



# Copyright

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Quick reference guide enabling side-by-side comparison of local insights into copyright issues, including online and digital regulation; extraterritorial application; role of centralised copyright agencies; protectable works and rights; copyright notice, deposit and registration; ownership and transfer; copyright duration, renewal and extension; infringement (liability, remedies, and prevention); relationship to foreign rights; relationship to international copyright conventions; and recent trends.

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## LEGISLATION AND ENFORCEMENT

### Relevant legislation

What is the relevant legislation?

The main copyright statute in the United States is the Copyright Act, which is codified in Title 17 of the United States Code (17 USC section 101 et seq), and is referred to as the Copyright Act of 1976. It originally took effect on 1 January 1978 and has been amended numerous times since. In addition, 18 USC sections 2319 to 2319C provide for criminal penalties for certain copyright-related offences.

*Law stated - 10 May 2022*

### Enforcement authorities

Who enforces it?

The copyright laws of the US are generally enforced through civil lawsuits initiated by copyright owners. In certain circumstances, the US federal government may initiate a criminal copyright enforcement action against an alleged infringer at the request of the copyright owner. However, only a handful of criminal copyright charges are typically filed in a year. Copyrights are also sometimes enforced against imported goods through actions at the US International Trade Commission. A copyright owner can record its rights with US Customs and Border Protection, which will then seek to stop the infringing products at the border and prevent them from entering the US.

*Law stated - 10 May 2022*

### Online and digital regulation

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

Various specific provisions of the Copyright Act address digital exploitations, including the following.

Section 106(6) provides a sound recording performance right limited to performances by means of a digital audio transmission, and sections 114 and 112(e) provide statutory licences for certain kinds of digital performances of sound recordings, including non-interactive internet webcast performances, along with ephemeral copies made to facilitate such performances.

Section 115 provides a statutory licence for 'mechanical' reproduction and distribution of musical works with special provisions for 'digital phonorecord deliveries', including a blanket licence of musical works for digital music services.

Section 512 of the Act, which was added by the Digital Millennium Copyright Act (DMCA), creates a conditional safe harbour for online service providers by shielding them from money damages and limiting injunctive relief for certain acts of direct and secondary liability when they meet certain requirements. In particular, safe harbours are provided for transitory digital network communications, system caching, storage of information at the direction of a user, and the provision of information location tools, subject to detailed requirements for each safe harbour and certain generally applicable requirements.

Chapter 12 of the Act, which was also added by the 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.

**Extraterritorial application**

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 Copyright Act against infringing transmissions from a foreign-operated website into the US. Accordingly, there has been successful enforcement of the Copyright Act against foreign-based sites. The US also has applied civil forfeiture provisions to seize US-registered internet domain names associated with foreign-owned and foreign-operated websites that infringe US copyright by targeting distribution of infringing copies into the US.

*Law stated - 10 May 2022*

**Agency**

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

The Copyright Office, which is part of the Library of Congress, is the centralised copyright agency in the US. It administers various provisions of the Copyright Act and serves as an office of record where private parties' claims to copyright are registered and where documents relating to copyright may be recorded to give notice thereof.

The Copyright Office also:

- furnishes information to the general public about copyright law;
- provides expert assistance to Congress and the executive branch on copyright matters;
- analyses and assists in drafting copyright legislation and undertakes studies for Congress;
- assists the Department of State, the US Trade Representative's Office and the Department of Commerce in negotiating international intellectual property agreements; and
- provides technical assistance to other countries in developing their own copyright laws.

Starting in 2022, a new unit of the Copyright Office called the Copyright Claims Board will provide an alternative forum for the adjudication on a voluntary basis of copyright disputes with no more than US\$30,000 in controversy.

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.

*Law stated - 10 May 2022*

**SUBJECT MATTER AND SCOPE OF COPYRIGHT****Protectable works**

What types of works may be protected by copyright?

