LEXOLOGY
Getting The Deal Through

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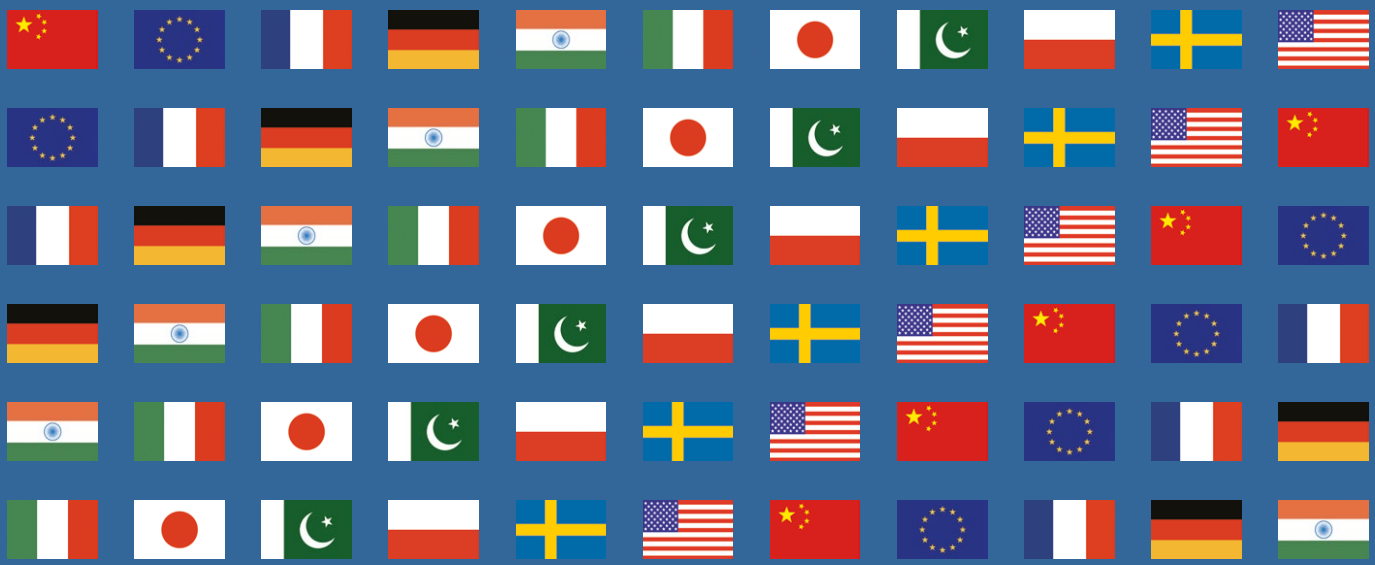

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START READING

Jurisdictions

Published May 2023

Global overview

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During the past year, copyright law around the world continued to evolve to address advances in technology. National legislation, international treaties and judicial decisions in various countries all reflect efforts to strike the appropriate balance between encouraging creativity by providing meaningful protection of intellectual property rights and encouraging the continued growth and development of new technologies.

Notably, countries around the world are considering the copyright implications of the rapid rise in the availability, use and performance of generative artificial intelligence (AI). A key issue is the extent to which national legislation recognises copyright protection for works generated in whole or in part through the use of AI. In the United States, no court has yet addressed how much influence or control a human must have over an AI technology's output to give rise to copyright ownership over that output. However, the US Copyright Office has firmly staked out a position that copyright protects only material that is the product of human creativity and has indicated that it is unlikely to register claims to works created with currently available generative AI systems that it does not perceive as giving human users sufficient creative control over the material generated.

In the European Union, works completely generated by AI are also most likely not protected by copyright, but it remains to be seen where courts will ultimately draw the line on how much influence or control humans must have over the output of an AI system to give rise to copyright protection under EU directives and member state national laws. For example, in January 2023, the Italian Supreme Court found that the use of software in the realisation of an artistic work does not exclude per se the presence of human creativity necessary for copyright protection, but explained that in order to determine copyrightability, it will be necessary to consider the extent to which human creativity is reflected in the software output.

Pending lawsuits in the US and United Kingdom also raise questions as to whether copyrighted works can be used to 'train' generative AI systems without copyright owner consent. Meanwhile, the UK government proposed copyright law amendments to permit the use of copyrighted works for the purposes of machine learning, but then backtracked, and as at April 2023 is reportedly working on guidelines for the use of copyrighted works in training generative AI.

In the EU, implementation of the Directive on Copyright and Related Rights in the Digital Single Market (the Directive) continues. Adopted in April 2019, the Directive addresses a wide variety of topics, including, most controversially, the use of works by online content-sharing services. National legislatures were required to transpose the Directive into national law by June 2021. However, only three member states met that deadline. Although more member states have

implemented the Directive since then, the process of transposing the Directive into national law remains ongoing. In February 2023, the European Commission decided to refer Bulgaria, Denmark, Finland, Latvia, Poland and Portugal to the Court of Justice for failure to complete transposition of the Directive.

Furthermore, international treaties addressing copyright issues continue to be ratified. The Beijing Treaty on Audiovisual Performances, which was adopted in 2012, entered into force in April 2020. As at April 2023, 47 countries have ratified or acceded to that treaty. The most recent countries to do so are Mexico and Morocco. Countries also continue to implement and accede to the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. It entered into force in 2016, and as at April 2023, 92 countries have ratified or acceded to that treaty. Recent countries to do so include Armenia, China and Vietnam.

China also adopted a major revision of its copyright law in 2020. The process of revising regulations for the implementation of that law remains ongoing.

Courts continue to confront novel copyright issues. For example, in *Liberi editori e autori v Jamendo SA*, the Court of Justice of the European Union is considering the implementation of the Collective Rights Management Directive in Italy. Swedish courts have recently decided cases concerning works of applied art. Additionally, by June 2023, the US Supreme Court is expected to decide the case of *Andy Warhol Foundation for the Visual Arts v Goldsmith*, which concerns the scope of the fair use defence to copyright infringement under US law.

As the digital world continues to evolve, so too 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 might have.

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Summary

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 What is the relevant legislation?

The relevant legislation is the Copyright Law of the People's Republic of China (2020 Amendment) (the Copyright Law). It was issued on 11 November 2020 and has been effective since 1 June 2021.

Enforcement authorities

2 Who enforces it?

The Chinese government enforces the legislation, mainly through the National Copyright Administration (NCAC) under the Publicity Department of the Communist Party of China's Central Committee.

Online and digital regulation

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

Yes. In the right of reproduction of the Copyright Law, it particularly addresses the right to produce one or more copies of the work digitally. In addition, there are specific rights of communication through information networks enjoyed by copyright owners, performers and producers of audiovisual recordings, that is, the right to provide works that may be obtained by the public at the time and place selected by the public by wired or wireless means. There is also a Regulation on Protection of the Right of Communication through Information Network (2013 Revision) for protecting the right of communication through information networks.

Extraterritorial application

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

Yes, the Copyright Law may have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright in some circumstances. In accordance with the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relations, the laws of the country where protection is claimed shall apply to the foreign infringement liabilities of intellectual property rights, and the parties concerned may also choose the applicable laws of the country where the court is located by agreement after the infringement takes place.

Agency

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

The NCAC is the centralised copyright agency, which has the same body and two titles with the National Press and Publication Administration (the NPPA). The Commissioner of the NCAC is also the Administrator of the NPPA. The NCAC deals with all copyright administrative works nationwide, and its duties are as follows:

- to prepare the drafting and implementation of laws and policies;
- to supervise the publication activities, publication units and contents in the market, organise the investigation and handle copyright infringement cases and foreign-related infringement cases with significant impact; and
- to organise and carry out the work related to the foreign exchange and cooperation of press, publication and copyright, to be responsible for the administration of the import of publications, and to coordinate and promote the import and export of publications.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 What types of works may be protected by copyright?

Under article 3 of the Copyright Law, copyright protects any ingenious intellectual achievements in the fields of literature, art and science that can be presented in a certain form. The specific types of works that the Copyright Law protects are as follows:

- written works;
- oral works;
- musical, dramatic, *quyi*, choreographic and acrobatic art works;
- works of fine art and architecture;
- photographic works;
- audiovisual works;
- drawings of engineering designs and product designs, maps, sketches and other graphic works, as well as model works;

- computer software; and
- other intellectual achievements that meet the characteristics of works.

The last item is a catch-all provision for all other intellectual achievements that meet the characteristics of works, which is an important revision of the Copyright Law. The definition of works is more open, and the scope of copyright protection can be better adapted to the development of economy and society.

Rights covered

7 | What types of rights are covered by copyright?

The Copyright Law protects two types of rights: personal rights and property rights.

Personal rights are the inherent rights given to the creator of the works, which are as follows:

- the right to decide whether to make a work public;
- the right to claim authorship and to have the author's name mentioned in connection with the work;
- the right to revise a work or to authorise others to revise a work; and
- the right to protect a work from distortion or tampering.

Property rights are the exclusive rights of a creator or copyright holder to obtain economic benefits from his or her works by:

- reproducing the works into any shape, form and format;
- distributing the copies of the works;
- leasing out the works;
- displaying the works publicly;
- publicly performing the works and transmitting the performance through various means;
- screening the works through technical equipment such as a film projector or slide projector;
- publicly transmitting or broadcasting the works non-interactively;
- providing the works to the public through cable or wireless methods interactively;
- fixing the works on a carrier by way of producing audiovisual works;
- making adaptations or transformations of the works;
- translating the works from one language to another language;
- making arrangements and compilations of the works; and
- any other rights to be enjoyed by copyright holders.

Meanwhile, the Copyright Law provides neighbouring rights, which are rights related to copyright, and constitute exclusive rights including the personal rights and property rights to a performer, and the property rights to the producer of sound or video recordings as well as broadcasting stations.

Excluded works

8 What may not be protected by copyright?

There following are the types of content that cannot be protected by copyright:

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

Fair use and fair dealing

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

Yes, there is a specific article on fair use in the Copyright law, which allows the exploitation of a work without the permission from, and without payment of remuneration to, the copyright owner, provided that the name or designation of the author and the title of the work are mentioned and such use shall not affect the normal use of the said work or unreasonably harm the legitimate rights and interests of the copyright holder.

In determining whether a use is a fair use, you must comply with 12 categories of particular situations that are clearly defined by the Copyright Law. The fair use stipulated by the law fully embodies the principle of the 'three-step test' of international conventions to which China is a member, such as the Berne Convention. The principle of fair use also applies to other rights related to copyright.

Architectural works

10 Are architectural works protected by copyright? How?

Yes, architectural works are protected under the Copyright Law. It includes aesthetic works in the form of buildings or structures. Under the Copyright Law, architecture works are listed in line with fine works, which are different from drawings of engineering designs and model works.

Architectural works under the Copyright Law refer to only three-dimensional buildings or structures excluding graphic architectural designs and architectural models. In addition, it is the building itself that is protected by copyright law rather than the materials and technology used in an architectural work, where the latter might be protected by patent law.

Performance rights

11 Are performance rights covered by copyright? How?

Yes. The Copyright Law provides performance rights to the copyright owner. It is a kind of property right of the author. The performance rights include performing his or her works

publicly (live performance), and transmitting such performance by various means (mechanical performance) to live audiences.

Neighbouring rights

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

Yes, the Copyright Law provides protection to three types of copyright-related rights, which are called neighbouring rights (ie, the personal and property rights of performers, the property rights of sound or video recording producers and the property rights of broadcasting stations).

The performer's rights include personal rights and property rights to authorise others to record his or her performance, reproduce, distribute and lease the sound or video recordings that record his or her performance, and transmit his or her performance to the public through the information network.

With respect to the property rights of sound or video recordings producers, it includes the right to license the replication, distribution or lease of their audio and video recordings by others, or the transmission of their audio and video recordings to the public through information networks by others and to receive remuneration.

The broadcasting station's rights include prohibiting others from rebroadcasting by wired or wireless means, recording and reproducing, or disseminating via information networks a radio and television programme broadcast by it. The exercise of the rights stipulated therein by a broadcasting institution shall not affect, restrict or infringe upon others' exercise of copyright or neighbouring rights.

Moral rights

13 | Are moral rights recognised?

Yes, personal rights (moral rights) are recognised under the Copyright Law. Furthermore, personal rights are not assignable or transferable. If the creator has passed away, personal rights are protected by his or her lawful heir.

The author enjoys four personal rights, being the following:

- the right to decide whether to make a work public;
- the right to claim authorship and to have the author's name mentioned in connection with the work;
- the right to alter or authorise others to alter one's work; and
- the right to protect one's work against distortion and mutilation.

The performer enjoys two personal rights as the following:

- the right to be identified as performers; and
- the right to protect the image in his or her performance from distortion.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No.

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

Not applicable.

Deposit

16 | Is there a requirement of copyright deposit?

No.

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

Not applicable.

Registration

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

Yes, there is a system for copyright registration. According to the Copyright Law, authors and other rightsholders of copyright and related rights may register their works with a registry recognised by the copyright authority of the state.

The Copyright Protection Centre of China (CPCC) is a nationwide copyright registration agency, supervised directly by the National Copyright Administration (NCAC), and is responsible for applications for copyright registration nationwide. There are copyright protection centres established under the copyright administrative departments of provinces and cities that are responsible for local copyright registration applications. However, certain special registration issues such as software registration and copyright pledge registration can only be applied to the CPCC or a software registration office established by the NCAC.

Authors or other copyright owners who apply for the registration of works should provide evidence to prove their identity and authorship of the works to be registered (such as publications, manuscripts, photos and samples), fill in the registration form as required and pay a registration fee. Applications can be submitted offline or online, or submitted by oneself or through an agent.

The copyright registration agency only conducts a formal examination and issues a rights registration certificate in accordance with the type specified by the NCAC after the examination is passed.

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

No. The copyright registration is not mandatory. The protection for a copyright automatically begins when the work is created.

Nevertheless, it is suggested to apply a registration of copyright. In practice, the certificate of a copyright is the primary evidence to prove copyright ownership. It will help to facilitate the deal of transference or licence in the market. In judicial practice, a copyright certificate can be used as preliminary evidence of copyright ownership, which has a legal effect for the holder unless it is proven otherwise by the other party. Compared with the complexity of other evidence, copyright registration certificates are a convenient method of ownership evidence favoured by copyright owners.

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

The fees of applying for copyright registration from the Copyright Protection Centre of China (CPCC) depends on the type of work or contract being registered. In addition, special registration issues such as software registration and pledge registration have their own special charging standards. The CPCC has stopped collecting software copyright registration fees since 1 April 2017.

Some provincial copyright registration centres provide free registration, such as the Beijing Copyright Protection Centre. Nonetheless, due to the differences in the authorities of issuance and applicable regions between national certificates and local certificates, copyright owners may still be willing to choose to apply for paid registration from the CPCC as needed.

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

Copyright registration is not mandatory. The registration certificate is straightforward to prove the ownership and easy to keep in comparison with other types of copyright-related documents, such as manuscripts, original copies, lawful publications and proofs issued by an authentication agency (for example, IFPI, BSA or MPA), and contracts for obtaining the rights, etc.

However, where the property rights in copyright are pledged, a pledge on a proprietary right in copyright shall be created subject to registration. The pledgor and pledgee shall be obliged to apply for registration according to the law.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

Unless proven otherwise, the owner of a copyrighted work (the creator) may be:

- the creators of the copyrighted work;

- anyone persons, legal persons and other organisations that have obtained property rights of copyright according to the contract or the law without participating in the creation of the work; and
- the state under certain circumstances as the property rights are donated to the state or the property rights uninherited, etc.

Employee and contractor work

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

Yes, an employer may own a copyrighted work made by an employee. However, the employer's ownership is not automatic by virtue of the employment relationship; instead, generally the author employed enjoys the copyright of such work, and the employer can enjoy copyrights in works, except for the right of authorship that is still enjoyed by the author, only in the circumstances stipulated by law.

Where the employee owns the copyrighted work, the exercise of the rights by the employee shall be subject to the following restrictions:

- The employer shall be entitled to have a priority right to exploit the work within the scope of its professional activities.
- During the two years after the completion of the work, the employee shall not, without the consent of the employer, authorise a third party to exploit the work in the same way as the employer does.

Under the following circumstances in the Copyright Law, the employer owns the copyrighted work, while the employee still has the right of authorship and may receive a reward from the employer:

- drawings of engineering designs and product designs, sketch maps, computer software and other works, which are created by the employee taking full advantage of the materials and technical resources of the employer, and the employer is responsible for the work;
- the employer is a newspaper, a periodical press, a news agency, a radio station, or a television station; and
- works of which the copyright is, in accordance with the laws or administrative regulations or as expressively agreed upon in the contract, enjoyed by the employer.

Usually, the agreement regarding the transfer of ownership of a copyrighted work from an employee to the employer is stipulated in the relevant employment agreement between them. An oral agreement is recognised in China. However, it is difficult to prove an oral agreement exists if the employee raises an objection afterwards.

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

Yes, a hiring party may own a copyrighted work made by an independent contractor provided that the parties clearly agree the ownership of the copyrighted work belongs to the hiring party. The independent contractor will be the automatic owner of the copyrighted work,

unless agreed otherwise between the parties. It is advisable that the agreement stipulating the ownership of the relevant copyrighted work be in writing.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. A copyrighted work may be co-owned. If a work comprises separate parts created by two persons or more, for example, for a musical work that includes a song with lyrics, both the writer of composition and writer of lyrics will have a joint ownership of the song.

Co-ownership of a copyright may also happen by virtue of a partial assignment of the property right from the copyright holder to any other party (or parties).

Transfer of rights

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

Generally, personal rights in copyright are not transferable, but the property rights may be transferred by way of inheritance, grant, endowment and will, etc. A copyright holder may transfer all or part of the property rights to others to exercise and receive remuneration.

As for the procedures, the agreement of transfer or assignment of copyright must be in writing. The Copyright Law stipulates the main content of such agreement.

Licensing

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

Yes, the property rights may be licensed during the protection period. If a copyright owner grants an exclusive licence of any rights in part or whole to the licensee, unless otherwise agreed in the agreement, the owner has no right to exploit the relevant rights by him or herself or license to any third parties again until the rights are returned when the licence agreement is terminated. The legal effect is somewhat like transference of copyright during the licence period in such a case.

The property rights may be licensed by entering a licensing contract. The Copyright Law stipulates the main content of licensing contracts.

28 | Are there compulsory licences? What are they?

No, there are no compulsory licences in the Copyright Law. However, there are statutory licences that have similar effects as compulsory licences.

A statutory licence means that the public can directly use a work in specific circumstances as provided by the Copyright Law without the consent of the copyright owner but with payment of reasonable remuneration.

Statutory licences and fair uses are both the limitation of copyright. The difference between the two is that statutory licences require the users to pay remunerations, while fair uses are free uses.

There are four types of statutory licence stipulated in the Copyright Law:

- to compile published works for the purpose of compiling and publishing textbooks for compulsory education and national education planning;
- to reprint published works among newspapers and periodicals, unless the copyright holders have expressly stated that such reprinting is not permitted;
- to use other's musical works that are already legitimately recorded in the production of new sound recordings, unless the copyright holders have expressly stated that such use is not permitted; and
- to broadcast published works by broadcasting organisations.

There is a statutory licence and a quasi-statutory licence stipulated in the Regulations on the Protection of Right of Communication through Information Network, which are as follows:

- to make and provide courseware through information network so as to implement the nine-year compulsory education or the national education planning; and
- to provide specific works to rural areas through information network.

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

Yes, pursuant to the Copyright Law, a creator, copyright holder or neighbouring rights holder can join relative collective management societies (CMOs) for the societies to collectively administer his or her property rights in accordance with membership agreements and receive fair compensation from any party that uses his or her copyright and neighbouring right in a commercial manner.

All CMOs are at national level and approved by the National Copyright Administration (NCAC). According to the Regulation on the Collective Administration of Copyright, there is no duplication or repetition of the scope of business among the existing CMOs. Up to now, there are five CMOs administering the property rights of written work, photographic work, cinematographic work, musical work, audio and video recordings. The copyright holders, including holders of performing rights, join CMOs voluntarily.

Termination

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

No.

Recordal

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

The parties to the assignment contracts may file an application for contract recordation with registration agencies authorised by the copyright administration authorities. However, the application is not mandatory.

DURATION OF COPYRIGHT

Protection start date

32 When does copyright protection begin?

Copyright protection begins as follows:

- The copyright protection of a work begins from the date that the work is created.
- The copyright protection of the publisher's right in the format design of any book or periodical begins from the date the book or periodical is published for the first time.
- The copyright protection of the performer's right in his or her performance begins from the date of the performance.
- The copyright protection of the producer's right in a sound recording or a video recording begins from the date the sound recording or the video recording is produced for the first time.
- The copyright protection of the broadcast station's right in broadcasting a programme begins from the date the programme is broadcast for the first time.

Duration

33 How long does copyright protection last?

The term of copyright protection varies by type of right, type of work and authors.

With respect to personal rights of authorship, the alteration and integrity of an author and personal rights of a performer, the term shall be permanent.

In respect of a work of a natural person, the term of the right of publication and of the property rights shall be the lifetime of the author and 50 years after his or her death, expiring on 31 December of the 50th year after his or her death. In the case of a joint work, such term shall expire on 31 December of the 50th year after the death of the last surviving author.

In respect of a work owned by a legal person or an unincorporated organisation, the term for the right of publication shall be 50 years, ending on 31 December of the 50th year after the creation of the work, and the term for the property rights shall be 50 years, ending on 31 December of the 50th year after the first publication of the work, but if a work has not been published within 50 years after the creation, it shall no longer be protected by the Copyright Law.

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In respect of an audiovisual work, the term for the right of publication shall be 50 years, ending on 31 December of the 50th year after the creation of the work, and the term for the property rights shall be 50 years, ending on 31 December of the 50th year after the first publication of the work, but if a work has not been published within 50 years of the creation, it shall no longer be protected by the Copyright Law.

For a publisher's right in the format design of any book or periodical, the term is 10 years from the first publication. For a performer's rights in his or her performance, the term is 50 years from the first performance. For a producer's rights in a sound recording, the term is 50 years from the first production, and for a broadcast station's rights in a broadcast programme, the term is 50 years from the first broadcast.

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

Yes.

Renewal

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

No.

Government extension of protection term

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

Yes, in accordance with the Copyright Law, the term for the right of publication in a photographic work is extended to be the lifetime of the author and 50 years after his or her death, replacing the previous 50 years from the date of creation. The term for the property rights in a photographic work is also extended to be the lifetime of the author and 50 years after his or her death, replacing the previous 50 years from the first publication.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Any unauthorised use of copyrightable works without the permission of the copyright owner and without meeting the conditions prescribed by law (such as statutory licence and fair use) constitutes infringement.

Vicarious and contributory liability

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

Yes, secondary liability exists for indirect copyright infringement according to the provisions of the Civil Code (articles 1169 and 1197).

In the field of copyright, the inducement liability and the contributory liability are stipulated in the Regulations on Protection of the Right of Communication through Information Network and the supporting judicial interpretations. If the internet service providers (ISPs) are found to have subjective faults in providing services, they cannot apply the safe harbour principle to be exempt from liability, but they shall bear indirect liability. The determination of whether the ISP has subjective faults is whether the ISP 'knows or should have known' about the infringement. For example, where the ISP induces and encourages network users to infringe on the right of network transmission by means of words, technical support, and reward points, the people's court shall rule that the ISP constitutes an inducement infringement. If the ISP knows or should know that network users use network services to infringe upon the right of network transmission but fails to take necessary measures such as deleting, blocking, disconnecting links or providing technical support and other assistance, the people's court shall rule that the ISP constitutes a contributory infringement.

Available remedies

39 | What remedies are available against a copyright infringer?

There are three remedies against copyright infringement in China, which are as follows:

- to file an administrative complaint to the relevant government agency for punishment;
- to file a lawsuit to the civil court with jurisdiction for injunction and compensation; and
- to report to the police aiming for initiating the criminal procedure.

Limitation period

40 | Is there a time limit for seeking remedies?

The limitation for civil litigation is three years, which begins when the entitled person knows or should know that his or her rights have been infringed. However, if it has been more than 20 years since the date of infringement, the people's court shall not protect it.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, the Copyright Law provides that a creator, a copyright holder or neighbouring rights holder, or their rightful heir, who suffers damage is entitled to receive compensation. The compensation shall be given based on actual losses of the holder of rights, the illegal income of the infringer or the royalties, which will be finally decided by the civil court. For obviously malicious infringements, the court can also determine the amount of compensation

in accordance with the punitive compensation clause stipulated in the Law (more than one time and less than five times the amount of the actual losses of the holder of rights, the illegal income of the infringer or the royalties due).

Attorneys' fees and costs

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

Yes, attorneys' fees and costs can be compensated as reasonable expenses in an action for copyright infringement.

Criminal enforcement

43 Are there criminal copyright provisions? What are they?

Yes, the Criminal Law has provisions for crimes of infringing copyright and selling infringing copies. Penalties range from imprisonment of up to 10 years to a fine. The criminal acts include:

- violating the property right of a creator or copyright holder by reproducing and distributing or communicating any works to the public through an information network;
- publishing any book of which another person has the exclusive right of publication; and
- violating the property rights of a producer's audiovisual recording, or a performer's performance in the audiovisual recording by reproducing and distributing or communicating to the public through an information network.

Online infringement

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

Yes, specific liabilities, remedies and defences for online copyright infringement are stipulated in the Regulations on Protection of the Right of Communication through Information Network and the relevant regulations. The Regulations include a series of contents such as fair use, statutory licence, the safe harbour principle and copyright management technology, and distinguish the rights and interests that copyright owners, libraries, network service providers and readers can enjoy.

Article 18 of the Regulations stipulates the copyright administrative department may order to stop the infringing act and confiscate the illegal income. If the illegal business volume is more than 50,000 yuan, a fine of more than one but less than five times the illegal business volume may be imposed. If the illegal business volume is less than 50,000 yuan, according to the seriousness of the circumstances, a fine of less than 250,000 yuan may be imposed. If the circumstances are serious, the copyright administrative department may confiscate computers and other equipment mainly used to provide network services. If a crime is constituted, the criminal liabilities shall be investigated according to the applicable laws.

Prevention measures

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

Yes, there is an Administrative Penalty Law of the People's Republic of China, revised on 22 January 2021 and effective on 15 July 2021. The National Copyright Administration, the Ministry of Public Security, and the Ministry of Industry and Information Technology have jointly launched the Jianwang Campaign against online infringement and piracy every year since 2005.

Moreover, there are Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights providing measures for creator and copyright holders to prevent the import and export of goods infringing intellectual property rights.

Furthermore, the Copyright Law provides specific protection to rights holders who adopt technical measures for the purpose of protecting copyright and the rights relating to copyright.

In consideration of the difficulties for the creator and right holder to prove his or her actual loss, or the illegal income of the infringer or the royalties, the Copyright Law stipulates the minimum and maximum compensation amount for the court ranging from 500 yuan to 5 million yuan based on the extent of the infringement. In the case of intentional infringement of copyright or copyright-related rights, where the infringement is serious, repeated or continuous, the compensation may be paid ranging from one to five times the amount determined pursuant to the aforesaid method.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 Which international copyright conventions does your country belong to?

China belongs to the following international copyright conventions:

- the Beijing Treaty on Audio-visual Performances;
- Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled;
- WIPO Performances and Phonograms Treaty (WPPT);
- WIPO Copyright Treaty (WCT);
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement);
- Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms;
- Universal Copyright Convention; and
- Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).

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

In general, China has been fulfilling its obligations to the conventions it has acceded to through amendments to its domestic laws, unless it has stated reservations. To date, China has amended the Copyright Law three times. The current Copyright Law is the third amendment.

The following amendments have been made to the Copyright Law (2020):

- extending the term of protection of photographic works to the life of the author and to 50 years after his or her death, corresponding to the WCT;
- improving the rights of persons with disabilities to fair use of works, corresponding to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled;
- adding the right of performers to allow others to rent audio and video recordings embodying their performances and receive remuneration, corresponding to the WPPT and Beijing Treaty on Audio-visual Performances;
- adding the rights of sound producers to remuneration for broadcast and mechanical performances, corresponding to the WPPT. Although China declared reservations when it joined the WPPT, the provision has been added to take into account the impact of the development of new technologies on record producers;
- revising the definition of the broadcasting right in copyright and extending the scope of the broadcasting right, corresponding to the WCT;
- improving the copyright fair use system by stressing the three-step test principle, corresponding to Berne Convention for the Protection of Literary and Artistic Works (Berne Convention); and
- adding provisions on copyright technical protection measures and rights management information, corresponding to the WPPT.

UPDATE AND TRENDS

Key developments of the past year

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

On 11 November 2020, the newly revised Copyright Law of the People's Republic of China (the Copyright Law (2020)) was officially released, and came into force on 1 June 2021.

The revision of the Copyright Law (2020) mainly focuses on the following aspects:

- clarifying the copyright ownership of audiovisual works;
- revising the definition of the broadcasting right in copyright and extending the scope of the broadcasting right to be consistent with copyright treaties;
- increasing damage compensation by introducing the punitive compensations system;
- improving the copyright collective management system; and

- increasing rights for sound recordings producers to be paid for broadcasts and performances.

The accompanying regulations for the implementation of the Copyright Law are in the process of being revised.

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Summary

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 What is the relevant legislation?

The European Union (EU) does not have a legal framework that regulates EU copyright law. It consists of international treaties, EU legislation and national law. Since the 1990s, there have been numerous directives of the EU that partly regulate and partly harmonise copyright law in the member states. Before that, it was the responsibility of each member state to regulate national copyright law. As of May 2021, there are 11 directives and two regulations forming the EU copyright legislation. The directives, though, do not directly apply within the member states but must be implemented by them in their national law. Copyright is now largely harmonised within the EU. Nevertheless, there are repeated efforts to create a uniform European copyright law.

The most important pieces of legislation are as follows:

- 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;
- Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights;
- Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs; and
- Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

All EU member states are parties to the Berne Convention for the Protection of Literary and Artistic Works. Thus, the stipulations of that treaty also apply in all member states as a minimum standard.

Enforcement authorities

2 | Who enforces it?

The copyright laws of the EU member states are generally enforced by the national civil courts. For example, in Germany copyright protection can be sought in civil legal actions. Where the copyright law of an EU member state provides for criminal liability with respect to copyright infringement, a prosecution by the European Public Prosecutor's Office is possible.

The Court of Justice of the European Union (CJEU) is the court of highest instance regarding EU legislation. The CJEU determines whether member states have implemented the directives appropriately in their national law and decides civil cases where EU law is applicable. This especially includes the compliance of EU regulations and directives with primary EU law (eg, EU treaties and the EU Charter of Fundamental Rights) and the interpretation of EU law.

Online and digital regulation

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

According to EU copyright guidelines, the author has the right to exploit their work, regardless of the form of exploitation (digital or analogue). One of the specific rights regarding digital exploitation is the right to make the work available to the public by wire or wireless, in such a way that it is accessible to members of the public from places and at times of their choice. For the fulfilment of this right, it is not necessary that there is actual distribution – the mere act of making the work available is sufficient.

