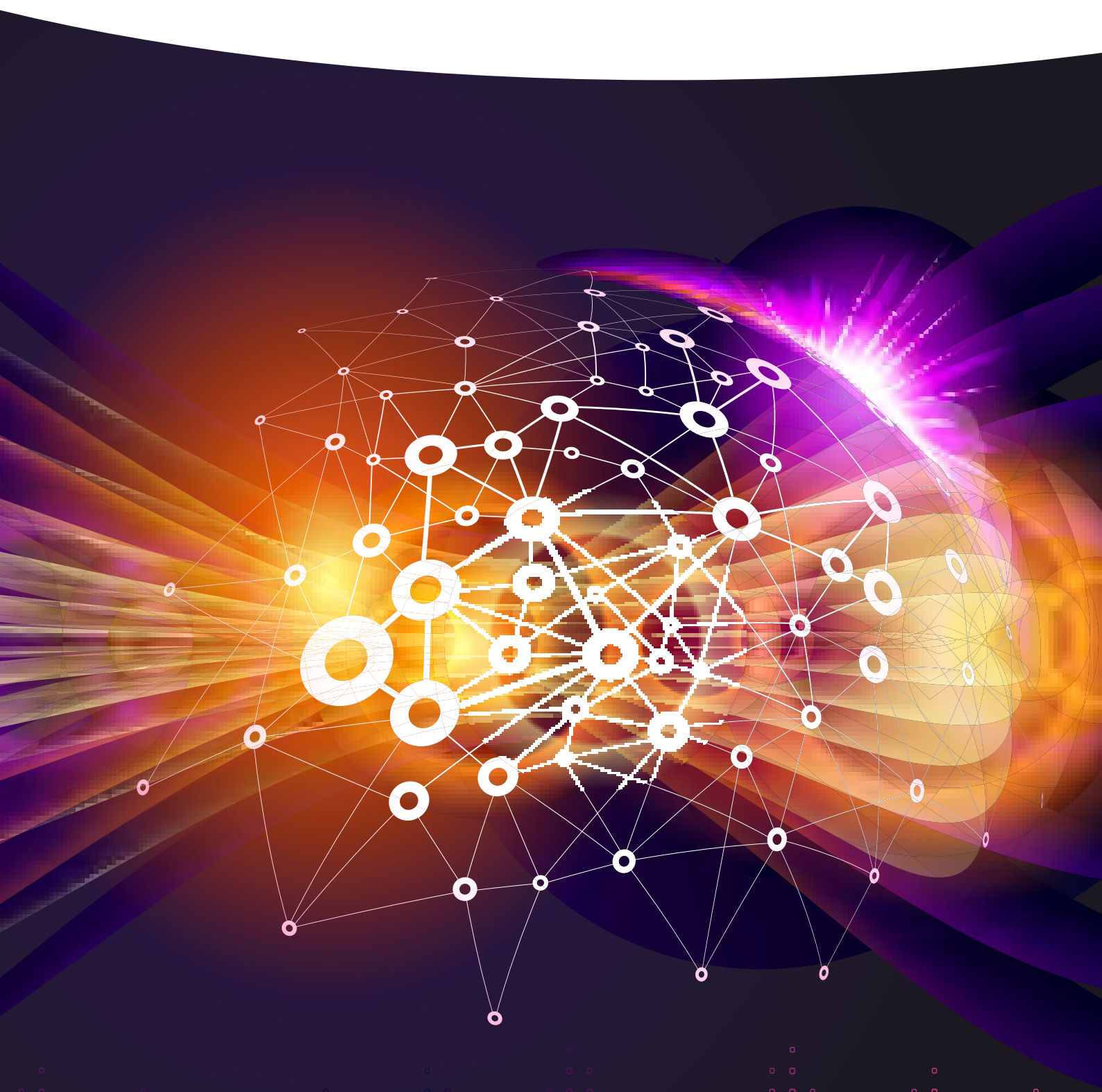




TERRALEX®

CROSS-BORDER COPYRIGHT GUIDE 2016





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We are delighted to present the TerraLex Cross-Border Guide to Copyright 2016.

Copyright rules across national boundaries are becoming increasingly relevant to businesses, particularly as the digital market makes its impact felt on all industry sectors. Issues such as digital content portability, pirated content and copyright licensing models now appear high on legislative agendas around the world and businesses need to be nimble enough to operate in an environment in which the creative industries operate globally, but copyright law still varies by jurisdiction.

This Guide draws together contributions from copyright experts in territories we have found are key to global businesses. We hope you will find the Guide a useful resource for getting to grips with the framework of copyright law in each of those territories, safe in the knowledge that if further specialist advice is needed, it's only a call or email away.

We at RPC have very much enjoyed pulling together the contributions from enthusiastic and expert contributors and are grateful to everyone who has taken part in this project.

Wishing all our readers a happy and successful 2016.

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Australia

Lander & Rogers, Robert Neely



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in Australia is the Copyright Act 1968 (Cth) (**Copyright Act**). Although the Copyright Act replaced and repealed four previous Copyright Acts (1912, 1933, 1935 and 1963), the previous Acts are still applied today where a work was in copyright immediately before the commencement of the current Copyright Act.

As a common law legal system, Australia also relies on case law to interpret and set precedents in law. As a result there are a number of judicial decisions that contribute to the sources of copyright law in Australia.

2. Subsistence of copyright

2.1 What type of subject matter can be protected by copyright?

The categories of subject matter that can be covered by copyright are: literary, dramatic, musical and artistic works, sound recordings, films, broadcasts and published editions of works. They are broad categories, and can be summarised as follows:

Literary works

These are any works, other than a dramatic or musical work, which are expressed in print or writing. Tables, compilations and computer programs are also categorised as literary works.

Dramatic works

A dramatic work includes a work of dance or mime; this might be a script for a play, a dance routine that has been choreographed or a screenplay of a book for film.

Musical works

These are works consisting of music, without any words or actions that are intended to be performed with the music. There is copyright in the sound recording of a musical work but that is a separate and distinct right (see below).

The term “musical” in the Copyright Act does not refer to any artistic or aesthetic qualities the work should possess, but rather a method of production.

Artistic works

These include graphic works, photographs or sculptures (irrespective of quality), a work of architecture (be it a building or a model for a building) or a work of artistic craftsmanship.

A graphic work is broad in scope and can be, amongst other things, a painting, drawing, diagram, map, chart, plan, engraving or etching.

A work of artistic craftsmanship must have some aesthetic appeal and be the result of the work of a skilled craftsman; for example, stained-glass windows or wrought-iron gates.

Sound recordings, films, broadcasts, published editions of works

These categories are designed to cover both recordings of sounds which are not based on underlying literary, dramatic or musical works, and recordings of literary, dramatic or musical works.

A film is a recording from which a moving image may be produced and, importantly, includes the soundtrack to the film.

Broadcasts are the electronic transmission of visual images, sounds or other information for simultaneous reception via a broadcasting service to members of the public.

2.2 What is required for works to qualify for copyright protection?

A work which falls within the one of the categories above may be protected by copyright if it is original. A work is original if the author (see point 3.1 for how to decide who is the author) has created the work through his/her own skill, judgement and individual effort and has not copied from other works. Save for works of artistic craftsmanship, it is not necessary that the work is of artistic merit. It is also not necessary that the whole of a work be original.

Copyright does not protect information or ideas as such – in order to qualify for copyright protection, a work must be ‘expressed in material form’. As a general rule, Australia provides copyright protection if the author is a national or resident of, or the work was first published in, Australia.

2.3 What rights does copyright grant to the rights holder?

The Copyright Act sets out the rights subsisting in copyright works which are the exclusive preserve of the rights holder (before any licences are granted or copyright is transferred to someone else). They include the right to:

- Reproduce the work in a material form
- Publish the work
- Perform the work in public
- Communicate the work to the public
- In the case of a literary work (other than a computer program) or a musical or dramatic work, enter into a commercial rental arrangement in respect of the work reproduced in a sound recording
- In the case of a computer program, enter into a commercial rental arrangement in respect of the program
- Make an adaptation of the work or do any of the above in relation to the adaptation.

Creators of works also have the moral rights described in question 2.4.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In Australia the following moral rights are provided for by the Copyright Act:

- The right to be identified as the author of a copyright work
- The right to object to derogatory treatment of a copyright work
- The right not to suffer false attribution of a copyright work.

Moral rights are applicable to literary, dramatic, musical or artistic works and films. Moral rights do not apply to sound recordings, broadcasts or published editions of works.

2.5 What is the duration of copyright in protected works and other subject matter?

The duration of protection for copyright subject matter varies according to the type of work or other subject matter and the date of creation. In general, for items created on or after 1 May 1989 the duration of copyright protection is as follows:

3. Ownership

Category of work:
Literary, dramatic, musical or artistic works
<p>Duration: Copyright expires 70 years from the end of the calendar year in which the author dies.</p> <p>Where a work has a joint author/co-author, 70 years from the end of the calendar year in which the last known author dies.</p> <p>Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was made or first made available to the public.</p>
Category of work:
Sound recordings and films
<p>Duration: Copyright expires 70 years from the end of the calendar year in which the recording or film is first published.</p>
Category of work:
Broadcasts
<p>Duration: Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made.</p>
Category of work:
Published editions of works
<p>Duration: Copyright expires 25 years from the end of the calendar year in which the work was first published.</p>

2.6 For how long do moral rights subsist in copyright works?

An author's moral right to be identified as the author, right against false attribution and right to object to derogatory treatment lasts for the life of the author plus 70 years.

An author's right to object to derogatory treatment in respect of a film lasts for the life of the author.

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the author. The main exception to the rule is where the work was made by a person in the course of his/her employment; in those circumstances the employer is the first owner unless there is an agreement to the contrary.

The author is defined as the person who creates the work. The Copyright Act provides guidance for the specific categories of subject matter where the creator is less clear:

- For sound recordings, the author is the person who made the arrangements necessary for making the sound recording
- For films, the author is the person who made the arrangements necessary for the making of the film (in the case of a commissioned film), or each director of the film (in the case of a non-commissioned film)
- For broadcasts, it is the person making the broadcast
- For published editions, it is the publisher of the publication.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where there is an assignment of part of a person's interest in the copyright.

To qualify as joint authors, it is necessary that the contributions of each author are not distinct. If they are distinct then two works subsist, each with separate copyright.

Joint owners have their own individual rights with respect to the work that can be assigned independently of the other or others, but the consent of all joint authors is required for licensing or use of the copyright work.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in Australia; it arises automatically upon creation of the work. There is no registration system.

4. Infringement

A copyright notice may be useful to evidence ownership of copyright and the date of authorship. It creates a presumption that the named person is the author, and puts third parties on notice of the rights. It can also affect the

remedies available for infringement, as damages will not generally be available unless the infringer was put on notice of the owner's copyright. However, copyright subsists without such notice and the failure to display such notice does not affect copyright in a work.

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment of copyright must be in writing, signed by or on behalf of the copyright owner.

A licence of copyright can, in addition to being in writing, be agreed orally or by implication (although this is not best practice as the rights holder will not benefit from certain statutory rights as licensee, such as the right to sue third-party infringers).

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights can be waived but they cannot be assigned.

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed. There are two classes of infringement: direct infringement and indirect infringement.

4.1 What acts constitute direct infringement of copyright?

Direct infringement occurs where a person performs any of the acts comprised in the copyright (set out in 2.3 above) without the consent of the rights holder.

There is no need to show that the alleged infringer had knowledge of another's subsisting right, or intention to infringe that right. However, as noted above, having notice of the owner's rights may affect the remedies granted by the court.

4.2 What acts constitute indirect infringement of copyright?

In general terms, indirect infringement of copyright occurs where a person, with knowledge or reasonable grounds for such knowledge:

- Imports for sale, distribution or hire an article which, if made in Australia, would infringe the copyright
- Exhibits, distributes, sells, or lets for hire an article, the making of which infringed the copyright
- Gives permission for use of a public place for a performance that infringes the copyright.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that are specifically permitted under the Copyright Act, notwithstanding the existence of copyright protection. These permitted acts (termed 'fair dealing' in Australia) are wide in variety but often relate to very specific scenarios. They include (amongst others):

Fair dealing act

Temporary reproduction of work

A copy that is transient or incidental which:

- Is part of a technological process of making or receiving a communication; or
- Is incidentally made as a necessary part of a technical process of using a copy of the work (eg ISPs who use caching).

Fair dealing act
Personal copies for private and domestic use
There are format-shifting exceptions for the copying of books, newspapers and periodicals, photographs, videotapes and sound recordings for private use. The exceptions only apply if the owner of the original makes a copy, and the original is not an infringing copy. The format-shifting exception for films only applies to copies made from films in analogue form and does not apply to digital-to-digital copying.
There are also time-shifting exemptions for recording broadcasts to be watched or listened to at a later time.
Fair dealing act
Research or study
Copying may be allowed for the purpose of research or study where the amount copied is within the statutory limit or where use is 'fair dealing' having regard to factors including (among others) the purpose and character of the dealing, the effect of the dealing on the potential value of the work, and the amount copied.
Fair dealing act
Criticism or review and reporting news
Where the copyright work is being used for the purpose of criticism or review, whether of that copyright work or another work, or for the purpose of, or is associated with, the reporting of news in a newspaper, magazine, or similar periodical, or by means of an electronic communication or film.
An acknowledgement of any copyright work used in a criticism or review is required.
Where the news is reported in a film or communicated electronically, no acknowledgment is required.
Fair dealing act
Judicial proceedings or professional advice
Where the copyright work is being used for the purpose of professional advice by a legal practitioner, patent attorney or trademark attorney, or for use in a judicial proceeding or report of a judicial proceeding.

Fair dealing act
Parody or satire
Where the copyright work is being used for the purpose of parody or satire.
It should be noted that parodied or satirised work does not excuse defamatory remarks or the moral right to object to the unreasonably derogatory treatment of a work.

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The law in Australia is not yet clear on hyperlinking or framing.

In Australia, it is an infringement of copyright to communicate a work to the public, including by making a work available online. In *Universal Music Australia v Cooper* [2005] FCA 972, the question was whether providing a hyperlink on a website that led to a copyright work was "making available" that work to the public. Tamberlin J found that given that the copyright work was not stored on Cooper's website but on a remote website, it was the remote website rather than the Cooper website that had "made available" the copyright work. On appeal, however, the Full Federal Court held that Mr Cooper had authorised the primary copyright infringement.

There has not yet been any litigation on framing in Australia.

4.5 Is a licensee of copyright able to bring an infringement action?

Under the Copyright Act, an infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action depends on the type of licence involved.

An exclusive licence authorises the licensee to exercise rights which would otherwise be exercisable exclusively by the copyright owner. One such right is the right to bring an infringement action.

A non-exclusive licensee may also bring an infringement action but only where the licence is in writing and signed by the copyright owner and expressly grants the non-exclusive licensee the right to enforce the copyright.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The Copyright Act provides the following remedies for rights holders:

- Interlocutory injunctions (including search orders and freezing orders)
- Delivery up of infringing articles
- Seizure of infringing articles
- Forfeiture of infringing articles
- A final injunction against the infringer
- To elect between either an enquiry as to damages or an account of profits arising from the infringement.

5.2 Are there any specific remedies for online copyright infringement?

An injunction can be obtained against an internet service provider which is providing access to an online location outside Australia used primarily to infringe or facilitate infringement of copyright. The ISP can be required to take reasonable steps to disable access to the online location (s115A of the Copyright Act).

There are a number of specific actions in respect of access control measures (such as a measure to limit the geographical area in which a particular work may be accessed). An action lies against a person who tries to circumvent an access control measure (s116AN of the Copyright Act) and a person who manufactures a circumvention device (s116AO) or provides a circumvention service (s116AP).

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

The Copyright Act creates a number of criminal offences in relation to copyright. Generally, criminal offences involve commercial dealings or infringements on a commercial scale.

The relevant criminal acts are:

- Commercial-scale copyright infringement that has a substantial prejudicial impact on the owner of the copyright
- Making an infringing copy for sale, or hire, or for commercial advantage
- Selling or letting for hire an infringing copy
- Offering an infringing copy for sale or hire, or for commercial advantage or profit

- Exhibiting an infringing copy in public commercially
- Importing a copy of a copyright work into Australia commercially
- Distributing an infringing copy
- Possessing an infringing copy for commerce
- Making or possessing a device, intending to use it for making an infringing copy
- Advertising the supply of an infringing copy
- Causing a work to be performed publicly or a recording or a film to be heard or seen in public
- Circumventing an access control technological protection measure for commercial advantage or profit
- Manufacturing a circumvention device or providing a circumvention service for a technological protection measure
- Removing or altering electronic rights protection information
- Distributing, importing or communicating copies after removal or alteration of electronic rights management information
- Distributing or importing electronic rights management information.

Each offence requires a level of intention, knowledge or belief on behalf of the alleged infringer, and each carries various penalties. Generally, what is required is:

- The intention to engage in the physical act
- Intention, knowledge or recklessness as to the circumstance or result of the act.

The potential penalties are:

- For indictable offences – AUD\$99,000 or imprisonment for not more than five years, or both
- For summary offences – AUD\$21,600 or imprisonment for two years, or both
- For strict liability offences (where applicable) – AUD \$10,800.

There are slightly different potential penalties for the following offences:

- Importing a copy of a copyright work into Australia commercially – AUD\$117,000 or imprisonment for not more than five years, or both
- Advertising the supply of an infringing copy – AUD\$5,400 or six months' imprisonment, or both
- Circumventing an access control technological protection measure for commercial advantage or profit – AUD\$10,800.

6. Enforcement

For some strict liability offences, the Australian Federal Police or the State or Territory Police can issue an infringement notice as an alternative to prosecution. In this case, an alleged offender can avoid prosecution if they pay a penalty and forfeit infringing copies and devices used to make them to the Commonwealth.

An aggravated offence is committed if in certain cases the infringing copy was made by converting a work from hard copy into a digital form. The consequence is a higher maximum fine of AUD\$153,000 and/or imprisonment for not more than five years.

While fines and imprisonment are both possible sanctions for infringement of copyright, more often than not the penalties are monetary. A corporation can be fined up to five times the amount of the maximum fine.

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is six years to bring a claim for breach of copyright. Time begins to run from the time the infringing act was done.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In Australia, the general rule is that the unsuccessful party pays a proportion of the costs of the successful party. However, this is subject to the very wide discretion of the court which can order otherwise. As a general rule, a successful party will not recover more than 60% of its costs. However, the general rule relating to costs and the amount of costs that can be recovered will be influenced by the making of an offer of settlement and the timing of that offer.

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

Action for copyright infringement is generally brought either in the Federal Court of Australia or the Federal Circuit Court.

Actions can also be brought in the State and Territory Courts, if the amount of damages sought is within the limit that the court can award and there is a connection with the state or territory.

6.2 Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure by the Australian Customs Service of infringing copies being imported into Australia. A copyright owner must lodge a Notice of Objection with the Chief Executive Officer of Customs, which then authorises a Customs officer to seize copies of allegedly infringing copyright material. Customs may decide not to seize the copies unless the copyright holder gives a written undertaking to repay to the Commonwealth the expenses of seizing the copies.

Criminal proceedings

Criminal proceedings, although rare, can be brought on the grounds described in 5.3 above, and pursued through the criminal courts. Infringing activity may be reported to the State or Territory Police, or may be referred directly to the Australian Federal Police. Generally, the Australian Federal Police investigates copyright infringements and the Commonwealth Director of Public Prosecutions prosecutes offences under the Copyright Act.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

The Commonwealth Attorney-General's Department is responsible for the development of Australian copyright policy as well as monitoring and communicating Australia's stance on international copyright issues.

The Australian Copyright Council is an independent, not-for-profit organisation that represents the interests of many copyright owners and advocates for the importance of copyright. It provides an online legal advice service, lobbies for law reform and publishes educational material on specific copyright matters.

The Copyright Tribunal is an independent tribunal established by the Copyright Act. The Tribunal deals with statutory licences (or statutory exclusions from infringement), the administration of licence schemes, and commercial licensing disputes between collecting societies and users of copyright material. It does not deal with criminal 'piracy' of copyright works.

There is no agency specifically tasked with enforcement of copyright. The Australian Federal Police will target criminal activity (see 5.3) but it is up to the rights holders or the rights management agencies to identify infringement of their rights and seek civil remedies under the Copyright Act, with the additional option of bringing criminal infringements to the attention of the authorities.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

As a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collecting societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent.

The key Australian collecting societies in each sector are as follows:

Agency
Aboriginal Artists Agency Limited
Who it represents
Aboriginal and Torres Strait Islander artists
Agency
Australasian Mechanical Copyright Owners' Society
Who it represents
Musicians and music publishers
Agency
Australian Performing Rights Association
Who it represents
Musicians, composers, music publishers
Agency
Australian Screen Directors Authorship Collecting Society Ltd

Who it represents
Directors
Agency
Australian Writers' Guild Authorship Collecting Society Ltd
Who it represents
Scriptwriters
Agency
Christian Copyright Licensing International
Who it represents
Christian music-writers and film makers
Agency
Copyright Agency Limited
Who it represents
Authors, journalists, illustrators, visual artists, photographers, and newspaper, magazine and book publishers
Agency
LicenSing
Who it represents
Christian music publishers
Agency
Phonographic Performance Company of Australia
Who it represents
Musicians and record companies
Agency
Screenrights
Who it represents
Artists, film producers and distributors, script writers, music copyright owners
Agency
Word of Life International
Who it represents
Christian music-writers and publishers

6.5 Are copyright levies payable? By whom, and in what circumstances?

Copyright levies are not payable in Australia.

7. Copyright Reform

7.1 What do you consider to be the top two recent copyright developments?

Copyright Notice Scheme Code 2015

In December 2014, the Australian Government required industry leaders to develop an industry code to be registered by the Australian Communications and Media Authority (ACMA). The Government directed that the code include a process to notify consumers when a copyright breach has occurred and to provide consumers with information on how they can gain access to legitimate content.

In response, the Communications Alliance developed the Copyright Notice Scheme Code 2015, which establishes a 'three strikes' copyright infringement notice scheme. If a rights holder detects that an IP address has been used to allegedly infringe its copyright, the ISP must match the IP address to an account holder and send an Education Notice to the account holder. If a second infringement is reported within 12 months of the Education Notice, a Warning Notice will be issued, and if a third infringement is reported within 12 months of the initial Education Notice, the ISP will issue a Final Notice explaining that the rights holder can immediately seek a court order compelling the ISP to reveal the account holder's details to the rights holder, who can then commence a copyright infringement action against the account holder.

In April 2015, the code was submitted to ACMA, which has indicated that it will confirm that the code meets its requirements for registration. The code is due to be introduced in late 2015 / early 2016.

Copyright Amendment (Online Infringement) Bill 2015

The Copyright Amendment (Online Infringement) Bill 2015 came into force in June 2015, introducing amendments to the Copyright Act aimed at reducing online copyright infringement.

Under the Copyright Act, copyright owners are now able to apply directly to the Federal Court of Australia for an injunction requiring an ISP to block access to an overseas online location (or website) where that online location "has the primary purpose of infringing copyright or facilitating the infringement of copyright". The amendments have been criticised by academics, who have argued that certain file-sharing sites such as Dropbox that do not intend to host infringing material could be caught by the provisions. The Government has stated that it will review the effectiveness of the law in 18 months.

Dallas Buyers Club LLC v iiNet Limited [2015] FCA 317

In late 2014, Dallas Buyers Club sought preliminary discovery from certain ISPs of consumer details associated with Australian-based IP addresses that it alleged had been used to download unlicensed copies of the film *Dallas Buyers Club* through the torrent file sharing website BitTorrent.

In April 2015, Justice Perram of the Federal Court of Australia ordered that iiNet and five other ISPs disclose the names and addresses associated with nearly 4,716 IP addresses to Dallas Buyers Club and Voltage Pictures. However, in order to protect the privacy of account holders, Justice Perram constrained the use of the consumer details to identifying consumers using BitTorrent to download the films, suing consumers for infringement and negotiating with consumers in relation to their liability for infringement. Justice Perram also required Dallas Buyers Club and Voltage Pictures to submit drafts of any letter they proposed to write to account holders as a means of protecting consumers from speculative invoicing. iiNet did not appeal the decision.

This was the first case in Australia in which rights holders sought preliminary discovery from ISPs of details of account holders and will guide the way that ISPs and rights holders manage discovery in actions for copyright infringement in the future.

7.2 What do you consider will be the top two copyright developments in the next year?

Broadening of the 'fair dealing' exceptions

In February 2014, the Australian Law Reform Commission (ALRC) released its Final Report on Copyright and the Digital Economy, in which it proposed that the current fair use exceptions in the Copyright Act be repealed and replaced with a broad, flexible exception for fair use of copyright material. Under the ALRC's proposal, fair use would be determined by reference to a non-exhaustive use of factors, including the purpose of the use, the nature and amount of the copyright material and the effect of the use on the value of the copyright material. The ALRC has also proposed a non-exhaustive list of illustrative purposes, including research and study, criticism or review, parody or satire, reporting news and private and domestic purposes.

The current Australian Attorney-General, Mr George Brandis, has indicated that the Government may not support the ALRC's proposed fair use provisions. The Attorney-General has stated there are higher priorities in Australian copyright reform, and favours industry self-regulation. There has, however, been increased pressure to

adopt the fair use provisions, both amongst academics and legal practitioners.

Cloud computing

Cloud computing services are increasingly being used to deliver copyright material to users, store materials and information, and access data on multiple devices and platforms. There has been some argument in Australia that cloud service providers may be breaching the Copyright Act by copying protected material from one server to another (including by allowing or facilitating material to be cached and indexed on various servers and multiple devices).

In practice, the most commonly used way of avoiding copyright infringement in this context is by obtaining the express consent of the copyright owner. The cloud service provider will also often require the copyright owner to warrant that they are the owner of the material and that use of the material by the provider will not infringe the Copyright Act. Copyright infringement may also be avoided under the 'fair dealing' exceptions contained in the Copyright Act (see 4.3), although the position is not always entirely clear. In addition, it should be noted that the "fair dealing" exceptions are currently being reconsidered (see above).

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China

Zhong Lun Law, Helen Cheng



1. Legislation and regulation

What are the main sources of copyright law?

The main source of copyright legislation in China is the Copyright Law. The first Copyright Law was promulgated in 1990 by the Standing Committee of the National People's Congress, which is the legislative body of the Chinese Government. This law has since been revised twice, in 2001 and 2010. A third revision is now in discussion before the Legislative Affairs Office of the State Council.

Judicial interpretations are another important source of copyright in China. Judicial interpretations are binding opinions issued by the Supreme People's Court on the implementation of certain laws. Regional courts can also issue interpretations, which would only be binding upon courts in those local jurisdictions. Chinese courts may cite judicial interpretations of Copyright Law to support their reasoning in judgments.

As a civil law system, court decisions are not sources of copyright law in China and have no binding effect. However, certain guiding cases, which are selected and published by the Supreme People's Court each year, have reference value to the lower courts.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The types of work covered by copyright are: literary, oral, musical, dramatic, *Quyi* (see below for definition), choreographic, acrobatic, fine art, architectural, photographic, cinematographic (and those created by means similar to cinematography), graphic, model, and computer software. These are the broad categories of copyrightable works. Brief summaries of each category are below:

Literary works

These works include novels, poems, prose, treatises, and other works that are expressed in written form.

Oral works

Oral works are impromptu speeches, lectures, court debates, and other works that are expressed orally.

Musical works

Musical works include songs, symphonies, and other similar works, with or without lyrics, that can be sung or played.

Dramatic works

Dramatic works include dramas, operas, and other works that are created for stage performance.

Quyi works

Quyi works are works typically performed through conversation and singing, such as *xiangsheng* (comic dialogues), *kuaishu* (quick-patter), *dagu* (Chinese base drum), *pingshu* (storytelling based on classic novels like *Romance of the Three Kingdoms*), etc.

Choreographic works

Choreographic works are works that express thoughts and feelings through movements, dances, facial expressions, etc.

Acrobatic works

Acrobatic works include acrobatics, magic acts, circus acts, and other performances that are expressed through bodily movements and techniques.

Fine art works

Works of fine art include paintings, calligraphy, sculptures, and other two- or three-dimensional works or artistic creations formed by visual lines, colours, and/or other patterns.

Architectural works

Architectural works include buildings or structural works.

Photographic works

Photographic works are art created by recording images of objects on light-sensitive materials or other media with the aid of instruments.

Cinematographic works and works created by means similar to cinematography

These are works captured on certain media and may include images with or without accompanying sounds, and disseminated with the aid of certain devices.

Graphic works

Graphic works include engineering design drawings and product design drawings created for construction or production, as well as maps and schematic drawings created to show geographical phenomena or demonstrate principles or structures.

Model works

These are three-dimensional works made to a certain scale according to the shape and structure of objects for display, testing, or exhibition, etc.

Computer Software

These are computer programs and their relevant documentation.

Computer programs are sequences of command codes, symbolic command sequences, or symbolic statement sequences, which can be automatically converted to a coded command sequence. These are executable by a computer or any other device with information processing abilities.

Documentation is written information and diagrams that are used to describe the content, composition, design, functionality specifications, development details, test results, and usage method, of a program, such as the program design description, flow chart, and user's manual.

2.2 What is required for works to qualify for copyright protection?

To be eligible for copyright protection, works need to be original intellectual creations of a type listed above. The works must also be capable of being reproduced in a tangible medium. A work is original if the author (see 3.1 for discussion on authorship) created the work through his/her own skill, judgement and individual effort and did not copy from other works. Works do not need to be of high artistic merit but must exhibit some modicum of creativity. The work also does not need to be entirely original. Generally, the threshold for originality is low in China compared to other civil law countries such as France, Germany, or Japan.

As a general rule Chinese law only accords copyright protection to works if the author is a Chinese national, or if the work was first published in China or another country party to one of the various international conventions that China is also a party to.

2.3 What rights does copyright grant to the rights holder?

The Copyright Law enumerates the rights that comprise copyright. These rights are the exclusive rights of the rights holder (before any licences are granted) and include the rights to:

- Reproduction, ie make one or more copies of a work by means of printing, photocopying, duplication, etc.
- Distribution, ie make original or copies of works available to the public by sale or donation
- Rent, ie authorise others to use works on a temporary basis
- Exhibition/public display, ie showcase the original or copies of works
- Public performance/broadcast, ie perform the works or broadcast them via any medium
- Public exhibition via film projectors or other equipment, works of fine art, photographic works, cinematographic works, or works created by means similar to cinematography
- Public broadcast or dissemination of a work through wireless transmission, to disseminate a broadcast work to the public through wire transmission or rebroadcast, and to disseminate a broadcast work to the public through a loudspeaker or any other similar instrument used to transmit symbols, sounds, or images
- Dissemination of a work via an information network, ie make a work available to the public by wired or wireless means
- Fixation of a work in a medium by cinematographic or similar means
- Creation of derivative or adapted works so as to create a new work
- Translation
- Compilations or arrangements
- Other rights to which a copyright owner will be entitled.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In China the Copyright Law provides the following moral rights for all types of works:

- The right to publish a work
- The right to be credited as the author of a work
- The right to alter or authorise others to alter a work
- The right to object to derogatory treatment of a work.

2.5 What is the duration of copyright in protected works?

Copyright term varies by right. For example, an author's moral rights to attribution, to alter (or authorise others to alter) the work, and to object to derogatory treatment of his or her work are perpetual.

However, the term for the moral right to publish a work and any economic copyrights (see point 2.3) are the life of the author plus 50 years. The term of protection ends on 31 December of the 50th year after the author's death. For jointly-created works, the term runs from the work's creation to 31 December of the 50th year after the death of the last known author.

The right of publication and other economic rights for works created by a legal person or an organisation, or works made for hire, have terms of 50 years beginning from the date of creation. The term ends on 31 December of the 50th year after creation.

The copyright term for cinematographic works, works created by means similar to cinematography, or photographic works is different from the term for other types of works. The term for the publication right and economic rights (see point 2.3) for these works is 50 years starting from the date of publication. The term ends on 31 December of the 50th year after the first publication date. If the work is never published, its term of protection is 50 years from the date of creation.

Orphan works, which are works whose author cannot be identified or contacted, are protected for terms of 50 years, which begin on the date of the first publication.

2.6 For how long do moral rights subsist in copyright works?

See point 2.5.

An author's moral right to attribution, to alter (or authorise others to alter) the work, and to object to derogatory treatment of his or her work are perpetual. Similarly, a performer's moral rights to be identified as the performer and to protect his/her performance from distortion are perpetual.

The right to publish a work persists for the life of the author plus 50 years if the author is an individual. For cinematographic works, the term is 50 years after the work's first publication, depending on the type of cinematographic work. Works authored by legal persons have terms of 50 years from the date of creation.

3. Ownership

3.1 Who is the first owner of a copyright work?

As a general rule, the initial owner of the copyright to a work is its author. Under the Copyright Law, an author can be an individual or a legal person (such as a corporation). Normally, an individual who creates a work is its author. Works created with the sponsorship of, or according to the intent of, another legal person or organisation responsible for such works are considered authored by such legal person or organisation.

The main exception to this rule involves works for hire where the work is graphical in nature or is computer software. Where an employee creates such a work using the employer's resources, materials, or technical support, the copyright will vest in the employer irrespective if the work was created under the direction of or for the employer or not. In other words, as long as an employee utilises employer resources to create a graphical work or computer software, the copyright will automatically vest in the employer even if the employee created such work outside the direction of the employer.

The copyright for works made for hire may also vest in employers pursuant to laws, regulations, and contracts. However, the author always reserves the right of authorship.

Another exception is where a contract for the creation of a work explicitly states that the copyright in commissioned work belongs to the commissioning party. Here, the commissioning party may acquire the copyright in the work and become the first owner.

The Copyright Law also provides specific rules on the ownership of cinematographic works. Specifically, the copyright in such works will generally vest in the producer, provided that the screenwriter, director, cinematographer, lyricist, composer, and other authors reserve their authorship rights in any work they contributed.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Yes. Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where the copyright in a work is assigned either in part or in whole.

To qualify as joint authors, each author must share a joint intent of creation. In other words, both authors must be aware that they are collaborating together to create something and intend to combine their work into a single creation.

Joint owners will negotiate in good faith on how to exploit the work. If no consensus can be reached through friendly

consultation, each owner may use the work or license the work, provided that the royalties are shared among the joint owners. Assignment of the copyright requires the consent of all joint owners.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Yes. Copyrights can be registered in China even though the copyright attaches automatically upon creation.

Copyright registration is *prima facie* evidence of ownership of a copyright. In a copyright infringement action, the rights holder may use a copyright registration to certify his/her rights, provided that there is no evidence to the contrary.

A copyright notice may be useful evidence of copyright ownership and of the date of authorship. According to the Copyright Law, in the absence of evidence to the contrary, the author of a work will be the individual, legal person, or other organisation whose name is affixed to that work. Therefore, a copyright notice can create a presumption that the named person is the work's author and puts third parties on notice. However, copyright still exists without such notice. Failure to display such notice does not affect the existence of copyright in a work.

3.4 What steps should you take to validly transfer, assign or license copyright?

Copyright assignments must be in writing and signed by or on behalf of the copyright owner.

The law requires exclusive licences to be in writing but is silent on non-exclusive licences. However, as a practical matter, all licences should be in writing.

The copyright assignment agreement or copyright licence agreement may be registered with the Copyright Administrative Department, which creates an official record of such transaction. The benefit of this registration is that the registration is evidence of the licence and the parties' relationship.

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights cannot be transferred, assigned or licensed.

4. Infringement

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) are infringed. There are two types of infringement: primary and secondary.

4.1 What acts constitute primary infringement of copyright?

Primary infringement occurs where a person performs any of the exclusive rights protected under copyright law (see point 2.3) without authorisation of the owner. These acts include:

- Copying
- Distributing copies of work to the public
- Renting or lending cinematographic works, works created by means similar to cinematography, or computer software to the public
- Displaying works of fine art or photographic work to the public
- Performing a work in public
- Projecting works of fine art, photographic works, cinematographic works, or works created by means similar to cinematography to the public
- Broadcasting a work to the public
- Disseminating a work to the public via an information network
- Fixing work in a medium by cinematographic or similar means
- Making an adaptation of a work
- Translating a work into another language
- Preparing a compilation of a work.

Primary infringements are strict liability offences. This means that there is no need to show that the alleged infringer had knowledge of another's right, or the intent to infringe. Knowledge or intent is only relevant in the calculation of damages or the determination of remedies.

4.2 What acts constitute secondary infringement of copyright?

Secondary infringement is not explicitly discussed in the Copyright Law. The legal basis for secondary infringement lies in the doctrine of contributory liability, which is found in the General Principles of the Civil Law and the Tort Liability Law. Secondary infringement arises when a person materially contributes to, facilitates, or induces infringers to engage in primary infringement. Primary infringement is therefore a necessary precondition for secondary infringement. The secondary infringer must also know or have reason to know of the primary infringement.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of exceptions to copyright provided in the Copyright Law. There are a wide variety of exceptions designed for specific situations. The exceptions permit certain uses of protected works without authorisation or remuneration. However, the author's name and the work's title should still be specified. The exceptions are as follows:

Exceptional Use
Private study, research, or personal enjoyment
This exception provides that using protected works for private study, research or personal enjoyment is not subject to copyright. However, commercial uses are not covered, and the amount of the protected work used should be limited.
Exceptional Use
Introduction, commentary, or criticism
Citing or quoting a published work for the purpose of introduction, criticism, or commentary on a particular issue or question is permitted. This exception is essential for academics.
Exceptional Use
News reporting
Media outlets need to be able to cite or reference protected works to perform their duties. This exception protects the public's right to understand current events.
Exceptional Use
Publication or broadcast of articles on political, economic, or religious topics
The scope of this exception is limited to articles on political, economic, or religious issues. These articles must have been published by another media outlet (such as a newspaper, periodical, television station, etc.). This exception does not apply if the author explicitly prohibits the reprinting or rebroadcasting of his or her work.
Exceptional Use
Publication or broadcast of public speech
This applies to speeches delivered in public. This exception does not apply if the author explicitly prohibits the reprinting or rebroadcasting of his or her work.

Exceptional Use
Education or scientific research
This applies only to published works. Translations or limited amounts of reproduction are allowed. No further distribution is allowed.
Exceptional Use
Official use by government agencies
This exception only applies to published works. The amount of the protected work used should be limited.
Exceptional Use
Library archival
Libraries, museums, or art galleries may reproduce protected works for archival purposes.
Exceptional Use
Free performance
This exception applies to published works. The performance must be free of charge and the performer may not benefit from the performance.
Exceptional Use
Reproduction of exposed or exhibited artwork
Artwork is that exhibited or otherwise displayed in public may be copied, painted, photographed or recorded.
Exceptional Use
Translation of literary works into a Chinese minority's language
This exception only applies to published works. Also, the work must have been created in Chinese by a Chinese citizen, legal person or other organisation.
Exceptional Use
Publication of works in Braille
This exception only applies to published works and allows the publication of works in Braille.

The Copyright Law also includes compulsory licences for certain uses of copyrighted works. These compulsory licences enable certain individuals to use protected works without the authorisation of the copyright owner in exchange for a certain fee. Some of these compulsory licences include:

Licensed Use
Reprinting
This licence only applies a when newspaper or journal reprints works already published in another newspaper or journal. Other media outlets may reprint the original work or publish excerpts without the rights holder's authorisation. This licence does not apply if the author explicitly prohibits the reprinting or rebroadcasting of his or her work.
Licensed Use
Sound recording
This only applies to musical works that are lawfully recorded by another producer. A sound recording producer may utilise a protected musical work to create a new sound recording without the rights holder's authorisation. This licence does not apply if the author explicitly prohibits the reprinting or rebroadcasting of his or her work.
Licensed Use
Broadcasting published work
This only applies to published works. Radio or television stations may rebroadcast a protected work without the rights holder's authorisation. This licence does not apply to cinematographic works or works created by similar means.
Licensed Use
Broadcasting published sound recordings
This only applies to published sound recordings. Radio or television stations may broadcast protected sound recordings without the rights holder's authorisation.
Licensed Use
Inclusion in education textbooks
This only applies to published works. This licence permits the usage of certain works in compilations for textbooks. This licence is usually limited to portions of protected works and applies to short literary works and musical works, individual pieces of fine art, and photographic works. This exception does not apply if the author explicitly prohibits the reprinting or rebroadcasting of his or her work.

