

The Copyright Board is a quasi-judicial tribunal that is empowered to rectify errors in the Register of Copyrights, to grant compulsory licences, and to fix the rates of licence fees in cases of statutory and compulsory licences; it also provides an alternative forum for the resolution of certain disputes between assignors and assignees. The chairman of the Copyright Board is a person who has been a judge of a high court or is qualified for appointment as a judge of a high court. It has been clarified by the High Court that despite no expressed statutory provision for review powers, the Copyright Board has the power to review its own decision if it is to correct procedural infirmities.

The government of India has recently passed the Finance Bill, 2017 by virtue of which the Copyright Board has been merged with the Intellectual Property Appellate Board (IPAB). The IPAB was previously constituted to hear appeals from the decisions of the Trademark

Registry and Patent Office and will now hear appeals and references from the Copyright Registrar as well.

Subject matter and scope of copyright

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 World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Any work that is made substantially from the infringement of any other work does not enjoy any copyright protection.

As per section 15 of the Copyright Act, a design (which may be the reproduction of an original artistic work) does not get copyright protection if the same is registered under the Designs Act, 2000. Additionally as per section 15(2) of the Copyright Act, 1957, copyright in any design ceases to have copyright protection if the same is capable of being registered under the Designs Act, 2000 but has not been and more than 50 copies of the work have been made by any industrial process. However, in a recent judgment in 2015 by the Delhi High Court, it has been held that in order to be a subject matter registrable as a design for the

operation of section 15(2), the said work should be 'novel' and this is the sole condition for operation of section 15(2) in order to deny copyright protection to artistic works not registered as designs.

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, that is, the right to receive royalties (R3 right). This right is unaffected by a performer's written consent to allow his or her performance to be incorporated in a film. Hence, the right to royalties of performers would have to be dealt with separately from other performers' rights when parties negotiate upon how the performance will be incorporated in a film and the mutual considerations between them.

With the passing of the Copyright (Amendment) Act, 2012, the concept of performers' rights has been cemented and exclusive rights have been granted to a performer akin to copyright in original works. This is in accordance with provisions of the WIPO Performances and Phonograms Treaty and the 2012 amendments to the Copyright Act have also granted moral rights to performers giving them extra protection. The rules accompanying the Copyright Act further provide the setting up of a separate 'performers' society' for each class of 'performers'.

The Indian Singers' Rights Association (ISRA) has been registered with the government of India as a copyright society for singers as a class of performers. The purpose of the copyright society is to administer the rights of the singers who are its members and collect royalty on their behalf for their exclusive rights as per the Copyright Act. The Delhi High Court has passed an injunction order dated 19 December 2014 restraining a club in Delhi from infringing the performers' rights of singers in a lawsuit prevented on behalf of the Indian Singers' Rights Association [CS(OS) No. 3958 of 2014]. The suit was decreed in favour of the 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 amendments, such remedy was available only against mutilation, modification, etc, of a work during the term of the copyright in the work. However, this moral right is now a perpetual right of the author and his or her heirs.)

Moral rights of a performer consist of the following:

- the right to claim to be identified as the performer of his or her performance except where omission is dictated by the manner of the use of the performance; and
- the right to restrain or claim damages in respect of any distortion, mutilation or other modification of his or her performance that would be prejudicial to his or her reputation. (Mere removal of a portion of a performance for the purpose of editing, or to fit a recording of a performance within a limited duration, or any other modification required for purely technical reasons, is not deemed to be prejudicial to the performer's reputation.)

Copyright formalities

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 for the Protection of Literary and Artistic Works, but after the TRIPS Agreement, the UCC is of little practical importance.)

In practice, some form of notice such as '©', or a longer notice such as '©, name of owner, date', is often displayed on or next to the copyrighted work.

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.

Update and trends

The Copyright Board has been merged with the Intellectual Property Appellate Board leading to speedier resolution of disputes. The ISRA's right to receive royalties in respect of performances that form part of other copyrighted works such as cinematographic films and sound recordings has been challenged by music producers in suits filed by the ISRA before the Delhi High Court. The industry and performers are eagerly awaiting the outcome.

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 grant of any licence is also required to be in writing and the details of work, territory and term should be specified. If it is not specified, the term shall be presumed to be five years and the territory shall be presumed to be restricted to India only. A licence agreement needs to be in writing. However, there is no requirement for it to be signed as is mandatory for assignment agreements.

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 (the Indian Performing Right Society Limited (IPRS), the Phonographic Performance Limited (PPL) and the ISRA) are forms of 'copyright societies' for collection, licensing, administration and enforcement of rights. Such copyright societies are required to be registered as such under section 33 in order to legally continue the business of granting licences and collecting royalties. In the absence of valid registration, Courts have struck down the licences granted by such societies (see *Leopold Café Stores v Novex Communications Pvt Ltd*). Further, post the 2012 Amendments, the newly inserted section 33(3A) required all previously registered copyright societies to re-register themselves. However, a few music collecting societies refused to do so and, as a result, the legality of their business was under question. After some investigations, one of the societies re-registered itself as a copyright society, although a few enquiries related to its management. These societies collect performance royalties for literary and musical works and for sound recordings and cinematograph film. There are two other copyright societies, namely the Indian Reprographic Rights Organisation (IRRO) and the copyright society for singers as performers, the ISRA, duly 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.

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 60-year post-publication term, copyright in photographs now effectively subsists till 60 years after the death of the photographer.
- The term of protection of performers' rights was also extended in 1999 from 25 years to 50 years.
- The term of protection for all works, whether calculated after the death of the author or from the date of publication (as specified in question 35 for different works), was increased for a period of 10 years 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 United Kingdom.

41 What remedies are available against a copyright infringer?

The remedies provided by the Copyright Act, 1957 against infringement of copyright are:

- civil remedies – these provide for injunctions, damages, rendition of accounts, delivery and destruction of infringing copies and damages for conversion;
- criminal remedies – these provide for imprisonment, fines, seizure of infringing copies and delivery of infringing copies to the owner; and
- border enforcement – the Act also provides for prohibition of import and destruction of imported goods that infringe the 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.

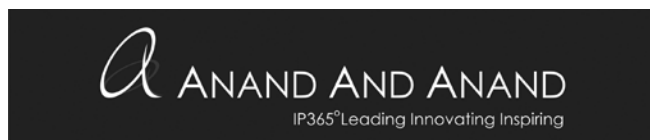
44 Can attorneys' fees and costs be claimed in an action for copyright infringement?

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.



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- (ii) Section 65A penalises circumvention of effective technological measures that may be applied to copies of a work with the purpose of protecting any of the rights conferred under the Act (ie, 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.
- (iii) Section 65B makes unauthorised removal or alteration of 'rights management information' punishable with imprisonment of up to two years and payment of a fine. The provision makes the unauthorised distribution, broadcast or communication to the public of copies of the work punishable in the same manner if the person is aware that electronic rights management information in the copy has been removed or altered. Section 65B was inserted by the Copyright (Amendment) Act, 2012.
- (iv) Section 63A provides for enhanced penalty on second or subsequent convictions under section 63 (see point (i)).
- (v) Other provisions in the chapter provide penalties for offences such as using infringing copies of a computer program, making or possessing plates for the purpose of making infringing copies of works, and making false entries in the Register of Copyrights.