Extraterritorial application

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

In general, a copyright holder can only take action against copyright infringements committed via websites operated from abroad in the courts of the states from which those websites operate. However, if the website has sufficient connection to an EU member state, the courts of that member state are competent to decide the case. The criteria for determining a sufficient connection include language, the first-level domain of the website and the possibility of shipping to the member state. The international accessibility of a website, on the other hand, is not a substantial argument.

Agency

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

No. There is no centralised European copyright agency because the creation of copyright is not linked to formal requirements such as registration.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

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

There is no EU-wide statutory definition of the term 'work' that is granted copyright protection. Normally, two elements are required: expression and originality. In common law countries, fixation is also a requirement, meaning that the work must be fixed in a tangible medium of expression. Some EU directives do refer to article 2 of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), where different types of work are defined as 'literary and artistic works' that are protected by copyright. Additionally, some EU directives define 'protected works' within their scope of regulation (eg, Directive 2009/24/EC (the Computer Programs Directive)).

Based on specific regulations in individual EU directives, the Court of Justice of the European Union (CJEU) has developed a general EU definition of the term 'work' within the scope of copyright law that refers back to the elements of expression and originality.

These are the most relevant works that are protected by EU copyright law:

- literary works, such as novels, poems, plays and newspaper articles;
- computer programs and databases;
- films, musical compositions and choreographies;
- artistic works, such as paintings, (technical) drawings, photographs and sculptures; and
- architecture.

Rights covered

7 | What types of rights are covered by copyright?

The different EU directives grant to authors the following rights, each according to its specific scope:

- the right of reproduction for authors, performers, producers of phonograms and films, and broadcasting organisations;
- the right of distribution for authors, performers, producers of phonograms and films, and broadcasting organisations;
- the right of rental, lending, or both for authors, performers, and producers of phonograms and films, with an associated right of equitable remuneration for rental, lending, or both for authors and performers;
- the right of computer program reproduction, distribution and rental for authors;
- the right of communication to the public for authors, performers, producers of phonograms and films, and broadcasting organisations;
- the right of communication to the public by satellite and cable for authors, performers, producers of phonograms, and broadcasting organisations; and
- the right of broadcasting for performers, producers of phonograms and broadcasting organisations and the right of fixation for performers and broadcasting organisations.

Excluded works

8 What may not be protected by copyright?

Ideas may not be protected by copyright law, only their expression in a work. Also, a minimum level of creativity and threshold of originality is needed to claim a copyright. This excludes from copyright protection works that are wholly trivial.

Fair use and fair dealing

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

There is no 'fair use' doctrine in EU copyright law comparable with that of the United States. Instead, EU law provides an explicit list of exceptions from copyrights granted to the rightsholders, each with a specific scope. While some copyright limitations and exceptions are mandatory for the member states to implement, others may be granted by each member state at its own discretion.

Member states may provide for exceptions or limitations to the reproduction rights set out in article 2 of Directive 2001/29/EC (the InfoSoc Directive), in respect of reproductions on paper or any similar medium as long as the affected rightsholders receive fair compensation. The same applies in respect of reproductions on any medium made by a natural person for private use. The Computer Programs Directive stipulates a mandatory exception in article 5(1) that acts of permanent or temporary reproduction and acts of translation, adaption and other alteration of a computer program shall not require authorisation by the rightsholder 'where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction'.

Architectural works

10 Are architectural works protected by copyright? How?

Yes, architectural works fulfil the requirements for copyright protection according to EU law. Some EU directives refer to article 2 of the Berne Convention, which explicitly lists architecture among the works that are protected by EU copyright law. Some directives also imply copyright protection for architecture.

Performance rights

11 Are performance rights covered by copyright? How?

Yes, performance rights are protected as related rights. Such rights are established in the same way as authors' rights (eg, in article 2 of the InfoSoc Directive). However, different rules may apply regarding certain aspects of copyright protection. For example, Directive 2006/116/EC (the Copyright Term Directive) and the revised Directive 2011/77/EU only regulate the duration of copyrights with respect to authors' rights. Member states may, at their own discretion, determine the duration of performance rights.

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 secures protection in performances for performers, in phonograms for producers of phonograms and in broadcasts for broadcasting organisations. This treaty guarantees a minimum protection period of 20 years from the end of the year in which the fixation was made or the performance took place.

Neighbouring rights

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

Yes, different 'neighbouring rights' are recognised by specific European directives (eg, article 2 et seq of the InfoSoc Directive regarding the protection of the performer or of the producer of phonograms).

Moral rights

13 | Are moral rights recognised?

Yes, moral rights are recognised. For the continental EU member states, moral rights are always attached to the author of the work. The author can require their authorship to be stated using their name or a pseudonym. In countries that follow common law, such as Ireland, the concept of moral rights is significantly weaker. However, all EU member states are signatories to the Berne Convention, which provides moral rights in the form of the right to recognition of authorship and the right to integrity of the work.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No, there is no requirement in EU law for a copyright notice to be attached to a work. The copyright protection automatically starts at the moment of creation of the work.

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

There are consequences regarding the authorship or the copyright for the work in question. The lack of a copyright notice does not allow any presumption of authorship or ownership, as stipulated in article 5 of Directive 2004/48/EC on the enforcement of intellectual property rights. The presumption means that an infringement action may be brought by anyone whose name is indicated in the usual manner on the work. This provision also applies to holders of rights related to copyright, such as phonogram producers, with respect to their subject matter.

Deposit

16 | Is there a requirement of copyright deposit?

No, there is no longer such a requirement in EU member states. However, some EU countries may offer a voluntary deposit of works protected by copyright.

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

In the absence of a requirement to make a copyright deposit, there are also no consequences for failure to make a deposit. Nevertheless, a copyright deposit might make it easier to prove ownership.

Registration

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

There is no system of EU copyright registration for works. Some EU countries offer the possibility to register works, but this is dependent on the national law of each member state.

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

Copyright registration is not mandatory. The copyright protection starts with the creation of the work. Nevertheless, a voluntary registration might be useful (eg, to resolve disputes over ownership or creation).

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

There is no copyright registration at EU level. EU member states or even private organisations may request a fee for a (voluntary) registration.

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

There are no legal consequences for failure to register a copyrighted work as registration is not mandatory. Nevertheless, it might be harder for the author or creator to prove ownership in a dispute.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The owner of a copyrighted work is its creator or author. According to EU copyright law, both an individual person and, where the legislation of the member state permits, a legal person can be the owner (article 2(1), paragraph 1 of Directive 2009/24/EC (the Computer Programs

Directive)). The national law of continental EU member states strictly distinguishes between moral rights (ownership) and exploitation rights. Only the latter can be transferred to others, including legal entities, whereas moral rights cannot be transferred or waived. Common law countries of the EU also recognise moral rights and do not allow the transfer of such rights, but they do allow such rights to be waived.

Employee and contractor work

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

Generally, creators or authors of a copyrighted work are the owners of the work regardless of whether they have created it within the scope of their activity as employees. However, the national law of EU member states may permit a legal entity designated as the rightsholder to be the owner of copyrighted work. It is also up to the national law to determine whether the employer automatically obtains the ownership of such work.

According to the Computer Programs Directive, there are special exceptions with respect to computer programs. If a computer program is created by an employee in the performance of their duties or according to the instructions of their employer, the employer is exclusively entitled to exercise all proprietary rights in the computer program, unless otherwise provided by the contract; ownership, though, remains with the author.

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

The independent contractor or its employees remain the owner of the copyright. An agreement is not a legal requirement to transfer or grant exploitation rights to the hiring party, but it is advisable to conclude such an agreement in writing, especially for evidentiary purposes.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes, according to EU copyright law a copyrighted work may be co-owned. This is especially the case when a group of (natural) persons jointly create a work (see article 2(2) of the Computer Programs Directive 2009/24/EC). There are no stipulations regarding where co-ownership is held by legal entities.

Transfer of rights

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

Owing to the distinction between moral rights and exploitation rights in copyright law in the continental EU member states, the copyright itself cannot be transferred from the creator. The only exception to this rule is the transfer of rights to the heirs of the author after their death. Exploitation rights, on the other hand, can be granted by the author to third parties.

Licensing

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

Yes, authors can grant rights of use of their work to third parties, including legal entities. The right may be granted as a simple, non-exclusive right or as an exclusive right. This right may also be limited in terms of territory, duration or type of use. There are no specific procedures stipulated by law. An ordinary agreement between the author or copyright holder and the third party is sufficient to grant such right.

28 | Are there compulsory licences? What are they?

There are no standardised compulsory licences in EU copyright law. However, the issue of compulsory licences might become relevant in connection with cartel law and is a matter of EU case law.

EU legislation provides exceptions to the requirement to get authorisation to use a work in specific cases. In addition, the EU directives allow EU member states to stipulate legal licences for certain acts when providing fair compensation to the author. Furthermore, there is a form of compulsory licensing when collective management organisations are involved. Owing to their de facto monopoly, such organisations are obliged either to offer a licence to the user asking for it or to provide a reasoned statement explaining why they do not intend to license a particular service.

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

EU copyright law provides that rightsholders may choose to have their rights held in trust by collecting societies or collective management organisations for collective management. Directive 2014/26/EU (the Collective Rights Management Directive) specifies certain requirements regarding the administration of such societies and organisations, including membership status, management of rights revenue and supervision by the authorities.

Termination

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

According to EU copyright law, the copyright itself cannot be transferred. Therefore, the issue of termination of transfers of rights does not occur. However, the author might terminate a contract granting usage rights if provided by the contract (eg, where there is a material breach of contract). However, 70 years after the death of the author the copyright in the relevant works automatically terminates.

Recordal

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

No, documents evidencing transfers and other transactions may not be recorded at a government agency at EU level.

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DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection automatically begins with the creation of a work that is eligible for copyright protection.

Duration

33 | How long does copyright protection last?

Copyright protection in the EU lasts until 70 years after the death of the author or creator. For works that originate outside the EU, the protection lasts until at least 50 years after the death of the creator.

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

No, the duration of the copyright protection does not depend on when the author or creator published a work. The one exception is when a work has been legally published for the first time after the protection has terminated.

Renewal

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

No, the terms of copyright cannot be renewed. The protection automatically terminates 70 years after the death of the author.

Government extension of protection term

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

Directive 93/98/EEC harmonises the term of copyright protection at 70 years after the death of the author. Since then, there has been no extension of the term of copyright protection. Neither the executive branch nor the legislative branch has the power to extend the term after the partial harmonisation by Directive 93/98/EEC.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

There is no legal definition of the term 'copyright infringement'. It has been held that an infringement is any act that interferes with the different rights granted to the beneficiary of

protected works by the copyright acts, especially by EU directives, without the consent of the respective beneficiary. There are several stipulations in the different pieces of EU legislation that limit the beneficiary's rights.

Vicarious and contributory liability

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

At EU level, there is no harmonisation regarding secondary liability in case of copyright infringement. At national level, different approaches have been taken, leading to an uneven playing field and different results when it comes to secondary liability. However, there are liability privileges in articles 12 to 14 of Directive 2000/31/EC (the e-Commerce Directive) that limit possible national secondary liability.

The Court of Justice of the European Union has harmonised secondary liability in several judgments establishing duty of care (eg, if the person linking to a website knew or ought to have known that the link leads to illegal content, it constitutes a liability for communication to the public).

Available remedies

39 What remedies are available against a copyright infringer?

EU member states must provide adequate measures, procedures and remedies to ensure the enforcement of intellectual property rights. For copyright holders or other authorised persons, the following remedies are available:

- corrective measures, including recall from the channels of commerce, definitive removal from the channels of commerce and destruction;
- injunctions that aim to prohibit any further infringement by the infringer;
- damages for intentional or negligent infringement (for cases where the infringer acted neither intentionally nor negligently, the question of whether damages apply will be determined by national legislation); and
- publication of judicial decisions against an infringer at the request of the copyright holder.

EU member states may, at their own discretion, establish further remedies.

Limitation period

40 Is there a time limit for seeking remedies?

Each EU member state has its own statutes of limitation for bringing civil actions to court. Further information can be found here.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, monetary damages can be claimed in case of a copyright infringement. The damages depend on criteria such as lost profits and unfair profits made by the infringer. Alternatively, the damages may be set as the amount of royalties or fees that the infringer would have to pay when asking the copyright holder for authorisation.

Attorneys' fees and costs

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

Yes, EU member states must ensure that 'reasonable and proportionate legal costs and other expenses' resulting from successful infringement claims are borne by the unsuccessful party. However, EU copyright law leaves it to member states to decide on reasonability and proportionality.

Criminal enforcement

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

There are no EU provisions with respect to criminal liability for copyright infringement. With a few exceptions in the field of serious crime, criminal law is not harmonised in the EU, leaving it to each member state to set its own criminal legislation.

Online infringement

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

There are no specific remedies for online copyright infringements set by the EU legislature. However, with Directive (EU) 2019/790 (the Digital Single Market Directive), EU copyright law imposes a new liability for online content-sharing service providers. These providers must obtain an authorisation from the copyright holder to 'communicate to the public or make available to the public works or other subject matter'. The limitation of liability stipulated in article 14(1) of Directive 2000/31/EC (the e-Commerce Directive) does not apply in this case.

The service provider may defend itself against this liability by demonstrating that best efforts were made to obtain an authorisation and to ensure the unavailability of specific works or subject matter for which the copyright holder has provided relevant and necessary information. In addition, the service provider must act expeditiously after receiving a sufficiently substantiated notice from the copyright holder by (1) disabling access to or removing from the relevant internet pages the notified works or subject matter, and (2) preventing future uploads of the same works or subject matter.

The Digital Single Market Directive grants facilities for new online content-sharing service providers that offer their services to the public in the EU for less than three years and that

have an annual turnover below €10 million. Service providers with more than five million unique visitors per month face additional requirements regarding the precautionary measures to prevent further uploads (ie, demonstrating that best efforts measures have been implemented to avoid further infringement of works and subject matter for which the copyright holder has provided relevant and necessary information to the service provider).

Prevention measures

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

There are different measures available to prevent copyright infringement. The new Digital Single Market Directive, for example, requires online content-sharing service providers to make best efforts to prevent future uploads of works and other subject matter when they have been informed of an act of infringement. This requirement will significantly reduce the number of online copyright infringements.

Directive 2001/29/EC (the InfoSoc Directive) stipulates the legal obligation of member states to provide adequate legal protection against the circumvention of any 'effective technological measures'. This also applies to the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components, or the provision of services that are advertised for the purpose of circumvention, have only limited commercially significant purpose other than to circumvent, or are primarily designed, produced or performed to circumvent any effective technological measures.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 Which international copyright conventions does your country belong to?

All EU member states belong to the following international copyright conventions:

- the Berne Convention for the Protection of Literary and Artistic Works (1886, as revised); and
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961).

Certain EU member states belong to the following international copyright conventions:

- the Universal Copyright Convention (1952): Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden; and

- the Revised Universal Copyright Convention (1971): Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden.

All EU member states and the EU itself belong to the following international copyright conventions:

- the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994);
- the World Intellectual Property Organization (WIPO) Copyright Treaty (1996); and
- the WIPO Performances and Phonograms Treaty (1996).

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

The objective of the international conventions to which the EU and its member states belong is worldwide harmonisation of copyright protection. In addition, these agreements are intended to extend national copyright protection to foreigners.

UPDATE AND TRENDS

Key developments of the past year

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

By the end of November 2022, the software 'ChatGPT' (Generative Pre-trained Transformer) was first introduced to the public by the company OpenAI. While not being the first of its kind, it drew massive attention all over the world. The software uses artificial intelligence (AI) to provide answers to all kinds of questions asked by its users. Focusing on legal aspects, it remains unclear whether the output of this software is protected by copyright law. With regard to the scope of copyright protection, the relevant EU directives refer to the Berne Convention. For example, in accordance with article 1 of the Directive 2009/24/EC (Computer Programs Directive), member states of the EU shall protect computer programs, by copyright, as literary works 'within the meaning of the Berne Convention for the Protection of Literary and Artistic Works'. Article 3 paragraph (1) of the Berne Convention limits the copyright protection granted by this treaty to 'authors' who are nationals of a country. Some directives (eg, the Directive 2009/24/EC) limit authorship to natural persons or group of people while allowing legal persons to be the rightsholder when stipulated by national law. Hence, works completely generated by a software like ChatGPT are most likely not copyright protected.

The challenge is to determine whether computer-generated works are indeed fully 'invented' by such AI-enabled software. Users are currently kept in the dark regarding the source of the information presented by such kinds of software. Also, authors of copyrighted materials are facing new troubles enforcing their copyright.

Another hot topic regarding copyright regulation still is Directive (EU) 2019/790 (the Digital Single Market Directive) and its implementation into national copyright law. The stipulations included in this directive caused controversy during the drafting phase, among not only experts but also the wider EU population, and have led to demonstrations in numerous European cities.

At the centre of the dispute is article 17 of the directive, which provides regulations for the direct liability of 'online content-sharing service providers'. Under article 2(6), such a provider is defined as 'a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes'. These service providers shall be fully responsible for copyright infringements committed by their users unless they have:

- made their best efforts to obtain the usage rights from the rightsholders;
- made their best efforts in accordance with high industry standards of professional diligence to ensure that certain works in respect of which rightsholders have provided them with information are not available; and
- acted expeditiously upon receipt of a notice from the rightsholders to disable access to or remove the relevant works from their websites and have done everything possible to prevent the future uploading of such works.

There was extensive criticism of the requirement to ensure that works designated by rightsholders are not available via these websites, which de facto leads to the quasi-mandatory use of upload filters, provoking fears of censorship and blocking of content. Even Germany, which had voted in favour of the directive, expressed concerns about the possible mandatory use of such upload filters. At the same time, it is unclear whether implementation of the directive into national law without a legal specification of upload filters would be possible at all. As a result, Poland brought an action for annulment of the directive before the Court of Justice of the European Union (CJEU), claiming that the exercise of the right to freedom of expression and information is in conflict with article 52(1) of the Charter of Fundamental Rights of the European Union (the Charter). On 15 July 2021, the CJEU Advocate General came to the opinion that the application of annulment only of article 17(4)(b) and (c), in fine, of Directive 2019/790, is inadmissible. According to the settled case law of the CJEU, the partial annulment of an EU act is possible only if 'the elements the annulment of which is sought may be severed from the remainder of that act'.However, the application in the alternative – the annulment of article 17 of Directive 2019/790 in its entirety – is admissible. Regarding the substance of the case, the CJEU Advocate General came to the conclusion that the limitation on the exercise of the right to freedom of expression and information satisfies all of the conditions laid down in article 52(1) of the Charter. Therefore, the action shall be dismissed.

On 26 April 2022, the court published its decision and fully adopted the Advocate General's opinion regarding the admissibility and proceeded to examine the substance of the case and dismissed the case. The court confirmed that an upload filter will prove unavoidable to conform with article 17 Directive of (EU) 2019/790. This constitutes a limitation on the right to freedom of expression and information. But according to the court, there are enough safeguards in place to ensure that the essence of the right to freedom of expression is sufficiently respected, the limitation is proportional, and the rights of the users are not

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disproportionately restricted. Therefore, the requirements of article 52(1) of the Charter are satisfied and Poland's action shall be dismissed. The alternative mechanism proposed by Poland would prove ineffective.

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Summary

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 What is the relevant legislation?

Copyright in France is mainly governed by two laws: the Law of 11 March 1957 and the Law of 3 July 1985. These laws and all other relevant legislation are codified in the first part of the French Intellectual Property Code (from articles L 111-1 to L 343-7) (IPC). The copyright law applicable in France also derives from international conventions to which France is a party, such as:

- the Berne Convention for the Protection of Literary and Artistic Works of 1886;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961;
- the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty of 20 December 1996;
- the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights, notably on copyright and related rights; and
- the WIPO Copyright Treaty of 1996. The European Union law is also part of French copyright law when implemented. In particular, the 2006 Law on Copyright and Neighbouring Rights in the Information Society on authors' rights and related rights in the information society was adopted in France in order to implement the EU Directive 2001/29/EC, which itself implemented the WIPO Copyright Treaty of 1996.

Law No. 2015-195 of 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.

In addition, Law No. 2019-775 of 24 July 2019 implements article 15 of the Directive 2019/790/EU into French law and creates neighbouring rights for press publishers. Orders No. 2021-580 of 12 May 2021, No. 2021-798 of 23 June 2021 and No. 2021-1518 of 24 November 2021 complete the implementation of the Directive 2019/790/EU of 17 April 2019 on copyright and neighbouring rights into French law. However, Order No. 2021-580 was partially censored in a recent decision of the French High Administrative Court.

Enforcement authorities

2 | Who enforces it?

Civil courts

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

Criminal courts

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

French customs

Copyright owners may request that customs 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.

ARCOM

The Regulatory Authority for Audiovisual and Digital Communication (ARCOM) results from the merger on 1 January 2022 of the High Audiovisual Council and the High Authority for the Dissemination of Works and Protection of Copyrights on the Internet. Independent from the government, it acts under the control of the judges and reports to Parliament. Its responsibilities include the protection of the freedom of speech, the protection of works and the respect of people and the public, as well as the technical and economic regulation of the sector. In particular, ARCOM ensures the protection of audiovisual works by fighting against illicit works and encouraging the development of legal works. It also supervises the means implemented by the major online platforms to fight against disinformation and online hate speech.

Online and digital regulation

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

The Order of 12 November 2014 has adapted the IPC to the digital era. 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 their 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.*

Additionally, the Digital Single Market Directive 2019/790/EU also has a great impact on French provisions relating to the digital exploitation of works. Article L 218-2 of the IPC now provides that 'the permission of the press publisher or press agency is required before any reproduction or communication to the public of all or part of its press publications in digital form by an online public communication service'. Press publishers can now be remunerated for the use of their works by online content sharing service providers. However, this right does not apply to private non-commercial uses, hyperlinks, the use of isolated words or of 'very short' excerpts and texts first published before the Directive entered into force (article L 211-3-1 of the IPC).

Articles L 137-1 to L 137-4 of the IPC are dedicated to the online content sharing service providers who, by providing access to copyrighted works uploaded by their users, perform an act of representation of these works. For those works, authorisation must be obtained from the rights holders without prejudice to the authorisation to be obtained for the reproduction of these works.

It also provides that for the liability of the online content sharing service 'in the absence of authorisation from rights holders, [. . .] for the unauthorised acts of exploitation of copyrighted works'.

There are exceptions when the online content sharing service can demonstrate that:

- it has used its best efforts to obtain permission from rights holders who wish to grant such permission;
- it has made its best efforts, in accordance with the industry's high standards of professional diligence, to ensure the unavailability of specific works for which the rights holders have provided him or her, directly or indirectly through a third party designated by them, the relevant and necessary information; and
- it has in any case acted promptly, upon receipt of a sufficiently reasoned notification from the rights holders, to block access to the notified works or to remove them from its service and has made its best efforts to prevent the works from being uploaded in the future, pursuant to (2).

Articles L 136-1 to L 136-4 of the IPC provide rules regarding automated image referencing services and research. The goal is to ensure remuneration to authors whose works are referenced in these services.

Extraterritorial application

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

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

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

Agency

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

There is no centralised copyright agency in France.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

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

As a matter of principle, all creations are protected by copyright provided that 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 French Intellectual Property Code (IPC) provides for a non-exhaustive list of the works that may be protected by copyright law: books and other writings; speeches; musical works; works of fine art such as paintings, drawings or sculptures; photographic and cinematographic works; and plans, maps and sketches.

Rights covered

7 | What types of rights are covered by copyright?

Copyright covers both economic and moral rights.

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

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

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

Excluded works

8 What may not be protected by copyright?

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

Fair use and fair dealing

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

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

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

Order No. 2021-1518 of 24 November 2021 implements certain provisions of the EU Directive 2019/790 of 17 April 2019 on copyright and neighbouring rights into French law and provides for not optional exceptions to copyright and neighbouring rights to promote notably data mining for scientific research purposes, the use of works for educational purposes and their reproduction for the purpose of preserving cultural heritage (articles L 122-5-3, L 122-5-10 to L 122-5-13 of the IPC).

Architectural works

10 Are architectural works protected by copyright? How?

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

Law No. 2016-1321 provides for a new exception to copyright infringement (article L 122-5-11 of the IPC), pursuant to which individuals are allowed to reproduce or represent architectural works and sculptures located permanently in public places for non-commercial purposes.

Performance rights

11 | Are performance rights covered by copyright? How?

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

Pursuant to article L 212-3 of the IPC, performers have the exclusive right to authorise all recording, reproduction or communication to the public of their performance. Furthermore, the performer's permission is required in the 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 the performer's authorisation to fix, reproduce and communicate this performance to the public.

In addition, Order No. 2021-580 of 12 May 2021 implements partially the EU Directive 2019/790 on the right for the author or performer who has assigned his or her rights on an exclusive basis to terminate the contract in the case of non-exploitation of the assigned work by the assignee. The terms of implementation will be determined by professional agreements between the collective management organisations and the representative organisations of the assignees, or in the absence of an agreement within 12 months of the publication of the Order, by decree. Furthermore, an additional remuneration is also provided for all works except software when the proportional remuneration initially provided for proves to be exaggeratedly low in relation to the income derived from the exploitation of the work.

Concerning performers, the Order provides for a limited list of cases where lump sum remuneration is possible.

Other decrees will be issued in application of the Order concerning, in particular, the conditions under which the author or performer may obtain communication of information held by the sub-licensee of his or her rights with respect to the rendering of accounts.

The provisions regarding remuneration and accountability to authors and performers are effective as of 7 June 2022 to all current contracts.

Neighbouring rights

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

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

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

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

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The Law No. 2019-775 dated 24 July 2019 grants neighbouring rights to press publishers. The term of these economic rights shall be two years from 1 January of the calendar year following that of the first publication of a press publication (article L 211-4 of the IPC).

In addition, Order No. 2021-580 of 12 May 2021, Order No. 2021-798 of 23 June 2021 and Order No. 2021-1518 of 24 November 2021 complete the implementation of the EU Directive 2019/790 of 17 April 2019 on copyright and neighbouring rights into French law, although Order No. 2021-580 was recently partially censored.

Moral rights

13 | Are moral rights recognised?

Moral rights are recognised in France. They are perpetual, inalienable and imprescriptible, and therefore may not be transferred or 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 to divulge his or her work;
- the right 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 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 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 withdrawal.

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

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

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

However, copyright deposit is mandatory for some works.

15 | What are the consequences for failure to use a 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.

Deposit

16 | Is there a requirement of copyright deposit?

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

- the French National Library;
- the French Audiovisual Institute, which manages radio and television;
- the French Cinematographic Centre, which is responsible for movies; and
- any library authorised by order of the Ministry of Culture.

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

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

Registration

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

There is no system for copyright registration in France.

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

There is no system for copyright registration in France.

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

There is no system for copyright registration in France.

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

There is no system for copyright registration in France.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

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

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

If the author of a work is unknown, French law applies the regime of orphan works: even without a known author, the work is protected but can be used under some conditions, in particular, only for cultural, educative or research purposes and not for profit.

Employee and contractor work

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

Under French law, there is no work-for-hire theory. Hence, without regard to the employment contract that may be in force between an employer and his or her employee, as a general rule, the employee remains the author of his or her work and an assignment agreement should be entered into between the employer and the employee.

One of the exceptions to this rule is a collective work.

A 'collective work' is defined by article L 113-2-3 of the French Intellectual Property Code (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 with the moral rights that ensue from the individual part of their creations.

However, article L 113-9 of the IPC sets a devolution of the economic rights on software and its documentation to the employer when it has been created by its employees in the performance of their duties or according to his or her instructions.

Order No. 2021-1658 of 15 December 2021, relating to the devolution of intellectual property rights on assets obtained by authors of software or inventors who are not employees or public agents hosted by a legal person carrying out research, provides for an extension

of the devolution or allocation of rights to the benefit of legal entities carrying out research and hosting individuals who are neither employees nor public agents. Article L 113-9-1 has, therefore, been added to the IPC to that end. This new provision concerns all software creators, and natural persons who are not employees or public agents of the state, in particular trainees, foreign doctoral students and professors and doctors emeritus. These persons must be hosted within the framework of an agreement by legal entities of public or private legal entities carrying out research; such notion not being specified must be understood broadly as including academic, theoretical or applied research, whether it is scientific or technical, until case law provides more details.

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

Under French law, the creator of a work remains the author and, thus, the owner of the copyright. Hence, as a general rule, an assignment should be entered between the hiring party and the independent contractor for the former to own the copyright over the work made by an independent contractor.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

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

Article L 113-2-1 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.

If a work is used and amended to create a new one, that new work qualifies as a transformative work. The author of the new work must obtain the authorisation of the author of the existing work to do so. Without prior authorisation, the rights in the transformative work are owned by the author of the existing work. Notably, transformative works can be found in the context of non-fungible token or artificial intelligence creations.

Transfer of rights

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

Moral rights are inalienable and may not be transferred by contract but are transferred by inheritance.

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

Licensing

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

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

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

The IPC also provides for legal licences in three cases.

Article L 122-5-3°e of the IPC provides, in the case of an exception for the use of a work for educational or research purposes, for a legal licence. The IPC sets a negotiated remuneration on a lump sum basis. However, in practice, educational and research institutions negotiate broader agreements to cover more than the exception.

Articles L 311-1 to L 311-7 of the IPC provide for a right to a lump sum remuneration, for private copy, to the benefit of authors, performers and producers of works fixed on phonograms, videograms or when copy has been made in digital mode. The remuneration will be collected on the selling price of the copy media. Article L 311-8 provides for hypotheses when the remuneration is not due.

Articles L 133-1 to L 133-4 of the IPC provide for the remuneration of the authors for the publishers of books that are loaned in libraries open to the public. This remuneration extends to lending a copy of a book in a digital version.

Articles L 132-25-1 and L 132-25-2 of the IPC (introduced by Order No. 2021-580 of 12 May 2021) enable authors' professional associations to conclude agreements with producers' professional associations, setting a minimum remuneration for authors. These agreements can last up to five years. One example is the Decree of 22 February 2023 setting a minimum overall remuneration to be paid by audiovisual production companies for the presentation of documentary projects of 52 minutes or more.

On 12 May 2022, the unions and organisations representing performers and music producers signed an agreement setting a minimum remuneration guarantee. It aims to implement the minimum remuneration guarantee provided for by article L 212-14 of the IPC. For performers receiving proportional royalties, royalty rates higher than 10 per cent are guaranteed. This creates a right to receive systematically a minimum advance from the producer and sets a maximum rate and duration of authorised abatement. It also establishes the principle of a rate bonus in case of major success. For musicians who are mainly paid on a fee basis, the agreement provides that they will receive, on the one hand, a specific lump sum for streaming and, on the other hand, additional remuneration each time certain success levels are reached.

28 | Are there compulsory licences? What are they?

Article L 214-1 of the IPC provides for compulsory licences when a phonogram has been published for commercial purposes. Neither the performer nor the producer may oppose

its broadcasting or the simultaneous and integral cable distribution of such broadcast, as well as the reproduction of such phonogram strictly reserved for those purposes, carried out for or on behalf of an audiovisual communication enterprise with a view to inclusion in the soundtrack of its own programme broadcast on its own channel or on any channels of audiovisual communication enterprises that pay equitable remuneration.