US copyright law protects any qualifying 'original works of authorship' that are fixed in a tangible medium of expression so as to be perceptible for more than a transitory duration. The fixation need not be directly perceptible, as long as it may be perceived with the aid of a machine or device. Protected works include the following categories:

- literary works, including characters;
- musical works, including any accompanying words;
- dramatic works, including any accompanying music;
- pantomimes and choreographic works;
- pictorial, graphic and sculptural works;
- motion pictures and other audiovisual works;
- sound recordings created on or after 15 February 1972, as well as certain earlier foreign sound recordings entitled to US protection under international treaties; 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).

Sound recordings created before 15 February 1972 have specialised protection pursuant to section 1401 of Title 17 of the United States Code. This specialised protection largely mirrors copyright protection for later recordings, but there are important differences. For example, formalities such as registration do not apply, but there is a special statutory process for rights owners to record claims to works to be eligible to recover statutory damages. There is also a special statutory process for seeking permission for non-commercial uses of pre-1972 recordings that are not being commercially exploited.

*Law stated - 10 May 2022*

## **Rights covered**

### **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.

*Law stated - 10 May 2022*

## **Excluded works**

### **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 and discoveries, as distinguished from descriptions, explanations or illustrations;
- blank forms that are designed for recording information and do not themselves convey information; and
- works containing no original authorship.

*Law stated - 10 May 2022*

## **Fair use and fair dealing**

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

US law recognises the doctrine of fair use, which is codified in section 107 of the Copyright Act. Under section 107, courts are to consider four non-exclusive factors in determining whether a particular use is fair use. These are:

- the purpose and character of the use, especially whether the use is 'transformative' in nature and, to some extent, whether it is for commercial or for non-profit educational purposes (a use is considered 'transformative' if it does not merely supersede the original work, but instead adds new expression, meaning or message with a further purpose or different character);
- the nature of the copyrighted work;
- the amount and substantiality of the portion taken; and
- the effect of the use upon the potential market for or value of the copyrighted work.

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

*Law stated - 10 May 2022*

## **Architectural works**

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 for architectural works 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.

Protection is available for any architectural work created on or after 1 December 1990. In addition, any architectural works that on 1 December 1990 were not constructed, but were embodied in unpublished plans or drawings, and were constructed by 31 December 2002, are eligible for protection. Architectural works embodied in plans published or buildings constructed prior to 1 December 1990 are not protected by copyright.

## Performance rights

### 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. This right encompasses both performances to an audience present in the place where the performance is rendered and performances made by means of transmission. The Act also provides a public performance right for sound recordings, but it is limited to performances by means of 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).

Law stated - 10 May 2022

## Neighbouring rights

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

Although 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 enactments codified in Title 17 of the United States Code provide specialised copyright-like protection:

- Integrated circuit layouts (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.
- Sound recordings created before 15 February 1972 are protected under specialised provisions in Chapter 14 of Title 17.

Law stated - 10 May 2022

## Moral rights

### Are moral rights recognised?

Moral rights are protected to some extent, but they are more narrowly defined and of less practical effect in the US than in many other jurisdictions.

The Copyright Act provides only limited moral rights of attribution and integrity to authors of a narrowly defined class of

works of visual art, under the Visual Artists Rights Act (VARA). VARA provides authors of limited edition works of the fine arts and exhibition photographs the right to claim or disclaim authorship in a work; limited rights to prevent distortion, mutilation or modification of a work; and the right, under some circumstances, to prevent destruction of a work that is incorporated into a building. The legislation provides for waiver of these moral rights, but only by a signed, written agreement specifically identifying the work and the uses of the work to which the waiver applies. The Copyright Act's exclusive right to prepare derivative works protects all types of works against modification but is freely assignable and also subject to limitations such as fair use. The Copyright Act also prohibits providing false copyright management information (CMI), including the name and identifying information of the author, and removing or altering CMI in certain circumstances.

State laws relating to privacy, publicity, contracts, fraud, misrepresentation, unfair competition and defamation, and the federal Lanham Act also provide certain protections consistent with the concept of 'moral rights'.

*Law stated - 10 May 2022*

## **COPYRIGHT FORMALITIES**

### **Notice**

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 (eg, '© 2022 Jenner & Block LLP'). For sound recordings, a copyright notice consists of the symbol '℗', the year of first publication and the name of the copyright owner.