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

Yes. The 2012 amendments to the Act introduced certain provisions that are specifically relevant to copyright infringement and the internet.

Under the fair use provisions of the Act, section 52(1)(b) provides that transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public does not constitute infringement of copyright. This provision provides safe harbour to internet service providers that may have incidentally stored infringing copies of a work for the purpose of transmission of data.

Section 52(1)(c) further provides that transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration that is not expressly prohibited by the 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 Copyright (Amendment) Act, 2012 has also clarified this in many places. Remedies against copyright infringement on the internet are not dealt with separately under that Act as the provisions sufficiently cover all forms of exploitation of works, including exploitation over the internet, and the remedies for copyright infringement would apply to the internet as they would to any other medium or platform.

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 UCC;
- the Convention for the Protection of Producers of Phonograms Against Unauthorized 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 UCC, works first published outside India in any of the convention countries enjoy protection in India at par with the protection granted to Indian works with the exception that if the term specified in the country of origin is shorter than that in India, the work will be protected for the shorter term in India.

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.

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).

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

On 23 February 2018, the Cabinet approved and submitted to the Diet a bill to partially amend the Copyright Act (Copyright Act Amendment Bill). With the continued advance of information and communication technologies, the Copyright Act Amendment Bill is intended to expand the scope of free use of copyrighted works without the copyright owner's permission.

Unlike the concept of fair use in the United States, Japan's Copyright Act sets out an exclusive list of situations in which third parties may freely use copyrighted works without obtaining the copyright owner's permission. The Copyright Act Amendment Bill will expand the scope of such situations.

Of particular note are the following provisions included in the Copyright Act Amendment Bill, which are intended to promote industries in the information technology sector:

- A provision allowing copyrighted works to be used without permission, where such use is in relation to big data services, etc for the copyrighted works. This would apply in cases where the

expression of the copyrighted work is not perceived by the user, even though the work is copied onto a computer, such as a book search service where the search result displays only a portion of the book.

- A provision that would permit certain defined uses of copyrighted works without permission, since the advance of information technology may bring new ways to promote the utilisation of copyrighted works in the future. The provision is intended to promote innovation by adopting a concept similar to 'fair use', allowing for the flexible recognition of future uses of copyrighted works without requiring further revisions to the law.

The Copyright Act Amendment Bill (excluding certain provisions) is scheduled to come into force on 1 January 2019. The enactment of the Copyright Act Amendment Bill is expected to accelerate advanced technological development in fields such as artificial intelligence and the 'internet of things'.

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:

- prevent such infringed information from being transmitted to unspecified persons in practice (under civil laws); and
- disclose the identification information of the sender pertaining to the infringement if there is evidence that the copyright was infringed by distribution through the internet, since the identification information of the sender is necessary for the 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.

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Japan

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; the Universal Copyright Convention; and the Principle of Reciprocity in accordance with the Berne Convention are imposed.

Mexico

Carlos Trujillo

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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 referred to as a '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 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.

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.

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.

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.

7 What types of rights are covered by copyright?

Copyright in Mexico covers moral and economic rights.

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 (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;
- are inalienable;
- are irrevocable; and
- cannot be waived.

The author is the sole, original and perpetual owner of the moral rights of his or her works. The authors cannot assign moral rights, because moral rights are closely linked to the author of a work and protect the author's reputation.

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 2018, one UMA is equivalent to 80.60 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.

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.

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.

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).

Ownership and transfer

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.

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.

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 '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 articles 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.

Update and trends

A proposed legislation is under review by the Mexican Congress that is intended to amend the Federal Copyright Law regarding audiovisual and cinematographic materials and contracts relative to the production works pertaining to these fields. In the proposed amendments, there is a definition about the different stages present in the production of audiovisual works and a work of this nature would be deemed as completed, when the 'production' stage (excluding 'post-production' activities) has been finished. By virtue of the amendments, once an audiovisual work has been completed, a producer would have the obligation to make all pending payments it has undertaken to comply with pursuant to the agreement entered with the authors for the production of the work within 30 calendar days, except if it has agreed with them otherwise.

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 2018, one UMA is equivalent to 80.60 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 2018, one UMA is equivalent to 80.60 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.



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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);
- obtention of a copyright registration for the work;
- implementation of technological protection measures for digital works;
- monitoring the market to try to find illegitimate copies of works; and
- remittance of a cease and desist letter to the alleged infringer, pointing out the existence of protection and copyright registration regarding the allegedly infringed work.

Relationship to foreign rights**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 Berne Convention);
- the Universal Copyright Convention;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms;
- the trade-related aspects of Intellectual Property Rights;
- the 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, 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 has been reformed by Royal Decree-Law No. 2/2018 of 13 April 2018. The following are also relevant:

- Royal Decree of 14 September 1882, 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 into Spanish Legislation Council Directive 96/9/EC 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 No. 1889/2011 of 30 December 2011, which approves the Regulations on the functioning of the Copyright Commission; and
- Royal Decree No. 624/2014 of 18 July 2014, 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).

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.

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.

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.

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-ter, 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 Copyright for an application of record entry for a copyright work amounts to €13.33.

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 affected. 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 Council 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 (see question 9), shall be deemed infringement.

Update and trends

On 14 April 2018, the Royal Decree-Law No. 2/2018 that modifies the Copyright Act was published. In particular, it incorporates into the Spanish legal system the following directives:

- Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market; and
- Directive EU 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

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. This could mean the withdrawal and destruction of the illicit specimens and the disablement or destruction of the devices, equipment, tools and so on, destined to perform the infringement; 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 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 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 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.

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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.

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

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 has been handed over to the Swiss National Council and the Swiss Council of States for further parliamentary 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).

The FACN also provides for criminal sanctions such as imprisonment or the payment of fines in cases of intentional infringement of copyright. These remedies are enforced by a locally competent criminal authority (usually a state attorney) either upon a prosecution request of an injured party or, in the case of an infringement with commercial intent, in the own motion of the authority (ex officio).

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.

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.

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.

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 or

audiovisual works as well as choreographic works and works of mime. The Swiss Federal Supreme Court has recently held that even a simple chair may enjoy copyright protection if it is sufficiently individual that it clearly differentiates itself from pre-existing forms and shapes (BGE 143 II 373). The FACN also explicitly provides for protection of computer programs (software) as a recognised work category (article 2, paragraph 3, FACN). Please note that the NFACN is expected to introduce a new category of copyrighted works, namely photographic reproductions and three-dimensional images produced similarly to photography, but which do not necessarily have an individual character (article 2, paragraph 3, NFACN).

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 or to make recordings and copies and sell them). The producer of a sound recording or audiovisual recording only has an exclusive right to copy and sell the physical carriers (article 35, FACN). Furthermore, broadcasting organisations only have the exclusive right to retransmit their broadcasting programme, make it available to the public, or to produce recordings and copies thereof and to sell it (article 37, FACN). The duration of 'neighbouring rights' is 50 years from 31 December of the year in which the performance, the production of the sound recording, audiovisual recording or the dissemination of the original broadcasting programme took place (article 39, FACN). The NFACN is expected to provide for new duration periods for neighbouring rights.