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

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

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

Performers are free to join any performing rights societies but are under no obligation to.

In France, various societies exist, such as:

- the Society of Authors, Composers and Publishers of Music, for musical works;
- the Society of Dramatic Authors and Composers, for drama and audiovisual works;
- the Civil Society of Producers of Phonograms in France, for producers of phonograms;
- SAJE Distribution, for studio games, adventure games or game-like reality shows created for television; and
- the French-speaking Society for Non-fiction Authors, for multimedia works.

Termination

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

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

Recordal

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

There is no agency specific to copyright formalities in France.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

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

Duration

33 | How long does copyright protection last?

Moral rights have no time limit.

Economic rights last for the whole life of the author and shall subsist for his or her successors in title for 70 years after the author's death.

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

Pseudonymous, anonymous or collective work is protected for 70 years starting from 1 January of the calendar year following the date at which the work was published.

When the protection expires, the work is said to enter the public domain, which means, in theory, that it can be freely used. However, a work in the public domain can be subject to other specific provisions such as the French Heritage Code for architectural work, which are classified as national domains and benefit from greater protection with the use of their image for commercial purposes being subject to prior authorisation of the administrator of the national domain.

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

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

Renewal

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

Terms of copyright do not have to be renewed.

Government extension of protection term

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

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

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

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

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

Copyright may also be infringed when a moral right of the author (such as the right of disclosure, integrity, paternity or withdrawal) is violated.

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

Vicarious and contributory liability

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

The provision that most closely approximates contributory liability is article L 335-2-1 of the French Intellectual Property Code (IPC) pursuant to which the editing, making available to the public or communicating to the public a piece of software obviously intended to make sound recordings available to the public without authorisation is prohibited as a criminal offence. The French 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 promises, threats or abuses of authority, provokes the offence or gives instructions to commit the offence.

Available remedies

39 | What remedies are available against a copyright infringer?

Several remedies are available against a copyright infringer, including:

- an award of monetary damages;
- an injunction (final or preliminary) to refrain from infringing;
- a precautionary seizure order of the capital assets and real estate of the alleged infringer (at the pretrial stage);
- an 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
- an award of legal costs.

Limitation period

40 | Is there a time limit for seeking remedies?

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

Monetary damages

41 | Are monetary damages available for copyright infringement?

Monetary damages are available for copyright infringement.

The court must take into account, separately:

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

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

Attorneys' fees and costs

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

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

Criminal enforcement

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

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

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In addition, specific criminal offences exist such as:

- 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 Regulatory Authority for Audiovisual and Digital Communication (ARCOM) 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 of, making available to the public or communicating to the public a piece of software obviously intended to make sound recordings available to the public without authorisation;
- any advertisement or notice of use relating to a means allowing the suppression or the neutralisation of any technical device protecting a software, which does not contain the mention in apparent characters that the illicit use of these means is liable to the sanctions provided for in the event of infringement (article R 335-2 of the IPC); and
- to hold for private use or use a technological application, device or service aimed at infringing digital rights management (DRM) that protects a work (article R 335-3 of the IPC).

Online infringement

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

Several provisions were created to deal with online copyright infringement, including the following examples.

The graduated response regime from the ARCOM

After the High Authority for the Dissemination of Works and Protection of Copyrights on the Internet Laws of 2009, Law No. 2021-1382 of 25 October 2021 created ARCOM, and Decree No. 2021-1853 of 27 December 2021 defined its competences and organisation in the field of copyright and related rights. It is a criminal offence for the owner of access to an 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 ARCOM 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, ARCOM 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 that hearing.

ARCOM then renders its decision. It can also send files to the public prosecutor for criminal sanctions (a fine of up to €5,000) if the graduated response regime has not led to an end of the illicit acts.

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ARCOM was appointed as coordinator regarding the obligation set by the Digital Services Act, Regulation (EU) 2022/2065 of October 19, 2022. It can now order big platforms with more than 45 million active users to pay a fine of up to 6 per cent of their global turnover. In the case of recurring infringement of a certain gravity by a big platform, ARCOM can transfer the case to the European Commission.

Prevention of illegal downloading and offer

The presiding judge of the Judiciary Court 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 the case of copyright and related rights infringement occasioned by the content of an online communication service to the public, rights holders can ask courts to order 'all appropriate measures to prevent or stop a copyright infringement against any person who may be likely to contribute to such prevention or termination'.

Prevention measures

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

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

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

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

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 Which international copyright conventions does your country belong to?

France is signatory of the following international copyright conventions:

- the Berne Convention for the Protection of Literary and Artistic Works of 1886 (the Berne Convention);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961;

- the World Intellectual Property Organization Performances and Phonograms Treaty of 20 December 1996;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1995, notably on copyright and related rights; and
- the World Intellectual Property Organization Copyright Treaty of 1996.

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

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

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

UPDATE AND TRENDS

Key developments of the past year

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

On 16 May 2022, the French Ministry of Culture published a press release listing 13 operational measures to be implemented before the end of 2022 in favor of photography and photographers. These measures will notably allow the prevention of the abusive use of the reserved rights mention and, thus, allow for good identification of the photographers, support and encourage the development of marking and traceability tools for the use of images on the internet, support the author's agencies in photography and support the constitution, indexation and digitisation of the photojournalists' patrimonial funds. At the date of this publication, they are yet to be implemented.

Article 2 and articles 17 to 23 of the Directive 2019/790/EU on Copyright in the Digital Single Market were implemented into French law by Order No. 2021-580 of 12 May 2021 with the aim of changing the rules applicable to contracts for the exploitation of copyright (in particular assignment or licence agreements).

The new provisions on proportional remuneration and termination for non-exploitation came into force on 14 May 2022 (amending article L 131-5 of the French Intellectual Property Code (IPC) and the articles L 131-5-2 and L 131-5-3 of IPC that came into force on 14 May 2021), and those on the rendering of accounts (article L 131-5-1 of the IPC) have applied since 7 June 2022.

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However, on 15 November 2022, the French High Administrative Court partially censored Order No. 2021-580 of 12 May 2021 for not providing that authors assigning their exclusive rights for the exploitation of their works have the right to receive an 'appropriate' remuneration, in addition to a proportional one that is already provided for in French law. A new Order should thus be drafted by the French government.

The Digital Service Package enacted by the EU Commission in 2022 includes the Digital Market Act and the Digital Services Act. They aim at creating a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses. In particular, they consolidate the duties of platforms, internet providers and online intermediaries. This package has no effect on already existing copyrights rules. However, the concept of illegal content referred to includes the 'non-authorised use of copyright', thus easing the regulation of online copyright infringement.

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Summary

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The relevant German statutes in the copyright area are:

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

Enforcement authorities

2 | Who enforces it?

German copyright law grants the author exclusive rights to exploit their work.

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

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

Online and digital regulation

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

The Copyright Act does not explicitly address the digital exploitation of works. However, it provides that the author has the exclusive right to exploit their work in any tangible form or to communicate their 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 by wireless means, in such a manner that members of the public may access it from a place and at a time individually chosen by them.

Extraterritorial application

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

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

Agency

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

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

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

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

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 What types of works may be protected by copyright?

Section 2 of the German Act on Copyright and Related Rights of 9 September 1965 (the Copyright Act) provides a catalogue of protectable types of 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, works 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 be novel or unique.

Rights covered

7 | What types of rights are covered by copyright?

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

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

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

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

Excluded works

8 | What may not be protected by copyright?

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

Fair use and fair dealing

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

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

Architectural works

10 Are architectural works protected by copyright? How?

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

Performance rights

11 Are performance rights covered by copyright? How?

A performer, namely a person who performs, sings, acts or in another manner presents a work or an expression of popular art or who participates artistically in such a presentation, is also protected under German copyright law. The performer shall have the right in relation to their performance to be recognised as such and the performance can be separately exploited by television or radio broadcasts 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 their performance of such nature as to jeopardise their standing or reputation as a performer.

Neighbouring rights

12 Are other 'neighbouring rights' recognised? How?

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

Moral rights

13 Are moral rights recognised?

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

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

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

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

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

Deposit

16 | Is there a requirement of copyright deposit?

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

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

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

Registration

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

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

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

In Germany, copyright registration is neither mandatory nor possible.

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

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

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

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

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

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

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

Employee and contractor work

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

German copyright law does not recognise the 'work made for hire' doctrine. Even when an employee creates a work in the course of their 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, the employer is entitled to rights in that work. For instance, the Act on Copyright and Related Rights of 9 September 1965 (the Copyright Act) provides that where a computer program is created by an employee in the execution of their duties or following the instructions of their employer, the employer shall be exclusively entitled to exercise all economic rights in the computer program, unless otherwise agreed.

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

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

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

Joint and collective ownership

25 | May a copyrighted work be co-owned?

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

The right of publication and of exploitation of the work accrues jointly to the joint authors; alterations to the work shall be permissible only with the consent of the joint authors. However, a joint author may not refuse their 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; they may, however, demand performance only to all of the joint authors.

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

Transfer of rights

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

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

Licensing

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

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

28 | Are there compulsory licences? What are they?

The Copyright Act stipulates a compulsory licence for the production of audio recordings. That means that if a producer of audio recordings has been granted a right of use in a musical work entitling them 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 the Copyright Act applies.

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

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

Collective management organisations are associations of creative people organised under private law. They grant licences for the works managed by them, monitor the use of these

works and collect royalties in order to subsequently distribute the revenues to the right-sholders on the basis of distribution schemes.

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

Termination

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

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

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

Recordal

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

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

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection begins with the date of creation.

Duration

33 | How long does copyright protection last?

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

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

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

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

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

Renewal

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

Terms of copyright may not be renewed.

Government extension of protection term

36 Has your jurisdiction extended the term of copyright protection?

No.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 What constitutes copyright infringement?

German copyright law protects all rightsholders defined in the Act on Copyright and Related Rights of 9 September 1965 (the Copyright Act) equally. It does not make a difference whether an infringer violates an exclusive right of an author, an author's moral right or a neighbouring right protected under the Copyright Act.

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

Vicarious and contributory liability

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

Under German copyright law, the direct infringer is liable, as well as other persons involved in the infringement, such as the 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.

Available remedies

39 What remedies are available against a copyright infringer?

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

- to order the infringer to eliminate the infringement 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;
- to oblige any person who intentionally or negligently performs such an act 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 their 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 that are the injuring party's property be released against payment of an equitable remuneration, which may not exceed the production costs;
- to render information about the distribution chain of the infringing products, accounting for turnover and profits made with infringing acts; and
- to present documents and to permit inspection of an object in the possession of the infringer if this is necessary to substantiate the claims.

Limitation period

40 | Is there a time limit for seeking remedies?

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

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

Monetary damages

41 | Are monetary damages available for copyright infringement?

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

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

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

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

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

There is no basis for punitive damages in German law.

Attorneys' fees and costs

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

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

Criminal enforcement

43 Are there criminal copyright provisions? What are they?

Copyright infringements under German law also constitute criminal acts, which are punishable by fines or up to three years of 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. In addition, any attempt shall be punishable.

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

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

Online infringement

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

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

Prevention measures

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

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

Furthermore, copyright violations can be the basis for border seizure requests.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 Which international copyright conventions does your country belong to?

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

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

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

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

The established minimum standards relate to, for instance:

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

Germany grants and respects copyrights of non-citizens.

UPDATE AND TRENDS

Key developments of the past year

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

In 2022, the German legislator remained silent and no copyright legislation was passed or proposed.

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LEGISLATION AND ENFORCEMENT

Relevant legislation

1 What is the relevant legislation?

Copyright law in India is governed by the Copyright Act 1957, which has been amended six times, with the last amendment in 2012. It is a comprehensive statute providing for copyright, moral rights (known as author's special rights) and neighbouring rights (rights of broadcasting organisations, performers and *droit de suite*). The Act provides for exhaustive economic rights (copyright and performers' rights) 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 on 14 March 2013 and provide for the procedure to be adopted for relinquishing copyright, compulsory licences, statutory licences, voluntary licences, registration of copyright societies, membership and administration of affairs of copyright societies and performers' societies.

The Copyright Amendment Rules 2021 were more recently passed by the Ministry of Commerce and Industry and came into effect on 30 March 2021.

The amendments relate to the following:

- Measures have been introduced to achieve the transparent functioning of copyright societies. For example, Rule 65A has been inserted, which provides for an obligation on the copyright society to publish an annual transparency report for each financial year within six months of the end of that financial year. The copyright society shall ensure that the published report remains available on its website for at least three years and contains information relating to details of royalties, among other things.
- A sub-rule has been inserted under Rule 55(2), providing that, in relation to the collection and distribution of royalties, the copyright society should create a system of payment through electronic modes that are traceable.
- Additional sub-rules have been inserted under Rule 58, which provide for the obligation of the copyright society to keep unpaid royalties in a separate account in a situation

where the authors and owners of the copyright are not traceable. The society must also ensure that at the end of each quarter it publishes on its website information including the title of the work, the name of the author and the owner of the work, and any other information that would assist in identifying the rightsholder. If the royalties remain undistributed at the end of three years from the end of the financial year in which the royalties are collected, the society is obligated to transfer them to the welfare fund of the copyright society.

Enforcement authorities

2 | Who enforces it?

Copyright can be enforced in civil courts and criminal courts. Civil remedies for the copyright owner include injunctions, 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 for enhanced penalties on second and subsequent convictions.

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 that there is an order within 14 days of the date of detention from a court that has jurisdiction.

As part of the Finance Act 2017, the Copyright Board was merged into the Intellectual Property Appellate Board (IPAB). The IPAB now stands abolished in view of the promulgation of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance 2021, which came into effect on 4 April 2021. The current position is that all appeals arising from an order of the Registrar of Copyrights can be made to the high courts.

Section 72 of the Copyright Act stipulates that an aggrieved person can challenge any final order passed by the Registrar of Copyrights within a period of three months to the Appellate Board. Such appeal will henceforth lie with the high court concerned.

In this regard, it is notable that recently the Delhi High Court enacted the Delhi High Court Intellectual Property Rights Division Rules 2022 (the IPD Rules) to regulate the practice and procedure of the Intellectual Property Division, which was created by the Delhi High Court in July 2021 pursuant to the abolition of the Intellectual Property Appellate Board. The IPD Rules set out the procedure for dealing with cases transferred to the High Court (which the IPAB previously had jurisdiction upon).

Online and digital regulation

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

Amendments to the Copyright Act 1957 (up until 2012) have ensured that, with the advent of satellite television and the internet, the definitions of rights are such that all digital platforms and formats are covered. The last amendment to the Copyright Act by the Copyright (Amendment) Act 2012 introduced specific provisions for dealing with the circumvention of technological measures pertaining to copyrighted works and provides solutions on a par with those for copyright infringement. 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 the maintaining of records by a person permitted to circumvent technological measures as per the act.

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 rightsholder 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 copyrighted 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 them to refrain from providing access, then access may be resumed at the end of that period.

Apart from the above-mentioned provisions, 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 that 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.

Courts have interpreted the infringement provision under the Act in the context of secondary liability and held that permitting 'a place' to be used for profit for the purposes of communication of a work to the public under section 51(a)(ii) would also include the internet.

Extraterritorial application

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

Yes. The Copyright Act 1957 provides jurisdiction to a copyright owner to sue if they are 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 taken by the motion picture producers of Bollywood and by sports broadcasters. Recently, the Delhi High Court has also issued orders to the Department of Telecommunications and the 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. In another recent case, *Swami Ramdev v Facebook* (Order dated 23 October 2019 in CS (OS) 27/2019), which dealt with the taking down of defamatory content by an intermediary, the Delhi High Court directed that as long as the uploading of information had taken place from an IP address in India, Indian courts would have jurisdiction to have that content completely taken down globally. However, where content had not been uploaded from an IP address in India, the intermediaries could be directed to geo-block the content within India's jurisdiction. Although this was decided in a case dealing with defamatory content, the court's ruling regarding the taking down of unlawful content extends to copyright infringement cases.

Recently, in the case of *Star India Private Limited & Anr v Live4Wap.Click & Ors* (CS(COMM) 11/2023), the Delhi High Court highlighted the need for legislative policy to address the rising cases of copyright infringement by rogue websites. The judgement stated 'This Court finds itself inundated with such suits, which keep cropping up every now and then. It may be useful for the Legislature to formulate some kind of a policy by which such disputes can avoid being taking up the time of the courts.'

As a signatory to the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), India follows the principle of national treatment and therefore does not discriminate between Indian and foreign works. Section 40 of the Copyright Act 1957 provides the central government with the power to extend copyright to foreign works, and it is in pursuance of this power that the legislature enacted the International Copyright Order 1999. The Order extends protection to any work made or published in a country that is party to the Berne Convention, the Universal Copyright Convention or the Phonograms Convention, or that is a member of the World Trade Organization.

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 chair 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 courts 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 passed the Finance Act 2017, which merged the Copyright Board and the IPAB. The IPAB was previously constituted to hear appeals from the decisions of the Trademark Registry and Patent Office, but it now hears appeals and references from the Registrar of Copyrights as well. The IPAB now stands abolished, following the promulgation of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance 2021, which came into effect on 4 April 2021 and later became an act.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

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

The Copyright Act provides a closed list of protected works under section 13. These works are original literary, dramatic, musical, artistic works, sound recordings and cinematographic works. Copyright law in India also protects neighbouring rights (ie, broadcast reproduction rights and performers' rights).

The Indian courts (notably the Supreme Court in *Eastern Book Company v DB Modak* (2008) 1 SCC 1 and the Division Bench of the Delhi High Court in *Dart Industries Inc v Techno Plast* (Order dated 21 July 2016 in FAO (OS) 326 of 2007) have laid down that not every effort or industry, or exercise of skill, results in a copyrightable work, and only those works whose creation involves some intellectual effort, as well as a certain degree of creativity, can be protected by way of a copyright.

Each category of works is separately defined under the act, providing the corresponding exclusive rights associated with each such right under section 14 and certain other provisions applicable to neighbouring rights, such as section 37 (broadcast reproduction right) and section 38A (performers' rights). Section 16 of the Copyright Act stipulates that there shall be no copyright except in accordance with the provisions of the act. In other words, copyright is a creation of the statute. In the case of *Akuate Internet Services Pvt Ltd v Star India Pvt Ltd*, which dealt with the 'hot news' doctrine, the court interpreted section 16 to deny protection to the plaintiff who had filed an action to prevent others from publishing or sharing match information. As of April 2021, the matter is pending adjudication before the Supreme Court.

Rights covered

7 What types of rights are covered by copyright?

The Copyright Act 1957 sets out the following rights of copyright held by copyright owners:

- in the case of literary, dramatic or musical works – the exclusive right to reproduce (including storage in any medium by electronic means, issuing copies, public performance, or making any film or sound recording in respect of that work); to translate and adapt the work; and to communicate the work 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 for 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 for 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; and
- in the case of sound recordings – to make any other sound recording embodying it on any medium including storing 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.

Further, the incorporation of a literary, dramatic or musical work in a sound recording or a cinematographic film does not extinguish the separate copyright in such works, which continues to subsist in favour of the authors of such works, unless and until the copyright in

these works has been specifically assigned by authors of the works to the producers of the sound recordings or cinematographic films. In cases where such assignments have been entered into by the authors of such works, the authors of the works, after the 2012 amendment to the Copyright Act, continue to retain an inalienable right to royalty in respect of the commercial exploitation of such works.

The author enjoys moral rights independent of copyright; these being the rights to paternity and integrity, which exist despite the assignment of copyright. However, this does not extend to the adaptation of a computer program for fair dealing purposes. The Copyright Act also specifically states that violation of moral rights (specific to the right to integrity) is to be judged objectively.

Moral rights can be enforced by the legal representatives of the author. The 2012 amendments to the Copyright Act provide that a legal representative of an author can exercise both paternity as well as integrity rights in a work. The 2012 amendments also consciously omit the previous co-extensive term of moral rights with copyright by specifically removing the copyright term restriction on a claim for right to integrity by the legal representative. Moral rights are not assignable (although on general principles as it is a civil right and not a fundamental right under the Indian constitution, moral rights can be waived).

Excluded works

8 | What may not be protected by copyright?

The 'idea and expression' dichotomy is applied generally, as in other common law jurisdictions, as required under article 9.2 of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights. Further, 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 it 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 it 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 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 work should be 'novel' and this is the sole condition for the operation of section 15(2) in order to deny copyright protection to artistic works not registered as designs.

Apart from the aforesaid cases, there have been some cases that have held that certain categories of works are not entitled to copyright protection. These include a title of a film – the rationale being that it is not sufficiently original to be afforded protection. Copyright protection was denied to a format of a game in the *Scrabble* case before the Delhi High Court (*Mattel, Inc and Others v Jayant Agarwalla and Others*), based on the idea and expression dichotomy. Moreover, methods of operation, such as an accounting system, would not merit copyright protection. Historical facts, functional aspects and also techniques are not copyrightable. In the case of *Institute for Inner Studies v Charlotte Anderson* 2014 (57) PTC 228 (Del), MIPR 2014 (1) 129, the court denied copyright protection to Pranic healing techniques on the principle that only the selection and arrangement of the expression of the art form

was copyrightable, not the technique itself. However, the court recognised the rights of the co-author, who had written down and transcribed lectures by expending skill and labour.

Fair use and fair dealing

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

The Copyright Act contains an exhaustive list of non-infringing uses. The doctrine of 'fair dealing' applies to the extent and nature of such uses as specifically delineated in section 52 of the Copyright Act. The Delhi High Court, in the landmark judgment of *Chancellor, Masters & Scholars of University of Oxford v Rameshwari Photocopy Services* 2016(68) PTC 386, observed that all defences provided under section 52 have to be analysed against the touch-stone of fairness and that the 'purpose of the use' would determine whether it is fair use.

In that case, the court held that in the context of teaching and the use of copyrighted material under section 52(1)(i), the fairness in the use can be determined using the touchstone of 'extent justified by the purpose'.

Further, the Division Bench of the Delhi High Court in another leading case, *Syndicate of the Press of the University of Cambridge v BD Bhandari* 2011 (47) PTC 244 (Del) (DB), held that the 'four factors' test as enunciated by the courts in the United States (ie, the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and the effect of the use upon the potential market) would be applicable in determining fair dealing of copyrighted works under section 52(1)(a) of the Copyright Act.

Architectural works

10 Are architectural works protected by copyright? How?

Yes. Architectural works are protected as a form of artistic work. However, an injunction cannot be taken out against a structure that has already been erected.

In the case of *Raj Rewal v Union of India & Ors*, the Delhi High Court held that copyright, being a creation of statute, will not prevail over a defendant's constitutional right to freely deal with their property and land. Accordingly, the court held that an architectural work created on another person's land may be liable to demolition. Further, the court held that such demolition would not amount to a distortion, mutilation or modification of the work and that therefore it would not amount to an infringement of the architect's moral rights.

Moreover, the protection of the architectural work does not extend to the processes or methods of construction. This underscores the functionality doctrine.

Performance rights

11 Are performance rights covered by copyright? How?

The right of performance (that is, the right to perform a work in public) is covered by the Copyright Act. Section 14 lists the exclusive rights of all copyright holders and section 14(a)

(iii) recognises the exclusive right of an author of a literary, dramatic or musical work to perform the work in public.

Neighbouring rights

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

Yes. The Copyright Act provides for broadcasting reproduction rights and rights of performers over their performances under Chapter 8 of the Act. *Droit de suite* is recognised under section 53A of the Act.

Broadcast Reproduction Rights under section 37 of the Copyright Act are special rights granted to broadcasting organisations in respect of their broadcasts. These include the right to:

- re-broadcast a broadcast;
- cause a broadcast to be heard or seen by the public on payment of any charges;
- make sound recordings or visual recordings of broadcasts, and reproduce such sound or visual recordings; and
- sell or provide for commercial rental, or offer for sale or rental, any sound or visual recording of the broadcast.

Broadcast reproduction rights subsist for 25 years from the beginning of the year following the year in which the broadcast is made.

Performers' rights are recognised under sections 38 and 38A of the Copyright Act 1957 as special rights, 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 right to:

- make sound recordings or visual recordings of the performance, including reproduction of it in material form and storing it in any medium by electronic or other means and issuing copies to the public;
- sell the recording or provide it for commercial rental, or offer it for sale or for commercial rental; and
- 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 their consent for incorporation of their performance in a cinematograph film, they cannot object to the producer enjoying the exclusive performers' rights, provided that there is no contract to the contrary. Performers' rights last for 50 years from the beginning of the year following the year in which the performance is made.

Performers are further also entitled to an inalienable right to royalties from commercial exploitation of a performance (ie, the right to receive royalties (R3 right)). This right is unaffected by a performer's written consent to allow their 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 World Intellectual Property Organization Performances and Phonograms Treaty. 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 for the setting up of a separate 'performers' society' for each class of 'performer'.

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 royalties on their behalf for their exclusive rights as per the Copyright Act. The Delhi High Court has, on many occasions, upheld ISRA members' right to receive royalties and has restrained third parties from infringing this right by not paying the royalties due to performers.

Section 53A of the Copyright Act provides a special right to an author who is the first owner of a painting, sculpture, drawing or manuscript of a literary or dramatic or musical work. Such an author has the right to receive a share in the resale price of the original painting, sculpture, drawing or manuscript of a literary or dramatic or musical work. The share of the author in the resale price shall be fixed by the Intellectual Property Appellate Board. Further, this special right is coterminous with the term of copyright in the concerned work.

Moral rights

13 | Are moral rights recognised?

Yes. The Copyright Act provides for the protection of the 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.

The moral rights of an author consist of the right to:

- claim authorship of the work (paternity right); and
- 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 their 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 their heirs.

There are a few instances of Indian courts passing orders to enforce and protect the moral rights of authors, including the following:

- *Amar Nath Sehgal v Union of India* 2002 (25) PTC 56 (Del): in this case, the government of India had commissioned a sculptor to create a mural for the lobby of a central government ministry. Once the sculptor had completed the mural, it was displayed for a period of time after which it was pulled down and disposed of by the government. The sculptor then sued the government for violating his moral rights, comprising his right of paternity and right of integrity, both of which were independent of copyright in the mural. The court in this case granted the defendant damages of 50,000 rupees for violation of his moral rights.
- *Jatin Das v Union of India*, Orders dated 2 August 2018 and 19 September 2019: in this case, on the first day of the hearing, the Delhi High Court issued an interim injunction in favour of an artist who had sought to protect the integrity of his work, a 30-feet-tall steel art installation entitled 'Flight of Steel', which had been commissioned for the Bhilai Steel Plant in 1996. The plaintiff, a few years after the artwork was installed, discovered that the sculpture had been broken into pieces, removed to a nearby zoo and painted over. The court, in order to enforce the moral rights of the plaintiff as an author, issued an interim injunction against the government of India and the concerned authorities ordering that no further loss, damage or mutilation was to be caused to the art installation until the suit is decided. Thereafter, the court fashioned a unique remedy wherein it constituted a committee of senior officials of the central government as well as the director of the National Gallery of Modern Art to look into the matter and suggest a fair solution. The committee, after holding multiple meetings with all stakeholders concerned, recommended relocation of the sculpture to a new location selected by the artist, to be undertaken under the supervision of the artist at the cost of the defendant. The court decreed the matter in terms of this recommendation and also directed the defendant to pay an honorarium of 15,000 rupees to the artist for this relocation of the sculpture.

The moral rights of a performer consist of the right to:

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

COPYRIGHT FORMALITIES

Notice

14 Is there a requirement of copyright notice?

No. There is no legal requirement. The '©' mark was considered useful to protect copyright in countries that were members of the Universal Copyright Convention (UCC) but not members of the Berne Convention for the Protection of Literary and Artistic Works – but after the Agreement on Trade-Related Aspects of Intellectual Property Rights, the UCC is of little practical importance.

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

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

There are no adverse consequences.

However, section 52A of the Copyright Act requires certain particulars to be displayed on sound recordings published in India. The consequences of not complying with this provision are provided in section 68A, with a term of imprisonment that may extend to three years and a fine. This provision has been enacted to protect against piracy and counterfeiting.

Deposit

16 | Is there a requirement of copyright deposit?

There is no requirement of copyright deposit.

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

There is no requirement of copyright deposit.

Registration

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

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, the names and addresses of authors, publishers and owners of copyright and other such particulars as prescribed. The author, publisher or owner of, or another person interested in, the copyright of a work may apply for registration.

The Register of Copyrights is evidence of the particulars entered therein and certified extracts from the register are admissible as evidence in all courts without further proof or requirement of the production of the original.

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

No. Copyright subsists in a work from the date of its creation for its entire term and there is no formal requirement of registration to be entitled to copyright protection. However, registration in the Register of Copyrights serves as prima facie proof of the particulars therein. Hence, registration is useful due to its initial evidentiary value.

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

The fees that are to be paid to the Registrar of Copyrights along with a prescribed application for registration of copyright in a work are as follows:

- for literary, dramatic, musical or artistic works – 500 rupees per work;
- for literary or artistic works used in relation to any goods – 2,000 rupees per work;
- for a cinematograph film – 5,000 rupees per work; and
- for a sound recording – 2,000 rupees per work.

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

Since registration is not mandatory, there are no adverse consequences for failure to register a work. However, it is advisable to have a registration as enforcement agencies in India, including the police and customs, do not take action without proof by way of a copyright certificate.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

As a general rule, the author of a work is the first owner of the copyright in a work. For an original literary, musical, dramatic and artistic work, it is the person who created or composed the work and for a sound recording and cinematograph film, it is the producer of the work. In the case of a photograph, it is the photographer. For computer-generated works, the author (ie, first owner of the 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, and are summarised below:

- In the case of literary, dramatic or artistic works made by the author in the course of their 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, 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, 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. The general rules regarding ownership of works are as follows:

- in the case of a work created by an author in the course of their employment under a contract of service or apprenticeship, 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 they do 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; and
- in the case of works created by international organisations, the international organisation would be the first owner of the work.

Employee and contractor work

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

If a person in the course of their employment under a contract of service or apprenticeship creates any work, their employer becomes the first owner of the copyright in the work, as long as there is no contract to the contrary. Hence, an employer's ownership is automatic by virtue of the employer–employee relationship. However, for any literary, musical, artistic and dramatic works that are incorporated in a film, the employer does not become the first owner of the copyright and the employee author retains the first ownership. A specific assignment of copyright in such a case is required by the employer.

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

In the absence of an assignment in favour of the hiring party, the first owner of the copyright is the independent contractor. The hiring party would have only an equitable right to use the material created for the purpose of hiring or commission, and possibly against any assignment detrimental to such use.

To own the copyright, the hiring party would have to obtain an assignment in writing from the independent contractor.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. Joint authorship of a work 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.

The leading case of joint authorship in India is *Najma Heptulla v Orient Longman Ltd and Ors*, AIR 1989 Delhi 63.

Transfer of rights

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

Yes. Copyright and neighbouring rights can generally be transferred by assignment, by testamentary disposition or by inheritance.