*Law stated - 10 May 2022*

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

The only current legal consequence of a failure to use a copyright notice is that it makes it easier for an infringer of the work to claim that they are an 'innocent infringer', which in some circumstances can result in a lower award of damages. However, if a work was published without notice before 1 March 1989, the omission may have caused copyright to be lost.

*Law stated - 10 May 2022*

### **Deposit**

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 made in connection with copyright registration. However, copyright registration is optional. If the copyright owner chooses to register their work with the Copyright Office, the applicant must submit specified copies of the work in connection 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.

*Law stated - 10 May 2022*

### 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.

*Law stated - 10 May 2022*

### Registration

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

The US has a copyright registration system. To apply for a copyright registration, the author must submit a completed application form, a non-refundable filing fee, and a non-returnable deposit copy or copies of the work to be registered. The primary means of registration is to use the Copyright Office online system called the Electronic Copyright Office (eCO). The Copyright Office receives over 95 per cent of copyright claims through eCO. When using the online system, the filing fee is paid online, and deposit copies of certain categories of works can be uploaded directly. Otherwise, hard-copy deposits are submitted with a shipping slip that allows the Office to associate the deposit with the online registration record. Paper forms can also be used for copyright registration but require payment of a higher filing fee and involve a longer processing time. Forms can be downloaded from the Copyright Office's website, picked up in person or requested by post.

*Law stated - 10 May 2022*

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

There is no requirement that a work be registered. Copyright protection exists from the moment the work is created. However, for 'US works' (generally, works first published in the US or unpublished works where all the authors are US nationals), registration (or an unsuccessful attempt to register) is a prerequisite to suing for infringement.

*Law stated - 10 May 2022*

#### 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\$45. When there are multiple authors, a claimant is not the author or a work is made for hire, the fee for an online application is US\$65. When paper forms are used, the standard fee is US\$125. Various different fees apply for certain kinds of 'group registrations' covering multiple works. The fee for expedited service is US\$800.

*Law stated - 10 May 2022*

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

A US work must be registered to bring a suit for infringement, unless a registration application, deposit and registration fee have been delivered to the Copyright Office in proper form and registration has been refused. 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. Further, if registration occurs within five years after first publication, the registration certificate is considered prima facie evidence of copyright validity and of the facts concerning authorship and ownership stated in the certificate. This presumption is important because it can greatly simplify proving copyright ownership in a court, particularly when multiple works are at issue or it is necessary to prove authorship or ownership many years after the creation of a work.

*Law stated - 10 May 2022*

## OWNERSHIP AND TRANSFER

### Eligible owners

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

The general rule is that the author of the work initially owns the copyright. 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.

*Law stated - 10 May 2022*

### Employee and contractor work

#### 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 their employment. Traditional common law agency principles are applied to determine who constitutes an employee. As an alternative to the 'work made for hire' doctrine, an employer may own a copyrighted work as the result of an assignment from its employee.

*Law stated - 10 May 2022*

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

A hiring party may own a copyrighted work made by an independent contractor either by assignment or, in some circumstances, as a work made for hire. If a work prepared by an independent contractor is considered a work made for hire, the hiring party will be considered the author of the work. For a work created by an independent contractor to be considered a work made for hire, the parties must expressly agree in a written document signed by them that the work will be considered a work made for hire, and the work must be specially ordered or commissioned for use as:

- a contribution to a collective work;
- a part of a motion picture or other audiovisual work;

- a translation;
- a supplementary work;
- a compilation;
- an instructional text;
- a test;
- answer material for a test; or
- an atlas.

*Law stated - 10 May 2022*

## **Joint and collective ownership**

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

Copyrights can be co-owned either in the case of a joint work or by assignment or other transfer of ownership (such as inheritance). In either case, unless the co-owners have agreed otherwise, a co-owner can exploit or license the work without seeking permission from the other co-owners but owes the other co-owners a duty to account for the profits of such exploitation or licensing. A co-owner cannot grant a licence that is exclusive as to the interests of another co-owner without the agreement of the other co-owner.

When two or more people create a joint work together, the copyright in the work 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 a 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 the authors are co-owners of equal, undivided interests in the entire work.

