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Cross-Border Copyright Guide 2018

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We are delighted to present the TerraLex Cross-Border Copyright Guide 2018, the third edition of this invaluable guide.

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 2018.

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RPC

TerraLex

The world's second largest law firm network, with over 160 leading independent law firms spanning more than 100 jurisdictions, TerraLex provides truly global business law support. The strength of the network is built around not only the quality of its member firms and lawyers (all 19,000 of them) but also the depth of relationships – network members all know each other well, sharing best practice at regular meetings held all over the world throughout the year.

Australia

Lander & Rogers, Robert Neely

1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright law 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 Although the Copyright Act replaced and repealed four previous Copyright Acts (1912, 1933, 1935 and 1963), the previous Acts are still applied today where a work was in copyright immediately before the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 Australia is a common law legal system, Australian copyright law also draws from a significant body of case law laid down by the courts over the years as they have interpreted and enforced copyright legislation.

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 craftsperson; 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 that falls within 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 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:

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 was 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. 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.

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.

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: 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):

Act
Temporary reproduction of work
Description
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).

Act
Personal copies for private and domestic use
Description
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.
Act
Research or study
Description
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.
Act
Criticism or review and reporting news
Description
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.
Act
An acknowledgement of any copyright work used in a criticism or review is required.
Description
Where the news is reported in a film or communicated electronically, no acknowledgment is required.
Act
Judicial proceedings or professional advice
Description
Where the copyright work is being used for the purpose of professional advice by a legal practitioner, patent attorney or trade mark attorney, or for use in a judicial proceeding or report of a judicial proceeding.

Act
Parody or satire
Description
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 – AU$99,000 or imprisonment for not more than five years, or both
- for summary offences – AU$21,600 or imprisonment for two years, or both
- for strict liability offences (where applicable) – AU$10,800.

There are slightly different potential penalties for the following offences:

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

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 AU$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. Enforcement

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 investigate 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? 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 filmmakers
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, scriptwriters, 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?

First cases brought under section 115A Copyright Act 1968 (Cth)

In June 2015, the Copyright Amendment (Online Infringement Act) 2015 introduced amendments to the Copyright Act which permit a copyright owner to apply 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" (also known as the 'site-blocking legislation').

Section 115A gives the Federal Court of Australia the power to order an injunction to require a carriage service provider (CSP) to take reasonable steps to disable access to the online location. In determining whether to grant the injunction, the Court will take into account the following:

- the flagrancy of the infringement or the facilitation of the infringement
- whether disabling access to the online location is a proportionate response to the circumstances
- whether it is in the public interest to disable access to the online location.

In February 2016, the first applications for injunctions under the new legislation were made in the Federal Court by Village Roadshow (seeking to block access to streaming site SolarMovie) and Foxtel (seeking to block torrent websites The Pirate Bay, Torrentz, TorrentHunt and IsoHunt) in order to have these streaming and torrent websites blocked by ISPs. The cases were heard together. At issue was whether an injunction should be granted requiring carriage service providers to take reasonable steps to disable access to online locations outside Australia that infringed or facilitated the infringement of copyright. In accordance with s115A, the Court granted injunctive relief, requiring the respondent CSPs to take reasonable steps to disable access to the infringing sites and to redirect users to landing pages which outlined the reasons for the blocked access.

The Court has emphasised that section 115A provides for a 'no fault' remedy against carriage service providers. The entitlement of an applicant for relief under the section does not depend upon establishing that a carriage service provider has infringed copyright either by its own acts or by authorising the acts of another person.

In April 2016, Universal Music Australia, Warner Music Australia, Sony Music Entertainment Australia and Albert Music, together with collection agency APRA AMCOS, also brought an action in the Federal Court, successfully seeking injunctive relief requiring a number of ISPs to disable access to the KickassTorrents website. In the more recent decision of *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435, the Federal Court of Australia found in favour of the applicant, which took action against 30 respondent CSPs, ordering them to disable internet user access by way of implementing a Domain Name System Blocking (DNS Blocking) to the KAT website.

On 18 August 2017, Foxtel Management Pty Limited and Roadshow Films successfully sought injunctive relief pursuant to s115A of the Copyright Act 1968 (Cth), having the effect of disabling access to 49 online locations that allegedly infringe, or facilitate the infringement of, the respective copyrights. The Court made the requested orders, requiring the carriage service providers to take reasonable steps to disable access to the infringing sites, including Putlocker, WatchFree, PrimeWire and Movie4K.