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 - are 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, that is, 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, etc) in that contracting state, shall regard these requirements as satisfied with respect to all works protected in accordance with the UCC and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication.

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?

Copyrights are vested in the author who created the work. An author is always considered to be the natural person who created an individual work (not, for example, a legal entity hiring such authors to work for them; article 6, FACN). If multiple authors have contributed to the creation of the work, the copyright is owned jointly by them. In the latter case, ownership may only be exercised with the consent of all other co-authors, unless they have agreed otherwise. However, if the individual contributions can be separated and the authors have not agreed otherwise, each co-author may use his or her contribution independently (article 7, FACN).

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 the FACN or in the Swiss Code of Obligations generally applicable to contracts. Copyright licence agreements are considered 'contracts' (ie, contracts not governed under a specific statute). Therefore, provisions on various statutory contract types under the Swiss Code of Obligations will apply in a fragmented manner or by analogy. Copyright licences can be exclusive, sole, non-exclusive, complete or partial. The parties to a copyright licence are free to determine the scope they wish to license. Copyright licences are not subject to any prescribed form. However, a written agreement will provide conclusive proof for the existence of a copyright licence.

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?**

Swissperform, the collective society for performing rights, 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 (a '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.

The NFACN is expected to introduce a new category of copyrighted work, namely photographic reproductions and three-dimensional images produced similarly to photography, but which do not necessarily have an individual character (article 2, paragraph 3, NFACN). It is envisaged that these works will be protected for 50 years after their production.

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.

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. This would also constitute a specific exception to established data protection principles in Switzerland. 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.

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 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?

The FACN provides for criminal penalties imposed on copyright infringements. The wilful infringement of copyright is punished with imprisonment of up to five years or a fine, or both. Fines may range from one Swiss franc up to a maximum of approximately 1 million Swiss francs, depending on the degree of fault and the personal and economic circumstances of the infringer (article 67, FACN). In regular practice, the sentences typically imposed are significantly lower.

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').

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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:

- 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 No. 5846 on Intellectual and Artistic Works of 5 December 1951 (the Law). There is also Law No. 6279 on Compilation of Reproduced Intellectual and Artistic Works, Law No. 5224 on Evaluation, Classification and Promotion of Cinema Films 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 case of copyright infringement. Moreover, administrative duties are performed by the Directorate General for Copyright (the Directorate) of 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 is about 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?

Our copyright laws do not have 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 foreign websites 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 banderol; issues producer's certificate; and issues certificate for the natural and legal persons who or which manufacture materials for fixation or reproduction of works and/or fill, reproduce and sell 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 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 the rights against the 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 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 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, ideas and principles on which any element of a computer program 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 right holder's permission shall not constitute copyright infringement. The outlines of those 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 under question 10.

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

Author's permission is the main condition that determines 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 be generally 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 the ones 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 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 article 4 of Law No. 6279, 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, Istanbul 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. These works defined under article 4 are as follows;

- works such as a book, embossed books, booklet, encyclopedia, album, atlas and music note that are published individually or are published separately as part of a set or serial;
- periodicals such as newspapers, journals, bulletins, calendars;
- graphic works such as banner, postcard, etching, reproduction, printed picture;
- any material containing data such as slides, strips, film fragments, spools, cassettes, cartridges, films and microforms;
- works reproduced by recording in optical and magnetic media containing audio, video and data produced for use in all kinds of computer, music and video devices;
- block of or single stamps and paper money with their prospectus;
- geographical, geological, topographical, or meteorological maps, plans and sketches;
- works that are printed or reproduced abroad but sold and distributed at home; and
- electronic publications that are produced and used in electronic environment.

Moreover, under article 5, the works 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 which is published in the Official Gazette No. 28388 (Compilation Regulation). 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 within 15 days of the reproduction process; while the delivery period for the works specified in article 4(g) and article 5 is 60 days.

In addition to the above-mentioned obligations, according to newly amended articles of the Compilation Regulation, the compilers are also liable for submitting the works specified in article 4(g) of Law No. 6279 and electronic copies of the works specified in article 4(a), (b), (g) to the National Library Presidency. Works specified in article 4(g) shall be delivered to the National Library Presidency via Electronic Publication Compilation System (EYDeS) within 15 days of the date when the liability arose. It is stated in the Compilation Regulation that the National Library Presidency shall set up EYDeS and issue a directive with regards to delivery rules and principles. However, EYDeS has not been set up yet.

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 of 1,000 to 5,000 Turkish lira per compilation copy. While determining the penalty amount, number of sales, 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, which is published in the Official Gazette No. 26171 (Registration Regulation), 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 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, 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 (right holders), together with the application file which has been examined by the relevant collective licensing body, shall submit the documents listed in the Registration Regulation 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 Registration Regulation with a special undertaking.

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

Registration fees are updated every six months by the Ministry in line with a fee calculation method defined in article 11, the Registration Regulation. As of January 2018, the registration fee for local and imported cinematography or phonogram is 543 Turkish liras. The registration fee for local and imported manufactured cinematography or phonogram is 109 liras. For phonograms containing up to three works, the registration fee is 136 Turkish liras. For optional registration of works, the registration fee is 135.69 Turkish liras.

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

There is 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 not determined 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 his or her job shall be deemed to have automatically assigned, upon the creation of the work, the right to exercise economic rights to his or her 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 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 the 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 (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 or valid to transfer a work that is not yet 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 the 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 Authorisation Certificates Provided by the Owners of Intellectual and Artistic Works which is published in the Official Gazette No. 19211. 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 expiration 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 of 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 should be submitted with the documents listed in the Registration Regulation 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 expiration 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 reregulation.

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. 4110 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, digitally transmitting, distributing, performing, making available, broadcasting, adapting or displaying the work.

Moral rights of the author are infringed when: (i) the work that 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.

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.

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 the 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.

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, the copyright holder 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, the 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;
- compensation up to three times of current value that shall be determined according to provisions of the Law; or
- that the reproduced copies, films and similar devices enabling reproduction be destroyed or handed over to copyright holder in return for equitable remuneration not exceeding their production cost, in cases where 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 the 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, the copyright holder may also claim the profit acquired by the copyright infringer. In such a 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 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 above under 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 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. However, it should be noted that the 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 the client to his 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 that are deemed as criminal offence 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 carries out an investigation and starts a prosecution or adopts a non-prosecution decision.

According to articles 71 and 72 of the Law, the following acts are deemed as a criminal offence and the persons who commit these offences shall face a criminal fine or shall be sentenced to imprisonment from six months to five years:

- 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 his or her 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.

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 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 that may be requested from the court before or after filing a legal claim.

Provisional seizure at the customs is also applicable according to Customs Law No. 4458 during the import or export of the copies that require sanctions where an infringement of rights is likely to occur.