Licensed Use
Inclusion in coursework for educational purposes
<p>This only applies to published works.</p> <p>This licence permits the use of segments of protected work to create course materials for educational purposes.</p> <p>However, any materials may only be transmitted via information networks to specific students.</p>
Licensed Use
Disseminating certain works across information network to rural areas
<p>This only applies to works where the author is a Chinese citizen, legal person, or other organisation. Also, the work must be published and relate to agriculture/ husbandry, disease prevention and treatment, disaster prevention and reduction, or other work that satisfies basic cultural needs.</p> <p>Works under this licence may only be transmitted via information networks.</p> <p>To utilise this licence, the person disseminating the work must give notice to the rights holder. The rights holder has 30 days to object to such use.</p> <p>The person disseminating the work should also not benefit either directly or indirectly from such use.</p>

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The Copyright Law does not prohibit hyperlinking to or framing copyrighted work if the work is lawfully uploaded to a server. Such acts do not constitute “dissemination via information network” and do not infringe a rights holder’s exclusive right to disseminate the work via an information network (the Information Network Communication Right).

The Information Network Communication Right is derived directly from the right of communication to the public found in Article 8 of the WIPO Copyright Treaty. Communication to the public refers to the first expression of a work rather than subsequent reiterations or re-expressions. The first act publicises the work. This act may include uploading a work on an open server for public access. Linking to or framing links to protected material merely proliferates the original work by referencing it but does not “disseminate” the work because there is no reproduction or copying.

As an extension of this principle, Chinese law prohibits providers from caching copyrighted work on their servers when hyperlinking or framing. Caching is considered infringement of the right to reproduction since caching is a process that necessitates temporal copies.

Although hyperlinking to or framing protected work is generally permitted, there are instances where such acts could violate certain competition laws. If there is an economic benefit derived from such exploitation, such as advertising fees, and if the hyperlinking or framing largely replaces the original work, legal liability may arise.

4.5 Is a licensee of copyright able to bring an infringement action?

Under the Copyright Law, copyright infringement is actionable by the copyright owner. However, the Copyright Law is silent on a licensee’s authority to bring an infringement action.

In practice, exclusive licences imply the right of the licensee to bring an infringement action (unless otherwise stated in the licence). Non-exclusive licensees may only bring an infringement action if the copyright owner expressly grants such right.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The Copyright Law provides the following remedies for rights holders, which a court may order:

- Damages
- Injunctions
- Preliminary injunctions (including orders to cease infringement, and property preservation measures, which can be obtained prior to initiating a copyright lawsuit)
- Mitigation of adverse effects
- Issuance of an apology.

The Civil Procedure Law provides rights holders with interim injunctions (including order to cease infringement and property preservation measures during a copyright lawsuit).

5.2 Are there any specific remedies for online copyright infringement?

If an internet service provider (ISP) displays infringing material on its website, rights holders can utilise the notice-and-takedown mechanism in Chinese laws and regulations. The relevant provisions are Article 36 of the Tort Liability Law and Article 14 of the Regulations on Protection of Information Network Communication Right. The procedure is as follows:

- Rights holder discovers infringing material on an ISP's website
- Rights holder notifies the ISP to remove the specific infringing material from the website
- The ISP removes or blocks access to the infringing materials.

If the ISP does not respond after receipt of notice, the rights holder may seek an injunction from a court ordering the ISP to remove or block access to the infringing material.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal violations of copyright law. The main offences are for unauthorised reproduction, distribution, or sale a copyrighted works. Dissemination of work via an information network may also be criminal if certain conditions are met. The penalty for committing a criminal copyright offence is generally either a fine and/or imprisonment.

If a company commits a criminal copyright offence and an individual officer is shown to have consented to committing such offence, that officer can also be individually liable for

the crime. In this circumstance, the company may incur a fine up to three times what the officer is fined.

Criminal offences require intent or knowledge. The damage thresholds for each offence also vary. Each offence involves different penalties.

Crime
Unauthorised reproduction or distribution of copyrighted works.
Requisite intent
Infringer knew or had reason to know that it was infringing another's copyright; and Infringer intended to profit from the infringement.
Damage Thresholds
Any of the following would constitute a crime: <ul style="list-style-type: none"> • The illegal gains total at least RMB 30,000, • The illegal turnover totals at least RMB 50,000, or • There are at least 500 unauthorised reproductions. Any of the following would constitute a severe crime: <ul style="list-style-type: none"> • The illegal gains total at least RMB 150,000 • The illegal turnover is at least RMB 250,000, or • There are at least 2,500 unauthorised publications.
Penalties
Penalties for a crime: up to three years' imprisonment or criminal detention, and/or a fine. Penalties for a severe crime: three to seven years' imprisonment and a fine.
Crime
Unauthorised dissemination of copyrighted works via information networks.
Requisite intent
Infringer knew or had reason to know that it was infringing another's copyright; and Infringer intended to profit from the infringement.
Damage Thresholds
Any of the following would constitute a crime: <ul style="list-style-type: none"> • The illegal gains total at least RMB 30,000, • The illegal turnover totals at least RMB 50,000, or • There are at least 500 unauthorised reproductions.

Any of the following would constitute a severe crime:
<ul style="list-style-type: none"> • The illegal gains total at least RMB 150,000 • The illegal turnover is at least RMB 250,000, or • There are at least 2,500 unauthorised publications.
Penalties
Penalties for a crime: up to three years' imprisonment or criminal detention, and/or a fine.
Penalties for a severe crime: three to seven years' imprisonment and a fine.
Crime
Unauthorised publication of a book.
Requisite intent
Infringer knew or had reason to know that it was infringing another's neighbouring right to typographical arrangements; and
Infringer intended to profit from the infringement.
Damage Thresholds
Any of the following would constitute a crime:
<ul style="list-style-type: none"> • The illegal gains total at least RMB 30,000, • The illegal turnover totals at least RMB 50,000, or • There are at least 500 unauthorised reproductions.
Any of the following would constitute a severe crime:
<ul style="list-style-type: none"> • The illegal gains total at least RMB 150,000 • The illegal turnover is at least RMB 250,000, or • There are at least 2,500 unauthorised publications.
Penalties
Penalties for a crime: up to three years' imprisonment or criminal detention, and/or a fine
Penalties for a severe crime: three to seven years' imprisonment and a fine.
Crime
Unauthorised reproduction or distribution of a sound recording or video recording.
Requisite intent
Infringer knew or had reason to know that it was infringing another's neighbouring right to sound recording or video recording; and
Infringer intended to profit from the infringement.

Damage Thresholds
Any of the following would constitute a crime:
<ul style="list-style-type: none"> • The illegal gains total at least RMB 30,000, • The illegal turnover totals at least RMB 50,000, or • There are at least 500 unauthorised reproductions.
Any of the following would constitute a severe crime:
<ul style="list-style-type: none"> • The illegal gains total at least RMB 150,000 • The illegal turnover is at least RMB 250,000, or • There are at least 2,500 unauthorised publications.
Penalties
Penalties for a crime: up to three years' imprisonment or criminal detention, and/or a fine
Penalties for a severe crime: three to seven years' imprisonment and a fine.
Crime
Reproduction or sale of a work of fine art using forged signature.
Requisite intent
Infringer knew or had reason to know that it was infringing another's copyright; and
Infringer intended to profit from the infringement.
Damage Thresholds
Any of the following would constitute a crime:
<ul style="list-style-type: none"> • The illegal gains total at least RMB 30,000, • The illegal turnover totals at least RMB 50,000, or • There are at least 500 unauthorised reproductions.
Any of the following would constitute a severe crime:
<ul style="list-style-type: none"> • The illegal gains total at least RMB 150,000 • The illegal turnover is at least RMB 250,000, or • There are at least 2,500 unauthorised publications.
Penalties
Penalties for a crime: up to three years' imprisonment or criminal detention, and/or a fine.
Penalties for a severe crime: three to seven years' imprisonment and a fine.

6. Enforcement

Crime
Sale of infringing articles.
Requisite intent
Infringer knew or had reason to know that it was infringing another's copyright; and Infringer intended to profit from the infringement.
Damage Thresholds
The illegal gains totals at least RMB 100,000
Penalties
Up to three years' imprisonment or criminal detention, and/or a fine.

5.4 Is there a time limit for bringing a copyright infringement claim?

The statute of limitations to bring copyright infringement claim is two years from the date of discovery. This date is the date the rights holder is or should have been aware of the infringement. However, if the rights holder brings a lawsuit after expiration of this two-year period, but the infringement is still ongoing when the suit is filed, the court will order the infringer to cease infringement and compensate the rights holder for damages suffered over the preceding two years.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

Yes. In China, the general rule is that the losing party pays the costs and fees of the prevailing party. These include court fees and the rights holder's reasonable expenses incurred in stopping the infringement. Courts often support rights holders' claims to recover investigation costs, notarisation fees and attorney fees as long as the amount is reasonable.

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

In China, there are four judicial levels: basic courts, intermediate courts, high courts, and the Supreme People's Court. Generally, a case will reach its final judgment after being heard by two courts (or two **instances**). In deciding which court has original or **first instance** jurisdiction over a copyright case, the value and complexity of the matter is key.

High courts have first instance jurisdiction over copyright cases involving claims greater than RMB 200 million, or claims greater than RMB 100 million where the case involves a foreign element. A foreign element is where either party is a foreign citizen, legal person or other organisation.

Basic courts only have jurisdiction over copyright disputes if they are designated by the Supreme People's Court. Those that are designated have first instance jurisdiction over cases where the claim is under RMB 5 million, and cases where the claim is between RMB 5 million and RMB 10 million but both parties are domiciled in the same place such that the same intermediate or high court would have jurisdiction. The Supreme People's Court has designated 165 basic courts to hear first instance copyright cases.

Copyright cases with claims between RMB 10 million and RMB 100 million are subject to the first instance jurisdiction of intermediate courts. However, first instance jurisdiction for such cases in Beijing, Shanghai and Guangzhou are reserved with the newly established intellectual property courts in those cities.

There is no cap on the amount of damages or costs that can be awarded by a court at different levels. The court can decide damages according to the actual losses suffered by the rights holder. However, if actual losses are hard to determine, the court may award damages according to illegal gains. If the illegal gain is also hard to determine, the court may award statutory damages up to RMB 500,000.

6.2 Are there any other ways in which you can enforce copyright?

Administrative proceedings

A copyright holder may request the copyright bureau (cultural market enforcement team) to seize infringing copies of works in the market. Upon the rights holder's request, the administrative agency may seize and destroy

infringing articles, and seize materials, tools, equipment, etc. used for producing infringing products. The rights holder may also request that customs seize infringing products being imported into China or exported overseas.

Criminal proceedings

Criminal proceedings, although rare, can be brought by the rights holder against an infringer on the grounds described in 5.3 above. This would be pursued through the courts.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

In China, there are a few collective rights management agencies that grant licences for rights holders. Please see more details in point 6.4. There are no government agencies that promote copyright in China.

The National Copyright Administration of China (**NCAC**) and its local copyright bureaus are the official government bodies responsible for administrative management and enforcement of copyright in China.

The NCAC is responsible for:

- Formulation of national copyright policies, administration of copyright registrations and compulsory licences
- Negotiation of foreign copyright treaties
- Investigation into material infringement
- Promoting the use of copyrighted software.

In practice, the local copyright bureaus often set up cultural market enforcement teams to monitor piracy in the market. These teams have the authority to investigate infringing activities and punish infringers.

The Public Security Bureau (**PSB**) will target criminal activity (see point 5.3) if it meets the proper thresholds. The PSB may act proactively or reactively upon receiving reports from rights holders or rights management agencies.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

The consent of the rights holder is typically required before using a protected work. However, rights holders may not have the resources to negotiate and issue all individual licence requests. Therefore, rights holders may participate in collection schemes by signing up as members of collective management organisations. As members, these

rights holders either transfer certain rights to the society, which then administers the rights for them, or appoint the society as their agent.

The key collecting societies in each sector are as follows:

Agency
China Written Works Copyright Society
Who it represents
Writers
Agency
Music Copyright Society of China
Who it represents
Composers, songwriters, music publishers
Agency
China Audio-video Copyright Association
Who it represents
Producers and publishers of sound recordings and video recordings
Agency
Images Copyright Society of China
Who it represents
Photographers
Agency
China Film Copyright Association
Who it represents
Producers

6.5 Are copyright levies payable? By whom, and in what circumstances?

There is no copyright levies mechanism in China.

7. Copyright Reform

7.1 What do you consider to be the top two recent copyright developments?

Chinese Government to punish serious online copyright infringement

The Copyright Law provides administrative protection to copyright holders. Under the law, the Chinese Government may impose a fine on those who seriously infringe another's copyright. Recently, the Government has been treating online infringement more seriously by enforcing copyrights more stringently online.

On 26 June 2014, the Shenzhen Market Supervision Administration issued a RMB 260 million fine to QVOD Technology Company (QVOD). This was the largest punitive fine ever issued for online piracy in China and reflects the Chinese Government's resolve in enforcing copyright law.

QVOD has over 300 million users in China and provides on-demand movie and television streaming. However, none of the content offered by QVOD was authorised by the copyright holders. QVOD was charged with distributing hundreds of millions of pirated motion pictures to its subscribers. The Shenzhen local copyright bureau investigated for three months before rendering a decision. According to an official, the fine was calculated based on triple QVOD's illegal gains.

Upon receiving notification of the fine, QVOD filed an administrative review with the Copyright Bureau of Guangdong Province but was rejected. Then QVOD filed an administrative lawsuit before the Shenzhen Intermediate People's Court. The trial was held on 30 December 2014 and the court did not render a decision until late 2015.

This case marks a milestone in China's efforts to fight online piracy. The Chinese Government continues to provide strong copyright protection to the movie industry and endeavours to significantly reduce copyright infringement through administrative mechanisms, which it hopes will deter infringers.

Chinese courts support increased damages for copyright infringement cases

Recently, copyright holders have been obtaining greater damages for copyright infringement claims than before because Chinese courts have raised the available statutory damage in some cases.

In a copyright infringement case between two internet companies (*Shanghai Xuanting v Beijing Zongheng Network*), the Shanghai No. 2 Intermediate People's Court awarded damages of RMB 3 million to the plaintiff. The work

in dispute in this case was an online novel. The plaintiff acquired copyright of the novel from the author. Without the plaintiff's authorisation, the defendant uploaded the work on its own website and made the work available to the public. The first instance judgment was affirmed by the Shanghai High People's Court. The decision is now final.

The actual damages in this case were not high. However, the decision was a major breakthrough because the judgment awarded was far beyond the statutory damages provided in the Copyright Law (see point 6.1). According to the Copyright Law, if the copyright holder's actual loss and the infringer's illegal gain are hard to determine, a court may award statutory damages up to RMB 500,000. In this case, the court held that the plaintiff's damages were over RMB 500,000 based on the evidence, even though the exact amount was hard to determine. After considering the economic value of the work, the defendant's infringing activities, the duration of infringement, and the defendant's bad faith, the court awarded damages of RMB 3 million.

This case is a good indicator that Chinese courts may raise statutory damages for copyright infringement to better protect copyright holders' rights and interests.

7.2 What do you consider will be the top two copyright developments in the next year?

Third revision of Copyright Law

On 16 June 2014, the Legislative Affairs Office of the State Council circulated the third revision of the Copyright Law (Revised Draft for Submission) for public comments. The NCAC has published the draft for comments twice before, on 31 March and 6 July 2012, respectively. A few main revisions are listed below:

- Introduction of the concept of **neighbouring rights**. The current Copyright Law provides protection to typographical arrangements, performances, audio and video recordings, and broadcasts, but does not specifically define "neighbouring rights"
- Video recordings are removed from "neighbouring rights" and would now be protected as "audiovisual works" under copyright
- Works of applied art are protected for 25 years
- Model works are renamed as "three-dimensional works"
- The right to alter or authorise others to alter a work has been removed
- The right to create compilations has been removed
- A new chapter of technological protection measures and rights management information has been added

8. Neighbouring Rights

- Statutory damage has been increased to RMB 1 million
- Punitive damages (double or triple) are possible for repeated bad faith infringement.

This revision reflects China's initiative to establish a more comprehensive copyright system. The purpose of this revision is to meet the demands of a rapidly developing Chinese economy and culture. The passage of this new revision would be a milestone.

Regulations on copyright protection of folklore

China is an ancient civilization with many traditions and a rich cultural history. Chinese folklore is the pinnacle of the Chinese classical literature and includes folklore stories, mythology, songs, poetry, dances, puppetry, sculpture, architecture, etc.

The Copyright Law authorises the State Council to formulate regulations to protect folklore. After years of discussion, the NCAC finally published the first draft of the Regulations on Copyright Protection of Folklore on 2 September 2014 for public comments. This regulation is aimed to protect folklore, promote communication of folklore, and encourage its development. A few important points are listed below:

- The ownership of folklore belongs to the specific ethnic group or community who creates it
- The copyright holder of folklore enjoys the right to be identified as its author, to protect it from distortion, to reproduce, distribute, perform, adapt, and communicate it to the public
- The duration of folklore protection is perpetual.

The NCAC is receiving comments from various interested parties. The draft will be further revised before it is put into effect. The passage of the Regulations will be a significant development in the protection of folklore in China.

The Copyright Law states that certain types of creative works do not qualify for copyright but are instead eligible for neighbouring rights. These works are typographical arrangements, performances, audio and video recordings, and broadcasts. Neighbouring rights consist of a narrower range of copyrights and may vary depending on the type of work.

8.1 Neighbouring rights by type

The neighbouring rights associated with typographical arrangements include the right to authorise or prohibit another's use of layout designs contained in published works.

The neighbouring rights of performers are:

- To be identified as the performer
- To protect his or her performance from distortion
- To transmit the performer's live performance via live broadcast and public transmission
- To make an audio or visual recording of the performance
- To reproduce and/or distribute an audio or visual recording of the performer's performance
- To disseminate the performer's performance via an information network.

The exclusive rights of a producer of an audio or visual recording are:

- To reproduce the audio or visual recording
- To distribute the audio or visual recording, ie copy the recordings
- To rent the audio or visual recording, ie authorise others to temporarily use the recordings
- To disseminate the audio or visual recording via an information network.

The exclusive rights of broadcasters are:

- To rebroadcast radio or television programmes
- To record radio or television programmes that they have transmitted through an audio or visual medium, and to reproduce such media.

8.2 Terms of neighbouring rights

The term for typographical arrangements is 10 years. The term of protection ends on 31 December of the tenth year after the first publication date of the book or periodical that uses the typographical arrangement. years and ends on 31 December of the 50th year after the first broadcast.

Performer's neighbouring rights vary. The performer's moral right of attribution and the right to protect the performance from distortion are perpetual. The term for a performer's other

economic rights is 50 years. The term ends on 31 December of the 50th year after the first performance.

The term of a producer's neighbouring rights to audio or visual recordings is 50 years and ends on 31 December of the 50th year after the first recording is created.

The duration for broadcasters' neighbouring rights is 50 years and ends on 31 December of the 50th year after the first broadcast.

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Denmark

Bech Bruun, Niels M Andersen



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in Denmark is the Consolidated Danish Act on Copyright, no. 1144 of 23 October 2014 (**DCA**). The current version of the DCA is also applied to works created before the DCA came into force. However, if a work would enjoy a longer duration of protection under the rules applicable at the time when the work was created, the former rules apply with respect to the duration of protection.

Although Denmark is not a common law legal system, case law is still used to interpret and set precedents in law. As a result, judicial decisions contribute to the sources of copyright law in Denmark.

As a member of the European Union, the interpretation and application of Danish legislation by the judiciary must be read in accordance with European Directives and Regulations which have direct effect. Further, from time to time the Danish Courts and other EU national courts refer questions of law to the European Court of Justice, whose decisions are binding on national courts. As a result, Danish copyright law is occasionally added to and updated from both internal and external sources.

2. Subsistence of Copyright

2.1 What type of works can be protected by copyright?

The categories of work that can be covered by copyright are literary and artistic works, (including those expressed in both writing and speech as a fictional or a descriptive representation, musical or dramatic works, cinematographic or photographic work, works of fine art, architecture, applied art). Furthermore, Danish copyright law protects the so-called neighbouring rights. The provisions of neighbouring rights stipulate that creations by certain performing artists and producing artists enjoy protection similar to actual copyrights, although in some aspects more limited. See below for a description of neighbouring rights.

The three categories can be summarised as follows:

Literary works

These are any works which are written or spoken (eg novels, short stories, professional articles, poems, letters, speeches, interviews, works expressed in Morse code, shorthand writing).

Maps, drawings and other works of a descriptive nature executed in graphic or plastic form are considered as literary works.

Works in the form of computer programs are considered as literary.

A radio programme which is not a dramatic work is considered as literary.

Artistic works

These are graphic works, music, dramatic works, film works, photographs, sculptures or collages irrespective of quality etc., a work of architecture (be it a building or a model of a building) or a work of applied art. A graphic work is broad in scope and can be, amongst other things, a painting, drawing, mosaic, diagram, engraving or etching.

Applied art – a work of applied art must have some aesthetic appeal, for example stained-glass windows or wrought-iron gates.

Dramatic works – a dramatic work includes a work of dance or mime, an opera, ballet, musical, a script for a play, a dance routine that has been choreographed or a screenplay of a book for film.

Musical works cover any musical composition, including notes etc. There is copyright to the sound recording of musical works but that is a separate and distinct right (see below).

Music is defined as a combination of sounds for listening to – it is not the same as mere noise.

Film works – a film is a recording from which a moving image may be produced (including TV programmes and movies) and importantly includes soundtrack, manuscripts and other works created for the purpose of creating the film.

Neighbouring rights

Neighbouring rights appear from chapter five in the DCA. These are not works within the meaning of the DCA but enjoy similar protection as the actual works. The neighbouring rights are:

- Protection of performing artists
- Sound recordings
- Picture recordings
- Broadcasts
- Photographical pictures
- Catalogues
- Press releases.

Performing artists are granted protection under the DCA if the performance in question is a performance of a literary or

artistic work, regardless of whether the work is still copyright-protected, and if the performance is of artistic character.

The protection of sound and picture recordings are designed to cover both recordings of sounds and pictures which are not based on underlying literary and artistic works, and recordings of copyrighted works that are literary or artistic, dramatic or musical works.

Broadcasts are the electronic transmission of visual images, sounds or other information which is transmitted for simultaneous reception by members of the public.

The protection of photographical pictures covers all photographical pictures irrespective of whether the image or setting of the picture is also a work within the meaning of the DCA.

The protection of catalogues covers a table, database or the like, in which a great number of items of information has been compiled, or which is the result of a substantial investment (in time or money). This protection extends to a reproduction or making available to the public of insubstantial parts of the contents of catalogues if that availability is made repeatedly and systematically so as to equal acts which conflict with normal exploitation of the products or unreasonably prejudice the legitimate interests of the producer.

Press releases supplied under contract from foreign news agencies or from correspondents abroad may not without the consent of the recipient be made available to the public through the press, the radio or in any other similar manner until 12 hours after they have been made public in Denmark.

2.2 What is required for works to qualify for copyright protection?

A work within the meaning of the DCA (literary or artistic) may be protected by copyright if it is original. A work is original if the author (see point 3.1 for how to decide on who is the author) has created the work through their own skill, judgement and individual effort and has not copied from other works. Save for works of applied art, it is not requisite that the work is of artistic merit. It is also not necessary for the whole of a work to be original. In general, the threshold for originality is low in Denmark.

Neighbouring rights are protected as such in that the originality requirement does not apply to neighbouring rights. However, a creation may also enjoy copyright protection as a work (literary or artistic) if the creation in question is original.

As a general rule Denmark provides copyright protection if the author is a national of, or the work was first published in, Denmark or a state which is a signatory to one of the various international conventions which Denmark is a party to.

2.3 What rights does copyright grant to the rights holder?

The DCA sets out the rights subsisting in copyright works that are the exclusive rights of the rights holder (before any licences are granted). They include the rights to:

- Reproduce a work; and
- Make it available to the public.

This is whether in the original or in an amended form, in translation, adaptation into another literary or artistic form or into another technique.

Any direct or indirect, temporary or permanent reproduction, in whole or in part, by any means and in any form, is considered as reproduction. The recording of the work on devices that can reproduce it is also considered as a reproduction.

The work is made available to the public if: (i) copies of the work are offered for sale, rental or lending or distribution to the public in some other manner; (ii) copies are exhibited in public; or (iii) the work is performed in public.

Rights holders also have the moral rights described in question 2.4.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In Denmark the following moral rights are provided for by the DCA:

- Paternity right: the right to be identified as the author of a copyright work
- Integrity right: the right to object to derogatory treatment of your copyright work.

Moral rights are applicable to literary and artistic works.

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works varies according to the type of work and the date of creation. In general, for works created on or after 1 July 1995 the duration of copyright protection is as follows:

Category of work
Literary and artistic works
Duration
Copyright expires 70 years from the end of the calendar year in which the author dies.
Where a work has a joint author/co-author, 70 years from the end of the calendar year in which the last known author dies.
Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was made or made available to the public.
For film works, the copyright lasts for 70 years after the year of death of the last of the following persons to survive:
<ul style="list-style-type: none"> • the principal director; • the author of the script; • the author of the dialogue; • the composer of music specifically created for use in the film work.
Category of work
Neighbouring rights
Duration
Neighbouring rights expire, as a main rule, 50 years from the end of the calendar year in which the relevant right was established.
However, if a sound recording is published lawfully the right expires 70 years from the end of the calendar year in which it was first published.
The protection for catalogues lasts until 15 years have elapsed after the end of the year in which the product was produced.
Press releases may not be made available to the public through the press, the radio or in any other similar manner until 12 hours after they have been made public in Denmark.

2.6 For how long do moral rights subsist in copyright works?

The moral rights lapse with the expiry of the copyright, 70 years after the death of the author. Once the copyright has expired, however, a literary or artistic work may not be

3. Ownership

altered or made available to the public contrary to moral rights described above in question 2.4 if cultural interests are thereby violated.

3.1 Who is the first owner of a copyright work?

The first owner of copyright is the person creating the work (the author). Copyright to a work cannot originate in a legal person; however, a legal person can be assigned the copyright. Where work is made by an employee in the course of his/her employment, the copyright passes to the employer to the extent necessary for the normal business activity of the employer.

Where a computer program is created by an employee in the execution of his/her duties or following the instructions given by his/her employer, the copyright in such a computer program passes to the employer.

In addition to the rights of the author, the DCA chapter five stipulates a number of rights that coexist with the author's rights, the so-called neighbouring rights. Below is a list of who owns these rights in relation to various categories:

- Performing artists: the performer who carries out the performance of a literary or artistic work
- Sound and picture recordings: the person or legal entity producing the recordings
- Broadcasts: the broadcasting company (see no 2.1 for the content of this right)
- Photographical pictures: the photographer of the picture
- Catalogues, databases etc.: the person or legal entity who compiled information into a catalogue, database etc.
- Press releases: the foreign news agency that produced the press release.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where there is an assignment of the whole or of part of a work.

To qualify as joint authors it is necessary that the contributions of each author are not distinct. If they are distinct then two works subsist, each with separate copyright.

Joint owners have their own individual rights with respect to the work that can be assigned independently of the other or others, but the consent of all joint authors is required for licensing or use of the copyright work.

4. Infringement

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in Denmark; it arises automatically upon creation of the work. There is no registration system.

A copyright notice may be useful to evidence ownership of copyright and the date of authorship. It creates a presumption that the named person is the author, and puts third parties on notice of the rights, but copyright subsists without such notice and the failure to display such notice does not affect copyright in a work.

3.4 What steps should you take to validly transfer, assign or license copyright?

There are no formal requirements as to the assignment of copyright. An oral agreement of transfer is just as valid as a written one.

A licence of copyright can, in addition to being in writing, be agreed orally or implied. However, best practice will be to have all transfer and licence agreements stipulated in writing.

3.5 Can moral rights be transferred, assigned or licensed?

No. The moral rights can, however, be waived or assigned in respect of a limited use of the work. Such use must be limited in both nature and extent, eg a limited edition of a book.

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed.

4.1 What acts constitute infringement of copyright?

Infringement occurs where a person performs any reproduction of a work or makes it available to the public, whether in the original or in an amended form, in translation, adaptation into another literary or artistic form, or into another technique without the consent of the rights holder. The following acts, amongst others, constitute copyright infringements:

- Copying
- Issuing copies of the work to the public
- Renting or lending the work to the public
- Performing, showing or playing a copyright work in public
- Communicating the work to the public
- Making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation.

4.2 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be carried out in relation to copyright works despite the fact that they might be protected by copyright. The Information Society Directive (2001/29/EC) contains what has been termed a “shopping list” of exceptions and limitations, many of which the DCA has implemented into Danish law. These permitted acts are wide in variety but often relate to very specific scenarios. They include (amongst others):

Act
Making of temporary copies
A copy that is transient or incidental which: <ul style="list-style-type: none">• Is an integral and essential part of a technological process• Has the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary; or• Has no independent economic significance (eg ISPs who use caching).

Act
Personal copies for private use
The making of a copy that is made for the individual's personal and private use and not for ends that are directly or indirectly commercial. Computer programs are exempted from this permission.
Act
Private study
Copying is always allowed for private study.
Act
Criticism or review and reporting current events
Where the copyright work is being used for the purpose of criticism or review. It can be the criticism or review of that copyright work, or another work or performance provided the copyright work has been made available to the public. As for research, an acknowledgement of any copyright work used in a criticism or review is required. No acknowledgement is required when reporting current events, which are always deemed to be permitted acts under DCA.
Act
Quotation
Including where the use is for criticism and review, quotations are a permitted act provided that they relate to a work that has already been lawfully made available to the public. An acknowledgement of a copyright work used is required where a quotation is used.
Act
Parody
Naturally parodies, to some extent, require copying or mixing of another's work. People are allowed to use limited amounts of another's material without the owner's permission. The parody must evoke the existing work whilst being noticeably different from it. It should be noted that parodied work does not excuse defamatory remarks; neither does it preclude the moral right to object to derogatory treatment of a work.

Act
Computer programs
The person who has the right to use a computer program is entitled to produce such copies of the program and to make such alterations of the program that are necessary for that person to use the computer program in accordance with its intended purpose, including for error correction. The same applies to databases with regard to such actions that are necessary for the person to obtain access to the contents of the database and make normal use of it. Furthermore, it is allowed to make a back-up copy insofar as it is necessary for the use of the program.
Act
Reverse engineering
Reproduction of the code of a computer program and translation of its form is permitted where this is indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met: <ul style="list-style-type: none"> • these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorised to do so • the information necessary to achieve interoperability has not previously been readily available to the persons referred to in (i) and • these acts are confined to the parts of the original program which are necessary to achieve interoperability.

4.3 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The CJEU decision in *Nils Svensson v Retriever Sverige* (C-466/12) determined whether linking to or framing links to copyright material without consent is a "communication to the public" and therefore infringes the rights holder's communication to the public exclusive right.

The CJEU emphasised that to be a communication to the public, a link would have to be a communication to a 'new' public, ie a public not in the contemplation of the rights holder when the rights holder published the work. As a result, when a person uploads material to the internet, the

5. Remedies

public communicated to is the internet at large. Therefore, linking to a work freely available on the internet does not communicate that work to a “new” public.

However, where a work is not freely available on the internet, such as where the work sits behind a paywall, the copyright owner cannot be said to have communicated with the internet as a whole, and so linking to that work in a way that circumvents the paywall would, it appears from recent case law, constitute a communication to the public and infringe the rights of the rights holder.

4.4 Is a licensee of copyright able to bring an infringement action?

Under the DCA, an infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action depends on the licence agreement between licensee and licensor.

5.1 What remedies are available against a copyright infringer?

The DCA provides the following remedies for rights holders:

- Interim injunctions (including search orders, freezing orders and pre-action, non-party disclosure)
- Delivery up of infringing articles
- Seizure of infringing articles
- Forfeiture of infringing articles
- An injunction against the infringer
- To elect between either an enquiry as to damages or an account of profits arising from the infringement.

5.2 Are there any specific remedies for online copyright infringement?

Where it appears that a website is displaying infringing material, rights holders can seek an injunction from the court ordering the internet service provider (“ISP”) to block the website. The ISP should be put on notice of the person using their services to infringe copyright before the order is sought.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal acts under the DCA in relation to copyright. The main offences relate to reproduction or making publicly available copies of a copyright work. The sanction for committing a criminal offence in relation to copyright is likely to be a fine; however, in rare cases, a prison sentence might be appropriate.

If an offence is committed by a company and it is proven that an individual officer of the company consented to committing the offence, that officer can also be liable for the criminal act.

Each offence requires a level of intention, knowledge or belief on behalf of the potential culprit, and each carries various penalties:

Criminal Act
Any reproduction of a work or by making it available to the public
Relevant intention, knowledge or belief
The knowledge or reasonable belief (gross negligence) that the copy or making of the copy available to the public is infringing a person’s copyright.

Penalty
For an indictable offence: six years in prison
On summary conviction: one year and six months in prison and/or a fine

5.4 Is there a time limit for bringing a copyright infringement claim?

There is no time limit to bring a claim for breach of copyright. However, the claim might be statute barred after three years pursuant to the Danish statute of limitations. The time begins, as a starting point, from the date the damage is suffered.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In Denmark, the general rule is that the unsuccessful party pays the costs of the successful party. However, this is subject to the very wide discretion of the court who can order otherwise, either at the hearing (known as summary assessment) or after (known as detailed assessment). As a general rule the costs ordered by the courts rarely cover the actual costs for the successful party.

6. Enforcement

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

Copyright claims must be filed before the ordinary Danish city courts.

However, matters where rights to applied art or computer programs are of significance must be filed before the Danish Commercial and Maritime Court.

6.2 Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure by the customs authorities of infringing copies being imported into Denmark.

Criminal proceedings

Criminal proceedings, although rare, can be brought on the grounds described in 5.3 above, and pursued through the criminal courts.

Copyright License Tribunal

An alternative method of bringing proceedings is the Copyright License Tribunal. This is an independent tribunal appointed by the Ministry of Culture. Its main role is to adjudicate in commercial licensing disputes between collecting societies and users of copyright material in their business. It does not deal with copyright infringement cases or with criminal 'piracy' of copyright works.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

The Danish Ministry of Culture is the official government body responsible for copyright in Denmark.

The Danish Ministry of Culture is responsible for:

- Copyright regulation
- Educating businesses and consumers about copyrights and responsibilities
- Supporting IP enforcement.

Although there are no agency bodies that are responsible for promoting copyright, there are various bodies promoting copyright in Denmark, including the Joint Counsel for Copyright (www.samraadetforophavsret.dk).

The Joint Counsel for Copyright is a non-profit organisation for the discussion of issues regarding copyright in Denmark. The Joint Counsel is an informal co-operation between all organisations representing copyright holders in Denmark.

Furthermore there is *RettighedsAlliancen* (The Rights Holder Alliance) in Denmark which looks to enforce online copyright infringements and improve conditions for copyrights online. *RettighedsAlliancen* is a co-operation between the film, music and design industries.

There are no agency bodies that actively enforce copyright. The Danish police will target criminal activity (see 5.3) but it is up to the rights holders or the rights management agencies to spot infringing work and take action.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the rights holder.

However, as a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collecting societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent.

The key collecting societies in each sector are as follows:

Agency
CopyDan
Who it represents
Service organisation for five management societies (Writers, visual art, broadcasting, TV and movies for educational purposes and blank tape remuneration)
Agency
KODA
Who it represents
Society for the rights of composers
Agency
Gramex
Who it represents
Administration of the financial rights of performing artists and record companies

Agency
NCB
Who it represents
Administration and licensing services to composers, lyricists, music publishers and author societies. Licenses to users for the recording, manufacture and distribution of music on physical as well as digital media.
Agency
Motion Picture Licensing Company
Who it represents
Film and TV producers and distributors

6.5 Are copyright levies payable? By whom, and in what circumstances?

Copyright levies are not payable in Denmark where an exception applies, such as the exception for private copying. Private consumers pay blank tape remuneration when purchasing blank media such as CDs, DVDs USB sticks etc. The blank tape remuneration serves as compensation to the rights holders for the private copying allowed under the DCA.

7. Copyright Reform

7.1 What do you consider to be the top two recent copyright developments?

Share with Care campaign

In 2012, the Danish Ministry of Culture, the Telecoms Industry Association, *RettighedsAlliancen* and DI ITEK in unison agreed to launch the campaign Share with Care. This was an educational effort with the purpose of strengthening the partnerships between the interested parties and increasing consumers' legal knowledge.

The ambition of strengthening sustainable cultural usage through positive influencing of norms has made Share with Care an unusual informational campaign – and at the same time an effort which works on behalf of the user and embraces the opportunities of digitisation.

In 2014, as a part of the Share with Care campaign, a *Guidebook of Digital User Behaviour* was launched. The *Guidebook of Digital User Behaviour* is for the industries dealing with media and cultural consumers' behaviour on the internet, and the book:

- Gives advice and recommendations on how to work with and influence user behaviour and attitudes
- Communicates new insight into, and knowledge about, user behaviour that can work as a platform for future activities.

The purpose of the guidebook is to share what the Share with Care campaign has taught consumers about digital culture and the methods that can bring about improved behaviour.

The guidebook can be found in English on the Share with Care webpage:

http://www.sharewithcare.dk/media/20782/swc_haandbog_final_eng_lores.pdf

Code of Conduct for handling decisions by the courts of law or authorities concerning blocking of websites due to rights infringements

Following a request from the Danish Ministry of Culture and as one of a number of measures introduced to reduce the scope of rights infringements on the internet, the members of the Telecommunications Industry Association in Denmark (TI) have adopted a Code of Conduct (CoC) which aims to simplify and promote the implementation of decisions on Domain Name System (DNS) blocking.

The purpose of the CoC is to ensure that decisions concerning DNS blocking of websites directed at a single TI member (or possibly another ISP domiciled in Denmark) are implemented, via TI in a one-stop-shop procedure, within

seven working days by TI members, their subsidiaries or other affiliated enterprises.

The starting point is thus that a rights holder (for example represented by *RettighedsAlliancen*) goes to court with a claim that a particular website should be blocked, for example, due to an infringement of rights. If a court of law or other public authority finds in favour of the claimant and orders a particular member of TI (or another Danish ISP) to implement DNS blocking, the rights holder communicates this decision to the TI secretariat. TI then immediately communicates the decision to the TI members which, on this basis, arrange for DNS blocking as soon as possible and within seven working days of TI having communicated the decision at the latest.

7.2 What do you consider will be the top two copyright developments in the next year?

Digital Single Market Strategy for Europe

On 6 May 2015, The European Commission released its *Digital Single Market Strategy for Europe*. The Commission's stated aim is to "make the EU's single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one".

Copyright forms a central component of the strategy (but perhaps not as central as many had hoped) in the following areas:

- The harmonisation of copyright law between Member States
- The introduction of cross-border e-commerce rules
- Bringing an end to 'unjustified' geo-blocking (the practice of denying consumers access to a website based on their location, or re-routing them to a local website often with different pricing)
- Strengthening the copyright enforcement system against commercial-scale infringements.

The Strategy sets the Commission's agenda for EU-level copyright reform over its term and is worth keeping a close eye on.

GS Media

Whilst the CJEU in *Nils Svensson v Retriever Sverige* (C-466/12) decided that linking to or framing links to copyright material without consent does not constitute a "communication to the public" and therefore an infringement of the rights holder's communication to the public exclusive right, the case didn't decide the question of whether this would still be the case where the works linked to are themselves unlawfully uploaded (ie uploaded without the copyright holder's consent).

This is the basis of three questions referred to the Court of Justice of the European Union in Case C-160/15 *GS Media*.

The reasoning behind the decision in *Svensson* – that to be a communication to the public a link would have to be a communication to a ‘new’ public (ie a public not in the contemplation of the rights holder when the rights holder published the work) – would suggest that linking to an unlawful copy of a copyright work would be an infringement of copyright in the work, as it constitutes a communication to a public which the rights holder had not envisaged. Whatever decision the Court comes to, it is likely to prove controversial in this developing area of law.