At issue in both proceedings was determining who should appropriately bear the costs of implementing the DNS Blocking mechanisms, as the Copyright Act is silent on this point. In both cases, the Court found that the applicants should pay the respondents' compliance costs for the blocking orders, on the basis that the applicants receive a commercial benefit under s115A of the Copyright Act.

Copyright Amendment (Disability Access and Other Measures) Act 2017 (Cth)

On 15 June 2017, the Federal Parliament passed the Copyright Amendment (Disability Access and Other Measures) Act 2017 (Cth). The provisions are expected to take effect in December 2017. The Act makes a number of amendments to the Copyright Act specifically relating to the use of copyright material by persons with a disability and anyone assisting them, as well as organisations assisting persons with a disability.

Relevantly, the Act introduces a new fair dealing exception under s113E for access to copyright material by persons with a disability. The fair dealing exception will permit, for instance, enlarging text and graphics, and making changes to the format of materials. The Act also consolidates and streamlines the necessary exceptions allowing libraries and archives to make copies of copyright material for preservation purposes.

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

Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements

On 29 April 2016, the Productivity Commission, an independent federal government agency, released its Draft Report on Intellectual Property Arrangements (Report), which set out its findings and recommendations as to "whether current arrangements provide an appropriate balance between access to ideas and products, and encouraging innovation, investment and the production of creative works". In its Draft Report, the Productivity Commission recommended a number of significant changes to Australian copyright law, including:

- the replacement of the current fair dealing exceptions under the Copyright Act with a broad, US-style fair use exception
- the repeal of parallel import restrictions for copyright-protected books
- the repeal of section 51(3) of the Competition and Consumer Act 2010 (Cth), which exempts licensing or assignment of intellectual property from certain competition law prohibitions
- the expansion of the safe-harbour scheme to cover a broader set of online service providers
- changes to the Federal Circuit Court to improve dispute resolution processes for lower-value intellectual property disputes, especially those involving small and medium-sized enterprises.

A final Report was published in December 2016 and, in August 2017, the Australian Government released its Response to the Report which, whilst broadly supportive, indicated that the Australian Government will exercise caution in its implementation of the Commission's recommendations.

Specifically, in the Response:

- in response to the first change recommended above, the Government stated that it will publicly consult on more flexible copyright options in early 2018, in order to allow adequate time to properly consider the complexities of the recommended changes
- in response to the second recommended change above, the Government supported in principle the repeal of parallel import restrictions for copyright-protected books, and will "consult with the book industry to develop a reform pathway that is in the public interest"
- in response to the third recommended change above, the Government supported the repeal of section 51(3) of the Competition and Consumer Act 2010 (Cth), stating that "there is no fundamental conflict between IP rights and competition policy"
- in response to the fourth recommended change above, the Government supported in principle the expansion of the safe-harbour scheme to cover a broader set of online service providers and, acknowledging the limitations of the current scheme, will be undertaking additional consultation on the safe-harbour scheme before considering amending legislation.

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Brazil

Motta Fernandes Advogados, Fernando Stacchini/Renata Ciampi

1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in Brazil is the Law No. 9610 of 19 February 1998 (LDA), which regulates copyright and neighbouring rights.

The LDA is the result of the Brazilian Government's effort to adapt previous Brazilian copyright law to the provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) of the World Intellectual Property Organization (WIPO). Besides the LDA, Brazilian Federal Constitutions and infra-constitutional laws have established the protection of copyright since 1827.

Brazil is also a signatory of the revised Berne Convention (ratified in Brazil in 1975) and of TRIPs (ratified in Brazil in 1994).

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The LDA establishes that any creation of the mind – by any way expressed and no matter the medium in which it is fixed (tangible or intangible, currently known or created in the future) – can be covered by copyright. The LDA offers a non-exhaustive list of examples of the intellectual works under protection:

Literary works

Literary works include texts of literary, artistic or scientific works, lectures, addresses, sermons and other works of the same kind.

Dramatic works

Dramatic works include dramatic and dramatic-musical works, and works of choreography or mime, whose stage performance is set down in writing or otherwise. 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

Musical works consist of musical compositions with or without lyrics, not including actions that are intended to be performed with the music. There is copyright regarding

the performance of a musical work but that is a separate and distinct right (see the section on neighbouring rights below).

