

# Copyright 2020

Contributing editors

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

*Jenner & Block LLP*



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

*Legal 500* has also described Mr. Englund as **“A COPYRIGHT GURU.”**

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Law Business Research Ltd

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First published 2006

Fifteenth edition

ISBN 978-1-83862-317-3

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



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# Copyright 2020

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

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Copyright*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

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

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

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

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

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



London

May 2020

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This article was first published in July 2020

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# Global overview

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

Jenner & Block LLP

Copyright law around the world continues to evolve to address advances in technology and adoption of new communications media. 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 continued growth and development of new technologies.

In April 2019, the European Union adopted the Directive on Copyright and Related Rights in the Digital Single Market. This directive addresses a wide variety of topics, including exceptions and limitations for new technological uses, such as data mining and digital educational uses, use of out-of-commerce works by cultural heritage institutions, extended collective licensing, and more controversially, online use of press publications and use of works by online content-sharing services. Now, national legislatures throughout Europe are developing legislation to transpose the directive into national law, which must happen by June 2021. France has already implemented the directive's requirement of new rights for press publishers. In view of Brexit, the UK government has announced that it will not implement the directive.

South Korea is making significant changes in its copyright system, including the introduction of punitive damages, the establishment of a special online investigation authority and a mediation panel for small copyright disputes, and the creation of a new exception for incidental use of copyrighted materials in photo shoots and audiovisual recordings.

Governments have also taken action with respect to music licensing. In the United States, efforts continue to implement the 2018 Music Modernization Act, which, in 2021, will permit digital music service providers to obtain blanket licences for the use of musical works in their services through a centralized collective. Meanwhile, in Greece, a 2020 ministerial decision approved the operation of a new collective

management organisation to represent the rights of the authors of musical works. In Indonesia, a 2019 proposal for legislation to regulate the creation and distribution of music proved controversial, and is now undergoing further review.

The Beijing Treaty on Audiovisual Performances, which was adopted in 2012, entered into force in April 2020. At the time of writing, 31 countries have ratified or acceded to that treaty. The most recent countries to do so include Indonesia and Switzerland. 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 at the time of writing, 65 countries have ratified or acceded to it. The newer contracting countries include Indonesia, New Zealand, Switzerland and Venezuela. European Union member states continue to move forward on national legislation to transpose a directive implementing the treaty. Greece recently adopted such legislation.

Courts continue to confront copyright issues raised by new technologies. For example, in a case involving use of a smartphone video in a news report, the Supreme Court of Sweden found the defendant, Sweden's public television company, liable for infringement notwithstanding the freedom of speech protected by the European Convention on Human Rights and the European Union Charter. In the United States, the coronavirus pandemic has delayed consideration of a closely watched Supreme Court case that will address the copyrightability and potential fair use of computer software interfaces.

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

# Austria

Sonja Dürager

bpv Hügel Rechtsanwälte GmbH

## LEGISLATION AND ENFORCEMENT

### Relevant legislation

#### 1 | What is the relevant legislation?

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

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

### Enforcement authorities

#### 2 | Who enforces it?

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

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

### Online and digital regulation

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

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

This provision transposes article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

### Extraterritorial application

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

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

### Agency

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

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

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

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

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

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

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

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

## Rights covered

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

The Copyright Act covers exploitation rights and moral rights.

Exploitation rights grant the author the exclusive right to exploit his or her work in the manner reserved to him or her in sections 14 to 18a of the Copyright Act, which set out the following rights:

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

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

## Excluded works

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

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

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

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

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

## Fair use and fair dealing

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

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

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

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

## Architectural works

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

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

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

## Performance rights

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

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

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

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

## Neighbouring rights

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

#### Photographs

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

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

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

## Audio recordings

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

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

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

## Broadcastings

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

Protection of broadcasts shall terminate 50 years after the broadcast.

## Databases

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

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

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

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

## Moral rights

### 13 | Are moral rights recognised?

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

#### Protection of authorship (section 19)

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

#### Designation of the author (section 20)

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

#### Protection of works (section 21)

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

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

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

## COPYRIGHT FORMALITIES

### Notice

#### 14 | Is there a requirement of copyright notice?

There is no requirement of copyright notice in Austria.

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

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

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

Not applicable.

### Deposit

#### 16 | Is there a requirement of copyright deposit?

No, there is no such requirement.

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

Not applicable.

### Registration

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

No, there is no copyright registration in Austria.

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

Not applicable.

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

Not applicable.

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

Not applicable.

## OWNERSHIP AND TRANSFER

### Eligible owners

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

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

### Employee and contractor work

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

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

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

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

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

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

### Joint and collective ownership

#### 25 | May a copyrighted work be co-owned?

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

### Transfer of rights

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

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

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

## Licensing

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

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

### 28 | Are there compulsory licences? What are they?

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

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

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

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

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

## Termination

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

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

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

## Recordal

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

Not applicable.

## DURATION OF COPYRIGHT

### Protection start date

#### 32 | When does copyright protection begin?

Protection starts with the creation of the work.

### Duration

#### 33 | How long does copyright protection last?

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

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

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

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

## Renewal

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

The terms for copyright protection are not renewable.

## Government extension of protection term

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

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

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

## COPYRIGHT INFRINGEMENT AND REMEDIES

### Infringing acts

#### 37 | What constitutes copyright infringement?

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

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

### Vicarious and contributory liability

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

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

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

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

### Available remedies

#### 39 | What remedies are available against a copyright infringer?

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

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

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

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

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

### Limitation period

#### 40 | Is there a time limit for seeking remedies?

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

### Monetary damages

#### 41 | Are monetary damages available for copyright infringement?

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

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

### Attorneys' fees and costs

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

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

### Criminal enforcement

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

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

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

## Online infringement

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

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

## Prevention measures

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

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

## RELATIONSHIP TO FOREIGN RIGHTS

### International conventions

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

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

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

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

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

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

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

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

## UPDATE AND TRENDS

### 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 last 12 months?

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 (L130/92) will have to be transposed by 7 June 2021. Austria's legislator has already started preparatory work on this. This Directive could have major impacts on copyright law in Austria, in particular on contract law as this is only regulated in a rudimentary manner. However, it is not yet clear to what extent the general rules of civil law and copyright law already meet the Directive's requirements, and what extent an amendment of the Copyright Act will be necessary. The discussion is ongoing and a draft of an amendment to the law is not yet available.

# Brazil

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## LEGISLATION AND ENFORCEMENT

### Relevant legislation

#### 1 | What is the relevant legislation?

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

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

### Enforcement authorities

#### 2 | Who enforces it?

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

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

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

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

### Online and digital regulation

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

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

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

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

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

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

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

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

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

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

### Extraterritorial application

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

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

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

### Agency

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

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

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

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

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

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

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

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

### Rights covered

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

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

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

### Excluded works

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

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

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

## Fair use and fair dealing

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

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

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

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

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

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

- the reproduction in a single copy of a legitimately acquired copy, for backup purposes;

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

## Architectural works

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

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

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

## Performance rights

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

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

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

## Neighbouring rights

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

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

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

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

## Moral rights

### 13 | Are moral rights recognised?

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

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

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

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

After the death of the author, the rights referred to under points (1) to (4) above will pass to his or her heirs who, in turn, will have the right to enforce them (section 24, first paragraph).

## COPYRIGHT FORMALITIES

### Notice

#### 14 | Is there a requirement of copyright notice?

There is no such requirement.

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

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

### Deposit

#### 16 | Is there a requirement of copyright deposit?

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

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

A deposit is not mandatory for copyright purposes.

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

### Registration

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

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

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

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

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

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

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

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

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

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

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

## OWNERSHIP AND TRANSFER

### Eligible owners

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

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

### Employee and contractor work

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

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

Section 4 of the Software Law stipulates that, unless an agreement is made to the contrary, the employer or commissioner of a work will be the exclusive owner of economic rights to a work created by an

employee or commissioned person if the work was created in the course of a contractual relationship which is expressly related to research and development of the software; and when the creation of the software is expressly foreseen in the contract or when the nature of the contractual relationship so determines.

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

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

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

**Joint and collective ownership**

**25 | May a copyrighted work be co-owned?**

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

**Transfer of rights**

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

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

**Licensing**

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

The comments made concerning assignments also apply to licensing.

**28 | Are there compulsory licences? What are they?**

There are no compulsory licences in Brazilian copyright legislation.

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

Licences for public performance are administered by performing rights societies.

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

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

**Termination**

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

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

**Recordal**

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

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

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

**DURATION OF COPYRIGHT**

**Protection start date**

**32 | When does copyright protection begin?**

Protection begins with the creation of the work, but there are a few exceptions (including films, TV and radio broadcasts, software and periodicals) in which copyright protection begins at the time the work is published.

**Duration**

**33 | How long does copyright protection last?**

See table overleaf.

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

Yes. It may vary according to the nature of the work.

**Renewal**

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

No. There is no possibility of renewal.

**Government extension of protection term**

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

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

**COPYRIGHT INFRINGEMENT AND REMEDIES**

**Infringing acts**

**37 | What constitutes copyright infringement?**

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

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

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

### Vicarious and contributory liability

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

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

### Available remedies

#### 39 | What remedies are available against a copyright infringer?

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

### Limitation period

#### 40 | Is there a time limit for seeking remedies?

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

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

### Monetary damages

#### 41 | Are monetary damages available for copyright infringement?

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

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

### Attorneys' fees and costs

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

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

### Criminal enforcement

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

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

- if the violation consists of total or partial reproduction, aiming to profit directly or indirectly, by any means or process, from an intellectual work, interpretation, performance or phonogram, without the express permission of the author, performer or producer, as appropriate, or from whom they are represented;

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

### Online infringement

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

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

### Prevention measures

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

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

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

## RELATIONSHIP TO FOREIGN RIGHTS

### International conventions

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

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

- the Berne Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations – Brazil has been a member since 9 February 1922;
- the 1971 Paris Revision of the Berne Convention – entered into force on 6 May 1975 by means of Decree No. 75,699;
- the Universal Copyright Convention – entered into force on 4 July 1960 by means of Decree No. 48,458;
- the Rome Convention – entered into force on 19 October 1965 by means of Decree No. 57,125;
- the Phonograms Convention – entered into force on 24 December 1975 by Decree No. 76,906;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – entered into force on 30 December 1994 by means of Decree No. 1,355; and
- the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, Washington Revision (1946) – entered into force by means of Decree No. 26,675 of 18 May 1949.

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

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

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

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

## UPDATE AND TRENDS

### 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 last 12 months?

According to decision issued by the 3rd Panel of the Superior Court of Justice, the use of election campaign jingle, in the form of a parody, without having the proper authorisation of the copyright owner, does not infringe the Brazilian Copyright Law. The Panel decided to exempt a local congressman from indemnifying a label record company for taking advantage of part of someone else's song, which famous in Brazil.

In the 2014 electoral campaign, the congressman recorded a video dressed up as the singer and imitating his appearance in a piece of advertising.

The congressman was condemned by the São Paulo State Court under the argument that modifying a song for electoral purposes without authorisation from those who have the rights to the work cannot be considered parody.

However, the thesis was overturned by the Superior Court of Justice, which recognised the parody. According to the Minister Marco Aurélio Bellizze, it is not possible to ignore the rule of article 47 of the Copyright Law, since the parody had no offensive content in relation to other candidates or the owner of the original song.

According to the provision cited by the minister, parody is one of the limitations of copyright, which allows the use of free paraphrases and parodies that are not true reproductions of the original work or imply discredit to it. The 3rd Panel said that, respecting these conditions, the authorisation of the owner of the parodied work is unnecessary.

The decision was issued on 12 November 2019 (REsp 1810440/SP).

# France

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## LEGISLATION AND ENFORCEMENT

### Relevant legislation

#### 1 | What is the relevant legislation?

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

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

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

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

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

In addition, Law No. 2019-775 of 24 July 2019 implements article 15 of the Directive 2019/790/EU into French law and creates neighboring rights for press publishers.

### Enforcement authorities

#### 2 | Who enforces it?

#### Civil courts

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

#### Criminal courts

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

### French Customs

Copyright owners may request French Customs to detain goods that infringe their copyright. French Customs detain allegedly infringing

goods for up to 10 days. After that deadline, the goods are released unless legal proceedings are brought by the copyright owner.

### HADOPI

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

### Online and digital regulation

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

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

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

Once entirely implemented into French Law, the Digital Single Market Directive 2019/790/EU will also have a great impact on French provisions relating to the digital exploitation of works. Its implementation has already begun with Law No. 2019-775 dated 24 July 2019 implementing article 15 of the Directive, which grants neighbouring rights to press publishers. Indeed, 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 information society 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).

### Extraterritorial application

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

Copyright provisions per se do not provide for extraterritorial application of French copyright law. However, further to article 7.2 of Council

Regulation (EC) No. 1215/2012, 'a person domiciled in a Member State may, in another Member State, be sued: in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred or may occur'.

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

### Agency

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

There is no centralised copyright agency in France.

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

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

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

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

### Rights covered

7 | What types of rights are covered by copyright?

Copyright covers both economic and moral rights.

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

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

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

### Excluded works

8 | What may not be protected by copyright?

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

### Fair use and fair dealing

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

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

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

In addition, the Digital Single Market Directive 2019/790/EU dated 15 April 2019 creates new exceptions to copyright, which are not optional, such as data mining for scientific research purposes (article 3), usage for teaching purposes (article 5) and copying by cultural heritage institutions (article 6). However these exceptions still need to be implemented into French Law.

### Architectural works

10 | Are architectural works protected by copyright? How?

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

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

### Performance rights

11 | Are performance rights covered by copyright? How?

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

Pursuant to article L212-3 of the IPC, performers have the exclusive right to authorise all recording, reproduction or communication to the public of their performance. Furthermore, the performer's permission is required in case of any separate use of the sounds or images of his or her performance where both the sounds and images have been fixed.

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

### Neighbouring rights

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

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

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

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

The recent 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).

## Moral rights

### 13 | Are moral rights recognised?

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

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

Moral rights cover the following prerogatives:

- The right for the author to divulge his or her work.
- The right for the author to have the integrity of his or her work respected. This right allows the author to oppose any modification of his or her work (cuts, for instance) as well as to oppose any modifications that would alter the spirit of his or her work.
- The right for the author to have his or her name indicated on any representation or reproduction of the work. It is called the right of authorship. It should be noted, however, that the author is entitled to remain anonymous or to use a pseudonym.
- The right for the author to reconsider or to withdraw his or her work from the market even after publication, provided that he or she indemnifies the assignee for any harm suffered as a result of the reconsideration or the withdrawal.

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

## COPYRIGHT FORMALITIES

### Notice

#### 14 | Is there a requirement of copyright notice?

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

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

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

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

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

### Registration

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

There is no system for copyright registration in France.

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

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.

### Employee and contractor work

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

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

The exception to this rule is the collective work. A 'collective work' is defined by article L 113-2 subsection 3 of the 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 of the moral rights that ensue from the individual part of their creations.

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

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

### Joint and collective ownership

## 25 | May a copyrighted work be co-owned?

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

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

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

### Transfer of rights

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

Moral rights are inalienable and may not be transferred.

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

### Licensing

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

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

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

## 28 | Are there compulsory licences? What are they?

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

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 on performers and producers to remuneration.

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

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

In France, various societies exist, such as:

- SACEM, for musical works;

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

### Termination

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

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

### Recordal

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

There is no agency specific to copyright formalities in France.

## DURATION OF COPYRIGHT

### Protection start date

## 32 | When does copyright protection begin?

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

### Duration

## 33 | How long does copyright protection last?

Moral rights have no time limit.

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

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

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

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

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

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

### Renewal

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

Terms of copyright do not have to be renewed.

### Government extension of protection term

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

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

## COPYRIGHT INFRINGEMENT AND REMEDIES

### Infringing acts

#### 37 | What constitutes copyright infringement?

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

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

Copyright may be infringed when 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 IPC. Thus, the editing, making available to the public or communicating to the public of a piece of software obviously intended to make sound recordings available to the public without authorisation is prohibited and is a criminal offence. The Criminal Code also includes the concept of complicity, which is equivalent to the figure of contributory infringement. The accomplice of a criminal offence (including felonies against copyright) stands for anyone who knowingly abets, facilitates or by means of 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:

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

### Limitation period

#### 40 | Is there a time limit for seeking remedies?

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

### Monetary damages

#### 41 | Are monetary damages available for copyright infringement?

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

- the negative economic consequences of the infringement, including loss of profits and loss suffered by the injured party;

- the moral prejudice caused to the rights holder; and
- the profits made by the infringer, including savings in intellectual investment, equipment and promotion, which the infringer made through the infringing acts.

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

### Attorneys' fees and costs

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

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

### Criminal enforcement

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

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

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

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

### Online infringement

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

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

### The graduated response regime from the HADOPI

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

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

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

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

### 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 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 digital rights management (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 of 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 useful DRM which protects a work. The punishment for this offence is a fine of up to €750 (article R 335-3 of the IPC).

## RELATIONSHIP TO FOREIGN RIGHTS

### International conventions

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

France is signatory of the following international copyright conventions:

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

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

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

The Berne Convention provides that the enjoyment and the exercise of copyright shall not be subject to any formality; such enjoyment

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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 last 12 months?

The Directive on copyright in the Digital Single Market No. 2019/790 (DSM Directive) was enacted on 17 April 2019 after almost three years of legislative procedure between the three EU parliamentary bodies.

The DSM Directive creates new exceptions to copyright, which are not optional, such as data mining for scientific research purposes (article 3), usage for teaching purposes (article 5) and copying by cultural heritage institutions (article 6).

It also provides that, for out-of-commerce works, member states will have to choose between to-be-created exceptions and licensing mechanisms through collective management organisations (article 7).

A new mediator shall also be appointed to negotiate licensing agreements with video-on-demand platforms (article 13).

Furthermore, the DSM Directive creates a new neighbouring right for press publishers regarding online uses of their publications (article 15). Press publishers will retain the right to authorise the representation and reproduction of the works they publish for two years starting from 1 January of the year following the publication of those works. This new neighbouring right does not, however, apply to hyperlinking.

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

notice or made their best efforts by setting up automated recognition tools that are subject to human review (article 17).

Member states have to implement the DSM Directive by 7 June 2021.

In France, article 15 of the DSM Directive was rapidly implemented since Law No. 2019-775 creating neighbouring rights for press publishers dates from 24 July 2019.

Regarding the implementation of article 17 of the DSM Directive, the French government has submitted a bill related to audiovisual communication and national sovereignty in the digital era to the French parliament. Article 17 is likely to be implemented quickly since a similar provision has already been discussed in the context of the adoption of the Law for a Digital Republic of 7 October 2016.

# Germany

Oliver Nilgen

Meissner Bolte

## LEGISLATION AND ENFORCEMENT

### Relevant legislation

#### 1 | What is the relevant legislation?

The relevant German statutes in the copyright area are:

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

### Enforcement authorities

#### 2 | Who enforces it?

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

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

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

### Online and digital regulation

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

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

### Extraterritorial application

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

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

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

### Agency

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

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

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

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

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

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

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

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

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

## Rights covered

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

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

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

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

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

## Excluded works

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

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

## Fair use and fair dealing

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

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

## Architectural works

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

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

## Performance rights

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

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

## Neighbouring rights

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

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

## Moral rights

### 13 | Are moral rights recognised?

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

## COPYRIGHT FORMALITIES

### Notice

#### 14 | Is there a requirement of copyright notice?

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

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

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

### Deposit

#### 16 | Is there a requirement of copyright deposit?

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

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

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

### Registration

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

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

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

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 his or her employment, the company will not become the owner of the copyright.

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

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

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

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

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

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

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

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

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

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

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

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

**28 | Are there compulsory licences? What are they?**

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

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

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

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

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

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

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

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

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

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

## DURATION OF COPYRIGHT

### Protection start date

#### 32 | When does copyright protection begin?

Copyright protection begins with the date of creation.

### Duration

#### 33 | How long does copyright protection last?

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

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

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

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

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

### Renewal

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

Terms of copyright may not be renewed.

### Government extension of protection term

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

No.

## COPYRIGHT INFRINGEMENT AND REMEDIES

### Infringing acts

#### 37 | What constitutes copyright infringement?

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

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

### Vicarious and contributory liability

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

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

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

### Available remedies

#### 39 | What remedies are available against a copyright infringer?

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

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

### Limitation period

#### 40 | Is there a time limit for seeking remedies?

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

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

### Monetary damages

#### 41 | Are monetary damages available for copyright infringement?

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

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

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

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

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

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

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

There is no basis for punitive damages in German law.

### Attorneys' fees and costs

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

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

### Criminal enforcement

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

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

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

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

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

### Online infringement

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

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

### Prevention measures

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

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

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

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## RELATIONSHIP TO FOREIGN RIGHTS

### International conventions

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

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

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

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

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

The established minimum standards relate to, for instance:

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

Germany grants and respects copyright of non-citizens.

## 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 last 12 months?

No updates at this time.

# Greece

Pigi Konstantinou

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## LEGISLATION AND ENFORCEMENT

### Relevant legislation

#### 1 | What is the relevant legislation?

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

### Enforcement authorities

#### 2 | Who enforces it?

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

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

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

### Online and digital regulation

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

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

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

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

### Extraterritorial application

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

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

### Agency

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

No, there is not.

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

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

The notion of 'originality' is not defined in law, except in regard to computer programs (see below). However, according to established Greek case law, this notion is defined on the basis of the theory of 'statistical uniqueness', which argues that a work is original when, under similar circumstances and with the same goals, no other author would be in a position to create a similar work, or in combination with the criterion that a work presents an individual specificity or a minimum threshold of 'creative height' so as to stand out and differentiate from the daily (common) works or from other similarly known works.

The law provides for an indicative list of works, which, if considered original, can be protected by copyright. This list includes:

- written and oral texts;
- musical compositions with or without words;
- theatrical works accompanied or unaccompanied by music;
- choreographies and pantomimes;
- audiovisual works;
- works of fine art, including drawings, works of painting and sculpture, engravings and lithographs;
- works of architecture;
- photographs; and
- works of applied art, illustrations, maps and three-dimensional works relative to geography, topography, architecture or science.

Furthermore, the following types of works may also be protected by copyright:

- derivative works such as translations, adaptations, arrangements and other alterations of works or of expressions of folklore; and
- collections of works or collections of expressions of folklore or of simple facts and data, such as encyclopaedias and anthologies, provided that the selection or the arrangement of their contents is original.

Moreover, databases which, by reason of selection or arrangement of their contents, constitute the author's intellectual creation, as well as computer programs and their preparatory design material that are original, in the sense that they are the author's personal intellectual creation, are also protected by copyright.