Relationship to foreign rights

48 Which international copyright conventions does your country belong to?

Turkey is a party to many treaties including:

- Berne Convention for the Protection of Literary and Artistic Works;
- the TRIPS Agreement;
- the Paris Convention;
- the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961;
- 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 President of the Republic. According to the Constitution, the ratified and published treaties are equivalent to law and they are enforceable the same as national legislation. In addition to that, relevant regulations and provisions are also introduced to national legislation based on provisions of relevant treaties.

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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 United Kingdom is also currently a member of the European Union and, therefore, UK law should be in accordance with the various European Union directives that impact on copyright, such as the Copyright Directive 2001/29/EC (sometimes called the Information Society Directive) and the Software Directive 2009/24/EC.

2 Who enforces it?

There are a number of public bodies which have powers of enforcement of relevant criminal offences in the UK, including local weights and measures authorities (Trading Standards), the Office of Fair Trading and the police. Her Majesty's Revenue and Customs also has powers to seize pirated goods 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' (section 17(2), CDPA).

Making copyright works available over the internet will infringe UK law which provides for a communication right for all categories of copyright-protected work which includes the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them (sometimes referred to as the on-demand right (section 20, CDPA)).

The Digital Economy Act 2010 also provides for a number of measures to reduce copyright infringement caused by file-sharing on the internet.

The role of intermediaries and ISPs, which enable or facilitate the digital exploitation of works, is addressed in the Copyright Directive 2001/29/EC and Electronic Commerce Directive 2000/31/EC. The Copyright Directive provides that 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.

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.

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 2018.

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 that offer copyright registration services. When using these sites, users should be aware that these services are not connected to the UK Intellectual Property Office and the utility of such services is not established.

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.

Update and trends

The Cross-border Portability Regulation has recently come into force in the UK. It requires providers of many online content services to allow their subscribers to access the service across the EU and not just in the home member state. It provides that the communication of such content is treated as having taken place in the home member state, so that copyright and related rights are not infringed in other member states.

Brexit is the hot topic across all areas of UK law at the moment. UK copyright law will largely remain unaffected in the short term as copyright law is largely a matter for national law and relevant EU directives have already been incorporated into national law. However, depending on the terms of the future trading relationship between the EU and the UK, there may be some specific consequences in the cross-border treatment of copyright. These include broadcasters' ability to transmit content cross-border and the co-operation of collective societies in the UK and the EU. It may be that the UK's withdrawal from the EU will also mean that the Cross-border Portability Regulation can no longer apply into and out from the UK.

Copyright holders can now block access to live-streaming of protected content by obtaining injunctions against internet service providers (ISPs). This is a logical development of the law which has seen a recent expansion of blocking orders sought against third-party ISPs to stop infringement of IP rights taking place on their networks.

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.

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 – known as the '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 UK, other than for his or her private and domestic use, an article which is, and which he or she knows or has reason to believe is, an infringing copy of the work (section 22, CDPA);
- possesses in the course of business an article which is, and which he or she knows or has reason to believe is, an infringing copy of the work (section 23(a), CDPA);

- sells or lets for hire, or offers or exposes for sale or hire an article which is, and which he or she knows or has reason to believe is, an infringing copy of the work (section 23(b), CDPA);
- in the course of a business exhibits or distributes an article which is, and which he or she knows or has reason to believe is, an infringing copy of the work (section 23(c), CDPA);
- distributes other than in the course of a business to such an extent as to affect prejudicially the owner of the copyright an article which is, and which he or she knows or has reason to believe is, an infringing copy of the work (section 23(d), CDPA);
- makes, imports into the UK, possesses in the course of business or sells or lets for hire, or offers or exposes for sale or hire an article specifically designed or adapted for making copies of that work, knowing or having reason to believe that it is to be used to make infringing copies (section 24(1), CDPA);
- transmits the work by means of a telecommunications system (other than by communication to the public), knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in the UK or elsewhere (section 24(2), CDPA);
- gives permission for a place of public entertainment to be used for a performance which infringes copyright unless when he or she gave permission he or she believed on reasonable grounds that the performance would not infringe copyright (section 25 CDPA); or
- supplies apparatus that is used to infringe copyright by a public performance of the work or by the playing or showing of the work in public (section 26, CDPA).

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 or 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.



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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 and Customs as to copyright infringing material to be detained at border control.

Infringement may be reduced by inserting a copyright notice on the work indicating the date and the owner of a particular work, which will alert third parties to the existence of copyright. Enforcing copyright may deter third parties for attempting to carry out infringing acts.

Relationship to foreign rights**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 Organizations 1961 (the Rome Convention);
- the Convention for the Protection of Producers of Phonograms against the Unauthorized Duplication of Their Phonograms 1971 (the Phonograms Convention);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (the TRIPS Agreement);
- the WIPO Copyright Treaty; and
- the WIPO Performances and Phonograms Treaty.

The Berne Convention and the UCC are the two major copyright conventions. The Berne and Rome Conventions were supplemented and updated by the two 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.

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 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.

As of mid-2018, legislation is pending that would significantly revise the Copyright Act's provisions concerning digital uses of music (see 'Update and trends').

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.

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.

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 have from time to time suggested additional non-statutory factors that may bear on a fair use analysis, such as whether an alleged infringer acted in good faith. Courts apply these factors to particular situations on a case-by-case basis, weighing the factors in light of the purposes of copyright. The outcome of any given question of fair use can therefore be difficult to predict.

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 broadcasters and creators of photographs and many databases, are protected in the US as a matter of federal copyright law. In addition, other provisions of US federal or state law provide protection that might be considered neighbouring rights in some other countries:

- 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 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, '© 2018 John Smith'). For sound recordings, a copyright notice consists of the symbol '℗', the year of first publication and the name of the copyright owner.

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' (Electronic Copyright Office). 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), picked up in person or requested by post.

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

The standard registration fee for a simple application submitted through the eCO online system is US\$35. When there are multiple authors, a claimant who is not the author, multiple works, or a work made for hire, the fee for an online application is US\$55. When paper forms are used, the standard fee is US\$85. The fee for expedited service is US\$800.

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 his or her 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 owes 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. If a joint work exists, then both authors are co-owners of equal, undivided interests in the entire work.

However, not everyone who makes any contribution to a work will be considered an 'author' of the work. Whether a contribution rises to the level of authorship generally requires that a person contribute copyrightable expression and play a sufficiently important role in the creation of the work to be considered an author (based on factors such as an intention shared with other authors of the work to be co-authors, control over the work, receiving credit commensurate with other authors, and contribution to the audience appeal of the work).

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 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 and creators.

In addition to these compulsory licences, section 116 provides special authority for collective negotiations between copyright owners of musical works and operators of coin-operated phonorecord players (jukeboxes), with the possibility of a rate determination by the Copyright Royalty Board if necessary.

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 (BMI), SESAC and Global Music Rights are the principal US performing rights organisations for musical works.

In the case of sound recordings, SoundExchange collects and distributes royalties under the sound recording statutory licences on behalf of the featured artists and copyright owners of such works, and also under some direct licence agreements.

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 'renewal' rights to works under statutory copyright protection before 1978, the statute provides similar rights of termination, generally between 56 and 61 years after the date copyright was originally secured.