Audiovisual works

Audiovisual works are those works that result from the fixing of images, with or without sound, whose purpose is to give, through their reproduction, an impression of movement, regardless of the processes used for capturing them, the medium initially or subsequently used for fixing them or the means used for disseminating the work. This category includes multimedia and cinematographic works.

Artistic works

An artistic work is a broad concept in scope and includes, amongst other things, photographs and works produced by a process analogous to photography, drawings, paintings, engravings, sculptures, lithographs and works of kinetic art, illustrations, maps and other works of the same kind, drafts, mock-ups, and visual arts relating to geography, engineering, topography, architecture, park and garden planning, stage scenery and science.

Adaptations

Adaptations, translations, and other transformations of an original work, presented as new intellectual creations. Protection granted to an adaptation is without prejudice to the copyrights of the original work.

Computer programs

A computer program is the expression of an organised set of instructions in natural or code language, contained in a physical medium of any kind, necessarily employed in automatic machines for the manipulation of data, devices, tools, or peripheral equipment, based on digital or analogue techniques, so they will operate in the way and with the purposes determined (with specific conditions regulated by Law No. 9609/1998).

Collections

Collections or compilations, anthologies, encyclopaedias, dictionaries, databases and other works which, by the selection, co-ordination or arrangement of the subject matter, constitute intellectual creations.

Neighbouring rights

The LDA also regulates neighbouring rights that protect the performance of interpreters and artists (eg actors, musicians, singers, dancers); the work of producers of phonograms and sound recordings; and the programmes of broadcasting companies.

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

The LDA does not contain an express definition of 'work of authorship' and is silent about the prerequisites for its protection by copyright. Notwithstanding, the doctrine and jurisprudence understand that the concept of 'creations of mind by any way expressed' leads to the conclusion that, to be protected by copyright a work must be: (i) the result of creative activity and, consequently, original; and (ii) materialised in any kind of medium, tangible or intangible.

The requisite of originality is not absolute, and it is not necessary for the whole work to be original. In general, the threshold for originality is low in Brazil.

Additionally, the LDA expressly determines what shall not be object of copyright protection:

- ideas, normative procedures, systems, methods, projects or mathematical concepts
- schemes, plans or rules to carry out mental acts, games or businesses
- forms to be filled in with any type of information, scientific or not, and their instructions
- texts of treaties or conventions, laws, decrees, regulations, court decisions and other official acts
- information of common use, such as that contained in calendars, diaries, registers or legends
- isolated names and titles
- industrial or commercial exploitation of the ideas embodied in the works.

As a general rule, Brazil provides copyright protection if the author is a national of Brazil or is resident in a state which is a signatory to one of the various international conventions which Brazil is a party to, or resident in countries that assure Brazilians or persons resident in Brazil reciprocity in the protection of copyright or equivalent rights.

2.3 What rights does copyright grant to the rights holder?

According to the LDA, the author has the exclusive right to use, explore and dispose of the work. Moreover, the use of a work shall depend on the author's express prior authorisation, including for the following purposes:

- complete or partial reproduction
- publication
- adaptation, musical arrangement or any other transformation

- translation into any language
- incorporation in a phonogram or in an audiovisual production
- distribution
- incorporation in databases, storage in a computer, microfilming and any other storage format
- any other form of use currently existing or that may be created in the future.

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 Brazil, the LDA affords the author the following moral rights:

- the right to claim authorship of the work at any time
- the right to have his or her name, pseudonym, or conventional sign to appear or to be announced as the author when the work is used
- the right to keep the work unpublished
- the right to ensure the integrity of the work by objecting to any modification or any derogatory treatment of the work or to any act that may be prejudicial to his/her reputation or honour as an author
- the right to modify the work either before or after it has been used
- the right to withdraw the work from circulation or to suspend any kind of use that has already been authorised where the circulation or the use of the work may have adverse impact on the reputation or image of the author
- the right to have access to the sole or a rare copy of the work that is lawfully in a third party's possession

In an audiovisual work, the director shall exercise the moral rights.

Moral rights are inalienable and irrevocable. Moreover, upon death of the author, the first four moral rights listed above shall be transferred to his or her successors.

Moral rights do not apply to computer programs, except for the right to claim authorship.