### Rights covered

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

Greek copyright law covers both economic as well as moral rights and provides for an indicative list of these rights. The main economic rights of the authors are the following:

- the fixation and the reproduction right;
- the translation right;
- the arrangement, adaptation or other alteration right;
- the distribution right;
- the rental or public lending right;
- the public performance right;
- the broadcasting and rebroadcasting right;
- the communication to the public right, including the making available to the public right; and
- the importation right, in relation to the works produced abroad without the author's consent or the importation of copies from a country outside the European community, when the right over such importation in Greece had been retained by the author through contract.

### Excluded works

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

Greek copyright law does not apply to any work that cannot be considered as an original intellectual literary, artistic or scientific creation or which is not expressed in a specific form. Therefore, mere ideas, methods, artistic styles, and scientific theories are not protected. Furthermore, the law does not apply to official texts expressive of the authority of the state, notably to legislative, administrative or judicial texts, nor it applies to expressions of folklore, news information or simple facts and data.

### Fair use and fair dealing

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

No. Greek copyright law only provides for certain specific exceptions to and limitations of the economic rights (exhaustive list). This means that in order for a person to legally use a protected work, without the licence of the rights holder and without any payment, the respective use has to be covered by a specific exception and all the requirements of this exception must be met. These exceptions cover, among other things, uses in relation to quotations of short extracts, reproduction for personal use, for teaching purposes, by libraries and archives, for judicial or administrative purposes, for information purposes, and for the benefit of people with disabilities.

### Architectural works

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

The law specifically includes the architectural works among the works that can be protected, if the work is considered to be original. Both two-dimensional works, namely drafts, plans, studies, and three-dimensional works (building mock-ups and integrated constructions), both in their exterior and interior design, and interior fittings, can be protected, while the purpose of these works, their scale and dimension and their construction materials are indifferent for the purposes of copyright protection.

### Performance rights

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

Greek copyright law grants performers – namely the persons who in any way whatsoever act or perform works, such as actors, musicians, singers, chorus singers, dancers, puppeteers, shadow theatre artists, variety performers or circus artists – with neighbouring rights, which consist of both economic and moral rights.

### Neighbouring rights

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

Greek copyright law recognises certain neighbouring (related) rights – of economic nature only – to the following categories of persons:

- producers of phonograms;
- producers of visual or sound and visual recordings;
- radio and television organisations;
- publishers; and
- persons who, after the expiry of copyright protection, for the first time lawfully publish or lawfully communicate to the public a previously unpublished work.

### Moral rights

#### 13 | Are moral rights recognised?

Yes. Greek copyright law grants to the authors the following moral rights (indicative list):

- the right of publication;
- the right of attribution;
- the right to prohibit any distortions, mutilations or other modifications of their works and any other offence due to the circumstances of the presentation of these works in public;
- the right to access their works, even when the economic right in these works or the physical embodiment of these works belongs to another person; and

- in the case of a literary or scientific work, the right to rescind a contract transferring the economic right or an exploitation contract or licence in relation to a work, when the author considers such action to be necessary for the protection of his or her personality because of changes in his or her beliefs or in the circumstances.

## COPYRIGHT FORMALITIES

### Notice

#### 14 | Is there a requirement of copyright notice?

No, there is not.

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

Not applicable, since there is no requirement for a copyright notice under Greek copyright law.

### Deposit

#### 16 | Is there a requirement of copyright deposit?

No, there is not.

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

Not applicable, since there is no requirement for copyright deposit under Greek copyright law.

### Registration

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

Greek copyright law does not recognise any system for copyright registration. In practice, authors may seek to formulate evidence in order to prove that their work existed under a specific form on a specific date.

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

Greek copyright law does not provide for either a mandatory or a voluntary registration. However, in practice, authors may seek to formulate evidence in order to prove that their work existed under a specific form on a specific date. This can be mainly achieved by either filing their work to a notary public or by using the time-stamping services, recently entered into force by the Hellenic Copyright Organisation, which provide certified dates in relation to works.

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

Not applicable, since there is no requirement for copyright registration under Greek copyright law.

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

Not applicable, since there is no requirement for copyright registration under Greek copyright law.

## OWNERSHIP AND TRANSFER

### Eligible owners

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

The initial holder of both the economic and the moral right in a work is always the author of that work. Under Greek copyright law only natural persons – and not legal entities – can be considered as authors of works.

### Employee and contractor work

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

The initial holder of both the economic and the moral rights in a work is always the author of the work, even in case that a work is created by an employee in the execution of his or her employment contract.

The employer may only become a subsequent owner of all or of certain economic rights in a work (the moral rights always remain with the author) through a transfer of these rights made either automatically, by virtue of the employment relationship, or expressly agreed between the parties in a written contract. More specifically:

- When a work is created by an employee working in the private sector, unless otherwise provided for in the employment contract, only such economic rights as are necessary for the fulfilment of the purpose of the contract shall be exclusively transferred to the employer.
- When a work is created by an employee working in the public sector in execution of his or her duties, then all the economic rights are automatically (*ipso jure*) transferred to the employer, by virtue of the employment relationship, unless otherwise provided for in the employment contract.
- As far as computer programs are concerned, all the economic rights in a computer program created by an employee in the execution of an employment contract or following instructions given by his or her employer shall be automatically transferred to the employer, unless otherwise provided for in the employment contract.

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

The initial holder of both the economic and the moral rights in a work is always the author of the work, even in case that a work is created by an independent contractor by virtue of a hiring relationship. A hiring party may only become a subsequent owner of all or of certain economic rights in a work (the moral rights always remain with the author) through a transfer of these rights expressly agreed between the parties in a written contract.

### Joint and collective ownership

#### 25 | May a copyrighted work be co-owned?

A copyrighted work may be co-owned either by persons or by entities. More specifically, two or more persons can co-own both the moral and the economic rights in a work, in case of joint authorship (collaborative works) or of a composite work, while two or more persons or entities can co-own the economic rights in a work in case of transfer of these rights by the author(s).

## Transfer of rights

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

Only the economic rights may be transferred between living persons or as mortis causa. The moral rights are not transferable between living persons, while after the death of an author, the moral rights pass to his or her heirs, who have to exercise the rights in compliance with the author's wishes, provided that such wishes have been explicitly expressed.

## Licensing

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

The author of a work may either:

- conclude contracts, by which he or she entrusts economic rights to another contracting party (the 'exploitation contracts') and in which case the other party undertakes the obligation to exercise the rights thus entrusted; or
- authorise another person to exercise certain economic rights (the 'exploitation licenses'), in which case the other party has the right, but not the obligation, to exercise the rights thus licensed.

Exploitation contracts and licences may be exclusive or non-exclusive. These contracts or licences may in no circumstance refer to all the future works of the author and shall never be deemed to refer to forms of exploitation that were unknown on the date of the contract.

### 28 | Are there compulsory licences? What are they?

Greek copyright law provides for the following compulsory licences:

- in case that technical means (such as audio or video recorders, magnetic tapes or other material suitable for the reproduction of sound or images, including digital reproduction devices and media) are used for the reproduction of a work for private use (which is permitted by Greek copyright law without the consent of the author), a reasonable remuneration is due to the author of the respective works and to the rights holders of certain involved related rights; and
- when sound recordings are used for a radio or television broadcast by any means, such as wireless waves, satellite or cable, or for communication to the public, the user shall pay a single and equitable remuneration to the performers whose performances are carried on the recordings and to the producers of the recordings.

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

The authors or the rights holders of related rights have the right to authorise a performing rights society (collecting society) of their choice to manage or to protect their economic right or certain powers deriving therefrom in relation to certain or to all of their works or other protected material, for the territories of their choice. This authorisation is voluntary, however, there are cases for which the law introduces an obligatory collective management or obligatory exercise of rights by a collecting society, as in the case of the collection of equitable remuneration deriving from private reproduction or when sound recordings are used for a radio or television broadcast by any means, such as wireless waves, satellite or cable, or for communication to the public.

The authorisation may be granted by transfer of the right or of the relevant powers, for the purpose of management, either by power of attorney or by any other contractual agreement and is made in writing and for a certain period of time that cannot exceed three years.

The management of authors' rights and related rights in Greece can be carried out collectively, through a collective management organisation (CMO) or an independent management entity (IME), and the protection of these rights can be carried out by a collective protection organisation (CPO). At present, there are 17 CMOs (eight representing authors and nine representing holders of related rights) in Greece and two CPOs that are all licensed by the Minister of Culture and Sports and supervised by the Hellenic Copyright Organisation.

The licensing of the use of the works is subject to the payment of a percentage fee, which is calculated based on tariff tables adequately communicated to the public by CMOs. When formulating and implementing their remuneration, CMOs must apply objective criteria, act without arbitrariness and avoid abusive discrimination. CMOs and representative user associations may also enter into agreements regulating the remuneration payable by the user to each category of rights holders as well as any other matter relating to parties' relations.

## Termination

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

There are no such special provisions (only in relation to the duration of the transfer, the law states that, if the duration of the transfer of the rights is unspecified, it shall be deemed to be limited to five years). However, it is argued that the general rules of termination of an agreement may apply.

## Recordal

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

No, there is not any such agency.

## DURATION OF COPYRIGHT

### Protection start date

#### 32 | When does copyright protection begin?

Copyright protection begins with the creation of the work.

### Duration

#### 33 | How long does copyright protection last?

Copyright protection lasts for the whole of the author's life and 70 years after his or her death (calculated from 1 January of the year after the author's death).

After the expiry of the period of copyright protection, the state, represented by the Minister of Culture, may exercise the moral rights relating to the acknowledgment of the author's paternity and the rights relating to the protection of the integrity of the work.

With respect to collaborative works, copyright lasts as long as the life of the last surviving author and 70 years following his or her death.

The term of protection of audiovisual works expires 70 years after the death of the last of the following persons to survive: the principal director, the author of the screenplay, the author of the dialogue, and the composer of the music specifically created for use in the audiovisual work.

In case of anonymous or pseudonymous works, the term of copyright lasts for 70 years computed from 1 January of the year after that in which the work is lawfully made available to the public. However, if during the above period the author discloses his or her identity or when the pseudonym adopted by the author leaves no doubt as to his or her identity, then the general rules apply.

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

The publication of a work is relevant, in terms of copyright duration, only in case of anonymous or pseudonymous works (see question 33). In all other cases, copyright duration is calculated from the date of death of the respective author(s).

#### Renewal

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

The term of copyright is specifically determined in law and cannot be renewed.

#### Government extension of protection term

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

The copyright protection was extended to 70 years after the death of the author in 1993 and in 1997, when the Greek law was updated to comply with Directive 93/83/EEC of 27 September 1993, an amendment was also made in relation to the calculation of copyright duration, and from then it has been calculated from 1 January of the year after the author's death, instead from the end of the year of the author's death.

## COPYRIGHT INFRINGEMENT AND REMEDIES

#### Infringing acts

### 37 | What constitutes copyright infringement?

Any use of a protected work which falls within the scope of any economic or moral right, is made without the consent of the author or of the respective rights holder, and does not fall under any exception or limitation provided by law, constitutes a copyright infringement.

A copyright infringement may occur even in case that a party who has entered into a licence or exploitation agreement with the author or the respective rights holder for certain uses or exploitations of a work, acts outside the defined scope of these agreements.

#### Vicarious and contributory liability

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

A specific reference to a secondary liability for indirect infringement is made in Greek copyright law in relation to:

- the intermediaries (for example, internet service providers) whose services are used by a third party to infringe a copyright or related right or the sui generis right of a database maker, where the law states that the rights holders may also apply for an injunction against these intermediaries; and
- the circumvention of technological measures, where the law states that the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which are promoted, advertised or marketed for the purpose of circumvention of, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures are prohibited. The perpetrator has both civil and criminal liability, while administrative penalties may also be imposed.

Furthermore, the general civil law provisions on tort liability also apply for copyright infringements. Thus in case that an infringing act was

committed by a person who either works as an employee or is the legal representative of an entity, then both this person as well as the respective entity will be considered liable for this infringement or in case that a person acts under the instructions of another person or for the benefit of this other person, then both these persons may be considered liable for the same infringement.

#### Available remedies

### 39 | What remedies are available against a copyright infringer?

The law provides for several remedies against a copyright infringer, including the following.

#### Preliminary measures

The rights holder may file for preliminary measures (and also obtain a temporary injunction until the issuance of the decision regarding the preliminary measures) requesting, among other things:

- precautionary seizure of items in the possession of the alleged infringer that constitute means of commission or product or evidence of the infringement;
- a detailed description of such items, including the taking of photographs; or
- any other measure intended to prevent any imminent infringement of the rights or to forbid, on a provisional basis, a continuation of the infringement of that right.

In case of an infringement committed on a commercial scale, the court may order the precautionary seizure of the property of the alleged infringer, including the blocking of his or her bank accounts.

#### Civil action

The rights holder may file a civil action to claim:

- recognition of his or her rights (being infringed);
- discontinuation of the infringement and its omission in the future (which may include recall from the channels of commerce of goods that they have found to be infringing rights, definitive removal from the channels of commerce or destruction); and
- indemnification for moral damages and to seek damages of not less than twice the legally required or normally payable remuneration for the form of exploitation that the infringing party made without a licence, in case of an infringement committed by intent or negligence of the infringing party. Instead of seeking damages, and regardless of whether the infringement was committed by intent or negligence, the rights holder may demand either the payment of the sum accrued by the infringing party from the unlicensed exploitation of a work or the profit gained by the infringing party from such exploitation.

#### Administrative fines

The law provides also for the imposition of special administration fines to the following categories of persons:

- persons who reproduce, sell or otherwise distribute to the public or possess with the purpose of distributing a computer program;
- street vendors or standing persons (outside a shop) caught to distribute to the public by sale or by other means, or to possess with the intention of distributing sound recordings on which a work protected by copyright or related rights law has been recorded; and
- persons who reproduce phonograms stored on any technical storage media.

The law also provides for an administrative procedure before the Committee for Online Infringement, in cases of copyright infringement on the internet.

### Criminal sanctions

The law provides for specific criminal sanctions, such as imprisonment or imposition of certain fines, for any persons violating copyright, related rights and database rights, circumventing technical measures, or making unauthorised usage of computer programs.

### Publication of Decisions of civil or criminal courts

Decisions of civil and criminal courts concerning copyright infringement may order the appropriate measures to be taken for the propagation of information relating to the decision, including the posting of the decision, as well as its publication, in summary, or in its entirety, in the mass media or the internet.

### Application for evidence

The right holder may request for the court to order that specified evidence which lies in the control of the opposing party to be presented in the court by this opposing party and in case of an infringement committed on a commercial scale, the court may also order the communication of banking, financial or commercial documents under the control of the opposing party. The court may also order information on the origin and distribution networks of the goods or services which infringe a copyright to be provided by the infringer.

### Limitation period

#### 40 | Is there a time limit for seeking remedies?

A compensation claim or a claim for moral damages (in case of an infringement committed by intent or negligence) is barred five years after the claimant became aware of the damage and the person liable for the damage. In any case these claims are barred 20 years after the infringing act. The 20-year statute of limitation also applies to claims that are based on unjustified enrichment and to cease-and-desist claims.

### Monetary damages

#### 41 | Are monetary damages available for copyright infringement?

The rights holder may file a civil action to claim indemnification for moral damages and to seek damages of not less than twice the legally required or normally payable remuneration for the form of exploitation that the infringing party made without licence, in case of an infringement committed by intent or negligence of the infringing party. Instead of seeking damages, and regardless of whether the infringement was committed by intent or negligence, the rights holder may demand either the payment of the sum accrued by the infringing party from the unlicensed exploitation of a work or the profit gained by the infringing party from such an exploitation.

The law also provides for the imposition of certain fines for any persons violating copyright, related rights and database rights, circumventing technical measures, or making unauthorised usage of computer programs.

### Attorneys' fees and costs

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

In Greece, the losing party is obliged to reimburse the winning party for certain legal costs of the court proceedings. In case of an action for copyright infringement, such legal costs and other expenses shall obligatorily include any pertinent expenditure, such as witness costs, attorney fees, fees of experts and technical consultants of the parties and expenses made for the discovery of the infringers reasonably incurred by the winning party.

### Criminal enforcement

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

The law provides for specific criminal sanctions for any persons violating copyright, related rights and database rights, circumventing technical measures and make unauthorised use of computer programs.

As far as the violation of copyright is concerned, any person who, in contravention of the provisions of Greek copyright law or of lawfully ratified multilateral international conventions on the protection of copyright, infringes any of the economic or certain of the moral rights of the author, is liable to imprisonment of no less than a year and to a fine from €2,900 to €15,000. If the financial gain sought or the damage caused by the perpetration of an act referred to above, is particularly great, the sanction shall be not less than two years imprisonment and a fine of €6,000 to €30,000.

If the guilty party has perpetrated any of the aforementioned acts by profession or at a commercial scale or if the circumstances in connection with the perpetration of the act indicate that the guilty party poses a serious threat to the protection of copyright, the sanction shall be imprisonment of up to 10 years and a fine of €6,000 to €30,000, together with the withdrawal of the trading licence of the undertaking that served as the vehicle for the act.

### Online infringement

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

In general, all the provisions referring to liabilities, remedies and defences for copyright infringement apply in both the analogue and digital worlds.

The law provides further for a specific administrative procedure before the Committee for Online Infringement in cases of copyright infringement on the internet. In particular, the rights holder may submit to this committee a pro forma application for termination of infringement along with all the relevant evidences, which is admissible only in case that the rights holder has previously made use of the corresponding procedure which the provider had determined, and which was concluded within reasonable time but with no result. Where the committee substantiates that copyright is infringed, it shall notify respectively the involving parties and ask from those that are notified to remove the infringing content from the website where it has been illegally posted or to block access to it. In case of non-compliance with the dictum of the decision, the committee shall impose a fine of €500 to €1,000 for each and every day of non-compliance.

Furthermore, the law grants the rights holders with a right to apply for an injunction against the intermediaries (eg, internet service providers) whose services are used by a third party to infringe a copyright or related right or the sui generis right of database maker.

### Prevention measures

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

The law provides for several measures for the prevention of copyright infringement, including:

- Imposition of technological measures, meaning any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts in respect of protected works, which are not authorised by the respective rights holder. The circumvention of these technological measures is prohibited, while the infringer also faces criminal charges.
- Where there is a clear intention of a third party to offer an unlawful public performance of a theatrical or cinematographic or a musical

work, the rights holder may request from the competent local police authority to prohibit the infringing act.

- In any case of threat of infringement of copyright, the rights holder may file for preliminary measures in order to prevent the infringement or claim the recognition of his or her right and the discontinuation of the threatened infringement and its omission in the future.

The law also provides for several other measures (such as the imposition of certain specifications for the equipment and other materials used in the making of reproductions of works, use of control systems which permit the designation of reproduced or used works and the extent and frequency of the reproduction or use, control labelling in visual or sound recordings) that have not been entered into force yet.

## RELATIONSHIP TO FOREIGN RIGHTS

### International conventions

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

Greece is a party to the following main treaties referred to copyright and related rights:

- the Berne Convention for the Protection of Literary and Artistic Works;
- the Universal Copyright Convention;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights;
- the World Intellectual Property Organization Copyright Treaty; and
- the World Intellectual Property Organization Performance and Phonograms Treaty.

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

Greece has ratified the treaties listed below with national laws without any reservations and therefore is bound by all the obligations provided for in these treaties:

- the Berne Convention for the Protection of Literary and Artistic Works;
- the Universal Copyright Convention;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights;
- the World Intellectual Property Organization Copyright Treaty; and
- the World Intellectual Property Organization Performance and Phonograms Treaty.

## 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 last 12 months?

In February 2020, a ministerial decision was issued that approves the operation of a new collective management organisation (CMO) named 'Music works rightsholders' collective management organisation – limited liability cooperative' and the distinctive title 'Rightholders'

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co-operative EDEM'. This CMO shall represent the rights of the authors of musical works and is the successor to the Special Service of Emergency Rights Management that was established to carry out the actions necessary for the emergency management of the copyright of the respective rights holders who were members of the previous CMO (the Hellenic Society for Protection of Intellectual Property (AEPI)) that had its licence withdrawn in 2018.

Furthermore, Greece's parliament recently passed legislation for the implementation of EU Directive 2017/1564 'on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society'.

# India

Pravin Anand, Dhruv Anand and Udit M Patro

Anand and Anand

## LEGISLATION AND ENFORCEMENT

### Relevant legislation

#### 1 | What is the relevant legislation?

Copyright law in India is governed by the Copyright Act, 1957, which has been amended six times, with the last amendment in 2012. It is a comprehensive statute providing for copyright, moral rights (known as author's special rights) and neighbouring rights (rights of broadcasting organisations, performers and droit de suite). The Act provides for exhaustive economic rights (copyright and performer's right) in various works that are transferable. Moral rights exist in perpetuity and are vested in the authors and their legal representatives, being non-transferable and enforceable by the authors and legal representatives even when the copyright in the work has been assigned.

The Copyright Rules, 2013 came into force from 14 March 2013 and provide for the procedure to be adopted for relinquishing copyright, compulsory licences, statutory licences, voluntary licences, registration of copyright societies, membership and administration of affairs of copyright societies and performers' societies.

### Enforcement authorities

#### 2 | Who enforces it?

Copyright can be enforced in civil courts and criminal courts. Civil remedies for the copyright owner include 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 there is an order within 14 days from the date of detention from a court that has jurisdiction.

### Online and digital regulation

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

Amendments to the Copyright Act, 1957 up until 2012 have ensured that, with the advent of satellite television and the internet, the definitions of rights are such that all digital platforms and formats are covered. The last amendment to the Copyright Act by the Copyright (Amendment) Act,

2012 introduced specific provisions for dealing with the circumvention of technological measures pertaining to copyrighted works and provides solutions at par with that for infringement of copyright. This addition to the Act is specifically to deal with digital piracy and amending digital protection measures used to check piracy. By virtue of the newly inserted section 65A of the Act, any person who circumvents an effective technological measure applied for the purpose of protecting rights conferred under the Act, with the intention of infringing such rights, shall be punished with imprisonment that may extend to two years and would also be liable to a fine. Similarly, section 65B provides that any person who removes or participates in the removal of rights management information or the dissemination of copies of works from which rights management information has been removed shall be punished with imprisonment of up to two years and shall also be liable to pay a fine. The Copyright Rules, 2013 also provide for 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 right holder would not be infringement of copyright, unless the person responsible is aware of infringement or has reasonable grounds for believing that such storage is that of an infringing copy.

Under section 52(1)(c), if the owner of a copyright work, in a written complaint to the person responsible for digitally storing an infringing copy of the work, complains that such transient or incidental storage is an infringement, then the person responsible would have to refrain from facilitating access to the infringing copy of the work for a period of 21 days. If within 21 days, the person responsible does not receive an order from a competent court that directs the person responsible to refrain from providing access, then access may be resumed at the end of that period.