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 recording 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.

Update and trends

Music Modernization Act

Legislation is pending in Congress that would significantly revise the provisions of the Copyright Act concerning licensing of music, particularly for delivery of downloads and interactive streaming. The centrepiece of the bill, which is called the Music Modernization Act, would thoroughly revise the century-old statutory regime for licensing 'mechanical' uses of musical works. Digital music services would be able to obtain blanket licenses for such uses and pay royalties through a new mechanical licensing collective. The version of the bill pending as of this writing would also change the royalty rate-setting standard for compulsory licenses of musical works and sound recordings, change the process and evidentiary standards for litigating musical work performance royalty rates, and federalise the right to make certain digital audio transmissions of pre-1972 sound recordings that are currently protected only under state law.

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. The last year has seen several important judicial decisions in that regard. In *BMG Rights Management (US) LLC v Cox Communications Inc*, the Fourth Circuit Court of Appeals provided an important interpretation of one of the prerequisites for an online service provider to qualify for the safe harbours in section 512 of the Copyright Act: reasonably implementing a policy of termination of the accounts of repeat infringers. In that context, the court defined a repeat infringer simply as someone who has infringed copyrights more than once, and declined to require either a heightened awareness of infringement or a judicial holding of infringement. The court also held that finding a service provider liable for contributory infringement requires knowledge of, or wilful blindness to, specific instances of infringement, which is consistent with previous interpretations of section 512. In *Spanski Enterprises Inc v Telewizja Polska S.A.*, the D.C. Circuit held that when the operator of a website based outside the US, acting abroad, transmits to US users video content in which another party holds exclusive US public performance rights, the website operator commits an infringing public performance under US law notwithstanding the principle that the US Copyright Act has no extraterritorial application. *Goldman v Breitbart News Network, LLC* involved liability for embedding a photograph on a web page through a link that caused the image to be displayed from a third-party server. There, the US District Court for the Southern District of New York held that when the use of the embedded photograph was infringing, the publisher of the web page violated the copyright owner's exclusive display right even though the image was hosted on a server operated by an unrelated third party. Finally, in *Mavrix Photographs, LLC v LiveJournal, Inc*, the Ninth Circuit held that the section 512 safe harbour for storage at the direction

of a user would not apply to photographs submitted by users if they were reviewed and selected for inclusion by moderators who qualified as agents of the service provider.

Fair use

After a number of years of increasingly expansive interpretations of the fair use doctrine under US copyright law, several recent judicial decisions suggest that trend may have reached its limit. In *TCA Television Corp v McCollum*, the Second Circuit held that use in a new play of one minute of material from a famous comedy routine was not a transformative use (and hence not a fair use), because the play used the routine for its original, comedic purpose without adding any new commentary, meaning or message to the comedy routine itself. The court emphasised that it is not permissible to use copyrighted material in a larger new work simply because the new work has a purpose or message different from that of the appropriated material. In *Penguin Random House LLC v Colting*, the US District Court for the Southern District of New York held that certain condensed and edited children's versions of classic novels did not qualify as a fair use, since they used large parts of each original work without providing significant analysis or other new material. In the long-running saga of *Oracle America, Inc v Google LLC*, the Court of Appeals for the Federal Circuit held that Google's unauthorised use of certain parts of Oracle's Java application programming interface in Google's Android operating system was not a fair use because (1) the use was commercial even though there was no charge to the consumer; (2) the use was not transformative, since it involved verbatim copying for a similar purpose with no changes to the expressive content; (3) what was copied was qualitatively significant; and (4) the use interfered with Oracle's actual and potential licensing of Java for smartphones. Finally, in *Fox News Network, LLC v TVEyes, Inc*, the Second Circuit held that it was not a fair use to provide a service that allowed users to search for and watch clips of previously recorded television programming. The court found that while making the programming searchable served a transformative purpose, the use was not a fair use because the service made almost all of the plaintiff's programming available and deprived the plaintiff of potential revenue.

Circumvention of Technological Protection Measures

The US Copyright Office is conducting a 'triennial' rulemaking proceeding to determine whether there are non-infringing uses of copyrighted works that are being unduly constrained by the prohibition on the circumvention of access controls in section 1201 of the Copyright Act, such that exemptions from that prohibition should be granted. So far, the Office has determined to extend all the existing exemptions and is evaluating proposals for various new or expanded exemptions.

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 was registered, before 1 January 1978. If so, the copyright term is 95 years from the date federal copyright was originally secured (usually the date of publication). Otherwise, the copyright term is generally computed in the same way as for works created on or after 1 January 1978. That is, the term is life plus 70 years, or 95 or 120 years, depending on the circumstances of authorship and publication. However, for works that were unpublished and unregistered on 1 January 1978 but were published on or before 31 December 2002, the term of copyright will not expire before 31 December 2047.

Both the requirements for copyright protection and the US copyright term have changed over time. In the past, the copyright term was shorter, and many pre-1978 works fell into the public domain earlier

than the expiry of their full term. Determining whether any particular work created before 1 January 1978 is still under copyright is thus fairly complicated, and depends on factors such as the source country of the work, when the work was created and published, whether the work was published with notice, and whether the copyright was renewed during the 28th year after publication or registration (see question 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.

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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 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 Unauthorized 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.

Vietnam

Le Quang Vinh

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Legislation and enforcement

1 What is the relevant legislation?

The Civil Code of 2015 (only general rules stated in sections 8, 115, 221, 222 and 683); the Law on Intellectual Property of 2005 as amended in 2009 (IP Law); the Criminal Code of 2015 as amended in 2017 (section 225); and the Law on Customs of 2014 (sections 73, 74, 75 and 76)

2 Who enforces it?

Under section 200 of the IP Law, the state bodies that have the competence to deal with acts of infringement of intellectual property rights may be bodies such as courts, inspectorates, market management offices, customs offices, police offices or people's committees at all levels.

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?

Basically the answer is no. The main reason is that Vietnam has not yet acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) which update and supplement the unsettled new problems by the Berne Convention, namely, the latest developments of the internet and digital technologies. However, some acts relating to copyright and related rights, however indirect and incomplete, may be deemed as an infringement, such as duplicating, producing copies of, distributing, displaying or communicating a work to the public via a communications network or digital means without permission from the copyright holder.

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

There are no provisions in the IP Law on extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright. However, at the sub-law level, such extraterritorial application rule on foreign-owned or foreign-operated websites that infringe copyright may be found in article 5(4) of Decree No. 105/2006/ND-CP as amended, stating that an act under consideration shall also be deemed to have been committed in Vietnam if it was committed on the internet and aimed at consumers or people using information in Vietnam.

Agency

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

Yes. The Copyright Office of Vietnam (COV), an agency under the Ministry of Culture, Sports and Tourism, is responsible for the state administration of the copyright and related rights sector nationwide, including Collective Management of Copyright and Related Rights (CMOs), the granting and cancellation of copyright registration certificates as requested. Accordingly, based on section 200 IP Law, COV is not an intellectual property rights enforcement body.