However, moral rights are not assignable. Furthermore, with the amendment of the Copyright Act in 2012, authors of literary or musical works that are included in cinematographic films or sound recordings have an inalienable right to receive royalties for the exploitation of their works, and this right to receive royalties cannot be assigned by the author to anyone except their own legal heirs or to a copyright society for the purpose of collection and distribution of royalties. Similarly, where performances of performers are incorporated in cinematographic films or sound recordings, such performers also have inalienable rights to receive royalties for the exploitation of their performances, and this right to receive royalties cannot be assigned by the performer to anyone except their own legal heirs or to a performers' rights 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.

There is a requirement under the act for mentioning the territorial extent and the duration of the assignment. Further, the period of assignment would be considered to be five years, if such period is not otherwise mentioned. In such a case, after the expiry of the five-year period, the copyright in the work will revert to the assignor.

Licensing

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

Yes, the owner of a copyright may either license the entire copyright or the licence may be confined to one or more interests in the copyright. The copyright may be licensed to more than one person non-exclusively. However, a licence would not result in a change of ownership of a work. Like assignment, the grant of any licence is also required to be in writing, and the details of work, territory and term should be specified. If it is not specified, the term shall be presumed to be five years and the territory shall be presumed to be restricted to India only. A licence agreement needs to be in writing. However, there is no requirement for it to be signed, as is mandatory for assignment agreements.

28 | Are there compulsory licences? What are they?

Yes. The Copyright Board is empowered to grant compulsory licences with regard to Indian and foreign works. Some of the purposes for which compulsory licences may be granted are:

- when a work has been withheld from the public because the owner of the work has refused to grant a licence to republish or perform the work;

- when 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
- when 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.

In the case *Tips Industries v Wynk Music* (Order dated 23 April 2019 in Notice of Motion (L) No. 197 of 2018 IN Commercial Suit IP (L) No. 114 of 2018) involving an online streaming service and the scope of statutory licences that can be granted to such a broadcaster, the Bombay High Court held that:

- section 31D does not allow for 'download or purchase' of the copyrighted work and the act of the defendant in permitting users to download and store copyrighted music for unlimited future use constituted a 'sale' and a not mere 'communication to the public', which section 31D contemplates; and
- section 31D was intended to cover only radio and television broadcasting, and did not cover internet broadcasting.

In another case, *Shumita Deb v Saregama*, a dispute involving cover versions, the Supreme Court of India emphasised the importance of strict compliance with the mandatory requirements laid out in section 31C of the Copyright Act and, upon an undertaking of such strict compliance by the respondent, disposed of the special leave petition filed by the petitioner.

In the case of *Music Broadcast Limited v Tips Industries Ltd & Ors*, which was decided on 30 December 2020, the Intellectual Property Appellate Board (IPAB) held that for radio broadcasting of musical works and sound recordings, there should be separate statutory royalty rates for owners of musical works and sound recordings, and owners of underlying works, and accordingly fixed the specific royalty rates. In particular, it was observed that the payment of the royalty and consideration for the sound recording as a whole must be made to the owner of the sound recording (ie, the producer), whereas the distribution of the royalty on a shared basis must be made between the relevant owner of the underlying work (authors and composers) and the assignee or owner of the sound recording.

The Delhi High Court, less than a week after the IPAB judgment, made a contrasting decision in the cases of *The Indian Performing Right Society Ltd (IPRS) v Entertainment Network (India) Ltd* (Radio Mirchi) and *Phonographic Performance Ltd (PPL) & IPRS v CRI Events (P) Ltd & Ors*, holding that when sound recordings are broadcast, the underlying works are not considered to be independent of the sound recording and, therefore, a separate licence for communicating the underlying works is not required.

While the IPAB recognised the rights of the authors of underlying works, the Delhi High Court did the opposite, thereby leaving the sharing of royalties a contentious issue. Both judgments have been challenged and are pending before the Division Bench of the Delhi High Court as at April 2021.

The Bombay High Court in the case of *Anil G Karkhanis v Kirloskar Press and Another* (MANU/MH/1141/2023), granted a licence under section 32 of the Copyright Act to the petitioner to translate a literary work from English to Marathi. Section 32 allows the publication of a translated work after seven years from the first publication without the authorisation of the author. The petitioner, Anil G Karkhanis, was granted the licence to produce and publish the translated version of Madeleine Slade (popularly known as Mira Behn)'s autobiography *The Spirit's Pilgrimage* in Marathi. Originally authored in English, the work was first published in 1960 in India by Orient Longman Private Ltd and in the United Kingdom by Longmans, Green & Co. The petitioner argued that, despite best efforts, he was not able to locate any publishers and thus had approached the court to issue the licence. This is perhaps India's first licence to be granted under section 32 of the Copyright Act 1957.

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

Yes. Performing rights societies (the Indian Performing Right Society Limited, the Phonographic Performance Limited and the Indian Singers' Rights Association) are copyright societies for the collection, licensing, administration and enforcement of rights. Such copyright societies are required to be registered under section 33 of the Copyright Act 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, the Division Bench of the Madras High Court in the case of *Lyca Productions v J Manimaran* (2018(73)PTC[Mad[DB]) held that an organisation that is not a copyright society is not competent to administer any right in any work, including cinematographic films.

On 18 April 2023, the central government registered M/s Cinefil Producers Performance Limited as a copyright society under section 33(3) of the Copyright Act in the realm of cinematographic film works. It is a society formed by film producers and other owners.

After the 2012 amendments to the Copyright Act, 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 came under question. After an investigation, one of the societies re-registered itself as a copyright society, although enquiries were made relating to its management. These societies collect performance royalties for literary and musical works, for sound recordings and for cinematograph films. Another copyright society, the Indian Reprographic Rights Organisation, was duly registered in 2013.

Termination

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

A copyright may be transferred in one of two ways, namely by assignment or by licensing. Licences may be exclusive or non-exclusive.

Assignments can be in part or in full in a future or existing work subject to statutory presumptions such as the term, unless specified otherwise in the agreement or unless the agreement provides a contingency. Rights not utilised in a work within a period of one year from the date of assignment or licence are deemed to lapse back to the assignor.

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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.

This is clear from section 51 of the Copyright Act, which states:

> *When copyright infringed. Copyright in a work shall be deemed to be infringed –*
>
> *(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act.*

Recordal

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

Yes. If the copyright in a work has been registered with the Copyright Office and its particulars have been recorded in the Register of Copyrights, then transfer of ownership may be recorded in the Register pursuant to an application to the Registrar of Copyrights in a prescribed form, along with a prescribed fee.

DURATION OF COPYRIGHT

Protection start date

32 When does copyright protection begin?

Copyright protection begins the moment a work comes into existence (ie, date of creation).

The first proviso to section 18(1) of the Copyright Act states that 'in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence'.

Duration

33 How long does copyright protection last?

The term of copyright depends on the nature of the work:

- literary, dramatic, musical or artistic work – throughout the life of the author and 60 years from the beginning of the year following the year in which the author dies;
- anonymous or pseudonymous work – 60 years from the beginning of the year following the year when the work is published;
- posthumous works – 60 years from the beginning of the year following the year when the work is first published;

- cinematograph films, government work, work of a public undertaking or work of an international organisation – 60 years from the beginning of the year following the year of first publication;
- broadcast reproduction rights – 25 years from the beginning of the year following the year in which the broadcast is made; and
- performers' rights – 50 years from the beginning of the year following the year in which the performance is made.

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

Yes. 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;
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- 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.

Renewal

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

No. There is no renewal of copyright under Indian law as neither registration nor renewal are required for subsistence of copyright in a work for its entire term. After the completion of the copyright term, the work will fall into the public domain and is irretrievable.

Government extension of protection term

36 Has your jurisdiction extended the term of copyright protection?

The terms of copyright protection have been extended as follows:

- Pursuant to the Copyright (Amendment) Act 2012, the term of copyright protection in photographs has been made coterminous with other artistic works. Therefore, instead of enjoying a 60-year post-publication term, copyright in photographs now effectively subsists until 60 years after the death of the photographer.
- The term of protection of performers' rights was 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, was increased for a period of 10 years from 50 years to 60 years in 1992.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 What constitutes copyright infringement?

Copyright infringement occurs when any of the following occur:

- unauthorised use of the exclusive rights of the owner of a copyright whether in relation to the whole or a substantial part of the copyright work;
- permitting a place to be used for infringing purposes on a profit basis; and
- displaying or exhibiting in public by way of trade or distributing for the purpose of trade or importing infringing copies of a work.

In the case of *MySpace Inc v Super Cassettes Industries Ltd*, the Division Bench of the Delhi High Court held that the word 'place' mentioned in section 51 of the Copyright Act is broad enough to include the internet and therefore displaying infringing work on the internet would amount to copyright infringement.

Vicarious and contributory liability

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

The terms 'indirect', 'secondary', 'vicarious' and 'contributory' infringement are not mentioned in Indian copyright law, although they are sometimes used. The acts referred to would generally amount to infringement under Indian law, as in the case of jurisdictions that have similar wording in their copyright statutes, such as Australia or the United Kingdom.

In the context of intermediary liability, the only issue is that of secondary liability since an intermediary, by definition, only provides a platform for facilitating online transactions. An intermediary can be held liable if it does not comply with the provisions of section 79 of the Information Technology Act 2000, which also requires certain due diligence to be undertaken, as provided for in the Consumer Protection (E-Commerce) Rules 2020 and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, which superseded the Intermediary Guidelines Rules 2011.

Available remedies

39 What remedies are available against a copyright infringer?

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

- civil remedies – these provide for injunctions, damages, rendition of accounts, delivery and destruction of infringing copies and damages for conversion;
- criminal remedies – these provide for imprisonment, fines, seizure of infringing copies and delivery of infringing copies to the owner; and
- border enforcement – the act also provides for the prohibition of import and destruction of imported goods that infringe the copyright of a person with the assistance of the customs authorities of India.

Limitation period

40 | Is there a time limit for seeking remedies?

Yes. The period of limitation for filing a suit for damages for infringement of copyright is three years from the date of such infringement.

However, each time there is an infringement, it constitutes a recurring cause of action, which will provide a fresh limitation for filing an action (*M/S Bengal Waterproof Ltd v M/S Bombay Waterproof Manufacturing Company & Another*).

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes. Besides damages the copyright owner can also claim rendition of account of profits.

Attorneys' fees and costs

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

Yes. Litigation costs are a standard request in infringement suits, but the decision to award such costs is at the discretion of the court. Costs awarded seldom cover actual legal expenses. However, the Commercial Courts, Commercial Division and Commercial Division Appellate Division of High Courts Act 2015 brought forth amendments to the Code of Civil Procedure and specifically provides for payments of costs and lays down scenarios in which costs are to be paid and the method used to calculate costs.

Criminal enforcement

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

Yes. The Copyright Act 1957 has provided for the enforcement of copyright through a series of penal provisions under Chapter 13 of the act. The following are the principal penal provisions under the act:

1 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.

2 Section 65A penalises circumvention of effective technological measures that may be applied to copies of a work with the purpose of protecting any of the rights conferred under the act (ie, copyright and performance rights). The punishment under this provision is imprisonment, which may extend to two years and payment of a fine. Section 65A was inserted by the Copyright (Amendment) Act 2012.

3 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.

4 Section 63A provides for an enhanced penalty on second or subsequent convictions under section 63 (see point (1)).

5 Other provisions in Chapter 13 provide penalties for offences such as using infringing copies of a computer program, making or possessing plates for the purpose of making infringing copies of works and making false entries in the Register of Copyrights.

Online infringement

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

Yes. The 2012 amendments to the Copyright 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 a safe harbour to internet service providers that may have accidentally 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 rightsholder 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 copyrighted 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 them 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 their short story has been published on the website of B, they 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 their 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 their 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 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.

As regards online copyright infringement involving intermediaries, section 79(3)(b) of the Information Technology Act 2000 fastens liability on an intermediary if it had actual knowledge of the infringement. 'Actual knowledge' was interpreted by the Supreme Court in the case of *Shreya Singhal v Union of India*, (2013) 12 SCC 73, as meaning knowledge through a court order. However, this requirement was read down for cases involving copyright infringement by the Division Bench of the Delhi High Court in *MySpace Inc v Super Cassettes Industries Ltd*, and now for copyright infringement matters specific knowledge by the intermediary is sufficient, without the need for a court order.

In the case of *Samridhi Enterprises v Flipkart Internet Private Limited & Ors* (CS(COMM) 63 of 2023), it was held by the Delhi High Court that intermediaries are not required to act against alleged infringers on a user's complaint under rule 3 of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Rule 3 is concerned with the infringement of a copyright, patent, trademark or any other proprietary right.

The Delhi High Court, while repudiating the submissions of the counsel for that plaintiff, affirmed that rule 3(2) specifies the requirement for intermediaries to publish the details of the grievance officer and the mechanism by which the users could complain against the violation of the provisions of rule 3 of the Information Technology Rules. On receipt of a grievance, rule 3(2)(a) simply requires the grievance officer to acknowledge the complaint and dispose of it. The clause does not go on to say that the intermediary must take any specific action in response to a notice of infringement, much less take any specific action against the intermediary.

In sharp contrast to the above, the Delhi High Court in the case of *Aaradhya Bachchan v Bollywood Time* (CS(COMM) 230/2023) is examining whether intermediaries such as YouTube are required to take proactive measures to prevent the dissemination of misinformation. The suit was instituted on behalf of the plaintiff by her father – the famous Indian actor, Abhishek Bachchan. Mr Bachchan was aggrieved with objectionable videos of his daughter (ie, fake news about his daughter's health), Aaradhya Bachchan, being circulated on various platforms such as YouTube. The Court ordered several websites to immediately stop disseminating or publishing such objectionable videos and also directed Google (which owns YouTube) to set out its policy in detail to ensure that it is in compliance with

the Information Technology Rules 2021. The Court has indicated that on the next hearing date, it will examine the plea of the plaintiff on how the process of taking down objectionable content from YouTube without any lapse of time should be streamlined.

Prevention measures

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

No degree of vigilance can guarantee an 'infringer-free' environment, but certain deterrent measures must be adhered to by copyright owners, for instance:

- documentation of instances of use;
- registration of copyright;
- proper notice of copyright;
- monitoring the activities of habitual infringers;
- 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).

In the context of 'confidentiality', the Bombay High Court on 30 March 2023 in *Rochem Separation Systems (India) Pvt Ltdv Nirtech Pvt Ltd* held that 'there has to be clear-cut, specific description and data with the Court pertaining to the information in which the plaintiff claims confidentiality. In the absence of such clear-cut information and material, furnished by the plaintiff before the Court, there would be no basis for examining the allegations leveled against the defendants', owing to the fact that the plaintiff had not placed on record the specifics of the confidentiality before the Court. In this case, the Bombay High Court also referred to *Zee Telefilms Ltd and Ors v Sundial Communications Pvt Ltd andOrs*, and *Narendra Mohan Singh and Ors v Ketan Mehta and Ors*, and laid down that the procedure adopted by the Courts of providing the 'information in sealed covers with material particulars' is mandatory and would not amount to the diluting of the information since it would check the veracity of the claims made by the plaintiff thereby adding an interesting twist to the enforcement of the breach of confidentiality claims.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 Which international copyright conventions does your country belong to?

India is a member of the following conventions and agreements that concern its copyright regime:

- the Berne Convention for the Protection of Literary and Artistic Works;
- the Universal Copyright Convention (UCC);
- the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms;

- the Agreement on Trade-Related Aspects of Intellectual Property Rights;
- the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty; and
- the WIPO Copyright Treaty.

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

Due to the ratification of the Berne Convention and the UCC, works first published outside India in any of the convention countries enjoy protection in India that is equal to 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.

UPDATE AND TRENDS

Key developments of the past year

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

The Delhi High Court recently came up with the Live Streaming and Recording of Court Proceedings Rules of the High Court of Delhi 2022. One of the ways whereby the Court aims to curtail misuse of the recordings of court proceedings is by claiming copyright on these recordings. The Court framed these rules as per section 7 of the Delhi High Court Act 1966 (Act 26 of 1966) and article 227 of the Constitution of India. These are applicable to the Delhi High Court and the courts and tribunals over which it has supervisory jurisdiction.

Recently, it was held by the Supreme Court in the case of *M/s Knit Pro International v The State of NCT of Delhi and Anr* (Criminal Appeal No. 807 of 2022) that copyright infringement under section 63 of the Copyright Act 1957 is a cognisable and non-bailable offence. Section 63 discusses the punishment of the offence or infringement of copyright and states that such acts are punishable with imprisonment for a term 'which shall not be less than six months, but which may extend to three years'.

In the case of *JA Entertainment Pvt Ltd v M/s Sithara Entertainment & Ors* (CS(COMM) 191/2022), the rights of copyright owners in relation to the subtitling and dubbing of their work were decided by the Delhi High Court. The plaintiff had been assigned the rights to remake a Malayalam film in Hindi and obtained the dubbing rights for the same. The defendant, on the other hand, had secured the right to remake the Malayalam film in Telegu. However, when the Hindi-dubbed version of the teaser for the Telegu remake (made by the defendant) was shared in public, the plaintiff claimed that his rights had been violated and asked for an interim injunction as a relief contending that the rights of the defendant were limited to making a Telegu remake only. Although the producers of the original Malayalam film agreed with the plaintiff, the Court, after perusing the agreements between the defendant and the original producers of the Malayalam film, determined that since the defendant is the rightful author of the Telegu remake, they also had the right to subtitle as well as dub their work

in Hindi. The Court held that as no exclusive right of the plaintiff was infringed, then hence there was no infringement of copyright.

Recently, in the landmark case of Amitabh Bachchan v Rajat Negi (CS (COMM) 819/2022), the Delhi High Court widened the scope of John Doe orders to protect personality rights for the first time. The plaintiff had inter alia averred in the plaint that 'personality rights' are protected under the Copyright Act 1957 as they are an extension of moral rights that enure to artists. It was submitted that since sections 38, 38A and 38B of the Act grant authors and the performers the right to be given credit and claim authorship of their work, the corollary of this is equally true, in other words, performers have a negative right of restraining others from causing any kind of damage to their work, which in turn disrupts their reputation. In this case, the Court injuncted the known defendants and other John Does from illegally exploiting the famous actor Amitabh Bachchan's rights, including his right to personality, right to publicity, rights under the Copyright Act 1957 and other common law rights, including passing off whether via standard means and modes and including on future mediums inclusive of non-fungible tokens and the Metaverse.

There continues to be a possibility that 'over-the-top' platforms will be regulated by the government. The government issued a gazette notification on 9 November 2020 stating that online films, audiovisual programmes, online news and current affairs content have been brought under the ambit of the Ministry of Information and Broadcasting. However, concrete rules and regulations are yet to come into effect.

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Italy

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Summary

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The main source of law regulating copyright in Italy is Law No. 633 of 22 April 1941 (the Copyright Act), as supplemented and amended by subsequent laws (most recently by Legislative Decree No. 177/2021, which implemented Directive (EU) 2019/790).

The Italian Civil Code also contains some provisions concerning copyright (articles 2575 to 2583).

Moreover, as a member of the European Union, Italy is also subject to European legislation (regulations and directives) concerning copyright.

Finally, Italy is also a member state of several international treaties concerning copyright law, including the Berne Convention for the Protection of Literary and Artistic Works of 1886.

Enforcement authorities

2 | Who enforces it?

Copyright can be enforced before civil courts that specialise in intellectual property matters (created by Legislative Decree No. 168/2003). An action may be brought by the copyright holder, the author or their heirs, as well as by an exclusive licensee (it is still disputed whether the non-exclusive licensee can enforce copyright). Finally, the Italian Society of Authors and Publishers (SIAE) can also enforce copyright on behalf of its members.

Moreover, in 2018 (Resolution No. 490/18/CONS), the independent Italian Communications Regulatory Authority (AGCOM), which was established in 1997 as the national media regulatory body, introduced some amendments to the existing regulation on copyright enforcement in electronic communications networks. The above-mentioned claimants may consequently also seek a remedy for copyright violations before the AGCOM, which has specific powers for further combating copyright infringement, such as the power to adopt precautionary measures against specific violations. For example, the AGCOM can, following a specific

administrative procedure, order that an internet service provider remove or block access to websites hosting copyright-infringing materials.

Following the implementation of Legislative Decree No. 177/2021, the AGCOM now also has the power to:

- issue a decision on a complaint lodged by the copyright holder against decisions of the online content-sharing service provider (OCSSP) not to remove or disable content that is allegedly infringing its rights (article 102-decies, Copyright Act); and
- determine fair compensation for press publishers for the online use of their journalistic content by information society service providers (ISSPs), in case they fail to negotiate a fee for such use.

Online and digital regulation

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

Article 70(1-bis) of the Copyright Act allows the publication, through the internet, of low-resolution or degraded images and music for educational or scientific purposes only, provided that such use is not for profit.

Moreover, through the implementation of Legislative Decree No. 177/2021 the following additional provisions on the digital exploitation of copyright-protected works were introduced:

- the right of press publishers to receive fair compensation from ISSPs for the online publication – upon authorisation – of their journalistic work (article 43-bis, Copyright Act). Authorisation and compensation are not required for private and non-commercial uses, acts of hyperlinking, use of single words or very short extracts. On February 24 2023 the AGCOM adopted the regulation to provide criteria to determine the amount of fair compensation;
- the right of the authors to receive, from press publishers, a fair amount, which is to be calculated between 2 per cent and 5 per cent of the compensation received by the press publishers from the ISSP;
- the necessity for OCSSPs to obtain authorisation from the rightsholders (ie, through a licence agreement) to make copyrighted works available to the public on their platforms, even if such content is uploaded by the users of the OCSSP (article 102-sexies, Copyright Act). If no authorisation is granted, OCSSPs shall be liable for unauthorised acts of communication to the public of copyrighted works, unless they demonstrate that they have (1) made their best efforts to obtain an authorisation, (2) made their best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information, and (3) in any event, acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to or to remove from their websites the works or other subject matter flagged by the rightsholders, and made their best efforts to prevent future uploads of the same (article 102-septies, Copyright Act).

Extraterritorial application

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

Yes, according to Italian case law, in a certain way, copyright laws are applicable to foreign-owned or foreign-operated websites that infringe copyright, as long as the infringing material is directed at the Italian public or is visible from Italy. In particular, the consequence of such content on a foreign-owned or foreign-operated website is that it would be blocked in Italy.

Agency

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

Until 2017, the SIAE was the only administrative body acting as a register and a collecting society of authors, publishers, composers and other owners of copyright. From 2017, it became possible for other organisations to perform the same functions, according to the provisions under Legislative Decree No. 35/2017 (see article 180 of the Copyright Act).

The main function of these organisations is intermediation in the field of authors' rights. They are entrusted with authorising the use of works, collecting fees due from users and distributing fees to the rightsholders.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

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

Article 2 of Law No. 633 of 22 April 1941 (the Copyright Act) protects creative works of literature, music, fine arts, architecture, theatre and cinematography, computer programs, databases and, under specific conditions, objects of industrial design. According to Italian case law and doctrine, this list is 'open', ie, it can be extensively interpreted and thus does not exclude the potential for other creative works to be protected by copyright.

Rights covered

7 | What types of rights are covered by copyright?

Copyright law covers the moral rights (article 20 of the Copyright Act) and economic rights (article 12) of the author or rightsholder.

Excluded works

8 | What may not be protected by copyright?

An idea that is not expressed in any form or expression cannot be protected by copyright (article 1 of the Copyright Act).

Moreover, the official documents of Italy and of the Italian and foreign public administrations are excluded from copyright protection as well (article 5).

Fair use and fair dealing

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

In Italy, the doctrine of fair use has not been implemented. However, some limitations to the exclusive right of the copyright owner are set forth in the following articles of the Copyright Act:

- Article 70, which provides that summaries, quotations, reproductions and communications to the public of mere abstracts of works are allowed, if carried out for criticism or discussion purposes, or for teaching or scientific research purposes. This also holds for summaries, quotations, reproductions and communications to the public of mere abstracts of works carried out through digital means, provided that such uses take place under the responsibility of the educational institution in a secure digital environment, accessible only to staff and students of the institution (article 70-bis).
- Article 70-ter, which allows the reproduction of copyrighted works made by research institutes (such as universities or other research institutes operating without a commercial aim and pursuing purposes of public interest) and institutions for the protection of cultural heritage (such as libraries, museums or archives open to the public) for scientific research purposes, in order to extract text and data from works available in the databases to which they have access.
- Article 70-quater, which allows the acts of reproduction and extraction of text and data from copyrighted works that are contained in networks or databases that are accessed legally, provided that the copyright owners or the database owner did not expressly restrict the use of the works. Such reproduction or extractions may be stored only as long as is necessary for the purpose of text and data extraction.
- Article 70-sexies, which provides that when a copyright owner adopts technological measures to protect their work, educational institutions and research institutes and institutions that have legally acquired a sample of such work may extract a copy of it, provided that such copy does not infringe the copyright of the owner.
- Article 68(2-bis), according to which the institutions for the protection of cultural heritage may always make a copy of the copyrighted works that are permanently present in their collections.

More in general, Italian case law's conclusion with reference to fair use, as recently confirmed by an interesting decision by the Italian Supreme Court discussing the caricature of a character protected under copyright, is that the exploitation of any protected work or content can be considered fair only if it does not cause prejudice to the interest (including economic) of the author of the original work.

Architectural works

10 | Are architectural works protected by copyright? How?

Architectural works are protected as long as they manifest the personal imprint of the author and can be recognised as their unique creation due to precise choices in the composition of their elements. The choices must not be dictated by the necessity to solve a technical or functional problem (article 2 of the Copyright Act).

Performance rights

11 | Are performance rights covered by copyright? How?

Performance rights are covered by Italian copyright law (article 80 et seq of the Copyright Act). In particular, performers (including voice actors) have the exclusive right (for 50 years following the performance) to authorise the reproduction, distribution or rental of their performance (article 85).

According to the Copyright Act, a performer can also enforce their moral rights against any communication or reproduction of their performance that might be prejudicial to their honour or reputation (article 81).

Moreover, performers who transfer or license the rights of exploitation of their works are entitled to receive compensation that is adequate and proportionate to the value of their rights and to the revenue generated by the exploitation (article 107, Copyright Act). With specific regard to cinematographic works, the primary and co-primary performers are entitled to receive additional compensation as a percentage of the revenue generated from public viewings of the work (article 46, Copyright Act).

Performers (as well as authors) are also entitled to receive additional adequate compensation in cases that agreed on in the licence or transfer agreement turns out to be disproportionately low compared with the revenue generated by the exploitation of the works (article 110-quinquies, Copyright Act).

Neighbouring rights

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

Italian copyright law recognises specific rights for those individuals who have certain connections to the author of the work. These rights protect interests related to the exercise of the author's rights and work that are the result of an industrial activity in the cultural and creative field. In addition to performers, the most important neighbouring rights are those reserved for:

- phonographic producers (article 72 et seq of the Copyright Act);
- producers of cinematographic or audiovisual works (article 78-bis et seq);
- radio and television broadcasting companies (article 79 et seq); and
- photographs (article 87 et seq).

Neighbouring rights are characterised by a shorter period of protection than copyright.

Moral rights

13 | Are moral rights recognised?

Moral rights are recognised under Italian copyright law (article 20 of the Copyright Act). They correspond to the right of the author to be recognised as author of the work (right of paternity) and prevent any third party from modifying the work without the author's permission (right of integrity). Moral rights are perpetual and cannot be assigned or waived (article 22 to 23).

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No, there is no general requirement of copyright notice.

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

None, since copyright notice is not required by law.

Deposit

16 | Is there a requirement of copyright deposit?

Article 105 of Law No. 633 of 22 April 1941 (the Copyright Act) provides a general requirement of copyright deposit, requiring authors and producers to file a copy of the work with the Office of the President of the Council of Ministers within 90 days of publication or the start of the commercialisation of the work (this term is 60 days from the first representation, showing or public performance for works of public entertainment).

This deposit obligation does not apply to photographs, except for those photographs that reproduce works of figurative or architectural art or photographs of a technical or scientific nature or outstanding artistic value (article 105, paragraph 4 of the Copyright Act).

Moreover, article 103 provides for the possibility to deposit, on a voluntary basis, a work of software with the register kept by the Italian Society of Authors and Publishers. This registry indicates the name of the owner of the economic rights and the date of publication of the software (publication being the first act of exercise of the exclusive rights).

Nevertheless, those deposits rarely take place in practice and the failure to make the deposit is not sanctioned by the law.

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

Article 106 of the Copyright Act provides that the failure to make a copyright deposit does not affect the acquisition and exploitation of the economic rights of the copyright over a protected work.

Nevertheless, the copyright deposit may be useful as proof of authorship and to establish the date of creation and date of publication of the works, in case they are disputed (article 103, paragraph 5).

Registration

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

No, Italian legislation does not provide for a copyright registration system.

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

No, there is no mandatory or voluntary registration. The Copyright Act provides a general requirement of copyright deposit, requiring authors and producers to file a copy of the work with the Office of the President of the Council of Ministers within 90 days of publication or the start of the commercialisation of the work.

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

Italian legislation does not provide for a copyright registration system.

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

Italian legislation does not provide for a copyright registration system.

OWNERSHIP AND TRANSFER

Eligible owners

22 Who is the owner of a copyrighted work?

In general terms, the owner of a copyrighted work is its creator, the author. More specifically, article 8 of Law No. 633 of 22 April 1941 (the Copyright Act) stipulates that the author is considered to be the person identified as such in the forms of use (ie, the person who is announced as such in the recitation, representation, performance or broadcasting of a protected work).

Specific rules are provided in these cases:

- the author or owner of collective works (ie, works consisting of different and separate contributions coordinated for a specific and common purpose) is the person who organises and coordinates the creation of the work (article 7 of the Copyright Act);
- works that are made with the indistinguishable and inseparable contribution of several persons belong to all such persons, collectively (article 10); and
- works made and published in the name, on behalf of and at the expense of the state administrations belong to the state administrations (article 11 of the Copyright Act). The same applies for non-profit-making organisations, academies and other cultural organisations with reference to their records or publications (or both).

Employee and contractor work

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

Yes, the exploitation rights of certain copyrighted works, in particular software, databases and industrial design (see article 12-bis and 12-ter of the Copyright Act), made by employees in the performance of their duties are automatically owned by the employer. The owner, in this case, is not the author.

In all other cases, such ownership is not automatic: the alleged owner must be able to offer written evidence of their rights.

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

Yes, the exploitation rights of a copyrighted work made by an independent contractor are owned by the hiring party. Such ownership is automatic; thus, a written agreement is not necessary, but it is always advisable to be able to provide written evidence of the hiring relationship.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. This is the case in works of joint authorship, which are created by several persons whose contributions are indistinguishable and inseparable. Copyright of those works is jointly co-owned by all co-authors and is governed by the provisions on community of property (article 1100 et seq of the Italian Civil Code). In such cases, all co-owners may individually act to defend the moral rights of a co-owned work.

By contrast, the publication, modification or new use of the work in a form other than that of its first publication must be approved by all the co-authors (article 10 of the Copyright Act). However, in the event of an unjustified refusal by one or more of the co-authors, the publication, modification or new use of the work may be authorised by the judicial authorities.