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
Literary, dramatic, musical or artistic works
Duration
Copyright expires 70 years as from 1 January of the year following the death of the author. The rights of the joint author who dies without heirs shall be added to the rights of the surviving authors. Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was released to the public
Category
Audiovisual and photographic works
Duration
Copyright expires 70 years from 1 January of the year in which the work was released to the public
Category
Neighbouring rights
Duration
Protection expires 70 years from 1 January of the year following fixation for phonograms, transmission for broadcasts and public performance in other cases
Category
Computer program
Duration
Copyright expires 50 years from 1 January of the year in which it was released to the public or, in the absence of such date, the date of its creation

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

An author's moral rights (see 2.4) are perpetual.

3. Ownership

3.1 Who is the first owner of a copyright work?

Pursuant to the LDA, the first owner of the copyright is the author of the work (ie the natural person who created the work). This means that a person who is shown as the author (or is announced as such) in the use of a work shall be deemed to be the author of the work, absence proof to the contrary. The main exception to this rule is where the work consists of a computer program, which shall belong to the employer or the contractor of the author, 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.

The joint author whose contribution can be used separately shall enjoy all the faculties inherent in its creation as an individual work, but is prohibited any use that may prejudice the exploitation of the whole work.

Unless otherwise agreed, the joint authors of a work shall jointly exercise their rights upon mutual agreement. The consent of all joint authors is required for licensing or using of the protected work.

When the work is done by the initiative, organisation and responsibility of one person and consists of the participation of different authors whose contributions merge into an autonomous creation, this is considered a collective work. In this case, each individual contribution shall be protected.

Regarding a collective work, any of the contributors may invoke their moral rights to prohibit indication of their name in connection with the collective work, without prejudice to their right to receive the remuneration accordingly.

The economic rights of a collective work shall belong to the organiser, and the agreement signed with each participant shall specify their contribution, delivery date, compensation and other conditions in relation to their 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 protection is independent of registration; it arises automatically upon creation of the work.

However, authors and rights holders may register their work before the relevant public entity. The main registration authority in Brazil is the Copyright Office of the National Library. Regarding artwork, it is also possible to file pictures, paintings, and images before the Belas Artes School of the Federal University of Rio de Janeiro.

Although registration is optional, it is useful to ensure presumption of anteriority and/or to evidence authorship, date of creation and term of the relevant copyright.

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

According to the LDA, only economic rights can be assigned, transferred or licensed. The relevant agreement must be in writing, signed by or on behalf of the copyright owner, subject to the conditions of the LDA.

The assignment of the economic rights regarding future works shall encompass a maximum period of five years.

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights are inalienable and irrevocable and cannot be assigned or waived.

4. Infringement

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

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

4.1 What acts constitute primary infringement of copyright?

Brazilian 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, Brazilian 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 the fact that they might be protected by copyright. These permitted acts (exceptions and limitations) are wide in variety but often relate to very specific scenarios. They include (amongst others):

Act
Reproduction of news and articles by the press
Description
Reproduction in the daily or periodical press of news or informative articles, from newspapers or magazines, with the mention of author's name (if signed) and of the publication from which they have been transcribed
Act
Reproduction of public speeches
Description
Reproduction in the daily or periodical press of speeches given at public meetings of any kind

Act
Reproduction of portraits
Description
Reproduction of portraits or of other works of representation of personal image, made as a work for hire, where the reproduction is done by the owner of the original work and the represented person or his heirs have no objection to it
Act
Reproduction for visually disabled individuals
Description
Reproduction of literary, artistic or scientific works for the exclusive use of visually disabled individuals, provided that the reproduction is done without commercial intent, either in Braille or another process using a medium designed for such users
Act
Private use
Description
Reproduction in one single copy of short extracts of a work for private personal use, without commercial intent. Stage and musical performance, where carried out in the family circle
Act
Quotation
Description
Quotations are permitted for studies, criticism and review, as long as the quotation includes an indication concerning the name of the author and the origin of the work
Act
Private study
Description
Notes taken by attendees of lessons given in teaching establishments, provided that their complete or partial publication is prohibited without the express prior authorisation of the person who gave the lessons