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France

PDGB, Benjamin Jacob



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in France is the Intellectual Property Code, enacted by a statute of 1 July 1992. At the time of the enactment of the Code, French Copyright law was ruled by an Act of 11 March 1957, modified by the Act of 3 July 1985. Their dispositions were incorporated in the Intellectual Property Code in 1992.

As a member of the European Union, the interpretation and application of French legislation by the judiciary must be read in accordance with European Directives and Regulations which have direct effect. Further, the French Courts and other EU national courts often refer questions of law to the European Court of Justice, whose decisions are binding on national courts. As a result, French copyright law is frequently added to and updated from both internal and external sources.

France is also party to several bilateral and international conventions, such as the Berne Convention of 9 September 1886 for the protection of literary and artistic works; the Universal Geneva Convention of 6 September 1952 on author's rights; the Rome Convention of 26 October 1961 on

the protection of performers, producers of phonograms and broadcasting organisations; the Geneva Convention of 29 October 1971 for the protection of producers of phonograms against unauthorised duplication of their phonograms; and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

All types of intellectual work may be protected by copyright law by virtue of their creation, without any formal requirements.

Article L.112-2 of the French Intellectual Property Code lists a non-exhaustive list of creations that shall be considered as intellectual creations:

- Books, pamphlets and other literary, artistic and scientific writings
- Lectures, addresses, sermons, pleadings and other works of such nature
- Dramatic or dramatic-musical works
- Choreographic works, circus acts and feats and dumb show works, the acting form of which is set down in writing or in other manner
- Musical compositions with or without words
- Cinematographic works and other works consisting of sequences of moving images, with or without sound, together referred to as audio-visual works
- Works of drawing, painting, architecture, sculpture, engraving and lithography
- Graphical and typographical works
- Photographic works and works produced by similar techniques to photography
- Works of applied art
- Illustrations, geographical maps
- Plans, sketches and three-dimensional works relative to geography, topography, architecture and science
- Software, including the preparatory design material
- Creations of the seasonal industries of dress and articles of fashion.

2.2 What is required for works to qualify for copyright protection?

As mentioned in question 2.1, all intellectual creations may be protected by copyright, whatever their kind, their form of expression, their merit or their purpose. However, the following two conditions must be satisfied in order to benefit from copyright protection:

- The work must be fixed in a material form; and
- The work must be original.

A work is considered original if it bears the imprint of its author's personality. For example, the work will be considered original if the author has created the work through his/her own skill, judgement and individual effort and has not copied from other works. French courts also

refer to the harmonised definition of originality as "the author's own intellectual creation" since the ECJ ruling in the *Infopaq* case (C-5/08, 16 July 2009).

2.3 What rights does copyright grant to the rights holder?

The French Intellectual Property Code sets out the rights subsisting in copyright works which are the exclusive rights of the rights holder (before any licences are granted). They include the:

- Performance right, which consists in the communication of the work to the public by any means whatsoever
- Reproduction right, which consists in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way. Reproduction may be carried out, in particular, by printing, drawing, engraving, photography, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording.

Rights holders also have the moral rights described in question 2.4.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

In France the following moral rights are granted to authors by the French Intellectual Property Code:

- The right to be identified as the author of a copyright work
- The right to oppose any distortion, mutilation or other modification of his/her work
- The right to choose to present his/her work to the public and to choose the modes by which it is presented
- The right to withdraw his/her work from the market after its publication.

2.5 What is the duration of copyright in protected works?

Pursuant to article L.123-1 of French Intellectual Property Code, the author shall enjoy, during his or her lifetime, the exclusive right to exploit his/her work in any form whatsoever and to derive monetary profit therefrom.

After the death of the author, that right shall subsist for his/her successors in title during the current calendar year and the 70 years thereafter.

In the case of **collaborative works** (as defined in question 3.1), the calendar year taken into account shall be that of the death of the last surviving co-author.

In the case of **audiovisual works**, the calendar year taken into account shall be that of the death of the last survivor of the following joint authors:

- The author of the scenario
- The author of the dialogue
- The author of the musical compositions, with or without words, specially composed for the work
- The main director.

In the case of **pseudonymous, anonymous or collective works** (as defined in question 3.1), the term of the exclusive right shall be 70 years from 1 January of the calendar year following that in which the work was published.

If the pseudonymous, anonymous or collective work is published in instalments, the term shall run as from 1 January of the calendar year following the date on which each instalment was published. The publication date shall be determined by any form of proof recognised by the general rules of law, particularly by statutory deposit.

In the case of **posthumous works**, the term of the exclusive right shall be the 70 years after the death of the author.

Nevertheless, in the case of posthumous works disclosed after the expiry of the common term (ie 70 years after the death of the author), the term of exclusive rights shall be 25 years from 1 January of the calendar year following that of publication.

Pursuant to articles L.123-8 et seq. of the French Intellectual Property Code, the rights of heirs and successors in title of authors, composers or artists shall be extended for a period equal to that which elapsed:

- Between 2 August 1914 and the end of the year following the day of signature of the peace treaty for all works published prior to that latter date and which didn't fall into the public domain on 3 February 1919
- Between 3 September 1939 and 1 January 1948, for all works published before that date and which didn't fall into the public domain on 13 August 1941.

Moreover, the rights above mentioned shall also be further extended for a term of 30 years if the author, the composer or the artist died on active service (as recorded in the death certificate).

2.6 For how long do moral rights subsist in copyright works?

Pursuant to article L.121-1 of French Intellectual Property Code, the moral right is perpetual, inalienable and imprescriptible.

As a result, contrary to the economic rights, the author cannot transfer or renounce his/her moral rights, which continue to exist and must be respected even after the work has fallen into the public domain.

3. Ownership

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the author. The author is defined as the person who creates the work. The French Intellectual Property Code (L.113-2 and seq.) provides guidance for the specific categories of work where the creator is less clear:

- A collaborative work – defined by article L.113-2 of the French Intellectual Property Code as a work in the creation of which more than one natural person has participated – shall be the joint property of its authors
- Authorship of an audiovisual work shall belong to the natural person or persons who have carried out the intellectual creation of the work. Unless proved otherwise, the following are presumed to be the joint authors of an audiovisual work made in collaboration: the author of the script; the author of the adaptation; the author of the dialogue; the author of the musical compositions, with or without words, specially composed for the work; the director
- A composite work – defined by article L.113-2 of the French Intellectual Property Code as a new work in which a pre-existing work is incorporated without the collaboration of the author of the latter work – shall be the property of the author who produced it, subject to the rights of the author of the pre-existing work
- A collective work – defined by article L.113-2 of the French Intellectual Property Code as a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his or her 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 the possibility to attribute to each author a separate right in the work as created – shall be the property, unless proved otherwise, of the natural or legal person under whose name it has been disclosed
- Authorship of a radio work shall belong to the natural person or persons who carried out the intellectual creation of the work
- Unless otherwise provided by statutory provision or stipulation, the economic rights in the software and its documentation created by one or more employees in the execution of their duties or following the instructions given by their employer shall be the property of the employer.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where there is an assignment of the whole or of part of the rights relating to the work.

As mentioned in 3.1 above, pursuant to article L113.2 of the Intellectual Property Code, a collaborative work shall mean a work in the creation of which more than one natural person has participated. A collaborative work shall be the joint property of the authors. The joint authors shall exercise their rights by mutual agreement.

Nevertheless, where the contribution of each of the joint authors is of a different kind, each may, unless otherwise agreed, separately exploit his or her own personal contribution without, however, prejudicing the exploitation of the common work.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in France. It arises automatically upon creation of the work. There is no registration system.

A copyright notice may be useful to evidence ownership of copyright and the date of authorship. It creates a presumption that the named person is the author, and puts third parties on notice of the rights, but copyright subsists without such notice and the failure to display such notice does not affect copyright in a work.

In case of copyright infringement, it can be difficult to unquestionably prove the content and/or the date of creation of a copyright work. Indeed, copyright protection in France is acquired as from the date of creation. This is why copyright holders may purchase a **Soleau envelope** from the National Institute of Industrial Property (INPI). The envelope – which is sealed and kept by INPI from five to 10 years – is used as a means of keeping evidence that its content (eg a manuscript or a picture of a copyright work) was known or had been created by the applicant at the date of stamping.

4. Infringement

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment of copyright must be in writing, signed by or on behalf of the copyright owner.

Furthermore, assignment of copyright shall be subject to each of the assigned rights being separately mentioned in the contract and the field of exploitation of the assigned rights being defined as to its scope and purpose, as to place and as to duration.

French law is particularly protective of authors' rights. Not only do performance and reproduction rights need to be transferred distinctively, but the scope of such a transfer shall be deemed "limited to the exploitation modes specified in the contract" (article L.122-7 of the French IP Code). In other words, what is not expressly transferred under the contract shall be deemed remaining within the author's exclusive rights.

3.5 Can moral rights be transferred, assigned or licensed?

No. As explained in question 2.6, moral rights are inalienable. Therefore, moral rights cannot be waived or assigned.

4.1 What acts constitute infringement of copyright?

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed.

French law does not differentiate between primary and secondary infringements but considers that the use of works protection by copyright law without the rights holder's authorisation constitutes an infringement of copyright.

Articles L.335-2 and seq. of the Intellectual Property Code list a number of offences, which notably constitute an infringement of copyright:

- Any edition of writings, musical composition, drawings, paintings, or other printed or engraved production made in whole or in part regardless of the laws and regulations governing the ownership of authors shall constitute an infringement
- Any reproduction, performance or dissemination of a work of the mind, by any means whatsoever, in violation of the author's rights
- Any fixation, reproduction, communication or making available to the public, on payment or free of charge, or any broadcasting of a performance, a phonogram, a videogram or a programme made without authorisation of the performer, that of the phonogram or videogram producer or that of the audiovisual communication enterprise, where such authorisation is required
- Sale, exportation and importation of infringing works.

4.2 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be carried out in relation to copyright works despite the fact that they might be protected by copyright. The Information Society Directive (2001/29/EC) contains what has been termed a "shopping list" of exceptions and limitations, many of which the Intellectual Property Code has implemented into French law. Under specific circumstances, the following uses are permitted without the copyright owner's authorisation, provided that the copyright work has already been disclosed:

Act
Making of temporary copies
A copy that is transient or incidental which: <ul style="list-style-type: none">• Is an integral and essential part of a technological process

<ul style="list-style-type: none"> • Has the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary; or • Has no independent economic significance. (eg ISPs who use caching).
Act
Personal copies for private use
The making of a copy that is made for the individual's personal and private use and not for ends that are directly or indirectly commercial.
Act
Private and free performances
Private and free performances are permitted if they are carried out within the 'family circle' and only for a non-commercial purpose.
As a result, French residents may freely make copies of works (except software) for their private use, and freely display those works within their family circle (which is interpreted to include friends), without the agreement of the copyright holder.
Act
Short quotation
Including where the use is for criticism and review, short quotations are a permitted act provided that they relate to a work that has already been lawfully made available to the public.
The exception for short quotations is very strictly interpreted: the quotation must be short, incorporated in another work and justified by the nature of the work in which it is incorporated.
Short quotations are permitted provided that the name of the author and the source of the work are clearly indicated.
Act
Parody, pastiche and caricatures
Parodies, pastiche and caricatures are authorised, so long as they are created for humorous purposes and there is no risk of confusion between the original work and the parody.
The parody, pastiche and caricatures are permitted provided that the name of the author and the source of the work are clearly indicated.

Act
Public speech
Dissemination, even in their entirety, through the press or by broadcasting, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings, as well as in public meetings of a political nature and at official ceremonies is authorised without the author's permission.
Act
Reproduction of works in the catalogue of a judicial sale
French law allows for complete or partial reproductions of works of graphic or three-dimensional art intended to appear in the catalogue of a judicial sale held in France, in the form of the copies of the said catalogue made available to the public prior to the sale for the sole purpose of describing the works of art offered for sale.
Act
Educational and research purposes
The representation and/or performance of excerpts of a work are allowed so long as these are strictly limited to educational purposes.
Act
Acts necessary to access a database
These are the acts that a database user must be able to perform in order to access the database (such as temporary copies of the database).
Act
Exception in favour of the disabled
The law also allows establishments that are open to the public to reproduce all types of copyright-protected content in accessible formats to people with impairments.
Act
Exception in favour of libraries, museums and archive services
This exception allows for copying works for the purpose of preserving them, as long as the library, museum or archive service does not derive any economic or commercial benefit from such copying.

5. Remedies

4.3 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The CJEU decision in *Nils Svensson v Retriever Sverige* (C-466/12) determined whether linking to or framing links to copyright material without consent is a “communication to the public” and therefore infringes the rights holder’s communication to the public exclusive right.

The CJEU emphasised that to be a communication to the public, a link would have to be a communication to a ‘new’ public, ie a public not in the contemplation of the rights holder when the rights holder published the work. As a result, when a person uploads material to the internet, the public communicated to is the internet at large. Therefore, linking to a work freely available on the internet does not communicate that work to a ‘new’ public.

However, where a work is not freely available on the internet, such as where the work sits behind a paywall, the copyright owner cannot be said to have communicated with the internet as a whole, and so linking to that work in a way that circumvents the paywall would, it appears from recent case law, constitute a communication to the public and infringe the rights of the rights holder.

This solution was confirmed in the CJEU *BestWater International* case (C-348-13).

4.4 Is a licensee of copyright able to bring an infringement action?

A licensee is not able to bring an infringement action under French law, such action being exclusive to the copyright owner.

The French IP Code allows for one exception: the person exclusively invested of a right of exploitation belonging to a producer of phonograms or videograms may, unless otherwise stipulated in the licence contract, take legal action to enforce his or her rights. Such legal action must be notified to the producer.

On the contrary, the exclusive licensee of rights in a patent, a trade mark or an industrial design may institute infringement proceedings, unless otherwise laid down in the licence agreement, if the owner does not exercise such right after a formal notice from the beneficiary of the exclusive right.

5.1 What remedies are available against a copyright infringer?

As mentioned above, infringement can lead to both civil and criminal proceedings.

In case of criminal proceedings, the court can order principal penalties but also accessory penalties.

In terms of principal penalties, the court may order fines and/or a prison sentence.

In terms of accessory penalties, the court may order:

- Confiscation of all or part of the proceeds resulting from the infringement and the confiscation of all phonograms, videograms, articles and copies that are infringing or have been unlawfully reproduced and of the equipment specifically installed for the purpose of committing the offence
- Confiscation of the financial profits from the infringement
- Total or partial, permanent or temporary closure of the establishment used to the commission of the offence, for a period not exceeding five years
- Publication of all or part of the judgment at the cost of the infringement, in newspapers or on the infringer’s website.

Moreover, as explained in question 5.2, the court can order a suspension of the infringer’s internet access if the infringement is committed using an online public communication service.

In case of civil proceedings, the court may order the same remedies as the criminal accessory penalties (except for closure). Civil courts can also award damages (for the method used to award damages, see question 7.1).

5.2 Are there any specific remedies for online copyright infringement?

Pursuant to article L.335-2 of the Intellectual Property Code, in the event of an infringement of a copyright or related right caused by the content of a public online communication service, the judge may order, at the request of holders of rights, all appropriate measures to prevent or to stop such infringement of a copyright or related right.

Moreover, pursuant to article L.335-7 of the Intellectual Property Code, if the offence is committed by means of a public online communication service, the infringer can also be sentenced to the additional penalty of suspension of access to a public online communication service for a maximum of one year, together with the prohibition to subscribe, for the same period, to another contract for the same kind of service with any operator.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

In France, the general rule is that a copyright infringement is both a civil and a criminal act. Indeed, pursuant to article L. 335-2 of the Intellectual Property Code, any edition of writings, musical compositions, drawings, paintings or other printed or engraved production made in whole or in part regardless of the laws and regulations governing the ownership of authors shall constitute an infringement.

The sanction for committing a criminal offence in relation to copyright is likely to be either a fine and/or a prison sentence.

Pursuant to article L 335-2 of the French Intellectual Property Code, infringement shall be liable to a three-year imprisonment and a fine of €300,000.

Where offences are committed by an organised criminal group, the penalties will be increased to five-year imprisonment and a fine of €500,000.

Specific sanctions are also provided (pursuant to articles L.335-2 and seq.):

- In the event of circumvention of technological protection measures implemented (from €750 to €30,000 penalties and up to six months' imprisonment)
- In the event of infringements involving publishers of peer-to-peer type software allowing unauthorised exchanges of protected works (penalties of up to €300,000 and up to three years' imprisonment).

Pursuant to the French criminal code, when the infringement is committed by a legal person, the fines are multiplied by five. Besides, additional sanctions can also be ordered by the court (such as the dissolution of the company, the placement of the company under judicial surveillance etc).

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit varies according to the nature of the action.

In case of civil action, the time limit to bring a claim for breach of copyright is five years from the time when the claimant knew or ought to reasonably have known of the infringement acts.

In case of criminal action, the time limit is three years from the date of the offence.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In France, the general rule is that the unsuccessful party pays the costs of the successful party. However, this is subject to the very wide discretion of the court which generally takes into account the equity and the economic situation of the unsuccessful party but which can order otherwise.

The amount awarded to the winning party generally takes the form of a lump sum.

6. Enforcement

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

Copyright infringement being both a civil and a criminal offence, copyright infringement actions can be brought before civil and/or criminal courts. In most cases, copyright actions are taken before civil courts.

Pursuant to article L. 331-1 of the French Intellectual Property Code and Decree N° 2009-1205 of 9 October 2009, only 10 civil courts of first instance (*tribunal de grande instance*) have exclusive jurisdiction over copyright claims in France. This is meant to ensure that copyright cases are ruled by copyright specialist court judges.

6.2 Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure of copies constituting an unlawful reproduction of works.

Pursuant to article L.332-1 of the French Intellectual Property Code, the court may order, including but not limited to:

- The seizure, whatever the day or time, of the copies constituting an unlawful reproduction of work, whether already manufactured or in the process of manufacturing, of the proceeds obtained and of copies unlawfully used
- The seizure of proceeds from any reproduction, performance or dissemination, by any means whatsoever, of an intellectual creation, carried out in violation of the copyright.

Moreover, during the pre-trial phase, the claimant may, pursuant to article L.331-1-1 of the French Intellectual Property Code, ask the court to order the precautionary seizure of the capital assets and real estate of the alleged infringer. To this purpose, the claimant may in particular demonstrate circumstances likely to jeopardise the recovery of damages if such precautionary seizure is not ordered.

Withholding measure

Pursuant to article L.335-10 of French Intellectual Property Code, the Customs administration may, at the written request of an owner of copyright accompanied by proof of his/her right, withhold in the course of its inspections any goods alleged by him/her to be infringing that right.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

Except for the High Authority for the distribution of Works and the Protection of Rights on the Internet (HADOPI, as described in question 7.1), there are no agency bodies who are responsible for promoting copyright and also no agency bodies that actively enforce copyright.

As a general rule, it is the rights holders and the rights management agencies that are in charge of spotting infringing works and of taking action.

It must however be noted that the National Industrial Property Institute (INPI) – which is more specifically in charge of patents, trade marks and industrial design rights – promotes intellectual creations in general, including works eligible for copyright protection. Hence, the possibility for an author to purchase a *Soleau* envelope from the INPI (see question 3.3).

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the rights holder.

However, as a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collecting societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent.

The main key collecting societies in each sector are as follows:

Agency
Société des Gens de Lettres (SGDL)
Who it represents
Writers
Agency
Société Française des Intérêts des Auteurs de L'écrit (SOFIA)
Who it represents
Writers

Agency
Centre Français d'exploitation du Droit de Copie (CFC)
Who it represents
Writers and books or press publishers
Agency
Société des Auteurs, Compositeurs et éditeurs de Musique (SACEM)
Who it represents
Writers, composers and publishers of music
Agency
Société Civile des Producteurs Phonographiques (SCPP)
Who it represents
Music producers
Agency
Société Civile des Producteurs de Phonogrammes en France (SPPF)
Who it represents
Producers of phonograms and videograms
Agency
Société civile pour l'administration des droits des artistes et musiciens interprètes (ADAMI)
Who it represents
Performers (actors, singers, musicians, conductors, dancers)
Agency
Société de Perception et de Distribution des Droits des Artistes-interprètes de la Musique et de la Danse (SPEDIDAM)
Who it represents
Performers
Agency
Société des Auteurs et Compositeurs Dramatiques (SACD)
Who it represents
Authors of audiovisual works and performing arts

Agency
Société Civile des Auteurs Multimédia (SCAM)
Who it represents
Authors-director of audiovisual works
Agency
Société des Auteurs dans les Arts Graphiques et Plastiques (ADAGP)
Who it represents
Visual artists and designers
Agency
Société des Auteurs des Arts Visuels et de L'image Fixe (SAIF)
Who it represents
Visual artists

6.5 Are copyright levies payable? By whom, and in what circumstances?

The private copying exception grants the lawful acquirer of a work the right to copy it for his or her personal use on a recording medium. In return for this exception to the author's exclusive rights, article L.311-1 of the French IP Code provides that the authors of works fixed on phonograms or videograms and the producers of such phonograms or videograms shall be entitled to remuneration for the reproduction of those works made from a legal original and in accordance with the exception for private copying. Such remuneration is also owed to authors and publishers of works fixed on any other medium for the reproduction of those works made from a legal original and in accordance with the exception for private copying, on a digital recording medium.

The remuneration for private copying is set by an independent administrative commission in consideration of a flat rate for each medium, depending on the duration or the medium capacity and its use. The remuneration for private copying is collected by the French company Copie France from manufacturers and importers of blank recording media. The sums collected are split, with 75% going directly to the creators, publishers and producers of the works copied, and 25% going to support cultural initiatives like festivals or to help young creators.

7. Copyright Reform

7.1 What do you consider to be the top two recent copyright developments?

Creation and internet law

The HADOPI, as mentioned in question 6.3, was created in 2009 to promote the distribution and protection of creative works on the internet, using what is known as a **graduated response** as a means to encourage compliance with copyright laws.

The HADOPI is an independent public authority solely dedicated to the distribution of works and the protection of rights on the internet.

The High Authority's fields of action and missions were set out in the French Intellectual Property Code. The HADOPI is, in particular, responsible for:

- Encouraging the development of legal supply and observing the legal and illegal use of works on the internet
- Protecting works from violations of rights, through the graduated response procedure
- Regulating the use of technical protection measures.

The HADOPI also promotes responsible use of the internet.

To this purpose, the HADOPI applies an educational policy, issuing **reminders of the law**; by sending warning messages referred to as recommendations, it informs internet users of their duty to keep watch over their access to the internet, so that it cannot be used to provide or reproduce copyright-protected digital content.

In order to raise internet users' awareness of the responsible use of cultural content online, the High Authority was instituted to guide them in the way they use individual works. It informs them of the existence of legal supply available online (free-of-charge or at-cost), and aims to encourage the development of an abundant and diverse range of legal supply.

Responsible internet use also means ensuring that internet access is not used for illegal purposes and, in particular, to illegally circulate works protected by copyright.

New legislation on damages for copyright infringement

In France, damages are traditionally supposed to cover only the prejudice suffered. Hence French law does not allow punitive damages.

Nevertheless, Act n°2014-315 of 11 March 2014 amended the French Intellectual Property Code in order to enable improved compensation for the rights holders as well as better protection of intellectual property rights.

Pursuant to article L 331-1-3 of the French IP Code, the court must, in order to assess the damages in copyright and neighbouring rights infringement cases, 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
- The profits made by the infringer, including savings in intellectual investment, equipment and promotion, which the infringer made through the infringement acts.

As a result, the court must explain its assessment for each type of prejudice, which means that the claimants will also have to justify their claims for each type of prejudice.

7.2 What do you consider will be the top two copyright developments in the next year?

Digital Single Market Strategy for Europe

On 6 May 2015, The European Commission released its *Digital Single Market Strategy for Europe*. The Commission's stated aim is to "make the EU's single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one".

Copyright forms a central component of the strategy (but perhaps not as central as many had hoped) in the following areas:

- The harmonisation of copyright law between Member States
- The introduction of cross-border e-commerce rules
- Bringing an end to 'unjustified' geo-blocking (the practice of denying consumers access to a website based on their location, or re-routing them to a local website often with different pricing)
- Strengthening the copyright enforcement system against commercial-scale infringements.

The Strategy sets the Commission's agenda for EU-level copyright reform over its term and is worth keeping a close eye on.

GS Media

Whilst the CJEU in *Nils Svensson v Retriever Sverige* (C-466/12) decided that linking to or framing links to copyright material without consent does not constitute a "communication to the public" and therefore an infringement of the rights holder's communication to the public exclusive right, the case didn't decide the question

of whether this would still be the case where the works linked to are themselves unlawfully uploaded (ie uploaded without the copyright holder's consent).

This is the basis of three questions referred to the Court of Justice of the European Union in Case C-160/15 *GS Media*.

The reasoning behind the decision in *Svensson* – that to be a communication to the public a link would have to be a communication to a 'new' public (ie a public not in the contemplation of the rights holder when the rights holder published the work) – would suggest that linking to an unlawful copy of a copyright work would be an infringement of copyright in the work, as it constitutes a communication to a public which the rights holder had not envisaged.

Whatever decision the Court comes to, it is likely to prove controversial in this developing area of law.

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Germany

SKW Schwarz, Magnus Hirsch/Yvonne Schäfer



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in the Federal Republic of Germany is the Act on Copyright and Related Rights (Copyright Act of 9 September 1965, as last amended 5 December 2014).

There are some further legal statutes like the **Urheberrechtswahrnehmungsgesetz** (or the **Verlagsgesetz**) that govern performing rights associations and the relationship between publishers and authors.

Furthermore, there are international conventions by which the Copyright Act has been ratified, such as the revised Berne Convention on Industrial Property or TRIPS.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

2.1.1 Article 2 of the Copyright Act defines works as the author's own intellectual creations, and contains a list of protected works in literary, scientific and artistic domain. This list is not exhaustive.

Literary works

The Copyright Act protects literary works, such as written works, speeches and computer programs. Literary works include all individual linguistic creations such as scientific writings, lectures, prose and plays, including libretti for operas.

Excluded from copyright protection are official publications such as court decisions.

Musical works

Musical works are works consisting of music, without any words or actions that are intended to be performed with the music.

Music is defined as a combination of sounds for listening to.

It is not the same as mere noise.

Pantomimic works

By pantomimic works (including works of dance), thoughts, feelings and stories are expressed through individual movements and gestures.

Artistic works

Artistic works include works of architecture and of applied art and drafts of such works that are of an individual characteristic and have a distinctive element.

Mere functional features are not protected by copyright.

Photographic works

Photographic works are protected (including works produced by processes similar to photography) which express a particular artistic conception.

Cinematographic works

Cinematographic works are protected (including works produced by processes similar to cinematography) which contain an intellectual creation.

Illustrations of a scientific or technical nature

Illustrations of a scientific or technical nature (such as drawings, plans, maps, sketches, tables and three-dimensional representations) are protected.

2.1.2 Articles 3 and 4 of the German Copyright Act contain further types of works that can be protected:

Adaptations

Translations and other adaptations of a work which are the adapter's own intellectual creations are protected as independent works without prejudice to the copyright in the adapted work. The insubstantial adaptation of an unprotected musical work is not protected as an independent work.

Collection works

Collections of works, data or other independent elements which by reason of the selection or arrangement of the elements constitute the author's own intellectual creation (collections) are protected as independent works without prejudice to an existing copyright or related right in one of the individual elements.

Database works

A database work within the meaning of the German Copyright Act is a collection whose elements are arranged systematically or methodically and the individual elements are individually accessible by electronic or other means. A computer program (Article 69a Copyright Act) used in the creation of the database work or to provide access to its elements does not constitute an integral part of the database work.

2.1.3 Furthermore, Art. 69a of the German Copyright Act contains a regulation for protection of computer programs:

Computer programs

Computer programs are programs of any form, including the drafts and their preparatory design material. Protection applies to any form of a computer program if it represents individual works (ie they are the result of the author's own intellectual creation).

2.2 What is required for works to qualify for copyright protection?

Only the author's own intellectual creations constitute works within the meaning of the Copyright Act. That means the protected works, by their nature, represent a particular artistic creation or a particular concept. A certain minimum standard of effort is necessary to qualify a work for copyright protection.

In particular a work needs to consist of four elements:

- Personal creation: There has to be a result that was made by the creative, formative influence of a human being. A creation is not qualified as personal if it is made by machines or animals.
- Perceptible formation: This element differentiates from ideas that are not manifested in any formation. For a perceptible formation it is sufficient that it is an improvisation.
- Intellectual content: The author has to create a world of ideas or emotions that have an exciting effect on the observer.
- Individual personal character or **threshold of originality**: A significant level of individuality and originality has to be met. Mere routine acts are not protected. The necessary level of originality varies for the different kinds of works.

As a general rule, Germany provides copyright protection if:

- The author is a national of Germany, of another Member State of the European Union or of another Agreement in the European Economic Area, or
- The work was first published in Germany or a state which is a signatory to one of the various international conventions which Germany is a party to.

2.3 What rights does copyright grant to the rightsholder?

This question depends upon the agreement between the author as rights holder and a rights holder who has been granted rights by the author. Every rights holder can be

granted the right to use a work in a particular manner, but only the author has further rights such as moral rights (see 2.4 below) and some exclusive rights with regard to the work.

The German Copyright Act guarantees the author rights concerning his or her intellectual and personal relationships to the work and in respect of the use of the work. Those are the moral rights of authors and exploitation rights.

The author has the right to exploit their work in material form, which includes:

- The right of reproduction
- The right of distribution
- The right of exhibition.

The author also has the exclusive right to communicate their work to the public in non-material form, which includes:

- The right of recitation, performance and presentation
- The right of making the work available to the public
- The right of broadcasting
- The right of communication by video or audio recordings
- The right of communication of broadcasts and of works made available to the public.

Further rights of the author are:

- Right of access to copies of works
- Right of resale
- Right of remuneration for rental and lending.

In case of infringement of copyrights, a rights holder has the following rights:

- Right to require cessation of infringement and to damages
- Notification
- Claim to destruction, recall and release of copies
- Pecuniary compensation
- Right of information
- Entitlement to presentation and inspection.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. The German Copyright Act sets out the following moral rights:

- Right of publication
- Recognition of authorship
- Right to prohibit the distortion or any other derogatory

treatment of their work.

Moral rights are applicable to all kind of protected works.

2.5 What is the duration of copyright in protected works?

Rights are protected while the author is alive plus 70 years from the time of their death. This rule is valid for works where their author had not been dead for over 70 years in 1965.

Category of work
Literary, scientific and artistic
Duration
Copyright expires 70 years from the end of the calendar year in which the author dies.
Where a work has a joint author/co-author, 70 years from the end of the calendar year in which the last known author dies.
Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was created or made available to the public.
Category of work
Audio recordings
Duration
The right shall expire 70 years after the release of the audio recording. If the audio recording was not released within 70 years of production, but was used lawfully for communication to the public, the right shall expire 50 years after the latter. If the audio recording has not been released or lawfully used for communication to the public during that period, the right shall expire 50 years after the production of the audio recording.
The time limit begins at the end of the relevant calendar year.

Category of work
Films
Duration
For films, the reference point is the end of the calendar year in which the last living author dies. Copyright then lasts 70 years afterwards.
Category of work
Broadcasting organisation
Duration
Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made.
Category of work
Database
Duration
The rights of the producer of a database expire 15 years after the publication of the database, but after 15 years following its production if the database was not published within that period. The time limit begins at the end of the calendar year in which the work was published or produced.
Category of work
Photographs
Duration
The right of a photographer expires 50 years after the photograph was released or, if its communication to the public occurred prior to that date, 50 years thereafter, although the right will expire 50 years after production if the photograph was not released or legally communicated to the public within this period. The time limit begins at the end of the relevant calendar year.
Category of work
Recognition of a performer and derogatory treatment of the performance
Duration
The rights shall expire with the death of the performer, but not before 50 years have passed since the performance, if the performer has died prior to expiry of that period of time, and not prior to expiry of the period of time applicable to the rights of exploitation. The period begins at the end of the relevant calendar year. If a work is performed by several performers together, the death of the last of the participating performer shall be decisive.

2.6 For how long do moral rights subsist in copyright works?

An author's moral right to be identified as the author, to object to derogatory treatment or to privacy lasts for the life of the author plus 70 years.

3. Ownership

3.1 Who is the first owner of a copyright work?

The first owner of the copyright is the author. This even applies if a work was created by a person in the course of their employment. The employee is the author and first owner of the copyright. However, there can be an agreement that the employer has a right of transferring rights of use from the employee. With regard to computer programs such a right to transfer is granted by Art. 69b of the Copyright Act.

The author is the creator of the work. That is the only definition German law provides.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where there is an assignment of the whole or of part of a work.

To qualify as joint authors it is necessary that the contributions of each author are not distinct. If they are distinct then two works subsist, each with separate copyright.

Joint owners have their own individual rights with respect to the work that can be assigned independently of the other or others, but the consent of all joint authors is required for licensing or use of the copyright work.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in Germany; it arises automatically upon creation of the work. There is no registration system that is comparable to registration of trade marks or patents.

However, the author may register his or her work with the German Office for Patents and Trademarks (DPMA) under a pseudonym or even anonymously. Such a registration is useful with regard to the duration of copyright.

Furthermore there is the possibility of a notarial deposit of the protected work. The notarial deed can give proof of the authorship and the date of creation of the protected work. A copyright notice eg © together with the author's name creates a presumption that the named person is the author.

3.4 What steps should you take to validly transfer, assign or license copyright?

No special form has to be met to validly transfer, assign or license copyright. However, a contract by which the author grants rights in respect of unknown types of exploitation, or where he/she undertakes the obligation to do so, must be drawn up in writing.

For purposes of evidence an assignment of copyright must be in writing, signed by or on behalf of the copyright owner.

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights can be waived but they cannot be assigned.

4. Infringement

Owners of copyright can take legal action if any of their exclusive rights have been infringed.

This can be infringement of rights of exploitations or appropriation of a work under its own name (plagiarism). Often rights are infringed by producing and purchasing unlawful copies of works.

4.1 What acts constitute primary infringement of copyright?

German law does not differentiate between primary and secondary infringement as, for example, UK law does.

4.2 What acts constitute secondary infringement of copyright?

As stated above, German law does not differentiate between primary and secondary infringement.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be carried out in relation to copyright works despite that fact that they might be protected by copyright. They include (amongst others):

Act
Temporary acts
Temporary acts of reproduction are permissible if they are transient or incidental and constitute an integral and essential part of a technical 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 protected subject matter to be made and which have no independent economic significance.
Act
Administration of justice and public security
It is permissible to make individual copies of works for use in proceedings before a court, arbitration tribunal or authority or to have such copies made.
Act
Persons with disabilities
The reproduction of a work for non-commercial purposes is permissible for persons whose access to the work is not possible or is made considerably more difficult by the already available means of sensual perception because of a disability, if such reproduction is necessary to facilitate access and its distribution is exclusive to such person(s).

Act
Collections for religious, school or instructional use
Reproduction, distribution and making works available to the public is permissible after publication where limited parts of works, of small scale literary works and of musical works, individual artistic works or individual photographs are incorporated in a collection which combines the works of a considerable number of authors and is intended, by its nature, exclusively for instructional use in schools (but not in music schools), in non-commercial basic and further training facilities or in vocational training facilities or for church use.
Act
Education broadcasts
Schools, teacher training and further training institutions may make individual copies of works to be used as part of a school broadcast by transferring the works to video or audio recording mediums. The same shall apply to youth welfare institutions and state image archives or comparable institutions under public ownership.
The video or audio recording mediums may only be used for teaching purposes. They must be deleted by the latest at the end of the academic year following the transmission of the school broadcast, unless the author has been paid equitable remuneration.
Act
Public speeches
It is permissible to reproduce and distribute speeches relating to current affairs or delivered during public negotiations before state, local authority or church bodies.
It is not, however, permissible to reproduce and distribute the speeches in the form of a collection predominantly containing speeches by the same author.
Act
Newspaper articles and broadcast commentaries
It is permissible to reproduce and distribute individual broadcast commentaries and individual articles, as well as illustrations published in connection therewith, from newspapers and other information sheets devoted solely to current affairs in other newspapers or information sheets of this kind, and it is permissible to communicate such commentaries, articles and illustrations to the public, if they concern current political, economic or religious issues and do not contain a statement reserving rights.

The author shall be paid equitable remuneration for the reproduction, distribution and communication to the public, unless the reproduction, distribution and communication to the public is of short extracts of several commentaries or articles in the form of an overview.

It is permissible without limitation to reproduce, distribute and communicate to the public miscellaneous news items of a factual nature and news of the day which has been published via the press or broadcasting; protection granted under other statutory provisions shall remain unaffected thereby.

Act

Reporting on current events

For the purposes of reporting on current events by broadcasting or similar technical means in newspapers, periodicals and other printed matter or other data carriers mainly devoted to current events, as well as on film, the reproduction, distribution and communication to the public of works which become perceivable in the course of these events shall be permitted to the extent justified by the purpose of the report.

Act

Quotations

It is permissible to reproduce, distribute and communicate to the public a published work for the purpose of quotation so far as such exploitation is justified to that extent by the particular purpose. This is permissible in particular where:

- subsequent to publication individual works are included in an independent scientific work for the purpose of explaining the contents
- subsequent to publication passages from a work are quoted in an independent work of language
- individual passages from a released musical work are quoted in an independent musical work.

Act

Published work

It is permissible to communicate to the public a published work if that communication serves a non-profit-making purpose for the organiser, if participants are admitted free of charge and, in the case of a lecture or performance of a work, if none of the performers is paid a special remuneration. Equitable remuneration shall be paid for the communication.

The obligation to pay remuneration shall not apply to events organised by the youth welfare service, the social welfare service, geriatric and welfare service, the prisoners' welfare service, as well as to school events insofar as they are only available to a specific, limited group of persons on account of their social or educational purpose. This shall not apply where the event serves the profit-making purpose of a third party; in such cases the third party shall pay the remuneration.

It is also permissible to communicate to the public a published work in a religious service or at a religious celebration organised by a church or religious community. The organiser shall, however, pay the author equitable remuneration.

Act

Making works available to the public for instruction and research

It is permissible for published small, limited parts of a work to be made available to the public, to the extent that this is necessary for the purpose of instruction and research and is justified for the pursuit of non-commercial aims.

Act

Communication of works at terminals in public libraries, museums and archives

So far as there are no contractual provisions to the contrary, it is permissible to make published works available from the stocks of publicly accessible libraries, museums or archives, which neither directly nor indirectly serve economic or commercial purposes, exclusively on the premises of the relevant institution at terminals dedicated to the purpose of research and for private study.

Act

Reproduction for private and other personal uses

It is permissible for a natural person to make single copies of a work for private use on any medium, insofar as they neither directly nor indirectly serve commercial purposes, as long as no obviously unlawfully produced model or a model which has been unlawfully made available to the public is used for copying.

Act
Incidental works
It is permissible to reproduce, distribute and communicate to the public works if they are to be regarded as works incidental to the actual subject matter being reproduced, distributed or communicated to the public.
Act
Works in exhibitions, on public sale and in institutions accessible to the public
Reproduction, distribution and making available to the public of artistic works and photographic works which are exhibited in public or intended for public exhibition or public sale by the organiser shall be permitted for advertising purposes to the extent necessary for the promotion of the event. Furthermore, it is permissible to reproduce and distribute those works in lists issued by public libraries, educational institutions or museums in connection with an exhibition with respect to content and time, or to take inventory, and with which no independent gainful purpose is served.
Act
Works in public places
It is permissible to reproduce, distribute and make available to the public works located permanently in public roads and ways or public open spaces. In the case of buildings, this authorisation shall only extend to the façade.
Act
Portraits
Reproduction, as well as distribution for which no payment is received and is not for commercial purposes, of a portrait by the commissioner of the portrait. If the portrait is an artistic work, exploitation is only permissible by photography.

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The decision of the German Federal Court of Justice (BGH) ruled that the operator of a homepage does not infringe copyrights if they are embedding contents on their homepage via “framing”, that are available on another homepage for every user of the internet with the permission of the owner of rights (Decision dated 9 July 2015, Case I ZR 46/12).

However, that case did not deal with the question of what will apply if the content is provided on another homepage without permission of the copyright owner.

4.5 Is a licensee of copyright able to bring an infringement action?

An infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action depends on the type of licence involved.

An exclusive licence authorises the licensee to exercise a right which would otherwise be exercisable exclusively by the copyright owner. One such right generally is the right to bring an infringement action.