Subject matter and scope of copyright

6 What types of works are copyrightable?

Any work that is created and fixed in any tangible medium of expression with originality is copyrighted. Subject matters protectable as copyright by section 14 IP Law comprise:

- literary works, scientific works, textbooks, teaching courses and other works expressed in written language or other characters;
- lectures, addresses and other speeches;
- press works;
- musical works;
- stage works;
- cinematographic works and works created by a process analogous to cinematography;
- plastic art works and applied art works;
- photographic works;
- architectural works;
- sketches, plans, maps and drawings related to topography or scientific works;
- folklore and folk art works; and
- computer programs and collections of data.

Derivative works shall only be protected if such protection is not prejudicial to the copyright in the works used to create such derivative works.

7 What types of rights are covered by copyright?

The rights conferred upon copyrighted works consist of moral rights and economic rights. Under section 19 of the IP Law, except for the transferable right to publish or permit others to publish works (under moral rights), the remaining moral rights comprise the non-transferable exclusive rights: to name works, to attach real names or pseudonyms to works, to attribute (to be given credit to) creator's real names or pseudonyms when works are published or used by others, to protect the integrity of works and to prevent others from modifying, mutilating or distorting works in any form prejudicial to their honour and reputation.

Economic rights under section 20 include rights to create derivative works, perform the work for the public, reproduce the work, distribute or import original works or copies thereof, communicate the work to the public by wire or wireless means through electronic information networks or by any other technical means, lease the original or copies of a cinematographic work or a computer program.

8 What may not be protected by copyright?

Vietnam does not accept protection in favour of three types of subject matters: (a) daily news as mere items of information; (b) legal instruments, administrative and other documents in the judicial domain, and official translations of such documents; and (c) processes, systems, operational methods, concepts, principles and data.

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

Yes. Fair use is included in section 25 and section 32 of the IP Law, whereby others may freely use published copyright or related rights without needing to seek permission and to pay royalties or remuneration from the copyright holder on the condition that such use does not conflict with a normal exploitation of the work or related rights and does not unreasonably prejudice the legitimate interests of the author.

The 10 defence circumstances on fair use relating to a published copyrighted work comprise:

- making one copy of the work for scientific research or teaching purposes;
- reasonable quoting from a work in order to comment on or illustrate one's own works, without misrepresenting the author's views;
- quoting from a work in order to write an article published in a newspaper or periodical, in a radio or television broadcast or in a documentary, without misrepresenting the author's views;
- quoting from a work in a school or university for lecturing purposes without misrepresenting the author's views and not for commercial purposes;
- copying a work by a library for archival and research purposes;
- performing of a stage work or other art work in mass cultural, communication or mobilisation activities without collecting fees in any form;
- audio-visual recording of a performance in order to report current events or for teaching purposes;
- photographing or televising plastic art, or an architectural, photographic, or applied art work displayed in a public place in order to present images of such work;
- transcribing a work into braille or into characters of other languages for the blind; and
- importing copies of another's work for personal use.

However, it is worth noting that the circumstances in (a) and (e) indicated above shall not be applied to architectural works, plastic works and computer programs.

The four defence circumstances as fair use regarding the published related rights consist of:

- making one copy of a work for personal scientific research purposes;
- making one copy of a work for teaching purposes, except for performances, audio-visual fixation or broadcasts which have been published for teaching purposes;
- reasonable quoting from a work in order to provide information; and
- making provisional copies of a work by a broadcasting organisation for broadcasting purposes when such organisation has the broadcasting right.

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

In practice, in view of the current fair use provisions, Vietnam's transposition of its Berne Convention and TRIPS members' obligation is deemed obedient because these provisions incorporate the Berne-based three-step test which provides that 'members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder'. Thus, readers should go through sections 25 and 32, especially their sub-sections 2 which state, for instance, that organisations and individuals who use the works stipulated in section 1 of this article must neither affect the normal use of such works nor cause prejudice to the rights of the author or copyright holder, and must provide information being the author's name and the source and origin of the work, or organisations and individuals who use works stipulated in section 1 of this article must neither affect the normal use of performances, audio and visual fixation (sound and image recordings) or broadcasts, nor cause prejudice to the rights of performers, producers of audio and visual fixation, or broadcasting organisations.

11 Are architectural works protected by copyright? How?

Yes. Architectural works may be protected in two forms: either a design drawing of a building or a complex of buildings, interior, landscape or in the form of an architectural building per se, according to Decree No. 22/2018/ND-CP which has been in effect since 10 April 2018.

12 Are performance rights covered by copyright? How?

No. Other than copyright, performance rights are classified into a group of related rights (also known as neighbouring rights). These subject matters are also protected the same as those of copyrighted ones provided that they are fixed or displayed and not prejudicial to copyright.

13 Are other 'neighbouring rights' recognised? How?

Related rights or neighbouring rights that are eligible for protection have three types of subject matter: (a) performance (by artist, singer, or commonly called performers), (b) audio and visual fixation (sound or image recordings), and (c) broadcasting; they are protected under the laws of Vietnam as an independent protectability subject matter other than copyright.

14 Are moral rights recognised?

Yes. See question 7.

Copyright formalities

15 Is there a requirement of copyright notice?

No provision or requirements are available under the current laws and regulations.

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

There are no consequences as there is no provision on the same.

17 Is there a requirement of copyright deposit?

There is no requirement for copyright deposit.

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

None.

19 Is there a system for copyright registration?

Yes. Upon request, a certificate of registered copyright or a certificate of registered related rights may be granted by the COV. However, such a certificate shall not be a compulsory pre-requisite for entitlement to copyright or related rights. Indeed, concerned parties are recommended to register since those who are granted certificates of registered copyright or certificates of registered related rights shall not bear the burden of proving such copyright or related rights in a dispute.

20 Is copyright registration mandatory?

No. See question 19.

21 How do you apply for a copyright registration?

When seeking to obtain a registration of copyright or related right, the applicant (authors, copyright holders or related right holders) has to submit a required dossier with COV, thereby such dossier basically contains:

- a request for registration of copyright or related rights. Such request must be made in Vietnamese and duly signed by the author, copyright holder, related rights holder or person authorised to file the application, fully stating the information on the applicant, author, copyright holder or related rights holder; summarising the content of the work, performance, phonogram, video recording or broadcast; the name of the author, the title of the work used to make derivative work in cases where the work to be registered is a derivative work; the date, place and form of publication; a undertaking accepting liability for information stated in the application;
- two copies of the work subject to application for copyright registration, or two copies of the fixed object subject to the related right registration;
- a letter of authorisation, where the applicant is the authorised person;
- documents proving the right to file application where the applicant acquires such right due to inheritance, succession from or assignment by another person;
- written consent of co-authors, for works under joint authorship; and
- written consent of co-owners if the copyright or related rights are under joint ownership.

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

The official charges are generally insignificant – between US\$4 and US\$22 depending on the type of work or related right subject seeking registration.

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

There are almost no consequences for failure to register a copyrighted work. As explained in question 20, it is not mandatory to register copyright or related right. However, the registration is highly recommended to help the stakeholder bearing the burden of proof.