Act
Demonstration
Description
Use of literary, artistic or scientific works, phonograms and radio and television broadcasts in commercial establishments for the sole purpose of demonstration to customers, provided that said establishments commercialise the materials or equipment that make the use of such works possible
Act
Teaching purposes
Description
Stage and musical performance carried out exclusively for teaching purposes in educational establishments, without intent for profit
Act
Proof in judicial or administrative proceedings
Description
Use of literary, artistic or scientific works to produce judicial or administrative proceedings evidence
Act
Short extracts
Description
Reproduction in any work of short excerpts from existing works, regardless of their nature, or of the whole work in the case of a visual art, on condition that the reproduction is not *per se* the main subject matter of the new work and does not jeopardise the normal exploitation of the work reproduced or unjustifiably prejudice the author's legitimate interests
Act
Parody
Description
Paraphrases and parodies shall be free where they are not actual reproductions of the original work and are not in any way derogatory to 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
Act
Public places
Description
Works permanently located in public places may be freely represented by painting, drawing, photography and audiovisual processes

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

The LDA does not provide specific provisions on linking or 'framing' of work covered by copyright. The mere insertion of a hyperlink may not *per se* be considered as copyright violation as it does not reproduce protected works, but rather directs the user to a specific site where the protected work may be freely accessed by the public.

However, linking or framing copyright material without the necessary consent may infringe the rights holders' exclusive right of public communication; thus, it is likely to be considered as copyright infringement.

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

Under the LDA, copyright infringement 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. Remedies

5.1 What remedies are available against a copyright infringer?

The LDA provides the following remedies for rights holders:

- injunctions against the infringers (including search orders, freezing orders, and non-disclosure orders)
- seizure of infringing articles
- forfeiture of infringing articles and payment of the price of infringing articles sold to third parties
- indemnification for damages resulting from the infringement.

5.2 Are there any specific remedies for online copyright infringement?

The LDA does not provide 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 to remove the material or block the website.

The Brazilian Internet Act (Law 12.965/2014), which establishes the basic principles that govern the use of the internet in Brazil, also does not mention a specific proceeding against online copyright infringement. However, Article 19 of the Brazilian Internet Act determines that the provider of internet applications can only be subject to civil liability for damages resulting from content generated by third parties if, after a specific court order, it fails to take any steps to make unavailable the content that was identified as being unlawful.

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

There is one specific crime regarding copyright, established in the Penal Code (Decree No. 2848/1940). There are some variations regarding copyright and neighbouring rights infringement. 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 must also be liable for the criminal act.

In order to characterise each criminal act, evidence is required of different levels of intention, knowledge or belief on behalf of the potential offender, and each carries various penalties:

Criminal act
5.3.1 Copyright and neighbouring rights infringement.
Penalty
Three months to one year of criminal detention, or a fine.
Criminal act
5.3.1.1 If the violation consists of a total or partial reproduction of intellectual work, interpretation, performance or phonogram for profit, by any means, without the express authorisation of the author, performer, or producer, or of who represents them.
Penalty
Two to four years' imprisonment, and a fine.
Criminal act
5.3.1.2 If someone distributes, sells, exhibits for sale, rents, introduces into the country, acquires, hides or stores an original or copy of intellectual work or phonogram reproduced in violation of copyright or neighbouring rights; or rents an original or copy of intellectual work or phonogram, aiming at profit and without the express authorisation of the right holders or who represents them.
Penalty
Two to four years' imprisonment, and a fine.
Criminal act
5.3.1.3 If the violation consists in the offer to the public by cable, optic fibre, satellite, waves, or any other system that allows the user to make the selection of the work or production to receive it at a time and place previously determined by the one who formulates the demand, for profit, without express authorisation of the author, performer, phonogram producer or who represents them.
Penalty
Two to four years' imprisonment, and a fine.
Criminal act
5.3.1.4 Items 5.3.1.1, 5.3.1.2 and 5.3.1.3 above shall not apply in the case of an exception or limitation to copyright or neighbouring rights, or in case of copying an intellectual work or phonogram (only one copy) for the private use of the copyist, with no intention of direct or indirect profit.

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

The time limit is three years to bring a claim for breach of copyright. Time begins to run from the date on which the rights holder became aware of the violation.

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 Brazil, the general rule is that the unsuccessful party pays the statutory attorneys' fees and court 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. Enforcement

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

Copyright litigation matters can be brought to ordinary state civil courts.

The special courts for small claims (*Juizado Especial Cível* – JEC) provide an alternative for less complex cases that involve claims worth less than R$35,200 (approximately US$10,000).

Copyright litigation matters resulting from employment relationships will probably be directed to the relevant labour courts.