A non-exclusive licensee cannot bring infringement actions unless specifically agreed otherwise with the author. Without that specific agreement, only the author (who remains the copyright holder) is allowed to bring infringement actions.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The German Copyright Act in connection with the German Code of Civil Procedure provides the following remedies for the rights holders:

- Interim injunction (including cease and desist orders, search orders, freezing orders and disclosure orders)
- Bringing an action
- Delivery up of infringing article
- Seizure or forfeiture of infringing articles
- Customs Seizure Actions.

5.2 Are there any specific remedies for online copyright infringement?

The German Copyright Act does not provide any specific remedies for online copyright infringement. However, the ECJ ruled in its case C-314/12 that internet providers have to block illegal websites if there is a judicial order.

Thus, where it appears that a website is displaying illegal infringing material, rights holders can seek an injunction from the court ordering the provider to block the website.

However, it is established under German common law that access providers are not obliged to establish barriers for music that is offered unlawfully (*OLG Köln*, decision dated 18 June 2014, case 6 U 192/11).

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal acts under the Copyright Act. The sanction for committing a criminal offence in relation to copyright is likely to be a fine and/or a prison sentence.

If an offence is committed by a company and it is proven that an individual officer of the company consented to committing the offence, that officer can also be liable for the criminal act.

Each offence requires a level of intention, knowledge or belief on behalf of the potential culprit, and each carries various penalties:

Criminal Act
Reproducing, distributing or communicating a work or an adaptation or transformation of a matter to the public other than those permitted by law. Any attempts shall be punishable.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright.
Penalty
Imprisonment of not more than three years or a fine. Where the offender acts on a commercial basis, the penalty shall be imprisonment of not more than five years or a fine.
Criminal Act
Affixing to the original of an artistic work the designation of author without consent of the author or distributing an original bearing such designation; Or Affixing to a copy, an adaptation or transformation of an artistic work the designation of author in a manner which gives the copy, adaptation or transformation the appearance of an original, or distributing a copy, such an adaptation or transformation bearing such designation.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the action is infringing a person's copyright.
Penalty
Imprisonment of not more than three years or a fine, unless other provisions impose a more serious sentence. Where the offender acts on a commercial basis, the penalty shall be imprisonment of not more than five years or a fine.
Criminal Act
Infringement of technological measures and rights management information.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright. Intention of enabling for himself/herself or a third party access to work which is protected.

Penalty
Imprisonment of not more than one year or a fine.

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is three years to bring a breach of copyright. Time begins to run from the end of the year the damage is suffered and the rights holder's knowledge of the infringement. Without such knowledge, the limit is 10 years.

Interim injunctions have to be brought immediately upon rights holders becoming aware of the infringement.

Time limit for filing a criminal complaint is three months. Time begins to run from the date of knowledge of the copyright infringement.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

The general rule in Germany is that the unsuccessful party pays the statutory attorneys' fees and disbursements of the successful party and court costs.

6. Enforcement

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

Civil law matters can be brought to ordinary courts. If the claim is worth less than €5,000 the action has to be brought to the local court. If the claim is worth €5,000 or more, action has to be brought to the regional court.

Recourse to the courts is permitted in respect of all legal disputes by means of which a claim is asserted on account of a legal relationship regulated under the Copyright Act. As regards copyright litigation matters resulting from employment or service relationships which have as their object only claims for payment of an agreed remuneration, recourse to the labour courts and the administrative courts shall remain unaffected or even prevail.

6.2 Are there any other ways in which you can enforce copyright?

Customs seizure

A copyright holder may request detention and seizure of infringing copies by the customs authorities.

Arbitration Board under the Law on the Administration of Copyright

The Arbitration Board under the Copyright Administration Law mediates disputes between collecting societies and users of copyright works such as concert organisers, discotheque operators, broadcasting organisations or producers of phonograms. The Arbitration Board is integrated into the German Patent and Trade Mark Office (DPMA).

If the parties cannot find an amicable agreement in front of the Arbitration Board, the Board submits a settlement proposal to the parties. If this proposal is not contested, its effect is similar to a court judgment.

Criminal proceedings

Criminal proceedings can be brought on the grounds described in 5.3 above, and pursued through criminal courts.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

The German Patent and Trade Mark Office (together with the Federal Cartel Office – *Bundeskartellamt*) is the supervision authority of collecting societies that are responsible for promoting and/or enforcing copyright.

Collecting societies are subject to government supervision since they have a monopoly position and hold rights in trust. The German Patent and Trade Mark Office acts as the supervisory authority on the basis of the Copyright Administration Law.

There are no further agency bodies that actively enforce copyright. The German police or Public Prosecution Department will target criminal activity but it is up to the rights holder or the rights management agency to spot infringing work and take action.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the rights holder.

However, as a result of the practical difficulties and administrative burdens for copyright owners in granting licences individually to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collection societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent.

The key collecting societies in each sector are as follows:

Agency
GEMA Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte
Who it represents
Musicians
Agency
GVL Gesellschaft zur Verwertung von Leistungsschutzrechten mbH
Who it represents
Artists, phonogram producers and video producers
Agency
VG-Wort Verwertungsgesellschaft Wort – Rechtsfähiger Verein kraft Verleihung
Who it represents
Creators and publishers

Agency
VG Bild-Kunst Verwertungsgesellschaft Bild – Kunst
Who it represents
Artists, photographer and graphic designers
Agency
VG Musikedition Verwertungsgesellschaft – Rechtsfähiger Verein kraft Verleihung
Who it represents
Musicians
Agency
GÜFA Gesellschaft zur Übernahme und Wahrnehmung von Filmaufführungsrechten mbH
Who it represents
Film
Agency
VFF Verwertungsgesellschaft der Film- und Fernsehproduzenten mbH
Who it represents
Film and TV producers and distributors
Agency
VGF Verwertungsgesellschaft für Nutzungsrechte an Filmwerken mbH
Who it represents
Film
Agency
GWFF Gesellschaft zur Wahrnehmung von Film- und Fernsehrechten mbH
Who it represents
Film and TV
Agency
AGICOA Urheberrechtsschutz Gesellschaft mbH – Association de Gestion Internationale Collective des CEuvres Audiovisuelles
Who it represents
Film

7. Copyright Reform

Agency
VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH
Who it represents
Media companies
Agency
VG TWF Verwertungsgesellschaft Treuhandgesellschaft Werbefilm GmbH
Who it represents
Film
Agency
GWVR Gesellschaft zur Wahrnehmung von Veranstalterrechten mbH
Who it represents
Artists, film, musicians

6.5 Are copyright levies payable? By whom, and in what circumstances?

In Germany copyright levies have to be paid for usage and copying of works protected by copyright law. These are payable as an additional charge together with the surcharge on the price for the devices or media with which copies can be made. The copyright levy is mostly payable as a lump sum, which means that the customer does not need to pay a levy for every single use of the relevant device/media.

7.1 What do you consider to be the top two recent copyright developments?

Freedom of panorama

Copyright law is being harmonised in the European Community. Thus, the European Parliament decided recently that everybody is allowed to take pictures of public buildings or art without the author's permission (**freedom of panorama**).

Regarding the freedom of panorama, different regulations exist in the different Member States. It is likely that Member States will amend their regulations with regard to this decision.

EC-Directive on collecting societies

EC-Directive 2014/26/EU implemented new regulations for collecting societies that have to be implemented into German law not later than 10 April 2016. The German Ministry of Justice and Consumer Protection drafted a legislative proposal with regard to the EC-Directive. With the new regulations, the work of the collecting societies will be harmonised. German collecting societies will get more influence on licensing and their business shall be more transparent to more easily grant licences for new music service providers.

In particular, the procedure for determining the compensation for devices and storage media shall become more efficient and faster. Therefore, regulations covering the cross-border granting of online rights for the use of music shall be implemented.

Moreover, German law is supposed to be amended with regard to the future co-operation with the European supervisory authorities.

7.2 What do you consider will be the top two copyright developments in the next year?

Copyright in the digital age

On 6 May 2015 the European Commission released its *Digital Single Market Strategy for Europe* to "make the EU's single market fit for the digital age". The cross-border transfer of knowledge has become problematic and, with regard to copyright law, very significant. Depending on what the Commission decides, changes might become necessary in the German Copyright Act.

Copyright contract law

There are discussions on the practical usage of copyright contract law in Germany, especially on the issue of whether the contractual consolidation of authors granted by the Copyright Act is sufficient. The Copyright Act contains various uncertainties that were leading to legal disputes; for example, with regard to remuneration entitlements for the creation of complex works of films or translation of books. A large number of lawyers, authors and media companies drafted proposals to amend the copyright law. It remains to be seen if German legislation will change with regard to copyright contract law.

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India

Singhania & Partners, Sonil Singhania/Nishi Shabana



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The Copyright Act 1957 (the **Act**), supported by the Copyright Rules 1958 (the **Rules**), is the governing law for copyright protection in India. Substantial amendments were carried out to the Copyright Act in 2012.

India follows a common law legal system so relies on case law to interpret and set precedents in law, and so judicial decisions contribute to the sources of copyright law in India.

India is a member of the Berne Conventions and Universal Copyright Convention. The Government of India has also passed the International Copyright Order, 1958. According to this Order, any work first published in any country that is a member of any of the above conventions is granted the same treatment as if it was first published in India.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

Copyright subsists throughout India in the following classes of works:

- Original literary, dramatic, musical and artistic works
- Cinematograph films
- Sound recordings.

These are the broad categories, and can be summarised as follows:

Literary works

The term 'literary works' covers works that are in print or writing, irrespective of the quality or style of the work. Literary work refers not only to works of prose and poetry, but anything that would be under the ambit of 'literature'. However, there will be no copyright if the work is merely a collection of words, the collection of which involved no literary skill. In India, a computer program is treated as a literary work and is protected as such.

Dramatic works

A dramatic work includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include a cinematograph film.

Musical works

Musical work means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music. A musical work need not be written to enjoy copyright protection.

Artistic works

Artistic work means a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; a work of architecture; and any other work of artistic craftsmanship. Any colour scheme, layout, or arrangement of any alphabets or features qualifies as an artistic work.

Cinematograph films

Cinematograph film means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films.

Sound Recordings

Sound recording means a recording of sounds from which sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. A phonogram and a CD-ROM are sound recordings.

2.2 What is required for works to qualify for copyright protection?

Any work which falls under any of the categories mentioned above and the work seeking to be copyrighted must be original; however, it is not necessary that the work should have some original thought or idea. The law is only concerned about the originality of the expression of thought.

2.3 What rights does copyright grant to the rights holder?

A copyright grants protection to the creator and his or her representatives for the works and prevents such works from being copied or reproduced without their consent.

The creator of a work can prohibit or authorise anyone to:

- Reproduce the work in any form, such as print, sound, video, etc
- Use the work for a public performance, such as a play or a musical work
- Make copies/recordings of the work, such as via compact discs, cassettes, etc
- Broadcast it in various forms
- Translate the same to other languages.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes, the Copyright Act grants an author special rights which exist independently of the author's copyright, and subsist even after the assignment (whole or partial) of the said copyright. The author has the right to:

- Claim authorship of the work
- Restrain or claim damages with respect to any distortion, mutilation, modification, or other act in relation to the said work if such distortion, mutilation, modification, or other act would be prejudicial to their honour or repute.

These special rights can also be exercised by the legal representatives of the author.

A recent amendment to copyright law now means that the right against distortion is available even after the expiry of the term of copyright. Previously, it was available only against distortion, mutilation etc. done during the term of copyright of the work

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works varies according to the type of work and the date of creation:

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 60 years from the end of the calendar year in which the author dies.
Where a work has a joint author/co-author, it expires 60 years from the end of the calendar year in which the last known author dies.

Where the author's identity is unknown, copyright expires 60 years from the end of the calendar year in which the work was first published.
Category of work
Cinematograph films
Duration
Copyright shall subsist until 60 years from the beginning of the calendar year following the year in which the film is published.
Category of work
Sound recordings
Duration
Copyright shall subsist until 60 years from the beginning of the calendar year following the year in which the sound recording is published.

2.6 For how long do moral rights subsist in copyright works?

An author's moral right as a right against distortion is available even after the expiry of the term of copyright.

2.7 Who is the first owner of a copyright work?

The concept of first owner under Indian copyright law is quite important and may be determined as follows:

In the case of a literary, dramatic or artistic work (which includes a photograph, painting or a portrait) created during the course of employment or under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the author of such a publication shall, in the absence of a contract to the contrary, be the first owner of copyright. However, such ownership shall vest with the proprietor of the publication only for the limited purpose of publishing the work or a reproduction of the work in a publication and, for all other purposes, the copyright shall vest with the author of the work.

If a photograph, painting or portrait has not been made for the purposes of publication in a periodical but has been made for any other purpose, then in the absence of a contract to the contrary, the copyright in such work shall vest with the person at whose instance the work was created.

In the case of a cinematograph film, in the absence of a contract to the contrary, the copyright in the cinematograph film shall vest with the producer of the film;

ie the person at whose instance the film was made for a valuable consideration.

In the case of a work made during the course of employment or under a contract of service or apprenticeship, the employer shall, in the absence of a contract to the contrary, be the first owner of copyright.

In the case of a government work, the copyright in the work shall vest with the government.

2.8 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

As per the Act, **work of joint authorship** means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors. Thus the Act recognises joint authorship. Joint authors fully enjoy all of the rights granted by the Act, as mentioned previously. The term of copyright of a work of joint authorship is calculated with respect to the author that dies last.

2.9 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Under Indian law, registration is not a prerequisite for acquiring a copyright in a work. A copyright in a work is created when the work is created and given a material form, provided it is original.

However, the Act provides a procedure for copyright registration. Such registration does not confer any special rights or privileges with respect to the registered copyrighted work. Certificate of registration of copyright and the entries made on the register serve as prima facie evidence in a court of law when a dispute relating to ownership of copyright arises. Copies of the entries and extracts from the Register that are certified by the Registrar of Copyright are admissible in evidence in all courts. Thus, registration only raises a presumption that the person in the Register is the actual author, owner or rights holder.

In infringement suits and criminal proceedings, when time is of essence to obtain urgent orders, registration is of tremendous help. Copyright notice is not necessary under Indian law to claim protection.

3. Infringement

2.10 What steps should you take to validly transfer, assign or license copyright?

An assignment of copyright shall be valid only when it is in writing, signed by the assignor or by his/her duly authorised agent.

2.11 Can moral rights be transferred, assigned or licensed?

No: moral rights cannot be transferred or assigned.

A copyright is infringed if a person without an appropriate permission or licence does anything that the owner of the copyright has an exclusive right to do. There are two classes of infringement: primary infringement and secondary infringement.

3.1 What acts constitute primary infringement of copyright?

Primary infringement occurs where a person performs any of the following acts without the consent of the rights holder.

- Copying
- Issuing copies of the work to the public
- Renting or lending the work to the public
- Performing, showing or playing a copyright work in public
- Communicating the work to the public
- Making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation.

3.2 What acts constitute secondary infringement of copyright?

Secondary infringement occurs where a person, with knowledge or reasonable grounds for such knowledge:

- Makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire
- Distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright
- By way of trade exhibits in public
- Imports into India

any infringing copies of the work.

3.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

Under the Act there are certain circumstances which constitute fair dealing, which is not considered as an infringement. The lists of non-infringing acts are summed up below:

Use
Parody
Conditions
There must be no intention to compete with the copyright holder, and the motive for use of copyrighted matter must not be improper.

Use
Private use, including research
Conditions
Applicable only to literary, dramatic, musical, or artistic works.
Use
Criticism or review
Conditions
–
Use
Reporting of current events, through newspaper, magazine or similar periodical, photographs, or film.
Conditions
Exception – The publication of a compilation of addresses or speeches delivered in public is not fair dealing.
Use
Reproduction of any work for the purpose of judicial proceedings or a report of judicial proceedings, or in any work produced by any house of any Legislature, exclusively for the use of the members of that Legislature.
Conditions
–
Use
The making of copies or adaptation of a computer program in order to utilize the computer program for the purposes for which it was supplied; or to make back-up copies purely as a temporary protection against loss, destruction or damage.
Conditions
Must be the lawful possessor of a copy of such computer program.
Use
Any act done to achieve operating inter-operability of an independently created computer program with other programs by a lawful possessor of a computer program.
Conditions
Only applicable if such information is not otherwise readily available.

Use
The making of copies or adaptation of the computer program from a personally legally obtained copy for non-commercial personal use.
Conditions
–
Use
The reproduction of any literary, dramatic or musical work in a certified copy made or supplied in accordance with any law for the time being in force.
Conditions
–
Use
The reading or recitation in public of any reasonable extract from a published literary or dramatic work.
Conditions
–
Use
The publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions, of short passages from published literary or dramatic works, not themselves published for the use of educational institutions.
Conditions
Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.
Use
Reproduction of a literary, dramatic, musical or artistic work by a teacher or a pupil in the course of instruction; or as part of the questions to be answered in an examination; or in answers to such questions.
Conditions
–
Use
The performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a sound recording.

Conditions
The audience must be limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording.
Use
The making of sound recordings in respect of any literary, dramatic or musical work, if sound recordings of that work have been made by or with the license or consent of the owner of the right in the work, or the person making the sound recordings has given a notice of his intention to make the sound recordings, has provided copies of all covers or labels with which the sound recordings are to be sold, and has paid in the prescribed manner to the owner of rights in the work royalties in respect of all such sound recordings to be made by him.
Conditions
–
Use
The causing of a recording to be heard in public by utilizing it, in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or as part of the activities of a club or similar organisation which is not established or conducted for profit; or as part of the activities of a club, society or other organisation which is not established or conducted for profit.
Conditions
–
Use
The performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution.
Conditions
–
Use
The reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction.

Conditions
–
Use
The publication in a newspaper, magazine or other periodical of a report of a lecture delivered in public.
Conditions
–
Use
The reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access.
Conditions
Provided that where the identity of the author of any such work or, in the case of a work of joint authorship, of any of the authors is known to the library, museum or other institution, as the case may be, the provisions of this clause shall apply only if such reproduction is made at a time more than sixty years from the date of the death of the author or, in the case of a work of joint authorship, from the death of the author whose identity is known or, if the identity of more authors than one is known from the death of such of those authors who dies last.
Use
The storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work.
Conditions
–
Use
The making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a non-commercial public library for the use of the library if such book is not available for sale in India.
Conditions
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Use
The reproduction or publication of any matter which has been published in any Official Gazette except an Act of a Legislature, or any Act of a Legislature subject to the condition that such Act is reproduced or published together with any commentary thereon or any other original matter, or the report of any committee, commission, council, board or other like body appointed by the Government if such report has been laid on the Table of the Legislature, unless the reproduction or publication of such report is prohibited by the Government, or any judgment or order of a court, tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the court.
Conditions
–
Use
The production or publication of a translation in any Indian language of an Act of a Legislature and of any rules or orders made thereunder.
Conditions
Provided that no translation of such Act or rules or orders in that language has previously been produced or published by the Government; or where a translation of such Act or rules or orders in that language has been produced or published by the Government, if the translation is not available for sale to the public. Also provided that such translation contains a statement at a prominent place to the effect that the translation has not been authorised or accepted as authentic by the Government
Use
The making or publishing of a painting, drawing, engraving or photograph of a work of architecture or the display of a work of architecture.
Conditions
–
Use
The making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work failing under section 2(c)(iii) of the Act, if such work is permanently situate in a public place or any premises to which the public has access.

Conditions
–
Use
The inclusion in a cinematograph film of any artistic work permanently situated in a public place or any premises to which the public has access; or any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film.
Conditions
–
Use
The use by the author of an artistic work, where the author of such work is not the owner of the copyright therein, of any mold, cast, sketch, plan, model or study made by him for the purpose of the work.
Conditions
–
Use
The performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority.
Conditions
Religious ceremony including a marriage procession and other social festivities associated with a marriage.
Use
The adaptation, reproduction, issue of copies, or communication to the public of any work in any accessible format by any person to facilitate persons with disabilities to access to works, or any organization working for the benefit of persons with disabilities in case the normal format prevents the enjoyment of such work by such persons.
Conditions
The copies of the works in such accessible format are made available on a non-profit basis and only to recover the cost of production and the organization shall ensure that the copies are used only by persons with disabilities, and take reasonable steps to prevent its entry into ordinary channels of business.

4. Remedies

3.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

Under the Act, hypertext linking does not per se constitute copyright infringement; however, reproducing any copyrighted work, issuing copies of the work to the public or communicating the work to the public could amount to copyright violation. But in the case of hyper linking, the linking site is not reproducing any work. The reproduction, if at all any, takes place at the end of the user who visits the linked page via the link. Technically, the linking site is only informing people about the presence of the work and giving the address of the site where the work is present. It is at the user's discretion to access the work by clicking the link. But, nevertheless, the linking site is definitely aiding in the distribution of the work.

3.5 Is a licensee of copyright able to bring an infringement action?

Under the Act, an infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action depends on the type of licence involved.

An exclusive licence authorises the licensee to exercise a right which would otherwise be exercisable exclusively by the copyright owner. One such right is the right to bring an infringement action.

A non-exclusive licensee may also bring an infringement action but only where the licence is in writing and signed by the copyright owner and expressly grants the non-exclusive licensee the right of action.

4.1 What remedies are available against a copyright infringer?

The Act provide following remedies for copyright infringement:

- Civil
- Criminal
- Administrative.

However, it is only the first two remedies, namely civil and criminal, which are of any real practical importance.

Under civil remedies, one may file for injunction, damages and accounts rendition, delivery of infringing copies and damages for conversion.

Under criminal remedies, one may file for imprisonment and fine, seizure of infringing copies and delivery of them to the owner.

Under administrative remedies, one may file for moving the Registrar to ban the import of infringing copies and delivery of the confiscated infringing copies to the owner.

4.2 Are there any specific remedies for online copyright infringement?

A Court can direct that infringing websites can be blocked by internet service providers (ISPs) either as part of a John Doe order or a website blocking order [*RK Productions v BSNL* (2012) 5 LW 626]. The Copyright Act says that any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by the Act, with the intention of infringing such rights, shall be punishable.

4.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

The Act prescribes that the intentional infringement or abetment of an infringement of the copyright in a work would be considered as criminal act.

Criminal remedies for copyright infringement include :

- Punishment through imprisonment which may not be less than six months but which may extend to three years
- Fines which shall not be less than Rs.50,000 and which may extend to Rs.200,000

- Search and seizure of the infringing goods including plates, which are defined as including blocks, moulds, transfers, negatives, duplicating equipment or any other device used or intended to be used for printing or reproducing copies of the work
- Delivery up of infringing copies or plates to the owner of the copyright.

4.4 Is there a time limit for bringing a copyright infringement claim?

The time limit for bringing in a copyright infringement claim is three years from the date of infringement.

4.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

Under the Act, the plaintiff can seek recovery of all three remedies, namely (a) account of profits (b) compensatory damages and (c) conversion damages, which are assessed on the basis of value of the article converted.

5. Enforcement

5.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

Every suit or civil proceeding in respect of the infringement of copyright can be instituted before district court or above.

5.2 Are there any other ways in which you can enforce copyright?

Copyright Board

The Copyright Board is a body constituted by the Central Government to discharge certain judicial functions under the Act. The Board is entrusted with the task of adjudication of disputes pertaining to copyright registration, assignment of copyright, grant of licences in respect of works withheld from public, unpublished Indian works, production and publication of translations and works for certain specified purposes. It does not deal with copyright infringement cases or with criminal piracy of copyright works.

5.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

In India, the Copyright Office is the government body responsible for promoting and enforcing copyright. The Office is under the control of the Registrar of Copyrights who acts under the direction of the Central Government. Specifically, the Copyright Office is under the aegis of the Department of Higher Education, Ministry of Human Resource Development.

5.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

In India there are some registered copyright societies which undertake the management and protection of copyright in works of authors and other owners of such works. Some of them are listed below:

- Musical works: The Indian Performing Right Society Limited (IPRS)
- Sound recording: Phonographic Performance Limited (PPL)
- Reprographic (photo copying) works: Indian Reprographic Rights Organization (IRRO)
- Performers' (Singers') Rights: Indian Singers' Rights Association (ISRA).

6. Copyright Reform

5.5 Are copyright levies payable? By whom, and in what circumstances?

The Indian Copyright Act does not prescribe any copyright levies.

6.1 What do you consider to be the top two recent copyright developments?

The Indian Government amended the Copyright Act in 2012 bringing about significant changes to the extant law. The most significant of these are:

Rights of authors and music composers:

Industry practice in film had become that lyricists and music composers assigned all their rights in their work to the producer for a one-time lump sum payment, meaning that they had no further right to any royalties accruing from their work, even if their work was being used in media other than cinematic films. This was justified by the 1977 judgment in *Performing Rights Society v Eastern India Motion Picture Association* (AIR1977 SC 1443), which concluded that the producer of a film is the first owner of the copyright (s.17(b) and s.17(c) of the Act), with no copyright subsisting in a lyricist or composer unless there is a specific contract to that effect. The amendments to the Act make clear that the provisions of s.17 do not affect the rights of the author of works incorporated into a film, and that any assignment of the right to royalties from independent uses of the work across different media is void unless made in favour of the legal heirs to the author of that work.

Incorporation of Performer's Moral Rights:

The Moral Rights of Performers have been introduced. These moral rights have been introduced to protect the performer's right so that no one is able to edit the original performance and put other things into the performance so that its nature is changed and money can be made out of it. These rights entitle the performer to sue the person who mutilates the nature of the performance.

6.2 What do you consider will be the top two copyright developments in the next year?

Delhi University photocopying case

The ongoing litigation between a group of leading publishers and a small photocopying shop attached to Delhi University has all the elements of a legendary 'fair dealing' debate.

The decision in this matter would be significant in deciding the threshold for fair dealing as was decided in the case between *Cambridge University Press v Becker* in May 2012. In this case it was decided that university does not require a licence to photocopy below threshold value of 10%.

Safeguarding personality rights; protection and enforcement through court system

Recently, famous film actors like Rajinikanth and Sridevi have attempted to safeguard their personality rights. While Rajinikanth successfully moved the Madras High Court for relief, Sridevi resorted to sending Ramgopal Varma a legal notice. Claims in India based on personality rights, image rights or celebrity rights have been on the rise in recent years. Of late, the judicial position also seems to favour individuals, and is inclined to protect personality rights vis-a-vis those who try to take undue credit of the persona and reputation of a well-known personality without his or her consent.

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Ireland

Eugene F Collins, David Hackett



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in Ireland is the Copyright and Related Rights Act, 2000 (CRRA). The CRRA repealed the previous Copyright Act of 1963.

The European Communities (Copyright and Related Rights) Regulations 2004 were enacted on 19 January 2004, transposing the remaining provisions of Information Society Directive (2001/29/EC) on the harmonisation of certain aspects of copyright and related rights in the information society. The 2000 Act had already implemented substantially the main terms of the then draft Directive.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The categories of work that can be covered by copyright are: literary, dramatic, musical and artistic works; sound recordings, films, broadcasts or cable programmes; typographical arrangements of published editions; and original databases. They are broad categories, and can be summarised as follows:

Literary works

This is a work (including a computer program) which is written, spoken or sung. However, it does not include a dramatic/musical work or an original database.

Dramatic works

A dramatic work includes a choreographic work or a work of mime.

Musical works

This covers a work consisting of music. However, it does not include words or action intended to be sung, spoken or performed with the music. There is copyright in the sound recording of a musical work but this is a separate and distinct right (see below).

Artistic works

An artistic work includes a work of any of the following descriptions, irrespective of their artistic quality:

- photographs, paintings, drawings, diagrams, maps, charts, plans, engravings, etchings, lithographs, woodcuts, prints or similar works, collages or sculptures (including any cast or model made for the purposes of a sculpture)
- works of architecture, being either buildings or models for buildings
- works of artistic craftsmanship.

Sound recordings, films, broadcasts, cable programmes

A sound recording means a fixation of sounds, or of the representations thereof, from which the sounds are capable of being reproduced, regardless of the medium on which the recording is made, or the method by which the sounds are reproduced.

A film means a fixation on any medium from which a moving image may, by any means, be produced, perceived or communicated through a device.

A broadcast means a transmission by wireless means, including by terrestrial or satellite means, for direct public reception or for presentation to members of the public, sounds, images or data or any combination of sounds, images or data, or the representations thereof, but does not include a Multipoint Microwave Distribution System.

A cable programme means any item included in a cable programme service, including a Multipoint Microwave Distribution System, which consists wholly or mainly of sending sounds, images or data or any combination of sounds, images or data, or representations thereof, by means of telecommunications system:

- for reception at two or more places (whether for simultaneous reception or at different times in response to requests by different users), or
- for presentation to members of the public.

Typographical Arrangement of Published Editions

This protection is in respect of the typographical layout of a book or other publication. A published edition includes the whole or any part of one or more literary, dramatic or musical works or original databases.

Original Databases

This work means a database in any form which by reason of the selection or arrangement of its contents constitutes the original intellectual creation of the author.

2.2 What is required for works to qualify for copyright protection?

A work may be protected by copyright once it is an original work that comes into existence within one of the above categories and is fixed in a stable medium. The requirement that a work is original is intended to connect the work with the person responsible for its creation. Copyright law is not concerned with the originality of ideas but with the expression of thought in its physical existence.

The CRRRA provides that to qualify for copyright protection, the author must be an Irish citizen, ordinarily domiciled in that state, or in any country, territory, state or area to which the relevant provisions of the Act extend to.

2.3 What rights does copyright grant to the rights holder?

The CRRRA sets out the rights subsisting in copyright works which are the exclusive rights of the rights holder (before any licences are granted). They include the right to:

- copy the work
- make the work available to the public
- make an adaptation of the work or to undertake either of the acts referred to above in relation to an adaptation

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In Ireland the CRRRA provides for the right to be identified as the author of a work and the right shall apply in relation to any adaptation of the work. This is known as a paternity right.

There is a right of the author of a work to object to any distortion, mutilation or other modification or other derogatory action in relation to the work, which would prejudice his or her reputation. This is known as an integrity right.

Moral rights do not apply in relation to works where copyright vests in the employer. A work made for the purpose of reporting current events, a newspaper, a periodical, an encyclopaedia, a dictionary, a yearbook, or other collective work of reference intended to be made available to the public will also be denied any moral rights.

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works can vary according to the type of work created. The duration of copyright protection is as follows:

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 70 years from the end of the calendar year in which the author dies.
Where a work has a joint author/co-author, 70 years from the end of the calendar year in which the last known author dies.
Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was made or first made available to the public.
Category of work
Sound recordings and films
Duration
Copyright expires 70 years from the end of the calendar year in which the recording or film is first published.
Category of work
Broadcasts
Duration
Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made.
Category of work
Published editions of works
Duration
Copyright expires 25 years from the end of the calendar year in which the work was first published.

2.6 For how long do moral rights subsist in copyright works?

An author's moral right to be identified as the author, right against false attribution and right to object to derogatory treatment lasts for the life of the author plus 70 years.

An author's right to object to derogatory treatment in respect of a film lasts for the life of the author.

3. Ownership

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the author. There are three exceptions to this rule:

- where the work is made by an employee in the course of employment, the employer is the first owner of any copyright in the work subject to any agreement to the contrary
- where the work is the subject of government or Oireachtas (the Irish legislature) copyright then the author is not regarded as the first author. If the work is the subject of the copyright of a prescribed international organisation or the copyright in the work is conferred on some other person by an enactment, then the author will not be the first owner of the copyright
- where the work, except a computer program, is made by an author in the course of employment by the proprietor of a newspaper or periodicals, the author may use the work for any purposes except for making it available to newspapers or periodicals without infringing the copyright.

The author is defined as the person who creates the work. The CRRA provides guidance for the specific categories of work where the creator is less clear:

- for a sound recording, the author is the producer
- for a film there are two authors; the producer and the principal director
- for a broadcast, the author is the person making the broadcast or, in the case of a broadcast which relays another broadcast by reception and immediate retransmission, without alteration, the author is the person making the other broadcast
- for a cable programme, the author is the person providing the cable programme service in which the programme is included
- for a typographical arrangement of published edition, the author is the publisher
- for a work that is computer generated, the author is the person by whom the arrangements necessary for the creation of the work are undertaken
- for an original database, the author is the individual or group of individuals who made the database
- for a photograph, the author is the photographer.

4. Infringement

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.

Joint owners have their own individual rights with respect to work that can be assigned independently of the other or others, such as works in relation to a compilation.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

In Ireland, there is no registration procedure for owners of copyright. The act of creating work creates the copyright, which then subsists in the physical expression of the work.

Copyright holders may choose to create evidence of their claim to authorship of a particular work. A copyright notice, including the copyright symbol (©), does not per se constitute evidence of ownership but it does show a claim to copyright and date of authorship which may prove to be useful if that claim has to be upheld in court at a later date.

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment of a copyright work, whether in whole or in part, must be in writing and signed by or on behalf of the assignor.

A licence of copyright does not have the same legal requirements attached to itself as assignments. Licences can be created by way of express or implied contract. There is more legal certainty with an express licence.

An exclusive licence can have much the same effect as an assignment. If such a licence is in writing and signed by or on behalf of the owner, it will be binding on successors in title.

3.5 Can moral rights be transferred, assigned or licensed?

Moral rights are not capable of assignment or alienation but may be passed on the death of the person entitled to the right. Pursuant to the CRRRA, moral rights can be waived.

Owners/authors of copyright can take action if any of the acts restricted by copyright (as set out in paragraph 2.3 above) have been infringed. There are two classes of infringement: primary infringement and secondary infringement.

4.1 What acts constitute primary infringement of copyright?

Primary infringement occurs where a person performs any of the following restricted acts without the consent of copyright owner:

- copying the work
- making the work available to the public
- adapting a work.

There is no need to show that the alleged infringer had knowledge of another's subsisting right, or intention to infringe that right in primary infringements. Carrying out one of the above mentioned restricted acts in relation to the work as a whole or to any substantial part of the work will be an infringement whether the act is undertaken directly or indirectly.

4.2 What acts constitute secondary infringement of copyright?

Secondary infringement comprises a number of dealings with a work without the permission of the copyright owner, including:

- selling, importing, making or having in his or her possession, custody or control a copy of the work knowing it to be an infringing copy; or
- having an article specifically designed or adapted for making copies of that work knowing that it has been or is to be used to make infringing copies.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply?)

Irish legislation provides for a number of circumstances in which certain acts are permitted in relation to copyright works. Many of these provisions are based on traditions and matters such as fair dealing, which is making use of a work to the extent that it is reasonably justified by the non-commercial purpose to be achieved.

The Information Society Directive (2001/29/EC) contains what has been termed a 'shopping list' of exceptions and limitations, many of which the CRRRA has implemented into Irish law.

These permitted acts are wide in variety but often relate to very specific scenarios. They include (amongst others):

Act
Research and private study
Description
Research is permitted where a person is researching for a non-commercial reason. In addition, the research must contain acknowledgement of the copyright work where it is referenced (ie identify it by title and author). Copying is always allowed for private study.
Act
Criticism or review and reporting current events
Description
Where the copyright work is being used for the purpose of criticism or review. It can be the criticism or review of that copyright work, or another work or performance provided the copyright work has been made available to the public. There must be a real contemporaneous event to use the defence relating to reporting current events. There must be a sufficient acknowledgment of not only the source of the work but also the author of the work.
Act
In the course of educational instruction or in preparation of education and instruction
Description
Reproduction for educational use does not infringe copyright as long as the copying is done by or on behalf of the instructor or student and is accompanied by sufficient acknowledgment.
Act
Librarians and archivists are permitted to make copies of a work for various non-commercial purposes
Description
Libraries and archives are given limited rights to copy works under certain conditions. Public libraries may also lend works without infringing the rights of the author.

Act
A back-up copy of a computer program
Description
It is not an infringement of the copyright in a computer program for a lawful user of a copy of the computer program to make a back-up copy of it which it is necessary for him or her to have for the purposes of his or her lawful use.
Act
Incidental inclusion
Description
The test for this defence is one of unreasonable prejudice to the copyright owner. The use of quotations or extracts from the work is permitted, where such use does not prejudice the interests of the owner of the copyright in that work and such use is accompanied by a sufficient acknowledgment.

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The CJEU has ruled in *Svensson and Others v Retriever Sverige AB* (C466/12) that providing a hyperlink to copyrighted works which are already freely available online does not constitute an infringement of copyright. Copyright infringement will only occur in circumstances where a hyperlink is created without the copyright holder's consent and where the protected work is directed to a "new" public.

However, where a work is not freely available on the internet, such as where the work sits behind a paywall, the copyright owner cannot be said to have communicated with the internet as a whole, and so linking to that work in a way that circumvents the paywall would, it appears from recent case law, constitute a communication to the public and infringe the rights of the rights holder.

It was important to obtain clarity on the issue of hyperlinking as it is fundamental to internet and social media usage.

The CJEU subsequently ruled in *Bestwater International* (C348/13), which concerned whether a website operator who embeds copyright protected videos in his website by framing technology infringes the copyright on these

videos. It was held that in order to establish a new communication to the public according to Article 3(1) of the Information Society Directive (2001/29/EC), the copyright protected work must have been communicated by technical means, which differs from the means of the initial communication or communicated to a new public.

4.5 Is a licensee of copyright able to bring an infringement action?

An exclusive licensee has, except as against the copyright owner, the same rights and remedies in respect of matters occurring after the grant of the licence as if the licence had been an assignment.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The CRRA provides for the following remedies for rights holders:

- commencement of proceedings
- search and seizure orders
- damages
- account of profits
- delivery of infringing articles
- forfeiture of infringing articles
- injunctive relief.

5.2 Are there any specific remedies for online copyright infringement?

In relation to online copyright infringement, a 'notify and take down' approach is often adopted whereby, if infringing material is being carried on a website, and the rights owners inform service providers that infringing material is being carried on their service, the service providers will be asked and often obliged to remove that material as soon as possible.

In Ireland, court orders are being obtained by rights holders to require internet service providers (ISPs) to prevent internet users accessing certain websites which are known to allow copyright material to be downloaded without the permission of the owners.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal acts under the CRRA in relation to copyright. The main offences relate to selling or making available for sale copies of a copyright work. The sanction for committing a criminal offence in relation to copyright is likely to be either a fine and/or a prison sentence.

If an offence is committed by a body corporate and it is proven to have been committed with the consent or approval of, or attributable to any neglect on part of an individual officer of the company, then that person shall be guilty of an offence.

Each offence requires a level of intention, knowledge or belief on behalf of the potential offender:

Criminal Act
Making a copy of a copyright work for sale, rental or loan.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is an infringing copy of the work.
Penalty
On summary conviction, a fine not exceeding €1,900 in respect of each infringing copy, article, device or a term of imprisonment not exceeding 12 months or both.
On indictment conviction, a fine not exceeding €125,000 or a term of imprisonment not exceeding five years or both.
Criminal Act
Sells, rents or lends, or offers to sell, rent or lend a copyright work without the consent of the copyright owner.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is an infringing copy of the work.
Penalty
On summary conviction, a fine not exceeding €1,900 in respect of each infringing copy, article, device or a term of imprisonment not exceeding 12 months or both.
On indictment conviction, a fine not exceeding €125,000 or a term of imprisonment not exceeding five years or both.
Criminal Act
Importing a copy of a copyright work into Ireland for private or domestic use.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is an infringing copy of the work.
Penalty
On summary conviction, a fine not exceeding €1,900 in respect of each infringing copy, article, device or a term of imprisonment not exceeding 12 months or both.
On indictment conviction, a fine not exceeding €125,000 or a term of imprisonment not exceeding five years or both.

Criminal Act
Possessing or making available a copyright work to the public in the course of business or trade.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is an infringing copy of the work.
Penalty
On summary conviction, a fine not exceeding €1,900 in respect of each infringing copy, article, device or a term of imprisonment not exceeding 12 months or both.
On indictment conviction, a fine not exceeding €125,000 or a term of imprisonment not exceeding five years or both.
Criminal Act
Making a copyright work available to the public to such an extent to prejudice the interest of the owner of copyright otherwise than in the course of business or trade.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is an infringing copy of the work.
Penalty
On summary conviction, a fine not exceeding €1,900 in respect of each infringing copy, article, device or a term of imprisonment not exceeding 12 months or both.
On indictment conviction, a fine not exceeding €125,000 or a term of imprisonment not exceeding five years or both.
Criminal Act
Making, possessing, importing into Ireland, selling, letting for hire or offering for sale or hire a protection defeating device intended to circumvent protection measures.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the device is to be used to circumvent rights protection measures.