Apart from the above-mentioned provisions, the entire scheme of the Copyright Act makes it amply clear that all the provisions of the Act must be applied to electronic and digital media in the same manner they are applied to conventional media. The Copyright (Amendment) Act, 2012 has also clarified this in many places. Remedies against copyright infringement on the internet are not dealt with separately under that Act as the provisions sufficiently cover all forms of exploitation of works, including exploitation over the internet, and the remedies for copyright infringement would apply to the internet as they would to any other medium or platform.

## Extraterritorial application

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

Yes. The Copyright Act, 1957 provides jurisdiction to a copyright owner to sue if he or she is conducting business in India.

Additionally, the courts have jurisdiction to adjudicate upon disputes arising within the territories of India. Hence, a website based outside India that facilitates infringement of copyright by providing infringing copies of a work to users in India will confer jurisdiction on the courts in India to adjudicate the matter.

The courts may block complete access to a website by ordering that all internet service providers (ISPs) refrain from providing access to specific websites and block access to the infringing copies by the users of the ISP. Courts in India continue to block several infringing websites and other file-sharing websites that facilitate infringement through ISPs in India. Civil action against regular pirate websites by geo-blocking them within the territories of India has become a popular measure to counteract infringement. Such actions are often being taken by the motion picture producers of Bollywood and by sports broadcasters. Recently, the Delhi High Court has also issued orders to the Department of Telecommunications and Department of Electronics and Information Technology to monitor and hence prevent URLs with infringing content from resurfacing under a different URL, despite an injunction order restraining the former URL. In another recent case, *Swami Ramdev v Facebook* [Order dated October 23, 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 geoblock the content within the India's jurisdiction. Although this was decided in a case dealing with defamatory content, the court's ruling regarding taking down of unlawful content extends to copyright infringement cases.

## Agency

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

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

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

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

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

Office, but it will now hear appeals and references from the Copyright Registrar as well.

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

The Copyright Act provides a closed list of protected works under section 13. These works are original literary, dramatic, musical, artistic 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 July 21, 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.

### 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, 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 on hire, or offering for sale or hire for commercial rental any copy of the computer program.
- In the case of artistic works – to reproduce the work in any material form. This may include storing it in any medium by electronic or other means or depicting a two-dimensional work in three dimensions or vice versa. Copyright in an artistic work also includes the exclusive right to communicate the work in public, issue copies of it, include it in a cinematograph film, and translate or adapt the work in any way.
- In the case of cinematograph films – to make copies of the film (on any medium, electronic or otherwise) including copies in the form of photographs that form a part of the film, sell or give on hire, or offer for sale or hire any copy of the film, to sell, give or offer for sale on commercial rental copies of the film and communicate the film to the public.
- In the case of sound recordings – to make any other sound recording embodying it on any medium including storing of it on any medium, to sell or give on commercial rental or offer for sale such rental and to communicate the sound recording to the public.

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 have 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 commercial exploitation of such works.

The author enjoys moral rights independent of copyright, being the rights to paternity and integrity, which exist despite assignment of copyright. However, this does not extend to the adaptation of a computer program for fair dealing purposes. The 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 Act provide that a legal representative of an author can exercise both paternity as well as integrity rights in a work. The 2012 amendments also consciously omit the previous co-extensive term of moral rights with copyright by specifically removing the copyright term restriction on a claim for right to integrity by the legal representative. Moral rights are not assignable (although on general principles as it is a civil right and not a fundamental right under the Indian constitution, moral rights can be waived).

### Excluded works

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

The 'idea/expression' dichotomy is applied generally, as in other common law jurisdictions, as required under article 9.2 of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). 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 recent judgment in 2015 by the Delhi High Court, it has been held that in order to be a subject matter registrable as a design for the operation of section 15(2), the 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.

### 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 touchstone 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 Factor' 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.

Recently, 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, as regards to the moral rights of the architect, the court held that such demolition would not amount to a distortion, mutilation or modification of the work and that therefore would not amount to an infringement of the architect's.

### 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 Indian 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 and 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 rights comprise:

- the right to re-broadcast a broadcast;
- the right to cause a broadcast to be heard or seen by the public on payment of any charges;
- the right to make sound recordings or visual recording of broadcasts, as well as the right of reproduction in respect of such sound or visual recordings; and
- the right to sell or give on 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 following:

- the right to make sound recordings or visual recordings of the performance including reproduction of it in material form including storing of it any medium by electronic or other means and issuance of copies to the public;
- communication of it to the public and selling or giving it on commercial rental or offer for sale or for commercial rental; and
- the right to broadcast or communicate the performance to the public, except where the performance is already broadcast.

Once a performer has, by way of a written agreement, given his or her consent for incorporation of his or her performance in a cinematograph film, he or she cannot object to the producer enjoying the

exclusive performer's rights, provided that there is no contract to the contrary. Performers' 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 his or her performance to be incorporated in a film. Hence, the right to royalties of performers would have to be dealt with separately from other performers' rights when parties negotiate upon how the performance will be incorporated in a film and the mutual considerations between them.

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

Moral rights of an author consist of the following:

- the right to claim authorship of the work (paternity right); and
- the right to claim damages in respect of any distortion, mutilation, modification or other acts in relation to the work if such distortion, etc, would be prejudicial to his or her honour or reputation (integrity right).

Prior to the 2012 amendments, such remedy was available only against mutilation, modification, etc, of a work during the term of the copyright in the work. However, this moral right is now a perpetual right of the author and his or her heirs.

A few instances of Indian Courts passing orders to enforce and protect moral rights of authors include:

- *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 dumped by the government of India. The sculptor then sued the government for violating his moral rights, comprising of 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 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 30ft 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 Union 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.

Moral rights of a performer consist of the following:

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

## COPYRIGHT FORMALITIES

### Notice

#### 14 | Is there a requirement of copyright notice?

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

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

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

There are no adverse consequences.

### Deposit

#### 16 | Is there a requirement of copyright deposit?

There is no requirement of copyright deposit.

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

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

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

No. Copyright subsists in a work from the date of its creation for its entire term and there is no formal requirement of registration in order 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 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 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, which are summarised below:

- In the case of literary, dramatic or artistic works made by the author in the course of his or her employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship for the purpose of publication in the newspaper, magazine or periodical, then the proprietor of the publication shall

be the first owner of the work for the purposes of its publication in a newspaper, magazine or similar periodical. In all other respects, the author is the first owner.

- In the case of a work that is a photograph, painting, portrait, engraving or cinematograph film that has been created at the instance of any person for valuable consideration, then such person is the first owner of the copyright in the work. However, this does not affect the rights of an author in any original literary, dramatic, musical or artistic work that is incorporated in a cinematograph film.

In the case of *Indian Heritage Society & Anr v Meher Malhotra & Anr* [CS(OS)No. 2717 of 2011], the Delhi High Court granted a permanent injunction in favour of the plaintiff who was not the photographer, but was held to be the first owner of copyright in the photographs. This was because it was at the plaintiff's instance that the photographs were taken for a valuable consideration paid to the photographer.

- In the case of a work created by an author in the course of his or her employment under a contract of service or apprenticeship, then the employer is the first owner of the work. However, this does not affect the rights of an author in any original literary, dramatic, musical or artistic work that is incorporated in a cinematograph film as has been clarified by the 2012 amendments to the Copyright Act.
- In the case of any address or speech delivered, the person making the address or delivering the speech, or the person on whose behalf he or she does so, is the first owner of the work.
- In the case of a government work, the government is the first owner of the work.
- In the case of a work made or first published by a public undertaking, the public undertaking will be the first owner of the work.
- In the case of works created by international organisations, the international organisation would be the first owner of the work.

#### Employee and contractor work

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

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

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

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

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

## Joint and collective ownership

### 25 | May a copyrighted work be co-owned?

Yes. 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.

## 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 exploitation of their works, and this right to receive royalties cannot be assigned by the author to anyone except his or her own legal heirs or to a copyright society for the purpose of collection and distribution of royalties. Similarly, where performances of performers are incorporated in cinematographic films or sound recordings, such performers also have inalienable rights to receive royalties for exploitation of their performances, and this right to receive royalties cannot be assigned by the performer to anyone except his or her 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.

## Licensing

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

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

### 28 | Are there compulsory licences? What are they?

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

- when a work has been withheld from the public because the owner of the work has refused to grant a licence to republish or perform the work;
- a work or a translation thereof has been withheld from the public because the author of the work is dead or cannot be found, or because the copyright owner cannot be found; and
- a compulsory licence is required for making a work available to persons with disabilities.

The Copyright Act also provides for statutory licences to broadcasters and statutory licences for cover versions.

In a recent case, *Tips Industries v Wynk Music* [Order dated April 23, 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.

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

Yes. Performing rights societies (the Indian Performing Right Society Limited (IPRS), the Phonographic Performance Limited (PPL) and the Indian Singers' Rights Association (ISRA)) are 'copyright societies' for the collection, licensing, administration and enforcement of rights. Such copyright societies are required to be registered under section 33 in order to legally continue the business of granting licences and collecting royalties. In the absence of valid registration, courts have struck down the licences granted by such societies (see *Leopold Café Stores v Novex Communications Pvt Ltd*). Further, the Division Bench of the Madras High Court in the recent 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.

Since the 2012 Amendments, the newly inserted section 33(3A) required all previously registered copyright societies to re-register themselves. However, a few music collecting societies refused to do so and, as a result, the legality of their business was under question. After some investigations, one of the societies re-registered itself as a copyright society, although a few enquiries related to its management. These societies collect performance royalties for literary and musical works and for sound recordings and cinematograph film. There are two other copyright societies, namely the Indian Reprographic Rights Organisation (IRRO) and the copyright society for singers as performers, the ISRA, duly registered in 2013.

## 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.

An assignment more than five years old can be revoked by the Copyright Board if the author can show that it is, or has become, onerous. Transfers of rights might also, conceivably, be held to be unlawful under the law of contract. Again, a licence would normally be

liable to termination if the licensee failed to comply with the conditions of the licence.

### Recordal

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

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

## DURATION OF COPYRIGHT

### Protection start date

#### 32 | When does copyright protection begin?

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

### Duration

#### 33 | How long does copyright protection last?

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

- literary, dramatic, musical or artistic work – throughout the life of the author and 60 years from the beginning of the year following the year in which the author dies;
- anonymous or pseudonymous work – 60 years from the beginning of the year following the year when the work is published;
- posthumous works – 60 years from the beginning of the year following the year when the work is first published;
- cinematograph films, government work, work of a public undertaking, or work of an international organisation – 60 years from the beginning of the year following the year of first publication;
- broadcast reproduction rights – 25 years from the beginning of the year following the year in which the broadcast is made; and
- performers' rights – 50 years from the beginning of the year following the year in which the performance is made.

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

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;
- 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.

### Renewal

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

No. There is no renewal of copyright under Indian law as neither registration nor renewal are required for subsistence of copyright in a work for its entire term.

### Government extension of protection term

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

It has done so in the case of:

- Photographs – pursuant to the Copyright (Amendment) Act, 2012, the term of copyright protection in photographs have been made co-terminus 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 also extended in 1999 from 25 years to 50 years.
- The term of protection for all works, whether calculated after the death of the author or from the date of publication, 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.

### Vicarious and contributory liability

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

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

### Available remedies

#### 39 | What remedies are available against a copyright infringer?

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

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

### Limitation period

#### 40 | Is there a time limit for seeking remedies?

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

### Monetary damages

#### 41 | Are monetary damages available for copyright infringement?

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

### Attorneys' fees and costs

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

Yes. Litigation costs are a standard request in infringement suits, but the decision to award such costs is at the discretion of the court. Costs awarded seldom used to cover actual legal expenses. However, the Commercial Courts, Commercial Division and Commercial Division Appellate Division of High Courts Act 2015 (Commercial Courts Act), which was enacted recently, had brought forth amendments in the Code of Civil Procedure and specifically provides for payments of costs, lays down scenarios in which costs are to be paid and the method of calculation of costs. Since the Commercial Courts Act was introduced very recently, the effects of these amendments will be seen in the near future.

### Criminal enforcement

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

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

- 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 that 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 enhanced penalty on second or subsequent convictions under section 63 (see point (1)).
- 5 Other provisions in the chapter provide penalties for offences such as using infringing copies of a computer program, making or possessing plates for the purpose of making infringing copies of works, and making false entries in the Register of Copyrights.

### Online infringement

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

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

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

Section 52(1)(c) further provides that transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration that is not expressly prohibited by the right holder would not be infringement of copyright, unless the person responsible is aware of infringement or has reasonable grounds for believing that such storage is that of an infringing copy.

Under section 52(1)(c), if the owner of a copyright work, in a written complaint to the person responsible for digitally storing an infringing copy of the work, complains that such transient or incidental storage is an infringement, then the person responsible would have to refrain from facilitating access to the infringing copy of the work for a period of 21 days. If within 21 days, the person responsible does not receive an order from a competent court that directs the person responsible to refrain from providing access, then access may be resumed at the end of that period.

Therefore, if A, the owner of a short story, finds that his or her short story has been published on the website of B, he or she may write a complaint to B declaring that B must refrain from providing the public with access to A's short story. B would then have to remove A's short story from visibility or accessibility on his or her website for 21 days, within which time A must persuade a competent court that it should order the complete removal of the infringing version or copy of the work. If the court does not issue such an order within that period of time, then B may resume making the short story available to the public on his or her website. This provision was inserted in the Act by the Copyright (Amendment) Act, 2012 which came into force on 21 June 2012. It is yet to be seen in practice.

Apart from the above-mentioned provisions, the entire scheme of the Copyright Act makes it amply clear that all the provisions of the Act must be applied to electronic and digital media in the same manner they are applied to conventional media. The Copyright (Amendment) Act, 2012 has also clarified this in many places. Remedies against copyright infringement on the internet are not dealt with separately under that Act as the provisions sufficiently cover all forms of exploitation of works, including exploitation over the internet, and the remedies for copyright infringement would apply to the internet as they would to any other medium or platform.

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 of a court order.

### 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).

### RELATIONSHIP TO FOREIGN RIGHTS

#### International conventions

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

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

- the Berne Convention;
- the UCC;
- the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention); and
- the TRIPS Agreement;
- the WIPO Performances and Phonograms Treaty (WPPT); and
- the WIPO Copyright Treaty (WCT).

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

Having ratified the Berne Convention and the UCC, works first published outside India in any of the convention countries enjoy protection in India at par with the protection granted to Indian works with the exception that if the term specified in the country of origin is shorter than that in India, the work will be protected for the shorter term in India.

### 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 last 12 months?

There are no updates at this time.



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# Indonesia

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## LEGISLATION AND ENFORCEMENT

### Relevant legislation

1 | What is the relevant legislation?

The current legislation for copyright in Indonesia is Law Number 28 of 2014 on Copyright (the Copyright Law).

### Enforcement authorities

2 | Who enforces it?

The Indonesian government, mainly through the Directorate General of Intellectual Property under the Ministry of Law and Human Rights of the Republic of Indonesia.

### Online and digital regulation

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

No. Moreover, the applicable law pertaining to electronic information, namely Law No. 11 of 2008 on Electronic Transaction and Information, strictly states that any electronic information or documents compiled to be an intellectual work, website or any intellectual work contained thereof are protected as an intellectual property based on the relevant prevailing laws and regulations.

### Extraterritorial application

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

No.

### Agency

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

The Directorate General of Intellectual Property (DGIP) is the centralised intellectual property agency that deals with all administrative work with respect to the recordation, assignment and licensing of copyright. Within the DGIP, the Directorate of Copyright and Industrial Design deals specifically with copyright, and its duties are as follows:

- to prepare the drafting and implementation of policies;
- to provide technical assistance and supervision; and
- to evaluate and report the application, publication, examination, certification, documentation, and provision of customer service for copyright, neighbouring rights and industrial design.

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

Under the Copyright Law, copyright protects any work in the field of science, art and literature. The Copyright Law then further specifies the specific types of work that are protected by copyright in Indonesia:

- books, pamphlets, typographical arrangement (namely, the artistic aspect with respect to the composition and shape of literary works), and all other literary works;
- public talks, lectures, speeches and other similar works;
- visual aids made for educational and scientific purposes;
- songs and music with or without lyrics;
- dramatic works, musical dramas, dances, choreography, puppet shows and pantomimes;
- fine art works in all forms such as paintings, drawings, engravings, calligraphy, sculptures, statues or collages;
- applied art works;
- architectural works;
- maps;
- batik art works or other pattern and motive arts;
- photographic works;
- portraits;
- cinematographic works;
- translations, interpretations, alterations, anthologies, databases, adaptations, arrangements, modifications and other works resulting from a transformation;
- translations, adaptations, arrangements, transformations or modifications of traditional cultural expressions;
- compilation of work or data, whether in a format that can be read by a computer program or by any other media;
- compilation of traditional cultural expressions provided that the compilation is an original work;
- video games; and
- computer programs.

### Rights covered

7 | What types of rights are covered by copyright?

The Copyright Law protects three types of rights: moral, economic and neighbouring rights.

- Moral rights are the inherent right given to the creator of the work to:
  - put or omit his or her name in the copies of the work with respect to the use of his or her work in public;
  - use his or her alias or pseudonym;
  - change his or her work in accordance with public propriety;

- change the title and sub-title of the work; and
- defend his or her right in the case of any distortion, mutilation, or modification, or any other actions that harm his or her reputation.

Economic right is the exclusive right of a creator or copyright holder to obtain economic benefit from his or her work by:

- publishing his or her work;
- duplicating his or her work into any shape, form and format;
- translating his or her work;
- making adaptations, arrangements or transformations of his or her work;
- distributing his or her work or the copies thereof;
- displaying/showing his or her work;
- announcing his or her work;
- communicating his or her work; and
- leasing out his or her work.

Meanwhile, neighbouring rights are the rights related to copyright, which constitute exclusive rights including the moral and economic right of a performer, and the economic right of a phonogram producer and broadcasting institutions.

### Excluded works

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

There are three types of work that cannot be protected by a copyright:

- any work that has not been manifested in a concrete form;
- any idea, procedure, system, method, concept, principal, invention or data, even though it has been disclosed, stated, described, explained, or incorporated into a work; and
- any tools, objects or products that are created solely to solve technical problems or those that are formed only to meet functional needs.

### Fair use and fair dealing

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

Under the Copyright Law, there are specific articles on limitation of copyright use and anything that falls within such limitations would not be considered copyright infringement. The standards used to determine whether a particular use is considered as fair is governed under the Copyright Law.

### Architectural works

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

Yes, architectural works are protected under the Copyright Law. 'Architectural works' include:

- the physical form of the building;
- the placement of the building location;
- the designs and technical sketches of the building; and
- the models or miniatures of the building.

The procedure for protecting architectural works is the same as the procedure to protect other works; that is, protection is automatically obtained based on a declaration by the owner of the work.

There is a limitation on the protection of architectural works under the Copyright Law, whereby any alteration to architectural works would not be deemed as copyright infringement if it is conducted based on technical considerations. Technical considerations include, among other things, any change in the measurement of the land due to insufficient

acreage, non-symmetrical position, composition of different materials and a change in architectural model due to natural factors.

### Performance rights

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

Yes, performance rights are covered by copyright under the Copyright Law. Performance rights - commonly known as 'performers' rights' - also consist of moral and economic rights.

The moral rights of a performer are the inherent rights of a performer, which cannot be eliminated or abolished for any reason whatsoever, even if the accompanying economic right has been assigned or transferred. Moral rights include the rights to have his or her name listed as a performer (unless agreed otherwise) and not to have his or her work subjected to any distortion, mutilation, modification of the work or any other actions that may harm his or her honour or reputation (unless agreed otherwise).

Whereas, economic rights of a performer include the rights to:

- permit or prohibit another party from broadcasting or communicating his or her performance;
- fixing his or her performances that have yet to be fixated;
- duplicating, distributing or leasing his or her fixated performance; and
- providing access to his or her fixated performance to the public.

### Neighbouring rights

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

Yes, neighbouring rights are recognised under the Copyright Law. These include the moral and economic rights of performers, the economic rights of phonogram producers and the economic rights of broadcasting institutions.

With respect to moral and economic rights of performers, the moral rights of a performer cannot be eliminated or abolished for any reason whatsoever, even if the accompanying economic right has been assigned or transferred. Moral rights include the rights to have his or her name listed as a performer (unless agreed otherwise) and to not be subjected to any distortion, mutilation, modification of the work or any other actions that may harm his or her honour or reputation (unless agreed otherwise).

Whereas, economic rights of a performer include the rights to:

- permit or prohibit another party from broadcasting or communicating his or her performance;
- fixing his or her performances that have yet to be fixated;
- duplicating, distributing or leasing his or her fixated performance; and
- providing access to his or her fixated performance to the public.

With respect to the economic right of a phonogram producer, it includes the right to permit or prohibit other parties from duplicating their phonogram in any form whatsoever, distributing their original phonogram or copies thereof, leasing copies of their phonogram to the public, and providing access of their phonogram to the public.

With respect to the economic right of a broadcasting institution, it includes the right to permit or prohibit other parties from rebroadcasting, communicating, fixing or duplicating fixation of broadcasts.

### Moral rights

#### 13 | Are moral rights recognised?

Yes, moral rights are recognised under the Copyright Law. Furthermore, moral rights are not assignable or transferable during the creator's lifetime. If the creator has passed away, the enforcement of the moral rights may be assigned or transferred to his or her lawful heir via a written testament or will.

## COPYRIGHT FORMALITIES

### Notice

14 | Is there a requirement of copyright notice?

No.

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

Not applicable.

### Deposit

16 | Is there a requirement of copyright deposit?

No.

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

Not applicable.

### Registration

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

Yes, the term provided in the Copyright Law is 'recording of copyright' and not 'registration of copyright'.

The application for the recording of copyright is submitted to the Directorate General of Intellectual Property (DGIP) by completing a standard form along with the required documents (including a sample of the relevant work). If the applicant is not the creator, then the applicant must also provide a copy of the transfer of the copyright over the relevant work.

Upon receipt of the complete application, the examiner at the DGIP will examine the relevant application to determine whether the relevant work or product of neighbouring rights is the same as any other works that have been recorded in the General Records of Copyright or with other intellectual property objects. If the application is accepted, the DGIP will then issue an official recording letter.

Under the Copyright Law, a fine art painting in the form of a logo or a distinctive sign used as a mark in the trading of goods or services or as a symbol of an organisation, business entity, or legal entity cannot be recorded as a copyright with the DGIP.

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

Copyright recording is not mandatory. The protection for a copyright automatically begins when the work is first published and manifested into a concrete form.