Transfer of rights

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

Yes, the economic exploitation rights of a copyrighted work may be transferred by deed between living persons or mortis causa (article 107 of the Copyright Act), and the transfer must be proved in writing (article 110). The transfer agreement may include all of the exploitation rights or only some of them, in which case the other rights remain at the assignor's disposal (article 119). Furthermore, the transfer of some exploitation rights does not extend to the rights to use any elaboration or transformation of the copyrighted work (article 119).

Specific rules apply in the following cases.

- The transfer of one or more copies of a copyrighted work does not imply, unless otherwise agreed, the transfer of the exploitation rights as well (article 109). However, the transfer of a mould or other medium used to reproduce a work of art entails, unless otherwise agreed, the right to reproduce the work itself (article 109).
- After the artist's death, the exploitation right of the works, unless otherwise indicated by the artist, is shared by all heirs for three years, after which the heirs may decide whether to maintain the exploitation right as community property and for how long (article 115).
- In the case of an editing contract, the editor cannot transfer the acquired exploitation rights to third parties, unless otherwise agreed or in the case of transfer of the company (article 132).

Moral rights cannot be transferred and remain at the disposal of the author and of their heirs.

Licensing

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

Economic rights in copyrighted works may be licensed according to the general rules and procedures provided by the Italian Civil Code on freedom of contract. As with transfer agreements, the existence of a licence agreement must be proved in writing, although it may (at least in theory) also be concluded orally (article 110 of the Copyright Act).

28 | Are there compulsory licences? What are they?

No, there are no compulsory licences for copyright under Italian law.

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

The licensing activity can be carried out by the Italian Society for Authors and Editors as well as other organisations that respect the provisions indicated in Legislative Decree No. 35/2017 (see article 180 of the Copyright Act).

In particular, those organisations shall:

- grant licences and authorisations for the economic exploitation of copyrighted works (article 180, paragraph 2 of the Copyright Act) – such licensing shall take place on

fair and non-discriminatory commercial terms, based on simple, clear, objective and reasonable criteria, and the fees shall be agreed on the basis of the economic value of the use of the rights, considering the nature and extent of the use of the copyrighted works (article 22, Legislative Decree No. 35/2017); and

- collect the proceeds of such licences and authorisations and distribute such sums regularly among the rightsholders (article 180, paragraph 2 of the Copyright Act) – such distribution shall take place within nine months of the end of the financial year in which the proceeds were received (article 1 of Legislative Decree No. 35/2017).

The copyright holders, when entrusting the management of their rights to one of those organisations, must specify in writing which rights they intend to entrust (article 4 of Legislative Decree No. 35/2017).

Nevertheless, licences, as well as any other economic right, may also be handled by the authors or their heirs or successors in title directly (article 180, paragraph 4 of the Copyright Act).

Termination

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

According to article 110-septies of the Copyright Act, in case of failure to exploit the rights deriving from the licensed or transferred work within the date established in the contract (and in any case, no longer than five years, or two years after the work was made available by the author), the author of the work can ask for termination of the agreement providing for the licence or transfer of their rights, or revoke any exclusivity provisions of the contract.

In any other case, general rules in contractual matters are applicable.

Recordal

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

Deeds drawn up by living persons transferring all or part of the economic rights and other transactions related to rights on copyrighted works can be registered at the Office of Literary, Artistic and Scientific Property, established at the Office of the President of the Council of Ministers. The following must be filed: (1) a certified copy of the deed or the original of a private contract with certified signatures, accompanied by a copy of the deed; and (2) a declaration in duplicate containing the applicant's data, the nature and date of the deed to be registered, the name of the public official who received the act and authenticated the signatures, and the registration number of the deposit of the protected work (article 104 of the Copyright Act).

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection begins with the creation of a work in an expressive form (article 6 of Law No. 633 of 22 April 1941 (the Copyright Act) and article 2576 of the Italian Civil Code), as the mere idea cannot be protected. However, it is not required that the work is fixed in a material support, as oral communication (eg, a professor's lecture) can be protected as well.

Indeed, there is no general requirement of notice, registration or deposit of the work to obtain protection, although article 105 of the Copyright Act formally provides that the work must be deposited with the Office of the President of the Council of Ministers. The failure to make such a deposit does not affect the acquisition or exercise of the economic exploitation rights in the work, as provided by the subsequent article 106 of the Copyright Act.

Duration

33 | How long does copyright protection last?

The protection of moral rights is perpetual and, after the author's death, the rights belong to their spouse, children, and other ascendants and descendants (article 23, Copyright Act).

Economic rights are granted for the life of the author plus 70 years after their death (article 25, Copyright Act). Specific rules are provided in the following cases:

- The protection of anonymous or pseudonymous works expires 70 years after the first publication of the works, as long as the pseudonym is such as to guarantee the author's anonymity (article 27). However, if the author's name is disclosed – either by the author or by their heirs or authorised persons – before the expiry of that date, protection of the economic rights is granted for 70 years after the artist's death, according to the general rule.
- The copyright protection for works of joint authorship (ie, works created with the indistinguishable and inseparable contributions of several persons) expires 70 years after the death of the last surviving co-author (article 26, paragraph 1).
- The copyright protection for collective works (ie, works consisting of different and separate contributions coordinated for a specific and common purpose) expires 70 years after the first publication, and the protection period for each contribution runs from its respective author's death (article 26, paragraph 2).
- The copyright protection for posthumous works (ie, works published for the first time after the author's death) expires 70 years after the author's death (article 31). However, the lawful publication of a work for the first time after the expiry of that protection period guarantees the rights of economic exploitation of the work for a period of 25 years after the first publication (article 85-ter).
- The copyright protection for works published in separate and subsequent volumes and parts runs from the publication of each volume or part (article 30).
- The copyright protection for cinematographic works expires 70 years after the death of the last surviving contributor among the following persons: the artistic director, the

authors of the screenplay and the composer of the music specifically created for that work (article 32).
- The right to receive compensation for the online publication of journalistic works is effective starting 1 January of the year after publication and lasts for two years after publication (article 43-bis, Copyright Act).

Specific rules are also provided for 'neighbouring rights' (the rights granted to other persons who are connected with the author of the work and who offer the work for public use), as follows:

- The rights of the performing artists, of the producers of phonograms and cinematographic works, and of radio or television broadcasting, last for 50 years respectively from the first performance, fixation or broadcast of the works (articles 75, 78-ter, 79 and 85 of the Copyright Act).
- The rights of the author of critical and scientific editions of a work in the public domain last for 20 years from the first lawful publication of the edition (article 85-quater).
- The rights of the author of 'simple photographs' (ie, photographs that have no artistic value) last for 20 years from when they were produced (article 92). By contrast, the duration of protection for photographs reproducing works of figurative or architectural art or that have a technical or scientific nature or outstanding artistic value is 40 years, starting from the mandatory deposit of the work with the Office of the President of the Council (as required by article 105).
- The right to obtain compensation for an engineering project work lasts for 20 years from the mandatory deposit of the work at the Office of the President of the Council (article 99).

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

In general terms, copyright duration does not depend on when the work was created or published; it depends only on the life of the author.

However, in some cases, the duration of protection specifically depends on the date of publication or creation of a work. According to the Copyright Act:

- anonymous or pseudonymous works are protected for 70 years after first publication (article 27);
- collective works consisting of different and separate contributions coordinated for a specific and common purpose are protected for 70 years after first publication (article 26, paragraph 2);
- works published in separate and subsequent volumes and parts are protected from the publication of each volume or part (article 30);
- 'simple photographs' (ie, photographs that have no artistic value) are protected for 20 years from their production (article 92);
- photographs reproducing works of figurative or architectural art or that have a technical or scientific nature or outstanding artistic value are protected for 40 years from the mandatory deposit of the work, as required by article 105;
- engineering project works compensation right lasts 20 years from mandatory deposit at the Office of the President of the Council (article 99);

- protection of performing artists, producers of phonograms and cinematographic works, and of radio and television broadcasting, lasts 50 years respectively from the first performance, fixation or broadcast of the work (articles 75, 78-ter, 79 and 85); and
- the right to receive compensation for the online publication of journalistic works is effective starting 1 January of the year after publication and lasts for two years after publication (article 43-bis, Copyright Act).

Renewal

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

It is not possible to renew the term of copyright protection under Italian law. Once the protection period has lapsed, the work becomes part of the public domain and is freely available to everyone, except in the case that the work is protected under the Italian Code of Cultural Heritage (Legislative Decree No. 42/2004 (article 32-quater, Copyright Act)).

Government extension of protection term

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

The term of copyright protection was extended from 50 to 70 years by Law No. 52 of 6 February 1996 (article 17), which also extended the protection term for performing artists, producers of phonograms, cinematographic works and radio or television broadcasting, to 50 years.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

The general rule is that any unauthorised use of protected works by a third party constitutes copyright infringement.

Law No. 633 of 22 April 1941 (the Copyright Act) provides the following exceptions:

- the making of a copy of a volume or of a work or article for private use (article 68);
- the making of a copy, by the institutions for the protection of cultural heritage, of the works that are permanently present in their collections (article 68, paragraph 2-bis);
- the reproduction or communication to the public of articles concerning arguments of an economic, political or religious nature, provided that the name of the author, the source and the date of publication are specified and the reproduction and communication have not been expressly reserved (article 65);
- the reproduction and communication of summaries or quotations of works, provided that they are carried out for criticism or discussion purposes or for teaching or scientific research purposes, and that such use is not for commercial purposes (article 70). This is valid also for summaries, quotations, reproductions and communications to the public of mere abstracts of works carried out through digital means, provided that such

use takes place under the responsibility of the educational institution in a secure digital environment that is accessible only to staff and students of the institution (article 70-bis);
- the reproduction of copyrighted works made by research institutes and institutions for the protection of cultural heritage for scientific research purposes to extract text and data from works and materials available in the accessible database (article 70-ter);
- the reproduction and extraction of text and data of copyrighted works contained in networks or databases that are accessed legally, provided that the copyright owners or the database owner did not expressly restrict the use of the works (article 70-quater); and
- when a copyright owner adopts technological measures to protect their work, the educational institutions and research institutes and institutions that legally acquired a sample of such work may extract a copy of it, provided that such copy does not infringe the copyright of the owner (article 70-sexies).

Vicarious and contributory liability

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

Under Italian law, there is no distinction between primary or secondary infringement or liability. The general rule is that any unauthorised use of a protected work falls under copyright infringement and any user engaging in such an act is liable for infringement. As to contributory liability, article 156 of the Copyright Act specifically provides for the liability of intermediaries (such as internet service providers) whose services are used for the purpose of infringing a protected work.

Available remedies

39 | What remedies are available against a copyright infringer?

The main remedy under Italian copyright law is a permanent injunction against the infringer (article 156 of the Copyright Act). Other available remedies are:

- delivery up or destruction of the infringing products or materials (article 158);
- seizure or description of infringing products or materials (article 161);
- withdrawal or recall of the infringing goods from the market (article 158); and
- publication of the decision in the press or on the internet (article 166).

Limitation period

40 | Is there a time limit for seeking remedies?

Under Italian law, it is possible to enforce rights within the general duration of the single copyright. That said, for seeking remedies such as an interim injunction or seizure, Italian case law requires the existence of *periculum in mora*, which means that the applicant will suffer serious and irreparable damage if the infringement is not immediately stopped.

Monetary damages

41 | Are monetary damages available for copyright infringement?

According to article 158 of the Copyright Act, monetary damages are granted to the copyright holder. The award of damages can be calculated by the court based on the infringer's profit or on the 'cost of consent', or both. The cost of consent is a virtual royalty that would have been applied if the infringer had obtained a regular licence.

Moreover, if an injunction is ordered, the court can also provide for a penalty to be paid for further infringements carried out in violation of the order.

In terms of recovering damages, according to article 2947 of the Italian Civil Code, a claimant can recover damages only for the five years preceding the beginning of the action.

Attorneys' fees and costs

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

Yes, attorneys' fees and costs can be claimed. The general principle is that the losing party bears the costs of the action as well as attorneys' fees (article 91 of the Italian Code of Civil Procedure).

Criminal enforcement

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

Specific cases where the copyright infringement constitutes a crime under Italian criminal law provisions include the following:

- The wilful reproduction, transcription, offer for sale, performance, broadcast communication to the public or distribution of a third party's work without consent, or publishing online a copyrighted work, is punishable with a fine. If the infringing acts concern a work not intended for publication, or they constitute infringement of the author's right of paternity or of the integrity of the work, the punishment may include imprisonment (article 171 of the Copyright Act).
- The unlawful reproduction, import or distribution in Italy of computer programs or databases for profitable purposes can be punished by imprisonment and a fine (article 171-bis).
- Reproduction, broadcasting or disseminating of a work intended for television or cinematographic distribution, or in cases of offering for sale or hire recordings of musical, cinematographic or audiovisual works, literary, dramatic, scientific, musical or multimedia works (article 171-ter), can be punished by imprisonment and a fine.

Online infringement

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

According to Resolution No. 490/2018 of the Italian Communications Regulatory Authority (AGCOM) and article 102-decies of the Copyright Act, there are specific procedures that can be used for removing copyright-infringing material from the internet.

As to liabilities, according to article 102-sexies of the Copyright Act, online content-sharing service providers are liable for giving access to copyrighted content uploaded by their users if they did not obtain the necessary authorisation from the rightsholder, unless they demonstrate that they have (1) made their best efforts to obtain an authorisation, (2) made their best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information, and (3) in any event, acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to or to remove from their websites the works or other subject matter flagged by the rightsholders, and made their best efforts to prevent future uploads of the same (article 102-septies, Copyright Act).

Moreover, the AGCOM may impose administrative sanctions on the information society service providers in the event that they refuse to provide the information necessary to determine the amount of fair compensation due to the press publishers for the online use of their journalistic content (article 43-bis, Copyright Act).

Prevention measures

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

According to Regulation (EU) No. 608/2013 concerning customs enforcement of intellectual property rights, customs authorities must suspend the release of an imported good if they suspect that it may infringe an intellectual property right, including copyright.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 Which international copyright conventions does your country belong to?

Italy belongs to the following conventions:

- the Berne Convention for the Protection of Literary and Artistic Works, ratified by Law 399/1978;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- the World Intellectual Property Organization (WIPO) Copyright Treaty; and

- the WIPO Performances and Phonograms Treaty.

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

EU and international law prevails over Italian legislation.

UPDATE AND TRENDS

Key developments of the past year

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

No relevant interventions were passed or proposed within the past 12 months.

That said, Italian doctrine is currently engaged in an extensively debated topic concerning the ownership of the copyright of artistic works made through AI and, more in general, the protectability of an AI realisation. At the moment there are no provisions, either internal or EU, to specifically regulate the AI phenomenon; the only law of support in Italy is still Law No. 633 of 22 April 1941 (the Copyright Act), according to which copyright protection applies (only) to works created by human beings.

The theoretical exclusion of AI-generated works from copyright protection is actually superseded by Italian doctrine with the prospect of an extensive application of article 12-bis of the Copyright Act, identifying the owner of the copyright as the programmer or user of an AI system or, on the basis of article 7 of the Copyright Act, considering the author of what can be defined as a 'collective work' as the person who organised and directed the process of creation of the work itself.

Very recently in January 2023, the Italian Supreme Court (confirming the necessity to regulate this new phenomenon organically) stated a certainly relevant principle in this regard: the fact that the use of software in the realisation of an artistic work does not exclude per se the presence of human creativity (which, under Copyright Act is necessary for obtaining the copyright protection) but, where the element of human creativity is challenged, it will be necessary to give evidence about whether and to what extent the use of the tool 'absorbed' the creativity of the artist who used the software.

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RETURN TO CONTENTS

Summary

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

Relevant legislation includes:

- the Copyright Act (Act No. 48 of 1970);
- the Act on Registration of Program Works (Act No. 65 of 1986);
- the Act on Management Business of Copyright and Neighbouring Rights (Act No. 131 of 2000);
- the Intellectual Property Basic Act (Act No. 122 of 2002);
- the Act for Improvement of Creation, Protection and Utilisation of Contents (Act No. 81 of 2004);
- the National Diet Library Act (Act No. 5 of 1948); and
- relevant regulations relating to these statutes.

Enforcement authorities

2 | Who enforces it?

Copyright-related legislation is enforced by the district courts, the Intellectual Property High Court (for civil cases), other high courts (for criminal cases and civil cases having jurisdiction other than the Tokyo High Court), and the Supreme Court of Japan. The Intellectual Property High Court was established on 1 April 2005 as a special branch of the Tokyo High Court that exclusively hears intellectual property cases.

Online and digital regulation

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

Yes. There are some specific provisions addressing the digital exploitation of works under the Copyright Act that have been amended and expanded to keep up to date with the digital society, for example:

- rights of public transmission (article 23);
- compensation for private sound and visual recording (article 30, section 2);
- copying by the National Diet Library for the collection of internet material (article 42–2);
- ephemeral reproduction for maintenance or repairs on reproducing machines with built-in memory (article 47–4); and
- copying for information analysis (article 47–7).

Extraterritorial application

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

While there is no specific provision addressing extraterritorial application to deal with foreign-owned or foreign-operated websites, protected works (such as works of Japanese nationals, works first published in this country (including those first published outside Japan but subsequently published in Japan within 30 days thereof) and works that Japan has the obligation to grant protection to under international treaties) are protected under the Copyright Act. If the infringed work is protected in this way, then the Act will generally apply to a foreign-owned or operated website that infringes copyright; however, there is some controversy in relation to extraterritorial application. Some guidance is provided by judicial precedents accepting application of the Copyright Act of Japan, in accordance with article 5, section 2 of the Berne Convention for the Protection of Literary and Artistic Works:

> *The enjoyment and exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his or her rights, shall be governed exclusively by the laws of the country where protection is claimed.*

Agency

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

The Agency of Cultural Affairs (ACA) is the primary agency for handling copyright-related issues. The ACA registers copyrighted works – although registration is not mandatory in Japan – with the exception of computer programs, which are registered at the Software Information Centre.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

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

Works in which thoughts or sentiments are expressed in a creative way, and that fall within the literary, scientific, artistic or musical domains, are copyrightable. The following are all copyrightable:

- novels;
- play or film scripts;
- dissertations, lectures and other literary works;
- musical works;
- choreographic works and pantomimes;
- paintings, engravings, sculptures and other artistic works;
- architectural works;
- maps and diagrammatic works of a scientific nature, such as drawings, charts and models;
- cinematographic works;
- photographic works; and
- computer programs.

Rights covered

7 | What types of rights are covered by copyright?

Rights of reproduction, performance, screen presentation, public transmission, recitation, exhibition, distribution, ownership transfer, rental, translation and adaptation are covered by copyright.

Excluded works

8 | What may not be protected by copyright?

The following works may not be protected by copyright:

- the Constitution and other laws and regulations;
- public notices, instructions, circular notices and the like issued by public entities;
- judgments, decisions, orders and decrees of courts;
- rulings and judgments made by government agencies;
- translations and compilations prepared by public entities;
- current news reports and miscellaneous reports having the character of mere communication of fact; and
- ideas without any creative expression, even if the idea is unique.

In addition, utility articles, applied arts and designs for utilities in which thoughts or sentiments are not expressed in a creative way and that fall within the literary, scientific, artistic or musical domains may not be protected by copyright.

Read this article on Lexology

Fair use and fair dealing

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

While there was no general doctrine of 'fair use' in Japan prior to the amendment in 2018, there have been some equivalent exemptions provided by the Copyright Act, such as:

- quoting from and exploiting a work already made public fairly and to the extent justified by the purpose of the quotations;
- private use, to a limited extent;
- consequent copy of copyrighted work, to a limited extent;
- use of copyrighted work for consideration before licensing, to a limited extent;
- test use of publicised work, to a limited extent;
- reproduction in libraries;
- reproduction in school textbooks, schools and other educational institutions;
- use for those with disabilities; and
- reproduction for judicial proceedings.

In addition to those exemptions, the amendment in 2018 introduced the following new exemptions:

- certain actions that are usually considered not to harm copyright owners' interests (articles 30–4 and 47-4); and
- certain actions that may cause only minor harm to copyright owners (article 47-5).

The amendment in 2018 aimed to extend the scope of rights restriction provisions to balance the fair use of copyrighted works and the proper protection of copyright to correspond with the move towards digitisation and networking.

Article 30-4 of the Copyright Act permits the free use of copyrighted works to the extent considered necessary where the intended use of such works is not the enjoyment of the ideas or emotions expressed therein. In such circumstances, the works' use would usually not impair the copyright owner's interests. Therefore, these circumstances have been added to the exclusive list of rights restriction provisions. In addition to the general framework for determining whether a certain unlicensed use is permitted, article 30-4 states that the unlicensed use of copyrighted works is permitted where it is required to:

- test the development of technology for the use of copyrighted works or similar;
- analyse information; or
- process information using electronic computers without human recognition.

Article 47-4 permits the use of copyrighted works without the copyright owner's authorisation to the extent necessary to ensure the smooth or efficient use of the copyrighted works in computers or to maintain or restore their state of use. As with article 30-4, article 47-4 provides a list of circumstances in which the use of works would usually not impair the copyright owner's interests. Article 47-4 provides some specific applicable circumstances and the general framework for determining whether a certain unlicensed use is permitted. As a consequence, creating a cache for speeding up information processing through a

network and the temporary copying of data to media from a portable audio player during its exchange to another party can be performed without the copyright owner's authorisation under article 47-4.

Article 47-5 permits the unlicensed use of copyrighted works where the use is minor and forms part of information processing by computers and the provision of the results thereof. Article 47-5 provides circumstances in which the use of works could cause only minor harm to the copyright owner's interests. Unlike articles 30-4 and 47-4, article 47-5 identifies only specific applicable circumstances where a person searches for or analyses information and provides the results thereof, although to meet future needs the government can add certain circumstances to this category by a cabinet order. Notably, under article 47-5, the extent of the use must be minor. For example, locating a certain book using specific keywords and displaying a part thereof with the keywords can be done without the copyright owner's authorisation.

Architectural works

10 | Are architectural works protected by copyright? How?

Yes. Architectural works in which thoughts or sentiments are expressed in a creative way and that fall within the literary, scientific, artistic or musical domains are protected by copyright.

Architectural works protected by copyright have the same general rights as copyright, except the right to maintain integrity. The author of an architectural work is required to accept the modification of the work by way of extension, rebuilding, repairing or remodelling. In addition, the exploitation of architectural works located permanently in open space shall be permitted except for the (imitative) reproduction of an architectural work and the offering of such reproduction to the public by transferring ownership of it.

Performance rights

11 | Are performance rights covered by copyright? How?

A performer has the moral right to:

- indicate his or her name and to preserve integrity;
- make sound or visual recordings;
- broadcast and to wire-broadcast;
- make his or her performance transmittable;
- transfer ownership; and
- offer his or her performance to the public by rental as neighbouring rights.

In addition, a performer has the right to receive secondary use fees from broadcasting organisations or wire-broadcasting organisations using commercial phonograms incorporating a sound recording of the performance through designated organisations (this right is not deemed to be a neighbouring right).

Neighbouring rights

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

Yes. Producers of phonograms, broadcasting organisations and wire-broadcasting organisations all have neighbouring rights.

Moral rights

13 | Are moral rights recognised?

Yes. An author shall have the right to make the work and derivative works thereof public; to determine how the author's name is shown (whether it is his or her true name or a pseudonym); and to maintain the integrity of his or her work and its title, without distortion, mutilation or other modification against the author's will.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No. However, many authors do put copyright notices on their works to help prevent copyright infringement.

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

There is no requirement to use a copyright notice.

Deposit

16 | Is there a requirement of copyright deposit?

No. However, there is a similar requirement to deposit a copy of a publication in the National Diet Library in order to maintain the publication as public property for public use and record in accordance with the National Diet Library Act. If a governmental institute publishes a piece of work, that institute deposits multiple copies to be used for the discussion of national issues and international cooperation.

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

When a publisher fails to make a deposit within 30 days after publishing without reasonable cause, an administrative fine of not more than five times the price of the book may be imposed.

Registration

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

A work may be protected by copyright without any copyright registration. However, the transfer (other than by inheritance or another form of succession) of copyright or a restriction on the disposal of the copyright, and the establishment, transfer, modification or termination of a pledge on a copyright, or a restriction on the disposal of a pledge established on the copyright, may not be asserted against a third party unless the work has been registered.

In addition, the author of a work that is made public, anonymously or pseudonymously, may have his or her true name registered with respect to said work, regardless of whether he or she actually owns the copyright therein; the copyright holder of any work, or the publisher of an anonymous or pseudonymous work, may register the said work's date of first publication or the date when the work was first made public.

Furthermore, the author of a computer program may register the date of the creation of his or her work within six months of the work's creation.

In practice, the copyright registration system is used in a limited number of situations, such as attachment security on musical copyright work in a financial transaction.

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

Copyright registration is not mandatory.

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

The fee for registering 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 registering the transfer of copyright is ¥18,000. The fee for registering the transfer of neighbouring rights is ¥9,000. The fee for the establishment of the right of publication is ¥30,000. In addition to the above, a registration fee of ¥47,100 per software applies in the case of computer software.

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

The rightsholder or author may not assert his or her rights against a third party unless registered.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The author of a copyrighted work is its owner. Since copyright may be transferred, the assignee may become the owner of the work; this excludes moral rights, which may not be transferred.

Exemptions to this principle are authorship of a work made by an employee and authorship of a cinematographic work.

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.

Authorship of a cinematographic work shall be attributed to those who, by taking charge of producing, directing, filming and art direction, etc, have creatively contributed to the creation of such cinematographic work as a whole, with the exception of authors of novels, play and film scripts, music or other works adapted or reproduced in such a cinematographic work.

Employee and contractor work

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

Yes. With the exception of computer programs, the authorship of a work that, on the initiative of a juridical person (such as a company) or other employers, is made by an employee in the course of the performance of his or her duties in connection with the employer's business and is made public by the employer as a work under its own name, shall be attributed to the employer, unless there are contract or work regulations that provide that the work should be attributed to the employee who created the work.

The authorship of a computer program work that, on the initiative of a juridical person (such as a company) or other employers, is made by an employee in the course of his or her duties in connection with the employer's business, shall be attributed to the employer unless otherwise stipulated by contract, work regulations or the like at the time of the making of the work.

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

Yes. Such ownership must be expressly agreed to. Although it is not strictly necessary to have a written agreement, it is customary to have one in order to prevent copyright disputes.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. A co-holder of a copyright in a work of joint authorship or of any other co-owned copyright may not transfer or pledge his or her share without the consent of the other co-holders.

Transfer of rights

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

Yes.

Licensing

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

Yes.

28 | Are there compulsory licences? What are they?

Yes. When, despite reasonable efforts, it is not possible to contact the copyright holder because his or her identity is unknown or for other reasons, it shall be possible to exploit a work, under the authority of a ruling for a compulsory licence issued by the Agency of Cultural Affairs (ACA) and upon depositing, for the benefit of the copyright holder, compensation of the amount fixed by the Commissioner.

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

Yes. Japanese performing rights societies include the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC), the Japan Writers' Association, the Writers Guild of Japan, and the Japan Writers Guild.

Owners of copyrighted works may either entrust administration of their copyright to the entity of their choice, or manage their rights personally in whole or in part. If a copyright owner chooses to entrust his or her copyright to an administrator, this entity and the owner will execute an entrustment agreement.

Termination

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

No.

Recordal

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

If the transfer and other transactions are registered, yes. The ACA or the Software Information Centre requires such documents in order to register the transfer or transaction, and to summarise the fact in the registration.

DURATION OF COPYRIGHT

Protection start date

32 When does copyright protection begin?

Copyright protection begins at the time of the creation of the work.

Duration

33 How long does copyright protection last?

Protection lasts for 50 years after the death of the author or, in the case of a jointly authored work, for 50 years after the death of the last surviving co-author (in principle). The copyright in a work that bears the name of a juridical person or other corporate body as its author shall continue to subsist until the end of the 50-year period following the work being made public. The copyright in a cinematographic work shall continue to subsist until the end of the 70-year period following the work being made public; or if the work was not made public within the 70-year period following its creation, until the end of the 70-year period following the work's creation. Since the end of December 2018, the protection period has been amended to 70 years, to comply with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

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

Yes. There are special copyright durations, pursuant to the Act on Special Provisions of Duration of Copyright of the Allies, for works created during World War II (this time frame runs from 8 December 1941 to the day before each peace pact).

Renewal

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

No.

Government extension of protection term

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

Yes. Protection for 30 years after death was extended to 38 years, and then to 50 years in 1970, in accordance with the Brussels Amendment of the Berne Convention (1948). With respect to cinematographic works, protection for a 50-year period following the copyright work being made public was also extended to 70 years (or, if the work was not made public within the 70-year period following its creation, until the end of the 70-year period following the work's creation).

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Reproduction, performance, screen presentation, public transmission, recitation, exhibition, distribution, rental, translation or adaptation without the copyright owner's approval constitute copyright infringement.

Vicarious and contributory liability

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

Yes. A representative, an agent, an employee or any other worker of a juridical person (such as a company) or a person (individual) who commits copyright infringement in connection with the business of that person shall be jointly or vicariously liable for the infringement under the Copyright Act and civil law, and may have criminal liability in accordance with the Copyright Act.

Available remedies

39 | What remedies are available against a copyright infringer?

Remedies available include injunction, compensation, measures for the restoration of honour and reputation (such as a public apology), and the collection of unjust enrichment.

Limitation period

40 | Is there a time limit for seeking remedies?

Compensation in accordance with the Civil Code must be sought within three years of the infringement and infringer becoming known, or within 20 years of the infringement.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes.

Attorneys' fees and costs

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

Yes, although it is rare that the amounts awarded in a judgment will cover attorneys' fees and the costs of an action.

Criminal enforcement

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

Yes. A person who infringes copyright, right of publication or neighbouring rights (excluding some exemptions provided in the Act) shall be punished by imprisonment with work for a term not exceeding 10 years or 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 or 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 computer programs; circumvention of technological protection measures; illegal reproduction of a person's true name or widely known pseudonym; and the reproduction, distribution or possession of a commercial phonogram without any authority, etc.

The authorities may not investigate copyright infringements and bring charges against offenders unless the copyright holders have filed a complaint with the authorities, or the following three requirements are met:

- the alleged offenders intend to financially benefit from or to harm the copyright holders;
- the alleged offenders assign, publicly transmit or duplicate paid copyrighted works in their original language; and
- the copyright holders' prospective benefit arising from offering paid copyrighted works is unjustly infringed.

If the preceding requirements are met, the authorities may investigate copyright infringements and bring charges, even if the copyright holders have not filed complaints.

In addition, selling devices to circumvent access control is subject to criminal sanctions.

Online infringement

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

Yes. When copyright is infringed by information distributed through the internet, a person alleging that his or her copyright has been infringed may request that a telecommunications service provider, such as an internet service provider, prevent such infringed information from being transmitted to unspecified persons in practice (under civil laws); and disclose the identification information of the sender pertaining to the infringement, if there is evidence that the copyright was infringed by distribution through the internet, since the identification information of the sender is necessary for the rightsholder demanding the above disclosure to exercise his or her right to claim damages, and there is justifiable ground for the right-sholder 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 being distributed through the telecommunications provided by the provider; or
- the service provider had knowledge of the information distributed by its service or there are reasonable grounds to find that the service provider could know the infringement was caused by information distributed through its service.