Penalty
On summary conviction, a fine not exceeding €1,900 in respect of each infringing copy, article, device or a term of imprisonment not exceeding 12 months or both. On indictment conviction, a fine not exceeding €125,000 or a term of imprisonment not exceeding five years or both.
Criminal Act
Providing information or performing a service intended to enable a person to circumvent protection measures.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe that the copyright in the work would be infringed.
Penalty
On summary conviction, a fine not exceeding €1,900 in respect of each infringing copy, article, device or a term of imprisonment not exceeding 12 months or both. On indictment conviction, a fine not exceeding €125,000 or a term of imprisonment not exceeding five years or both.
Criminal Act
Making or possessing, selling or lending or importing into Ireland an article specifically designed for making copies of a copyright work.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe the article is to be used to make infringing copies of the work.
Penalty
On summary conviction, a fine not exceeding €1,900 in respect of each infringing copy, article, device or a term of imprisonment not exceeding 12 months or both. On indictment conviction, a fine not exceeding €125,000 or a term of imprisonment not exceeding five years or both.
Criminal Act
Causing a work protected by copyright to be performed, broadcasted, played or shown in public.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe that the copyright in the work would be infringed.

Penalty
On summary conviction, a fine not exceeding €1,900 in respect of each infringing copy, article, device or a term of imprisonment not exceeding 12 months or both. On indictment conviction, a fine not exceeding €125,000 or a term of imprisonment not exceeding five years or both.

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is six years to bring a claim for breach of copyright. Time begins to run from the date on which the cause of action accrued.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In Ireland, only costs which are reasonably incurred can be recovered. The courts usually decide the issue of costs on the basis that the costs shall follow the event; however, there are statutory provisions that provide that the costs of proceedings shall be at the discretion of the courts.

6. Enforcement

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

The monetary value of the damages, or any other relief being sought, will determine which court to bring the copyright claim in.

For lower value claims up to €15,000 the appropriate court will be the District Court.

For claims greater than €15,000 but less than €75,000, the appropriate court will be the Circuit Court.

The High Court has an original jurisdiction to hear virtually all matters irrespective of amount. As the Circuit Court has jurisdiction to hear claims up to a value of €75,000, the High Court will usually only hear claims that exceed that figure. There is no limit on the amount of damages which the High Court may award.

Proceedings in respect of a copyright claim, with a value of at least €1 million, may be heard in the High Court Commercial List, which moves faster and more efficiently than the traditional High Court list.

6.2 Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure by the Revenue Commissioner of infringing articles which would be treated as prohibited goods in the State.

Criminal proceedings

Criminal proceedings can be brought on the grounds described in paragraph 5.3 above and are pursued through the criminal courts.

Controller of Patents, Designs and Trademarks

Pursuant to the CRRA, the Controller can determine disputes arising under the Act between licensing bodies and persons requiring licences or organisations claiming to be representatives of those persons.

In certain circumstances, and with the consent of both parties, a dispute may be referred to arbitration.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

The Irish Patents Office is the official government body responsible for intellectual property rights including patents, designs, trade marks and copyright in Ireland.

The Department of Jobs, Enterprise and Innovation has responsibility for certain legislative and policy matters relating to intellectual property.

The Irish Patents Office is responsible for:

- granting patents
- registration of trade marks and design rights
- administration and maintenance of industrial property rights.

The Controller of the Irish Patents Office has certain statutory functions under the CRRA. These functions are concerned with registration of copyright licensing bodies, references and applications relating to licensing schemes operated by those bodies and the resolution of disputes regarding royalty amounts.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the copyright owner.

In accordance with the CRRA, the Controller of the Irish Patents Office maintains a Register of Copyright Licensing Bodies.

The following collecting societies have been registered with the Controller to date:

Agency
Authors' Licensing & Collecting Society
Who it represents
Writers
Agency
Association for the International Collective Management of Audiovisual Works
Who it represents
Audiovisual performers
Agency
Christian Copyright Licensing International Limited
Who it represents
Music and book publishers

Agency
The Irish Copyright Licensing Agency Limited
Who it represents
Creators and publishers
Agency
Irish Music Rights Organisation
Who it represents
Musicians
Agency
Irish Visual Artists Rights Organisation
Who it represents
Visual artists
Agency
Mechanical Copyright Protection Society (Ireland) Limited
Who it represents
Music composers and publishers
Agency
Motion Picture Licensing Company International Limited
Who it represents
Film and TV producers and distributors
Agency
Newspaper Licensing Ireland Limited
Who it represents
Newspapers
Agency
NLA Media Access Limited
Who it represents
Newspapers, magazines and websites
Agency
Phonographic Performances Ireland Limited
Who it represents
Musicians

Agency
The Screen Directors Collecting Society of Ireland
Who it represents
Directors

6.5 Are copyright levies payable? By whom, and in what circumstances?

Ireland does not impose levies on goods as our copyright legislation does not have exceptions which require the payment of fair compensation.

Article 5(2)(b) of the Information Society Directive (2011/29/EC) provides for levies to be paid to compensate copyright holders for the private copying of their work. However, this provision was never implemented in Ireland. Ireland, along with countries like the UK and Cyprus, has taken the view that copies made for private use do not cause any harm that requires additional remuneration in the form of private copying levies over and above the purchase price.

In the Member States that do provide for such levies, the tariff and scope of these levies vary from one State to another. The CJEU's recent decision in *Copydan Bandkopi* (C463/12) demonstrated that Member States have discretion to set the minimum threshold for when a levy is payable, provided that it is applied consistently with the principle of equal treatment.

7. Copyright reform

7.1 What do you consider to be the top two recent copyright developments?

Report of the Copyright Review Committee entitled *Modernising Ireland*

In Ireland, an independent committee was appointed by the Minister for Jobs, Enterprise and Innovation to examine Irish copyright legislation as it was evident that reform was needed in order to meet the demands created in our modern society.

The committee published a report with wide-ranging recommendations such as the establishment of an independent, self-funded Copyright Council of Ireland, the introduction of specialist IP tracks in the District and Circuit Courts and introducing the full range of copyright exceptions permitted by EU law through the Information Society Directive (2001/29/EC). The report includes a draft Bill designed to give the Government a steer on implementing their recommendation, Copyright and Related Rights (Innovation) (Amendment) Bill 2013.

Sony Music Entertainment [Ireland] Ltd & Ors v UPC Communications Ireland Limited [2015 IEHC 317]

Three music companies (Sony Music, Warner Music and Universal Music) brought proceedings against UPC Communications Ltd, Ireland's second largest internet service provider, in order to take measures to stop the illegal downloading of music. Similar actions failed in the past; however, the CRRA was recently amended to allow a copyright owner to seek an injunction against an intermediary whose services are being used to infringe a copyright (SI 59/2012 EU (Copyright and Related Rights) Regulations 2012 inserted s40(5A) into the CRRA).

The Court has now granted an injunction requiring UPC to take measures against those of its subscribers who illegally download music and other copyright material. It is likely to work as a 'three strikes' policy. UPC will send two warning letters and then in the third instance, the music company will seek the disconnection of the offender's internet service through a court order. The Court has ordered that such a detection system is set up in the next 12-15 months.

7.2 What do you consider will be the top two copyright developments in the next year?

Digital Single Market Strategy for Europe

On 6 May 2015, The European Commission released its *Digital Single Market Strategy for Europe*, which proposes a series of reforms in telecoms regulation, copyright and data protection, aimed at creating a Digital Single Market. The strategy aims to make it easier for businesses to operate throughout the 28 Member States.

Modernising copyright across Europe and bringing it in line with today's digital reality is an important component of the overall strategy. The proposals include:

- harmonising copyright law between Member States
- improving access to cultural content online
- ensuring users who buy film, music or articles can use them throughout Europe
- reviewing the role of online intermediaries in relation to copyright protected work
- stepping up enforcement against commercial-scale infringement of copyright.

The Strategy sets the Commission's agenda for EU level copyright reform over its term and is worth keeping a close eye on.

ITV Broadcasting Limited & Ors v TV Catchup Limited & Ors (C607/11)

This ongoing case brought by ITV and other broadcasters against TV Catchup alleges that TV Catchup's online streaming service breached their copyright in communicating their broadcasts live on the internet.

The CJEU ruled on an initial reference and found that television broadcasters may prohibit the retransmission of their programmes by another company via the internet. A company that intercepts and livestreams a TV broadcaster's signal is communicating the copyright to the public and this can only be done with the authority of the copyright owner.

The UK Court of Appeal is now seeking clarification on whether UK copyright law, which previously found to allow the livestreaming of terrestrial TV in limited circumstances, goes beyond what is permitted under Article 9 of the Information Society Directive (2001/29/EC).

Streaming services are gaining increasing popularity and the outcome of this decision could potentially lead to serious implications for website owners who provide real time streaming of TV programmes which may be prohibited from continuing to stream certain content without a licence.

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Italy

Carnelutti Studio Legale Associato, Margherita Bariè/Pietro Pouché



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in Italy is Italian Law no. 633 of 22 April 1941 (ICL), and its subsequent amendments, which substantially enforce the Berne Convention for the Protection of Literary and Artistic Works of 1886.

As a member of the European Union, Italian legislation must be interpreted and applied by the judiciary in accordance with European Directives and Regulations which have direct effect.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The categories of work covered by Article 2 ICL are: literary, dramatic, scientific, didactic, religious works, musical and artistic works, choreographic and pantomimic works, designs and architectural works, films and cinematographic works, photographs, software, databases and industrial designs. These are broad categories and can be summarised as follows:

Literary works

These are any works (other than dramatic, scientific, didactic or religious works) which are written or expressed orally.

Dramatic works

A dramatic work includes a work of dance or mime; for example, this might be a script for a play, a dance routine that has been choreographed or a screenplay of a book for film.

Musical works

These are works consisting of music, and specifically lyric or symphonic works, songs both constituted by solely music and the ones having also music and lyrics. Music is defined as a combination of sounds for listening to – it is not the same as mere noise.

Designs and architectural works

These include designs or architectural works related to buildings, interior design, urban plans and also gardens if they consist of a single project. These include also industrial designs, even if these have fallen within the public domain before 19 April 2001.

Artistic works

A graphic work, sculpture, painting, figurative work, engraving or scenographic work.

A graphic work is broad in scope and can be, amongst other things, a painting, drawing, diagram, map, chart or plan, engraving or an etching.

Films and cinematographic works

The ICL does not provide a specific definition of such works. However, this category includes all cinematographic works having creative character that are destined to be broadcast in a cinema.

Photographs

This category includes all photographs having creative character in light of the combination of certain aspects such as, among other things, the particular lights or colours used by the photographer, the effects applied, the subject, etc.

Software

Software concerns all the specific information stored in certain hardware.

2.2 What is required for works to qualify for copyright protection?

If a work falls within the one of the categories above, it may be protected by copyright if the work contains:

- novelty
- creative character
- legitimate aim

2.3 What rights does copyright grant to the rights holder?

The ICL sets out the rights (both moral and economic) subsisting in copyright works that are the exclusive rights of the rights holder (before any licences are granted). They include the right to:

- use of their work
- publication of the work or lending of the work to the public
- reproduction of the work
- elaboration of the work
- synchronisation
- economic exploitation of the work
- issuing copies and the renting or lending of the work to the public
- showing or playing the work to the public
- rights holders also have the moral rights described in question 2.4.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In Italy the following moral rights are provided for by Articles 10-24 of ICL:

- the right to be identified as the author of a copyright work
- the right to object to derogatory treatment or modification of your copyright work (save for the architectural works where the rights holder cannot oppose the amendments that are necessary during their creation as well as other amendments that are necessary for the work)
- the right for the author using a pseudonym to reveal their identity to the public
- the right not to suffer false attribution to a copyright work
- the right to disclaim the paternity of certain works.

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works varies according to the type of work and the date of creation. In general, the duration of copyright protection is as follows:

Category of work
Literary, dramatic, musical or artistic works, databases, software or industrial designs
Duration
Copyright expires 70 years from the end of the calendar year in which the author dies.

Where a work has a joint author/co-author, 70 years from the end of the calendar year in which the last known author dies (Art. 26 ICL).

Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was created or made available to the public (Art 27).

Category of work

Films

Duration

For films, the reference point is the end of the calendar year in which the last living author dies, among the ones indicated in Art. 35 ICL. Copyright then lasts until 70 years after.

Category of work

Broadcasts

Duration

Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made or from its first publication according to Art. 75 ICL.

Category of work

Photographs

Duration

Copyright in a photograph expires 70 years from the end of the calendar year in which the author dies (Art. 32-bis ICL).

2.6 For how long do moral rights subsist in copyright works?

The author's moral rights last for the life of the author plus 70 years.

3. Ownership

3.1 Who is the first owner of a copyright work?

Pursuant to Art. 8 ICL, the first owner of the copyright is the person who is indicated as the author of the work. This means that a person who is shown as the author (or is announced as such) in the course of the recitation, performance or broadcasting of a work shall be deemed to be the author of the work, absence proof to the contrary. The main exception to the rule is where the work was made by a person in the course of their employment; in those circumstances the employer is the first owner unless there is an agreement to the contrary.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where there is an assignment of the whole or of part of a work.

To qualify as joint authors it is necessary that the contributions of each author are not distinct. If they are distinct then two works subsist, each with separate copyright. According to Art. 10.2 ICL should no different agreement occur between the parties, each portion of co-authorship is considered equal to the other one.

Joint owners have their own individual rights with respect to the work that can be assigned independently of the other or others, but the consent of all joint authors is required for licensing or use of the copyright work. Should the work be unpublished it cannot be published, amended or used in a manner different from the one used in the first publication without the consent of all the joint authors. Should either co-author refuse, publication, modification or new utilisation of the work may be authorised by the judicial authority (Art. 10.3 ICL).

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in Italy; it arises automatically upon creation of the work. There is no registration system. Nevertheless, the author may file a copyright notice with the Italian Collecting Society (SIAE) which may prove useful to evidence ownership of copyright and the date of authorship. This creates a presumption that the named person is the author and puts third parties on notice of the rights, but copyright subsists without such notice and the failure to display such notice does not affect copyright in a work.

4. Infringement

3.4 What steps should you take to validly transfer, assign or license copyright?

According to Italian law only the economic rights can be assigned or transferred. An assignment of economic rights must be in writing, signed by or on behalf of the copyright owner pursuant to Article 110 ICL.

A licence of copyright must be in writing.

3.5 Can moral rights be transferred, assigned or licensed?

No. According to Art. 148 ICL, moral rights cannot be waived or assigned.

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed. Even if not specifically provided for by Italian copyright law, courts normally recognise the existence of two classes of infringement: primary infringement and secondary infringement.

4.1 What acts constitute primary infringement of copyright?

Primary infringement occurs where a person performs any of the following acts without the consent of the rights holder.

- copying
- issuing copies of the work to the public
- renting or lending the work to the public
- performing, showing or playing a copyright work in public
- communicating the work to the public
- making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation.

Primary infringements are strict liability offences. This means that there is no need to show that the alleged infringer had knowledge of another's subsisting right, or intention to infringe that right.

4.2 What acts constitute secondary infringement of copyright?

Secondary infringement occurs where a person, with knowledge or reasonable grounds for such knowledge:

- imports, exhibits or distributes, sells, lets or offers for hire the copyright work
- deals in articles adapted for making copies of copyright work
- transmits a copyright work via a telecommunications system
- gives permission for use of public place for a performance that infringes the copyright
- supplies apparatus for playing recordings that would show a copyright work in public
- gives permission to use their premises to show a copyright work to the public
- supplies a copy of a sound recording which has been used to perform a copyright work to the public.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be carried out in relation to copyright works despite the fact that they might be protected by copyright. The ICL provides certain acts that constitute a sort of exception to the copyright limitations. They include (amongst others):

Act
Use or reproduction of article related to economic, political, religious or topical arguments
Description
Such articles can be reproduced or made available to the public when the use or the reproduction has not be prohibited as long as the origin of the work, the name of the author and the date of creation of the work are indicated (Art. 65 ICL). The same provisions apply for works reproduced in Parliament or during judicial or administrative procedure for public security reasons (Art. 67 ICL).
Act
Personal copies for private use
Description
The making of a copy (of a single work stored in a library) that is made for the individual's personal and private use and not for ends that are directly or indirectly commercial or aimed at making work publicly available (Art. 68 ICL and 71-sexies ICL).
Act
Research and private study
Description
Research is permitted where a person is researching for a non-commercial reason or for teaching or scientific purposes (Art. 70.2 ICL). Copying is always allowed for private study.
Act
Criticism or scientific purposes
Description
Where the copyright work is being used for criticism or scientific purpose. Where the work is to be used for teaching or scientific research purposes, it is not to be used for commercial reasons (Art. 70.1 ICL).

Act
Quotation
Description
Including where the use is for criticism and review, quotations are a permitted as long as the quotation includes an indication concerning the name of the author, the title of the work, the editor, and the translator, should they occur in the original work (Art. 70.3 ICL)
Act
Parody
Description
The use of a work for the purpose of parody is not expressly provided by the ICL. Nevertheless, such exception could be implied from the provisions indicated in Art. 70 ICL that allow the use of a work for criticism purposes.

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

Italian copyright law does not provide specific provisions on the use of a hyperlink to, or a frame of, a work covered by copyright.

Nevertheless, there is guidance from case law and in particular from the decisions issued by the ECJ. Among the most recent, reference is made to the decision related to the case *Nils Svensson v Retriever Sverige (C-466/12)*.

The above mentioned CJEU decision determined whether linking to or framing links to copyright material without consent is a "communication to the public" and therefore infringes the rights holder's communication to the public exclusive right.

The CJEU emphasised that to be a communication to the public, a link would have to be a communication to a 'new' public, ie a public not in the contemplation of the rights holder when the rights holder published the work. As a result, when a person uploads material to the internet, the public communicated to is the internet at large. Therefore, linking to a work freely available on the internet does not communicate that work to a 'new' public.

However, where a work is not freely available on the internet, such as where the work sits behind a paywall, the copyright owner cannot be said to have communicated

with the internet as a whole, and so linking to that work in a way that circumvents the paywall would, it appears from recent case law, constitute a communication to the public and infringe the rights of the rights holder.

4.5 Is a licensee of copyright able to bring an infringement action?

Under CDPA, an infringement of copyright is actionable by the copyright owner or their heirs. When copyright is licensed, according to Article 167 ICL an action may be brought by the subject who represents the rights owner. Thus, an exclusive licence authorises the licensee to exercise a right which would otherwise be exercisable exclusively by the copyright owner. One such right is the right to bring an infringement action.

Nevertheless, according to certain Italian legislative provisions and case law, a non-exclusive licensee may also bring an infringement action should the licensee have the power to represent the owner according to Article 167.1 let. b) ICL.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The ICL provides the following remedies for rights holders:

- interim injunctions (including freezing orders, disclosing the name of the subjects involved in the marketing or distribution of the infringing products, exhibition orders related to the accounts and financial documents belonging to the infringing party)
- delivery up of infringing articles
- seizure or description of infringing articles
- forfeiture of infringing articles
- destruction of the infringing material
- an injunction against the infringer
- act for the damages compensation arising from the infringement.

5.2 Are there any specific remedies for online copyright infringement?

Where it appears that a website is displaying infringing material, rights owners can seek an injunction from the court ordering the internet service provider (**ISP**) to block the website as a preliminary injunction measure.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal acts under the ICL in relation to copyright. The main offences relate to selling, distributing or making available for sale copies of a copyright work but there are offences for the reproduction or duplication of the infringing copy. The sanction for committing a criminal offence in relation to copyright is likely to be a fine and/or a prison sentence.

If an offence is committed by a company and it is proven that an individual officer of the company consented to committing the offence, that officer can also be liable for the criminal act.

The penalties for the copyright crimes are various and include fines, administrative sanctions and prison. The fines for a copyright infringement range from €2,582 to €25,822 for each crime. The administrative sanctions range from €103 to €1,032 for each crime. Should prison sentences be applicable, these range from one to four years for each crime.

6. Enforcement

5.4 Is there a time limit for bringing a copyright infringement claim?

Italian copyright law does not provide any time limit for bringing an infringement action. Nevertheless, according to the leading Italian case law, for the granting of a preliminary injunction proceeding, the urgency requirement (together with the likelihood of the right) has to occur. According to Italian case law, the urgency requirement requires that the action has to be started within approximately six to eight months from when the applicant became aware of the infringement.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In Italy, the general rule is that the unsuccessful party pays the costs of the successful party. However, this is subject to the very wide discretion of the court who can order otherwise and the costs could be shared by the parties should the final decision only partially grant the claims of one party.

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

The Italian legal system provides that on the copyright matters the Specialised Division on Company Matters has the relevant jurisdiction.

The value of the case has to be indicated within the first stage of the proceeding (ie when the writ of summons or the preliminary injunction application is served/filed) and the courts have jurisdiction also for cases where the value, for various reasons, cannot be determined.

6.2 Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure by Customs of infringing copies being imported into Italy.

Criminal proceedings

Criminal proceedings, although rare, can be brought on the grounds described in 5.3 above, and pursued through the criminal courts.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

See point 6.1 above.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

In Italy the rights of the authors are managed from an administrative point of view by the Italian Collecting Society (SIAE) described in section 3.3 above, which substantially allows the authors to obtain a notice concerning the existence of their rights, as well as the operating dates of their rights.

6.5 Are copyright levies payable? By whom, and in what circumstances?

According to Article 71-sexies ICL copyright levies are not payable in Italy where an exception applies, such as the exception for private copying without commercial purposes.

7. Copyright reform

7.1 What do you consider to be the top two recent copyright developments?

Regulation about copyright protection

On 31 March 2014, the Regulation on copyright protection in electronic communication networks issued by the Italian Communication Regulatory Authority (AGCOM) entered into force.

From an administrative point of view, the Regulation is a landmark provision introducing rules to combat digital piracy through the implementation of simplified mechanisms of notification in the case of intellectual property rights violations. The Regulation is also aimed at promoting the development of legal offering of digital content and at cultivating its legal usage.

The Regulation does not apply to end users of digital content, and it does not impact on peer-to-peer applications.

This Regulation does not limit the freedom of expression and information, but ensures the full guarantee of the rights to inform, comment and discuss and for educational and scientific purposes; and any use not adversely affecting the normal exploitation of the content.

Although the regulation provides for AGCOM penalties, legal proceedings may still be commenced by rights holders against the infringing parties.

The measures aim to protect the freedom of the network, because AGCOM's procedure does not inhibit access to the infringing site until an investigation concludes with a negative outcome which will then result in an order to selectively remove the infringing content or to disable access to the website.

In addition to measures of notice and takedown, under principles set out by Legislative Decree no. 70/2003, the Regulation states that AGCOM may act at the request of a party in order to protect copyright in accordance with EU case law.

Unauthorised use of photos covered by copyright on Facebook

Through the decision no. 12076 issued on 1 June 1 2015, the Specialised Division of Court of Rome stated that the uploading of photos on social networks by the relevant authors, if they are covered by copyright, does not correspond to a total assignment of the rights on the photos.

In fact, from an examination of the conditions provided in the licence agreement of Facebook signed by users, the publication on Facebook of videos or pictures covered by copyright does not correspond to an assignment of the rights on these works by its author.

Thus, should the photos uploaded in the personal page of its authors be illicitly used by third parties (eg pictures published by a newspaper) the author has the right to obtain the compensation for the violation of copyright on the photos, including the compensation of their moral rights.

7.2 What do you consider will be the top two copyright developments in the next year?

Digital Single Market Strategy for Europe

On 6 May 2015, The European Commission released its *Digital Single Market Strategy for Europe*. The Commission's stated aim is to "make the EU's single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one".

Copyright forms a central component of the strategy (but perhaps not as central as many had hoped) in the following areas:

- the harmonisation of copyright law between Member States
- the introduction of cross-border e-commerce rules
- bringing an end to 'unjustified' geo-blocking (the practice of denying consumers access to a website based on their location, or re-routing them to a local website, often with different pricing)
- strengthening the copyright enforcement system against commercial-scale infringements.

The Strategy sets the Commission's agenda for EU level copyright reform over its term and is worth keeping a close eye on.

The digital exhaustion of the copyrights

On 3 July 2012, the ECJ handed down its landmark decision in *UsedSoft GmbH v Oracle International Corp* (C-128/11) ruling that the owner of copyright in software cannot prevent a perpetual licensee who has downloaded the software from the internet from selling his 'used' licence.

Substantially the CJEU announced that, under Directive 2009/24 (the **Software Directive**), the purchaser of a digital copy of a computer program may resell that copy – or even just the "used" licence that entitles the purchaser to download the copy – subject to certain limitations and requirements.

This decision has significant implications for the software and other digital industries, since the software house companies will amend their licence agreements in order to comply with this new trend in the market.

The case law issued by ECJ provides some guidelines concerning the necessary rules for the correct transfer of the used software licences and the national legislation, including Italian ones, identified possible methods and suggestions for making possible the exhaustion of the copyrights on the licensed software and, therefore, the relevant transfer of the licence.

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Netherlands

Boekel N.V., Marc Elshof



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in the Netherlands is the Copyright Act (*Auteurswet*).

Another relevant act is the Neighbouring Rights Act (*Wet op de naburige rechten*), which contains rules for the protection of rights of performing artists, producers of phonograms or films, and broadcasting companies. Furthermore, the Database Act (*Databankenwet*) provides protection for databases that meet certain criteria (in addition to potential protection pursuant to the Copyright Act).

Case law is also an important source on how to interpret the legislation. As a result there are a number of judicial decisions that contribute to the sources of copyright law in the Netherlands.

As a member of the European Union, the interpretation and application of Dutch legislation by the judiciary must be read in accordance with European Directives and Regulations which have direct effect. Further, the Dutch

Courts and other EU national courts often refer questions of law to the European Court of Justice, whose decisions are binding on national courts. As a result, Dutch copyright law is frequently added to and updated from both internal and external sources.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The categories of work that can be covered by copyright are works of literature, science or art, including:

- books, brochures, newspapers, magazines and other documents
- theatrical productions and dramatic-musical works
- oral lectures
- choreographic works and pantomimes
- musical works, with or without words
- drawings, paintings, buildings, sculptures, lithographs, engravings and other reproductions
- geographical maps
- designs, sketches and plastic works, relating to architecture, geography, topography or other sciences
- photographic works
- films
- works of applied arts and drawings and industrial designs
- computer programs, including any preparatory materials.

In general, any product in the field of literature, science or art, irrespective of the way or form it is expressed, can under Dutch law be protected by copyright.

2.2 What is required for works to qualify for copyright protection?

If a work falls within one of the categories above, it may be protected by copyright if it has its own original character and carries the personal stamp of the author. In EU case law the criterion is that a work must be the expression of the intellectual creation of its author. In Dutch case law and legal doctrine it is assumed that both criteria create the same threshold.

As a general rule Dutch law provides copyright protection if the author is a national of, or the work was first published in, the Netherlands or a state which is a signatory to one of the various international conventions which the Netherlands is a party to.

2.3 What rights does copyright grant to the rights holder?

The Copyright Act sets out the rights subsisting in copyright works which are the exclusive rights of the rights holder (before any licences are granted). They include the rights to:

- copy the work
- issue copies of, rent or lend the work to the public

- perform, show or play the work to the public
- make an adaptation of the work or do any of the above in relation to the adaptation.

Rights holders also have the moral rights described in question 2.4.

The Copyright Act contains some limitation/exceptions to these rights (see below question 4.2).

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In the Netherlands the following moral rights are listed in the Copyright Act (and continue to apply after the author has assigned their copyright):

- the right to object to publication of a copyright work without being named as author
- the right to object to publication of a copyright work under another name than his/her own (or pseudonym)
- the right to object to amendment of the name of a copyright work or in the indication of the author (insofar as these are included on or in the copyright work or have been published in connection with the copyright work)
- the right to object to any other amendment in the work, unless the amendment is such that the objection would be unreasonable
- the right to object to derogatory treatment of the copyright work.

Moral rights apply to all copyright works. For films, certain additional moral rights exist:

- the author has the right to have his/her name mentioned in the film, including his/her capacity or contribution to the film
- to demand that the part of the film where his/her name is mentioned is screened
- to object against mentioning his/her name in the film, unless this objection is unreasonable.

2.5 What is the duration of copyright in protected works?

- The duration of protection for copyright works varies according to the type of work and the date of creation. In general, for works created on or after 29 December 1995 the duration of copyright protection is as follows:

3. Ownership

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 70 years from the end of the calendar year in which the author dies.
Where a work has a joint author/co-author, 70 years from the end of the calendar year in which the last known author dies.
Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was made or made available to the public.
Category of work
Films
Duration
For films, the reference point is the end of the calendar year the last of the following persons die: the chief director, screenwriter, writer of the dialogues and the author of the music for the film. Copyright then lasts until 70 years after.

2.6 For how long do moral rights subsist in copyright works?

An author's moral rights lapse when the author dies, unless he or she has appointed someone to guard these rights in his or her last will. In that case, the moral rights lapse when the copyright ceases to exist (ie in principle 70 years from the end of the calendar year in which the author dies).

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the author. There are three main exceptions to this rule:

- if the work was made following a design prepared by someone else and under that person's supervision, that person is regarded as the first owner
- if the work was made by a person in the course of his/her employment, the employer is the first owner unless there is an agreement to the contrary
- if the work has been made public by a (public or private) legal entity under its own name, without mentioning the name of the person that created the work, the entity is regarded as the first owner, unless such publication was unlawful. Parties can deviate from this rule.

The author is defined as the person who creates the work. For films, any person who made a creative contribution to the film is regarded as an author. However, the above mentioned exceptions apply, meaning that in principle the employer of such person will be regarded as the first owner (note: the sole fact that a party is the producer of a film does not in itself grant the producer the authorship of the film).

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more people. This can occur where a work is created by more than one person or where there is an assignment of the whole or of part of a work.

To qualify as joint authors it is necessary that the contributions of each author are not distinct. If they are distinct then two works subsist, each with separate copyright.

Joint owners have their own individual rights with respect to the work that can be assigned independently of the other or others, but the consent of all joint authors is required for licensing or use of the copyright work. Parties can make deviating contractual arrangements.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in the Netherlands; it arises automatically upon creation of the work. There is no registration system.

4. Infringement

A copyright notice may be useful to evidence ownership of copyright and the date of authorship. However, it does not necessarily create a presumption that the named person/entity is the author. It puts third parties on notice that copyright is asserted, but copyright subsists without such notice and the failure to display such notice does not affect copyright in a work.

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment of copyright must be in writing, signed by or on behalf of the copyright owner.

A licence of copyright can, in addition to being in writing, be agreed orally or implied, unless it regards an exclusive licence (which must be in writing, signed by or on behalf of the copyright owner). For evidence purposes a written licence agreement is generally recommended.

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights can be waived in part but they cannot be assigned. The author can waive his or her moral right to object to publication without his or her name (or pseudonym). The author can further waive his or her right to object to publication of the work under another name or to amendments to the work. The author cannot waive his or her right to object to derogatory treatment of the work.

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed.

4.1 What acts constitute infringement of copyright?

Infringement occurs where a person performs any of the following acts without the consent of the rights holder:

- copying
- issuing copies of the work to the public
- renting or lending the work to the public
- performing, showing or playing a copyright work in public
- communicating the work to the public
- making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation.

In essence, any form of publication, reproduction, copying, amending or imitating the work without sufficient permission constitutes an infringement of copyright. The Copyright Act provides for various exceptions to this main rule (see question 4.2).

4.2 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be carried out in relation to copyright works despite the fact that they might be protected by copyright. The Information Society Directive (2001/29/EC) contains what has been termed a “shopping list” of exceptions and limitations, many of which the Copyright Act has implemented into Dutch law. These permitted acts are wide in variety but often relate to very specific scenarios. They include (amongst others):

Act
Making of temporary copies.
Description
A copy that is transient or incidental which: <ul style="list-style-type: none">• is an integral and essential part of a technological process• has the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary or• has no independent economic significance. (eg ISPs who use caching).
Act
Personal copies for private use.

Description
The making of a copy that is made for the individual's personal and private use and not for ends that are directly or indirectly commercial.
Levies are in place for devices whose function is to store personal copies.
Act
Research and private study
Description
Research is permitted where a person is researching for a non-commercial reason and provided a fair compensation is paid to the author/copyright holder.
In addition, the research must contain acknowledgement of the copyright work where it is referenced (ie identify it by title and author).
Copying is always allowed for private study.
Act
Criticism or review and reporting current events
Description
Where the copyright work is being used for the purpose of criticism or review.
It can be the criticism or review of that copyright work, or another work or performance provided the copyright work has been made available to the public.
As for research, an acknowledgement of any copyright work used in a criticism or review is required.
Reporting current events are deemed to be permitted acts under the Copyright Act provided that (where reasonably possible) the source, including the name of the author, is mentioned.
Act
Quotation
Description
Including where the use is for criticism and review, quotations are a permitted act provided that they relate to a work that has already been lawfully made available to the public.
An acknowledgement of a copyright work used is required where a quotation is used.

Act
Parody
Description
Naturally parodies, to some extent, require copying or mixing of another's work. People are allowed to use limited amounts of another's material without the owner's permission.
The parody must evoke the existing work whilst being noticeably different from it.
It should be noted that parodied work does not excuse defamatory remarks or the moral right to object to derogatory treatment of a work.

4.3 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The CJEU decision in *Nils Svensson v Retriever Sverige* (C-466/12) determined whether linking to or framing links to copyright material without consent is a "communication to the public" and therefore infringes the rights holder's communication to the public exclusive right.

The CJEU emphasised that to be a communication to the public, a link would have to be a communication to a 'new' public, ie a public not in the contemplation of the rights holder when the rights holder published the work. As a result, when a person uploads material to the internet, the public communicated to is the internet at large. Therefore, linking to a work freely available on the internet does not communicate that work to a 'new' public.

However, where a work is not freely available on the internet, such as where the work sits behind a paywall, the copyright owner cannot be said to have communicated with the internet as a whole, and so linking to that work in a way that circumvents the paywall would, it appears from recent case law, constitute a communication to the public and infringe the rights of the rights holder.

4.4 Is a licensee of copyright able to bring an infringement action?

Under the Copyright Act, an infringement of copyright is actionable by the copyright owner.

When copyright is licensed, a licensee can only bring an action itself if it has been granted this right by the copyright owner (often paired with a power of attorney to act on behalf of the copyright owner).

5. Remedies

If no such contractual rights have been granted, the licensee is dependent on the copyright owner. The copyright owner can bring a claim also on behalf of the licensee or the licensee can intervene in proceedings initiated by the copyright owner and claim the damages it suffered.

5.1 What remedies are available against a copyright infringer?

The Copyright Act provides the following remedies for rights holders:

- interim injunctions (including search orders, freezing orders and pre-action, non-party disclosure)
- delivery up of infringing articles
- seizure of infringing articles
- forfeiture of infringing articles
- an injunction against the infringer
- to elect between either an enquiry as to damages or an account of profits arising from the infringement.

5.2 Are there any specific remedies for online copyright infringement?

Where it appears that a website is displaying infringing material, rights holders can seek an injunction from the court ordering the internet service provider (**ISP**) to block the website. The court will balance the interests of the copyright holder against the right of the ISP to freely conduct its business. The ISP should be put on notice of the person using their services to infringe copyright before the order is sought.

Furthermore, the copyright holder can under certain circumstances request an ISP or other company that provides online services to provide the details of the person that posted the infringing material online (eg the sale of copyright infringing products via an online sales platform such as eBay or Marktplaats).

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal acts under the Copyright Act in relation to copyright. The main offences as listed below relate to selling or making available for sale copies of a copyright work but there are offences for communicating the infringing copy to the public. The sanction for committing a criminal offence in relation to copyright is likely to be either a fine and/or a prison sentence.

Each offence requires a level of intention, knowledge or belief on behalf of the potential culprit, and each carries various penalties:

Criminal Act
Infringement of a copyright
Relevant intention, knowledge or belief
Intentional infringement (<i>opzet</i>) is required
Penalty
Maximum: Six months' imprisonment or €20,500 fine (€82,000 for legal entities)
Criminal Act
Publicly offering, possessing with a view to copying, importing, exporting or forwarding in transit, or keeping for profit an infringing copy of a copyright work
Relevant intention, knowledge or belief
Intentional infringement (<i>opzet</i>) is required
Penalty
Maximum: One year imprisonment or €82,000 fine (or €820,000 for legal entities)
Relevant intention, knowledge or belief
Having reason to believe that the copy is infringing a person's copyright
Penalty
A fine of €8,200 (or €20,500 for legal entities)
Criminal Act
Publicly offering, possessing with a view to copying, importing, exporting or forwarding in transit, or keeping for profit any means to unlawfully (ie without permission of the copyright owner) remove or evade technical security measures on software programs (decoders)
Relevant intention, knowledge or belief
Intentional infringement (<i>opzet</i>) is required
Penalty
Maximum: Six months' imprisonment or €20,500 fine (€82,000 for legal entities)

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is five years to bring a claim for breach of copyright. Time begins to run from the date the copyright holder has knowledge of the damages and of the person responsible for such damages.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

Under Dutch intellectual property law the general rule is that the unsuccessful party pays the costs of the successful party (implemented as a consequence of the IP Rights Enforcement Directive (2004/48/EC)). However, the courts have put together a list of indicative costs for 'standard' IP infringement proceedings. Unless the unsuccessful party does not oppose the requested cost order or the successful party can convincingly explain why the court should deviate from the indicative list, courts tend to use the indicative amounts in their costs orders. Note that these indicative amounts do not apply in more complex intellectual property disputes.

6. Enforcement

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

Often intellectual property claims are brought in summary proceedings. These are brought before the preliminary relief section (*Voorzieningenrechter*) of the district courts (*rechtbank*). Note that if a court order is granted in summary proceedings, the claimant must initiate substantive proceedings within a period set by the court.

Substantive proceedings are brought before the district court.

Appeal and appeal in cassation is possible.

6.2 Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure by the Dutch Customs authorities of infringing copies being imported into the Netherlands.

Criminal proceedings

Criminal proceedings, although rare, can be brought on the grounds described in 5.3 above, and pursued through the criminal courts.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

N/A

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the rights holder.

However, as a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collecting societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent.

The key collecting societies in each sector are as follows:

Agency
Buma/Stemra
Who it represents
Composers, lyrics writers and music publishers
Agency
BREIN
Who it represents
Joint anti-piracy programme of authors, artists, publishers, producers and distributors of music, film, games, interactive software and books
Agency
SENA
Who it represents
Dutch artists and record producers (rights under the Neighbouring Rights Act)
Agency
Lira
Who it represents
Authors and translators of literary works (everything that has been written with words)
Agency
Leenrecht
Who it represents
Libraries (public lending)
Agency
Pictoright
Who it represents
Illustrators, graphic artists, graphical designers, photographers, architects
Agency
Reprorecht
Who it represents
Authors of books, magazines, newspapers and other publications for copies of such works made by companies and governmental agencies

7. Copyright reform

Agency
ThuisKopie
Who it represents
Collection of the private copy levies
Agency
VEVAM
Who it represents
Film and television directors
Agency
SEKAM
Who it represents
Film and television works broadcast outside the Netherlands

6.5 Are copyright levies payable? By whom, and in what circumstances?

Copyright levies are not payable in the Netherlands where an exception applies, such as the quotation right.

7.1 What do you consider to be the top two recent copyright developments?

Strengthening of the position of authors vis-à-vis intermediaries that exploit their copyright

The Dutch Government recently introduced new rules to strengthen the position of authors vis-à-vis intermediaries that exploit their copyright, eg publishers. The new rules include the obligation to pay the author a reasonable compensation. If the agreed compensation turns out to be unreasonably low, the author can request the court to amend this (the bestseller clause).

GS Media

Whilst the CJEU in *Nils Svensson v Retriever Sverige* (C-466/12) decided that linking to or framing links to copyright material without consent does not constitute a “communication to the public” and therefore an infringement of the rights holder’s communication to the public exclusive right, the case didn’t decide the question of whether this would still be the case where the works linked to are themselves unlawfully uploaded (ie uploaded without the copyright holder’s consent).