Nevertheless, it is prudent to file a recording of copyright in order for the Directorate General of Intellectual Property (DGIP) to validate the protection under a copyright, as well as to gain commercial value. This is because in practice, the purchaser or licensee of a copyrighted work will usually ask for an official statement pertaining to the ownership of such copyright from the seller or licensor.

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

The fees to apply for a copyright recording will depend on the type of work that is the subject of the application and whether the application is submitted manually or electronically.

For almost all types of work, the application fee is 400,000 rupiah (electronic submission) and 500,000 rupiah (manual submission). For a computer program or software, the application fee is 600,000 rupiah (electronic submission) and 700,000 rupiah (manual submission).

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

Copyright recording is not mandatory. However, recording of a copyright licence is mandatory and one of the requirements in applying for the recording of a copyright licence is the proof of copyright ownership in the form of a copy of the relevant copyright recording letter issued by the Directorate General of Intellectual Property (DGIP). Failure to record a copyright licence may result in such a licence not having a legal effect against third parties, which means that if there is an infringement upon such licensed copyright by a third party, the licensee is not authorised to take any legal action against such infringement.

## OWNERSHIP AND TRANSFER

### Eligible owners

22 | Who is the owner of a copyrighted work?

Unless proven otherwise, the owner of a copyrighted work (creator) is any person whose name is:

- mentioned in the work;
- stated as the creator of a work;
- mentioned in the copyright recording letter issued by the Directorate General of Intellectual Property; or
- stated in the General Record of Copyright as the creator.

### Employee and contractor work

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

Yes, an employer may own a copyrighted work made by an employee. However, such ownership is not automatic by virtue of the employment relationship as the Copyright Law mandates that the creator of a work (in this case, the employee) will be the automatic owner of the copyrighted work created by him or her, unless agreed otherwise between the employer and the employee. Usually the agreement regarding the transfer of ownership of a copyrighted work from an employee to the employer is stipulated in the relevant employment agreement between them or the company regulation.

In relation to the procedure for copyright recording, a copy of the transfer of the copyright ownership is required if the applicant for the copyright recording is not the creator. As such, it is advisable to have the agreement in writing.

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

Yes, a hiring party may own a copyrighted work made by an independent contractor. The arrangement for such ownership is the same as the arrangement between an employer and employee, in that such ownership is not automatic by virtue of the employment relationship as the Copyright Law mandates that the creator of a work (in this case, the employee) will be the automatic owner of the copyrighted work created by him or her, unless agreed otherwise between the employer and the employee. Usually the agreement regarding the transfer of ownership of a copyrighted work from an employee to the employer is stipulated in the relevant employment agreement between them or the company regulation. It is advisable for the agreement to 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, the person who will be regarded as the creator is the person who leads and oversees the completion of the entire creation. However, if there is no such person, then the person who compiles the entire creation will be regarded as the creator without diminishing other people's copyright over each separate part of such creation.

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

## Transfer of rights

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

Yes, ownership rights over a copyrighted work are transferable, either in part or whole, by way of inheritance, grant, endowment, will, written agreement, or any other means as provided under the prevailing laws and regulations. However, a creator or copyright holder may not assign or transfer the same copyright twice to a different person or entity.

In addition, the Copyright Law stipulates that copyright over books and other literary works, songs and music (with or without lyrics) that has been assigned or transferred by virtue of an outright buyout agreement (sold flat), or timeless assignment, shall be returned to the creator or original copyright holder when the relevant arrangement has reached 25 years. That will also apply to the performers' economic right over the songs and music in which he or she performed.

As for the procedures, the transfer or assignment of copyright can be recorded with the Directorate General of Intellectual Property (DGIP) to the extent that the relevant copyright is already recorded with the DGIP. The recordation of such transfer or assignment may only be conducted if the entire rights are transferred to the transferee. The application for recordation of a transfer or assignment must be submitted to the DGIP. While the Copyright Law does not provide any time frame for the recordation of a transfer or assignment of copyright, in practice, it usually takes around three to six months.

## Licensing

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

Yes. A copyright holder or neighbouring rights holder is authorised to grant a licence to use his or her work when the protection period of the relevant work is still effective.

With regard to the licensing of copyright, please note that there is a requirement to record a copyright licence at the Directorate General of Intellectual Property (DGIP).

The application for recordation of a licence agreement can be filed either manually or electronically by attaching the following documents:

- a copy of the licence agreement;
- proof of ownership of the copyright or related rights;
- a power of attorney, if the application is filed through a proxy;
- receipt of the payment receipt of the official fee.

Under the regulation, the DGIP will then review the application within five business days after the application is deemed to be complete. If the DGIP considers the application to be complete, it will issue a notice of licence agreement recordation within two business days. The DGIP will also record the licence agreement in the General Registrar and announce such recordation in the Official Gazette.

In practice, the DGIP may take up to one year to complete the recordation of a licence agreement.

### 28 | Are there compulsory licences? What are they?

Yes, compulsory licences are stipulated under the Copyright Law. However, a compulsory licence is limited to the licence to translate and duplicate works in the field of science and literature for educational or scientific purposes, as well as for research and development.

The application for a compulsory licence shall be submitted to and granted based on the approval of the Directorate General of Intellectual Property (DGIP). Upon receiving such application, the DGIP may:

- 1 require the copyright holder to translate or duplicate the relevant work by himself or herself in the territory of the Republic of Indonesia and within a specified period;
- 2 require the copyright holder to grant authorisation to other parties to translate or duplicate the relevant work in the territory of the Republic of Indonesia within a specified period in the event that the copyright holder is unable to conduct such action himself or herself; or
- 3 appoint other parties to translate or duplicate the relevant work in the event that the copyright holder is unable to carry out the actions as mentioned in point 2.

A compulsory licence shall only be granted if three years has passed from the announcement of the relevant work and no translation or duplication of such work has been made in the territory of the Republic of Indonesia.

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

Yes, pursuant to the Copyright Law, a creator, copyright holder or neighbouring rights holder must be a member of a collective management institution in order to collect their economic right and receive fair compensation from any party that uses his or her copyright and neighbouring right in a commercial manner.

Moreover, specifically for the management of royalty from songs and music, there are two national management institutions that have been formed to represent the interest of the creators and the neighbouring rights holders. These national management institutions are authorised to charge, collect and distribute royalties from the commercial users.

## Termination

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

There are no specific provisions for the termination of the transfer of right under the Copyright Law. However, there is a time limitation for copyright over books and other literary works, songs and music (with or without lyrics) that has been transferred by virtue of an outright buyout agreement or timeless assignment. The Copyright Law stipulates that a copyright over books and other literary works, songs and music (with or without lyrics) that has been assigned or transferred by virtue of an outright buyout agreement (sold flat), or timeless assignment, shall be returned to the creator or original copyright holder when the relevant arrangement has reached 25 years. The same will also apply to the performers' economic right over songs and music in which he or she performed.

## Recordal

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

Yes. The Directorate General of Intellectual Property (DGIP) organises the recordation of assignment of copyright and neighbouring rights products. However, before applying for recordation of a copyright assignment, the applicant must first record the relevant copyrighted work with the DGIP, as one of the requirements for the recordation of copyright assignment is proof of ownership of the relevant copyright in the form of a copy of the copyright recordation letter issued by the DGIP.

## DURATION OF COPYRIGHT

### Protection start date

#### 32 | When does copyright protection begin?

Copyright protection over a work will automatically begin when the relevant work is first published and manifested into a concrete form.

### Duration

#### 33 | How long does copyright protection last?

Copyright protection consists of moral and economic rights.

The term of protection for the creator's moral right is indefinite. Whereas, the term of protection for the creator's economic right would depend on the type of work and number of creators or owners of such work.

The table overleaf presents the term of protection for the creator's economic right under the Copyright Law.

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

Copyright protection over a work will automatically begin when the relevant work is first published and manifested into a concrete form.

### Renewal

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

No, they are not renewable.

### Government extension of protection term

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

Yes. The current Copyright Law has extended the term of copyright protection from the previous copyright law, specifically on the term of protection for books, talks, visual aids, songs, choreographies, drawings, architectural works, maps, and batik art, from 50 years after the creator's death to 70 years after the creator's death.

## COPYRIGHT INFRINGEMENT AND REMEDIES

### Infringing acts

#### 37 | What constitutes copyright infringement?

A copyright infringement means:

- any party that violates the moral right of the creator;
- any party that exercises the economic right of the copyright holders or neighbouring rights holder without obtaining prior authorisation or permission from such holder or without paying any royalty to the collective management institution; or

- any party that uses, duplicates, performs, distributes, or communicates photos or portraits of any persons for a commercial purpose without obtaining any authorisation from the relevant persons.

### Vicarious and contributory liability

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

There is no provision in the Copyright Law that specifically stipulates secondary liability. However, there is a provision stipulating that the operator of a commercial establishment is not permitted to sale or duplicate any goods resulting from the infringement of copyright or neighbouring rights in the place of establishment.

Furthermore, the Indonesian Criminal Code also stipulates that a party may be liable if he or she knowingly or intentionally provides an opportunity, assistance or effort, or information to commit a crime (such as a copyright infringement).

### Available remedies

#### 39 | What remedies are available against a copyright infringer?

A party may seek legal remedy over a copyright infringement by filing a police report and seeking settlement through an alternative dispute resolution, arbitration or commercial court. Apart from an infringement of copyright or neighbouring rights in the form of piracy, as long as the domicile of the disputing parties are known or if they are located within the territory of the Republic of Indonesia, then they must enter into a mediation to achieve settlement before filing a criminal claim to the court.

The legal remedies that are available against a copyright infringer are as follows:

- filing a claim for compensation against the infringer if the creator, copyright holder, or neighbouring rights holder suffers any loss or damages;
- filing a claim for injunction to the commercial court to:
  - request for the confiscation of any work that was announced or duplicated, or confiscation of the duplication instrument used to produce works resulting from infringement of copyright; or
  - cease the announcement, distribution, communication, or duplication of works resulting from infringement of copyright;

The commercial court may also issue an injunction to:

- prevent the entry of any goods suspected to be the result of an infringement of copyright or neighbouring rights into the commercial trade routes;
- withdraw from distribution and confiscate, as well as keep as evidence, goods that are suspected to be the result of an infringement of copyright or neighbouring rights;
- secure as evidence and prevent the disappearance of evidence by the infringer; and
- cease the infringement to stop further loss and damage.

The commercial court issues decisions on copyright infringement claims within 90 working days of a claim's filing date.

### Limitation period

#### 40 | Is there a time limit for seeking remedies?

No.

Terms of copyright protection	
Type of work	Duration
<ul style="list-style-type: none"> <li>Books, pamphlets, and all other literary works;</li> <li>talks, lectures, speeches and other similar works;</li> <li>visual aids made for educational and science purposes;</li> <li>songs or music with or without lyrics;</li> <li>dramatic works, musical dramas, dances, choreography, puppet shows, pantomimes;</li> <li>fine art works in all forms such as paintings, drawings, engravings, calligraphy, carvings, sculptures, or collage;</li> <li>architectural works;</li> <li>maps; and</li> <li>batik art works or other pattern/motive arts.</li> </ul>	<p>If there is only one creator, the copyright protection will be valid up to 70 years after the creator's death, calculated from 1 January of the following year.</p> <p>If there are more than one creators, the copyright protection will be valid up to 70 years after the last death of the creators, calculated from 1 January of the following year.</p> <p>If the copyright holder is a legal entity, then the copyright protection will remain effective up to 50 years as of the first publication of the related work.</p>
<ul style="list-style-type: none"> <li>Photographic work;</li> <li>portrait;</li> <li>cinematographic;</li> <li>video game;</li> <li>computer program;</li> <li>typographical arrangement;</li> <li>translation, interpretation, alteration, anthology, database, adaptation, arrangement, modification, and other works resulting from transformation;</li> <li>translation, adaptation, arrangement, transformation, or modification of traditional cultural expression;</li> <li>compilation of works or data, whether in a readable format by computer program or by other media; and</li> <li>compilation of traditional cultural expressions so long as the compilation is an original work.</li> </ul>	<p>The copyright protection will remain effective up to 50 years as of the date of the first announcement of the relevant work.</p>
<ul style="list-style-type: none"> <li>Applied arts works.</li> </ul>	<p>The copyright protection will remain effective up to 25 years as of the date of the first announcement of the relevant work.</p>

**Monetary damages**

**41 | Are monetary damages available for copyright infringement?**

Yes, the Copyright Law provides that a creator, copyright holder, or neighbouring rights holder, or their rightful heir, who suffers damages is entitled to receive compensation. The compensation shall be given based on a final and binding decision of a civil or criminal court.

**Attorneys' fees and costs**

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

No, based on the Indonesian Civil Procedural Law, attorneys' fees and costs will be imposed on the party that receives the legal service from the relevant attorney.

**Criminal enforcement**

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

Yes. The table below provides a summary of the criminal copyright provisions stipulated in the Copyright Law.

**Online infringement**

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

The only specific remedy or defence for an online infringement is to make a report of such infringement to the Directorate General of Intellectual Property (DGIP). In this regard, the DGIP will then examine the report to verify its validity. If there is sufficient evidence based on the verification, then the DGIP, upon the request of the applicant, will make a recommendation to the Ministry of Technology and Information to block the content or access to the perpetrator's website.

**Prevention measures**

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

Although it is difficult to prevent copyright infringement in its entirety, there are steps that can be taken to minimise it, such as to conduct socialisation and provide education to the public regarding copyright. Hopefully the public's understanding and awareness on copyright will increase through socialisation and education, which in turn, will make them appreciate other people's intellectual property.

Another action is to increase the level of enforcement under the Copyright Law, specifically the provisions on copyright infringement to cause a deterrent effect in society. Strict enforcement will encourage the public against committing copyright infringement in the future.

A copyright holder may prevent a copyright infringement by recording their work at the Indonesian Customs Office. Once recorded, the Customs Office will monitor any goods being shipped into or out of the territory of the Republic of Indonesia and will notify the copyright holder of any suspected infringement to the recorded copyright so that the copyright holder can take further action, including filing a suspension order petition to the Commercial Court.

**RELATIONSHIP TO FOREIGN RIGHTS**

**International conventions**

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

Indonesia is a member of the agreement to establish the World Trade Organization (WTO), which includes the Trade Related Aspects of Intellectual Property (TRIPS Agreement).

Indonesia then ratified the Berne Convention for the Protection of Artistic and Literary Works (Berne Convention) and the World Intellectual Property Organization Copyright Treaty in 1997 (the Copyright Treaty).

Summary of the criminal copyright provisions stipulated in the Copyright Law		
No.	Criminal action	Punishment
1	Removing, altering or damaging any copyright management information and copyright electronic information for commercial purposes without authorisation.	Maximum imprisonment of two years or maximum fine of 300 million rupiah, or both.
2	Violating the economic right of a creator or copyright holder by leasing a copyrighted work for commercial purposes without authorisation.	Maximum imprisonment of one year or maximum fine of 100 million rupiah, or both.
3	Violating the economic right of a creator or copyright holder by translating, adapting, arranging, transforming, showing or exhibiting, or communicating a copyrighted work for commercial purposes without authorisation.	Maximum imprisonment of three years or maximum fine of 500 million rupiah, or both.
4	Violating the economic right of a creator or copyright holder by publishing, duplicating, distributing or announcing a copyrighted work for commercial purposes without authorisation.	Maximum imprisonment of four years or maximum fine of 1 billion rupiah, or both.
5	Fulfilling elements of criminal actions as stated in point 4 in the form of piracy.	Maximum imprisonment of 10 years or maximum fine of 4 billion rupiah, or both.
6	Operating a commercial place, in any form, while intentionally and knowingly letting the sale or duplication of products derived from copyright infringement action.	Maximum fine of 100 million rupiah.
7	Commercially using, duplicating, publishing, distributing, or communicating a photo or portrait of a person for advertisement purposes without authorisation of the related person or his or her rightful heir, whether via electronic or non-electronic media.	Maximum fine of 500 million rupiah.
8	Violating the economic right of a performer by leasing his or her fixated show or its copy for commercial purposes without authorisation.	Maximum imprisonment of one year or maximum fine of 100 million rupiah, or both.
9	Violating the economic right of a performer by broadcasting and communicating his or her show, fixating his or her show that has not been fixated, or providing his or her fixated show for commercial purposes without authorisation.	Maximum imprisonment of three years or maximum fine of 500 million rupiah, or both.
10	Violating the economic right of a performer by duplicating his or her fixated show, or distributing his or her fixated show or its copy for commercial purposes without authorisation.	Maximum imprisonment of four years or maximum fine of 1 billion rupiah, or both.
11	Fulfilling elements of criminal actions as stated in point 10 above in the form of piracy.	Maximum imprisonment of 10 years or maximum fine of 4 billion rupiah, or both.
12	Violating the economic right of a phonogram producer by leasing a copy of the copyrighted phonogram to the public for commercial purposes without authorisation.	Maximum imprisonment of one year or maximum fine of 100 million rupiah, or both.
13	Violating the economic right of a phonogram producer by duplicating a phonogram by any means, distributing an original phonogram or its copy or making a phonogram to be accessible by the public, with or without cable, for commercial purposes without authorisation.	Maximum imprisonment of four years or maximum fine of 1 billion rupiah, or both.
14	Fulfilling elements of criminal actions as stated in point 13 above in the form of piracy.	Maximum imprisonment of 10 years or maximum fine of 4 billion rupiah, or both.
15	Violating the economic right of a broadcasting institution by rebroadcasting, communicating, fixating, duplicating a broadcast for commercial purposes without authorisation.	Maximum imprisonment of four years or maximum fine of 1 billion rupiah, or both.
16	Fulfilling elements of criminal actions as stated in point 15 in the form of piracy.	Maximum imprisonment of 10 years or maximum fine of 4 billion rupiah, or both.
17	Collective Management Institution that collects royalties but does not hold a business licence from the Directorate General of Intellectual Property (DGIP).	Maximum imprisonment of four years or maximum fine of 1 billion rupiah, or both.

Lastly, in 2004, Indonesia also ratified the World Intellectual Property Organization Performances and Phonograms Treaty (the Phonograms Treaty).

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

As a member of the WTO, Indonesia must give effect to the provisions of the TRIPS Agreement and may, but is not obliged to, implement more extensive protection in their local law than what is required by the TRIPS Agreement, provided that such protection does not contravene the provisions of the TRIPS Agreement.

As a country that ratified the Berne Convention, Indonesia must adopt, in accordance with its constitution, the measures necessary to ensure the application of the Berne Convention. Taking into consideration the prevailing legislation and constitution, Indonesia does not consider itself to be bound by the provision of article 33(1) of the Berne Convention.

Since Indonesia also ratified the Copyright Treaty, it must also abide by the rights and obligations under the Copyright Treaty.

As a member of the Phonograms Treaty, Indonesia must:

- provide adequate legal protection and effective legal remedies against the circumvention of technological measures by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and which restrict acts, in respect of their performances or phonograms, that are not authorised by the performers or the producers of phonograms concerned or permitted by law;
- provide adequate and effective legal remedies against any person who knowingly perform any of the following acts:
  - remove or alter any electronic rights management information without any authority; and
  - distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

**UPDATE AND TRENDS****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 last 12 months?

In early 2019, the House of Representatives released a draft of a law governing music (the Draft Music Law) for socialisation purpose and to request feedback from the stakeholders and the public in general. The Music Law Draft was met with a lot of resistance and backlash owing to certain provisions that were seen to limit freedom of creation and creativity and negatively affect musicians. Some of these concerns included:

- Article 5 stipulating that during the creation process, every person involved is prohibited from:
  - encouraging the public to engage in violence, gambling or the use of drugs;
  - including pornographic, sexually violent and child exploitation content;
  - provoking conflict in society between groups, ethnic groups, races and classes;
  - defaming, harassing or tarnishing any religion;
  - encouraging the public to commit unlawful or illegal acts;
  - introducing and spreading negative influences of foreign cultures; and
  - degrading humanity's dignity.
- Article 10 paragraph (2) stipulating that the distribution of music must be done by record labels or specific service providers for distribution of musical products in a physical form, or content providers for digital music. The Draft Music Law does not provide opportunities for the distribution of music by independent parties or the musicians themselves.
- Article 20 stating that competency in the field of music must be obtained through formal education or from self-learning. Furthermore, article 32 stipulates that to be acknowledged as a professional, musicians coming from an educational or a self-taught background must take a competency exam. These provisions are very restrictive towards musicians because not everyone has the same skill level or qualification in music.

Fortunately, the government and members of the House of Representatives were open to the input and feedback and they will review the Draft Music Law, and discuss and revise it further, before enacting it.

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# Italy

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## LEGISLATION AND ENFORCEMENT

### Relevant legislation

#### 1 | What is the relevant legislation?

The system of privileges, which was used in pre-unification Italy, only came to an end in the 19th century with the recognition of the author, which took inspiration from French jurisprudence and the concept of intellectual property.

After Italy's unification, copyright was ratified by the Law of 25 June 1865. Along with the *Testo Unico* of 19 September 1882 No 1012, the former law remained in force until 1925, when it was replaced by the Law of 7 November 1925, No 1950, and then in 1941 by Law No 633 of 22 April 1941 (the Copyright Act), which is still in force.

The Act and the corresponding regulation of 18 June 1942, No. 1369, are still in force.

The Copyright Act has been amended several times upon the approval of new international conventions and EU directives relating to the protection of copyright and related rights.

Italy's constitution does not provide specific copyright protection, despite constitutional protection inferred in the combined provisions of articles 2, 9, 21, 33 and 42.

Provisions on copyright are also found in the Civil Code, articles 2575 and following.

### Enforcement authorities

#### 2 | Who enforces it?

Pursuant to article 54, Law 218/1995, the rights on intangible assets are regulated by the law of the country of use. Therefore, Italian law is applicable to works used in Italy's territory.

The Bern Convention of 1866 establishes reciprocity and automatic recognition of copyright protection between states. Therefore, citizens of countries that adhere to the Convention who use their work in Italy benefit from the protection of Italian 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?

The main legal reference for the digital exploitation of works remains European law, specifically EU Directive 2001/29/EC 'on the harmonisation of certain aspects of copyright and related rights in the information society', which incorporates principles expressed by the WIPO Copyright Treaty 1996 (WCT). Legislative Decree No 68/2003 ratifies the principles laid down by Directive 2001/29/EC into Italy's national law.

### Extraterritorial application

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

Websites enjoy the copyright protection referred to in Article 1 Copyright Act and are included among 'creative works of intellect' if they show, through aesthetic and technical choices, a degree of creativity such as to deserve such protection.

Software is also included in the list of works protected by the Copyright Act. It is regarded as literature (article 1(2)). The list includes any kind of software, providing it is the result of an intellectual effort originally made by its author (article 2(8)).