However, not everyone who makes a 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).

*Law stated - 10 May 2022*

## **Transfer of rights**

### **May rights be transferred? If so, what rules and procedures apply?**

Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred. However, a transfer of exclusive rights (other than by operation of law) is not valid unless that transfer is memorialised in a writing signed by the owner of the rights conveyed or such owner's duly authorised agent. The writing need not be made at the time of assignment. A letter or other writing confirming the agreement is sufficient. Transfer of a right on a non-exclusive basis does not require a written agreement. A copyright may also be conveyed by operation of law and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession. 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.

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. Thus, for example, if an assignment is accomplished by means of

a contract imposing obligations on both parties, it would be desirable (and may in some cases be necessary) to have the document signed by both parties (and not just by the assignor).

*Law stated - 10 May 2022*

## Licensing

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

Copyright rights can be licensed on an exclusive or non-exclusive basis. The holder of an exclusive licence is the owner of the licensed right and as such is entitled to sue any party that infringes the right while the exclusive licensee owns it. A non-exclusive licence gives the licensee the right to exercise one or more of the copyright owner's rights but does not prevent the copyright owner from giving others permission to exercise the same right or confer standing to sue.

*Law stated - 10 May 2022*

### 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.

*Law stated - 10 May 2022*

### 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.

*Law stated - 10 May 2022*

## Termination

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

The Copyright Act has two operative provisions for termination of transfers. For transfers or licences executed by an author on or after 1 January 1978, the Act permits termination under certain conditions, generally between 35 and 40 years after first publication, by serving written notice on the transferee within specified time limits. For grants made before 1978 of 'renewal' rights to works under statutory copyright protection before 1978, the statute provides similar rights of termination between 56 and 61 years after the date copyright was originally secured.

*Law stated - 10 May 2022*

## Recordal

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

A document that transfers copyright ownership, and other documents pertaining to a copyright, may be recorded in the Copyright Office. To be recorded, the document filed for recording must bear the actual signature of the person who executed it or be accompanied by a sworn or official certification that it is a true copy of the original signed document. A recordation fee must be paid.

Recording of a document in the US Copyright Office gives all persons constructive notice of the facts stated therein (if the work has been registered), and recording a transfer also provides priority over certain conflicting transfers.

*Law stated - 10 May 2022*

## DURATION OF COPYRIGHT

### Protection start date

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.

*Law stated - 10 May 2022*

### Duration

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.

*Law stated - 10 May 2022*

## 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.

Similarly, the duration of the specialised protection for sound recordings created before 15 February 1972 depends on when a particular work was published. Recordings published before 1923 entered the public domain at the end of 2021. Unpublished pre-1972 recordings, and pre-1972 recordings published in 1923 or later, have varying periods of protection, with the last of them entering the public domain on 15 February 2067.

*Law stated - 10 May 2022*

## Renewal

### 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.

*Law stated - 10 May 2022*

## Government extension of protection term

### 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 the term of existing copyrights by 20 years. The extension was not applied to copyrights that had already expired.

*Law stated - 10 May 2022*

## **COPYRIGHT INFRINGEMENT AND REMEDIES**

### **Infringing acts**

#### **What constitutes copyright infringement?**

Copyright infringement occurs when a party violates any of the copyright owner's exclusive rights. 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 a manner that implicates the copyright owner's exclusive rights (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 infringer'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.

*Law stated - 10 May 2022*

### **Vicarious and contributory liability**

#### **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.

*Law stated - 10 May 2022*

### **Available remedies**

## 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, in some circumstances, '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.

*Law stated - 10 May 2022*

## Limitation period

### 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.

*Law stated - 10 May 2022*

## Monetary damages

### 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 within a prescribed range, as provided by the Copyright Act. However, statutory damages are available only if registration for the infringed work was obtained within certain time requirements.