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

Basically, an author is deemed as the first owner of a copyright. Section 36 of the IP Law defines the copyright owner as an organisation or individual who holds one, several or all of the economic rights. Further, where there is evidence that authors are duly those who used their own time, finance and material or technical facilities to create works then they would enjoy protection under both section 19 on moral rights and section 20 on economic rights.

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

Yes. Where any organisation assigns the task of creating a work to an author who belongs to such organisation, the organisation shall be the owner of the copyright entitled to hold all economic rights under section 20, plus one of the four moral rights under section 19, being the right to publish his or her works or to authorise other persons to publish his or her works, unless otherwise agreed.

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

Yes. In the case that any organisation or individual enters into a contract with an author (other than the author whose creation is formed while performing on the basis of an employee-employer relationship) for the creation of a work, that organisation or individual shall be the owner of all economic rights under section 20, plus one of the four moral rights under section 19, being the right to publish his or her works or to authorise other persons to publish his or her works, unless otherwise agreed.

27 May a copyrighted work be co-owned?

Yes. Section 38(1) of the IP Law provides that co-authors who use their time, finance and material or technical facilities to jointly create works shall share the rights to such works stipulated in section 19 (moral rights) and section 20 (economic rights). Section 38(2) further defines that co-authorship means two or more than two authors that jointly create a work and this provision also ascertains the rule that each of the joint authors who own their joint moral and economic rights may exploit or use independently his or her rights on the condition that such independent use may be detachable and does not prejudice the parts of the work of the other co-authors.

28 May rights be transferred?

Yes. All of the economic rights pertaining to copyright or related rights are assignable. For moral rights, only one of four rights under section 19 are transferrable, this being the right to publication or to permit others to publish. See question 7.

29 May rights be licensed?

Yes, except for moral rights (excluding the right to publication or to permit others to publish) that are prohibited from licensing. These prohibited licensing rights are stated in section 19 comprising the right to (a) to give titles to their works, to attach their real names or pseudonyms to their works, (b) to have their real names or pseudonyms acknowledged when their works are published or used, (c) to protect the integrity of their works, and to forbid other persons from modifying, editing or distorting the work in whatever form, causing harm to the honour and reputation of the author, and in section 47(2) consisting of the right to (a) to have the name acknowledged when performing, when distributing audio and visual fixation or when broadcasting performances, (b) to protect the integrity of the imagery of the performance, and to prevent others from modifying, editing or distorting the work in any way prejudicial to the honour and reputation of the performer.

30 Are there compulsory licences? What are they?

Yes. As per section 26 of the IP Law, compulsory licences, known as non-voluntary licences, are available except for cinematographic works. Whereby it is understood to mean cases when published works may be used without having to seek permission but royalties or remuneration must be paid on the condition that such use does not conflict with a normal exploitation of the work or related rights and does not unreasonably prejudice the legitimate interests of the author; and it must also provide the author's name and the source and origin of the work.

31 Are licences administered by performing rights societies? How?

Generally, yes. Up to now, most common types of works have been managing and granting licences to use by the collective management of copyright and related rights or also known as collective management organisations (CMOs), such as the Vietnam Literary Copyright Center (VLCC), the Recording Industry Association of Vietnam (RIAV), the Vietnam Center for Protection of Music Copyright (VCPMC), the Vietnam Reproduction Rights Organization (VIETRRO) and the Association for Rights Protection of Music Performing Artists (APPA). The names of each of the collective management bodies basically describe the types of works that each one grants licences to.

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

The termination of transfer of rights is merely subject to the terms and conditions agreed in the fiduciary licence agreement signed between CMOs and copyright holders. In practice, for different reasons, copyright holders may unilaterally terminate the signed contract with CMOs.

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

No provisions are available.

Duration of copyright
34 When does copyright protection begin?

Copyright protection begins at the time a work is created and fixed in a certain material form with originality.

35 How long does copyright protection last?

The duration of protection varies subject to the type of copyrighted work, and under the laws of Vietnam the term of protection applicable for a set of moral rights is different from that of a group of economic rights. Section 19 moral rights such as (a) the right to give titles to their works, to attach their real names or pseudonyms to their works, (b) the right to have their real names or pseudonyms acknowledged when their works are published or used, (c) the right to protect the integrity of their works and to forbid other persons from modifying, editing or distorting their works in whatever form, causing harm to the honour and reputation of the author, and (d) the right to publish their works or to authorise other persons to publish their works, shall be protected indefinitely, except for the moral right under (d) above.

Relating to section 20, economic rights comprise the right (a) to make derivative works, (b) to display their works to the public, (c) to reproduce their works, (d) to distribute or import the original or copies of their works, (e) to communicate their works to the public by wireless or landline means, electronic information networks or other technical means, (f) to lease the original or copies of cinematographic works and computer programs; in the event of publication, cinematographic, photographic, stage, applied art and anonymous works are protected for a period of 75 years from the date of first publication. Where these cinematographic, photographic, stage, applied art works have not been published for 25 years from the date of fixation, their protection term would be 100 years from their fixation date.

Works that are absent from the above list shall be protected for the whole life of the author plus 50 years after his or her death and, in case of a work of joint authors, the term of protection shall expire in the 50th year after the death of the last surviving co-author. It is worth noting that the last right belonging to the group of moral rights is the right 'to publish their works or to authorise other persons to publish their works'

Update and trends

Vietnam may soon accede to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) so that it is able to control growing online copyright infringement and piracy. Vietnam is now expected to crack down on copyright infringement by putting into practice wilful copyright infringement on a commercial scale by prosecuting and adjudicating criminal offenders, whether natural persons or for-profit corporations, under the 2015 Penal Code in 2018.

and has a definite term of protection the same as that of the economic rights mentioned above.

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

It depends on both point of creation and publication. For example, cinematographic works, photographic works, works of applied art and anonymous works have a term of protection of 75 years from the date of first publication; for cinematographic, photographic or applied art works which remain unpublished within 25 years from the date of fixation, the term of protection is 100 years from the date of fixation. For other remaining works, the general rule of protection is the whole life of the author plus 50 years after his or her death and for joint authorship, the term of protection expires in the 50th year after the death of the last surviving co-author.

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?

Pursuant to section 28, there are 16 acts of copyright infringement:

1. Appropriating copyright in a literary, artistic or scientific work.
2. Impersonating an author.
3. Publishing or distributing a work without permission from the author.
4. Publishing or distributing a work of joint authors without permission from the co-authors.
5. Modifying, editing or distorting a work in any way which prejudices the honour and reputation of the author.
6. Copying a work without permission from the author or copyright holder, except for two instances of fair use, being a copy of a work being made for scientific research or teaching purposes or the copying of a work by a library for archival and research purposes under section 25(1)(a)(dd).
7. Making a derivative work without permission from the author or copyright holder of the original work, except for the section 25(1) fair use-based 10 circumstances.
8. Using a work without permission from the copyright holder and without paying royalties, remuneration or other material benefits in accordance with law, except for the section 25(1) fair use-based 10 circumstances.
9. Leasing out a work without paying royalties, remuneration or other material benefits to the author or copyright holder.
10. Duplicating, producing copies of, distributing, displaying or communicating a work to the public via a communications network or digital means without permission from the copyright holder.
11. Publishing a work without permission from the copyright holder.
12. Deliberately destroying or de-activating the technical solutions applied by the copyright holder to protect copyright in his or her work.
13. Deliberately deleting or modifying electronic information in a work regarding the management of the rights to such work.
14. Manufacturing, assembling, transforming, distributing, importing, exporting, selling or leasing out equipment when knowing, or having grounds to know, that such equipment may de-activate

technical solutions applied by the copyright holder to protect copyright in his or her work.