Italian law protects databases that, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation (article 1(2)). In particular, protected databases are understood as being collections of works, data or other independent elements systematically or methodically arranged and individually accessible by electronic means or otherwise. The protection of databases does not extend to their content and is without prejudice to rights relating to the said content (article 2(9)).

### Non-Italian websites

Articles 12-16 of the E-commerce Directive apply to infringement perpetrated through foreign websites.

The Directive was transposed into Italian law by Legislative Decree 70/2003 – in particular, by article 14 (mere conduit), article 15 (caching), article 16 (hosting) and article 17 (no general obligation to monitor), which textually reproduced articles 12 to 16 of the E-Commerce Directive.

The E-Commerce Directive, articles 12 to 16 do not prevent a member state's court or administrative authority requiring a service provider to terminate or prevent an infringement, nor do they prevent member states from establishing procedures governing the removal or disabling of access to information.

### Article 12

Article 12 on the activity of 'mere conduits. states:

*... where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, member states shall ensure that the service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.*

### Article 13

Article 13 on temporary storage, known as caching, states:

... where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that: (a) the provider does not modify the information; (b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

### Article 14

Article 14 on the hosting service states:

... where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

### Articles 15 to 17

Article 15 to 17 state that a member state cannot impose a general obligation on an internet service provider (ISP) which is providing services that violate articles 12, 13 and 14 to monitor the information which it transmits or stores, nor can it impose a general obligation on an ISP to actively seek facts or circumstances indicating illegal activity.

### Agency

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

There is no central copyright agency in Italy, but there are national copyright collection societies, such as the following:

- New Institute for the Protection of Performing Artists Rights (NUOVO IMAIE);
- Society for the Collective Administration of Audio-visual Performers' Rights (ARTISTI 7607);
- Institute for the Protection of Performing Artists (IMAIE) (currently inactive);
- Motion Picture Licensing Corporation Italy;
- Società Italiana degli Autori ed Editori (SIAE);
- Società Consorzio Fonografici (SCF);
- Diritti Artisti (IPAA);
- Rete Artisti Spettacolo Innovazione (RASI);
- Society collecting compensations of neighbouring rights (ItsRight); and

- Soundreef.

SIAE is the competent authority for copyright. It handles the intermediation of exclusive rights for economic exploitation (music, theatre and TV), as well as the collection and allocation of remuneration rights, such as:

- private copying pursuant to Articles 71 sexies and following of the Copyright Act;
- resale right pursuant to Articles 144 and following of the same Act;
- right to rent pursuant to Article 18b and remuneration pursuant to Article 46b;
- remuneration for reprography pursuant to Article 68; and
- remuneration for loan pursuant to Article 69.

SIAE is subject to transparency obligations, in compliance with Legislative Decree No 35/2017, which opened the market to other collecting societies. SIAE has maintained the exclusive right to issue the stamp and collect the resale fee.

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

Copyright applies to intellectual works with a creative character relating to literature, music, figurative arts, architecture, theatre, or cinematography, whatever their means or form of expression. The list of works that benefit from protection is not exhaustive, but illustrative, which is why, in addition to all creative works that are recorded in a material form (such as film, paper, etc), it may also include works, generally of contemporary art, that are intangible (such as performance art).

### Rights covered

**7 | What types of rights are covered by copyright?**

Copyright law consists of two fundamental elements: the moral right and the right of economic use.

The first is closely linked to the author's person and, except in special cases, remains so, while the second is originally the author's, who can transfer it for remuneration to a licensee, who in turn can transfer it again within the limits of the licence and the applicable law, without prejudice to moral rights.

Moral rights aim to protect the author's personality, honour and reputation by correctly communicating his or her works to others. By their nature, these rights are inalienable and autonomous.

Copyright gives the author of a work a number of exclusive rights to prevent third parties from economically exploiting their work. According to article 12 of the Copyright Act, the author has the exclusive right to economically use the work in any form, whether it is an original or a derivative work, with regard to the exercise of the exclusive rights indicated in articles 13 to 18 of the Copyright Act, such as:

- right of reproductions;
- right of transcription of oral work;
- right of public performance or recitation;
- right of communication;
- right of distribution;
- right of modification, translation and publication of the works in a collection; and
- right of rental and lending.

All these rights are independent of each other: the exercise of one does not exclude the exercise of all the others. Moreover, these rights relate to the work as a whole and to each of its parts.

'Neighbouring rights' are the rights that the law recognises to other subjects in any case related to the author of the work. These are artists, performers, producers of phonographic supports, producers of cinematographic or audio-visual works, radio and television broadcasters, and so on. In other words, they are those offering the work to the public and which also own economic rights and, in some cases, moral rights (performers). Particular examples are:

- the rights of the phonograms producers (articles 72 to 78);
- rights of producers of cinematographic or audio-visual works or moving image sequences (articles 78-bis to -ter);
- rights related to radio and television broadcasting (article 79);
- rights of performers (articles 80 to 85-bis);
- rights relating to works published or communicated to the public for the first time after the extinction of copyright (article 85-ter);
- rights relating to critical and scientific editions of works in the public domain (articles 85-quarter and -quinqies);
- rights relating to sketches of theatrical scenes (article 86);
- rights relating to photographs (articles 87 to 92);
- rights relating to correspondence and portraits (articles 93-95);
- rights relating to portraits (articles 96 to 98);
- rights relating to engineering works projects (article 99); and
- protection of the title, headings, external appearance of the work of articles and news – prohibition of certain acts of unfair competition (articles 100 to 102).

### Excluded works

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

The Italian legislature guarantees the protection of a work endowed with creative character that shows elements of novelty and originality. A work can be considered 'new' when it is distinguishable from previous works and 'original' when it is the result of a non-trivial product of human ingenuity.

Simple ideas are excluded from protection.

### Fair use and fair dealing

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

Italian law provides for specific exceptions and limitations to copyright, commonly defined as 'fair use', such as the reproduction of single works for personal use and the reproduction and public disclosure of articles of economic, political or religious nature.

Pursuant to article 70 of the Copyright Act, citation or reproduction of a protected work is permitted if it is made for the purpose of criticism, discussion, teaching or scientific research, is within the limits of such purposes, provided the reproduction is used for illustrative and non-commercial purposes and does not constitute competition with the economic use of the original work.

Article 70 paragraph 1-bis of the Copyright Act adds that the free publication through the internet of low resolution or degraded images and music, for educational or scientific use, and only if such use is not for commercial purposes, is allowed. The limits to the didactic or scientific use referred to in this article are defined by a decree of the Minister of Cultural Heritage and Activities, made in consultation with the Minister of Education, the Minister of University and Research, and the competent parliamentary committees.

### Architectural works

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

Copyright applies to intellectual works with a creative character, including architecture. Architectural works and projects are protected by copyright nationally, under the Copyright Act, and internationally, under the Bern Convention for the Protection of Literary and Artistic Works, provided they are creative and original.

The author of the architectural work and the project is the owner of the rights of economic exploitation and moral rights related to the work, as with authors of other works.

Regarding the ownership of the rights, the general principle is that projects carried out in collaboration (ie, with the indistinguishable and inseparable contributions of several persons), the rights to the work belong collectively to all of the co-authors.

Regarding property rights, the general principle is that all forms of economic exploitation must be authorised by the author.

Regarding moral rights and modifying the work, Italian law states that the author of an architectural work cannot oppose modifications that may become necessary during construction or after the work is completed. However, if the competent state authority recognises the work as having an important artistic character, the author must study and implement such modifications.

### Performance rights

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

Yes. The list of works that benefit from protection is not exhaustive but illustrative, and so may also include intangible works, such as performance art.

### Neighbouring rights

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

The rights related to copyright (neighbouring rights) are those the law recognises as belonging to others who assisted the author in creating the work. These include artists, performers, producers of phonographic supports, producers of cinematographic or audio-visual works, radio and television stations and so on. The most important neighbouring rights include:

- the rights of producers of a cinematographic or audio-visual work (article 78-ter of the Copyright Act);
- the rights of performers (articles 80 to 85-bis); and
- rights related to photographs (articles 87 to 92).

Neighbouring rights include economic rights, alienable and transmissible rights, and, in some cases, also moral rights, such as those of performers of the work.

The average duration of neighbouring rights is 50 years, but specific and different durations are provided for each type of object of the right.

### Moral rights

#### 13 | Are moral rights recognised?

Beside rights to the economic exploitation of the work, the author is entitled to a series of faculties that constitute his or her moral rights, which are inalienable and non-transferable. These are the:

- right of paternity, meaning the right to be identified as the author of the work;
- right of disclosure;
- right to the publication of unpublished works;
- right to the integrity of a work; and
- right to the removal of a work.

There are no time limits on moral rights. At the author's death the right of paternity and the right to the integrity of the work can be asserted, without a limitation on time, by the author's spouse and children or, in their absence, by the parents and other direct ascendants and descendants. Each of them can act without the consent of others.

According to article 22 of the Copyright Act, moral rights are inalienable. However, the author who has known and accepted modifications of his or her work is no longer allowed to act to prevent the work's execution or to request its removal. With the death of the author, his or her moral rights regarding the removal or prevention of execution are extinguished. However, according to the article 23 of the Copyright Act, a similar right arises for the author's relatives. The author's moral rights, contemplated in article 20 of the Copyright Act, can be exercised by the author's children and other relatives in the order indicated in article 23 of the Copyright Act, after his or her death.

According to Article 23 of the Copyright Act, in the absence of ascendants and descendants, the right can be asserted by the author's siblings and their descendants. Finally, for reasons of public interest, the action can be promoted by the Ministry of Culture.

Therefore, as moral rights lack a time limit they have the character of perpetuity, as stated in article 23 of the Copyright Act.

## COPYRIGHT FORMALITIES

### Notice

#### 14 | Is there a requirement of copyright notice?

The Italian legislator has established that a work can be protected from the point of its creation. No particular formalities are contemplated and copyright registration is not compulsory.

However, works can be deposited on a voluntary basis with the Italian Society of Authors and Publishers (SIAE) and the Italian Ministry of Cultural Heritage and Activities (Mibact). SIAE also manages the Public Register of Cinematographic Works, which is managed by Mibact, following the Law of 14 November 2016, No 220.

Article 103 of the Copyright Act also allows the recording of transfers of rights for the economic exploitation of works. There is also a public register for software also that records and publicises the existence and ownership of rights related to programs. Moreover, unpublished works can be deposited with SIAE, which can include screenplays, plots, audiovisual works, software, databases, and specimens of intellectual work in general. Such a deposit is granted to provide documentary proof of the existence of the work on the date of deposit. Through this service, the depositor also obtains proof of the work's existence with a clear date (the one when it was deposited at SIAE). An unpublished work can be held in SIAE's depository for five years, and the deposit may be renewed on the expiry date for an equal period of time. The details of the deposited works are available to the public.

The Ministry of Cultural Heritage and Activities and Tourism manages the General Public Register of Protected Works, which holds records works that must be recorded pursuant to article 105 of the Copyright Act. As with the Public Register for Cinematographic Works, recording a work in the General Public Register of Protected Works provides evidence, unless proved otherwise, of the existence and ownership of the said works. The authors and producers listed in the register are considered, unless proved otherwise, as the authors and producers of the works that are attributed to them (article 103 of the Copyright Act).

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

SIAE's register serves primarily as a tool to record and publicise the existence of works (and thus copyright ownership) that are not required to be recorded under the Copyright Act, thus providing legal certainty from an evidence standpoint. The register also has a constitutive function regarding rights relating to deposits of engineering or similar works covered by article 99 of the Copyright Act.

### Deposit

#### 16 | Is there a requirement of copyright deposit?

Copyright applies to intellectual works with a creative character relating to literature, music, figurative arts, architecture, theatre or cinematography, whatever their means or form of expression.

In order to access the protection granted by the legislation, the work must satisfy the prerequisite of creativity. The law does not consider lawfulness as a prerequisite to copyright protection. Neither the merit nor value of the work are considered prerequisites either, as both are subjective and ever-changing.

Copyright results automatically from the creation of a work and requires no formalities or fulfilments. The work is subject to specific protection from the moment that it is created.

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

SIAE's register serves primarily as a tool to record and publicise the existence of works (and thus copyright ownership) that are not required to be recorded under the Copyright Act, thus providing legal certainty from an evidence standpoint. The register also has a constitutive function regarding rights relating to deposits of engineering or similar works covered by article 99 of the Copyright Act.

### Registration

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

Registration is not compulsory and works can be deposited on a voluntary basis with the Italian Society of Authors and Publishers (SIAE) and the Italian Ministry of Cultural Heritage and Activities (Mibact). The SIAE also manages the Public Register of Cinematographic Works, which is also managed by Mibact following the Law of 14 November 2016, No 220. This register serves primarily as a tool to record and publicise the existence of works (and thus copyright ownership) that are not required to be recorded under the Copyright Act, thus providing legal certainty from an evidence standpoint. The register also has a constitutive function regarding rights relating to deposits of engineering or similar works covered by article 99 of the Copyright Act.

The application process depends on the work you intend to register.

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

The Italian legislature has established that a work is protected from the time of its creation. No particular formalities are contemplated and registration is not compulsory.

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

It depends on the work you intend to register.

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

Since registration is not compulsory there are no consequences provided by law other than the fact that, since the registration has a constitutive function regarding rights relating to deposits, failure to do so could make it more difficult to identify a certain date of the work's creation.

### OWNERSHIP AND TRANSFER

#### Eligible owners

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

The author is the person who created the work, as indicated in article 8 of the Copyright Act, which provides for a legal presumption of authorship: the author of the work is considered, unless otherwise proven, the person who is indicated as such in the forms of use, or who is announced as such in the acting, performance, representation and broadcasting of the work itself.

#### Employee and contractor work

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

A company cannot be considered to be the author of a work, but only the holder of economic exploitation rights. However, this circumstance could disappear with the creation of works by artificial intelligence.

In the case of the creation of works by employees, there is an exception to the general rule that the creator has the right to be recognised as the author and to economically use the fruit of his intellectual activity, expressly establishing the principle that if the inventive or creative product is created in the context of an employment relationship, the relative right of economic use is held by the employer unless otherwise provided for (article 2590 of Civil Code; article 64 of the Industrial Property Code, Legislative Decree No. 30/2005).

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

The ownership of the rights of economic use of the original inventions or product supplied by self-employed workers are now contained in article 4 of Law No 81/2017, which refers to the discipline dictated by the law on copyright, and which provides that:

*... except in the case where the inventive activity is provided for as the object of the contract of employment and compensated for this purpose, the rights of economic use relating to the original contributions and inventions made during the execution of the contract are due to the self-employed, according to the provisions of Law No. 633 of 22 April 1941 and the Industrial Property Code of Legislative Decree No. 30 of 10 February 2005.*

Article 65 of the Industrial Property Code provides that when the employment relationship takes place with a university or with a public administration having among its institutional purposes research objectives, the researcher is the exclusive owner of the rights deriving from the patentable invention of which he or she is the author.

#### Joint and collective ownership

## 25 | May a copyrighted work be co-owned?

If several subjects have contributed to the creation of a work, they are considered co-owners under the Italian legal system, and they will all have the same moral rights and rights to economic exploitation. The co-authors may assign rights of economic exploitation to third parties, but not the moral rights that belong to the work's original creators.

The licensing of the exploitation of a co-owned work is admissible and is subject to the general discipline dictated by the Civil Code on ordinary communion (article 1103 Civil Code).

#### Transfer of rights

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

An author who reaches 16 years of age has the capacity to carry out all legal acts relating to the works created by him or her and to exercise all the resulting actions (article 108 of the Copyright Act).

The Copyright Act regulates the transfer of economic use of copyright with some general rules set out in articles 107 to 114. Some rules that specifically apply to publishing contracts (see articles 119 and 120 of the Copyright Act), which are of an imperative nature, are applicable to any contract for the sale of the rights of economic use.

In order for a transfer contract to be enforceable against third parties it must be in writing (article 110 of the Copyright Act) and must be signed by the holder of the rights.

#### Licensing

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

The Copyright Act regulates the transfer of the economic use of copyright with general rules in articles 107 to 114. Some rules of an imperative nature that specifically apply to publishing contracts, in articles 119 and 120, are applicable to any contract for the sale of the rights of economic use.

Only moral rights are inalienable and non-transferable, being always held by the person who has created the work.

## 28 | Are there compulsory licences? What are they?

In Italy, some compulsory licences are those signed between collective bodies and the right holders who give the bodies mandates to manage the collection and distribution of their remuneration due by law.

For instance, article 73 of the Copyright Act states that a phonographic producer owns the right to remuneration for the for-profit use of their phonograms in radio broadcasting, which supplements the existence of a legal obligation to remunerate for these rights. A phonogram producer is therefore entitled to exercise the right to equitable remuneration. Exercising this right is the responsibility the companies that carry out intermediation activities related to copyright (referred to in article 3(2) of the Decree of the President of the Council of Ministers (DPCM) of 19 December 2012) to which phonogram producers and performers give their mandates to in writing, clarifying that, in Italy, the collective bodies to which phonogram producers have given a mandate collect and distribute the remuneration due by law. The parties are empowered to negotiate, on the basis of their interests, the amount of the remuneration due by law through the subscription of licences.

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

Italian Legislative Decree 2017/35, implementing Directive 2014/26, establishes the collective and independent bodies and entities that manage copyright and related rights.

The collective management of related rights is entrusted to several entities operating in the field of music and audio-visual works, collecting and allocating remunerations pursuant to articles 73 and 73-bis of the Copyright Act, and remuneration for private copying pursuant to article 71-sexies.

Collective management organisations are owned and controlled by their members and are organised on a non-profit basis, while independent management entities are neither owned nor controlled by right holders and are organised on a for-profit basis.

### Termination

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

The principle of exhaustion is linked to the right of distribution of the protected work, which has as its objective the distribution of the original of a work and includes the exclusive right to introduce it in a territory. This right is exhausted when the work has been put on the market by the author or by third parties with the consent of the author.

According to article 17 of the Copyright Act, the objective of the exclusive right of distribution is to place the original work, or copies of it thereof, on the market or in circulation, or otherwise make it available to the public, by any means and in any way. It also includes the exclusive right to introduce reproductions made in non-EU countries into the territory of the European Community for distribution purposes.

The right of distribution of the original or copies of the work is not exhausted in the European Community, except in cases where the first sale or the first act of transfer of ownership in the Community is carried out by the right holder or with his or her consent. This does not apply to making works available to the public so that everyone can access them from the place and at the time chosen individually, even if making copies of the work is permitted to achieve this.

### Recordal

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

Article 103 of the Copyright Act allows for the recording of the transfer of rights for the economic exploitation of works. There are different public registers for different types of work.

A public register for software exists that records and publicises the existence and ownership of rights related to programs. The Ministry of Cultural Heritage and Activities and Tourism manages the General Public Register of Protected Works, which records the works that must be recorded pursuant to article 105 of the Copyright Act. As with the Public Register for Cinematographic Works, recording in the General Public Register of Protected Works provides evidence, unless proved otherwise, of the existence and ownership of said works. The authors and producers listed in the register are considered, unless proved otherwise, as the authors and producers of the works that are attributed to them (article 103).

## DURATION OF COPYRIGHT

### Protection start date

## 32 | When does copyright protection begin?

Copyright results automatically from the creation of a work and requires no formalities or fulfilments. The work is subject to specific protection from the moment that it is created.

### Duration

## 33 | How long does copyright protection last?

Economic rights have a limited duration and lapse 70 years after the death of the author of the work, even for works published posthumously. In the case of anonymous or pseudonymous works, save for some exceptions, rights to economic exploitation lapse 70 years after the work's first publication. Specific rules apply to the duration of collective works under article 26 of the Copyright Act.

Moral rights have no duration. At the death of the author, the rights of paternity and to the integrity of the work can be asserted without a time limit, by the author's spouse and children and, in their absence, by the parents and other ascendants and by direct descendants. Each of them can act without the consent of others.

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

Special rules on the duration of copyright concern cases where the work is the work of several people.

In particular, in cases of works in communion – that is works made with the indistinguishable and inseparable contribution of several people, such as two musicians working on the score of a piece – the duration is 70 years from the death of the last surviving co-author and collective works – that is works made with the indistinguishable and distinguishable contribution of several people, such as two authors of a book who have each edited a chapter or the lyricist and the composer of a song, respectively – the duration of the rights of economic use due to each collaborator is determined by the life of each of each contributor.

As for collective works, the rights cease after the 70th year after the first publication of the work as a whole. Therefore, in this case, copyright expires after 70 years from the first publication of the work as a whole.

In the case of periodic collective works (such as magazines and newspapers) the rights of economic use are valid for 70 years from the end of the year of publication of the individual files or individual issues.

In the case of anonymous or pseudonymous works, the term of the rights of economic use is 70 years from first publication. If a claimed author proves to be the author of the anonymous or pseudo-anonymous work, the term returns to the ordinary one: 70 years after death.

For cinematographic works, the rights of economic use last until the end of the 70th year after the death of the last surviving person among the following: the artistic director, the authors of the screenplay, the author of the dialogue, and the author of the music.

### Renewal

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

The duration of copyright is never the same for all works: it varies according to the lifespan of the author.

As said, important elements to establish the duration are that during the life of the author proceeds only go to the author, and 70 years after the author's death the proceeds go to the author's heirs, as the author is deceased.

Only property rights expire after 70 years. Moral rights are the exclusive rights that the law recognises in favour of the author to protect his or her personality. They are the right to the paternity of the work, to be unpublished and to the integrity of the work. These rights cannot be ceded to third parties, cannot be renounced and they are not prescribed even if they are not exercised for a long time.

### Government extension of protection term

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

A well-known extension of the term of copyright refers to the Legislative Decree implementing Directive 2011/77/EU, amending Directive 2006/116/EC on the term of protection of copyright and certain related rights. The measure affects both phonogram producers, performers, musical performers and collective management societies representing them.

The Directive, as approved, extends from the term of related rights of performers in musical performances fixed in a phonogram and of phonogram producers from 50 years to 70 years.

## COPYRIGHT INFRINGEMENT AND REMEDIES

### Infringing acts

#### 37 | What constitutes copyright infringement?

The Copyright Act does not set down copyright infringement cases that might constitute counterfeiting or plagiarism.

In general terms, 'counterfeiting' is the exploitation of economic rights resulting from the work without the consent of the author. It is the appropriation of the creative elements of a pre-existing protected work of a different individual. 'Plagiarism' is a variation of copyright infringement. It consists of the total or partial reproduction of the creative elements of a work belonging to others with the appropriation of its authorship.

There can be counterfeiting without plagiarism, as in piracy, where the counterfeit element is accompanied by the name of the actual author, and the will to appropriate the work belonging to others does not exist.

Online works are treated as paper publications, so works published on the internet cannot be copied or benefited from without the author's explicit consent.