This is the basis of three questions referred to the Court of Justice of the European Union in Case C-160/15 *GS Media*.

The reasoning behind the decision in *Svensson* – that to be a communication to the public a link would have to be a communication to a ‘new’ public (ie a public not in the contemplation of the rights holder when the rights holder published the work) – would suggest that linking to an unlawful copy of a copyright work would be an infringement of copyright in the work, as it constitutes a communication to a public which the rights holder had not envisaged.

Whatever decision the Court comes to, it is likely to prove controversial in this developing area of law.

7.2 What do you consider will be the top two copyright developments in the next year?

Digital Single Market Strategy for Europe

On 6 May 2015, The European Commission released its *Digital Single Market Strategy for Europe*. The Commission’s stated aim is to “make the EU’s single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one”.

Copyright forms a central component of the strategy (but perhaps not as central as many had hoped) in the following areas:

- the harmonisation of copyright law between Member States

- the introduction of cross-border e-commerce rules
- bringing an end to ‘unjustified’ geo-blocking (the practice of denying consumers access to a website based on their location, or re-routing them to a local website often with different pricing)
- strengthening the copyright enforcement system against commercial-scale infringements.

The Strategy sets the Commission’s agenda for EU-level copyright reform over its term and is worth keeping a close eye on.

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Whilst the CJEU in *Nils Svensson v Retriever Sverige* (C-466/12) decided that linking to or framing links to copyright material without consent does not constitute a “communication to the public” and therefore an infringement of the rights holder’s communication to the public exclusive right, the case didn’t decide the question of whether this would still be the case where the works linked to are themselves unlawfully uploaded (ie uploaded without the copyright holder’s consent).

This is the basis of three questions referred to the Court of Justice of the European Union in Case C-160/15 *GS Media*.

The reasoning behind the decision in *Svensson* – that to be a communication to the public a link would have to be a communication to a ‘new’ public (ie a public not in the contemplation of the rights holder when the rights holder published the work) – would suggest that linking to an unlawful copy of a copyright work would be an infringement of copyright in the work, as it constitutes a communication to a public which the rights holder had not envisaged.

Whatever decision the Court comes to, it is likely to prove controversial in this developing area of law.

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Russia

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1. Legislation and regulation

1.1 What are the main sources of copyright law?

The basic provisions of copyright law in Russia are established by international conventions to which the Russian Federation is a party and by the Constitution of the Russian Federation.

However, the main source of copyright legislation in Russia is the Civil Code of the Russian Federation (the Civil Code); specifically part IV of the Civil Code, which was enacted in 2008.

In addition, there are a number of governmental regulations and Presidential orders that have been adopted to implement the provisions of Federal laws and are tailored to make provision for specific copyright-related matters and to designate a regulatory regime for such matters.

The Russian Federation is a continental law legal system. However, for the purposes of uniformity of judicial practice, courts usually take into consideration certain relevant rulings of Russia's Higher Courts. Among them is a joint resolution of plenary sessions of the Russian Supreme Court and Supreme Commercial (**Arbitration**) Court issued on

26 March 2009, entitled "On Certain Issues Caused by the Entry into Force of Part Four of the Civil Code" (Resolution No.5/29).

The Criminal Code and the Administrative Offences Code of the Russian Federation regulate relations concerning liability for infringements in the sphere of copyright law.

2. Subsistence of copyright

2.1 Author's rights and related rights

Russian legislation directly provides for two categories of copyright: the rights of an author of the product (**author's rights**) and **related rights**. An author's right is the right to something created by an original author, provided that the product is a new and original one. Such right arises from the fact of a product being created through the author's own skill, judgement and individual effort and is not certified by a special document. For example, the author's right to a piece of music belongs to the person who wrote it. Related rights protect the legal interests of certain persons and legal entities who contribute to making works available to the public. For example, the related right to a phonogram belongs to the producer of the phonogram.

The principle of correlation between an author's rights and related rights is that objects of related rights should be created in compliance with the author's right to the work used in the process. At the same time, related rights are recognised regardless of whether copyright for such works exists and is in effect.

2.2 What type of works can be protected by copyright?

The categories of work that can be covered by copyright are works of science, literature, and art, regardless of the value and purpose of the work, as well as of the mode of its expression:

2.2.1 The objects of author's rights can be summarised as follows:

Literary works

These are any works, other than a dramatic or musical work, which are written, spoken or sung and have been recorded in writing or otherwise. Computer programs are also considered objects of copyright and are protected as literary works.

Dramatic works

This includes but is not limited to musical and dramatic works, and scripts for plays.

Choreographic works

This means works of choreography and pantomime.

Musical works

These are works consisting of music, with or without text.

Audiovisual works

An audiovisual work is a work consisting of a fixed series of interconnected images (with or without sound), and designed for visual and auditory (if accompanied by sound) perception with the aid of appropriate technical devices. These are films, movies, clips, TV films etc.

Artistic works

An artistic work is a painting, graphic work, sculpture, a work of design, graphic novel, comic, or any other work of art. This includes composite works such as collages.

Works of crafts and scenic design

Works of crafts are art products or household products that have artistic and aesthetic qualities and at the same time meet practical needs. Scenic design is a creation of theatrical, film or television scenery.

Architectural works

This includes works of architecture, town planning or garden design, which can be expressed in the form of projects, charts, drawings, layouts, and models.

Photographic works

Photographic works are photos and other objects that are created using the same or similar instruments as in photography.

Geographical works

Geographical works are geographical maps, geological maps, plans, sketches, plastic models used in geography, topology etc.

Other works, given that the list of objects of author's rights is open.

2.2.2 Related Rights:

Objects of related rights are:

- performances of performing artists and conductors, productions of director-producers of shows (performances) if these performances are expressed in a form that allows them to be reproduced and distributed by technical means
- phonograms, with the exception of sound recording included in an audiovisual work
- broadcasting or disseminating radio or television transmissions via cable
- databases – in terms of protecting them from unauthorised extraction and repeated use of the data constituting their content
- works of science, literature and art that are made public after they fall into the public domain, in terms of protecting the rights of the publishers of such works.

2.3 What is required for works to qualify for copyright protection?

The following features are necessary for works to be recognised as subject to copyright: a) creative nature b) objective form. Designation, public benefit or the quality of a work do not affect protectability. Publishing is not a must.

Separate parts of a work, such as a title or a character, benefit from copyright protection, as they are results of the author's creative work.

Copyright does not protect ideas, concepts, methods of solving technical problems, discoveries, facts, or machine codes. In addition, the Civil Code provides for a list of works that never fall under copyright protection. Those are official governmental documents, laws, court rulings, international agreements with translations; state and municipal symbols including flags, coats of arms, honours, banknotes etc.; folklore; informational messages in any form.

As a general rule, the Russian Federation provides copyright protection if: (i) the author is a national of the Russian Federation; (ii) the work was first published in the Russian Federation or was not published but is existing in some objective form within the territory of the Russian Federation (regardless of author's citizenship); or (iii) the work was first published outside the territory of the Russian Federation (or was not published), but the author's state is a signatory to one of the various international conventions to which the Russian Federation is a party.

2.4 What rights does copyright grant to the rights holder?

The Civil Code sets out the rights subsisting in copyright works, which are the exclusive rights of the rights holder, ie the author of the work (before any licences are granted). They include the rights to:

- copy the work
- distribute the original work or a copy of it by selling or otherwise disposing of it
- publicly display a work or a copy of it
- import a work or a copy of it for the purpose of further distribution
- rent out the work or a copy of it
- perform the work live in public or with the use of technical means
- broadcast the work or a copy of it on air or by cable
- translate or otherwise modify the work
- implement a project of architecture, town planning, or garden design

- bring the work to the public (via the internet)
- transfer the entire contents of a database or a substantial part of its constituent materials to another information carrier using any means and in any form, etc.

Rights holders also have the moral rights described in the answer to question 2.5 below.

2.5 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

The following moral rights are set out in the Civil Code:

- the right of authorship (ie the right to be recognised as the author of the work)
- the right to name (ie the right of the author to use or authorise the use of a work under his or her name, under a pen name or anonymously)
- the right of integrity and inviolability (ie the requirement that any modifications, edits, commentaries or illustrations of and to the work may only be made or added with the consent of the author, as well as the right of the author to demand that his/her reputation and personal integrity be protected)
- the right to make the work public first time
- in cases where the Civil Code so provides, other rights (such as the right to withdraw consent to the publication of work provided that the publisher is compensated for the resulting losses).

2.6 What is the duration of copyright in protected works?

The duration of the protection for copyright works varies according to the type of work and the date of creation. In general, the duration of copyright protection is as follows¹:

Category of work
Literary works (including computer programs), dramatic, choreographic, musical, audiovisual, artistic works, works of crafts and scenic design, architectural works, photographic works, geographical works
Duration
Copyright expires 70 years from 1 January of the year following the year in which the author dies.
Where a work has a joint author/co-author, 70 years from 1 January of the year following the year in which the last known author dies.

1. There are some exceptions for works created during the time of the Great Patriotic War (1941-1945) as well as for works created by authors who were repressed and posthumously rehabilitated.

Where the author's identity is unknown, copyright expires 70 years from 1 January of the year following the year in which the work was made available to the public.

Where the work was made available to the public within 70 years of the author's death, the copyright expires 70 years from 1 January of the year following the year in which the work was made available to the public.

Category of work

Performances

Duration

The exclusive right expires with the death of the performer but not earlier than 50 years from 1 January of the year following the year in which the performance was made, recorded or broadcast on air or by cable.

Category of work

Phonograms

Duration

The exclusive right expires 50 years from 1 January of the year following the year in which the phonogram was recorded.

If a phonogram was promulgated not later than 50 years from 1 January of the year following the year in which the phonogram was recorded, the exclusive right expires 50 years from 1 January of the year following the year in which the phonogram was promulgated.

Category of work

Broadcasting

Duration

The exclusive right expires 50 years from 1 January of the year following the year in which the radio or TV transmission was broadcast on air or by cable.

Category of work

Databases (with respect to protecting them from unauthorised extraction and repeated use of the data constituting their content), works of science, literature, and art that are made public after they fall into the public domain, with respect to the protection of the rights of publishers of such works

Duration

The exclusive right of a creator of a database arises at the moment when the database is completed and expires 15 years from 1 January of the year following the year in which it is completed.

If the database was promulgated not later than 15 years from 1 January of the year following the year when it was completed, exclusive rights expire 50 years from 1 January of the year following the year in which the database was promulgated.

The exclusive rights of a publisher arise at the moment when the database was promulgated and expire 25 years from 1 January of the year following the year in which the database was promulgated.

2.7 For how long do moral rights subsist in copyright works?

Authorship, the right to name of the author and the right to integrity do not have a time limit.

3. Ownership

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of a copyright work is the author, ie the individual who created the work. There is, however, one exception.

Exclusive rights to the work belong to the author's employer if the work was created by the author in performance of his or her employment duties, and where a labour contract or civil contract between the employer and the author has not provided otherwise. This type of work is known as work made for hire.

Audiovisual works have three authors/owners: the director, the screenwriter and the composer who wrote the music for the audiovisual work.

If a copyright is granted on the basis of an international agreement, the author is determined in accordance with the laws of the country that is the party to the agreement.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person. A work can constitute a unified whole (when it is impossible to determine which of the co-authors created a concrete part) or can consist of parts which have independent significance (eg a textbook, each chapter of which is prepared by an independent author).

Co-authors use the work together unless they have agreed otherwise.

When a work constitutes a unified whole, co-authors must not, without due cause, prohibit such work from being used.

As a general rule, a part of a work that has independent significance may be used by its author at their own discretion unless they and co-authors have agreed otherwise.

Any co-author is entitled to protect their rights in any lawful way without the prior consent of the other co-authors.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in Russia; it arises automatically when the work is created.

Copyright is only registrable, on an optional basis, for computer programs and databases. This is advisable as registration offers proof of authorship and date of creation for subsequent works. The procedure is carried out by the Russian Federal Service for Intellectual Property (Rospatent).

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment or licence agreement must be in writing, signed by or on behalf of the copyright owner and the assignee/licensee. A contract to grant the right to use a work in a periodical press publication may be concluded in oral form.

It is possible to grant an open licence with respect to works of science, literature or art. For more information regarding open licences, please refer to the respective part of question 7.1 below.

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights can be neither waived nor assigned. Such a waiver is deemed void.

4. Infringement

Owners of copyright can take legal action if any of their exclusive rights (as set out in question 2.4 above) have been infringed.

4.1 What acts constitute infringement of a copyright?

In accordance with the Civil Code and the Criminal Code of the Russian Federation, infringement occurs, in particular, where a person performs any of the following acts without the consent of the rights holder:

- making one or more copies of a work or any of its part
- distributing a work through sale or other form of alienation
- publicly displaying a work
- importing the original or copies of a work for the purpose of distribution
- renting out the original or a copy of the work
- performing a work in public live or with the use of technical means
- communication by wireless means
- broadcasting a work or its copy on air or via cable
- retransmitting
- making a translation or other modification of the work
- practically implementing an architectural design, city planning, or park/garden plan
- communicating a work to the public in such a way that any person may obtain access to the work from any place and at any time of their own choosing
- plagiarising.

Please note, this list is not exhaustive.

4.2 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be carried out in relation to copyright works despite the fact that they might be protected by copyright. These permitted acts are wide in variety but often relate to very specific scenarios. They include (amongst others):

Act
Making temporary copies
Description
A copy that is transient or incidental which: <ul style="list-style-type: none"> • is an integral and essential part of a technological process

- has the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary or
- has no independent economic significance.

Act

Making personal copies for private use

Description

Making of a copy exclusively for the individual's personal and private use and when necessary.

However, such means of use as the reproduction of databases or their significant parts, recording of an audiovisual work at a place open for free attendance and its reproduction with professional equipment and some other means are directly prohibited by the Civil Code.

Act

Free use of a work for informational, scientific, educational, or cultural purposes

Description

In particular:

- quotation for scientific, discussion, critical, informational and educational purposes
- use of works lawfully made public and excerpts from them as illustrations in educational publications, radio and television programmes
- reproducing in periodicals, broadcasting over the air or via cable and bringing to the public of:
 - articles on current economic, political, social and religious issues lawfully published in newspapers and magazines (unless such use is specifically forbidden by the rights holder)
 - publicly pronounced political speeches, addresses, reports and other similar works within a scope necessary for information purposes
- public performance at educational, medical organisations, social service institutions by staff and/or persons serviced or kept at these institutions
- recording on an electronic medium and bringing to public a summary of a thesis.

Act

Free use of a work permanently located at a place open to the public

Description
With the exception of cases when the reproduction of a work by this method is the basic object of the reproduction, communication by wireless means or by wire or when the image of the work is used for commercial purposes.
Act
Free recording of a work by a broadcasting organisation for the purpose of short-term use
Description
Such recording shall be made by a broadcasting organisation using its own equipment and for its own broadcasts. The recording shall be destroyed within six months of the day of its creation, unless a longer term has been agreed with the rights holder or provided by operation of law.
Act
Parody
Description
The creation of a work in the genre of a literature, musical, or other parody, or in the genre of caricature on the basis of another (original) work lawfully made public and the use of this parody or caricature.

4.4 Is a licensee of copyright able to bring an infringement action?

In accordance with the Civil Code, if infringement by third parties of an exclusive right to a work affects the rights of the licensee under a licence contract, the licensee shall have the opportunity to enforce their rights by enforcement measures provided by the Civil Code.

However, this rule applies only if the licence is exclusive.

4.3 Is it permissible to provide a hyperlink to, or frame a work protected by copyright? If so, in what circumstances?

In accordance with the provisions of Russian Anti-Piracy Law (Federal Law No. 187-FZ on Amending Certain Legislative Acts of the Russian Federation on Protecting Intellectual Rights in Information and Telecommunications Networks) linking to or framing links to copyright material may be regarded as a copyright infringement.

Anti-Piracy Law permits restricting access to the websites not only for placing illegal content, but also for placing the "information necessary for obtaining such illegal content". Hyperlinks and frames can be regarded as such information. For more information regarding Anti-Piracy Law, please refer to question 5.2.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The Civil Code provides for remedies for rights holders among which are, inter alia, provisional measures, injunctions, damages, as well as declaration, annulment, restoration or transfer of rights to the claimant.

Remedies specific to certain types of intellectual property include mandatory publication of a court decision, destruction of goods, award of compensation instead of damages, mandatory licence agreements, etc.

Provisional measures are usually granted for the purpose of seizing counterfeit goods or temporarily prohibiting the defendant or a third party from disposing of the subject matter of a dispute (eg, transfer a domain name, etc).

5.2 Are there any specific remedies for online copyright infringement?

In accordance with the newly adopted Russian Anti-Piracy Law there is a special remedy for copyright owners in Russia which includes two procedural stages: (i) provisional measures and (ii) a court ruling being issued for protection of copyrights.

A special interaction system has been developed in order to assure correct information sharing and liaison between a) the Moscow City Court (the MCC), which has exclusive jurisdiction to examine online copyright infringement disputes, b) Roskomnadzor (Federal Service for Supervision of Communications, Information Technology, and Mass Media), c) copyright owners, d) hosting providers and e) Communications Service Providers (CSP).

This order is applicable to almost all copyright objects (films, books, music, software, etc.) except for photographic works.

The mechanism for blocking content in accordance with the Anti-Piracy Law shall be as follows:

- Preliminary provisional remedies:

The copyright owner requests the Moscow City Court (the MCC) for preliminary injunction (blocking the content). Within one day, the MCC shall grant injunctive relief regarding the content to be blocked or refuse to do so.

Then, the administrator of the website will have to remove the infringing content. If the administrator refuses to do so, the website will be blocked by the hosting provider or CSP.

This prompt blocking of infringing content described above is limited to 15 working days following the day of the MCC's decision (unless the rights holder files a lawsuit to the MCC).

A court ruling being issued for the protection of intellectual property rights in the case where a rights holder filed a lawsuit within the 15-day period after injunctive relief.

A systematic violation of intellectual property rights may lead to a permanent blocking.

5.3 Under what circumstances does a copyright infringement constitute a criminal act and what sanctions may apply?

The main criterion which Russian law uses to define a copyright infringement as a criminal act is the extent of damage. Generally such damage may be calculated by multiplying the average market price of the original goods by the number of revealed counterfeit products.

The Criminal Code of the Russian Federation provides the following types of criminal acts:

Criminal Act
Unauthorised use of copyrighted works: specifically, purchase, storage or carriage of counterfeited copies of works or phonograms for the purpose of sale if it has caused significant damage (exceeding RUB 100,000)
Relevant intention, knowledge or belief
Direct intention
Penalty
Criminal sanctions include payment of a fine up to RUB 200,000; 480 hours of obligatory works or one year of correctional labour; or six months of arrest, at the discretion of the judge.
Criminal Act
The same action if: <ul style="list-style-type: none"> • it has caused damage at an especially large scale (exceeding RUB 1m) or • committed by an organised gang • committed by a person through the abuse of office
Relevant intention, knowledge or belief
Direct intention

Penalty
Five years of compulsory labour, or Six years in prison along with a fine in the amount of up to RUB 500,000 or in the amount of a wage/salary or other income of the convicted person for a three-year period.
Criminal Act
Appropriation of authorship (plagiarism), if it has caused significant damage (exceeding RUB 100,000) to the author or another rights holder
Relevant intention, knowledge or belief
Direct intention
Penalty
Criminal sanctions include payment of a fine of up to RUB 200,000 or six months' correctional labour or arrest at the discretion of the judge.

If a claim is satisfied in part, the costs are levied upon persons participating in the case in proportion to the amount of satisfied claims.

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit for bringing a copyright infringement claim depends on the nature of the claim. In the case where a property right has been violated, the limitation period will be three years.

Time begins to run from the moment when the rights holder learned or should have learned about the violation of their right and the identity of a proper defendant.

However, a time limit is not applicable to non-property claims, eg claims connected with an author's moral rights.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In Russia, the general rule is that the unsuccessful party pays the costs of the successful party (including expenses for legal representatives) within reasonable limits. Such costs may be recovered in a separate proceeding.

The court may reduce the required sums if they are higher than the average amount in the region where the dispute was examined. However, recent court practice shows that the courts are more willing to satisfy the claims for reimbursement of court expenses in cases where the amounts claimed are supported by evidence.

6. Enforcement

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

In deciding which court to bring a copyright claim in, the nature of the infringement (civil, administrative or criminal) and the extent of the economic activity involved are the key considerations.

Commercial (arbitration) courts examine copyright infringement disputes to which the parties are legal entities and citizens with the status of an individual entrepreneur. Courts of general jurisdiction examine copyright infringement disputes involving private individuals.

The judgment of a first-level commercial court can be appealed to the relevant appellate court. A resolution of an arbitration appellate court may also be appealed to the cassation level. A cassation appeal for cases involving protection of copyright should be filed with the Intellectual Property Court, which started to work on 3 July 2013. In this capacity, it reviews copyright infringement cases decided upon by all state commercial (arbitration) courts of first and appeal instance within Russia. As a court of first instance, the IP Court does not adjudicate cases concerning copyright infringements. However, as a court of cassation it plays a key role in ensuring consistent and transparent interpretation of the law relating to IP.

Moreover, review by way of supervision is available in both commercial courts and the general jurisdiction courts systems. The Supreme *Arbitrazh* Court of the Russian Federation was responsible for supervision of economic disputes until 6 August 2014. However, in the recent judicial reform its powers passed to the newly formed Supreme Court of the Russian Federation. This new unified supreme judicial authority now performs judicial supervision for all Russian courts (general jurisdiction courts, commercial (arbitration) courts and military courts) considering all types of disputes (civil, economic, criminal, administrative and other cases that are under the jurisdiction of the aforementioned courts).

The Moscow City Court (the MCC) has exclusive jurisdiction to examine online copyright infringement disputes. The jurisdiction of the MCC is discussed in question 5.2 above.

Under the Civil Code, a rights holder is entitled to demand that an infringement cease, counterfeit products be destroyed at the expense of the infringer if copyright items were illegally used in such products, and damages be paid. As an alternative, instead of payment of damages, the rights holder may demand compensation amounting to:

- from RUB 10,000 to RUB 5m determined at the discretion of the court
- double the cost of the counterfeit goods
- double the amount of the value of the licence fee which, in comparable circumstances, would usually be paid for lawful use of the copyright object.

The bailiff service should complete and enforce the court decision within two months after the claimant files the corresponding application.

6.2 Are there any other ways in which you can enforce copyright?

Criminal enforcement

Criminal proceedings can be initiated on the grounds described in question 5.3 above.

A copyright violation in the form of plagiarism is classified by the Criminal Procedural Code of the Russian Federation as one of the criminal cases for a private-public prosecution. In this category of case, a prosecution can be initiated only at the request of the victim.

The other type of violation is an unauthorised use of copyrighted works (purchase, storage or carriage of counterfeited copies of works or phonograms for the purpose of sale). This falls within the cases of public prosecution where the consent of the victim is not required.

Criminal cases concerning a violation of copyright are investigated by the investigators of the Investigative Committee of the Russian Federation and examined by the courts of general jurisdiction.

Administrative enforcement

If an infringement does not qualify for a criminal case, administrative proceedings can be initiated. In an administrative infringement case, there is no need to prove the amount of damage caused.

According to the Code of Administrative Offences of the Russian Federation, administrative proceedings can be initiated simply for unlawful use of IP rights (eg import, sale, hiring out of counterfeit items etc.) for the purpose of deriving revenue.

Administrative cases are investigated by the police and tried by the courts under a simplified procedure. This step is effective in terms of counterfeit copies of works being seized and subsequently destroyed.

Unfair competition action

The Federal Law on Protecting Competition provides for an opportunity to initiate unfair competition proceedings

within the Federal Anti-Monopoly Service against a copyright infringer.

The sale, exchange or other introduction into circulation of goods involving an illegal use of copyright may be recognised as unfair competition should the claimant and defendant be direct competitors in the same segment of the Russian market.

Applications regarding unfair competition are examined by the Federal Anti-Monopoly Service and its regional bodies, but they can transfer such cases to the relevant commercial (arbitration) court.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

The Ministry of Culture of the Russian Federation is the main government body responsible for general policy in the sphere of copyright.

Among the functions of the Ministry of Culture are enacting regulatory legal acts for the purpose of regulating relationships in the area of copyright and related rights as well as accrediting collective rights management agencies to represent rights holders.

There are currently no agency bodies in Russia that are responsible for promoting copyright.

With regard to enforcement, the police will target criminal activity (see section 5.3) but it is up to the rights holders or the collective rights management agencies to stop the infringing activity and take action.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

Collective rights management agencies in Russia act as intermediaries between rights holders (authors, publishers, performers, phonogram owners) and users of their works.

They are entitled to conclude licence agreements with users and collect remuneration under such agreements, to file lawsuits as well as to commit the other legal actions required to protect the rights of rights holders.

Such agencies exist in the form of non-commercial organisations. There are two types of collective rights management agencies existing in Russia – accredited and non-accredited. The first group includes those organisations that received a certificate of state accreditation from the Ministry of Culture of the Russian

Federation in the relevant sphere (the list of spheres is set out in the Civil Code). After it receives an accreditation, the agency is entitled to collect remuneration for the benefit of all rights holders (regardless of whether a signed agreement exists with them). The only exception is a situation when the rights holder himself/herself has already entered into an agreement with another non-accredited collective rights management agency.

The following collective rights management agencies have government accreditations (in each case, the acronym directly reflects that commonly used in Russian for the organisation in question):

Agency
Russian organisation for intellectual property (VOIS)
Who it represents
Performers, phonogram producers. Accreditation in the sphere of public performance and broadcast or cable transmission of phonograms published for commercial purposes.
Agency
Russian Authors' Society (RAO)
Who it represents
Composers and authors of text. Accreditation in the sphere of: <ul style="list-style-type: none"> • public performance and broadcasting of musical works • public performance and broadcasting of musical works used in audiovisual works.
Agency
Russian Union of Right-holders (RSP)
Who it represents
Authors, performers and producers of phonograms and audiovisual works. Accreditation in the sphere of free reproduction of phonograms and audiovisual works for private purposes. ² For more information, please refer to question 6.5.
Agency
Non-commercial partnership "UPRAVIS"

2. The remuneration is subject to payment by producers and importers of the equipment and the material media used for such reproduction, when they are imported into the customs territory of the Russian Federation.

7. Copyright reform

Duration
Painters, sculptors and other authors of works of art.
Accreditation in the sphere of managing the artist's resale right in respect of artistic works as well as the author's manuscripts (autographs) of literary and musical works.

Among agencies without government accreditation, the following are the most notable:

Agency
Russian Society of Management Performers' Rights (ROUPI)
Who it represents
Performers, phonogram producers.
Agency
National Federation of the Music Industry (NFMi)
Who it represents
A non-profit partnership of leading music companies brought together for the purpose of the development of the legal music market in Russia and the Russian internet, and promotion of respect to artists and their copyright.

6.5 Are copyright levies payable? By whom, and in what circumstances?

In accordance with Article 1245 of the Civil Code, the authors, performers and manufacturers of sound recordings and audiovisual works are entitled to receive a fee for a free reproduction/playback of the sound recordings and audiovisual works exclusively for personal purposes. Such fee is of a compensatory nature, and is payable to rights holders from the funds payable by the manufacturers and importers of the equipment and material media used for the reproduction/playback.

A list of the equipment and material media, and also the amount of, and procedure for collecting, the funds is approved by the Government of the Russian Federation. Under Regulation No.829 of the Government of Russian Federation dated 14 October 2010, there is a uniform 1% tax on computers, blank optical disks, memory sticks, TVs, video and audio recorders, radios, mobile phones, etc.

The Russian Union of Right-holders (RSP) is responsible for collecting these funds (a specific copyright levy), which is to be distributed in the following proportions:

- 40% – to the authors
- 30% – to the singers
- 30% – to the manufacturers of the media.

7.1 What do you consider to be the top two recent copyright developments?

Development of Anti-Piracy Legislation

On 2 July 2013, the Russian Parliament passed Federal Law No. 187 "On Amending Legislative Acts of the Russian Federation on Intellectual Property Issues in Information and Telecommunications Networks", which came into force on 1 August 2013. This law applies to all audiovisual content and had a major impact on copyright protection on the internet, affecting notification of internet providers, actions to cease infringement, preliminary injunctions and enforcement.

From 1 May 2015, the new Anti-Piracy legislation became applicable not only to audiovisual content but to almost all copyright items (films, books, music, software, etc.) except for photographic works.

For more information regarding recent developments in Anti-Piracy legislation, please see question 5.2 above.

Recent Amendments to the Civil Code

The major portion of the IP-related amendments to the Civil Code of the Russian Federation entered into force on 1 October 2014, while others entered into force on 1 January 2015. These amendments affect all areas of intellectual property including copyrights, patents or trade marks.

The amendments touched on almost every article of the Fourth Part of the Civil Code, which deals with IP issues, but most of them amounted to a refinement of the already existing provisions, eliminating contradictions between them, or smoothing out rules previously developed by court practice.

Among the most notable amendments are follows:

- from 1 January 2015, IP owners have been able to dispose of their copyright or related rights by way of a public declaration (paragraph 5 of Art. 1233 of the Civil Code), provided the right is not already the subject of a valid exclusive licence. The declaration, which cannot be withdrawn or varied, states that the work in question may be used by any other person on a royalty-free basis for a specified period and on specified conditions. Where the period is not specified, it is deemed to be five years. Such public declarations are to be placed on the website of the responsible state authority, but the government has not yet designated such authority
- there is a prohibition, between commercial entities, on an assignment being made free of charge and an exclusive licence being granted, the territory of which is the entire world and the time period of which applies for the entire time while an exclusive right remains effective (Art. 1234 and 1235)

- from 1 October 2014, 'fault' has been deemed an essential component of infringement (Art. 1250). The burden of proof in relation to the absence of fault lies on the infringer. However, the infringer is liable for damages, or other compensation, irrespective of "fault" where the infringement occurs in the course of commercial activity
- Open Licence
Article 1286.1 has introduced to the Civil Code the legal concept of an open licence to use scientific, literary and artistic works and items of related rights.

Such licence is non-exclusive, royalty-free (as a general rule) and, in addition, it is considered a contract of adhesion. The parties to the contract may set limits on the use of intellectual property.

Unless otherwise stated in the licence conditions, licences will be granted free-of-charge and be valid throughout the world for five years (if the open licence is for computer programs and databases, this will be for the duration of the exclusive rights).

It is expected that open licence will significantly simplify the procedure for the use of works, which in turn will reduce the number of copyright infringements: authors will be able to avoid the procedure of executing a licence agreement (which can be inconvenient and time-consuming) and will have the opportunity at their own discretion to set the terms of licence.

7.2 What do you consider will be the top two copyright developments in the next year?

In light of recent system amendments of the Civil Code regarding IP, we do not expect many further developments in the next year.

However, we can mention a merger of three Russian collective rights management agencies (RAO, VOIS and RSP).

In July 2015, it became known that there was a possibility of the existing system for copyright royalty collection being changed.

The proposal relates to the merger of three key Russian collective rights management agencies: the Russian Authors' Society (RAO), Russian organisation for intellectual property (VOIS), Russian Union of Right-holders (RSP). These are to become a single organisation – the Labour Union Organisation of Cultural Workers, Russian Authors' Society (PDK RAO).

The announced merger should make operations more transparent and simplify procedures for rights holders.

The Minister of Culture of the Russian Federation has already announced that it takes a positive view of this development. However, the issue of the government accreditation of the new organisation has not yet been resolved.

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Spain

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1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in Spain is the Royal Legislative Decree 1/1996, dated 12 April, enacting the consolidated text of the Intellectual Property Act (IPA). This regularises, clarifies and harmonises the previous legal provisions. Although the IPA replaced and repealed two previous Copyright Acts (1879 and 1987), the previous Acts are still applied today where a work was created at a time when those Acts were in force. Copyright infringements that qualify as a criminal act are established in the Organic Act 10/1995, dated 23 November, enacting the Criminal Code.³

As a member of the European Union, the interpretation and application of Spanish legislation by the judiciary must be read in accordance with European Directives and Regulations which have direct effect. Further, the Spanish Courts and other EU national courts often refer questions of law to the European Court of Justice, whose decisions are binding on national courts. As a result Spanish copyright law is frequently added to and updated from external sources.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

Any original creation – literary, artistic or scientific – expressed by any means can be protected under copyright. They are broad categories, and the IPA lists the following examples:

- books, pamphlets, printed matter, correspondence, writings, speeches and addresses, lectures, forensic reports, academic treatises and any other works of the same nature
- musical compositions with or without words
- dramatic and dramatico-musical works, choreographic works and entertainments in dumb show and theatrical works in general
- cinematographic works and any other audiovisual works whatsoever
- sculptures and works of painting, drawing, engraving and lithography, picture stories, cartoons or comics, including drafts or sketches therefore, and other works of three-dimensional art, whether applied or not
- projects, maps, models and drawings or architectural works and works of engineering

3. The Criminal Code has been recently modified in Spain by means of the Organic Act 1/2015, dated 30 March.

- illustrations, maps and sketches relating to topography, geography and science in general
- photographic works and works expressed by a process analogous to photography
- computer programs.

Finally, it should be noted that the title of a work shall be protected as part of the work provided it is original.

2.2 What is required for works to qualify for copyright protection?

If a work falls within the one of the categories above, it may be protected by copyright if it is original. A work is original if the author (see point 3.1 for how to decide on who is the author) has created the work through his or her own skill, judgement and individual effort and has not copied from other works. It is not requisite that work is of artistic merit. It is also not necessary for the whole of a work to be original.

Spain provides copyright protection if the author is:

- a national of Spain
- a national of other Member States of the EU
- a national of third countries ordinarily resident in Spain
- a national of other countries for those of their works published on Spanish territory for the first time or within 30 days of having been published in another country.

Nationals of other countries shall enjoy protection available under the international conventions and treaties to which Spain is a party.

The author's moral rights, whatever his or her nationality, are recognised.

2.3 What rights does copyright grant to the rights holder?

The IPA sets out the rights subsisting in copyright works which are the exclusive rights of the rights holder (before any licences are granted). They include the rights to:

- Reproduce the work
- Issue copies of, rent or lend the work to the public (distribution)
- Perform, show or play the work to the public (communication to the public)
- Make an adaptation of the work or do any of the above in relation to the adaptation (transformation)
- Rights holders (when authors) also have the moral rights described in question 2.4.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In Spain the following moral rights are provided for by the IPA:

- the right to be identified as the author of a copyright work
- the right to decide whether the work is to be made available to the public, and if so in what form
- the right to determine whether such communication should be effected in his/her name, under a pseudonym or sign or anonymously
- the right to demand respect for the integrity of the work and to object to any distortion, modification or alteration of it or any act in relation to it that may be prejudicial to his/her legitimate interests or reputation
- the right to alter the work subject to respect for the acquired rights of third parties, and the protection requirements of works of cultural interest
- the right to withdraw the work from circulation due to changes in his/her intellectual or ethical convictions, after paying damages to the holders of the exploitation rights
- the right of access to the sole or a rare copy of the work when it is in another person's possession, for the purpose of the exercise of the right of communication or any other applicable right.

Moral rights are applicable to literary, artistic and scientific works.

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works varies according to the type of work and the date of creation.

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 70 years from the end of the calendar year in which the author dies.
Where a work has a joint author/co-author, copyright expires 70 years from the end of the calendar year in which the last known author dies.

Where a work is collective, copyright expires 70 years from the end of the calendar year in which the work is lawfully made available to the public.
Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was lawfully made available to the public.
Where a work is not lawfully made available to the public, copyright expires 70 years from the end of the calendar year in which it was created.
Category of work
Phonogram producers
Duration
Copyright expires 50 years from the end of the calendar year in which the recording is made or, if the recording is published lawfully, 70 years from the end of the calendar year in which it was first published. If no lawful publication is made within such period of time but the phonogram is lawfully communicated to the public, 70 years from the first lawful public communication.
The aforesaid terms shall be counted from 1 January of the year following that in which the phonogram is recorded, published or publicly communicated.
Category of work
Broadcasting organisations
Duration
Copyright in a broadcast expires after 50 years, counted from 1 January of the year following that of the first making of a broadcast or transmission.
Category of work
Computer programs
Duration
Where the author is an individual, 70 years counted from 1 January of the year following that in which the author dies.
Where the author is a legal person, 70 years counted from 1 January of the year following that of the lawful communication of the program or that of its creation, if it has not been made available to the public.
Category of work
Rights of performers

Duration
The exploitation rights conferred on performers shall run for 50 years, counted from 1 January of the year following that of the performance.
If, in the course of that period, a recording of the performance is lawfully published, the rights in question shall expire 50 years after the publication of the said recording, counted from 1 January of the year following that in which it occurred.
If the recording of the performance is made through a sound recording, the rights shall expire 70 years after the publication of the said recording, counted from 1 January of the year following that in which it occurred.
Category of work
Audiovisual recording
Duration
50 years after publication, counted from 1 January of the following that of the making thereof.
If, during the said period the recording is lawfully published, the rights mentioned shall expire 50 years following publication, counted from 1 January of the year following the date on which the said publication took place.
Category of work
Ordinary photographs
Duration
The rights shall run for 25 years counted from 1 January of the year following the date of the making of the photograph or reproduction.
Category of work
Unpublished works in the public domain and unprotected works
Duration
The rights shall run for 25 years counted from 1 January of the year following that of the lawful communication of the work.

3. Ownership

Category of work
Databases
Duration
The <i>sui generis</i> right provided shall come into being at the same time as the process of making the database is deemed completed, and shall run for 15 years from 1 January of the year following the date on which the process was completed.

2.6 For how long do moral rights subsist in copyright works?

The following moral rights are perpetual and may be exercised by an author's executors, heirs or the State after the author's death:

- the right to be identified as the author
- the right to demand respect for the integrity of the work and to object to any distortion, modification or alteration of it or any act in relation to it that may be prejudicial to his/her legitimate interests or reputation

The right to decide whether the work is to be made available to the public, and if so in what form, shall pertain to the same persons as described above and shall last for 70 years from the end of the calendar year in which the author dies.

All other moral rights mentioned in 2.4 above shall be extinguished upon the author's death.

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the author. The main exception to the rule is where the work was made by a person in the course of their employment and in connection with the object of their employment; in those circumstances the employer is the first owner unless there is an agreement to the contrary.

The author is defined as the person who creates the work. In certain circumstances, the IPA establishes the *iuris tantum* presumption of who the author is:

- for sound recordings, the author is the person who made the arrangements necessary for making the sound recording
- for films, there are three main authors: the director; the authors of the scenario or adaptation and of the dialogue; and the composers of any music created specifically for the work
- for broadcasts, the author is the person making the broadcast.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person, and the rights in it shall pertain to all of them.

Joint owners have their own individual rights with respect to the work that can be assigned independently of the other or others, and may exploit their contribution separately in so far as the joint exploitation is not thereby prejudiced. However, communication and alteration of the work shall require the consent of all the co-authors, and once the work has been made available to the public none of the co-authors may unreasonably withhold their consent to its exploitation in the manner in which it has been disclosed.

The intellectual property rights in a work of joint ownership shall pertain to all the authors in the proportions determined by them and, in the absence of provisions, the rules laid down in the Spanish Civil Code on joint ownership (which determine that portions corresponding on the participants of the community shall be presumed equal) shall apply to such works.

4. Infringement

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in Spain; it arises automatically upon creation of the work.

However, the intellectual property rights in works may be subject to entries in the Intellectual Property Register, which may be useful to evidence ownership of copyright and the date of authorship. The registration creates a presumption that the named person is the author, and puts third parties on notice of the rights, but copyright subsists without such registration and the failure to display it does not affect copyright in a work.

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment of copyright must be in writing, signed by or on behalf of the copyright owner. If, after having been formally called upon to do so, the assignee fails to meet this requirement, the author may choose to terminate the contract.

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights cannot be waived nor assigned.

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 and 2.4 above) have been infringed.