On the other hand, if a service provider takes measures to block the transmission of information, that 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.

In 2020, the Copyright Act was amended to remove knowingly downloading illegally uploaded content from the scope of the exception, and downloading infringing content was criminalised in 2021. Additionally, operators of 'leech sites' that lead internet users to other websites that offer bootlegged materials, such as manga (Japanese comic books) and movies, became subject to criminal sanctions in October 2020.

Prevention measures

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

Copyright infringement may be prevented in Japan by putting a copyright notice on the work; education; appropriate measures against infringement, such as issuing a warning immediately after infringement is recognised; and legal action against the infringer.

Japanese copyright holders have suffered a number of copyright infringements by individuals and corporations based in foreign countries (eg, counterfeit software and cartoon books being translated and printed without approval); therefore, government-level action against countries in which many copyright infringers exist should be a critical factor in helping to prevent future copyright infringement.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 Which international copyright conventions does your country belong to?

Japan belongs to:

- the Berne Convention for the Protection of Literary and Artistic Works (Paris Act);
- the Universal Copyright Convention (Paris Act);
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations;
- the World Intellectual Property Organization Performances and Phonograms Treaty;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights; and
- the Beijing Treaty on Audiovisual Performances.

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

Principles of national treatment in accordance with the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, and the Principle of Reciprocity in accordance with the Berne Convention are imposed.

UPDATE AND TRENDS

Key developments of the past year

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

Exceptions introduced by the amendments to the Copyright Act

The Copyright Act was amended in May 2021 and introduced the following two amendments:

- In order to promote internet live streaming business in Japan, the amendments introduced the concept of 'simultaneous broadcast distribution' and aligned their treatment with the existing broadcast related regime. These amendments came into effect in January 2022.
- To address the rising demand for the digitisation of libraries under physical restrictions imposed by the covid-19 pandemic, the amendments introduced statutory exceptions:
    - to allow the National Diet Library to digitally transmit materials that are difficult to obtain (for example, out-of-print resources) to registered users (which came into effect from May 2022); and
    - to allow certain libraries to digitally transmit extracts of published works by email to users for research and study, subject to the payment of compensation (which will come into effect as at the date specified by a cabinet order within two years from 2 June 2021).

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Summary

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 What is the relevant legislation?

The Copyright Ordinance 1962 (the Ordinance), the Copyright Amendment Ordinance 2000 and the Copyright Rules 1967.

Enforcement authorities

2 Who enforces it?

As copyright owners have exclusive proprietary rights to their work, the copyright law in Pakistan provides for both civil and criminal remedies by which the right holder can enforce its rights.

Apart from the owner, the Copyright Registrar, the Federal Investigation Agency and, in some instances, the police can enforce rights against copyright infringement.

Online and digital regulation

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

The Ordinance places no bar on the medium through which work is exploited; therefore, it can be interpreted to include the digital exploitation of works. Further, while the Prevention of Electronic Crimes Act 2016 (PECA) does not strictly list copyright infringement as an offence, under section 24 it recognises offences committed under any Pakistani law and extends the protection under PECA, provided the offences include the use of an information system.

Extraterritorial application

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

Yes, and this in large part is ensured by the various conventions to which Pakistan is a signatory.

Agency

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

Yes, copyright is regulated by the Copyright Registry, which is one of the offices organised under the Intellectual Property Organisation (IPO). The IPO is recognised as an autonomous body, and administrative control lies with the Ministry of Commerce.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

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

Section 10 of the Copyright Ordinance (the Ordinance) recognises the following works to entail copyright:

- original, literary, dramatic, musical and artistic works;
- cinematographic works; and
- records.

Moreover, Section 2 of the Ordinance further defines the types of works that are protected in Pakistan:

- Literary works are defined as works on religion, humanity, physical and social sciences, table compilations and computer programs. 'Programs' include reproduction of any information by devices such as disc, tape, perforated media or other any other device that is capable of storing or reproducing information after it is fed into or located on a computer.
- Musical works include printing, alteration in writing or otherwise graphical production or reproduction of melody and harmony, or both.
- Dramatic works contain any piece of choreographic work or entertainment in mime, recitation, the acting or scenic arrangement of which the form is in writing, fixed or otherwise and excludes cinematographic work.
- Artistic works include works that are in the form of paintings, sculptures, photographs, engravings or drawings, such as a map, plan, chart or diagram without any specific requirement that those works possess artistic quality; any work of artistic craftmanship; and architectural works of art.

- Cinematographic works are described as patterns of visual images that include any kind of video film recorded on a material of any description, with or without sound, and that are exhibited or played back to indicate the sensation of motion.
- Records include any tapes, discs, perforated rolls, wires or any other devices capable of embodying and reproducing sounds, other than a soundtrack, which is considered to be associated with a cinematographic work.

Rights covered

7 What types of rights are covered by copyright?

Two types of rights are covered or protected by copyright: economic rights and moral rights.

Economic rights protect the economic interests of the author or the owner (ie, interests used for commercial gains).

Moral rights protect the reputation and creative integrity of the author, which are expressed through his or her work.

Excluded works

8 What may not be protected by copyright?

Copyright law only protects the expression of original ideas in a fixed tangible medium of expression but not the underlying idea itself. There are several categories of materials that cannot be copyright protected. These include:

- works that have not been fixed in a tangible form of expression;
- ideas, procedures, systems, methods, processes, principles, discoveries or devices that are not embodied in a particular work; and
- works comprising information that is considered common property and has no original authorship, such as facts in a biography, standard calendars and lists or tables taken from a public document.

Fair use and fair dealing

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

Fair use is a limited doctrine that permits the copying or use of copyrighted material without needing to seek permission from the copyright owner, if it is used for a limited purpose and for certain activities that are permitted under the law.

In accordance with section 57 of the Ordinance, the following acts do not constitute an infringement of copyright:

- fair dealing with a literary work for the purpose of private research or study and criticism or review either of that work or any other work;

- using a literary work for the purpose of reporting current events in a newspaper or magazine or similar periodical or using it in a broadcast of a cinematographic work or a photograph;
- reproduction of a literary work for judicial proceedings or report of judicial proceedings;
- publication in the newspaper of a report;
- reproduction of any literary work in the certified copy made or supplied in accordance with any law for the time being in force;
- reproduction and adaptation of a literary work for the sole purpose of instruction at an educational institute or elsewhere – this includes performance in an educational institute or similar organisation, as long as the audience is limited to staff members, students, parents and guardians of those students and any persons directly connected with the activities of the institute; and
- reading or recital in public from any published literary or dramatic work that is of a reasonable length.

Section 57 of the Ordinance gives further details on other kinds of work that are included in the doctrine of fair use.

Architectural works

10 | Are architectural works protected by copyright? How?

In accordance with section 10(5) of the Ordinance, architectural works are protected by copyright in respect of their design and artistic character; however, this does not extend to the processes or methods of construction. Where copyright in the architectural work has been infringed, the owner of the copyright is entitled to remedies by way of damages and accounts.

Under section 64 of the Ordinance, an injunction to restrain the construction of such building or structure or to order its demolition is not available. An explanation provided thereof specifically states 'construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work, shall not be an offence under this section'; therefore, criminal remedies are also not available.

Performance rights

11 | Are performance rights covered by copyright? How?

The Ordinance covers the rights of performers under section 24, which are the exclusive rights to:

- fix or prevent publication of their unfixed performance;
- reproduce the fixation of their performance;
- broadcast their performance by wireless means (ie, radio, television and social media applications such as YouTube); and
- communicate their performance to the public.

Neighbouring rights

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

'Neighbouring rights' are construed as related rights, which is a special category that refers to the category of rights granted to performers, producers of phonograms (sound recordings) and broadcasters in Pakistan, of which there are special provisions for their protection under section 24 of the Copyrights Ordinance.

Rights for performers

Performers can be defined as actors, musicians, singers, magicians or any individuals who make a live performance, who have the exclusive rights to:

- fix or prevent publication of their unfixed performance;
- reproduce the fixation of their performance;
- broadcast their performance by wireless means (ie, radio, television and social media applications such as YouTube); and
- communicate their performance to the public.

Rights for producers of phonograms in their recordings

Under section 24A of the Ordinance, the producers of sound recordings have the exclusive right to reproduce and rent their fixation and to prohibit the direct or indirect reproduction of their fixation or any rental thereof.

Rights of broadcasters

Section 26 of the Ordinance defines broadcasters and broadcasting as 'communication to the public by any means of radio-diffusion, including communication by telecast, or by wire, or by both.' Broadcasting organisations have special rights over their radio and television broadcasts and are allowed to authorise:

- the rebroadcasting of their broadcasts;
- the fixation of their broadcasts; and
- copy fixations of their broadcasts.

Moral rights

13 | Are moral rights recognised?

Moral rights are recognised as the author's special rights. They are incorporated under section 62 of the Ordinance, which provides for the author to be recognised as such.

Further, notwithstanding that the author of a work may have assigned or relinquished the copyright in their work, he or she has the right to restrain or claim damages in respect of any distortion, mutilation or other modification of the work and any other action in relation to the work that would be prejudicial to his or honour or reputation.

Such rights cannot be exercised by the legal representatives of the author.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No, it is not mandatory to place a copyright notice.

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

Since it is not mandatory, strictly speaking there are no penal consequences; however, it is highly recommended to display one as it helps to identify those who intend to obtain prior permission to use the work that does not belong to them. Further, such notice does not require any extra expense; thus, it is a cost-effective safeguard that stops anyone from copying work.

A copyright notice helps to identify the actual copyright owner by facilitating the process of granting prior permission. A valid notice reflects that the actual infringer was aware of the copyright status of the work. It also facilitates the process of establishing wilful infringement upon them, and the penalty of such infringement will be higher than that for an innocent infringement.

A notice on a work can be written, stamped, typed or even painted as there is no formal procedure for this requirement. Generally, a copyright notice includes the copyright symbol © or words such as 'copyright' or 'copr'.

Deposit

16 | Is there a requirement of copyright deposit?

Under section 4(2) of the Copyright Rules, an applicant is required to deposit a copy of work with the Copyright Registrar at the time of submission the application.

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

In case of failure to make a copyright deposit, the same will become ineligible to be accepted.

Registration

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

Yes, there is a mechanism provided under the Copyright Ordinance (the Ordinance) to seek copyright registration.

In accordance with section 3 of the Copyright Rules, the Copyright Register is divided into four parts, and an applicant can file a copyright application under any of those categories, based on the type of work for which copyright protection is sought. The categories are:

- literary, dramatic and musical works;
- artistic works;
- cinematographic works; and
- records.

Section 39 of the Copyrights Ordinance and section 4 of the Copyright Rules further state the documents that are required for registration:

- Form II, with full particulars of the applicant, including his or her name, address and nationality and details of the work applied for in the prescribed pro forma;
- a statement of particulars (only applies for the registration of literary, dramatic and musical works);
- a statement of further particulars;
- three copies of the application (Form II) and three copies of the work to be copyrighted (in the case of literary, cinematographic works and records, the applicant only needs to supply two copies of the work to be copyrighted);
- a no objection certificate (NOC) or affidavit for transfer of copyright from the artist or creator who created the work, if applicable (this is used in works for hire or commissioned work cases) – for literary works, the applicant requires a NOC or assignment of copyright from the copyright owner or writer in favour of the applicant, if applicable, and in the case of record and cinematographic works, the applicant requires a NOC for assignment of copyright from all contributors (performers, singers, lyricists and musicians) of the work, if applicable;
- an undertaking or affidavit for original creativity of the work by the applicant;
- a pay order of the official fee as set out in the schedule of fees in the name of the director general of the Intellectual Property Organisation; and
- a notarised power of attorney if an agent or attorney represents the applicant.

The applicant must then file Form II and pay the prescribed fees at the Copyright Registrar's Office in Karachi or at the intellectual property offices in Lahore, Peshawar or Islamabad.

Only one application can be filed for one work. Furthermore, in accordance with section 39(2) of the Ordinance, if the applicant is applying for registration of an artistic work, he or she must advertise the work in either an English or Urdu language newspaper where he or she either is domiciled or carries out business activities within one month of filing the application or within such extended time as the Registrar may determine and send two copies of the advertisement to the Registrar. The advertisement must be in the prescribed format as set out in section 39(2) of the Ordinance and section 4(3.A) of the Copyright Rules.

The applicant applying for registration must send a copy of his or her application to every person who claims or has an interest in the subject matter of the copyright or disputes the rights of the applicant.

Unlike trademark law, whether a copyright work is used once registered is irrelevant. The law does not provide that a registered owner use the work as is the case in trademark law; it only matters that the artist, creator or owner has rights over the work.

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

Copyright registration is not mandatory in Pakistan; it is automatically formed upon the creation of a work in a tangible form.

The benefits of copyright registration are that it certifies the proprietorship of the work, thereby granting exclusive rights to:

- reproduce and make copies of the work in any material form;
- publish, perform or communicate the work in public;
- produce, reproduce, perform or publish any translation or adaption of the work (ie, a derivative work);
- broadcast the work in public or use it in a cinematographic work or sound recording;
- offer the work for sale or rental and receive a payment in return;
- prevent third parties from using the work without permission or consent from the owner and have the authority to take legal action should any infringement take place of the work; and
- assign or license the copyrighted work to another party.

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

The fees for copyright registration are often revised; therefore, it is advisable to cross-check the fees from the official Intellectual Property Organisation's website. For 2022, the total official costs are under US$100.

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

Since a copyright registration is not mandatory to initiate a claim of infringement, it does not affect the rights and remedies under the law; however, an advantage of copyright registration is that the certificate is prima facie evidence of validity.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

Section 13 of the Copyright Ordinance (the Ordinance) specifies that the author of a work shall be the first owner of the copyright:

1 In the case of a literary, dramatic or artistic work 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 a

newspaper, magazine or similar periodical, the proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work.

2 Subject to the provisions of clause (1), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematographic work made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

3 In the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (1) or clause (2) does not apply, the employer shall, in the absence of any agreement to the contrary be the first owner of the copyright therein.

4 In the case of a government work, the government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

5 In the case of a work to which the provisions of section 53 apply, the international organisation concerned shall be the first owner of the copyright therein.

Employee and contractor work

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

Under section 13(c) of the Ordinance, a work made in the course of the author's employment under a contract of service or apprenticeship of the employer, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright.

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

In the event that a work is made for hire, the hiring party for whom the work was prepared is the initial owner of the copyright, unless both parties involved have signed a written agreement to the contrary.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. Section 11 of the Ordinance provides for the protection of works of joint authors. It holds that in the case of a work of joint authorship, if one or more of the joint authors do not satisfy the conditions conferring copyright laid down by the Ordinance, the work shall be treated for the purposes of the Ordinance as if the other author or authors had been the sole author or authors.

It further provides that the term of the copyright shall be the same as it would have been had all the authors satisfied the conditions.

Transfer of rights

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

Section 14 of the Ordinance provides that an owner of copyright in an existing work or a prospective owner of a future work can assign to any individual his or her copyright either wholly or partially, and this right can be subject to certain limits set by the owner. These limitations include the time frame of the assignment (ie, it can include the entire length of the term of copyright protection or can be for a specific time period).

In the case of future works of copyright, the copyright is assigned only when the work comes into existence.

Where the owner of the copyright is also the author of the work, the assignment of the copyright in the work is only effective for a period of 10 years. This is an express statutory limitation.

Upon expiration of the 10-year period, the assignment of the copyright will revert back to the owner, who is then free to reassign the copyright. If the owner is deceased, his or her rights will be assigned to his or her heirs or legal representatives, who shall have the same rights as him or her in the work. This statutory period of limitation does not apply to any assignment made in favour of a government, educational, charitable, religious or non-profit institution.

In terms of the assignment of copyright in an unpublished work that has been assigned by its author to any person or organisation that wishes to publish the work, the rights of the work revert back to the author if the work is not published within three years of the date of assignment.

Section 14(2) of the Ordinance stipulates that upon assignment, the assignee, in respect of the rights that have been assigned to him or her, and the assignor, in respect to the rights not assigned to him or her, are treated as the owners of the copyright for the duration of the assignment. The special rights of the author are also valid during the period of assignment, and he or she can take legal action if any alteration to his or her work damages his or her honour or reputation.

Any owner or publisher of the copyright, or any publisher who has the copyright assigned to him or her, can apply to the Copyright Board if he or she considers any terms of the assignment to be adverse to his or her own interests within one year of the assignment. The Board will hear from both parties and consider the matter. The order of the Board will be binding on both parties in accordance with section 14(2A) of the Ordinance.

All assignments are valid only when an agreement is made in writing and signed by the assignor or his or her duly authorised representative. Any assignment of copyright can be registered with the Registrar of Copyright once a party files the prescribed form with the Registry, which will then record the grant of assignment on its database.

Licensing

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

Yes. Section 35 of the Ordinance provides that the copyright owner has the right to license his or her work to third parties. The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the copyright by licence in writing, signed by the author or his or her duly authorised agent.

28 | Are there compulsory licences? What are they?

Yes. If a copyright owner refuses to allow his or her work to be republished, performed or broadcast in public, and the work is withheld from the public on the basis of being determined to be detrimental to the public interest, then any interested party can make an application to the Copyright Board. The Board can authorise the Registrar to grant the applicant a licence to make the work public.

In those cases, the applicant must pay compensation to the owner of the copyright (or his or her legal representatives) and be subject to other terms and conditions as decided by the Board in accordance with section 36 of the Ordinance.

In granting a compulsory licence, the Board has to strike a balance between the rights of the copyright owner and the applicant's rights to obtain a compulsory licence.

In addition, the government or Board can grant a licence on application from any government or statutory institutional body that wants to reprint, translate, adapt or publish any textbook on a non-profit basis, if the work is in the public interest.

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

A licence can be obtained from performing rights societies (ie, collective management organisations) for the broadcasting of an entire song. The music publishing rights include the right to record, the right to perform, the right to duplicate and the right to include the work in a new or different work, which is sometimes called a derivative work.

To facilitate commercial exploitation, most songwriters generally prefer to transfer the publishing rights to an entity identified as the publisher, pursuant to a music publishing agreement, who assigns the copyright or the right to administer the copyright to the publisher.

Among the many types of rights tied to works of music are performance rights, print rights, mechanical rights and synchronisation rights. Under section 31 of the Ordinance, a performing rights society has to file for a statement of fees, charges and royalties with the Registrar.

Termination

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

Generally, once a right has been transferred, it cannot be terminated unless it was conditional; however, the Ordinance provides a period of one year after the assignment within which the assignor may seek cancellation of the assignment by applying to the Copyright Board.

Once such an application is made, the Copyright Board has the discretion to allow or reject the assignment.

Recordal

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

Yes, under section 40 of the Ordinance, the legislature provides for recordal of such assignment with the Copyright Office. Recordal is not mandatory.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

The protection of copyrighted work begins from the moment of first creation into a fixed, tangible form.

Duration

33 | How long does copyright protection last?

For a work that was created and has been expressed in a tangible form for the first time, the copyright protection commences from the moment of its creation and is ordinarily given a term that extends across the author's lifetime plus an additional 50 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 50 years after the last surviving author's death.

For works made for hire and for anonymous and pseudonymous works, the duration of copyright is 50 years from publication.

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

The duration of the copyright term is dependent upon when the work was first published. The duration of the term is the life of the author plus 50 years after the author's death.

Renewal

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

The term for copyright registration is a lifetime and does not require renewal. After the death of the author, the term automatically turns to 50 years.

Government extension of protection term

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

No such amendment related to the extension of term has been presented.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

In accordance with section 56 of the Copyright Ordinance (the Ordinance), a copyright will be considered to have been infringed when:

- any person, without the consent of the copyright owner or a licence granted by the Registrar or in contravention of any of the provisions of the licence, does anything that only the copyright owner has the exclusive right to do;
- any person permits for profit his or her place to be used for the performance of the work in public where the performance constitutes an infringement of the copyright in the work; or
- any person who makes for sale or hire; sells or lets for hire by way of trade displays or offers for sale or hire; distributes either for the purpose of trade to such an extent as to affect prejudicially the owner of the copyright by way of trade exhibits in public; or imports into Pakistan any infringing copies of the work.

Vicarious and contributory liability

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

Yes. A copyright owner may be able to enforce rights on the basis of vicarious and contributory liability since section 29 of the Ordinance includes liability for infringement for any person who 'makes or causes the making of' infringing articles.

Available remedies

39 | What remedies are available against a copyright infringer?

The right holder can seek civil, criminal and special remedies against a copyright infringer. Under civil litigation, a suit for infringement and passing off of copyright can be initiated

in Pakistan. The right holder can seek remedies, such as an injunction, damages and accounting. This injunction can then be enforced against the infringer if he or she continued with the infringing activities.

In the case of criminal litigation, any person infringing the rights of a copyright holder may be imprisoned for up to three years or charged with a fine of up to 100,000 Pakistani rupees. The police also have the independent power to take action and seize all copies of the work and all plates and recording equipment wherever found and used for the purpose of making infringing copies of the work, if they believe that an infringement has taken place or is likely to take place. All copies, plates and recording equipment so seized shall, as soon as practicable, be produced before a magistrate.

Special remedies are provided after the insertion of section 60A by the Copyright (Amendment) Ordinance. Where copyright in any work has been infringed and the owner, for a sufficient cause, is unable to institute immediate regular legal proceedings, he or she may apply to the court for immediate provisional orders to prevent infringement of the copyright in the work and for preservation of any evidence relating to the infringement, even if regular proceedings in the form of a suit or other civil proceedings have not yet been instituted. If the court is satisfied that delay would cause irreparable harm or might result in the destruction of evidence, the court may pass an interim order without prior notice to the defendant.

Besides the civil and criminal remedies described above, there are also certain provisions under the copyright law and the customs law that allow a right holder to file an application with a customs officer, who may detain any consignment containing infringing copies to be imported into or exported out of Pakistan. The consignment is then examined by a customs officer in the presence of the parties and, upon determination that the consignment contains infringing copies, the seized consignment is confiscated, and the importer or exporter is liable for such penalties as are described under the Customs Act 1969.

Limitation period

40 | Is there a time limit for seeking remedies?

Yes. The Limitation Act provides that a claim of infringement shall be made within three years of the date of knowledge of the infringement.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, the Ordinance provides for the recovery of damages as one of the civil remedies.

Attorneys' fees and costs

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

Yes, the Ordinance provides for the recovery of the costs of bringing an action which includes attorney's fees; however, such costs are very seldom granted.

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Criminal enforcement

43 Are there criminal copyright provisions? What are they?

Yes, copyright infringement entails criminal liability. It is a cognisable offence.

Section 66 of the Ordinance provides that any person who knowingly infringes or abets the infringement of the copyright in a work (defined to include computer programs and software), or any other right conferred by the Ordinance, shall be punishable with imprisonment of up to three years or a fine of up to 100,000 Pakistani rupees, or both.

Section 70B of the Ordinance provides that where any person who has been convicted for an offence punishable under section 66 is convicted again for the same offence, he or she shall be imposed with a fine of 200,000 rupees, in addition to imprisonment of up to three years.

Section 74(1) of the Ordinance allows the police to seize infringing copies of the work and empowers any police officer – if he or she is convinced that an offence in respect of infringement in any work has been, is being or is likely to be committed – to seize, without warrant, all copies of the work and all equipment used for the purpose of making infringed copies of the work, which shall then be produced before a magistrate.

Online infringement

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

There are no specific remedies for online infringement; general copyright remedies apply.

Prevention measures

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

Besides the civil and criminal remedies described above, there are a number of administrative remedies provided by the law, as below.

Copyright Board

The Board has civil powers to deal with matters relating to infringement; therefore, if the copyright owner does not intend to institute an infringement suit or proceedings in the court of the district judge, he or she may, by petition, refer the matter to the Board.

The law further states that where a matter has been referred to the Board, no court shall hear, try or entertain any suit or proceedings relating to that matter.

The Copyright Law empowers the Copyright Registrar to ban the import and export of infringing copies in Pakistan. The Ordinance provides that the Copyright Registrar may,

on application of the copyright owner, make an order restricting the import or export of infringing items pursuant to the prohibitions under the Customs Act.

Customs

Section 65A of the Ordinance prohibits the import and export of infringing copies of any work through the borders of Pakistan.

Section 65B read, with the relevant provisions of customs law, allows a right holder to file an application with a customs officer, who may detain any consignment containing infringing copies to be imported into or exported out of Pakistan. The consignment is then examined by a customs officer in the presence of the parties.

Upon determination that the consignment contains infringing copies, the seized consignment is ordered to be confiscated, and the importer or exporter is liable for such penalties as are described under the Customs Act 1969.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

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

Pakistan is a member of:

- the Universal Copyright Convention 1952 (UCC);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) 1994;
- the Berne Convention for the Protection of Literary and Artistic Works 1886 (the Berne Convention);
- the World Intellectual Property Organization (WIPO) Copyright Treaty; and
- the Rome Convention.

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

The following international agreements to which Pakistan is a signatory have provisions in relation to copyright laws and protection.

Berne Convention

The Berne Convention, adopted in 1886, is an international agreement signed in Berne, Switzerland that deals with the copyright protection of works and the rights of their authors. It states that if the copyright exists in one of those countries, then the copyright is valid in all member countries that are signatories of the Berne Convention. At present there are 176 signatory countries.

The Convention also contains a series of provisions requiring member states to provide strong minimum protection for copyright laws, as well as special provisions available to developing countries that want to make use of them.

The main features of the Convention include:

- the principle of national treatment – authors who are nationals of works that originate in one member country are afforded the same protection that is given to nationals of all member countries that are signatories to the convention;
- automatic protection – copyright does not require registration, and works are given automatic protection once it is fixed in a tangible medium of expression;
- the minimum standards and duration of protection for copyright; and
- author's special rights – provides for moral rights of the author where creators are allowed to take action if their work is distorted, mutilated and modified in a manner that is prejudicial to their honour and reputation.

TRIPS Agreement

The TRIPS Agreement, which came into force on 1 January 1995, is an international legal agreement between all the member nations of the World Trade Organization and is, to date, the most comprehensive multilateral agreement on intellectual property. Pakistan signed the Agreement in 1948.

The Agreement currently has 162 member countries and covers the following areas of intellectual property:

- copyright and related rights;
- trademarks, including service marks and geographical indications;
- industrial designs;
- patents; and
- trade secrets.

UCC

The UCC is one of two international principal conventions (the other being the Berne Convention) protecting copyright and was adopted in Geneva, Switzerland in 1952. The United Nations Educational, Scientific and Cultural Organization (UNESCO) developed the UCC as an alternative legislation for countries that disagreed with aspects of the Berne Convention but nevertheless still wanted to participate in a multilateral treaty on copyright.

The UCC came into force in 1955. Its main features include the following:

- no member nation should give its nationals more favourable treatment in relation to copyright protection than they do to authors of other member nations;
- a formal copyright notice must appear in all copies of a work and comprise the symbol ©, the name of the copyright owner and the first year of publication;
- the minimum term of protection in all member nations must be the life of the author plus 25 years (with the exception of photographic works and works of applied art); and

- all member nations are required to grant an exclusive right of translation for a seven-year period, subject to a compulsory licence under certain circumstances for the balance of the term of copyright.

Pakistan acceded to the UCC in 1955. The UCC currently has 100 member countries.

Other agreements

The following international agreements, to which Pakistan is not a signatory, have significant provisions in relation to copyright laws and use and are utilised by many countries worldwide.

WIPO Copyright Treaty

The WIPO Copyright Treaty is a special agreement inserted into the Berne Convention and adopted by member states of the WIPO. The agreement is an international treaty that provides additional protection for the works and rights of authors in the digital age.

The treaty is notable in the sense that it specified that computer programs and databases had to be protected by copyright and also recognised the right of distribution, the right of rental and a broader right to communicate with the public. It came into force in 2002 and currently has 96 contracting parties.

Rome Convention

The Rome Convention is an agreement that gives additional copyright protection to performances for performers, in phonograms for producers of phonograms and broadcasts for broadcasting organisations that fall under the 'related rights' category of copyright.

The Convention is significant in that it extended copyright protection for the first time from the author of the work to the creators and owners of intellectual property that was fixed in a particular manner (ie, audiotapes and videocassettes).

The Convention currently has 93 contracting parties and is administered by the WIPO in conjunction with the International Labour Organization and UNESCO.

UPDATE AND TRENDS

Key developments of the past year

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

No developments in the last 12 months.

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Summary

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The main legislation covering copyright in Poland is the Act of 4 February 1994 on Copyrights and Related Rights. It covers copyright (moral, economic and derivative rights) and related rights (right to performances, phonograms and videograms, programme broadcasts, and first publications and scientific and critical publications).

Collective copyright management is covered by the Act of 15 June 2018 on the Collective Management of Copyright and Related Rights.

There are also several ordinances of the Minister of Culture in force, covering in detail issues such as fees paid by producers and importers of devices used for the fixation of works and by owners of reprographic equipment, as well as detailed rules on collective copyright and related rights management.

Related to copyright is also the act of 27 July 2001 on the protection of databases, which covers the protection of databases that do not pass the threshold of a copyrightable work.

In all cases whereby the copyright law does not directly cover copyright-related issues (eg, claims, contracts and protection of personal rights), Polish civil law applies, in particular the Polish Civil Code.

Poland is also a member of the European Union. Therefore, all EU legal acts relating to copyright are applicable and enforceable in Poland.

Enforcement authorities

2 | Who enforces it?

Copyright is primarily enforced by copyright holders, through civil actions (if necessary). In some cases (eg, criminal offences and counterfeit goods), copyright laws are also

enforced by public authorities such as the police, the Customs Service and the State Public Prosecutor's Office.

Online and digital regulation

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

There are several provisions of Polish copyright law that address the digital exploitation of works.

Digital exploitation of works is considered a separate field of exploitation, which has to be taken into account when drafting transfer and licence agreements. The Polish legislator introduced in article $23^1(1)$ of the Act on Copyrights and Related Rights a type of permitted use that does not constitute a copyright infringement – a temporary reproduction of a work, transient or incidental in nature, that has no independent economic significance and is an integral and essential part of a technological process whose sole purpose is to enable the transmission of the work or the lawful use of the work. This provision applies to caching, internet browsing, streaming and reproduction by computer RAM.

Article 25(4) of the Act on Copyrights and Related Rights extends the permitted use of works in media reports to the internet (and therefore digitally). Article 28(3) of the same act grants a right to libraries, schools and archives to share their collection not for profit through electronic means (digitally) through publicly available terminals. This provision does not apply to computer programs and databases. Educational and scientific permitted use also explicitly extends to digital exploitation.