### Vicarious and contributory liability

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

Article 156 of the Copyright Act specifically provides for the liability of intermediaries (that is, internet service providers (ISPs)) whose services are used for the purposes of infringing copyright. Therefore, those who have reason to fear the infringement of rights to economic exploitation to which they are entitled, or who wish to prevent the continuation or repetition of an infringement that has already occurred, can sue the intermediaries.

Moreover, the E-Commerce Act (Legislative Decree 2003/70) establishes specific domains of liability of intermediary service providers. Article 12, 13, 14 of Directive 2000/31/EC on the liability of information society service providers (those with roles limited to merely providing conduits, caching and hosting data) provides that, 'This Article shall not affect the possibility for a court or administrative authority, in accordance with member states' legal systems, of requiring the service provider to terminate or prevent an infringement'.

Pursuant to article 16 of the Italian E-Commerce Act, hosting service providers are exempt from liability where third-party rights are

violated on the hosts' online platforms, if the host has no knowledge nor information about the illegal activity, or acts expeditiously to remove the illegal material once they are made aware of its infringing nature. The Italian courts have repeatedly acknowledged the joint liability of ISPs for infringements committed directly by users of their services.

It is necessary to refer here to the Directive 2004/48/EC (Enforcement of intellectual property rights), section 5 of which is dedicated to the measures resulting from a decision on the merits of the case.

Article 10 on corrective measures states that:

*... without prejudice to any damages due to the right holder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods.*

Article 11 on injunctions states that member states shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue an injunction against the infringer, aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member states shall also ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.

Article 12 on alternative measures states that member states may provide that, in appropriate cases and at the request of the person liable to be subject to the measures provided for in this section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in this section if that person acted unintentionally and without negligence, if the execution of the measures in question would cause him disproportionate harm, and if pecuniary compensation to the injured party appears reasonably satisfactory.

The following section 6 on damages and legal costs states at article 13 that member states shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

### Available remedies

#### 39 | What remedies are available against a copyright infringer?

Civil actions against copyright infringement follow the classic division between main court proceedings (proceedings on the merits) and interim actions (preliminary injunctions).

Main court proceedings are usually initiated so as to obtain – upon assessment of the existence of an infringement – the measures required to obtain the cessation of an infringement and any compensation for the damage suffered.

Injunctions can be requested in order both to enable the summary assessment of an infringement, and to adopt measures (such as seizure and an injunction) aimed at preventing the commencement or continuation of the unlawful act. These are awarded in light of the severity and irreparability of the damage that the right holder could suffer if he or she were to wait for the conclusion of proceedings on the merits.

Interim actions can also be aimed at acquiring and maintaining proof of the infringement in view of the commencement of proceedings on the merits. Interim measures can be requested both before the commencement of the proceedings on the merits (pre-trial) and during the course of these proceedings.

The Specialised Courts of Milan and Rome have long since recognised the admissibility of dynamic injunctions to prevent possible future violations by the same party on condition that the contested offence can be considered unique from a phenomenological point of view. The admissibility of such dynamic and pro-future injunctions is justified by Articles 9(1)(a) and 11 of the Directive on the enforcement of intellectual property rights (IPR Enforcement Directive). They allow for the prevention of the broadcasting of certain works by the same subject, through broadcasting channels that only formally appear different, but which, on the contrary, are attributable in substance, on a phenomenological level, to the same illegal conduct.

Moreover, Italy has incorporated – within the framework of the Copyright Act – the protection instruments provided for by the IPR Enforcement Directive and, on the administrative side, it is also possible to follow the procedures established by the Italian Communications Regulatory Authority in the regulation on the protection of copyrights on electronic communications networks, in order to obtain, under certain conditions, injunctions against internet service providers.

Infringers typically claim the enforceability of exemption from liability and the exceptions to exclusive rights set forth in Article 65 of the Copyright Act.

### Limitation period

#### 40 | Is there a time limit for seeking remedies?

The general rule provided in Article 2947 of the Italian Civil Code – that is, a five-year limitation period, unless the fact constitutes a criminal offence – also applies to non-contractual infringements ascribable to copyright.

### Monetary damages

#### 41 | Are monetary damages available for copyright infringement?

In civil proceedings, the unsuccessful party (typically, the defendant) is required to pay the costs incurred by the right holder. However, in preliminary proceedings, to recover its costs (for legal assistance and the gathering of evidence), the right holder must initiate a separate action for pecuniary damages against the infringer.

### Attorneys' fees and costs

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

Costs typically stem from the gathering of evidence and from legal assistance. Court costs are settled by the judge at the end of the process.

In civil proceedings, the unsuccessful party is required to pay the costs incurred by the right holder. However, in most preliminary proceedings, to recover its costs (for legal assistance and the gathering of evidence), the right holder must initiate a separate action on the merits against the infringer.

### Criminal enforcement

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

In Italy, copyright infringement constitutes a violation under both private and criminal law, so the right holder may start different kinds of civil actions, to obtain preliminary injunctions or compensation for damages, or file a complaint with judicial authorities to have the criminal courts involved in the case.

With regard to criminal law protection, conduct limiting or violating copyright are prohibited pursuant to articles 171 to 171-nonies of the Copyright Act.

In fact, articles 171 and 171-ter of the Copyright Act punish those who, without having the right to do so, for any purpose and in any form whatsoever, communicates to the public, by means of connections of any kind, an intellectual work, protected by copyright, or part of it; as well as anyone who, in breach of article 16 of Legislative Decree No 70 of 9 April 2003, communicates to the public for profit, by placing it in a system of telematics networks, by means of connections of any kind, an intellectual work protected by copyright, or part of it.

The Italian Communications Regulatory Authority (AGCOM) adopted, with Resolution 680/13/CONS of 12 December 2013, the regulation on the protection of copyrights on electronic communications networks, according to which the authority can issue, under certain conditions, injunctions against internet providers. With the recent resolution 490/18/CONS, AGCOM extended the regulation with the provision of a precautionary proceeding and more efficient actions relating to web aliases – where multiple domain names point to the same website.

### Online infringement

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

Article 156 of the Copyright Act specifically provides for the liability of intermediaries (internet service providers (ISPs)) whose services are used for the purposes of infringing copyright. Therefore, those who have reasons to fear the infringement of a right to economic exploitation to which they are entitled, or wish to prevent the continuation or repetition of an infringement that has already occurred, can sue the intermediaries as defined above. Moreover, the E-Commerce Directive – transposed in Italy by the Legislative Decree no. 70 of 9 April 2003 – establishes specific domains of responsibility for the various intermediaries. The Italian courts have repeatedly acknowledged the joint liability of ISPs for infringements committed directly by users of their services.

### Prevention measures

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

Pursuant to Article 156 of the Copyright Act, a right holder that has reason to fear the violation of a right of economic use, or intends to prevent the continuation or repetition of an already occurred violation, can take legal action to ensure that his or her right is established and the continuation is forbidden. This action therefore aims to claim the ownership of the right against those who dispute it, even going so far as to prevent a violation that has materialised but is legitimately feared. Pronouncing the injunction, the judge can ask for a sum due for each violation or non-compliance subsequently established, as well as for any delay in the execution of the orders.

The Italian legal system essentially provides for three optional alternative dispute resolution systems: mediation, assisted negotiation, and arbitration.

Mediation and assisted negotiation are almost never taken into consideration. Arbitration is widely used. Considering that arbitration is fundamentally used when there is a contract that provides for an arbitration clause, it is easier for the parties to face arbitration procedures in cases where licence agreements are violated. In Italy's procedural system, arbitration is regulated by Article 806 of the Civil Procedure Code.

Consequently, there are measures that can be taken to avoid problems related to content ownership, such as:

- obtain permission from the author;
- use public works (works with expired copyright or that do not constitute intellectual property); and
- check the terms and conditions (licence terms indicate what possibilities there are with respect to a certain material); and
- acquire copyrighted content under a licence.

## RELATIONSHIP TO FOREIGN RIGHTS

### International conventions

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

Italy is a party to the following international treaties and conventions on the national treatment of foreign works:

- World Intellectual Property Organization (WIPO) Copyright Treaty;
- WIPO Performances and Phonograms Treaty;
- Bern Convention (ratified by Law No 1978/399);
- Rome Convention (ratified by Law No 1963/866);
- Geneva Convention for the Protection of Producers of Phonograms;
- Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (ratified by Law No 1977/771); and
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (ratified by Law No 1994/747).

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

Pursuant to Article 54, Law No 218/1995, the rights on intangible assets are regulated by the law of the country of use, therefore Italian law is applicable to works used in the Italian territory.

The Bern Convention of 1866 establishes reciprocity and automatic recognition of copyright protection between states. Therefore, citizens of countries that adhere to the Convention who use their work in Italy benefit from the protection of Italian copyright law.

## 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 last 12 months?

After the long and complex legislative process that led to the adoption of the new EU Copyright Directive (No. 790/2019) published on April 2019, the phase of transposition into national law has opened. The transposition is due to be completed by 7 June 2021.



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# Japan

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## 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 (SOFTIC).

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

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

- novels;
- play or film scripts;
- dissertations, lectures and other literary works;
- musical works;

- choreographic works and pantomimes;
- paintings, engravings, sculptures and other artistic works;
- architectural works;
- maps and diagrammatic works of a scientific nature, such as drawings, charts and models;
- cinematographic works;
- photographic works; and
- computer programs.

## Rights covered

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

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

## Excluded works

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

The following works may not be protected by copyright:

- the Constitution and other laws and regulations;
- public notices, instructions, circular notices and the like issued by public entities;
- judgments, decisions, orders and decrees of courts;
- rulings and judgments made by government agencies;
- translations and compilations prepared by public entities;
- current news reports and miscellaneous reports having the character of mere communication of fact; 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.

## 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, exploiting 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, then that institute deposits multiple copies to be used for the discussion of national issues and international cooperation.

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

When a publisher fails to make a deposit within 30 days after publishing without reasonable cause, an administrative fine of not more than five times the price of the book may be imposed.

## Registration

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

A work may be protected by copyright without any copyright registration. However, the transfer (other than by inheritance or 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 of 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 rights holder or author may not assert his or her rights against a third party unless registered.

## OWNERSHIP AND TRANSFER

### Eligible owners

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

The author of a copyrighted work is its owner. Since copyright may be transferred, the assignee may become the owner of the work; this excludes moral rights, which may not be transferred.

Exemptions to this principle are authorship of a work made by an employee 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, 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, then 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 (SOFTIC) requires such documents in order to register the transfer or transaction, and to summarise the fact in the registration.

## DURATION OF COPYRIGHT

### Protection start date

#### 32 | When does copyright protection begin?

Copyright protection begins at the time of the creation of the work.

### Duration

#### 33 | How long does copyright protection last?

Protection 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, a fine of not more than ¥10 million, or both. A person who infringes the author's moral rights, a person who, for profit-making purposes, causes a machine that has a reproduction function (provided in the article) to be used to reproduce works or performances (eg, automated bulk video copying) or a person who commits an act deemed to constitute copyright infringement shall be punished with penal labour for up to five years, a fine of up to ¥5 million, or both. A person who infringes an author or performer's moral rights after the author or performer's death shall be punishable by a fine of up to ¥5 million. There are also criminal provisions against the illegal reproduction of 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 financial benefit or to harm the copyright holders;
- the alleged offenders assign, publicly transmit or duplicate paid copyrighted works in their original language; and
- the copyright holders' prospective benefit arising from offering paid copyrighted works is unjustly infringed.

If the preceding requirements are met, the authorities may investigate copyright infringements and bring charges, even if the copyright holders have not filed complaints.

In addition, selling devices to circumvent access control is subject to criminal sanctions.

### Online infringement

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

Yes. When copyright is infringed by information distributed through the internet, a person alleging that his or her copyright has been infringed may request that a telecommunications service provider, such as an internet service provider, prevent such infringed information from being transmitted to unspecified persons in practice (under civil laws); and disclose the identification information of the sender pertaining to the infringement, if there is evidence that the copyright was infringed by distribution through the internet, since the identification information of the sender is necessary for the rights holder demanding the above disclosure to exercise his or her right to claim damages, and there is justifiable ground for the rights holder to receive the disclosed identification information of the sender in accordance with the Act on the Limitation of Liability for Damages of Specified Telecommunication Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (Act No. 137 of 2001).

When a telecommunication service provider has received a request to prevent the infringement, the service provider shall be liable for loss incurred from such infringement if:

- it is technically possible to take measures for preventing such information from being transmitted to unspecified persons;
- the service provider knew that the infringement was caused by the information 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 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.

### Prevention measures

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

Copyright infringement may be prevented in Japan by putting a copyright notice on the work; education; appropriate measures against infringement, such as issuing a warning immediately after infringement is recognised; and legal action against the infringer.

Japanese copyright holders have suffered a number of copyright infringements by individuals and corporations based in foreign countries (eg, counterfeit software and cartoon books being translated and printed without approval); therefore government-level action against countries in which many copyright infringers exist should be a critical factor in helping to prevent future copyright infringement.

## RELATIONSHIP TO FOREIGN RIGHTS

### International conventions

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

Japan belongs to:

- the Berne Convention for the Protection of Literary and Artistic Works (Paris Act);
- the Universal Copyright Convention (Paris Act);
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations;
- the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); 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 last 12 months?

The government has submitted a bill to amend the Copyright Act to the Diet of Japan. The bill is under discussion by the Diet. The bill includes several points, as follows:

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- the criminalisation of downloading content that infringes copyright;
- introducing criminal sanctions on operators of "leech sites" – websites that lead internet users to other websites that offer bootlegged materials, such as manga (Japanese comic books) and movies;
- strengthening legal protections for access control technologies (for example, offering serial codes to register software will be subject to civil and criminal sanctions); and
- making the program registration system more convenient to use.

The artificial intelligence (AI) and machine learning industry in Japan highly favours the 2018 amendment as it would advance and support the AI and machine learning industry as follows.

### New article 30-4

This exemption permits all users to analyse and understand copyrighted works for machine learning. This means accessing data or information in a form where the copyrighted expression of the works is not perceived by the user and would therefore not cause any harm to the rights holders. This includes raw data that is fed into a computer programme to carry out deep learning activities, forming the basis of AI.

### New article 47-4

This exemption permits electronic incidental copies of works, recognising that this process is necessary to carry out machine learning activities but does not harm copyright owners.

### New article 47-5

This exemption enables searchable databases, which are necessary to carry out data verification of the results and insights obtained through text and data mining.

# Mexico

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## LEGISLATION AND ENFORCEMENT

### Relevant legislation

#### 1 | What is the relevant legislation?

Copyright protection and the copyright legal system in Mexico derives from article 28 of the Federal Constitution. The Federal Copyright Law, which was enacted on 24 December 1996 and took effect as of 24 March 1997, is the main statutory law governing copyright and neighbouring rights. It affords copyright protection, constitutes the Public Copyright Registry and determines the causes of infringement against the copyright. Section 26 of the Federal Criminal Code contains a list of conduct to be considered as crimes against copyright and related rights, and establishes the applicable penalties for the offenders. Other relevant legislation is found in the Industrial Property Law.

This statutory law, which is focused on protecting industrial property rights, is applicable to the copyright field since it governs the proceedings to enforce copyright for conduct in which the alleged infringer obtains direct or indirect profits from the commercial use of a work, which is referred to as a 'trade-related infringement'.

### Enforcement authorities

#### 2 | Who enforces it?

The National Copyright Institute is the competent authority to enforce copyright for cases in which the conduct by the offender is not intended to obtain a profit with the use of a work and in which the infringement relates more to omissions in observing certain obligations foreseen in the Federal Copyright Law. For cases in which the infringement constitutes conduct focused on obtaining direct or indirect profits, the competent authority to take action against the alleged infringer is the Mexican Institute of Industrial Property.

The Office of the Mexican Attorney General is the competent authority to initiate a criminal action for a copyright criminal offence. Civil courts, with either federal or local jurisdiction, will be competent to hear a claim for damages against a copyright infringer. By an order coming from any of the mentioned administrative or judicial authorities, the Mexican Customs can seize illegitimate works at the border to prevent them from entering Mexican territory.

### Online and digital regulation

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

In general terms, there are no provisions in the Federal Copyright Law specifically dealing with the unauthorised use of digital works. But from the interpretation of the concepts foreseen in the aforementioned law, there can be causes of action against the unauthorised use, copying, distribution and public communication of digital works.

Article 112 of the Federal Copyright Law contemplates some general anti-circumvention measures by prohibiting the importation, manufacture, distribution or use of devices or the delivery of services that aim to eliminate technical protections of software or decode broadcasting signals. In addition, the Federal Criminal Code considers the unauthorised decoding of satellite signals to be an offence.

### Extraterritorial application

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

Mexican law does not have extraterritorial application. The owner of the website infringing copyright must be based in Mexico to support an infringement action under Mexican law.

### Agency

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

The National Copyright Institute is the central agency for copyright in Mexico. Among its different activities, it acts as the Public Copyright Registry where authors and copyright owners can register their works and documents to before making them public. Although copyright registration is not required for obtaining copyright protection, this formality proves to be very helpful since it constitutes proof of the existence of the work, and establishes presumption of copyright ownership. This facilitates the performance of commercial actions using the work and facilitates enforcement proceedings against infringers.

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

The copyright referred to in the Federal Copyright Law is recognised in respect of works in the following categories:

- literary works;
- musical works (lyrics and notes);
- dramatic works;
- dances;
- pictorial works or works of drawing;
- sculptures and works of plastic nature;
- works of caricature and short stories;
- architectural works;
- cinematographic and other audiovisual works;
- radio and television programmes;
- software;
- photographic works;

- works of applied art, including works of graphic or textile design; and
- works of compilation, consisting of collections of works such as encyclopaedias, anthologies and works or other elements such as databases, provided that they constitute intellectual creations by reason of the selection or arrangement of their content or subject matter.

Other works, which by analogy may be considered literary or artistic works, shall be included in the category that most closely corresponds to their nature.

### Rights covered

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

Copyright in Mexico covers moral and economic rights.

### Excluded works

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

The Federal Copyright Law expressly excludes the following from copyright protection:

- ideas, formulae, solutions, concepts, methods, systems, principles, discoveries, processes and inventions of any kind;
- the industrial or commercial exploitation of the ideas embodied in works;
- schemes, plans or rules for performing mental acts, playing games or doing business;
- letters, digits or colours in isolation, except where they are stylised to such an extent that they become original designs;
- names and titles or phrases in isolation;
- mere layouts or blank forms for completion with any kind of information, and related instructions;
- unauthorised reproductions or imitations of coats of arms, flags or emblems of any country, state, municipality or equivalent political subdivision, or the names, abbreviated names, symbols or emblems of inter-governmental or non-governmental international organisations, or those of any other officially recognised organisation, and the verbal designation thereof;
- legislative, regulatory, administrative or judicial texts, and official translations thereof; where they are published, they must conform to the official text, and they shall confer no exclusive right of publication; nevertheless, protection shall be available for parallel texts, interpretations, comparative studies, annotations, commentaries and other similar works that entail on the part of their author, the creation of an original work;
- the information content of news, whereas the form of expression thereof is protected; and
- information in everyday use, such as proverbs, sayings, legends, facts, calendars and scales of measurement.

### Fair use and fair dealing

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

The Federal Copyright Law foresees certain limitations to the exercise of economic copyright through which fair use situations are foreseen for certain conduct. These exceptions are based on the 'three-step test' of the Berne Convention for the Protection of Artistic and Literary Works. In this connection, artistic and literary works in Mexico may freely be used, without an authorisation from the owner of the economic rights, provided that the use does not affect the normal use of the work, in the following cases:

- text quotation, provided that the quoted portion is not a simulated reproduction of the complete work;
- reproduction of texts, photographs, drawings and comments related to present events that have been published on printed news or broadcasted by any media, except if the reproduction has expressly been prohibited by the copyright owner;
- partial reproduction of the work for criticism or for scientific, literary or artistic research;
- reproduction of works for a private use and without looking forward to obtain a profit (only applicable for individuals);
- backup copies of a work made by an archive or library for preservation purposes;
- reproduction of works for judicial or administrative proceedings;
- reproduction communication and distribution of paintings, photographs, drawings or audiovisual materials containing works that are viewable in public places; and
- publication of works without a lucrative purpose for persons with disabilities.

### Architectural works

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

Architectural works are protected by copyright on the same basis as other artistic or literary works. Protection extends to the architectural plans.

As part of the fair use of works, architectural works that are visible from public places can be reproduced, communicated and distributed in drawings, paintings, photographs and audiovisual materials, without the consent of the copyright owner and without remuneration.

### Performance rights

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

Performance rights are protected by copyright in Mexico for actors or performing artists for their public performances.

The law grants actors and performing artists 'neighbouring rights', which afford them the right to be recognised with their names in their respective performances and provide them with the ability to: authorise or oppose the public communication of his or her performances; authorise or oppose the fixation of their performances and further reproduction thereof; and authorise or oppose any alteration to a performance in a manner that affects his or her prestige or reputation.

The mentioned rights are extinguished if an authorisation to the fixation of the performance exists, provided that the titleholder of the resulting material support has fulfilled the payments as agreed with the actor or performing artist in question.

Aside from the above capabilities, actors and performing artists have the right to receive royalties for the public communication of their performances. This right can be exercised directly by the concerned individual or through a collective management organisation empowered to represent an actor's or a performing artist's interests.

The rights of actors and performers last for 75 years from the first performance; the first fixation of the performance in a phonogram, if the performance can be recorded; and the first broadcasting of the performance in any available media.

### Neighbouring rights

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

In addition to the performance rights, the Federal Copyright Law recognises protection through neighbouring rights to the following:

- book publishers;
- producers of phonograms;

- producers of videograms; and
- broadcasting organisations.

The protection provided in no way affects the protection of the copyright in literary and artistic works.

In Mexico, there is sui generis protection under the Federal Copyright Law called 'reservation of rights', which grants to its holder the right to use on an exclusive basis any of the following:

- names of serial publications;
- names of TV, radio or internet websites;
- original characteristics (physical and psychological) of characters;
- artistic names; and
- original advertisement mechanisms.

This protection is constituted by obtaining a reservation of rights certificate from the National Copyright Institute and is similar to trademark protection. The names, characters or mechanisms must not be identical or confusingly similar with others that were previously 'reserved' on behalf of other people.

### Moral rights

#### 13 | Are moral rights recognised?

The Federal Copyright Law recognises moral rights to be an expression of the author's personality. Moral rights are a set of rights or prerogatives related to the honour, prestige and reputation of the author and they are mainly focused on protecting the authorship and the integrity of the work.

