



TERRALEX®

CROSS-BORDER COPYRIGHT GUIDE 2018



France

PDGB Avocats, 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 France is 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 provides 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 audiovisual 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 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 visual art, mechanical, cinematographic or magnetic recording.

Rights holders also have the moral rights described in 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 their work in any form whatsoever and to derive monetary profit therefrom. After the death of the author, that right shall subsist for their successors in title during the current calendar year and the 70 years thereafter.

In the case of collaborative works (as defined in 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 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 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, as opposed 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 the 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 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 2.6 above, 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 protected 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
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.
Act
Private and free performances
Description
Private and free performances are permitted if they are carried out within the 'family circle' and only for a non-commercial purpose. Therefore, 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
Description
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 quotation 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
Description
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
Description
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
Description
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
Description
The representation and/or performance of excerpts of a work is allowed so long as it is strictly limited to educational purposes.
Act
Acts necessary to access a database
Description
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
Description
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
Description	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.
Act	Digital copies or reproductions made from a lawful source
Description	This exception allows for digital copies or reproductions made from a lawful source, in view of the exploration of texts and data included in or associated with scientific results for the needs of public research, excluding any commercial purpose.
Act	Freedom of panorama
Description	This exception allows the reproduction and representation of architectural works and sculptures permanently located in public areas, to be carried out by individuals, excluding any commercial use.

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

The CJEU furthermore considered in *GS Media* (C-160/15) that, in order to establish whether the fact of posting on a website without the consent of the copyright holder constitutes a ‘communication to the public’, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know, or could not reasonably have known, the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose (financial gain), a situation in which such knowledge must be presumed.

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.

Conversely, 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. Remedies

5.1 What remedies are available against a copyright infringer?

As mentioned above, infringement can lead to both civil and criminal proceedings. In the 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 in 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 infringer in newspapers or on the infringer's website. Moreover, as explained below in 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 the 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

5.2 Are there any specific remedies for online copyright infringement?

Pursuant to Article L.336-2 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, recognised collecting societies or professional defence bodies – 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 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 a fine and/or a prison sentence. Pursuant to Article L.335-2 of the French Intellectual Property Code, the infringer 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 a seven-year imprisonment and a fine of €750,000.

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

- in the event of circumvention of technological protection measures implemented (from €3,750 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. 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 the 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 infringing acts. In the case of criminal action, the time limit is six years from the date of the offence.

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 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.

6.1 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? What do they do?

Except for the High Authority for the Distribution of Works and the Protection of Rights on the Internet, 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 envelope from the INPI (see 3.3 above).

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

Agency
Centre Français d'exploitation du Droit de Copie (CFC)
Who represents
Writers and books or press publishers
Agency
Société des Auteurs, Compositeurs et éditeurs de Musique (SACEM)
Who represents
Writers, composers and publishers of music
Agency
Société Civile des Producteurs Phonographiques (SCPP)
Who represents
Music producers
Agency
Société Civile des Producteurs de Phonogrammes en France (SPPF)
Who represents
Producers of phonograms and videograms
Agency
Société civile pour l'administration des droits des artistes et musiciens interprètes (ADAMI)
Who 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 represents
Performers
Agency
Société des Auteurs et Compositeurs Dramatiques (SACD)
Who represents
Authors of audiovisual works and performing arts
Agency
Société Civile des Auteurs Multimédia (SCAM)

7. Copyright reform

Who represents
Authors and directors of audiovisual works
Agency
Société des Auteurs dans les Arts Graphiques et Plastiques (ADAGP)
Who represents
Visual artists and designers
Agency
Société des Auteurs des Arts Visuels et de L'image Fixe (SAIF)
Who 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.

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

The CJEU *ungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH* case

The CJEU was called upon to shed light on Article 8 (3) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006, which provides broadcasting organisations with the exclusive rights to authorise or prohibit the communication to the public of their broadcasts if such communication is made in places accessible to the public on payment of an entrance fee.

Whilst the CJEU reaffirmed its previous case law by holding that the provision of a signal by means of television or radio sets installed in hotel rooms constitutes a communication to the public within the meaning of Article 3 (1) of Directive 2001/29 and Article 8 (2) of Directive 2006/115, it nonetheless considered that such communication may not be regarded as being made on payment of an entrance fee in the sense of Article 8 (3) of Directive 2006/115/EC.

To reach its ruling, the CJEU notably relied on the Rome Convention of 26 October 1961 and the Phonograms Convention of the World Intellectual Property Organization and held that Article 8 (3) of Directive 2006/115/EC presupposed a payment specifically requested in return for a communication to the public of a broadcast. Accordingly, and although the distribution of a signal by means of TV and radio sets installed in hotel rooms constitutes an additional service which has an influence on the hotel's standing and on the price of rooms, it cannot be considered that that additional service is offered in a place accessible to the public on payment of an entrance fee within the meaning of Article 8 of that Directive.

The CJEU Pirate Bay case

After several years of legal proceedings, the CJEU ruled that BitTorrent site The Pirate Bay was directly infringing copyright, regardless of the fact that it didn't host nor provide direct links to infringing files. Instead, The Pirate Bay hosted 'trackers', files placed on that platform by its users which allowed other users to locate peers and download large files, including protected works, through BitTorrent protocol.

The CJEU notably held that the concept of communication to the public, within the meaning of Article 3 (1) of Directive

2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as covering, in circumstances such as those at issue in the main proceedings, the making available and management, on the internet, of a sharing platform such as The Pirate Bay which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.

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

Modernisation of EU copyright rules

In December 2015, the European Commission presented an ambitious objective of modernisation of the EU copyright framework with a view to making EU copyright rules fit for the digital age. The European Commission announced that it was mainly pursuing the following goals:

- ensuring a better choice of, and access to, content online and across borders
- improving copyright rules on research, education and inclusion of disabled people
- ensuring a fairer and more sustainable marketplace for the creators and the press.

While the European Commission adopted, on 14 June 2017, a ‘Regulation on cross-border portability of online content services’, a number of legislative proposals in relation to the modernisation of EU copyright rules are still being discussed by the European Parliament and Council, among which is a much-debated Directive proposal on copyright in the Digital Single Market.

With (among other new developments) a new set of exceptions, a new related right for publishers of press publications, and a possible new obligation for the information society service providers that store large amounts of works uploaded by their users to use effective content recognition technologies to prevent copyright infringement, this Directive – if adopted – would substantially affect the European copyright law landscape.

The CJEU *VG Media v Google Case*

The Berlin Regional Court requested a preliminary ruling before the CJEU regarding the validity of a German Media Law which prohibits commercial operators of search engines and commercial service providers which edit content, from making press products or parts thereof available to the public without compensating publishers.

Prior to the adoption of this law in 2013, the German Government failed to provide a draft of said law to the European Commission, as required by Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015, which laid down a procedure for the provision of information in the field of technical regulations and of rules on information society services.

According to Directive 2015/1535, any technical regulation a Member State intends to introduce in its national legislation for products and information society services should be examined by the EU Commission and other Member States before its adoption, in order to ensure that it is compatible with EU laws and the Internal Market Principle.

Therefore, the CJEU will have to determine if the law at hand is: (i) a technical regulation within the meaning of Directive 2015/1535; and (ii) specifically aimed at information society services. If such is the case, it may pave the way for identical or similar regulations being invalidated for lack of compliance with the 2015/1535 Procedure.