*Law stated - 10 May 2022*

## Attorneys' fees and costs

### 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.

*Law stated - 10 May 2022*

## Criminal enforcement

### 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 that have a total retail value of more than US\$1,000; or
- by the distribution of a work being prepared for commercial distribution by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

The Copyright Act specifies various additional criminal offences:

- placing a fraudulent copyright notice on any article, or publicly distributing or importing for public distribution any article bearing such fraudulent notice;
- removing or altering any notice of copyright appearing on a copy of a copyrighted work with fraudulent intent;
- knowingly making a false representation of a material fact in an application for copyright registration, or in any written statement filed in connection with the application; and
- wilfully and for purposes of commercial advantage or private financial gain violating the provisions of the Act concerning circumvention of technological protection measures or those concerning protecting the integrity of copyright management information.

In 2020, an additional copyright-related offence was added to Title 18 of the United States Code (18 USC section 2319C). The new provision prohibits wilfully, and for purposes of commercial advantage or private financial gain, providing to the public a digital transmission service with the primary purpose of making infringing public performances of copyrighted works.

*Law stated - 10 May 2022*

## Online infringement

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

Yes. Section 512 of the Copyright Act, which was added by the Digital Millennium Copyright Act, 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.

*Law stated - 10 May 2022*

## Prevention measures

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

Copyright owners in the US employ a mix of strategies to control copyright infringement, including:

- discouraging infringement by applying to their works a statutory copyright notice and sometimes other warnings against infringement, and by registering their works with the Copyright Office;
- employing technological protection measures to frustrate infringement;
- recording their works with US Customs and Border Protection 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; and
- in appropriate circumstances, 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.

*Law stated - 10 May 2022*

## RELATIONSHIP TO FOREIGN RIGHTS

### International conventions

Which international copyright conventions does your country belong to?

The US is a party to:

- the Berne Convention for the Protection of Literary and Artistic Works (1886, as revised);
- the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974);
- the Buenos Aires Convention (1910);
- the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971);
- the Universal Copyright Convention (1952 and 1971);
- the World Intellectual Property Organization (WIPO) Copyright Treaty (1996);

- the WIPO Performances and Phonograms Treaty (1996); and
- the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013).

The US has signed the Beijing Treaty on Audiovisual Performances (2012). However, as at April 2022, that treaty has not yet been ratified by the US.

The US is also a member of the World Trade Organization and a party to various free trade agreements containing copyright-related provisions.

*Law stated - 10 May 2022*

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

Each treaty to which the United States is a signatory 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 create an obligation to honour the copyright of citizens of other treaty parties by affording them copyright protection in the US on the same basis as US citizens.

*Law stated - 10 May 2022*

## UPDATE AND TRENDS

### Key developments of the past year

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

Supreme Court decides that unknowing errors of law can excuse inaccuracies in a registration application

On 24 February 2022, the US Supreme Court issued a decision in *Unicolors, Inc v H&M Hennes & Mauritz, LP*, holding that a copyright registrant's lack of knowledge of errors of either law or fact can excuse inaccurate statements in a registration application and the resulting registration. The Court interpreted 17 USC § 411(b)(1), which states that copyright registrations are valid regardless of whether they 'contain any inaccurate information', unless the inaccurate information was included 'with knowledge that it was inaccurate'. The Court held that the statute's reference to 'knowledge' did not distinguish between knowledge of law and knowledge of fact, and thus applied to both. However, the Court's analysis leaves open the possibility that copyright owners who obtain registrations with the assistance of counsel may continue to face challenges to registrations reflecting inaccurate conclusions of law because they might be found to have knowledge of or be willfully blind to a legal error.

New circumvention exemptions

In October 2021, the Copyright Office concluded its eighth triennial rulemaking proceeding to determine regulatory exemptions from the prohibition of circumvention of access control technologies under section 1201 of the Copyright Act. Every three years, the Copyright Office undertakes a process to determine exemptions from section 1201's general prohibition of circumvention for classes of works where that prohibition is likely to adversely affect non-infringing uses. In the 2021 proceeding, the Copyright Office renewed all of the exemptions from the previous proceeding. In addition, the Copyright Office added or expanded various exemptions, including those for jailbreaking routers and certain video

streaming devices and for diagnosis, maintenance, repair and modification of certain software-enabled devices. These exemptions will be in effect until October 2024.