4.1 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be carried out in relation to copyright works despite the fact that they might be protected by copyright. The Information Society Directive (2001/29/EC) contains what has been termed a “shopping list” of exceptions and limitations, many of which have been implemented into Spanish law through the last modification of the IPA conducted by the Law 21/2014, dated 4 November. These permitted acts are wide in variety but often relate to very specific scenarios. They include (amongst others):

Act
Making of temporary copies
Description
Reproduction that is transitory or accessory which: <ul style="list-style-type: none">• is an integral and essential part of a technological process;• has the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary or a lawful use (deeming this to be one either licensed by the author or authorised at law); or• has no independent economic significance (eg ISPs who use caching).
Act
Personal copies for private use
Description
The making of a copy that is made for the individual’s personal and private use, not professional or entrepreneurial and not for ends that are directly or indirectly commercial. Nevertheless, making a private copy will trigger a single and equitable compensation payment. This compensation, to be taken from the General State Budget, will be aimed at compensating the copyright payments not received because of the legal limit of private copy. The beneficiaries of this compensation will be the authors of the works.

Without prejudice to fair compensation as provided for in Article 25 of the IPA, the reproduction does not require the permission of the author, in any medium, without the assistance of others, of works already disclosed when the following circumstances occur simultaneously, which represent the legal limit for private copies:

- that it is carried out exclusively by a natural person for private use and not for professional or business use, and not for purposes that are directly or indirectly commercial
- that the reproduction is made from works that have been legally accessed from a lawful source. It is deemed to have been lawfully accessed and from a lawful source only in the following cases:
 - when a reproduction is made, directly or indirectly, from a medium containing a reproduction of the work authorised by its owner, commercialised and property acquired by commercial sale
 - when an individual reproduction of works is made that has been accessed through a legitimate act of public communication, by the diffusion of the image, sound or both, such reproduction not having been obtained by unauthorised fixing in an establishment or public space
- that the copy obtained is not subject to shared use or for profit, nor paid distribution.

Act

Quotations and reviews and illustrations with educational or scientific research purposes

Description

Including in one's own work excerpts of the works of others, whether of written, sound or audiovisual character, and also including isolated works of three-dimensional or photographic, figurative character, provided that the works concerned have already been lawfully made available to the public and that they are included by way of quotation or for analysis, comment or critical assessment. Such use may only be made for teaching or research purposes and to the extent justified by the purpose of the inclusion, and the source and the name of the author of the work shall be stated.

Periodical compilations made in the form of press summaries or reviews shall be deemed quotations. However, if the compilation of press articles merely consists of a reproduction, and is made for commercial purposes, the author who has not expressly opposed to the reproduction of their work shall be entitled to obtain an equitable remuneration. In the event that the author expressly indicates their opposition, such activity shall not be deemed covered by this limitation.

The provision by electronic service providers to the public of contents containing unimportant extracts, reported in journals or regularly updating websites which have an informative purpose, in creating public opinion or entertainment, shall not require authorisation, without prejudice to the right of the publisher or, where appropriate, of other rights holders, to receive fair compensation.

This right cannot be waived and will be paid by the management agencies of intellectual property rights. In any event, making available to the public by third parties of any image, photo or photographic work reported in journals or websites that are regularly updated is subject to authorisation.

However, the provision to the public by electronic service providers who provide search tools of isolated words included in the contents referred to in the previous paragraph shall not be subject to authorisation nor fair compensation, provided that such provision to the public takes place without a commercial purpose and that it is strictly limited to what is necessary in order to offer search results in response to prior queries entered in a search engine by a user, provided that the provision to the public includes a link to the source page content.

Teachers in regulated education taught in centres integrated into the Spanish educational system and personnel of universities and public research bodies engaging in scientific research, shall not need authorisation from the author or publisher to carry out acts of reproduction, distribution and public communication of small extracts of works and isolated works of plastic or photographic figurative character when not doing so for commercial purposes, and provided all of the following conditions are met simultaneously:

- that such acts are made solely to illustrate its educational activities, both in classroom teaching and in distance learning, or for scientific research, and justified by the non-commercial purpose

- that the works have already been published
- that the works do not have the status of textbook, university manual or assimilated publication, except in the case of:
 - acts of reproduction for public communication, including the act of public communication itself, which do not involve the making available or allowing access to the work or extract. In such cases a location shall be included from which students have a legal access to the protected work
 - acts of distribution of copies exclusively among staff collaborating in research of each specific research project
- that the author's name and the source are included, except in cases where this proves impossible.

The acts of reproduction, distribution and public communication of works or publications, shall also not require the author's authorisation when all of the following conditions are satisfied simultaneously:

- that such acts are performed solely for the purposes of illustration for teaching and scientific research
- that the acts are limited to a book's chapter, a magazine's article, or extension or equivalent to 10% of the work
- that the acts are carried out in universities or public research centres by their own staff and their own means and instruments
- that at least one of the following conditions is satisfied:
 - that the distribution of partial copies is exclusively between students and teachers or staff who are researchers in the same centre where the reproduction is made
 - that only the students and the teachers or staff who are researchers of the centre where the partial reproduction is made can access the works through the acts of public communication authorised, carrying this out through internal and closed networks that can be accessed only by the aforementioned parties who have been allowed such access or as part of a distance education programme offered by said educational institution.

Act
Parody
Description
The parody of a work made available to the public shall not be deemed a transformation that requires the author's consent, provided that it involves no risk of confusion with that work and does no harm to the original work or the author thereof.
Act
Security, official procedures and disabilities
Description
When a work is reproduced, distributed or made available to public for public security purposes or for the correct carrying out of administrative, judicial or parliamentary proceedings.
Act
Articles on topical subjects
Description
Studies and articles on topical subjects disseminated by the media may be reproduced, distributed and communicated to the public in any other media of the same type, subject to mention of the source and of the author if the study was published under a by-line and provided that no reserved copyright notice appeared on the original.
All the foregoing shall be without prejudice to the author's right to collect the agreed remuneration or, in the absence of agreement, such remuneration as is deemed equitable.
Act
Databases
Description
The lawful user of a database protected under Article 12 of IPA may, without licence from the author of the database, engage in whatever acts may be necessary for access to be had to the contents of the database and for its normal use by the user him/herself, even where they are subject to an exclusive right of the author. Insofar as the lawful user is licensed to use only a part of the database, this provision shall be applicable only to that part.

<p>Any agreement contrary to the terms of this provision shall be ipso iure null and void.</p> <p>Without prejudice to the provisions of Article 31 IPA, licence from the author of a database that is protected under Article 12 of the same Act and has been made available to the public is not necessary:</p> <ul style="list-style-type: none"> • if, in the case of a non-electronic database, a copy is made for private purposes • if the use made is for the purposes of illustration in teaching or scientific research, provided that it is made to the extent justified by the non-commercial purpose pursued, and that in all cases the source is mentioned • if the use is for purposes of public security or for the purposes of an administrative or judicial procedure.
Act
Works in the reporting of current events and of works located on public thoroughfares
Description
<p>Any work liable to be seen or heard in the reporting of current events may be reproduced, distributed and made available to the public, but only to the extent justified by the information purpose.</p> <p>Works permanently located in parks, streets, squares or other public thoroughfares may be freely reproduced, distributed and communicated by painting, drawing, photography and audiovisual processes.</p>
Act
Official acts and religious ceremonies
Description
The performance of musical works in the course of official State events or those of the Public Administrations or religious ceremonies shall not require the licence of the holders of the rights, provided that the public may attend them free of charge and that the performers who take part in them do not collect specific remuneration for their performances.

Act
Protection of the right of access to culture
Description
If, on the author's actual or declared death, their successors in title exercise their right of non-communication of the work in a manner contrary to the provisions of Article 44 of the Spanish Constitution, a Court may order appropriate measures at the instigation of the State, the Autonomous Communities, local corporations, public institutions of cultural character or any other person having a legitimate interest.
Act
Orphan works
Description
<p>Shall be considered to be a work whose rights holders are not identified or cannot be found despite having made a prior diligent search of the same work.</p> <p>Schools, museums, libraries and newspaper archives available to the public, as well as public broadcasters, files, record and film libraries can reproduce, for the purposes of digitization, offer to the public, indexing, cataloging, preservation or restoration, and make available to the public, the following orphan works, provided such acts are carried out on a non-profit basis and in order to achieve their mission related to public interest objectives, in particular the conservation and restoration of works contained in their collections and facilitating access thereto for cultural and educational purposes:</p> <ul style="list-style-type: none"> • cinematographic or audiovisual works, phonograms and works published in books, newspapers, magazines or other material contained in the collections of schools, museums, libraries and newspaper archives available to the public, as well as files, record and film libraries • cinematographic or audiovisual and sound recordings produced by public broadcasters up to and including 31 December 2002 and works contained in their archives.

4.2 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The CJEU decision in *Nils Svensson v Retriever Sverige* (C-466/12) determined whether linking to or framing links to copyright material without consent is a "communication

to the public” and therefore infringes the rights holder’s communication to the public exclusive right.

The CJEU emphasised that to be a communication to the public, a link would have to be a communication to a ‘new’ public, ie a public not in the contemplation of the rights holder when the rights holder published the work. As a result, when a person uploads material to the internet, the public communicated to is the internet at large. Therefore, linking to a work freely available on the internet does not communicate that work to a “new” public.

However, where a work is not freely available on the internet, such as where the work sits behind a paywall, the copyright owner cannot be said to have communicated with the internet as a whole, and so linking to that work in a way that circumvents the paywall would, it appears from recent case law, constitute a communication to the public and infringe the rights of the rights holder.

The doctrine established by the CJEU has been applied by several court decisions in Spain.

4.3 Is a licensee of copyright able to bring an infringement action?

Under the IPA, an infringement of copyright is actionable by the copyright owner. When copyright is transferred, the authority to bring an infringement action depends on the type of transfer involved.

An exclusive assignment authorises the exclusive assignee to exercise a right which would otherwise be exercisable exclusively by the copyright owner. One such right, which shall be independent of that of the assigning rights holder, is the right to institute proceedings for infringements that affect the rights that have been assigned to them.

The IPA does not establish whether a non-exclusive assignee may also bring an infringement action, so it will depend on the circumstances of the case.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The IPA provides the following remedies for rights holders:

- interim injunctions (including seizure and deposit of revenue, or posting or deposit of amounts payable by way of remuneration, suspension of the work of reproduction, distribution and communication to the public, seizure of copies produced or used and of material used mainly for the reproduction or communication to the public, destruction of the equipment, apparatus and material supports, or suspension of the services provided by intermediaries to third parties who use them to infringe intellectual property rights)
- suspending the infringing exploitation or the activity committing the infringement
- prohibiting the infringer from resuming the exploitation or the activity committing the infringement
- withdrawing from the market and destroying unlawful copies
- withdrawing from commercial circuits, disabling and, where necessary, destroying any moulds, plates, negatives and other material or instruments intended mainly for the reproduction, creation or manufacture of unlawful copies
- removing, or placing seals on, apparatus used for unlicensed communication to the public of works or services
- confiscating, disabling and, if necessary, destruction of the instruments whose sole purpose is to facilitate the unlicensed removal or neutralisation of any technical device used to protect a computer program
- removing or sealing the instruments used to facilitate the non-authorized suppression or neutralisation of any technical device whatsoever used to protect works or services
- suspending the services provided by intermediaries to third parties who use them to infringe intellectual property rights
- to elect between either an enquiry as to damages or an account of profits arising from the infringement.

5.2 Are there any specific remedies for online copyright infringement?

Where it appears that a website is displaying infringing material, or providing the description or localisation of works that are apparently being offered without authorisation (should such activity not be limited to a

mere technical intermediation), rights holders can seek an injunction from the Second Section of the Intellectual Property Commission (attached to the Education, Culture and Sports Ministry) ordering the internet service provider (“ISP”) to remove such infringing contents in the event it causes or may cause a patrimonial damage. The ISP should be put on notice of the person using their services to infringe copyright before the order is sought.

Should the ISP voluntarily remove the infringing contents once it has been requested to do so by the Second Section, the IPA determines that such removal shall be considered an implicit acknowledgement of the infringement.

Failure to voluntarily remove the infringing contents for the purpose of guaranteeing that the enacted resolution is effective shall prompt the Second Section to ask the intermediation services, electronic payment services and advertisement providers to suspend the corresponding service provided to the infringing ISP.

Should the service be provided under a domain name using the extension “.es” corresponding to Spain, or under another first level domain name whose register is established in Spain, the registry authority shall be notified to cancel the domain name, which shall not be assigned again for registration within, at least, six months.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal acts under the Criminal Code in relation to copyright. The main offences are related to selling or making available for sale copies of a copyright work but there are also offences for communicating the infringing copy to the public. The sanction for committing a criminal offence in relation to copyright is likely to be either a fine and/or a prison sentence.

If an offence is committed by a company, the legal person itself can also be liable for the criminal act. Additionally, if it is proven that an individual officer of the company consented to committing the offence, that officer can also be liable for the criminal act.

Each offence requires a level of intention, knowledge or belief on behalf of the potential culprit, and each carries various penalties:

Criminal Act
Reproducing, plagiarising, distributing or publicly disclosing all or part of a literary, artistic or scientific work.
Relevant intention, knowledge or belief
For profit and to the detriment of a third party and with the knowledge, or having reason to believe, that the copy is infringing a person’s copyright.
Penalty
Six months to four years in prison and a fine. In cases of occasional distribution: Six months to four years in prison or a fine, or 31 to 60 days of community work (in view of the circumstances of the offender and the small amount of financial profit). When the author is a legal person (according to article 31 bis of the Spanish Criminal Code): a fine.
Criminal Act
Transforming, interpreting, performing all or part of a literary, artistic or scientific work in any kind of medium, or broadcast by any medium, without authorisation by the holders of the relevant intellectual property rights or their assignees.
Relevant intention, knowledge or belief
For profit and to the detriment of a third party and with the knowledge, or having reason to believe, that the copy is infringing a person’s copyright.
Penalty
Six months to four years in prison and a fine. In cases of occasional distribution: Six months to four years in prison or a fine, or 31 to 60 days of community work (in view of the circumstances of the offender and the small amount of financial profit). When the author is a legal person (according to article 31 bis of the Spanish Criminal Code): a fine.
Criminal Act
Providing access or the location on internet to copyright work or services without authorisation by the holders of the relevant intellectual property rights or their assignees.

Relevant intention, knowledge or belief
For profit and to the detriment of a third party and with the knowledge, or having reason to believe, that the copy is infringing a person's copyright.
Penalty
Six months to four years in prison and a fine.
When the author is a legal person (according to article 31 bis of the Spanish Criminal Code): a fine.
Criminal Act
Intentionally exporting or storing copies of the works, productions or performances previously mentioned, including digital copies of them, with the intention of reproducing, distributing or publicly disclosing them.
Relevant intention, knowledge or belief
The knowledge, or having a reason to believe, that communicating the work is infringing copyright.
Penalty
Six months to four years in prison and a fine.
When the author is a legal person (according to article 31 bis of the Spanish Criminal Code): a fine.
Criminal Act
Intentionally importing the works, productions or performances previously mentioned, without authorisation and with the intention of reproducing, distributing or publicly disclosing them, regardless of whether these have a lawful or unlawful origin in their country of origin.
(Unless they come from a member of the European Union and have been acquired directly from the copyright holder).
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright.
Penalty
Six months to four years of prison and a fine.
When the author is a legal person (according to article 31 bis of the Spanish Criminal Code): a fine.

Criminal Act
Facilitating the above mentioned criminal acts by suppressing or neutralising any technical measures that have been placed to avoid them, without authorisation.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright.
Penalty
Six months to four years in prison and a fine.
When the author is a legal person (according to article 31 bis of the Spanish Criminal Code): a fine.
Criminal Act
Manufacturing, importing, putting into circulation or possessing with commercial aim any means specifically intended to facilitate unauthorised suppression or neutralisation of any technical device that has been used to protect computer programs or any other work, interpretation or performance subjected to copyright.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright.
Penalty
Six months to three years in prison.
When the author is a legal person (according to article 31 bis of the Spanish Criminal Code): a fine.
Criminal Act
Aggravating circumstances regarding all the above mentioned criminal acts:
<ul style="list-style-type: none"> • special economic importance of the profit • special seriousness of the events, attending to the value of the objects produced unlawfully, the number of works, or the special importance of the damage caused • that the offender belongs to an organisation or assembly whose purpose is to perpetrate activities that infringe intellectual property rights • using persons under 18 years of age to commit those offences.
Relevant intention, knowledge or belief
The knowledge, or having a reason to believe, that the article is to be used to make infringing copies for sale.

Penalty
Two to six years in prison and a fine and special barring from practice of the profession related with the offence committed from two to five years.
When the author is a legal person (according to article 31 bis of the Spanish Criminal Code): a fine.

5.4 Is there a time limit for bringing a copyright infringement claim?

For civil actions, the time limit is five years to bring a compensation for damages claim for breach of copyright. Time begins to run from the date when the actions could lawfully have been exercised.

There is no express time limit for bringing any other copyright infringement claim under the IPA. However, legal doctrine considers that the same limit of five years should apply, accepting the analogy with the provisions of the Law 11/1986, dated 20 March, on Patents and of the Law 17/2001, dated 7 December, on Trade marks.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In Spain, by virtue of the Law 1/2000, dated 7 January, on Civil Procedure, the general rule is that the unsuccessful party pays the costs of the successful party, unless the court considers and reasons that the case may pose serious *de facto* or *de iure* doubts.

If the upholding or dismissal of the pleas is partial, each party shall pay the costs involved in their proceedings and the common costs shall be shared equally, unless there are reasons to impose the costs on one of these as they litigated recklessly.

When the costs are imposed on the litigant who has lost the case, only they shall be obliged to pay the full amount of the part which corresponds to the attorneys and other professionals who are not subject to rates or dues, which shall not exceed one third of the cost of the proceedings, for each of the litigants in this situation.

6. Enforcement

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

According to the Organic Act 6/1985, dated 1 July, on the Judiciary, the Commercial Courts shall resolve disputes concerning intellectual property rights.

The Central Administrative Courts shall authorise the material execution of the resolutions adopted by Section Two of the Intellectual Property Commission in order to interrupt the provision of information society services, or in order to get the infringing contents withdrawn.

No monetary thresholds apply.

6.2 Are there any other ways in which you can enforce copyright?

Criminal proceedings

Criminal proceedings, although rare, can be brought on the grounds described in 5.3 above, and pursued through the criminal courts.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

The Intellectual Property Commission of Spain is the official government body responsible for intellectual property rights in Spain. It is an executive Commission of the Education, Culture and Sports Ministry.

The IPC is responsible for:

- mediation
- arbitration
- tariff determination
- control
- safeguard of the intellectual property rights assigned by the IPA
- advice on any matters within its competence when consulted by the Education, Culture and Sports Ministry.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the rights holder.

However, as a result of the practical difficulties and administrative burden for copyright owners in granting

licences individually to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collecting societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent.

The key collecting societies in each sector are as follows:

Agency
Sociedad General de Autores y Editores (SGAE)
Who it represents
Authors and editors
Agency
Centro Español de Derechos Reprográficos (CEDRO)
Who it represents
Writers, translators, journalists and publishing houses
Agency
Asociación de Gestión de Derechos Intelectuales (AGEDI)
Who it represents
Phonogram producers
Agency
Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE)
Who it represents
Performers
Agency
Visual Entidad de Gestión de Artistas Plásticos (VEGAP)
Who it represents
Plastic artists
Agency
Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA)
Who it represents
Producers of audiovisual recordings
Agency
Artistas Intérpretes, Sociedad de Gestión (AISGE)

Who it represents
Stage managers, dubbers, actors and dancers
Agency
Asociación de Derechos de Autor de Medios Audiovisuales (DAMA)
Who it represents
Directors and scriptwriters of audiovisual and cinematographic works

6.5 Are copyright levies payable? By whom, and in what circumstances?

This does not apply in our jurisdiction.

7. Copyright reform

7.1 What do you consider to be the top two recent copyright developments?

Copyright and Rights in Performances Regulations 2014

The Spanish Government introduced a range of new copyright exceptions under the Law 21/2014, dated 4 November, which amended the IPA. The most significant of these permits:

- the making of personal copies for private use (including data shifting)
- quotations and reviews and illustrations with educational and scientific research purposes (provided that the identity of the author quoted is indicated and the source has been lawfully made available to the public)
- orphan works.

The exceptions need to be read in connection with the Information Society Directive (2001/29/EC), which contains what a 'shopping list' of exceptions and limitations which can be implemented by Member States. However, once implemented, the exception will be read in accordance with EU case law.

News aggregators

The reform operated by virtue of the Act 21/2014, dated 21 November, introduces a new right in favour of publishers or other rights holders, which confirms their right to receive an equitable remuneration to be paid by news aggregators who use non-insignificant pieces of information, opinion or entertainment which have been previously published in a newspaper or on a website that is periodically updated.

Such remuneration cannot be waived by its holders. It imposes a limit on the exclusive rights of intellectual property, as aggregators cannot ask for the editors' prior authorisation, but will have to pay such equitable remuneration after having used the copyrighted works.

Such limit not expressly deriving from the Directive 2001/29/EC, on the harmonisation of certain aspects of copyright and related rights in the information society, and being under article 5 (concerning exceptions and limitations to the copyright) a *numerus clausus*, it is unclear if such provision is in compliance with European regulations.

Thus far, the entry in force of such provision has led Google News to close its service in Spain as from 16 December 2014, even if it will not be totally enforceable until the remuneration rates have been officially approved.

7.2 What do you consider will be the top two copyright developments in the next year?

The 4 November 2014 the latest reform of the IPA was approved, its provisions being already in force. Even if it was announced by the Government that the preliminary works necessary to conduct an integral reform of the IPA would start within the following year, it does not seem feasible such reform will be approved soon.

Digital Single Market Strategy for Europe

On 6 May 2015, The European Commission released its "Digital Single Market Strategy for Europe". The Commission's stated aim is to "make the EU's single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one".

Copyright forms a central component of the strategy (but perhaps not as central as many had hoped) in the following areas:

- the harmonisation of copyright law between Member States
- the introduction of cross-border e-commerce rules
- bringing an end to "unjustified" geo-blocking (the practice of denying consumers access to a website based on their location, or re-routing them to a local website, often with different pricing)
- strengthening the copyright enforcement system against commercial scale infringements.

The Strategy sets the Commission's agenda for EU level copyright reform over its term and is worth keeping a close eye on.

GS Media

Whilst the CJEU in *Nils Svensson v Retriever Sverige* (C-466/12) decided that linking to or framing links to copyright material without consent does not constitute a "communication to the public" and therefore an infringement of the rights holders' communication to the public exclusive right, the case didn't decide the question of whether this would still be the case where the works linked to are themselves unlawfully uploaded (ie uploaded without the copyright holder's consent).

This is the basis of three questions referred to the Court of Justice of the European Union in Case C-160/15 *GS Media*.

The reasoning behind the decision in *Svensson* – that to be a communication to the public a link would have to be a communication to a 'new' public (ie a public not in the contemplation of the rights holder when the rights holder published the work) – would suggest that linking to an unlawful copy of a copyright work would be an

infringement of copyright in the work, as it constitutes a communication to a public which the rights holder had not envisaged.

Whatever decision the Court comes to, it is likely to prove controversial in this developing area of law.

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Sweden

Lindahl, Johan Norderyd



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in Sweden is the Act on Copyright in Literary and Artistic Works (1960:729) (**The Copyright Act**). The Copyright Act has been amended regularly over the years, with the last amendment occurring on 27 June 2014.

Statutes are the predominant source of copyright law, complemented by the preparatory work for the statutes, and their amendments, and case law.

As Sweden is a member of the European Union, the interpretation and application of Swedish legislation by the judiciary has to be read in accordance with European Directives and Regulations which have direct effect. As in other countries within the Union, the Swedish Courts and other EU national courts frequently refer questions of law to the European Court of Justice, whose decisions are binding for the national courts. Subsistence of copyright

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The Copyright Act states that copyright shall apply to a literary or artistic work regardless of its form. The act recites numerous examples of work that can be protected by copyright, with the last example listed being a work expressed in some other manner.

The non-exhaustive list of examples includes:

- fictional or descriptive representation in writing or speech (this includes, inter alia, maps and other works of a descriptive nature executed as drawings, engravings, or in a three-dimensional form)
- computer program (this applies mutatis mutandis to preparatory design materials for computer programs)
- musical or dramatic work
- cinematographic work
- photographic work or other work of fine art, and
- work of architecture or applied art.

2.2 What is required for works to qualify for copyright protection?

The basic requirement for a work to be protected by copyright is that it possesses a certain degree of originality. What exactly constitutes originality is not easily defined, as it will depend upon the kind of work. For example, a work of art such as a painting generally requires a lower degree of originality in contrast to works that might have industrial applications such as applied arts or computer programs. The work has to be the result of a personal creative effort. As such, a mere reproduction of a work of art might not, in many cases, be eligible for copyright protection.

It shall be noted that there is no strict requirement as to the quality of the work in question. Earlier Swedish jurisprudence constructed a threshold of originality (Swedish: *verkshöjd*) in the sense that the copyrighted work has to be distinctive in some regard. There is currently a level of uncertainty on whether this still applies due to the implementation of EU directives in the field of copyright.

As a general rule Sweden provides copyright protection if the creator is a Swedish national or domiciled in Sweden. Copyright is equally applied to work that is published in Sweden or a state which is signatory to one of the various international conventions which Sweden is a party to.

One important exception to the requirement that the work has to reach a certain threshold of originality is the extended protection afforded to catalogues or similar kinds of works (also applicable to databases), which are covered by the so-called **related rights**.

2.3 What rights does copyright grant to the rights holder?

The Copyright Act grants the rights holder the exclusive right to:

- produce copies of the work
- to make the work (whether it is the original work or a revised version) available to the public.

In addition to these rights the rights holders also have the moral rights described in question 2.4.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

In the Sweden the following moral rights are provided for by the Copyright Act:

- the right to be identified as the author of a copyright

work, to the extent and in the manner according to good practice

- the right to object to derogatory treatment of the copyrighted work which may cause harm to the author's artistic or literary reputation. This includes the right to object to the way in which the work is made available to the public.

Moral rights are applicable to all kinds of work that might be protected by copyright. For the distinction where there is more than one author or if the work in question has been made by the author in their capacity as an employee, please see the questions under section 3 below.

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works varies according to the type of work and the date of creation. The main rule according to the Copyright Act is that copyright expires 70 years from the calendar year of the author's death. In general, for works created on or after 1 July 1961, the duration of copyright protection is as follows:

Category of work
Main rule
Duration
Copyright expires 70 years from the end of the calendar year in which the author passed away.
Where a work has a joint author/co-author, copyright expires 70 years from the end of the calendar year in which the last known author passed away.
Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was made or made available to the public.
Category of work
Practising artists (eg performing musicians)
Duration
Copyright of recording expires 50 years from either the end of the calendar year of the recorded performance, or the calendar year in which the recording was made available to the public (whichever is later).
Category of work
Musical work with lyrics

3. Ownership

Duration
Copyright expires 50 years from the end of the calendar year in which the recording is made or, if the recording is published lawfully, 70 years from the end of the calendar year in which it was first published.
Category of work
Films
Duration
For films, the reference point is the end of the calendar year the last living author (which would include, inter alia, the main director, the script writer, the music composer or the dialogue writer) dies. Copyright then lasts until 70 years after this event.
Category of work
Broadcasts
Duration
Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made.
Category of work
Photographs
Duration
Copyright for photographs expires 50 after the picture is taken.
Category of work
Catalogues and databases
Duration
Copyright expires 15 years from the moment of creation. Please note that each update of the catalogue or database renews the duration of the copyright.

2.6 For how long do moral rights subsist in copyright works?

An author's moral right to be identified as the author, to object to derogatory treatment, or of privacy lasts for the duration of the copyright.

After the death of a creator, specific government agencies have the ability to object to derogatory treatment of a work if the use of the work is liable to violate vital cultural interests. This is a very rare exception in the sense that it only protects classic works that might be deemed to be of vital importance.

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the creator of the work, which is always a natural person.

Principally, this is also the case where the work has been made by a person in the course of their employment. The solution to this issue is that the copyright is presumed to transfer to the employer to the degree of what can be considered to be necessary at the time of creation, with regard taken to the normal business operations of the employer. It might be noted that this ambiguity is generally resolved in the employment contract. The employee always has the right to his or her moral rights unless these are waived.

The Copyright Act furthermore sets up a presumption that a computer program created by an employee in the course of his employment is transferred to his employer unless an agreement has been made to the contrary.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person and where the parties' individual work cannot be distinguished.

Where there is a case of joint ownership, all parties need to be in agreement as to any form of use of the work in question. This would include, inter alia, whether to make the work available to the public, to license or to sell the work. The sole exception to this rule is that both owners are free to pursue actions for infringement. If no unity regarding the use of the work can be reached the solution offered by the Swedish legislation is for the work to be sold by public auction.

It is important to note that joint ownership is not achieved where one party's efforts solely consists of technical assistance (say the recording of a musical work). It should, however, be acknowledged that this is a distinction that is much harder to make today compared to the conception of the law in 1960.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

There is no system to register copyright in Sweden. Copyright is an unregistered right that arises automatically upon creation of the work in question.

4. Infringement

The extent (or existence) of copyright is only formally resolved if the purported existence of the copyright is of relevance to a court. Nevertheless, the use of a copyright notice is useful as evidence of ownership of copyright and at the very least makes an evident claim of ownership to the work in question.

3.4 What steps should you take to validly transfer, assign or license copyright?

There are no formal requirements as to the assignment or license of a copyright protected work. It is, however, strongly advised that such an agreement is made in writing and is formally signed by or on behalf of the copyright owner.

3.5 Can moral rights be transferred, assigned or licensed?

Moral rights can be waived but they cannot be assigned, transferred or licensed.

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed.

Let it be noted that the Swedish Copyright legislation does not formally differ between primary or secondary infringement. The circumstances relating to the infringement (ie whether there is a case of primary or secondary infringement) can, however, be a relevant circumstance when it comes to the claims for damages.

4.1 What acts constitute infringement of copyright?

An infringement occurs where the copyright protected work is exploited by copying and made the work available to the public, whether it is in its original or altered form. As such, this would include a large variety of actions, such as:

- copying
- issuing copies of the work to the public
- renting or lending the work to the public
- performing, showing or playing a copyright work in public
- communicating the work to the public
- making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation.

4.2 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of explicit limitations to the extent of the copyright. Many of these are based on the implementation of the Information Society Directive (2001/29/EC) which contains what has been termed a “shopping list” of exceptions and limitations. These permitted acts are wide in variety but often relate to very specific scenarios. They include (amongst others):

Act
Making of temporary copies
Description
A copy that is transient or incidental which: <ul style="list-style-type: none">• Is an integral and essential part of a technological process• Has the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary• Has no independent economic significance.

Act
Personal copies for private use
Description
The making of a copy that is made for the individual's personal and private use and not for ends that are directly or indirectly commercial.
If the work is a written work, the copy may only be in regards to limited part of the work or work of limited scope.
This exception does not confer a right to construct works of architecture, make copies of computer programs or copies in digital form of a compilation in digital form.
Act
Educational purposes
Description
Teachers and pupils may, for educational purposes, make recordings of their own performances of works. Such recordings may not be used for other purposes.
Act
Copies for certain archives or libraries
Description
Archives and libraries are entitled to make copies of works (with the exception of computer programs) for the purpose of:
<ul style="list-style-type: none"> • Preservation, completion or research • Allowing library borrowers to partake in the work under the condition that it is a single article or a short work • For use in reading devices
Act
Composite work
Description
Anyone is free to, in the course of educational activities, prepare a composite work containing work by a comparative large number of authors under the condition that the reproduction of the work is a minor portion of said literary or musical work and under the condition that five years have passed from the time of the work's publication. The authors (of the sourced work) have a right to remuneration.

This exception does not apply to if the works that form the parts of the composite work were made for educational purposes. Neither does the exception confer a right to prepare composite works for commercial purposes.
Act
Use of fine art in films, television or pictures
Description
Anyone is entitled to prepare a film, a television programme or a picture which copies, performs or features a work of fine art if the exploitation is incidental in relation to the content of the new work or if the work of fine art forms an insignificant part of the new work.
Act
Quotation
Description
Quotation of a work is permitted if it is done in accordance with proper usage and to the extent necessary for the purpose.
Act
Copies of work of fine art
Description
Works of fine art that have been made available to the public may be reproduced in connection with a text in a scientific publication if it has not been done for commercial purposes, in connection with a critical text, or in a newspaper if the text in question refers to current events.
Fine art may also be reproduced in pictorial form if the work is permanently located outdoors or in a public place, if the purpose of the picture is to advertise an exhibition or sale of the works of fine art, or if the works form a part of a collection or catalogue.

4.3 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The CJEU decision in *Nils Svensson v Retriever Sverige* (C-466/12) referred to the question on whether linking to or framing links to copyright material without consent could be construed as a "communication to the public" and therefore infringes the rights holders' communication to the public exclusive right.

5. Remedies

The CJEU clarified that in order to be considered a “communication to the public”, a link would need to be a communication to a “new” public, ie, a public to which the rights holder had not intended when they originally published the work. As such, in the instance where a party uploads material to the internet the “communicated public” would include the internet at large. Hence, the linking to a work freely available on the internet could not be considered a communication to a ‘new’ public.

It is, however, important to note that where a work is not freely available, for example in the case where the work might be available behind a paywall, it would be deemed that the rights holder could not be said to have communicated the work to the internet as a whole. This is ensure that the act of linking to a work that would circumvent the paywall could constitute a communication to the (‘new’) public and infringe the rights of the rights holder.

4.4 Is a licensee of copyright able to bring an infringement action?

Under the Copyright Act, an infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action will become dependent on the type of licence involved. It is, however, clear from the wording of the statute that a licensee can, under the correct circumstances, bring an infringement action.

5.1 What remedies are available against a copyright infringer?

The Copyright Act provides the following remedies for rights holders:

- Interim injunctions (including search orders, freezing orders and pre-action, non-party disclosure)
- Delivery up of infringing articles
- Seizure of infringing articles
- Forfeiture of infringing articles
- An injunction against the infringer (including disclosure)
- Demand a public acknowledgement of the infringing act

5.2 Are there any specific remedies for online copyright infringement?

There are no specific remedies exclusively available for online copyright infringement. Rights holders are, however, able to utilise the remedies listed above to have internet service providers (**ISP**) disclose information pertaining a website if they can show probable cause that the website is used to carry out or assist copyright infringing activities.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

In Sweden any action which could be considered to be an infringing act (see 4.1) can also be considered a criminal act. An infringement is a criminal act if the infringing act was carried out with (criminal) intent or gross negligence. The penalty for the offence is either a fine and/or up to two years in prison.

Complicit and attempted infringement is also punishable as outlined above. The sanctions involved will in turn depend heavily on the parties’ involvement and/or knowledge.

It is up to public prosecutors to decide whether to charge an alleged party with criminal copyright infringement.

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is 10 years to bring a claim for a breach of copyright.

The statute of limitations for the criminal act of infringement is five years.

6. Enforcement

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In the Sweden, the general rule is that the unsuccessful party reimburses the successful party for their costs brought on by the proceedings. It must be noted that this is subject to a great deal of discretion for the court, which will make an assessment at the end of the proceedings whether the costs in question are reasonable. In the case of several guilty parties the costs of the proceedings can be split between them.

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

In Sweden, the financial value of the claim is inconsequential.

In order to bring a civil copyright infringement action the claimant is required to file an application for a summons to a district court (Swedish: *Tingsrätt*).

6.2 Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure by the Swedish Customs Authority of infringing copies being imported into Sweden.

Criminal proceedings

Criminal proceedings, although rare, can be brought on as outlined in 5.3 above.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

The Swedish Patent and Trademark Office (*Patent och Registreringsverket*, or *PRV*) is the official government body responsible for intellectual property rights including patents, designs, trade marks and copyright in Sweden.

PRV is responsible for:

- IP policy
- Educating businesses and consumers about IP rights and responsibilities
- Supporting IP enforcement
- Granting Swedish patents, trade marks and design rights.

There is no official public body that actively enforces copyright. The Swedish police and the Swedish Customs Authority will target criminal activity (see 5.3) but it is generally up to the rights holders or the rights management agencies to spot infringing work and inform the police or take actions on their own.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the rights holder.

In Sweden there are a number of agencies who represents particular groups of rights holders. However, as a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collecting societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent.

The key collecting societies in each sector are as follows:

Agency
Bildkonst Upphovsrätt i Sverige ("BUS")
Who it represents
Painters, sculptors, graphic designers, illustrators, performers, video artists, designers
Agency
Föreningen Svenska Tecknare ("FST")
Who it represents
Illustrators, graphic designers, animators
Agency
Föreningen Sveriges Konsthantverkare och Industriformgivare ("KIF") & Konstnärernas Riksorganisation ("KRO")
Who it represents
Creators of applied arts, industrial designers, painters, artists.
Agency
Sveriges Tonsättares Internationella Musikbyrå ("STIM")
Who it represents
Music creators and publishers
Agency
Svenska Artisters och Musikers Intresseorganisation (SAMI)
Who it represents
Performers
Agency
Svenska Fotografers Förbund ("SFFot")

Who it represents
Photographers
Agency
Svenska Journalistförbundet ("SJF")
Who it represents
Journalists
Agency
Svenska Musikerförbundet ("SMF")
Who it represents
Musicians
Agency
Sveriges Dramatikerförbund ("SDF")
Who it represents
Script writers and translators
Agency
Sveriges Författarförbund ("SFF")
Who it represents
Writers and translators
Agency
Sveriges Läromedelförfattares Förbund ("SLFF")
Who it represents
Writers of educational books and materials
Agency
Sveriges Yrkesmusikerförbund ("SYMF")
Who it represents
Musicians (in particular orchestra and opera)
Agency
Teaterförbundet ("TF")
Who it represents
Directors, actors, singers and other performers in relation to theatre

6.5 Are copyright levies payable? By whom, and in what circumstances?

Copyright levies are payable to CopySwede. The Copyright levy is applicable to companies who import, manufacture or sell products which are, or can be, used for private copying. The levies are applicable to a great number of storage media including but not limited to CDs, USB drives, external hard drives or mobile phones. Companies which import or sell storage media to professional users or organisations for disabled persons are exempted from the levy.

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United Kingdom

RPC, Paul Joseph/Ciara Cullen/Adam Cusworth/Rebecca Rose



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in the UK is the Copyright, Designs and Patents Act (CDPA) 1988. Although the CDPA replaced and repealed two previous Copyright Acts (1911 and 1956), the previous Acts are still applied today where a work was created at a time when those Acts were in force.

As a common law legal system the UK also relies on case law to interpret and set precedents in law. As a result there are a number of judicial decisions that contribute to the sources of copyright law in the UK.

As a member of the European Union, the interpretation and application of UK legislation by the judiciary must be read in accordance with European Directives and Regulations which have direct effect. Further, the UK Courts and other EU national courts often refer questions of law to the European Court of Justice, whose decisions are binding on national courts. As a result UK copyright law is frequently added to and updated from both internal and external sources.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The categories of work that can be covered by copyright are: literary, dramatic, musical and artistic works, sound recordings, films, broadcasts and typographical arrangements. They are broad categories, and can be summarised as follows:

Literary works

These are any works, other than a dramatic or musical work, which are written, spoken or sung and have been recorded in writing or otherwise.

Dramatic works

A dramatic work includes a work of dance or mime; this might be a script for a play, a dance routine that has been choreographed or a screenplay of a book for film.

Musical works

These are works consisting of music, without any words or actions that are intended to be performed with the music. There is copyright in the sound recording of a musical work but that is a separate and distinct right (see below).

Music is defined as a combination of sounds for listening to; it is not the same as mere noise.

Artistic works

A graphic work, photograph, sculpture or collage irrespective of quality, a work of architecture (be it a building or a model for a building) or a work of artistic craftsmanship.

A graphic work is broad in scope and can be, amongst other things, a painting, drawing, diagram, map, chart or plan, engraving or an etching.

A work of artistic craftsmanship must have some aesthetic appeal, for example stained-glass windows or wrought-iron gates.

Sound recordings, films, broadcasts, typographical arrangements

These categories are designed to cover both recordings of sounds which are not based on underlying literary, dramatic or musical works, and recordings of copyrighted works that are literary, dramatic or musical works.

A film is a recording from which a moving image may be produced and importantly includes the soundtrack to the film.

Broadcasts are the electronic transmission of visual images, sounds or other information which is transmitted for simultaneous reception by members of the public.