15. Making and selling a work with a forged signature of the author of such work.
16. Importing, exporting or distributing copies of a work without permission from the copyright holder.

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

In the IP Law, there is no provision regarding 'secondary' infringers, only primary infringers. However, some regulatory provisions guiding the implementation of the IP Law regarding 'secondary' infringers are found, for example, in Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL on Stipulations on the Responsibilities for Intermediary Service Providers in the Protection of Copyright and Related Rights on the Internet and Telecommunications Networks (in force since August 2012). Under this joint circular, intermediary service providers are obliged, among other things, to remove and erase digital content in violation of copyright and related rights, and to cut off, stop and temporarily disconnect an internet cable or telecommunication transmission upon receipt of a written request by the Ministerial Inspectorates of Ministry of Information and Communications or the Ministry of Culture, Sports and Tourism or other competent ministries.

Also, intermediary service providers are liable directly for damage recovery due to their copyright or related rights violation in some cases, namely: (a) when they are the initial source that uploaded, transmitted or provided digital content through a telecommunication network and internet without the permission of copyright or related rights holders; or (b) when they modified, distorted or reproduced digital content in any form without the permission of the copyright or related rights holder.

41 What remedies are available against a copyright infringer?

Copyright infringement may be dealt with by using one of three remedies: a criminal penalty (section 225 of the 2015 Criminal Code as amended in 2017); an administrative violation fine of up to \$22,000 under Decree No. 131/2013/ND-CP; or a civil lawsuit with a compensation claim in accordance with the IP Law and Civil Proceedings Code. When found guilty of a crime, an offender may face a fine of up to three billion dong or subject to non-custodial reform for up to three years or be jailed for up to three years. Special attention is paid that the first time in its development history of criminal jurisprudence and legislation, Vietnam accepted and passed the new inclusion of corporate criminal liability regime in the Criminal Code of 2015 as amended, whereby such criminal penalty is not only applicable for the offender (natural person) who committed a crime infringing a copyright or related right but also for the corporation for which the offender is working on behalf of or for its benefit.

It is worth noting that unlike most other countries, administrative measures against copyright infringement or piracy are commonly used by copyright holders rather than civil proceedings or criminal liability because they are less time-consuming and are a simpler procedure. However, it is recommended that copyright infringement or piracy cases are submitted before the Ministry of Culture, Sports and Tourism's inspectorates or its provincial junior force as they are assigned by the state to control and deal with the culture sector and copyright and related rights matters.

42 Is there a time limit for seeking remedies?

Yes. The statute of limitation for initiating a copyright infringement lawsuit, where profit is directed at by both the plaintiff and defendant, is two years starting from the date on which the plaintiff knew that his or her right and legal interest was infringed. Where an infringement is dealt with via administrative remedy, the statute of limitation would be the same.

43 Are monetary damages available for copyright infringement?

Yes. Pursuant to article 204 of the IP Law, the types of monetary remedies available against a copyright infringer are remedies for material damage and spiritual damage.

Material damage includes property losses, decreases in income and profit, loss of business opportunities, reasonable expenses for prevention and remedying of such damage. Spiritual damage includes damage

to honour, dignity, prestige, reputation and other spiritual losses caused to performers or authors of literary, artistic and scientific works.

The plaintiff can request the court to decide on the compensation level of the above damages on one of the two following bases: (i) total material damage calculated in an amount of money plus profit gained by the defendant as a result of an act of IP infringement where the reduced profit amount of the plaintiff has not yet been calculated into such total material damage; (ii) the price of the licensing of an IP object with the presumption that the defendant has been licensed by the plaintiff to use that object under a licence contract within a scope corresponding to the committed infringing act. If it is impossible to determine the level of compensation on those two bases, such compensation level will be set by the court, but must not exceed 500 million dong (US\$22,000).

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

Yes. According to article 205.3 of the IP Law, the plaintiff has the right to request the court to compel the defendant to pay reasonable costs of hiring attorneys.

45 Are there criminal copyright provisions? What are they?

Yes. Criminal offence for infringing copyright or related rights set out in section 225 of the Criminal Code of 2015 as amended provides that:

a person who, without the consent of the holders of copyrights and relevant rights, deliberately commits any of the following acts which infringe upon copyrights and relevant rights protected in Vietnam and earns an illegal profit of from 50 million dong to under 300 million dong or causes a loss of from 100 million dong to under 500 million dong to the holders of such copyrights and relevant rights, or with the violating goods assessed at from 100 million dong to under 500 million dong shall be liable to a fine of from 50 million dong to 300 million dong or face a penalty of up to three years' community sentence: (a) reproducing works, phonograms or video recordings, or (b) distributing to the public copies of works, phonograms or video recordings. In the case a crime that has been committed in any of the following cases shall carry a fine of from 300 million dong to 1 billion dong or a penalty of three to six years' imprisonment: (a) the offence is committed by an organised group; (b) the offence has been committed more than once; (c) the illegal profit reaped is 300 million dong or over; (d) the loss incurred by the holders of copyrights and relevant rights is 500 million dong or over; and (e) the illegal goods are assessed at 500 million dong or over.

The offender might also be liable to a fine of between 20 million dong and 200 million dong and prohibited from holding certain positions or doing certain works for one to five years.

Punishments incurred by a corporate legal entity that commits any of the offences specified in this article are as follows: (a) any corporate legal entity that commits an offence specified in clause 1 of this article despite the fact that it previously incurred a civil penalty or has a previous conviction for the same offence which has not been expunged shall be liable to a fine of from 300 million dong to one billion dong; (b) a corporate legal entity that commits this offence in the case specified in clause 2 of this article shall be liable to a fine of between one billion dong and three billion dong or have its operation suspended for six to 24 months; and (c) the violating corporate legal entity might also be liable to a fine of between 100 million dong and 300 million dong or is prohibited from operating in certain fields or raising capital for one to three years.

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

There are no individual statutory provisions on online copyright infringement.

47 How may copyright infringement be prevented?

Copyright holders should be proactive and prompt in detecting and requesting the state bodies to handle the infringement

Relationship to foreign rights

48 Which international copyright conventions does your country belong to?

At present, Vietnam is a member of five international copyright conventions and treaties: the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention); the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention); the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention); the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Convention); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). In addition, Vietnam has signed bilateral agreements and memoranda for closer cooperation and strengthening of copyright protection.

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

By acceding to the above copyright-related international treaties, Vietnam is fundamentally deemed obedient having already transposed its obligations into its national laws.

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