#### Supreme Court to consider fair use dispute involving works of Andy Warhol

On 28 March 2022, the US Supreme Court agreed to consider the case of *Andy Warhol Foundation for the Visual Arts v Goldsmith*, which turns on the scope of the fair use defence to copyright infringement under US law. At issue is a series of portraits of the performing artist Prince that Andy Warhol created based on a copyrighted photograph. The Court will consider whether such works should be considered 'transformative' – and thus more likely to constitute fair use – based on the message they convey, even though they recognisably derive from copyrighted source material. The Court will hear the case during its term that begins in October 2022 and is expected to issue its decision by June 2023.

#### Launch of Copyright Claims Board

The new Copyright Claims Board continues to prepare to adjudicate on a voluntary basis copyright claims with no more than US\$30,000 in dispute pursuant to the Copyright Alternative in Small-Claims Enforcement Act of 2020. On 25 March 2022, the Board issued its final rule, which provides requirements for filing a claim, the Board's compliance review, service, notice of the claim, and the respondent's opt-out election, responses and counterclaims. The Board is slated to begin handling cases by mid-2022.

#### Embedding of online material

Over the past year, several courts have examined the issue of whether embedding on one website a photograph or video from a separate website without authorisation constitutes copyright infringement. A split appears to be developing between the Ninth Circuit and district courts in the Second Circuit as to whether a website with embedded content 'displays' that content within the meaning of the Copyright Act. The Ninth Circuit follows the 'server test', whereby a website infringes the right to display only when it also hosts a copy of the copyrighted work on its server. Because embedded content is stored on and retrieved from a third-party platform, a district court in the Ninth Circuit in *Hunley v Instagram, LLC* confirmed that, under the server test, embedding is not copyright infringement. However, district courts in the Second Circuit have rejected the server test and reached the opposite result, including, most recently, in *Nicklen v Sinclair Broadcast Group*. There, the court determined that embedding displayed a copyrighted work and stated that applying the server test in the context of embedding was 'contrary to the text and legislative history of the Copyright Act'. Given how widespread the practice of embedding is, this is an issue to watch.

#### Copyrightability of works created by artificial intelligence












On 14 February 2022, the Copyright Office Review Board, the Office's final arbiter of registration issues, refused to issue a copyright registration for a two-dimensional artwork created using artificial intelligence on the ground that it lacked creative contributions by a human author. The registration application identified the author of the work as the 'Creativity Machine' and the registrant as the machine's owner. The application further stated that the work 'was autonomously created by a computer algorithm running on a machine'. The Board noted that US courts have historically limited protection only to creations of human authorship and found the work at issue ineligible for registration because it was created by a machine. The registrant will have the opportunity to challenge the Board's decision in court, which could lead to one of the first US lawsuits regarding the copyrightability of works generated using artificial intelligence.

#### Proposed legislation concerning online infringement

The balancing of interests between copyright owners and online service providers whose systems are used for infringement remains a controversial topic in the US. Legislative discussions recently resulted in the introduction in the US Senate of a bill called the Strengthening Measures to Advance Rights Technologies Copyright Act (or the 'SMART Copyright Act'). Since the Digital Millennium Copyright Act was enacted in 1998, online service providers have been required to accommodate 'standard technical measures' to prevent online infringement. However, there has not been a consensus on what such measures are. The SMART Copyright Act would seek to make it easier to identify standard technical measures, including by giving the US Copyright Office the authority to designate technical measures that would qualify.

*Law stated - 10 May 2022*

## Jurisdictions

	<b>China</b>	TianTai Law Firm
	<b>European Union</b>	Witzel Erb Backu & Partner Rechtsanwälte mbB
	<b>Germany</b>	Meissner Bolte
	<b>India</b>	Anand and Anand
	<b>Italy</b>	Studio Legale Jacobacci & Associati
	<b>Japan</b>	Anderson Mōri & Tomotsune
	<b>Mexico</b>	Uhthoff, Gómez Vega & Uhthoff SC
	<b>Pakistan</b>	Ali & Associates
	<b>Poland</b>	Kobylanska Lewoszewski Mednis
	<b>Russia</b>	A Zalesov & Partners Patent & Law Firm
	<b>USA</b>	Jenner & Block LLP