2.2 What is required for works to qualify for copyright protection?

If a work falls within the one of the categories above, it may be protected by copyright if it is original. A work is original if the author (see point 3.1 for how to decide on who is the author) has created the work through their own skill, judgement and individual effort and has not copied from other works. Save for works of artistic craftsmanship, it is not requisite that work is of artistic merit. It is also not necessary for the whole of a work to be original. In general, the threshold for originality is low in the UK.

As a general rule the UK provides copyright protection if the author is a national of, or the work was first published in, the UK or a state which is a signatory to one of the various international conventions which the UK is a party to.

2.3 What rights does copyright grant to the rights holder?

The CDPA sets out the rights subsisting in copyright works which are the exclusive rights of the rights holder (before any licences are granted). They include the rights to:

- Copy the work
- Issue copies, rent or lend of the work to the public
- Perform, show or play the work to the public
- Make an adaptation of the work or do any of the above in relation to the adaptation
- Rights holders also have the moral rights described in question 2.4.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In the UK the following moral rights are provided for by the CDPA:

- The right to be identified as the author of a copyright work
- The right to object to derogatory treatment of your copyright work
- The right not to suffer false attribution to a copyright work
- The right to privacy in respect of certain films and photographs.

Moral rights are applicable to literary, dramatic, musical or artistic works and films. Moral rights do not apply to sound recordings, broadcasts or typographical arrangements.

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works varies according to the type of work and the date of creation. In general, for works created on or after 1 August 1989 the duration of copyright protection is as follows:

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 70 years from the end of the calendar year in which the author dies.

Where a work has a joint author/co-author, 70 years from the end of the calendar year in which the last known author dies.
Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was made or made available to the public.
Category of work
Computer-generated literary, dramatic, musical or artistic works
Duration
Copyright expires 50 years from the end of the calendar year in which the work was made.
Category of work
Sound recordings
Duration
Copyright expires 50 years from the end of the calendar year in which the recording is made or, if the recording is published lawfully, 70 years from the end of the calendar year in which it was first published.
Category of work
Films
Duration
For films, the reference point is the end of the calendar year the last living author dies. Copyright then lasts until 70 years after.
Category of work
Films
Duration
For films, the reference point is the end of the calendar year the last living author dies. Copyright then lasts until 70 years after.
Category of work
Broadcasts
Duration
Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made.

Category of work
Typographical arrangements
Duration
Copyright expires 25 years from the end of the calendar year in which the work was first published.

2.6 For how long do moral rights subsist in copyright works?

An author's moral right to be identified as the author, to object to derogatory treatment, or of privacy lasts for the life of the author plus 70 years.

The right not to suffer false attribution lasts for the life of the author plus 20 years.

3. Ownership

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the author. The main exception to the rule is where the work was made by a person in the course of his/her employment; in those circumstances the employer is the first owner unless there is an agreement to the contrary.

The author is defined as the person who creates the work. CDPA provides guidance for the specific categories of work where the creator is less clear:

- For sound recordings the author is the person who made the arrangements necessary for making the sound recording
- For films there are two authors: the producer and the principal director of a film
- For broadcasts it is the person making the broadcast
- For typographical arrangements it is the publisher of the arrangement.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where there is an assignment of the whole or of part of a work.

To qualify as joint authors it is necessary that the contributions of each author are not distinct. If they are distinct then two works subsist, each with separate copyright.

Joint owners have their own individual rights with respect to the work that can be assigned independently of the other or others, but the consent of all joint authors is required for licensing or use of the copyright work.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in the UK; it arises automatically upon creation of the work. There is no registration system.

A copyright notice may be useful to evidence ownership of copyright and the date of authorship. It creates a presumption that the named person is the author, and puts third parties on notice of the rights, but copyright subsists without such notice and the failure to display such notice does not affect copyright in a work.

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment of copyright must be in writing, signed by or on behalf of the copyright owner.

A licence of copyright can, in addition to being in writing, be agreed orally or implied (although this is not best practice as the rights holder will not benefit from certain statutory rights as licensee, such as the right to sue third-party infringers).

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights can be waived but they cannot be assigned.

4. Infringement

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed. There are two classes of infringement: primary infringement and secondary infringement.

4.1 What acts constitute primary infringement of copyright?

Primary infringement occurs where a person performs any of the following acts without the consent of the rights holder.

- Copying
- Issuing copies of the work to the public
- Renting or lending the work to the public
- Performing, showing or playing a copyright work in public
- Communicating the work to the public
- Making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation.

Primary infringements are strict liability offences. This means that there is no need to show that the alleged infringer had knowledge of another's subsisting right, or intention to infringe that right.

4.2 What acts constitute secondary infringement of copyright?

Secondary infringement occurs where a person, with knowledge or reasonable grounds for such knowledge:

- Imports, exhibits or distributes, sells, lets or offers for hire the copyright work
- Deals in articles adapted for making copies of copyright work
- Transmits a copyright work via a telecommunication system
- Gives permission for use of public place for a performance that infringes the copyright
- Supplies apparatus for playing recordings that would show a copyright work in public
- Gives permission to use their premises to show a copyright work to the public
- Supplies a copy of a sound recording which has been used to perform a copyright work to the public.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be carried out in relation to copyright works despite the fact that they might be protected by copyright. The Information Society Directive (2001/29/EC) contains what has been termed a 'shopping list' of exceptions and limitations, many of which the CDPA has implemented into English law. These permitted acts are wide in variety but often relate to very specific scenarios. They include (amongst others):

Act
Making of temporary copies
Description
<p>A copy that is transient or incidental which:</p> <ul style="list-style-type: none"> • Is an integral and essential part of a technological process; • Has the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary; or • Has no independent economic significance (eg ISPs who use caching).
Act
Personal copies for private use
Description
<p>There was an exception of private copying for a short while, but it was quashed for not complying with the relevant EU Directive as the government had not properly considered whether the exception offered adequate compensation to rights holders.</p>
Act
Research and private study
Description
<p>Research is permitted where a person is researching for a non-commercial reason.</p> <p>In addition, the research must contain acknowledgement of the copyright work where it is referenced (ie identify it by title and author).</p> <p>Copying is always allowed for private study.</p>
Act
Criticism or review and reporting current events

Description
Where the copyright work is being used for the purpose of criticism or review. It can be the criticism or review of that copyright work, or another work or performance provided the copyright work has been made available to the public. As for research, an acknowledgement of any copyright work used in a criticism or review is required. No acknowledgement is required when reporting current events which are always deemed to be permitted acts under CDPA.
Act
Quotation
Description
Including where the use is for criticism and review, quotations are a permitted act provided that they relate to a work that has already been lawfully made available to the public. An acknowledgement of a copyright work used is required where a quotation is used.
Act
Parody
Description
Naturally parodies, to some extent, require copying or mixing of another's work. People are allowed to use limited amounts of another's material without the owner's permission. The parody must evoke the existing work whilst being noticeably different from it. It should be noted that parodied work does not excuse defamatory remarks or the moral right to object to derogatory treatment of a work.

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The CJEU decision in *Nils Svensson v Retriever Sverige* (C-466/12) determined whether linking to or framing links to copyright material without consent is a "communication to the public" and therefore infringes the rights holder's communication to the public exclusive right.

The CJEU emphasised that to be a communication to the public, a link would have to be a communication to a 'new' public, ie a public not in the contemplation of the rights holder when the right-holder published the work. As a result, when a person uploads material to the internet, the public communicated to is the internet at large. Therefore, linking to a work freely available on the internet does not communicate that work to a 'new' public.

However, where a work is not freely available on the internet, such as where the work sits behind a paywall, the copyright owner cannot be said to have communicated with the internet as a whole, and so linking to that work in a way that circumvents the paywall would, it appears from recent case law, constitute a communication to the public and infringe the rights of the rights holder. The Midden-Nederland District Court has just referred questions on this point to the CJEU following proceedings concerning the Dutch anti-piracy organisation BREIN.

4.5 Is a licensee of copyright able to bring an infringement action?

Under CDPA, an infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action depends on the type of licence involved.

An exclusive licence authorises the licensee to exercise a right which would otherwise be exercisable exclusively by the copyright owner. One such right is the right to bring an infringement action.

A non-exclusive licensee may also bring an infringement action but only where the licence is in writing and signed by the copyright owner and expressly grants the non-exclusive licensee the right of action.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The CDPA provides the following remedies for rights holders:

- Interim injunctions (including search orders, freezing orders and pre-action, non-party disclosure)
- Delivery up of infringing articles
- Seizure of infringing articles
- Forfeiture of infringing articles
- An injunction against the infringer
- To elect between either an enquiry as to damages or an account of profits arising from the infringement

5.2 Are there any specific remedies for online copyright infringement?

Where it appears that a website is displaying infringing material, rights holders can seek an injunction from the court ordering the internet service provider (“ISP”) to block the website. The relevant provision is s.97A CDPA. The ISP should be put on notice of the person using their services to infringe copyright before the order is sought.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal acts under the CDPA in relation to copyright. The main offences relate to selling or making available for sale copies of a copyright work but there are offences for communicating the infringing copy to the public. The sanction for committing a criminal offence in relation to copyright is likely to be either a fine and/or a prison sentence.

If an offence is committed by a company and it is proven that an individual officer of the company consented to committing the offence, that officer can also be liable for the criminal act.

Each offence requires a level of intention, knowledge or belief on behalf of the potential culprit, and each carries various penalties:

Criminal Act
Making a copy of a copyright work for sale
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person’s copyright.

Penalty
For an indictable offence: 10 years in prison. On summary conviction: six months in prison and/or a fine.
Criminal Act
Importing a copy of a copyright work into the UK
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person’s copyright.
Penalty
For an indictable offence: 10 years in prison. On summary conviction: six months in prison and/or a fine.
Criminal Act
Distributing a copy of a copyright work in the course of business or otherwise that prejudices the rights holder
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person’s copyright.
Penalty
For an indictable offence: 10 years in prison. On summary conviction: six months in prison and/or a fine.
Criminal Act
Communicating a copyright work to the public
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person’s copyright.
Penalty
For an indictable offence: 10 years in prison. On summary conviction: six months in prison and/or a fine.
Criminal Act
Possessing a copy of a copyright work with a view to committing an infringing act whilst in the course of business
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person’s copyright.

Penalty
On summary conviction: six months in prison and/or a fine.
Criminal Act
Selling, letting for hire or offering for sale or hire a copy of a copyright work whilst in the course of business
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright.
Penalty
On summary conviction: six months in prison and/or a fine.
Criminal Act
Exhibiting in public a copy of a copyright work whilst in the course of business
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright.
Penalty
On summary conviction: six months in prison and/or a fine.
Criminal Act
Making or possessing an article specifically designed for making copies of a copyright work
Relevant intention, knowledge or belief
The knowledge, or having a reason to believe, that the article is to be used to make infringing copies for sale.
Penalty
On summary conviction: six months in prison and/or a fine.
Criminal Act
Causing a work protected by copyright to be performed, played or shown in public
Relevant intention, knowledge or belief
The knowledge, or having a reason to believe that copyright would be infringed.
Penalty
On summary conviction: six months in prison and/or a fine.

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is six years to bring a claim for breach of copyright. Time begins to run from the date the damage is suffered.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In the UK, the general rule is that the unsuccessful party pays the costs of the successful party. However, this is subject to the very wide discretion of the court who can order otherwise. As a general rule, a successful party will not recover more than 70% of its costs but it will be for the courts to assess this, either at the hearing (known as 'summary assessment') or after (known as 'detailed assessment').

6. Enforcement

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

In deciding which court to bring a copyright claim in, the financial value of the claim and the complexity of the facts are the two key considerations.

The Chancery Division of the High Court is reserved for claims worth at least £100,000 and that are sufficiently complex or important to the public. There is no cap on the amount of costs recoverable in the High Court; they must simply be proportionate and reasonable.

For lower value claims, the Intellectual Property Enterprise Court (“IPEC”) provides an alternative to the High Court. It will not award damages of more than £500,000 and costs orders are made proportionately to the value of the award, but in any event no higher than £50,000.

Within the IPEC there is also a small claims track for claims worth up to £10,000.

6.2 Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure by HM Revenue & Customs of infringing copies being imported into the UK.

Criminal proceedings

Criminal proceedings, although rare, can be brought on the grounds described in 5.3 above, and pursued through the criminal courts.

Copyright Tribunal

An alternative method of bringing proceedings is the Copyright Tribunal. It is an independent tribunal which was established by the Copyright, Designs and Patents Act 1988. Its main role is to adjudicate in commercial licensing disputes between collecting societies and users of copyright material in their business. It does not deal with copyright infringement cases or with criminal ‘piracy’ of copyright works.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

The Intellectual Property Office (IPO) of the United Kingdom is the official government body responsible for intellectual property rights including patents, designs, trade marks and copyright in the UK. It is an executive agency of the Department for Business, Innovation and Skills.

The IPO is responsible for:

- IP policy
- Educating businesses and consumers about IP rights and responsibilities
- Supporting IP enforcement
- Granting UK patents, trade marks and design rights.

Although there are no agency bodies who are responsible for promoting copyright, in the UK there is the Copyright Hub (www.copyrighthub.co.uk). The Copyright Hub is a not-for-profit organisation that looks to make it simpler for people and companies to purchase a licence in a copyright work. The premise is that the easier it is for people to legally use copyright work, the better it is for the rights holders and creative industries.

There are no agency bodies that actively enforce copyright. The UK Police will target criminal activity (see 5.3) but it is up to the rights holders or the rights management agencies to spot infringing work and take action.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the rights holder.

However, as a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collecting societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent.

The key collecting societies in each sector are as follows:

Agency
Authors’ Licensing & Collecting Society
Who it represents
Writers
Agency
Artists’ Collecting Society
Who it represents
Artists

Agency
Broadcasting Data Services
Who it represents
Broadcasting
Agency
British Equity Collecting Society
Who it represents
Audiovisual performers
Agency
Copyright Licensing Agency
Who it represents
Creators and publishers
Agency
Design and Artists Copyright Society
Who it represents
Artists
Agency
Directors UK
Who it represents
Directors
Agency
Educational Recording Agency
Who it represents
Education sector
Agency
Motion Picture Licensing Company
Who it represents
Film and TV producers and distributors
Agency
Newspaper Licensing Agency
Who it represents
Newspapers

Agency
PRS for Music
Who it represents
Musicians
Agency
Phonographic Performance Limited
Who it represents
Musicians
Agency
Publishers' Licensing Society
Who it represents
Publishers

6.5 Are copyright levies payable? By whom, and in what circumstances?

Copyright levies are not payable in the UK where an exception applies.

7. Copyright Reform

7.1 What do you consider to be the top two recent copyright developments?

Copyright and Rights in Performances Regulations 2014

The UK Government introduced a range of new copyright exceptions under the Copyright and Rights in Performances Regulations 2014. The most significant of these permit:

- The making of personal copies for private use (including data shifting)
- Quotation for the purposes of criticism and review (provided that the identity of the author quoted is indicated and the source has been lawfully made available to the public)
- Text and data mining for the purposes of non-commercial research
- Parody, caricature and pastiche.

The exceptions need to be read in connection with the Information Society Directive (2001/29/EC), which contains what has been termed as a ‘shopping list’ of exceptions and limitations which can be implemented by Member States. However, once implemented, the exception will be read in accordance with EU case law.

The Copyright Hub

Following the publication of Phase 1 of the Copyright Exchange Feasibility Study – ‘Is copyright licensing fit for purpose in the digital age?’ the government (in conjunction with the UK Intellectual Property Office) has created a digital copyright exchange called the Copyright Hub. The Copyright Hub is an online web-based computer system that allows licensors to offer their rights and allows licensees and rights users to license them, the theory being that a better marketplace for content will lower the transaction costs of licensing copyright works and reduce the propensity of users to infringe copyright.

The Copyright Hub is only in its preliminary test phase and, upon completion of Phase 2 of the Copyright Exchange Feasibility Study, more organisations will be included within the online system.

7.2 What do you consider will be the top two copyright developments in the next year?

Digital Single Market Strategy for Europe

On 6 May 2015, The European Commission released its *Digital Single Market Strategy for Europe*. The Commission’s stated aim is to “make the EU’s single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one”.

Copyright forms a central component of the strategy (but perhaps not as central as many had hoped) in the following areas:

- The harmonisation copyright law between Member States
- The introduction of cross-border e-commerce rules
- Bringing an end to ‘unjustified’ geo-blocking (the practice of denying consumers access to a website based on their location, or re-routing them to a local website, often with different pricing)
- Strengthening the copyright enforcement system against commercial-scale infringements.

The Strategy sets the Commission’s agenda for EU-level copyright reform over its term and is worth keeping a close eye on.

GS Media

Whilst the CJEU in *Nils Svensson v Retriever Sverige* (C-466/12) decided that linking to or framing links to copyright material without consent does not constitute a “communication to the public” and therefore an infringement of the rights holder’s communication to the public exclusive right, the case didn’t decide the question of whether this would still be the case where the works linked to are themselves unlawfully uploaded (ie uploaded without the copyright holder’s consent).

This is the basis of three questions referred to the Court of Justice of the European Union in Case C-160/15 *GS Media*.

The reasoning behind the decision in *Svensson* – that to be a communication to the public a link would have to be a communication to a ‘new’ public (ie a public not in the contemplation of the rights holder when the right-holder published the work) – would suggest that linking to an unlawful copy of a copyright work would be an infringement of copyright in the work, as it constitutes a communication to a public which the rights holder had not envisaged.

Whatever decision the Court comes to, it is likely to prove controversial in this developing area of law.

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United States

Nixon Peabody, Gina McCreadie



1. Legislation and regulation

1.1 What are the main sources of copyright law?

Copyright law in the United States is governed by federal statute, the US Copyright Act of 1976 (as amended), 17 U.S.C. § 101, et seq. (the Copyright Act). Over the years, there have been several revisions to the Copyright Act and these prior versions continue to apply to works created (or published/registered in some instances) at the time when those prior versions were in effect. It is imperative to determine what version of the US Copyright Act applies to a particular work to determine what rights are afforded to that work, particularly with respect to the duration of copyrights and steps that need to be taken to avoid the work from falling into the public domain prior to expiration of the copyright term.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

US copyright law protects original works of authorship fixed in a tangible form of expression. This expression can be seen directly or through the assistance of a machine or device. Notably, copyright does not protect an idea. The categories of works protected by copyright include: literary works; musical works, including lyrics; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. These categories are construed broadly. These types of works are broken down into the following categories:

Literary works

Literary works are nondramatic literary works, which include fiction, nonfiction, poetry, an article, textbooks, reference works, directories, catalogues, advertisements, compilations of information, computer programs, and databases.

Visual arts works

Visual arts works are pictorial, graphic, or sculptural works, which include two-dimensional or three-dimensional works of fine, graphic, and applied art, including jewellery, photographs, prints and art reproductions, maps, technical drawings, and architectural works.

Performing arts works

Performing arts works include a musical work (with or without music), a dramatic work (such as a screenplay, a play or other script), a pantomime, or a choreographic work. To the extent that the work includes a sound recording, that is a separate and distinct copyright discussed below.

Sound recording

This type of work incorporates the sound recording itself and can include the underlying musical, dramatic, or literary work that is embodied in that recording. A claimant seeking to protect all of these elements would do so as a sound recording under a single application. That said, if the claimant is seeking to protect sound associated with a motion picture or other audiovisual work, this is not a sound recording and is subject to a separate and distinct right, as discussed below.

Motion picture/audiovisual work

These works include a feature film, a documentary film, an animated film, television show, video, videogame, or other audiovisual work (which is a work that consists of a series of related images intended to be shown using a machine or device along with any sounds, if any).

2.2 What is required for works to qualify for copyright protection?

If a work falls within one of the categories above, it may be protected by copyright so long as it is original, which means that it was independently created by the author and has some minimal element of creative expression. Copyright does not protect familiar symbols or designs, basic geometric shapes, words and short phrases (such as names, titles, and slogans), or variations of typographic ornamentation, lettering or colouring. In addition, copyright protection does not extend to any idea, concept, system or process that may be embodied in the work.

With respect to unpublished works, copyright protection is available to all works regardless of the author's nationality or domicile. In general, published works are eligible for protection if: (1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States or a national, domiciliary, or sovereign authority of a treaty party; (2) the work is first published

in the United States or a foreign nation that is a treaty party when the work is first published; (3) the work is a sound recording that was first fixed by a treaty party; (4) the work is a pictorial, graphic, or sculptural work that is incorporated in a building or other structure or architectural work located in the United States; (5) the work is first published by the United Nations (or its agencies) or by the Organization of American States; or (6) the work is a foreign work that was in the public domain in the United States prior to 1996 and its copyright was restored under the Uruguay Round Agreements Act.

2.3 What rights does copyright grant to the rights holder?

The Copyright Act, 17 U.C.S. § 106, sets forth the following six exclusive rights held by a copyright holder:

- Reproduction
- Preparation of derivative works based on the copyrighted work
- Public distribution (by sale or other transfer of ownership, or by rental, lease, or lending)
- Public performance (in case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including motion pictures and other audiovisual works)
- Public display (in case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including individual images of a motion picture and other audiovisual works)
- Public performance by means of a digital sound recording (in the case of sound recordings).

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Generally speaking, the United States does recognise moral rights held in a copyright as an independent right. That said, moral rights have been judicially interpreted into legislative statutes, such as copyright, trade mark, privacy, and defamation statutes. Exclusively with respect to a visual art work, Congress enacted the Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A, which details statutory protections under the Copyright Act for rights of attribution and integrity for visual arts works and outlines the scope and exercise of, and exception to, these rights, along with duration, transfer, and waiver of these rights.

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works varies according to the type of work and the date of creation.

For works securing copyright protection for the first time on or after 1 January 1978, there is a single copyright term with two ways to calculate duration of this term. For works created and fixed in a tangible medium on or after 1 January 1978, the work is automatically protected by copyright from the moment of creation for the life of the author plus an additional 70 years. Where there is a joint work (ie the work is prepared by two or more authors and the work is not a work made for hire), the copyright term is 70 years after the death of the last surviving author. In the case of works made for hire or anonymous or pseudonymous works, the copyright term is 95 years from publication or 120 years from creation, whichever is shorter. For works that were created but not published or registered by 1 January 1978, the duration of the copyright term is generally computed the same way depending on the nature of authorship. However, all works falling in this category are afforded at least 25 years of statutory protection. In addition, if a work in this category was published before 1 January 1978, the term is extended by an additional 45 years.

For works that already secured statutory copyright protection before 1 January 1978, the Copyright Act refers to the previous copyright law, the Copyright Act of 1909, for computing duration of copyright protection. Under the 1909 act, copyright was secured on the date the work was published, or for unpublished works, on the date of registration. The first term of the copyright was 28 years from the date it was secured. During the 28th year, if renewed, the copyright term extended an additional 28 years. If not renewed, the copyright expired at the end of the first 28-year term. The Copyright Act and later versions lengthened the duration of the renewal term and allowed for automatic extensions and renewals depending on the type of work copyrighted. After computing all of these extensions, all works published before 1 January 1923 fell in the public domain.

Under the Uruguay Round Agreements Act, certain foreign works that may have fallen into the public domain for failure to comply with the applicable version of the Copyright Act were restored as of 1 January 1986. This restoration occurred automatically and the duration of the copyright term of the restored work is based on what the term would have been had the work not fallen into the public domain.

The Copyright Act provides that all copyright terms run to the end of the calendar year in which they expire.

2.6 For how long do moral rights subsist in copyright works?

As moral rights afforded to a copyright do not generally exist under United States law, duration of these rights is determined by other statutory laws incorporating these rights. With respect to the VARA, for works created on or after the effective date of VARA, the term of the rights granted is the life of the author with certain exceptions.

3. Ownership

3.1 Who is the first owner of a copyright work?

The author is typically the first owner of the copyright. An exception is a work made for hire, in which a work created by an employee within the scope of his employment is owned by the employer rather than the employee by operation of law.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

A copyright can be jointly owned under the Copyright Act. Authors of a joint work are co-owners of the copyright in the work, and each author has a full undivided interest in the work, meaning that each co-owner has the ability to sue for copyright infringement without the other co-owner, can recover a complete damages award without sharing it with the other co-owner, and can exploit or license any of the exclusive rights in the copyright and, absent an agreement to the contrary, is entitled to an equal share in exploitation of the work regardless of the contribution made.

To qualify as a joint work, the authors must have intended to merge their independent collaborations into a single unitary whole at the time the contribution was made.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

You can register a copyright with the US Copyright Office, but it is not required to own or secure a copyright. As noted above, copyright in a work exists upon creation. However, to commence a copyright infringement action, the copyright owner must hold a copyright registration for the asserted work. In addition, if the copyright is registered prior to commencement of the infringement, the copyright owner has the option to recover statutory damages instead of actual damages and/or a disgorgement of the infringer's profits, and is eligible to recover costs and attorneys' fees as the prevailing party. If the work is registered after commencement of the infringement, statutory damages and attorneys' fees are not available remedies.

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment or transfer of copyright must be in writing, signed by or on behalf of the copyright owner.

A copyright licence should be in writing, but can also be agreed orally or implied.

3.5 Can moral rights be transferred, assigned or licensed?

Moral rights, to the extent any exist, can be waived but they cannot be assigned, transferred, or licensed. This remains true even under VARA.

4. Infringement

An action for copyright infringement can be commenced in federal court based on infringement of any of the exclusive rights set out in 2.3 above provided that a copyright registration has been secured. There are two classes of infringement: direct infringement and secondary infringement.

4.1 What acts constitute direct infringement of copyright?

Direct infringement takes place when a person or entity makes unauthorised use of any of the exclusive rights detailed in section 2.3 granted to a copyright owner.

Direct infringement is a strict liability offence, which means that there is no requirement for the copyright owner to show that the infringer had knowledge of another's right in the copyright or any intention to infringe that right. However, the infringer may qualify as an innocent infringer to mitigate any actual or statutory damages awarded where the infringed work did not contain a proper copyright notice.

4.2 What acts constitute secondary infringement of copyright?

Secondary infringement can occur in the form of vicarious liability or contributory infringement. Under either form of liability, there must be a finding of direct infringement.

A person or entity is variously liable for copyright infringement where the defendant has the ability to control the direct infringer's activities and has a financial interest in those infringing activities.

A person or entity is liable for contributory infringement where the defendant knew of the infringing activity and acted in concert with the direct infringer by materially inducing, causing, or contributing to the direct infringer's conduct.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

In certain instances, certain uses of a copyright do not constitute infringement by statute.

In other instances, fair use of a copyright for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is a defence to infringement. To determine whether fair use can be made, the following factors are considered: (1) the purpose and character of the use, including whether the use is for commercial or non-profit education purposes; (2) the nature of the

copyrighted work; (3) the amount and substantiality of the portion of the work used in relation to the copyright as a whole; and (4) the effect of the use on the potential market or value of the copyrighted work.

Examples of uses of a work that are not infringing by statute or through fair use include:

Act
Personal copies for private use
Description
The making of a copy, including digital and analogue musical recordings, that is made for the individual's personal and private use and not for commercial use.
Act
Educational purposes
Description
Use permitted in limited circumstances, for example, where only a limited number of copies are made of a portion of a work (ie a chapter or a chart within a larger work).
Act
Parody
Description
Reproduction or use of a work for the purpose of ridicule or criticism of the work itself. This should be compared against a satire, in which a work is used to ridicule or criticise something else, which typically does not qualify as fair use.
Act
Criticism and comment
Description
Quoting or excerpting a work in connection with a review or criticism for purposes of illustration or comment.
Act
News reporting
Description
Summarising a work or providing brief quotations in a news article or report.

Act
Research and scholarship
Description
Quoting a short passage in a scholarly, scientific, or technical work to illustrate or clarify the author's position or conclusions.
Act
Abuse of right
Description
Copyright use permitted where the copyright owner's refusal to license a work is motivated by interests independent of copyright or by securing an economic advantage that is disproportionate to the copyright owner's investment in the work.
Act
Text and data mining
Description
In general, use of computer-based processes, such as text mining, web mining, and data mining, to transform an existing work into useful data.

Circuit noted that while linking and in-framing may cause a consumer to believe that they are viewing the image on a Google webpage, the Copyright Act does not protect against acts that cause confusion among consumers.

4.5 Is a licensee of copyright able to bring an infringement action?

Only an exclusive licensee of one or more rights in a copyright has standing to sue for infringement of those exclusive rights held in the copyright.

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

It is permissible to provide a hyperlink to or frame a work protected by copyright so long as there is no use or reproduction of the work itself.

In *Perfect 10, Inc. v Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), the Ninth Circuit found that Google's use of in-frames and hyperlinks in a search engine search displaying full-size photographic images constituted fair use because Google did not store any of the images on its servers, and thus, did not have a copy of the work. Rather, Google provided HTML instructions to direct a user's internet browser to a website that stored the image. Providing HTML instructions is not reproduction or otherwise showing a copy because the instructions were merely lines of text and the instructions do not cause the image to appear on the user's screen. Rather, the instructions only gave the address of the URL that contained the image. The Ninth

5. Remedies

5.1 What remedies are available against a copyright infringer?

The following civil remedies are available under the Copyright Act:

- Injunctive relief, including preliminary and temporary restraining orders
- Impoundment of infringing goods
- Destruction or other reasonable disposition of infringing goods
- The copyright owner's actual damages and/or disgorgement of infringer's profits, so long as there is no double-counting
- Statutory damages instead of actual damages and/or disgorgement of profits to the extent that the work was registered prior to commencement of the infringement
- Recovery of costs and attorneys' fees based on a finding of infringement if the work was registered prior to commencement of the infringement.

5.2 Are there any specific remedies for online copyright infringement?

In the case of online infringement, a copyright owner can serve a take-down notice under the Digital Millennium Copyright Act (DMCA) which, if properly completed and served, requires an online service provider to take down the infringing content subject to receipt of a counter-notification.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

A person who wilfully infringes a copyright can be held liable for criminal copyright infringement where the infringement was committed for commercial advantage or financial gain, by reproduction or distribution during a 180-day period of one or more copies or copyrighted works with a total retail value of more than \$1,000, or by distribution of a work prepared for commercial distribution by making it available on a computer network accessible by the public, if that person knew or should have known that the work was intended for commercial distribution. Forfeiture, destruction, restitution, imprisonment, and/or criminal fines may be ordered upon a guilty finding of criminal copyright infringement. There are also criminal sanctions ordered in connection with fraudulent use of a copyright notice, fraudulent removal of a copyright notice, and false representation of fact in a copyright application.

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit for a civil action is three years after the claim accrued. A criminal proceeding must be brought within five years after the cause of action accrued.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

If the copyright is registered prior to the commencement of the infringement, the successful party may recover costs and reasonable attorneys' fees incurred as the prevailing party. This also applies to the alleged infringer who successfully defeats a claim of copyright infringement.

6. Enforcement

6.1 What courts can you bring a copyright infringement action in, and, what monetary thresholds, if any, apply?

Copyright infringement actions may only be brought in federal court in the United States. There is no monetary threshold to commence a copyright infringement action.

6.2 Are there any other ways in which you can enforce copyright?

Seizure

Upon recording a copyright with the US Customs and Border Protection (CBP), a copyright holder may request seizure by CBP of infringing goods being imported into the United States.

Criminal charges

Criminal proceedings can be brought on the grounds described in 5.3 above, and pursued by the US government.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? If so, what do they do?

The US Copyright Office, created by Congress in 1897 as a separate department of the Library of Congress, is responsible for processing copyright applications. The Copyright Office does not promote and/or enforce copyrights, which duties are left to the copyright owners.

In addition to processing copyright application, the US Copyright Office is responsible for:

- Recording and maintaining a database of copyrighted works and copyright ownership information
- Administering statutory licences and disbursements of monies, including those relating to broadcast television signals retransmitted by cable operators
- Responding to public inquiries regarding copyright
- Domestic and international policy analysis
- Legislative support for Congress
- Litigation activities to the extent of interest to the US Copyright Office
- Participating in US delegations and meetings
- Hosting copyright training
- Providing public information and education

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

In general, use of a copyright requires permission from the copyright owner or other rights holder. However, for certain works, there are practical difficulties in contacting a copyright owner directly to obtain a licence for the right to use the work. As a result, some copyright owners become a member of a collective rights management agency, which manages the rights in the work. The predominant collective rights management agencies in the United States include:

Agency
Artists Rights Society of New York (ARS)
Who it represents
Visual artists and their estates, including painters, sculptors, photographers, architects, and others
Agency
American Society of Composers, Authors and Publishers (ASCAP)
Who it represents
Music (including songwriters, composers, and publishers)
Act
Broadcast Music Inc. (BMI)
Who it represents
Music (including songwriters, composers, and publishers)
Agency
Copyright Clearance Center (CCC)
Who it represents
Primarily academic publishers
Agency
Motion Picture Licensing Corporation (MPLC)
Who it represents
Motion picture rights holders
Agency
Society of European Stage Authors and Composers (SESAC)

7. Copyright Reform

Who it represents
Music (including songwriters, composers, and publishers)
Agency
SoundExchange
Who it represents
Sound recording artists
Agency
VAGA
Who it represents
Photography and fine art holders
Agency
Harry Fox Agency
Who it represents
Music publishers

6.5 Are copyright levies payable? By whom, and in what circumstances?

The Audio Home Recording Act of 1992, codified in the Copyright Act at 17 U.S.C. § 1008, provides that copying of digital and analogue musical recordings for non-commercial use does not constitute copyright infringement, and thus, no copyright levies or royalties are payable. Napster’s attempt to rely on Section 1008 as a defence to copyright infringement was rejected because it was a business and its use was for a commercial purpose. However, the cost to obtain the initial copy of the musical recording includes a levy or royalty paid to the artist, typically through one of the collective rights management agencies identified in 6.4 above.

7.1 What do you consider to be the top two recent copyright developments?

Supreme Court’s Aereo decision

On 25 June 2014, the US Supreme Court ruled, in *American Broadcasting Companies v Aereo*, 573 U.S. ___ (2014), that an online internet service offered by Aereo to paid subscribers to view broadcast television constitutes a public performance under the Transmit Clause in violation of the Copyright Act.

In the United States, use of a personal antenna to view over-the-air broadcast television is free, whereas cable and satellite providers pay a retransmission fee to show such content through their services. Aereo sought to capitalise on use of “free” airwaves by offering a service that utilises thousands of antennae to offer paid subscribers programming on a one-antenna to one-subscriber basis. When a subscriber utilised the service, Aereo assigned an antenna to the subscriber for use only by that subscriber for the duration of the programme. The antenna received the broadcast and an Aereo transcoder translated the signal received to data that could be viewed on the internet. This data was then saved to a folder on Aereo’s hard drive specific to that subscriber, and then streamed for the subscriber to view the broadcast online. Aereo was not paying retransmission fees.

The Supreme Court likened Aereo’s service to a cable provider and found that it “performed” the work. The Supreme Court also found that it was a “public” performance because of the way in which the service was provided to a large number of unknown and unrelated people. In the Supreme Court’s view, it did not matter that any particular subscriber was using a dedicated antenna at any given time.

Although the Supreme Court specifically noted that its decision was a limited application of the Transmit Clause to Aereo’s service, and should not have the effect of discouraging other technological advances, this decision seems to reveal the Supreme Court’s willingness to apply the Copyright Act to new technologies likely not contemplated when the law was enacted (or amended).

Copyright protection afforded to pre-1972 sound recordings

Recent court decisions in California and New York have turned the tables on whether public performance of a pre-1972 sound recording constitutes copyright infringement. Although musical compositions have been protected by copyright since the early 1800s, sound recordings have only been eligible to receive federal statutory copyright

protection since 15 February 1972. Any sound recordings created prior to this date are not protected. For these pre-1972 sound recordings, owners have had to rely on state common law to obtain any protection. Certain companies, such as Sirius XM Radio (Sirius), a subscription-based satellite and internet radio provider, and Pandora, an internet radio provider, have long been publicly performing pre-1972 sound recordings without paying any royalties for this use. Rather, royalties were only paid for use of the musical composition.

Flo & Eddie, Inc., which owns the copyrights to The Turtles' master recordings, filed class action lawsuits against Sirius in Florida, New York, and California. The California court granted summary judgment in favour of Flo & Eddie relying on § 980(a)(2) of the California Civil Code, which provides that the owner of "a sound recording originally fixed prior to February 15, 1972, has exclusive ownership therein until February 15, 2047." In New York, the court denied Sirius' motion for summary judgment of non-infringement based on the existence of several New York court decisions that afforded public performance rights to holders of common law copyrights such as plays and films. Although there was no specific case that extended rights to a public performance of a sound recording, the court concluded that New York common law protects public performance in all copyrighted works, including sound recordings. Sirius appealed the California and New York decisions. In contrast, the Florida court just recently granted summary judgment in favor of Sirius, ruling that unlike in California and New York, there is no specific Florida legislation or common law copyright related to arts that would extend protection to these pre-1972 sound recordings.

On 29 May 2014, the Respecting Senior Performers as Essential Cultural Treasures Act (RESPECT Act) was introduced in Congress and would require digital music services that transmit sound recordings to pay royalties for those fixed before 15 February 1972 in the same manner as was required for sound recordings fixed after this date. Sirius and Pandora have opposed this bill. However, if passed, Sirius and Pandora would be able to play these pre-1972 sound recordings without permission from the record companies at the rates required for post-1972 sound recordings. If the sound recording copyright owners prevail under state common law, they could demand higher royalties. To date, the Act has not been signed into law.

7.2 What do you consider will be the top two copyright developments in the next year?

Amendment of copyright laws affecting sound recordings and musical works

Recent legislation has been introduced in Congress to extend the rights of owners of sound recordings and musical works. The Fair Play Fair Pay Act of 2015, H.R. 1733, seeks to amend the Copyright Act to broaden the public performance right with respect to sound recordings to include any means of audio transmission rather than just limiting it to digital audio transmission. If this law goes into effect, it would require traditional AM/FM stations broadcasting copyrighted sound recordings to pay royalties for non-digital transmissions, which they historically have not been required to pay. In addition, the Songwriter Equity Act of 2015, H.R. 1283 and S. 662, seeks to amend the Copyright Act to remove consideration of a provision that prohibits payment of licence fees for the public performance of sound recordings from being taken into account in any judicial or other proceeding to set or adjust payable royalties to copyright owners for the public performance of musical works. Rather, the rates and terms that would have been negotiated in the marketplace between a willing buyer and seller should be used to establish royalty rates under a compulsory licence for the reproduction and distribution of musical works.

This legislation being introduced in Congress comes on the heels of the music industry losing significant amounts of revenue due to increased consumer use of digital music streaming services rather than traditional album purchases. Proponents argue that a shift in technology and consumer demands requires Congressional overhaul of the copyright laws concerning music and sound recordings to meet these changes.

Amendment of copyright laws to allow greater freedom to mobile device users

Also recently introduced into Congress is the Unlocking Technology Act of 2015, which would amend the Copyright Act's prohibition on circumventing a technological measure only to circumstances in which the act was carried out to infringe or facilitate infringement of the work. This legislation is designed to allow users of mobile devices to "unlock" their devices without fear of committing copyright infringement.

Under this Act, it is not a violation to: (1) circumvent a technological measure if the purpose of circumventing the measure does not constitute copyright infringement; or (2) use, manufacture, import, offer to the public, provide,

or otherwise traffic in any technology primarily designed or produced to facilitate non-infringing uses of protected works by circumventing a technology that controls access to the work, unless the intent is to infringe or facilitate infringement.

It would also not be an infringement to copy or adapt software or firmware of a mobile device for the sole purpose of enabling the device to connect to a wireless network if: (1) the copying or adapting is done by the owner or with permission; (2) the owner is in legal possession of the device; and (3) the owner has agreement with the “new” wireless network to use its network. Notably, there is no requirement of the owner to seek permission from the initial carrier network to switch carriers.

If passed, this legislation will allow media device users to permanently “unlock” all of their devices to give them freedom to choose the mobile technology that they feel best fits their needs. For example, users would not have to seek permission of one cellular carrier to switch their mobile device to another carrier. Once the mobile phone or tablet is purchased, it is up to the user to decide who will service the device and how. This will likely impact a cellular network’s ability to require consumers to enter into a long contract. In addition, as technology continues to develop, this legislation, if passed, could also impact computer chips that are almost certainly going to be embedded in a variety of consumer products. This change in the law will also almost certainly raise questions as to what constitutes a technology that is designed to carry out or facilitate infringement.

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