There are also provisions in Polish copyright law on computer programs that modify the general rules. Subject to exceptions, computer programs are treated as literary works. The general rule is that economic copyrights to the computer program created as an employee work vest in the employer (without the need to take further action). There are also certain uses of computer programs that do not require separate rightsholders' permission (if one is entitled to use the program) (eg, making copies necessary to use the program and reproducing the program's code to achieve interoperability with other computer programs). Computer programs are protected by the author's personal rights in a limited scope (compared with other types of works). Some types of permitted uses do not apply to computer programs, in particular permitted personal use (article 23 of the Act on Copyrights and Related Rights), temporary reproduction exception (article $23^1(1)$ of the Act on Copyrights and Related Rights), educational and scientific use, and use by libraries, archives and schools. Provisions requiring a separate authorisation to make changes to the work and allowing the termination of copyright transfers due to the author's vital interests also do not apply.

Extraterritorial application

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

In general, copyright protection has a territorial application. However, due to international agreements to which Poland is a party (in particular, the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS agreement)), copyright protection applies almost worldwide. According to article 5(2), sentence 2 of the Berne Convention (to which Poland is a party), the applicable law is the law of the country where the infringing use happened. A similar rule is included in the Rome II EU regulation. In cases of online infringements, Polish law (as with any other law of the country where the website is available) might be applicable.

Agency

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

No, there is no centralised copyright agency in Poland. The Minister of Culture and National Heritage is responsible for copyright matters.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 What types of works may be protected by copyright?

Copyrightable work is defined in article 1(1) of the Act of 4 February 1994 on Copyrights and Related Rights as any manifestation of creative activity of an individual nature, established in any form, irrespective of its value, intended purpose or form of expression.

According to Polish courts, it is impossible to say what the minimal level of creativity is for the work to be protected. It has to be assessed on a case-by-case basis. However, the definition of the copyrighted work is very broad and covers almost all works that possess a modicum of creativity, irrespective of their lawfulness or merit.

Therefore, work, in order to be protected by copyright under Polish law, has to:

- be created by a human – works created by animals or AI are not protected;
- be established – made available to communicate to persons other than the author themselves (even in an incomplete form);
- be a 'manifestation of creative activity of an individual nature'; and
- not fall into enumerative categories of uncopyrightable works.

Article 1(2) of the act provides a non-exhaustive list of examples of types of works protected by copyright:

- works expressed in words, mathematical symbols or graphic signs (literary, journalistic, scientific and cartographic works, and computer programs);
- artistic works;
- photographic works;
- string musical instruments;
- industrial design works;
- architectural works, architectural and urban planning works, as well as urban planning works;
- musical works, as well as musical and lyrical works;
- theatrical works, theatrical and musical works, as well as choreographic and pantomime works; and
- audiovisual (including cinematographic) works.

Rights covered

7 What types of rights are covered by copyright?

In general, Polish copyright law covers two types of rights: the author's personal rights and economic copyrights.

Polish copyright law also covers neighbouring rights: the right to artistic performances, to phonograms and videograms, to programme broadcasts, and to first publications and scientific and critical publications.

Excluded works

8 What may not be protected by copyright?

Polish copyright law explicitly states that inventions, ideas, procedures, methods, principles of operation or mathematical concepts are not protected by copyright. Only the manner of expression – the specific expression of an idea (procedure or method, etc) – is protected by copyright.

Article 4 of the Act of 4 February 1994 on Copyrights and Related Rights explicitly states that the following categories of works are not protected by copyright:

- legislative acts and their official drafts;
- official documents, materials, logos and symbols;
- published patent specifications and industrial design specifications; and
- simple press information.

Fair use and fair dealing

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

There are no doctrines of 'fair use' or 'fair dealing' in Polish copyright law. However, there are certain comparable limitations in 'permitted uses' of copyrighted works, which do not

constitute a copyright infringement. Unlike in a case of fair use, provisions on permitted uses are enumerative and casuistic.

Every permitted use of copyrighted works has to meet two categories of conditions to be non-infringing: general and specific to a particular type of permitted use. General conditions in article 35 of the Act of 4 February 1994 on Copyrights and Related Rights state that the use of the work cannot conflict with the normal use of the work or prejudice the legitimate interests of the author. These conditions echo the 'three-step test' applicable throughout Europe to copyright limitations and exceptions. Use of the work within the limits of permitted use requires the indication of the author's full name and the source (if possible). The permitted uses apply only to already disseminated works.

The most common types of permitted uses include:

- permitted personal use;
- quotation;
- parody, pastiche or caricature;
- temporary reproduction, transient or incidental in nature, forming an integral and essential part of a technological process;
- media reports of recent events; and
- uses of the works by educational institutions, libraries, museums and archives for educational or scientific purposes.

Architectural works

10 | Are architectural works protected by copyright? How?

Yes, architectural works are explicitly protected by copyright in article 1(2)(6) of the Act of 4 February 1994 on Copyrights and Related Rights. Generally, the same rules apply to the copyright protection of architectural works as to any other types of works. However, there are a few exceptions:

- permitted personal use of an architectural work (not requiring the author's authorisation) does not extend to building according to the architectural work – it requires the author's permission (usually in contract);
- the author of an architectural work cannot rescind or terminate a contract due to their vital creative interests (unlike in the case of 'regular' works);
- the author of an architectural work has no right to rescind or terminate a contract if the acquirer of the author's economic rights or the licensee who has undertaken to disseminate the work does not start the dissemination within the agreed time limit (unlike in the case of other works); and
- the law also states that – unless otherwise provided in the contract – acquisition of a copy of an architectural work from the author entitles the acquirer to use it for a single construction only.

Performance rights

11 | Are performance rights covered by copyright? How?

Yes, performance rights are protected as 'related rights' under the Act of 4 February 1994 on Copyrights and Related Rights.

Each performance of a work or expression of folklore enjoys protection. Article 85(2) of the act includes the following examples of protected performances: performances of actors, reciters, conductors, instrumentalists, vocalists, dancers and mimes, as well as other individuals who make a creative contribution to a performance.

Performers have exclusive rights to the protection of their personal interests in relation to the specific performance (similar in scope to authors' personal copyrights) and the exclusive economic rights in the following fields of exploitation: production of copies of the performance; putting into circulation, letting for use or rental of the copies; broadcast, rebroadcast and presentation, unless made with the use of a copy introduced to the market; or making available to the public any fixing of a performance in such a way as to allow anyone to access it at a place and time of their choosing (similar to economic copyrights provisions). The provisions on performances also grant the performer rights to remuneration for the use of their performance or disposition of rights thereto, as well as for (re)broadcasts and presentations.

In a case whereby the performance forms a part of an audiovisual work pursuant to the contract with the producer of such work, rights to manage and use the performance as part of the audiovisual work are automatically transferred to the producer.

The 'economic performance rights' generally expire after the lapse of 50 years from the year the performance was fixed.

Enumerated Polish copyright law provisions regarding authorship, employee works, transfer of economic rights, licences and the protection of moral rights apply accordingly to performances.

Neighbouring rights

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

Yes, some other 'neighbouring rights' (called 'related rights') are recognised in Poland. Polish law recognises the following neighbouring or related rights:

- the right to performances;
- the right to phonograms and videograms;
- the right to programme broadcasts; and
- the right to first publications and scientific and critical publications.

The neighbouring rights are similar in scope to the copyrights; however, they might differ (eg, with regard to the initial rightsholder and the protection term). Permitted uses apply accordingly to related rights as well.

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Moral rights

13 | Are moral rights recognised?

Yes, moral rights (the author's personal rights) are recognised by Polish copyright law. The author's personal rights protect the link between the author and their work, their personal ties to the work and their personal interests. They are unlimited in time and cannot be waived or transferred. They include, in particular, the right to authorship, to mark the work with their name or pseudonym or to make it available anonymously, to the inviolability of the content and form of the work and its proper use, to decide on the first making of the work available to the public and to control the use of the work.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

No, there is no requirement of copyright notice under Polish copyright law. Copyright notices (eg, ©) have a solely evidentiary value.

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

There are no consequences for failure to use a copyright notice, other than that it might be harder for the rightsholder to prove that they are a rightsholder of the work in cases of a dispute.

Deposit

16 | Is there a requirement of copyright deposit?

There is no requirement of copyright deposit.

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

Not applicable.

Registration

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

There is no system for copyright registration in Poland.

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

Not applicable.

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

Not applicable.

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

Not applicable.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

In general, the author is the owner of a copyrighted work. The rights to the copyrighted work consist of the economic and the author's personal copyrights, and different rules apply to these two categories of rights.

The authors always retain their personal rights, which protect their personal ties to the work and their personal interests. Such rights cannot be transferred or waived.

Economic copyrights to the work are generally granted to the author as well, who can freely transfer them. These rights are also inheritable. The author's economic rights allow them to derive financial benefits from the work – for instance by transfer or granting a licence to use the work. However, there are exceptions to the rule, like 'employee works' (if the employer accepts the work) or in cases of computer programs created by employees (with no need for acceptance of work).

Employee and contractor work

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

Yes, generally, the employer whose employee created the work within their duties as an employee acquires the author's economic rights upon acceptance of the work. The author's personal rights, on the other hand, remain with the employee forever; however, their contract might restrict their performance.

The provisions on employees' works apply only to employees under an employment contract. The creation of such work must be a part of the author's employment duties in the employment contract for the economic copyrights to transfer to the employer. An employment contract must be in writing. If the 'employer' and the 'employee' have a contractual relationship other than an employment contract (eg, a contract for performance of specific services), by default, the copyright remains with the employee, but the parties may explicitly agree otherwise in writing.

Economic copyrights are not automatically transferred to the employer at the moment the work is created. It happens when the work is accepted by the employer. If the employee refuses to deliver such work to the employer, it would be a breach of employment duties,

subject to disciplinary action against the employee. The burden of proving that it has accepted the work lies on the employer. This does not apply to computer programs, which do not have to be accepted to belong to the employer.

Special rules apply to scientific works. If the employees create scientific work as part of their work for a scientific institution, the employer has only the right to priority of publication, to use the scientific material contained in the work and to make the work available to third parties within the limits arising from the circumstances of the creation of the work.

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

Yes, it is possible if the contract between the hiring party and the independent contractor expressly includes the transfer of economic copyright resulting from the performance of the contract. The contract must be in writing and should specifically state the moment of copyright transfer and the fields of exploitation that the rights are transferred on. Failure to conclude the contract in written form renders the transfer of economic rights null and void.

If the agreement does not regulate these issues, the copyright remains with the independent contractor. This does not prevent parties from concluding another written copyright transfer contract. The author's personal rights, on the other hand, are non-transferable; however, the author may contractually agree to restrict the performance of their moral rights to particular works.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes, copyrighted work may be co-owned, both by persons and by entities.

If there is no agreement or court decision to the contrary, it is assumed that each co-author's share of the work is equal. Each co-author may freely exercise the copyright to their autonomous part of the work, as long as it does not prejudice the rights of other co-authors, as well as pursue claims for the copyright infringement to the whole work.

Exercising the copyright to the whole work requires consent of all co-authors or a decision of a court in the absence of such consent. Polish Civil Code provisions on fractional joint ownership apply accordingly to copyright co-ownership of economic copyrights.

Transfer of rights

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

Economic copyrights can be transferred. An author's moral rights cannot be transferred; however, the author can contractually oblige themselves to restrict their performance of personal rights.

The contract for copyright transfer must be in writing; otherwise, it would be null and void. If the contract does not explicitly state that it transfers economic copyrights, it would be

deemed a copyright licence. It is important that the contract must explicitly include fields of exploitation that the economic copyrights are transferred on – the copyrights are transferred only on these fields. Economic copyrights to future fields of exploitation (not known to the parties on the date the contract is concluded) cannot be transferred. Unless the contract explicitly states otherwise, the previous rightsholder is entitled to the remuneration for copyright transfer.

Licensing

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

Economic copyrights can be licensed. An author's personal rights cannot be licensed; however, the author can contractually oblige themselves to restrict their performance of personal rights.

The copyright licensing contract must explicitly include fields of exploitation that the economic copyrights are licensed on – the copyrights are licensed only on these fields. Economic copyrights to future fields of exploitation (not known to the parties on the date the contract is concluded) cannot be licensed. Unless the contract explicitly states otherwise, the previous rightsholder is entitled to the remuneration for the copyright licence.

Licences may be exclusive or non-exclusive under Polish law. Under the exclusive licence, the licensor can still use the licensed work; however, parties may add provisions to the contrary, where the licensor undertakes not to use the licensed work during the licence term. If the licence does not include the right to grant sublicences, the licensee cannot grant sublicences.

The copyright licence contracts do not have to be concluded in writing; however, the exclusive licence must be in writing (otherwise, it would be deemed as non-exclusive).

Polish law does not have a concept of a perpetual licence. Under Polish law, such licence would most likely be interpreted as a licence granted for indefinite time, which can be terminated within contractual time limits or – if there are no provisions on the termination in the contract – one year in advance at the end of a calendar year. In contrast, licences granted for a definite period of time can be granted for a maximum period of five years and cannot be terminated if the contract does not include a provision on this matter. After five years (if they have been granted for more than five years), they automatically change to a licence granted for an indefinite period of time.

28 | Are there compulsory licences? What are they?

There are no compulsory licences under the Act of 4 February 1994 on Copyrights and Related Rights.

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

Licences may be and often are administered by collective management organisations (CMOs) in Poland. Their organisation is governed by the Act of 15 June 2018 on the Collective Management of Copyright and Related Rights.

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Under this act, the rightsholder is able to conclude an agreement with the CMO for collective management of copyright and related rights, which may cover all of their works or specific works (which may also include future works) and all or specific fields of exploitation and also describes territories that it covers. Under such agreement, the CMO represents the rightsholder and grants licences (including multi-territorial licences, if it has the mandate in this scope) for the use of their works in the name of the rightsholder and then shares the profits (remuneration) with the rightsholder. CMOs are required to post on their websites draft licence agreements used by the CMOs.

Termination

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

Under Polish copyright law (article 56), the author may rescind or terminate a copyright transfer or licence contract due to their vital creative interests. If, within two years of such rescission or termination, the author intends to start using the work, they shall be obliged to offer such use to the acquirer or licensee, setting them a suitable time limit for this purpose. If the contract is terminated or rescinded after the work has been accepted by the acquirer or licensee, the author may be obliged to pay the costs incurred, unless the contract has been terminated or rescinded due to circumstances beyond the author's control. This provision does not apply to contracts where the transferred or licensed work is an architectural work, an architectural and urban planning work, an audiovisual work, or a work ordered within the scope of their exploitation in an audiovisual work, or to computer programs.

Under article 57, the author is entitled to rescind or terminate the contract if the acquirer or licensee has not started to disseminate the work within the agreed time limit if they have undertaken to do so. If there is no agreed time limit, the author may rescind or terminate the contract within two years from the acceptance of the work and may claim the damage to be repaired after the expiry of the additional term, not shorter than six months. If the work has not been made available to the public due to circumstances attributable to the acquirer (or the licensee), the author may claim double the remuneration specified in the contract instead of actual damages, unless the licence is non-exclusive. These provisions do not apply to architectural works and architectural and urban planning works.

Under article 58 of the act, the author may rescind or terminate the contract if the work is made available to the public in an unsuitable form or with changes to which the author is entitled to rightfully object. The termination or rescission can happen after the author summons to cease the infringement to no effect. The right to remuneration under the contract remains after the termination or rescission.

If there are no contract provisions to the contrary, in all cases parties can request the other party to return everything they received under the contract.

Parties are also free to set in the contract additional circumstances when the contract may be terminated.

Recordal

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

No.

DURATION OF COPYRIGHT

Protection start date

32 When does copyright protection begin?

An author's personal copyrights last indefinitely. Economic copyrights generally last 70 years from the death of the author. The term is calculated in full years following the year the protection started.

In relation to the joint authorship works, 70 years are counted from the moment of death of the last surviving author. In cases of anonymous or pseudonymous works (which stay anonymous or pseudonymous for the whole protection term), the 70-year period starts from the moment the work is fixed. In cases of works to which copyright protection starts in regard to a person other than the author, the 70-year term starts from the moment the work is disseminated (if it has not been disseminated, the moment it has been fixed). In relation to audiovisual works, the 70-year term starts from the moment of death of the last of the following persons: main director, screenplay author, author of dialogues and composer of music (soundtrack). In cases of joint lyrical and musical works, if the lyrical and the musical works were created especially for a given lyrical and musical work, the 70-year period starts from the death of the last of two categories of persons: the author of the lyrical work and the composer of the musical work. In cases of works disseminated in volumes, episodes, parts or inserts, the term for protection is calculated separately for each of such parts.

Duration

33 How long does copyright protection last?

An author's personal copyrights last indefinitely. Economic copyrights generally last 70 years from the death of the author. The term is calculated in full years following the year that the protection started.

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

No, the copyright duration is the same irrespective of when the particular work was created or published and applies to all copyrighted works.

Renewal

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

No, copyright terms do not have to be renewed. There is no renewal procedure for copyright protection terms under Polish law.

Government extension of protection term

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

Yes, several times. In 1952, the term was set for 20 years from the author's death. It was extended in 1976 to 25 years, and in 1994 to 50 years. The current 70-year copyright protection term was introduced in 2000.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Copyright infringement is any use of copyright-protected works without authorisation from the rightsholder or without another legal basis for such use. There are certain situations ('permitted uses') whereby the user of a copyrighted work does not need permission from the rightsholder. The copyright infringement may involve the infringement of either economic copyrights or the author's personal rights, or both. In general, it is irrelevant whether the infringer has the knowledge or intent to infringe; however, it may result in higher monetary liability or criminal charges.

Vicarious and contributory liability

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

Secondary liability for indirect copyright infringement exists in Polish law. Such liability is covered by article 422 of the Polish Civil Code. Three categories of indirect infringers are liable: persons who incite the direct infringer, persons who aid another person to cause damage and persons who knowingly take advantage of damage caused by another person. The liability of the indirect infringers is generally the same as in the case of the liability of the direct infringers; however, some remedies may not be available to be received from indirect infringers (it might apply mostly to non-monetary remedies).

Available remedies

39 | What remedies are available against a copyright infringer?

Remedies available against a copyright infringer vary depending on the kind of rights infringed – an author's personal rights or economic copyrights.

In relation to an author's personal rights, the following remedies are available to the author:

- cessation of infringing actions;
- removal of effects of the infringement, in particular through a public statement; and
- in cases of intentional remedies, monetary damages payable to the author or an obligation to pay a certain amount of money to a social cause indicated by the author.

In relation to economic copyrights, the following remedies are available:

- cessation of infringing actions;
- request for the remedy of the effects of the infringement;
- monetary damages either calculated by general rules or double the amount of the remuneration that would have been due at the time of the infringement;
- publication of a press statement; and
- withdrawal from the market, handover to the rightsholder or destruction of the materials used for the infringement.

Limitation period

40 | Is there a time limit for seeking remedies?

Yes, there is a time limit for seeking remedies. The general statute of limitations is three years from the day the injured party learnt about the injury (damage) and the person responsible for the injury (damage), though not later than 10 years from the day of the event that caused the damage. If the copyright infringement that caused the damage is also a crime, then the limitation period is 20 years from the day the crime occurred.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, monetary damages for copyright infringement are available – in relation to the infringement of both an author's personal rights and economic copyrights.

In regard to economic copyrights, the rightsholder may demand damages calculated by general rules (actual damages, which might be hard to calculate) or a set amount of double the amount of the remuneration that would have been due to the rightsholder at the time of the infringement (eg, licence fee).

In regard to the author's personal rights, monetary damages are available only in cases of wilful infringements. There is no possibility for a set amount of damages to be awarded and they would have to be calculated on a case-by-case basis.

Attorneys' fees and costs

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

Yes, standard rules for claiming attorneys' fees and costs in court procedures apply. There are specific limits on the amount of attorneys' fees and costs that may be claimed, which, in practice, means that the whole costs of professional representation can rarely be recovered – only in cases where they are relatively low.

Criminal enforcement

43 Are there criminal copyright provisions? What are they?

There are criminal copyright provisions in Polish copyright law. Polish law considers the following acts to be an offence: usurping authorship; dissemination, fixation and reproducing of copyright-protected items without approval; accepting or concealing illegal objects that are carriers of work for economic benefits; manufacturing or trading devices for illegal removal or circumvention of technological measures protecting copyrights; and prevention or hindering of the exercise of the right to monitor the use of copyright-protected items.

These offences are subject to fines, restriction of personal liberty or imprisonment for up to three years at the maximum. Most of these offences are prosecuted solely at the request of the aggrieved party.

Online infringement

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

In Poland, the issue of online infringements (including copyright infringements) is covered by the Act of 18 July 2002 on Rendering Electronic Services (in Polish). This act implements EU Directive 2000/31/EC of 8 June 2000 –the 'e-Commerce Directive'. This act includes the duties of service providers of services rendered through electronic means (including internet service providers).

In relation to copyright, the most important parts of the act are the provisions on the exclusion of liability of service providers (including copyright liability). The act describes three types of services rendered through electronic means: mere conduit, caching and hosting. Service providers of these services covered by the act have no obligation to actively monitor the information they transmit, store or share. Hosting is most relevant in terms of copyright infringements.

Hosting service providers are exempt from the liability if they comply with the 'notice and takedown' procedure. A hosting service provider is exempt from liability if the provider does not know of the infringing character of the data stored in its service by a third party and, upon receipt of administrative notice or reliable information on the illegal character of the stored data or activities connected with it ('notice'), expeditiously acts to disable access to the data ('takedown'). The service provider is not liable for the damage incurred by the

service recipient by disabling access to the content in all cases, when it received an administrative notice, and in cases of reliable information, when it promptly informs the service recipient that it has disabled access to such content.

The liability of online content-sharing service providers (as defined by the new Directive (EU) 2019/790 on Copyright in the Digital Single Market) – which are now considered hosting service providers under the aforementioned provisions – will change as soon as the new directive is implemented in Poland.

Prevention measures

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

In cases where there is a threat that copyrights will be violated (or the scale of violations will be bigger), the rightsholder (author in the case of moral rights) may ask a competent court to secure the rightsholder's claims by imposing obligations (positive or negative) on the (possible) infringer. However, for such protection to be obtained, the threat must be real (close to fruition) and the civil procedure might still take too long for the infringement to be prevented.

Customs enforcement measures are also available to rightsholders. The rightsholders (as well as, for example, an authorised licensee or a collective management organisation) may apply for customs protection of intellectual property (including copyright) to the Director of Polish Customs Services in Warsaw, based on EU Regulation No. 608/2013 of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No. 1383/2003. The rightsholder should appoint representatives for technical and legal matters in Poland who are responsible for contact with the Customs Office. After the decision approving the application for customs protection, Customs Services would be able to seize and potentially destroy infringing goods (eg, counterfeit goods) and cooperate with the rightsholder on this matter.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 Which international copyright conventions does your country belong to?

Poland is a party to the following copyright conventions:

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

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

All relevant obligations of international copyright conventions that Poland belongs to are being exercised by Poland and are included in the relevant provisions of Polish copyright laws.

UPDATE AND TRENDS

Key developments of the past year

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

On 7 June 2021, Poland was required to implement the new Directive on Copyright in the Digital Single Market (Directive (EU) 2019/790) (the DSM Directive) and the directive laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (Directive (EU) 2019/789). So far, these have not yet been implemented.

The government is also working on a draft of the act on rights of professional artists (in Polish). The act is supposed to create social benefits for low-income professional artists. These social benefits are supposed to be financed by new increased reprographic fees (copyright levies). As of now, the act is on the public consultations stage and it remains to be seen whether it will be enacted.

* *The author would like to thank Jakub Zalewski for contributing to this text.*

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Summary

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 What is the relevant legislation?

The 1960 Act on Copyright in Literary and Artistic Works (Swedish Books of Statute 1960:729), as amended, is the primary legislation governing copyright in Sweden. The said act is commonly referred to as the Copyright Act.

Enforcement authorities

2 Who enforces it?

With the exception of the Swedish Patent and Registration Office, which is entrusted to monitor organisations subject to the 2016 Act on the Collective Management of Copyright, no government authorities are specifically charged with regulating and enforcing copyright law.

Online and digital regulation

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

Section 12 of the Copyright Act explicitly excludes private copying of digital content.

Sections 15(a) to 15(c) of the Copyright Act provide a specific copyright exception for text and data mining.

Section 16 of the Copyright Act provides libraries, museums and certain other institutions with a right, in specific situations, to digitalise works with a view to preserve such works.

Section 23 of the Copyright Act excludes digital reproduction of works of fine art in connection with critical presentations.

Sections 26(l) and 26(m) of the Copyright Act on private copying compensation explicitly apply to digital media.

As to the neighbouring rights, mention should be made on the following provisions.

Sections 48(b) to 48(d) of the Copyright Act provide a new specific right for press publications concerning commercial online use of their press publications. A new collective licence mandate is also provided in section 42(h) for the online use of press publications.

Section 52(d) of the Copyright Act prohibits the unauthorised circumvention of any digital lock that prevents or limits the making of copies of a work protected by copyright.

Sections 52(i) to 52(u) of the Copyright Act set out the responsibilities of online content-sharing service providers.

Online content is not subject to specific statutory regulations in the Copyright Act, but the Act nevertheless applies when copyrighted works are made available online.

Extraterritorial application

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

Yes, although not codified in the Copyright Act, the Supreme Court has made a wide interpretation of the special jurisdiction rule, meaning that Swedish courts have jurisdiction in internet-related copyright infringements inter alia if the online content is or has been accessible in Sweden, thereby confirming the European Court of Justice's case law concerning the EU Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (44/2001). There are no specific rules to deal specifically with foreign-owned or foreign-operated websites that infringe copyright.

Agency

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

No, although the Patent and Registration Office has certain responsibilities in relation to collective licensing bodies.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

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

In principle, any original physical expression of literary or artistic work may be subject to copyright protection. According to a non-exhaustive list in section 1 of the Copyright Act, such work may be a:

- fictional or descriptive representation in writing or speech;
- computer program;
- musical or dramatic work;
- cinematographic work;
- photographic work or another work of fine art;
- work of architecture or applied art; or
- work expressed in some other manner.

Section 1 also states that maps and other works of a descriptive nature executed as drawings, engravings, or in a three-dimensional form, shall be considered as literary works.

In addition, section 1 explicitly states that provisions on computer programs will mutatis mutandis apply to preparatory design material.

Rights covered

7 | What types of rights are covered by copyright?

Even though the language of the Copyright Act implies otherwise, the main right afforded to a copyright holder is negative. Rights holders may limit the use by others of a copyrighted work. Another vital right vested with the copyright holder is the right to receive reasonable compensation and, in some cases, damages. A third important right for creators is moral rights.

Moral rights include the author's or artist's right to have his or her name stated when copies are made of a work, or when it is made available to the public. Further, a work may not be altered in a manner that is prejudicial to the author's literary or artistic reputation or to his or her individuality, nor may it be made available to the public in such a form or in such a context that is prejudicial in the manner stated.

Excluded works

8 | What may not be protected by copyright?

According to section 9 of the Copyright Act, copyright does not subsist in:

- laws and other regulations;
- decisions by public authorities;
- reports by Swedish public authorities; or
- official translations of the above-mentioned texts.

Section 10 excludes copyright in data chips.

Fair use and fair dealing

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

The limitations of copyright are addressed in Chapter 2 of the Copyright Act. The limitations and exceptions listed therein are exhaustive. Chapter 2 does not spell out a general fair use rule. However, case law must be taken into account.

In a judgment rendered by the Supreme Court (delivered on 18 March 2020, case NJA 2020 page 293), Sweden's public service television company was found liable for infringement even though the company argued that a legal basis for exception could be found in the European Convention on Human Rights and the Copyright Directive (2001/29/EC). According to the reasoning of the Supreme Court, the rights claimed by the defendant were not applicable in a civil matter as the items in question (short film cuts of no originality) had not lawfully been made available to the public by the rights holder. According to the Supreme Court, the Copyright Act could not be interpreted in conformity with the specific provision in the directive against the express wording of the Act.

As to parodies, Swedish courts have traditionally taken the view that such expressions may be regarded as new works created in free connection with the original work and, therefore, not dependent on a statutory exception. In a 2019 Patent and Market Court of Appeal judgment (Case No. PMT 1473–18), the Court declared that an exception for parody can no longer be upheld on that basis. Nevertheless, it concluded that such an exception still exists under Swedish law and that it must be construed and applied in conformity with the case law of the European Court of Justice. The existence of a parody exception in Swedish copyright law has grown increasingly unclear following a more recent judgment from the Patent and Market Court of Appeal (Case No. B 12315-20), where the Court found that there is a norm conflict between EU law and Swedish case law on parodies. The Court nevertheless concluded that the illustrations at issue could be seen as new and independent works, thus not dependent on the contested parody exception.

Limitations on copyright listed in Chapter 2 address, for example, temporary copying as a part of an integrated technical process, private copying, quotations, copying for people with disabilities and for educational purposes, text and data mining, for libraries and certain other institutions, use in news reporting, use of public office documents and adaptations of computer programs. Some limitations entitle the copyright holder to receive reasonable compensation.

Architectural works

10 Are architectural works protected by copyright? How?

Yes, all original artistic works are protected by copyright, including works of architecture (provided that they are constructed in Sweden). The protection relates to the expression of the architectural idea as such, regardless of whether it is formed in a blueprint or as a constructed building.

Performance rights

11 | Are performance rights covered by copyright? How?

According to section 1 of the Copyright Act, copyright is extended to dramatic works, which include theatrical plays and dance choreographies.

Under section 45 of the Copyright Act, performing artists have the exclusive right (neighbouring to copyright) to exploit their performances of a literary or artistic work or of an expression of folklore. The right relates to the performance as such, regardless of the quality level, meaning that less artistic deliveries enjoy protection. Such performance rights are typically not afforded to imitators, illusionists, acrobats, circus artists or athletes.

Neighbouring rights

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

Ancillary and neighbouring rights in relation to copyright are governed by Chapter 5 of the Copyright Act. Rules on neighbouring rights apply to, for example, performing artists, television and radio companies, producers of recordings and sound images, producers of catalogues and databases and photographers who have taken photos (regardless of the originality of the photo).

In short, the restrictions applicable to neighbouring rights are similar to those that apply to original works subject to copyright pursuant to section 1 of the Copyright Act.

The rules are detailed for each type of neighbouring right and the technique in the text is based on a large number of cross-references.

Moral rights

13 | Are moral rights recognised?

Yes. Moral rights include the author's or artist's right to have his or her name stated when copies are made of a work, or when it is made available to the public. Further, a work may not be altered in a manner which is prejudicial to the author's literary or artistic reputation or to his or her individuality, nor may it be made available to the public in such a form or in such a context as is prejudicial in the manner stated.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

Under Swedish law, copyright is in principle established on creation. There are no requirements on registration, deposit or any other formalities.

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

Not applicable.

Deposit

16 Is there a requirement of copyright deposit?

There are no requirements on registration, deposit or any other formalities.

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

Not applicable.

Registration

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

Under Swedish law, copyright is not subject to any formal procedure for registration or deposit, be it mandatory or voluntary. A copyright holder may display his or her work for someone (eg, a notarius publicus in order to secure evidence), but such measure has no formal effect.

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

Not applicable.

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

Not applicable.

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

Not applicable.

OWNERSHIP AND TRANSFER

Eligible owners

22 Who is the owner of a copyrighted work?

Any natural or legal person can be a holder of copyright. However, moral rights are not vested in legal persons.