According to the Federal Copyright Law, the author of any work has the following moral rights:

- to determine the method of disclosure and whether their work should be disclosed or remain undisclosed (right of publication);
- to demand the recognition of its authorship and to order publication as an anonymous or pseudonymous work (right of paternity);
- to demand respect for its work, opposing any deformation or modification, as well as any action or attempt that causes demerit or prejudice to the author's reputation (right of integrity);
- to modify their work (right of paternity);
- to withdraw its work from circulation (retirement right); and
- to oppose any attribution of a work that he or she did not create.

Moral rights in Mexico:

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

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

## COPYRIGHT FORMALITIES

### Notice

#### 14 | Is there a requirement of copyright notice?

According to article 17 of the Federal Copyright Law, all works to be published must display a copyright notice with the following information:

- the initials 'DR' or the indication 'Derechos Reservados';
- the copyright symbol '©';
- the name and address of the copyright owner; and
- the year of first publication.

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

Failure to display a copyright notice does not imply loss of copyright or the inability to enforce actions against infringers. However, in the event that a published work does not include the copyright notice, this action is considered a copyright infringement and the National Copyright Institute can fine the publisher an amount equivalent from 5,000 up to 15,000 UMAs.

The UMA (translated in English as 'unit of measure and update') substitutes references in Mexican federal and local laws made in connection to the daily minimum wage in Mexico City, which was previously taken as the economic value to calculate fines and other economic obligations foreseen in them. For 2020, one UMA is equivalent to 86.88 Mexican pesos.

### Deposit

#### 16 | Is there a requirement of copyright deposit?

The Federal Copyright Law does not require a deposit of works as a condition to achieve or maintain copyright protection, or to avoid the imposition of a fine for not performing this action. It is possible though to register a literary or an artistic work before the National Copyright Institute and for this it is necessary to file copies of the work. To obtain the registration from the mentioned institute, it is necessary to file copies of the work. There are also other documents and information that have to be filed to obtain the registration. The filing of the work confirms in a public registry the existence of the work in case this is required at any time by the author or copyright owner.

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

A deposit of works is not contemplated in Mexican law.

### Registration

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

Yes. Although not mandatory, it is highly recommended, as it will ensure the legal security of authors, owners of related rights, the holders of economic rights concerned, and their successors in title and afford sufficient publicity to works, instruments and documents in order to be asserted or enforceable against third parties. The National Copyright Institute is the Mexican authority in charge of the Copyright Public Registry.

In order to obtain a copyright registration for a work in Mexico from the National Copyright Institute, a written application based on an official format has to be filed, complying with certain formal requirements and documents.

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

Mexico follows the international trend of copyright protection. The Berne Convention for the Protection of Artistic and Literary Works is in force in our country and the provisions of this international treaty are incorporated into our national legislation. Therefore, registration is completely voluntary, being that artistic or literary works are protected at the time they are fixed in a tangible medium of expression.

Registration of copyrightable material will ensure the legal security of authors, owners of related rights, the holders of economic rights concerned, and their successors in title. It will also afford sufficient publicity to works, instruments and documents in order to be asserted or enforceable against third parties.

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

Government fees charged by the National Copyright Institute for a copyright registration of an artistic or literary work are the equivalent of approximately US\$20.

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

Not obtaining copyright registration for a literary or artistic work should have no negative impact for the work or for the copyright owner, since copyright protection is achieved at the very same time the work is fixed into a material form. In practice, however, obtaining copyright registration from the National Copyright Institute is highly advisable. The certificate of copyright registration issued by the National Copyright Institute is an official document that establishes proof of existence of the work and a presumption about the copyright ownership on behalf of the registrant. It facilitates the exercise of commercial actions with the registered work and helps to expedite the initiation of enforcement proceedings before the Mexican Institute of Industrial Property or the Office of the Mexican Attorney General (depending on whether the action is of an administrative or criminal nature).

### OWNERSHIP AND TRANSFER

#### Eligible owners

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

Moral and economic rights by operation of law pertain to the author (individual) by virtue of its creation. Moral rights belong to the author perpetually and cannot be transferred. Economic rights may be subject to transfer or licensed to a different person or to a company.

#### Employee and contractor work

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

For an employer to be the owner of the economic copyright of a work made by an employee, it is necessary that an employment agreement between them exists, which must include a provision stipulating that all economic rights over artistic or intellectual works created by the employee during his or her work will vest in the employer.

In accordance with Federal Copyright Law, if an employment agreement does not include this provision, it shall be presumed that the economic rights are shared equally between the employer and the employee.

In the absence of an individual employment agreement executed in writing, the economic rights belong to the employee.

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

Yes. A natural person or legal entity may enter into a 'work-for-hire' contract with an author. In this case, the natural person or the legal entity shall enjoy the ownership of the economic copyright therein for the duration allowed by law, and the rights relating to the disclosure and integrity of the work and the making of collections involving this type of creation shall accrue to him or her.

The person who takes part in the making of the work against remuneration shall have the right to the express mention of his or her status as author or performer of the part or parts in the creation of which he or she has been involved.

According to Mexican law and practice, a 'work-for-hire' relationship is different to that of an assignment. In the first, there is a production of a work by virtue of a commission by the 'producer' to the author and, in the second, an author develops a work and transfers the economic copyright to another party for a period of up to 15 years. The author transfers rights to the 'producer' (that is, an individual or a company different from the author) by executing a formal assignment document complying with applicable requirements or by recognising that the work was made under a work-for-hire relationship or through an employer-employee relationship.

#### Joint and collective ownership

## 25 | May a copyrighted work be co-owned?

Yes, it is possible that a copyright work be co-owned either by natural persons or entities under a co-ownership agreement.

According to article 81 of the Federal Copyright Law, unless otherwise agreed, the copyright in a work with music and words shall belong in equal shares to the author of the literary part and to the composer of the musical part. Each may freely exercise the rights in the part attributable to him or her or in the whole work and, in the latter case, shall unmistakably notify the other co-author, mentioning that co-author's name on the publication and, in addition, shall pay the co-author the share to which he or she is entitled when the rights are exercised for profit-making purposes.

#### Transfer of rights

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

Economic rights can be subject to transfer or licence. Taking this into consideration, a third party, either an individual or a company different from the author, can be the owner of the economic rights over a work only if the author had transferred such rights by executing a formal assignment document complying with applicable requirements or if the author recognises that the work was made under a work-for-hire relationship, or through an employer-employee relationship.

For a transfer of the economic rights to be enforceable in Mexico through an assignment agreement, the agreement:

- must be in writing;
- must contain a provision reflecting the consideration paid to the author; and
- must have a clause to stipulate the duration of the copyright transfer.

As a general rule, the transfers of copyright have a limited duration. Once the term has expired, the rights transferred are deemed to revert automatically to the author. The maximum duration for a transfer of copyright is 15 years as of the date of execution of the assignment agreement. This term may only be extended if there are special circumstances justifying an extension, such as the nature of the work and the investment in the development and production of the work. If an agreement does not have a specific disposition providing for the duration of the transfer by operation of law, the duration of the transfer is for five years as of the execution of the agreement.

This general rule has, however, two important exceptions for literary works and software. Pursuant to articles 43 and 103 of the Federal Copyright Law, the transfer of economic rights for them is not limited in time.

## Licensing

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

Economic rights can be subject to exclusive or non-exclusive licence. The licence will be validly enforceable in Mexico if it is done through written agreement and if the agreement contains a provision reflecting the consideration paid to the author.

Concerning the minimum clauses and formalities for a copyright licence agreement to be valid in Mexico, the following must be observed:

- the agreement must be in writing;
- it must have a clause to indicate whether the licence is exclusive or non-exclusive;
- it must establish the payment of an economic consideration or royalty by the licensee to the licensor for the granting of the licence; and
- it must have a provision regarding the duration of the licence.

### 28 | Are there compulsory licences? What are they?

According to article 147 of the Federal Copyright Law, there is compulsory licence in Mexico to publish or translate a literary or artistic work due to public interest for the advancement of science and national culture and education. When it is not possible to obtain the authorisation of the owner of the corresponding economic copyright, the federal government may, through the Secretariat of Culture and either ex officio or at the request of a party, license the publication or translation of the work through a payment of compensatory remuneration.

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

In Mexico, the main purpose of a collective management organisation (CMO) is to manage copyright and neighbouring rights collectively on behalf of its members, protecting national or foreign authors and owners of neighbouring rights, and collecting and delivering to them the royalties derived from the use of their works or performances. It is important to note that pursuant to the Federal Copyright Law, authors and performers have the non-waivable remuneration right to collect royalties for the public use and communication of their works or performances. CMOs may grant licences for the use of works or performances to third parties, provided that their members have granted them the right to perform this activity.

## Termination

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

The transfers of economic copyright is subject to a term with regard to the duration of the transfer. Once the term has expired, the rights are deemed to revert to the author automatically.

## Recordal

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

The registration of a copyright transfer with the National Copyright Institute is necessary for the transfer of rights to produce legal effects against third parties. The National Copyright Institute applies Mexican law when analysing the application for the registration of a copyright transfer and its corresponding agreement. In this regard, the transfer agreement needs to comply with the provisions of the Federal Copyright Law.

## DURATION OF COPYRIGHT

### Protection start date

#### 32 | When does copyright protection begin?

Artistic or literary works are protected from the point of fixation of the work and copyright registration. However, in theory, this is not strictly necessary to achieve copyright protection. Nevertheless, under Mexican practices, the registration of a work with the National Copyright Institute is an action necessary to support the existence of the work and the ownership of the economic copyright on behalf of the copyright owner.

### Duration

#### 33 | How long does copyright protection last?

Moral copyright belongs to the author perpetually and economic copyright is in force, as a general rule, for the life of the author plus 100 years. When a copyright work belongs to two or more co-authors, the 100 years shall be counted as from the death of the last co-author.

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

Copyright protection starts at the moment a work has been fixed in a material form. As a general rule, the economic copyright is in force for the life of the author plus 100 years. However, when the author is not identified, as in anonymous or pseudonymous works and also for posthumous works, the duration of copyright protection does depend on when the work was published on the basis of 100 years from the disclosure or publication of the work.

### Renewal

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

Copyrights in Mexico do not need to be renewed.

### Government extension of protection term

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

The term of copyright protection in Mexico has been extended many times. Pursuant to the last amendment of the Federal Copyright Law on 23 July 2003, the economic copyright protection term has been extended from 75 years to 100 years after author's death.

## COPYRIGHT INFRINGEMENT AND REMEDIES

### Infringing acts

#### 37 | What constitutes copyright infringement?

Copyright infringements are divided into two categories. In the first category are copyright infringements that contravene the regulations established in the Federal Copyright Law. In the second category are trade-related infringements that occur when there is a violation in a trade or commercial scale, mainly to the economic copyright, and that, by nature, requires highly specialised treatment. Copyright infringements, due to their eminently administrative nature, are attended to by the National Copyright Institute. Trade-related infringements will be attended to by the Mexican Institute of Industrial Property.

## Vicarious and contributory liability

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

In Mexico, the Federal Copyright Law does not foresee secondary liability for indirect copyright infringement. However, article 231 of the Federal Copyright Law establishes that trade-related infringements are constituted by conduct carried out in order to obtain direct or indirect profit. Activity that results in an advantage or additional attraction to the main activity of the operator in a commercial establishment is considered to have an indirect profit purpose.

## Available remedies

### 39 | What remedies are available against a copyright infringer?

Remedies against a copyright infringer are also divided into two categories.

Copyright infringements are penalised by the National Copyright Institute. The Federal Copyright Law establishes a fine ranging from 5,000 to 15,000 UMAs. An additional fine of up to 500 UMAs will be applied for every day that the infringement persists.

The trade-related infringements are punished by the Mexican Institute of Industrial Property with a fine ranging from 500 to 10,000 UMAs. An additional fine of up to 500 UMAs will be applied for every day that the infringement persists.

## Limitation period

### 40 | Is there a time limit for seeking remedies?

Yes. An infringement action has to be filed within five years of knowledge of the infringement or the time that it ceased if, due to the nature of the illegal conduct, it is repetitive or it extends over the time limit. In the case of a criminal action, the term to initiate proceedings is three to five years, depending on the type of violation committed by the offender. Regarding a civil action to claim damages for a copyright violation, it has to be filed within two years of the date the infringement occurred.

## Monetary damages

### 41 | Are monetary damages available for copyright infringement?

Yes, the Federal Copyright Law establishes the possibility of seeking monetary damages. In no case should the indemnification of economic or moral damages be less than 40 per cent of the sale price of the product or service upon which the infringement was declared. Monetary damages should be claimed through a civil law action.

## Attorneys' fees and costs

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

Yes, both the attorneys' fees and costs can be claimed. However, such claim should also be sought through a civil law action separately from the copyright infringement procedure.

## Criminal enforcement

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

Yes, Chapter 26 of the Federal Criminal Code contains a catalogue of conduct considered copyright offences. This catalogue also establishes the penalties applicable to the offender, which can be imprisonment from six months to three years and fines from 300 to 30,000 UMAs, which are imposed based on the kind of violation and the circumstances of the case. In general terms, a copyright offence implies the unauthorised

and wilful use, storage, marketing, distribution or communication of a copyrighted work, with an aim to make a direct or indirect profit by the offender. There are also other forms of conduct in the field of the copyright and neighbouring rights to be considered as a criminal offences, such as the use without authorisation of performances, the use of mechanisms to decode satellite signals with copyrighted contents, and in the field of moral rights, the wilful substitution of the name of an author for a published work.

## Online infringement

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

No, they are the same for all forms of copyright infringement.

## Prevention measures

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

It is advisable to implement the following:

- use of a copyright notice as is foreseen in the Federal Copyright Law;
- obtention of a copyright registration for the work;
- implementation of technological protection measures for digital works;
- monitoring the market to try to find illegitimate copies of works; and
- remittance of a cease-and-desist letter to the alleged infringer, pointing out the existence of protection and copyright registration regarding the allegedly infringed work.

## RELATIONSHIP TO FOREIGN RIGHTS

### International conventions

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

Mexico is a member of:

- the Literary and Artistic Property Convention (the Buenos Aires Convention);
- the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works;
- the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention);
- the Universal Copyright Convention;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms;
- the trade-related aspects of Intellectual Property Rights;
- the World Intellectual Property Organization Copyright Treaty (WCT);
- the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT);
- the Treaty on the International Registration of Audiovisual Works;
- the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled; and
- various bilateral copyright treaties.

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

The most important obligation, mainly derived from the Berne Convention, is the recognition of an automatic copyright protection through the fixation of works and without having to comply with additional formalities for this purpose. A regime of limitations and exceptions to the exercise of the copyright is also implemented, based on the three-step rule foreseen in the Berne Convention.

On the other hand, our copyright legal system by virtue of the commitments in the international conventions adopted by Mexico provides for national treatment for authors of other countries, who are granted with the same level of protection as if they were Mexican citizens. Artists, performers and producers of works are afforded protective rights over their collaborations and materials pursuant to the provisions of the different treaties in matters of the neighbouring rights Mexico is a party to.

Based on the World Intellectual Property Organization treaties (WCT and WPPT), Mexico has an obligation to protect authors and works which are in use or whose distribution, marketing or communication is made over the internet or through the use of digital formats and to implement the adoption of adequate anti-circumvention measures.

## 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 last 12 months?

As of 24 January 2020, President Andrés Manuel López Obrador enacted modified provisions regarding Popular Cultures, Traditional Knowledge and Traditional Cultural Expressions, in which a broader protection is given to works of popular art or craft, and also all original manifestations in local languages, and the practices, customs and traditions of the multicultural society constituting the Mexican State that do not have an identifiable author.



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# South Korea

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## LEGISLATION AND ENFORCEMENT

### Relevant legislation

#### 1 | What is the relevant legislation?

The relevant legislation includes:

- the Copyright Act;
- the Content Industry Promotion Act;
- the Act on the Layout-Designs of Semiconductor Integrated Circuits;
- the Unfair Competition Prevention and the Trade Secret Protection Act; and
- the regulations relating thereto.

### Enforcement authorities

#### 2 | Who enforces it?

Copyright-related legislation is enforced by the judiciary, the designated administrative agencies and the law enforcement authorities. The Korea Copyright Commission (KCC) serves as the non-judiciary dispute resolution body, while the Korea Copyright Protection Agency administers the enforcement of copyright, such as the monitoring and examination of infringement and issuance of corrective measures.

### Online and digital regulation

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

The Copyright Act provides for the digital exploitation of works, such as the provisions governing digital transmission, and the safe harbour applicable to online service providers. Further, the Act on Prohibition of Circumvention of Technological Protection Measures, and the Content Industry Promotion Act concern the online exploitation of copyrighted works.

### Extraterritorial application

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

While there is no specific provision addressing extraterritorial application to deal with foreign-owned or foreign-operated websites, the copyrighted works of Korean nationals, works created in Korea, and the works which Korea has the obligation to grant copyright protection under international treaties are protected under the Copyright Act.

### Agency

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

This role is performed by Korea Copyright Commission (KCC) and the Ministry of Culture, Sports and Tourism (MCST). KCC is delegated by the MCST to handle various tasks related to copyright protection, including mediation of copyright disputes, registration of copyright, issuance of corrective measures, conduct of education and research on policy, whereas the MCST sets the policies and standards for applying the Copyright Act and designates and authorises the relevant organisations.

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

Creative works which express human thoughts and emotions can be protected by copyright. As examples, article 2 of the Copyright Act states that the following can be protected by copyright: novels, play or film scripts, dissertations, musical works, choreographic works, paintings, architectural works, maps, cinematographic works, photographic works, and computer programs.

Unless provided otherwise, all provisions referenced herein refer to the Copyright Act.

### Rights covered

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

There are seven economic rights:

- right of reproduction;
- public performance;
- transmission;
- exhibition;
- distribution;
- rental; and
- production of derivative works.

### Excluded works

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

Mere ideas are not protected. In addition, laws, public notices, judgments, the translations thereof by the central or local governments, or news reporting that delivers simple facts are not protected (article 7).

### Fair use and fair dealing

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

Yes. In determining whether a person can avail of the fair use defence, the following factors are considered:

- the purpose and characters of use, including whether such use is for-profit or not-for-profit;
- the nature of work;
- the amount and substantiality of portion used in relation to the entire work; and
- the effect of use of works on the current or potential market.

### Architectural works

10 | Are architectural works protected by copyright? How?

Yes. Architectural works including buildings, architectural models and designs are protected (article 4). In the case of architectural structures, the 'reproduction' includes carrying out construction of the works in accordance with the design plans.

### Performance rights

11 | Are performance rights covered by copyright? How?

Yes. The copyright owner has the right to publicly perform the work, whereas performers' rights are protected as neighbouring rights comprising the economic rights and moral rights.

### Neighbouring rights

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

Yes. While performances are protected under the Copyright Act as a 'Performers' Right', integrated circuit layouts and hot news are protected by the Act on the Layout-Designs of Semiconductor Integrated Circuits and the Unfair Competition Prevention and Trade Secret Protection Act.

### Moral rights

13 | Are moral rights recognised?

Yes. The rights to make the work public, right of authorship, and right of integrity are protected as moral rights.

## COPYRIGHT FORMALITIES

### Notice

14 | Is there a requirement of copyright notice?

While there is no prescribed requirement for copyright notice, the use of the © symbol is typical and recommended in practice.

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

Not applicable.

### Deposit

16 | Is there a requirement of copyright deposit?

No. There are no particular formalities that are required for a work to be copyrighted. To register a copyright, however, a copy of the copyrighted work must be submitted.

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

Not applicable.

### Registration

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

Yes. The copyright to the work can be registered through registering with the Ministry of Culture, Sports and Tourism by recording the work in the copyright register (article 55).

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

No. Although copyright registration is not mandatory to effectuate the copyright, registration is required in order to claim statutory damages in a copyright infringement action.

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

In applying for a copyright registration, it costs 20,000 won for online applications, or 30,000 won for offline applications, in each case excluding the registration tax of 3,600 won per copyrighted material. For registering the copyright of computer programs, the fees are 60,000 won for online applications or 50,000 won for offline applications, excluding a registration tax of 3,600 won per program.

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

The owner of an unregistered copyright cannot claim statutory damages in an infringement action.

## OWNERSHIP AND TRANSFER

### Eligible owners

22 | Who is the owner of a copyrighted work?

The author, or the creator of the work, holds both the economic and moral rights in the work. Since copyright may be assigned, the assignee can become the owner of the work, except for the moral rights which are inalienable, personal rights of the original author.

### Employee and contractor work

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

Yes. A work created by an employee during the course of performing the employee's duties will be deemed a work-made-for-hire, and the rights in such work are owned by the employer unless otherwise stipulated in a contract or employment policy (article 9).

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

Yes. However, work-made-for-hire in a non-employment context is more difficult to be recognised than in an employment context. It is therefore highly recommended to execute an agreement that expressly provides for the assignment of the copyright in the work created by the outside consultant to the party commissioning the work.

## Joint and collective ownership

### 25 | May a copyrighted work be co-owned?

Yes. A copyrighted work may be co-owned, and the co-owner may be an individual or a legal entity.

## Transfer of rights

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

Yes. The author's economic right can be assigned in whole or in part. There are no particular statutory requirements for copyright transfer and recordation of a transfer is not required for a transfer to be valid. Even where an author's economic right is assigned in whole, the right of the production and use of derivative works is not presumed to be included in the transfer unless otherwise expressly agreed. Moral rights are unassignable but can be waived, in that the author may agree not to exercise the moral rights in the work.

## Licensing

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

Yes. The author's economic rights can be licensed in whole or in part. There are no particular statutory requirements for copyright license and recordation of a licence is not required for a licence to be valid. The licensee will be entitled to exploit the work in the manner and within the scope provided by the licence. The licence cannot be transferred to a third party without the consent of the holder of author's economic rights. The scope of a copyright licence is restricted to those explicitly written in the licence agreement and is construed very narrowly. Therefore, a copyright licence must include a clear scope for the licence.

### 28 | Are there compulsory licences? What are they?

Where the party wishing to use a copyrighted work is unable to identify the rights holder, such person may exploit the work after obtaining the approval from the Ministry of Culture, Sports and Tourism (MCST) (article 50). In such case, the compensation set by the MCST must be deposited with the MCST and the intent to use and the date of use need to be specified.

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

Yes. The Korean Music Copyright Association and the Korean Society of Composers, Authors, and Publishers collect the royalties from music copyright, whereas the Recording Industry Association of Korea and the Federation of Korean Music Performers administer the rights of the record labels and music performers, in each case, pursuant to the collection guidelines approved by the Ministry of Culture, Sports and Tourism. The Ministry of Culture, Sports and Tourism canceled the designation of performing rights societies for the Recording Industry Association of Korea as of 30 June 2019.

## Termination

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

No.

## Recordal

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

Yes. Documents evidencing transfers and other transactions can be recorded with the Korea Copyright Commission and such application for recordation must be filed with the application form, identification documents, list of the copyrighted works, copy of the contract, consent or affidavit from the assignor if the applicant is the assignee, etc.

## DURATION OF COPYRIGHT

### Protection start date

#### 32 | When does copyright protection begin?

Copyright protection begins at the time of the creation of the work.

### Duration

#### 33 | How long does copyright protection last?

Protection will last for 70 years after the death of the author or, in the case of a jointly owned work, for 70 years after the death of the last surviving co-author (in principle). The copyright in works-made-for-hire and cinematography continues to subsist until 70 years following the publication of the work; or, if the work is not made public within the first 50 years of its creation, then until 70 years following the work's creation.

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

Yes. From 1 July 2013, the copyright protection period has been increased from 50 to 70 years from the date of the death or the publication of the author. However, for works whose copyright term expired prior to 1 July 2013, the extended term for 70 years does not apply. The work of an author who died before 31 December 1962 is protected until 50 years after the death, while the work of a writer who died after 1 January 1963 is protected until 70 years after the death according to Copyright Act revised by statute no. 10807.

## Renewal

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

No.

## Government extension of protection term

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

Yes. The Copyright Act was revised effective from 1 July 2011, thereby extending the term of the copyright from the author's lifetime plus 50 years to the author's lifetime plus 70 years.

## COPYRIGHT INFRINGEMENT AND REMEDIES

### Infringing acts

#### 37 | What constitutes copyright infringement?

Reproduction, performance, screen presentation, public transmission, recitation, exhibition, distribution, rental, translation or adaptation without the copyright owner's approval constitutes copyright infringement.

## Vicarious and contributory liability

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

While the Copyright Act itself does not expressly provide for an indirect infringement theory for copyright, the case law has recognised such a concept which carries both civil and criminal liability in certain circumstances. As to what constitutes indirect infringement, the Korean Supreme Court has held that the crime of aiding and abetting copyright infringement includes any direct and indirect acts of facilitating or accommodating illegal reproduction activities, and indirect infringement does not require actual or specific knowledge as to the timing, location or identity of the infringer.

## Available remedies

### 39 | What remedies are available against a copyright infringer?

The available remedies include: injunction, compensation for damages, measures for the restoration of honour and reputation (such as a public apology), and disgorgement of unjust enrichment.

## Limitation period

### 40 | Is there a time limit for seeking remedies?

Yes. Compensation for damages must be claimed within the earlier of 10 years from when the infringement took place, or three years from when the copyright owner became aware of the damage caused by the infringement and the identity of the infringer.

## Monetary damages

### 41 | Are monetary damages available for copyright infringement?

Yes.

## Attorneys' fees and costs

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

Yes. Attorney's fees and costs may be claimed within certain limits set by the court.

## Criminal enforcement

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

Yes. An infringer of another's economic rights or other proprietary rights by means of reproduction, performance, public transmission, exhibition, distribution, rental, or production of derivative works can be subject to imprisonment of up to five years or a fine of not more than 50 million won, or both.

A person who defames the author or performer by infringing on the moral rights can be punished by imprisonment of up to three years or a fine of not exceeding 30 million won, or both.

In addition, the act of illegal reproduction of database, filing for false registration, failure to indicate the source of authorship is each criminally actionable.

## Online infringement

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

Yes. A person who infringes on the business interests of a content creator and a person who, without the authorisation, provides, imports, manufactures, transfers, leases, forwards or exhibits for transfer or

lease technologies, services, devices or main parts thereof with the main purpose of neutralising the technological protection measures is punishable by imprisonment of up to two years or by a fine of not exceeding 20 million won.

## Prevention measures

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

Monitoring of newly released works can be an effective way to avoid infringement. Prior to using a copyrighted work, the user must ascertain all rightsholders of the work. For example, a musical work involves various rightsholders, including the composer, lyricist, performers and publishers. In the case of musical works, copyright administration is usually entrusted with the collecting societies making the clearance of the copyrights easy.

In addition, copyright holders may consider registering their works with the Customs Office to stop infringing materials at the border. Once registered, works that are suspected to be infringing on a copyrighted work can be detained at the Customs Office (which requires posting of bond) and later be destroyed if ultimately found to be infringing on the rights of the copyright holder.

Further, the adoption of and regular updates to technological measures such as forensic, watermark, digital rights management, etc. and indicating copyright notice can also deter infringement. Although a copyright notice is not required for the work to be protected for copyright, indicating the notice can discourage unlawful use of the work by reminding the user of the need to seek permission before using the work. Copyright registration, while not required for copyright protection, is required in order to claim statutory damages in copyright infringement action and the registration also serves as constructive notice to the public.

## RELATIONSHIP TO FOREIGN RIGHTS

### International conventions

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

South Korea became the signatory to the Universal Copyright Convention in 1987, and joined other the copyright-related international treaties and conventions as follows:

- the Convention Establishing the World Intellectual Property Organization;
- the Universal Copyright Convention;
- 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 Berne Convention for the Protection of Literary and Artistic Works;
- the World Intellectual Property Organization Copyright Treaty;
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- the World Intellectual Property Organization Performances and Phonograms Treaty;
- the Convention Relating to the Distribution Of Programme-Carrying Signals Transmitted by Satellite;
- the Beijing Treaty on Audiovisual Performances; and
- the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

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

South Korea is bound by the principle of the most favoured nation treatment in accordance with the Berne Convention for the Protection of Literary and Artistic Works (Paris Act), the Universal Copyright Convention (Paris Act), and the principle of reciprocity in accordance with the Berne Convention (Paris Act).

#### UPDATE AND TRENDS

##### 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 last 12 months?**

In February 2020, the Ministry of Culture, Sports and Tourism announced its so-called 'Vision 2030' initiative which includes the introduction of punitive damages and the establishment of a special online investigation authority to help support the enforcement efforts of the rightsholders. The specifics or as to the timing of the legal effect of this initiative have not been announced yet. There are also two other amendments to the Copyright Act which will take effect later in 2020. From 27 May 2020, copyright materials incidentally used in a photo shoots, audio or audiovideo recordings may be reproduced, distributed, publicly performed, displayed or transmitted; and effective 5 August 2020, the Korea Communications Commission may set up a three-person mediation panel to mediate copyright dispute cases having a value less than 10 million won.

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# Sweden

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## 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.

Section 16 of the Copyright Act provides libraries 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 26l and 26m of the Copyright Act on private copying compensation explicitly apply to digital media.

Section 52d of the Copyright Act prohibits the unauthorised circumvention of any digital lock which prevents or limits the making of copies of a work protected by copyright.

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 ECJ's case law concerning the EU Regulation on

Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (44/2001).

### 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 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 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. For example, some Swedish courts have expanded the definition of 'newspapers' to include not only printed papers, but also websites and social media accounts run by newspaper companies – albeit this has not been confirmed by precedent.

In a recent judgment rendered by the Supreme Court (judgment delivered on 18 March 2020, case no. T 4412–19), 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 InfoSoc Directive (2001/29/EG). According to the reasoning of the Supreme Court, the rights claimed by the defendant were not applicable in a civil matter and 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 had previously 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.

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, for libraries and archives, 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 is 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 prepared 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 (for example, 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, it can be said that 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 to be 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 40a 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 was 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 recent 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 copyright 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.

A recent 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?

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). Under 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 (for example, 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.

### 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.

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 3a of the Copyright Act).

There are no formal requirements for copyright licences.

## 28 | Are there compulsory licences? What are they?

Yes, the Copyright Act includes a number of provisions on compulsory licenses, 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?

No. The provisions on transfers of rights in sections 27 to 42 of the Copyright Act are non-compulsory. General principles of contract law apply, along with specific principles on the construction of agreements in the field of copyright. Obviously, 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 deceased (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 53b 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 is 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 53a 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 s 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, 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 56a 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 52b of the Copyright Act).

Finally, according to Section 53h 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 on 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. Criminal action may, according to Section 59 of the Copyright Act, be instituted only by a public prosecutor if it is in the public interest or if there is a complaint from the rights holder. Should the public prosecutor decide not to commence infringement proceedings, the rights holder can commence criminal proceedings.

### Online infringement

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

Section 52g of the Copyright Act prohibits the deletion or removal of electronic rights management information relating to a work protected by copyright.

Obviously, rights holders have an interest to maintain a state-of-the-art administrative system, inclusive of electronic marks to each copyright protected item.

### 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 in order 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 Authorities.

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 Organisation and 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. In order 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 last 12 months?

As of 1 January 2019, the following developments are noteworthy.

#### Legislative developments

*No amendments to the Copyright Act*

The Copyright Act has not been subject to any amendments in 2019.

#### *DSM Directive*

The implementation of the DSM Directive (EU 2019/790) has commenced in Sweden. A large number of authorities, companies and NGOs have been invited to participate in the implementation work. A government bill setting out the legislative proposals is intended to be presented to parliament in 2021.

#### Case law

##### *Neighbouring right trumps freedom of speech*

The Supreme Court recently delivered a significant judgment in an infringement case where the plaintiff, a high-ranking member of the far-right populist party the Sweden Democrats, had claimed the right to damages after his smartphone video had been used in news reports on a major political scandal revealed by the video. The defendant, Sweden's public service television company, had argued, inter alia, that the Copyright Act's provisions on infringement and damages must be disregarded as they interfered with the freedom of speech as protected by the European Convention on Human Rights and the European Union Charter. The Supreme Court held the company liable for infringement as the freedom of speech, according to the Court's reasoning, cannot be enforced in a civil case. (Judgment delivered on 18 March 2020, case no T 4412-19.)

##### *Definition of the scope of copyright protection for work of applied art*

The Patent and Market Court of Appeal has upheld a copyright infringement ruling on the Swedish electric candlestick design classic 'Elflugan' (28 June 2019, case no PMT 3854-18). The appellate court found that three of the defendant's models of electric candlesticks infringed, while a fourth model fell outside the scope of protection. On the scope of protection, the Court, inter alia, assessed the product's major impact on the market at the time of launch and held that this commercial attention supports the Court's finding that the work displayed a high level of originality.

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#### *Warehouse storage of copyright-infringing products*

Criminal proceedings were brought against a shop owner who sold copyright-infringing garments and accessories with rock music motifs. He also had two storage facilities from which he regularly restocked his shop with such goods.

The Supreme Court noted that the storage of copyright-protected goods for the purpose of the sale is not expressly prohibited under Swedish law. After obtaining a preliminary ruling from the Court of Justice (Case C-572/17, Imran Syed, EU:C:2018:1033), the Supreme Court found the shop owner liable for criminal copyright infringement of the merchandise in both storage facilities. Applying the preliminary ruling, the court held that the stored goods were identical to those offered for sale and that they were intended for sale. (Judgment delivered on 28 May 2019, case NJA 2019 s 423.)

#### *Wristwatch protected by copyright*

The Patent and Market Court of Appeal has delivered a judgment in a case concerning copyright to a wristwatch (22 March 2019, case no PMT 5885-18). A watchmaker had sued a rival retailer who sold and marketed a watch highly similar to a watch manufactured and sold by the watchmaker.

The Patent and Market Court of Appeal found that the watchmaker's watch, regarded as a whole, was original in the sense that it was the author's own intellectual creation as a result of free and creative choices. The Court concluded that the watch was protected by copyright as a work of applied art. The Court thereby reversed the judgment of the court of first instance, which found that the watch was based on simple variations of previously known design elements and thus lacked originality.

Notably, the appellate court ordered the defendant to reimburse the claimant for publicising information about the judgment through sponsored posts on Facebook and Instagram. Such orders under Section 53h of the Copyright Act had previously been limited to publications in newspapers or similar means of communication.

# United States

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## LEGISLATION AND ENFORCEMENT

### Relevant legislation

#### 1 | What is the relevant legislation?

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

### Enforcement authorities

#### 2 | Who enforces it?

The copyright laws of the US are generally enforced through civil lawsuits initiated by copyright owners. In certain circumstances, 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 noninteractive internet webcast performances, along with ephemeral copies made to facilitate such performances.

Section 115 provides a statutory licence for 'mechanical' reproduction and distribution of musical works with special provisions for 'digital phonorecord deliveries'. In 2018, the Music Modernization Act substantially revised section 115 to provide for blanket licensing of musical works to digital music services.

Section 512 of the Act, which was added by the Digital Millennium Copyright Act (DMCA), creates a conditional safe harbour for online service providers by shielding them from money damages and limiting injunctive relief for certain acts of direct and secondary liability when they meet certain requirements. In particular, safe harbours are provided

for transitory digital network communications, system caching, storage of information at the direction of a user, and the provision of information location tools, subject to detailed requirements for each safe harbour and certain generally applicable requirements.

Chapter 12 of the Act, which was also added by the DMCA, provides civil and criminal remedies for certain circumventions of technological protection measures that control access to works or protect works from copying or other infringement (digital rights management), as well as for certain violations involving the integrity of copyright management information.

### Extraterritorial application

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

US copyright law generally does not have extraterritorial effects. However, US law would not view as extraterritorial the enforcement of the Act against infringing transmissions from a foreign-operated website into the US. Accordingly, there has been successful enforcement of the US Copyright Act against foreign-based sites. The US also has applied civil forfeiture provisions to seize US-registered internet domain names associated with foreign-owned and foreign-operated websites that infringe US copyright by targeting distribution of infringing copies into the US.

### Agency

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

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

The Copyright Office also:

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

Additionally, a separate unit of the Library of Congress, the Copyright Royalty Board, determines royalty rates and terms, and distributes royalties, under statutory licences in the music, cable and satellite television industries.

## SUBJECT MATTER AND SCOPE OF COPYRIGHT

### Protectable works

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

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

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

Since 11 October 2018, earlier sound recordings have had specialised protection pursuant to section 1401 of Title 17. 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 form of expression;
- words and short phrases such as names, titles and slogans;

- familiar symbols or designs;
- mere variations of typographic ornamentation, lettering or colouring;
- mere listings of ingredients or contents;
- facts, ideas, procedures, processes, systems, methods, concepts, principles, discoveries, as distinguished from descriptions, explanations or illustrations;
- blank forms that are designed for recording information and do not themselves convey information; and
- works containing no original authorship.

### Fair use and fair dealing

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

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

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

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

### Architectural works

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

Architectural works are protected by copyright. For this purpose, an architectural work is defined as 'the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings'. Protection extends to 'the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features'. Protection 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. 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?

While US law does not use the term 'neighbouring rights', it recognises various rights similar to ones covered by that term in other countries. Rights of performers and producers of audiovisual works and of sound recordings created on and after 15 February 1972, as well as broadcasters and creators of photographs and many databases, are protected in the US as a matter of federal copyright law. In addition, other provisions of Title 17 provide specialised copyright-like protection:

- Since 11 October 2018, section 1401 of Title 17 has provided specialised protection for sound recordings created before 15 February 1972.
- Integrated circuit layouts (called 'mask works') are protected under specialised provisions in Chapter 9 of Title 17.
- Unauthorised fixation and trafficking in live musical performances are prohibited by Chapter 11 of Title 17.
- Designs of boat hulls and decks are protected under specialised provisions in Chapter 13 of Title 17.

### Moral rights

#### 13 | Are moral rights recognised?

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

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

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

## COPYRIGHT FORMALITIES

### Notice

#### 14 | Is there a requirement of copyright notice?

Although US law once required use of a copyright notice as a condition of copyright protection, notice has been optional on copies of works published since 1 March 1989. A copyright notice generally consists of the symbol '©', the word 'copyright' or the abbreviation 'copr', the year of first publication and the name of the copyright owner (for example, '© 2018 John Smith'). For sound recordings, a copyright notice consists of the symbol '℗', the year of first publication and the name of the copyright owner.

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

The only current legal consequence of a failure to use a copyright notice is that it makes it easier for an infringer of the work to claim that he or she is an 'innocent infringer', 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 his or her work with the Copyright Office, the applicant must submit specified copies of the work along with the application. Upon their deposit in the Copyright Office, all copies and identifying material, including those deposited in connection with applications that have been refused registration, become the property of the US government. The details of the deposit requirement vary depending on the type of work involved.

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

If a mandatory deposit is not made on demand, a fine may be levied, and the relevant person may be required to pay the Library of Congress' cost of buying the copies demanded. In addition, when registration is sought, the underlying work will not be registered unless the required deposit copy or copies are submitted to the Copyright Office.

### Registration

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

The US has a copyright registration system. To apply for a copyright registration, the author must submit a completed application form, a non-refundable filing fee, and a non-returnable deposit copy or copies of the work to be registered. The primary means of registration is to use the Copyright Office online system called Electronic Copyright Office (eCO). The Copyright Office receives over 95 per cent of copyright claims through eCO. When using the online system, the filing fee is paid online, and deposit copies of certain categories of works can be uploaded

directly. Otherwise, hard copy deposits are submitted with a shipping slip that allows the Office to associate the deposit with the online registration record. Paper forms can also be used for copyright registration, but require payment of a higher filing fee and involve a longer processing time. Forms can be downloaded from the Copyright Office's website ([www.copyright.gov](http://www.copyright.gov)), picked up in person or requested by post.

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

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

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

The standard registration fee for a simple application submitted through the eCO online system is \$45. When there are multiple authors, a claimant who is not the author, or a work made for hire, the fee for an online application is \$65. When paper forms are used, the standard fee is \$125. Various different fees apply for certain kinds of 'group registrations' covering multiple works. The fee for expedited service is \$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. 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 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 his or her employment. Traditional common law agency principles are applied to determine who constitutes an employee. As an alternative to the 'work made for hire' doctrine, an employer may own a copyrighted work as the result of an assignment from his or her employee.

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

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

- a contribution to a collective work;
- a part of a motion picture or other audiovisual work;
- a translation;
- a supplementary work;
- a compilation;
- an instructional text;
- a test;
- answer material for a test; or
- an atlas.

### Joint and collective ownership

#### 25 | May a copyrighted work be co-owned?

Copyrights can be co-owned either in the case of a joint work 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 same copyright is initially co-owned by the joint authors. A joint work is defined by the Copyright Act as 'a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole'. Under this definition, all the involved authors must intend that their contributions be combined, and this intention must exist at the time 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 both 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 (ASCAP), Broadcast Music (BMI), SESAC and Global Music Rights are the principal US performing rights organisations for musical works.

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

## Termination

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

The Copyright Act has 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 the work is created in fixed form. The copyright in the work of authorship immediately becomes the property of the author who created the work.

### Duration

#### 33 | How long does copyright protection last?

The length of copyright protection varies according to when the particular work was created and published, and according to whether the author is an identified natural person.

#### 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. Such recordings published before 1923 will enter the public domain at the end of 2021. Unpublished pre-1972 recordings, and pre-1972 recordings published in 1923 or later, have varying periods of protection, with the last of them entering the public domain on 15 February 2067.

## Renewal

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

Renewal does not apply to works created on or after 1 January 1978, or to earlier works that were not published or registered before 1 January 1978. Works first published or registered up until 1963 had to be formally renewed, through a renewal registration in the US Copyright Office, to maintain protection. Failure to renew placed the work in the public domain. However, copyright protection was later restored to certain works of foreign origin that had fallen into the public domain due to failure to renew. For works first published or registered between 1964 and 1977, renewal was automatic, but obtaining a renewal registration provides certain advantages.

## Government extension of protection term

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

The US term of copyright protection has been extended many times. Most recently, the Sonny Bono Copyright Term Extension Act of 1998 extended copyright terms by 20 years. While the extension was not applied to copyrights that had already expired, it did extend the terms of existing copyrights.

## 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 the alleged infringer's activities of a type that implicates the copyright owner's exclusive rights (for example, 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 is able to pursue remedies for the infringements occurring within the past three years. However, where the essence of a copyright claim is a dispute concerning ownership of the copyright, courts have rejected the assertion of an ongoing wrong and have dismissed the claim if it was brought more than three years after it accrued.

## Monetary damages

### 41 | Are monetary damages available for copyright infringement?

Monetary damages are available for copyright infringement. A party found liable for copyright infringement may be found liable for either the copyright owner's actual damages and any additional profits of the infringer, or statutory damages within a prescribed range, as provided by the Copyright Act. However, statutory damages are only available if registration for the infringed work was obtained within certain time requirements.

## Attorneys' fees and costs

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

Both costs and attorneys' fees can be claimed in a copyright infringement action. They may be awarded to a prevailing party at the court's discretion if the work was registered with the US Copyright Office within certain time requirements.

## Criminal enforcement

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

The Copyright Act has criminal provisions. It is a criminal offence to wilfully infringe a copyright if the infringement was committed:

- for either commercial advantage or private financial gain;
- by the reproduction or distribution, including by electronic means, during a 180-day period, of one or more copies or phonographic records of one or more copyrighted works, which have a total retail value of more than \$1,000; or
- by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

The Copyright Act specifies various additional criminal offences:

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

## Online infringement

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

Yes. 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.

## 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, at the time of writing, 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 treaty to which the United States is a signatory has its own unique requirements. They generally require a certain minimum level of protection in terms of the rights recognised and the duration of protection and create an obligation to honour the copyright of citizens of other treaty parties by affording them copyright protection in the US on the same basis as US citizens.

### 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 last 12 months?

#### Supreme Court Cases

The US Supreme Court decided two copyright cases this year.

In *Allen v Cooper*, the Supreme Court decided that a federal law purporting to abrogate state sovereign immunity against claims of copyright infringement is unconstitutional. Thus, at least unless Congress adopts further legislation based on a congressional finding that there is a pattern of state infringement that would justify abrogation of sovereign immunity, states cannot be sued for copyright infringement without their consent.

In *Georgia v Public.Resource.Org*, the Supreme Court held that statutory annotations in the Official Code of Georgia Annotated are non-copyrightable 'government edicts'.

The most closely watched Supreme Court copyright case of this term has been held over to next year. In *Google v Oracle America*, the Supreme Court is expected to address the copyrightability of computer software interfaces and, if the Java interfaces involved are protected by copyright, whether it was a fair use for Google to copy the 'declaring code' for those interfaces when implementing the Java language for the Android operating system.

#### Legislation

With the novel coronavirus (SARS-CoV-2) disrupting government and private sector activity worldwide, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act. A small part of that legislation authorises the Register of Copyrights through 31 December 2021 to extend most copyright-related statutory and regulatory deadlines.

Works of authorship created by employees of the US federal government within the scope of their official duties have historically not been subject to copyright protection. The National Defence Authorization Act for Fiscal Year 2020 carved out an exception to that for scholarly publications by civilian faculty members of US military service academies.

Last year, Congress devoted substantial attention to proposed legislation to modernise the operations, infrastructure and information technology of the US Copyright Office and to create a new system for adjudication of small copyright claims in a more streamlined manner than full federal court litigation. There remains substantial interest in both proposals.

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