Employee and contractor work

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

Generally, copyright to works created in the course of employment is transferred from the employee to the employer only to the extent that is explicitly or implicitly agreed between the employer and employee. Thus, there are no statutory requirements for the agreement to be express or in writing. There is no ban on an employer being the full and sole holder of a copyrighted work made by an employee.

Although the Copyright Act includes a chapter on the transfer of copyright, rules governing the relationship between the employer and employee are few. One specific rule should be observed: section 40(a) of the Copyright Act presumes that copyright in a computer program created by an employee as a part of his or her tasks, or following instructions by the employer, is automatically transferred to the employer unless otherwise agreed.

The legal principles on the transfer of copyright with regard to employees and commissioned work were discussed by a legislative commission (SOU 2010:24). The commission forwarded a proposal for the codification and definition in the Copyright Act of the 'rule of thumb', a principle developed in Swedish case law. The commission suggested that an employer would be given a limited but exclusive right to use works created in the framework of employment relationships. However, to date, the government has not forwarded any proposal for statutory amendments in that regard.

A judgment by the Swedish Labour Court (27 November 2019, Case No. A 69/18) illustrates the context-specific demarcation issues in determining whether copyright has been transferred from an employee to the employer. An animator had created a set of popular characters for children, first as a freelance contractor for approximately 10 years and later as an employee. Even though the matter of copyright ownership was first mentioned in a supplement to the employment agreement, the Labour Court found that the company had acquired the copyright to all works created within the scope of the parties' contractual and employment relationships.

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

Generally, it can be said that copyrights to works created by an independent contractor are transferred to the hiring party only to the extent that is explicitly or implicitly agreed between the parties. Thus, there are no statutory requirements for the agreement to be expressly made or in writing. There is no ban for a hiring party to be the full and sole holder of a copyrighted work made by an independent contractor.

The legal principles on the transfer of copyright with regard to commissioned works were discussed by a legislative commission (SOU 2010:24). The commission forwarded a proposal for the codification of a 'principle on specification' developed in Swedish case law. In short, the commission proposed statutory provision where the hiring party would not acquire a more extensive right in a copyrighted work than what was expressed in the agreement or stemming from its purpose. However, to date, the government has not forwarded any proposal for statutory amendments in that regard.

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A judgment by the Swedish Labour Court (27 November 2019, Case No. A 69/18) illustrates the context-specific demarcation issues in determining whether copyright has been transferred from an independent contractor to the hiring party. An animator had created a set of popular characters for children, first as a freelance contractor for approximately 10 years and later as an employee. Even though the matter of copyright ownership was first mentioned in a supplement to the employment agreement, the Labour Court found that the company had acquired the copyright to all works created within the scope of the parties' contractual and employment relationships.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes. Section 6 of the Copyright Act states that copyright will belong to the authors jointly, if a work has two or more authors and where the contributions do not constitute independent works.

Each author may dispose of his or her rights and bring an action for infringement. However, the use of a copyrighted work is subject to mutual consent between the joint holders.

Transfer of rights

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

Yes. Under Swedish law, copyright is regarded as property. The copyright holder is entitled to freedom of contract and copyright may, with an exception for moral rights, be transferred, in whole or in part, or licensed (see section 27 of the Copyright Act). Pursuant to section 28, the person to whom a copyright has been transferred may not alter the work or transfer the copyright to others, unless otherwise agreed. One exception from this principle exists where the copyright forms part of a business activity; in that case, the applicable party (eg, an employer) may transfer the copyright together with the business activity.

No formalities are required to secure the legal effect of a transfer or an assignment.

Sections 29 to 29(c) of the Copyright Act contain newly introduced mandatory provisions on the author's right to compensation and information. Contract terms are void to the extent that they restrict the author's right to request an alternative dispute resolution procedure in a dispute regarding such rights.

Licensing

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

Yes. Under Swedish law, copyright is regarded as property. The copyright holder is entitled to freedom of contract and copyright may, with an exception for moral rights, be transferred, in whole or in part, or licensed (see section 27 of the Copyright Act). Section 28 of the Copyright Act states that in the absence of an agreement to the contrary, the person to whom a copyright has been transferred, which includes licences, may not alter the work or license the copyright to others.

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In addition, the Act includes statutory provisions on, for example, film and book publishing contracts. Mention should also be made of the extended effect of collective licences (see Chapter 3(a) of the Copyright Act).

There are no formal requirements for copyright licences.

Sections 29 to 29(c) of the Copyright Act contain newly introduced mandatory provisions on the author's right to compensation and information. Contract terms are void to the extent that they restrict the author's right to request an alternative dispute resolution procedure in a dispute regarding such rights.

28 | Are there compulsory licences? What are they?

Yes, the Copyright Act includes a number of provisions on compulsory licences, such as section 18 on the making of composite works for use in educational activities and section 47 on the use of sound recordings for public performances (a neighbouring right).

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

There are several collective licensing bodies operating in Sweden – for example:

- the Visual Copyright Society;
- Bonus Copyright Access;
- the Swedish Performing Rights Society; and
- the Swedish Artists and Musicians Interest Organisation.

The Patent and Registration Office is in the process of compiling an exhaustive list of all registered collective licensing bodies.

The collective licensing bodies' activities are regulated in the Act on Collective Management of Copyright (Swedish Books of Statute 2016:977). The Patent and Registration Office is entrusted to monitor collective licensing bodies and register new ones.

Termination

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

Yes. Sections 29(d) and 29(e) of the Copyright Act contain newly introduced mandatory provisions on the author's right to revoke a transfer of exclusive rights if the work has not been exploited within reasonable time following the transfer and other certain conditions stated therein have been met. The author's right of revocation does not apply to film works or to the transfer of the right to record a work on film, when such recording is already completed.

Aside from this right of revocation, general principles of contract law apply, along with specific principles on the construction of agreements in the field of copyright. The language of a transfer is vital as to the scope and limitations of an assignment.

Recordal

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

No. A copyright assignment agreement may be notarised, although there is no statutory requirement in this regard.

DURATION OF COPYRIGHT

Protection start date

32 When does copyright protection begin?

Copyright protection arises automatically as soon as the work is created.

Duration

33 How long does copyright protection last?

Copyright protection subsists until 70 years have passed since the author's death. As regards a cinematographic work, copyright protection lasts until 70 years have passed since the death of the last living principal director, author of the screenplay, author of the dialogue or composer of the music specifically created for the work. Copyright in musical work with lyrics lasts until 70 years have passed since the death of the last living composer or lyricist, if music and lyrics have been created specifically for the work.

A work that has been made public without stating the author's name is copyright protected until 70 years have passed since the year in which the work was made public.

The duration of protection for neighbouring rights is 50 years. The starting point for the protection varies depending on the right in question. The duration of protection for catalogues and databases is 15 years from the year in which the product was produced.

In addition, there are specific rules on duration in specific cases and for neighbouring rights.

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

Generally, the duration of copyright is determined by the year of the author's death. However, the duration of protection will in some cases depend on when the work was created or published; such exception applies to neighbouring rights and to copyright to works where the author is unknown or unidentified.

Renewal

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

No, terms of copyright do not have to be renewed. Copyright protection arises and continues to exist without registration.

Government extension of protection term

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

Since the last extension in 1995, copyright subsists until the end of the 70th year after the year in which the author died (with a few exceptions).

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Infringement occurs when the rights holder's exclusive right to exploit its work is violated by making copies of the work or making the work available to the public (see section 2 of the Copyright Act).

Vicarious and contributory liability

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

Yes, any person or legal entity that contributes to an infringement may be held responsible for contributory copyright infringement.

In relation to internet service providers (ISPs), in a 2017 Patent and Market Court of Appeal judgment, the Court declared that an ISP can be subject to blocking injunction. The Court stated that neither a contractual relationship between the intermediary and the third-party infringer nor criminal liability is needed for the grant of an injunction against an intermediary (13 February 2017, Case No. PMT 11706–15).

Available remedies

39 | What remedies are available against a copyright infringer?

The court can, according to section 53(b) of the Copyright Act, issue an injunction to prohibit an infringing party from continuing to commit, aid or abet an act constituting a copyright infringement. An injunction can also be issued to prohibit an attempt or a prepared infringement.

Section 54 of the Copyright Act stipulates that the rights holder is entitled to reasonable compensation for use of its copyrighted work. If the infringement is committed with intent or negligence, the rights holder is also entitled to additional damages. When determining the amount of the compensation, the following are considered:

- lost profits;
- profits made by the infringer;
- damage to the reputation of the work;
- moral damages; and
- the interest of the rights holder in avoiding infringements.

Unless clearly unreasonable, property and profits in connection with the crime (pursuant to the Copyright Act) will be declared forfeited. In lieu of property, the value of the property may be declared forfeited (see section 53(a) of the Copyright Act).

The Supreme Court has clarified how reasonable compensation and additional damages should be determined (judgment on 21 January 2019, Case NJA 2019 page 3). As regards reasonable compensation, the primary basis is an established regular price for the particular kind of use. In the absence of an existing market model, reasonable compensation is calculated through the court's assessment of the evidence submitted in the case. Reasonable compensation can be either higher or lower than the actual damage or loss suffered. The Supreme Court also noted that additional damages are not awarded to the extent already covered by the reasonable compensation.

According to section 55 of the Copyright Act, the court can decide that property involved in an infringement should be recalled from the market, altered or destroyed or that some other measures should be taken. The same applies to means of assistance that have been, or are intended to be, used in connection with an infringement.

If it can be reasonably assumed that someone has committed, aided or abetted an infringement, for the purpose of preserving evidence, the court may, in accordance with section 56(a) of the Copyright Act, order an infringement investigation to search for objects or documents that can be assumed to be of importance for the inquiry into the infringement.

If a claimant can demonstrate a likelihood that someone has committed an infringement, the court may, under the penalty of a fine, order one or several of the defendants to provide information to the claimant regarding the origin and distribution networks for the goods or services in respect of which the infringement has been committed (see section 52(b) of the Copyright Act).

Finally, according to section 53(h) of the Copyright Act, the court can order the infringing party to pay compensation for appropriate measures taken in order to distribute information about the judgment in the case.

Limitation period

40 | Is there a time limit for seeking remedies?

The Copyright Act has no limitation period regarding the initiation of civil infringement action. As a consequence, the general 10-year statute of limitations from the accrual of the claim applies. For criminal proceedings, the limitation period is five years, according to Chapter 35, section 1 of the Penal Code.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes. Section 54 of the Copyright Act stipulates that the rights holder is entitled to reasonable compensation for use of its copyrighted work. If the infringement is committed with intent or negligence, the rights holder is also entitled to additional damages.

Attorneys' fees and costs

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

In general, the costs (including attorneys' fees) follow the outcome of the trial. Thus, in most cases the winning party will recover all or a substantial part of its costs, subject to a specific decision by the court in this regard. Compensation for litigation costs is governed by the provisions in Chapter 18 of the Swedish Code of Judicial Procedure.

Criminal enforcement

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

Yes. Under section 53 of the Copyright Act, wilful or grossly negligent acts of copyright infringement are punishable by fines or imprisonment for up to two years. If the infringement is found wilful and gross, imprisonment shall be imposed for at least six months and at most six years. Criminal action may, according to section 59 of the Copyright Act, be instituted by a public prosecutor only if it is in the public interest. Should the public prosecutor decide not to commence criminal proceedings, the rights holder may do so.

Online infringement

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

Sections 48(b) to 48(d) of the Copyright Act provide a new specific right for press publications concerning commercial online use of their press publications. A new collective licence mandate is also provided in section 42(h) for online use of press publications.

Section 52(g) of the Copyright Act prohibits the deletion or removal of electronic rights management information relating to a work protected by copyright.

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Obviously, rights holders have an interest to maintain a state-of-the-art administrative system, inclusive of electronic marks to each copyright protected item.

Sections 52(i) to 52(u) of the Copyright Act set out the responsibilities of online content-sharing service providers.

Prevention measures

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

There are many steps that can be taken to prevent infringement, including various technical protection measures. The copyright symbol © is not necessary for copyright to apply but may deter infringers. Likewise, effective copyright monitoring and enforcement may prevent future infringements.

An anticipated cross-border infringement may be dealt with by alerting Swedish Customs.

An ongoing, including certain attempts to commit, copyright infringement may be addressed legally by filing a motion for a preliminary injunction.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 Which international copyright conventions does your country belong to?

Sweden has signed and ratified a number of international treaties in the field of copyright and neighbouring rights, most notably the 1886 Berne Convention, the 1952 Universal Copyright Convention, the 1996 World Copyright Treaty and the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled.

With regard to neighbouring rights, mention should be made of the 1961 Rome Convention, the 1971 Phonograms Convention, the 1996 World Intellectual Property Organisation Performances and Phonograms Treaty and the 2012 Beijing Treaty on Audiovisual Performances.

Sweden is also a member of the World Trade Organization and a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods.

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

Conventions and other international treaties which have been signed and ratified by Sweden do not automatically become part of Swedish law. For such treaty obligations to be applicable and binding before Swedish courts and authorities, they must be incorporated into

Swedish law. The Copyright Act includes a number of obligations imposed by the aforementioned conventions.

UPDATE AND TRENDS

Key developments of the past year

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

As of 1 January 2022, the following developments are noteworthy.

Legislative developments

The implementation in Sweden of the Directive 2019/790 on Copyright in the Digital Single Market has been completed. New and amended provisions in the Copyright Act, the Act on Collective Management of Copyright and the Act on Mediation in Certain Copyright Disputes (Swedish Books of Statute 2017:322) entered into force on 1 January 2023.

Case law

Swedish courts have recently delivered a number of judgments in infringements cases concerning works of applied art.

The Patent and Market Court has in two separate judgments found that a kitchen table and an armchair cushion are protected by copyright as works of applied art (judgments delivered on 19 October 2022 and 2 November 2022, Cases No. PMT 16606-21 and PMT 16530-21). The latter judgment has particularly been debated based on considerations regarding reparation or renovation of works of applied art.

The Patent and Market Court of Appeal has recently dismissed a copyright infringement claim brought by the British car manufacturer Jaguar Land Rover Automotive PLC against two individuals and a company that allegedly illegally manufactured a replica of a Jaguar racing sports car created in 1951 (judgment delivered on 22 March 2023, Case No. PMT 625-21). The Patent and Market Court of Appeal found that the car was protected by copyright as a work of applied art. Furthermore, the Court found that the individuals had exploited the work by preparing a copy of it and exhibiting it publicly. The Court, however, considered that the defendant company had not been involved in or contributed to either the copying act or the public exhibition. As to the question of infringement, the Court considered that the car manufacturer must be considered to have given general consent to such exploitation which the individuals had carried out up until they received a cease-and-desist letter from the car manufacturer. The Court concluded that the exploitation thereafter was for the completion of a replica for the purpose of private use.

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Summary

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 What is the relevant legislation?

The main copyright statute in the United States is the Copyright Act, which is codified in Title 17 of the United States Code (17 USC section 101 et seq), and is sometimes 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.

Enforcement authorities

2 Who enforces it?

The copyright laws of the US are generally enforced through civil lawsuits initiated by copyright owners. In certain circumstances, 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.

Online and digital regulation

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

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

Section 106(6) provides a sound recording performance right limited to performances by means of a digital audio transmission, and sections 114 and 112(e) provide statutory

licences for certain kinds of digital performances of sound recordings, including 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. These provisions extend to interactive streaming of musical works.

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 10 of the Act addresses limited categories of digital audio recording devices and media, requiring manufacturers and importers of such items to pay royalties for the distribution of such items in the US and providing a mechanism for allocating those royalties to interested parties with respect to sound recordings and musical works.

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

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 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.

Agency

5 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's

Copyright Claims Board adjudicates on a voluntary basis copyright disputes with no more than US$30,000 in controversy.

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.

Additionally, a separate unit of the Library of Congress, the Copyright Royalty Board, determines royalty rates and terms and distributes royalties under statutory licences in the music, cable and satellite television industries.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 What types of works may be protected by copyright?

US copyright law protects any qualifying 'original works of authorship' that are fixed in a tangible medium of expression so as to be perceptible for more than a transitory duration. The fixation need not be directly perceptible, 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.

Rights covered

7 What types of rights are covered by copyright?

The Copyright Act generally gives the owner of a copyright the exclusive right to:

- reproduce the work in copies or phonographic records;
- prepare derivative works based upon the work;
- distribute copies or phonographic records of the work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- perform the work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes and motion pictures, and other audiovisual works;
- display the copyrighted work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work; and
- perform the work publicly by means of a digital audio transmission, in the case of sound recordings.

Excluded works

8 What may not be protected by copyright?

The following may not be protected by copyright:

- works that have not been fixed in a tangible medium of expression;
- works prepared by employees of the US government as part of their official duties, except for scholarly publications created by civilian faculty of certain military schools;
- works that do not have a human author;
- 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.

Fair use and fair dealing

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

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

Architectural works

10 | Are architectural works protected by copyright? How?

Architectural works are protected by copyright. For this purpose, an architectural work is defined as 'the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings'. Protection extends to 'the overall form as well as the arrangement and composition of spaces and elements in the design but does not include individual standard features'. Protection 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

11 | Are performance rights covered by copyright? How?

The US Copyright Act provides a general right of public performance for literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works. 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).

Neighbouring rights

12 | 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; and
- sound recordings created before 15 February 1972 are protected under specialised provisions in Chapter 14 of Title 17.

Moral rights

13 | Are moral rights recognised?

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

The Copyright Act provides only limited moral rights of attribution and integrity to authors of a narrowly defined class of works of visual art, under the Visual 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'.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

Although US law once required use of a copyright notice as a condition of copyright protection, notice has been optional on copies of works published since 1 March 1989. A copyright notice generally consists of the symbol '©', the word 'copyright' or the abbreviation 'copr'; the year of first publication; and the name of the copyright owner (eg, '© 2023 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.

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

The only current legal consequence of a failure to use a copyright notice is that it makes it easier for an infringer of the work to claim that 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.

Deposit

16 | Is there a requirement of copyright deposit?

The owner of copyright or of the exclusive right of publication in a work published in the US generally is required to deposit two copies of the best edition of the work in the Library of Congress within three months after the date of publication. Such a deposit is not a condition of copyright protection.

Such a deposit is generally 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.

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

If a mandatory deposit is not made on demand, a fine may be levied, and the relevant person may be required to pay the Library of Congress' cost of buying the copies demanded. In addition, when registration is sought, the underlying work will not be registered unless the required deposit copy or copies are submitted to the Copyright Office.

Registration

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

The US has a copyright registration system. To apply for a copyright registration, the author must submit a completed application form, a non-refundable filing fee, and a non-returnable deposit copy or copies of the work to be registered. The primary means of registration is to use the Copyright Office online system called the Electronic Copyright Office (eCO). The Copyright Office receives about 98 per cent of copyright claims through the 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.

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

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

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

The standard registration fee for a simple application submitted through the eCO online system is US$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.

21 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.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The general rule is that the author of the work initially owns the copyright. A corporate entity can be considered the author in the case of a work made for hire. The initial owner of the copyright may assign its rights.

Employee and contractor work

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

An employer will be considered the author of a work, and will initially own the copyright, when the work is a 'work made for hire'. A work will be considered a work made for hire if it is prepared by an employee within the scope of 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.

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

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

- a contribution to a collective work;
- a part of a motion picture or other audiovisual work;
- a translation;
- a supplementary work;
- a compilation;
- an instructional text;
- a test;
- answer material for a test; or
- an atlas.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Copyrights can be co-owned either in the case of a joint work 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).

Transfer of rights

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

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

Licensing

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

Copyright rights can be licensed on an exclusive or non-exclusive basis. The holder of an exclusive licence is the owner of the licensed right and as such is entitled to sue any party that infringes the right while the exclusive licensee owns it. A non-exclusive licence gives

the licensee the right to exercise one or more of the copyright owner's rights but does not prevent the copyright owner from giving others permission to exercise the same right or confer standing to sue.

28 | Are there compulsory licences? What are they?

The Copyright Act provides various compulsory licences (sometimes referred to in the US as 'statutory licences'):

- section 111 – secondary transmissions by cable systems;
- section 112 – ephemeral reproductions of sound recordings;
- section 114 – public performance of sound recordings by means of digital audio transmissions;
- section 115 – 'mechanical' reproduction and distribution of musical works;
- section 118 – use of certain works in non-commercial broadcasting;
- section 119 – secondary transmissions by satellite carriers; and
- section 122 – local retransmissions by satellite carriers.

These licences are all very different from each other, and the details of most of them are fairly complicated. The section 122 licence is generally royalty-free. Otherwise, royalty rates under these licences are determined, or subject to adjustment in certain circumstances, by the Copyright Royalty Board. Royalties under sections 111 and 119 are paid into the Copyright Office and distributed to copyright owners under the supervision of the Copyright Royalty Board. Royalties under the other licences are paid directly to copyright owners or to collecting societies representing copyright owners and creators.

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

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

In the case of musical works, there is no requirement that licences be administered by performing rights organisations, but songwriters and music publishers generally have chosen to have a performing rights organisation grant and administer voluntary collective licences on their behalf. The American Society of Composers, Authors and Publishers, Broadcast Music, SESAC and Global Music Rights are the principal US performing rights organisations for musical works.

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

Termination

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

The Copyright Act has 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.

Recordal

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

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

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

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection exists from the time a work is created and fixed in a tangible medium of expression. The copyright in the work of authorship immediately becomes the property of the author who created the work.

Duration

33 | How long does copyright protection last?

The length of copyright protection varies according to when the particular work was created and published, and according to whether the author is an identified natural person.

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

The duration of copyright protection depends on when a particular work was created and published and on the nature of the author. A work created on or after 1 January 1978 is automatically protected from the moment of its creation and is ordinarily given a term continuing for the author's life plus an additional 70 years after the author's death. In the case of a 'joint work prepared by two or more authors who did not work for hire', the term lasts for 70 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright is 95 years from first publication or 120 years from creation, whichever is shorter.

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

Both the requirements for copyright protection and the US copyright term have changed over time. In the past, the copyright term was shorter, and many pre-1978 works fell into the public domain earlier than the expiry of their full term. Determining whether any particular work created before 1 January 1978 is still under copyright is thus fairly complicated and depends on factors such as the source country of the work, when the work was created and published, whether the work was published with notice, and whether the copyright was renewed during the 28th year after publication or registration.

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.

Renewal

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

Renewal does not apply to works created on or after 1 January 1978, or to earlier works that were not published or registered before 1 January 1978. Works first published or registered up until 1963 had to be formally renewed through a renewal registration in the US Copyright Office to maintain protection. Failure to renew placed the work in the public domain. However, copyright protection was later restored to certain works of foreign origin that had fallen into the public domain due to failure to renew. For works first published or registered between 1964 and 1977, renewal was automatic, but obtaining a renewal registration provides certain advantages.

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Government extension of protection term

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

The US term of copyright protection has been extended many times. Most recently, the Sonny Bono Copyright Term Extension Act of 1998 extended the term of existing copyrights by 20 years. The extension was not applied to copyrights that had already expired.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

Copyright infringement occurs when a party violates any of the copyright owner's exclusive rights. 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.

Vicarious and contributory liability

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

Secondary liability for indirect copyright infringement has been established by case law, although it is not specifically prescribed by statute. Secondary liability can be found under several theories:

- vicarious liability, when the defendant has the ability to supervise the infringing conduct and benefits financially from the infringement;
- contributory infringement, when the defendant has knowledge or reason to know of the infringement and contributes to, authorises or induces the infringement; and

- inducement as discussed in the Supreme Court's *Grokster* decision, when the defendant acts with the object of promoting infringement, as shown by clear expression or other affirmative steps taken to foster infringement.

Available remedies

39 | What remedies are available against a copyright infringer?

Remedies for copyright infringement can include:

- payment to the copyright owner of any profits the infringer received and of any losses suffered by the copyright owner or, 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.

Limitation period

40 | Is there a time limit for seeking remedies?

The statute of limitations for bringing a civil copyright infringement claim is three years (and five years for criminal actions). It is measured from the time the claim accrued. In most courts, a claim is considered to accrue at the time the plaintiff knew or had sufficient reason to know that the infringement occurred. However, some courts may view a claim as accruing at the time the infringement occurred. If, at the time of suit, the infringement has been ongoing for more than three years since the claim accrued, the copyright owner will at least be able to pursue remedies for the infringements occurring within the past three years. However, where the essence of a copyright claim is a dispute concerning ownership of the copyright, courts have rejected the assertion of an ongoing wrong and have dismissed the claim if it was brought more than three years after it accrued.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Monetary damages are available for copyright infringement. A party found liable for copyright infringement may be found liable for either the copyright owner's actual damages and any additional profits of the infringer or statutory damages 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.

Attorneys' fees and costs

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

Both costs and attorneys' fees can be claimed in a copyright infringement action. They may be awarded to a prevailing party at the court's discretion if the work was registered with the US Copyright Office within certain time requirements.

Criminal enforcement

43 Are there criminal copyright provisions? What are they?

The Copyright Act has criminal provisions. It is a criminal offence to wilfully infringe a copyright if the infringement was committed:

- for either commercial advantage or private financial gain;
- by the reproduction or distribution, including by electronic means, during a 180-day period, of one or more copies or phonographic records of one or more copyrighted works 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.

Title 18 of the United States Code (18 USC section 2319C) specifies an additional infringement-related criminal offence: 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.

The Copyright Act specifies various other copyright-related 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.

Online infringement

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

Yes. Section 512 of the Copyright Act provides 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.

Prevention measures

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

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

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

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 Which international copyright conventions does your country belong to?

The US is a party to:

- the Berne Convention for the Protection of Literary and Artistic Works (1886, as revised);

- the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974);
- the Buenos Aires Convention (1910);
- the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971);
- the Universal Copyright Convention (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 March 2023, 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.

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

Each copyright 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 copyrights of citizens of other treaty parties by affording them copyright protection in the US on the same basis as US citizens.

UPDATE AND TRENDS

Key developments of the past year

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

Supreme Court to decide fair use dispute involving works of Andy Warhol

By June 2023, the US Supreme Court is expected to decide the case of *Andy Warhol Foundation for the Visual Arts v Goldsmith*, which concerns 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. Specifically, the Court is likely to decide 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.

Copyrightability of works created by artificial intelligence

As artificial intelligence (AI) systems capable of generating text, images and music from user prompts have become widely available and are increasingly being used in the process

of creating works entering the stream of commerce, there has been increasing interest in the circumstances in which such AI-generated works might qualify for copyright protection. As at March 2023, no US judicial decision has addressed the circumstances in which a work output in whole or part by a generative AI system can qualify for copyright protection.

However, the Copyright Office has had occasion to address that question several times. In 2022, the Copyright Office Review Board, the Office's final arbiter of registration issues, refused to issue a copyright registration for an image assertedly created 'autonomously' by an AI system. The Office based this decision on authority limiting copyright protection only to creations of human authorship. The claimant has challenged the Board's decision in court. The briefing in court suggested that there actually was some level of human involvement in generating the image. However, because of the claimant's original representation that the work was created autonomously by the AI system, the court will likely focus on the question of whether human authorship is in fact required. A decision is expected later in 2023.

More recently, the Copyright Office reconsidered the copyright registration for a comic book with AI-generated illustrations. While the human creator of the book had used the image generation system Midjourney in a highly iterative manner to refine the AI-generated images to conform to her artistic vision, the Office nonetheless found that she lacked sufficient control over the images to be treated as the author of those images. The Office did, however, register her claim to authorship of the text of the book and the compilation of text and AI-generated images in the book.

In a subsequent statement of policy, the Copyright Office reiterated its view that copyright only protects material that is the product of human creativity. While acknowledging the possibility that there may be situations in which AI is merely a tool used to assist human authorship, the Office suggested that it is unlikely to register claims to works created with currently-available generative AI systems that it does not perceive as giving human users sufficient creative control over the material generated. The Office also stated an expectation that claimants will disclose the inclusion of AI-generated content in a work submitted for registration.

Training of AI systems

Generative AI systems are typically developed by 'training' them on vast quantities of existing material that is generally protected by copyright. In addition, AI systems sometimes generate outputs that closely resemble individual works used in their training. A market is beginning to emerge for the licensing of input data for use in AI systems. However, many major AI initiatives have relied on training data scraped from the internet without authorisation. In such cases there are substantial questions as to whether the training of the system and creation of outputs is infringing or fair use.

A number of currently-pending cases test this issue. A putative class action alleges that the generative AI tool Stable Diffusion is infringing because it was trained using millions of unlicensed images. Another putative class action has been filed on behalf of programmers whose software was used in training GitHub's CoPilot AI, which generates AI-created code. Getty Images has also brought cases against Stability AI in the UK and in Delaware, claiming copyright infringement of Getty's works as used in the Stable Diffusion training set. All of these cases are at an early stage and remain ongoing.

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'Circuit split' regarding availability of damages for infringements more than three years old

A disagreement has emerged among US courts of appeals regarding whether a plaintiff in a copyright infringement lawsuit can recover damages for infringements occurring more than three years prior to filing the lawsuit when the plaintiff did not reasonably know about the infringements until after they occurred. In 2020, the Second Circuit Court of Appeals ruled in *Sohm v Scholastic Inc* that the Copyright Act limits a plaintiff's damages to those 'incurred during the three years prior to filing suit', regardless of when the plaintiff learned of the infringements. However, in July 2022, the Ninth Circuit Court of Appeals disagreed with the Second Circuit and ruled in *Starz Entertainment, LLC v MGM Domestic Television Distribution LLC* that when a plaintiff reasonably could not have discovered the infringements until after they occurred, and files a lawsuit within three years after learning of them, the plaintiff can recover damages for all infringements, even those that occurred more than three years prior to the case being filed. In February 2023, the Eleventh Circuit Court of Appeals issued a decision in *Nealy v Warner Chappell Music, Inc* in which it agreed with the Ninth Circuit and disagreed with the Second Circuit. These types of disagreements among US Courts of Appeals – known as 'circuit splits' – can only be resolved by the US Supreme Court. Thus, it is possible the Supreme Court will consider this issue in the coming years.

Launch of Copyright Claims Board

The new Copyright Claims Board (CCB) opened for business in mid-2022. It was created to adjudicate on a voluntary basis copyright claims with no more than US$30,000 in dispute as an efficient, less expensive alternative to federal court. Close to 300 cases were filed with the CCB in 2022, and as at March 2023, the CCB has continued to receive over 40 case filings a month. Many of these cases have been dismissed on procedural grounds, but dozens have cleared the CCB's procedural hurdles and are now in active litigation. The CCB issued its first final determination in February 2023 (awarding a photographer US$1000 in statutory damages). As 2023 goes on and more cases move to completion, it should become clearer whether the CCB provides a cost-effective forum for resolving small copyright claims.

Legislative developments

The 117th Congress concluded with only two minor amendments to the Copyright Act over the past two years (one waiving copyright registration fees for works winning certain art competitions and another adding an additional school to the list of federal government institutions whose civilian faculty members may have copyright protection for their scholarly works). As at March 2023, a few copyright bills have been reintroduced in the new Congress, but it remains to be seen whether any proposed copyright legislation will gain traction in 2023.

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