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

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? What do they do?

The Brazilian Ministry of Culture is the official government body responsible for the promotion of copyright protection in Brazil.

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, rights 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
ECAD - Central Office for Collection and Distribution
Who it represents
Authors, performers, musicians; publishing and recording companies
Agency
UBEM – Brazilian Union of Music Editors
Who it represents
Music editors
Agency
ABMI – Independent Brazilian Music Association
Who it represents
Musicians

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

Copyright levies are not payable in Brazil.

7. Copyright reform

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

Collective copyright system

In 2013, a proposal to reestablish the Ministry of Culture as the responsible authority to manage the collective copyright system was approved. Law No. 12853/2013 establishes that ECAD, the organisation that collects and distributes royalties for public performance rights, will be regulated and monitored by the Brazilian Ministry of Culture. The scope of the Law was the transparency, efficiency, modernisation and regulation of the collection and distribution of royalties.

ECAD challenged the constitutionality of Law No. 12853/2013 before the Brazilian Supreme Court, which ruled against ECAD.

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

Revision of Copyright Law

The Copyright Reform Bill has been under analysis by the Brazilian Congress since 2012. The Reform Bill includes, among others changes, the increasing of exceptions and limits to copyright protection as well as the regulation of use and exploitation of copyrighted works on the internet.

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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, dance, 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 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 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 2.5.

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. 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 of 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 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:

Act
Private study, research or personal enjoyment
Description
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
Act
Introduction, commentary or criticism
Description
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
Act
News reporting
Description
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
Act
Publication or broadcast of articles on political, economic or religious topics
Description
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
Act
Publication or broadcast of public speech

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

Act
Publication of works in Braille
Description
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:

Act
Reprinting
Description
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
Act
Sound recording
Description
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
Act
Broadcasting published work
Description
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

Act
Broadcasting published sound recordings
Description
This only applies to published sound recordings. Radio or television stations may broadcast protected sound recordings without the rights holder's authorisation
Act
Inclusion in education textbooks
Description
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
Act
Inclusion in coursework for educational purposes
Description
This only applies to published works. This licence permits the use of segments of protected work to create course materials for educational purposes. However, any materials may only be transmitted via information networks to specific students
Act
Disseminating certain works across information networks to rural areas
Description
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. Works under this licence may only be transmitted via information networks. 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. The person disseminating the work should also not benefit either directly or indirectly from such use

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 reexpressions. 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 of 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: • the illegal gains total at least RMB30,000, • the illegal turnover totals at least RMB50,000, or • there are at least 500 unauthorised reproductions. Any of the following would constitute a severe crime: • the illegal gains total at least RMB150,000 • the illegal turnover is at least RMB250,000 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:

- the illegal gains total at least RMB30,000
- the illegal turnover totals at least RMB50,000 or
- there are at least 500 unauthorised reproductions.

Any of the following would constitute a severe crime:

- the illegal gains total at least RMB150,000
- the illegal turnover is at least RMB250,000 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:

- the illegal gains total at least RMB30,000
- the illegal turnover totals at least RMB50,000 or
- there are at least 500 unauthorised reproductions.

Any of the following would constitute a severe crime:

- the illegal gains total at least RMB150,000
- the illegal turnover is at least RMB250,000 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:

- the illegal gains total at least RMB30,000
- the illegal turnover totals at least RMB50,000 or
- there are at least 500 unauthorised reproductions.

Any of the following would constitute a severe crime:

- the illegal gains total at least RMB150,000
- the illegal turnover is at least RMB250,000 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:

- the illegal gains total at least RMB30,000
- the illegal turnover totals at least RMB50,000 or
- there are at least 500 unauthorised reproductions.

Any of the following would constitute a severe crime:

- the illegal gains total at least RMB150,000
- the illegal turnover is at least RMB250,000 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
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 total at least RMB100,000
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. Enforcement

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 RMB200 million, or claims greater than RMB100 million where either party is a foreign citizen, legal person or other organisation or is not domiciled within the court's jurisdiction.

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 RMB5 million, and cases where the claim is between RMB5 million and RMB10 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 not within the jurisdictions of either high courts or basic courts 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 RMB500,000.

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? 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 Bureaux 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 Bureaux 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 continues its fight against 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. On 26 June 2014, the Shenzhen Market Supervision Administration issued a RMB260 million fine to QVOD Technology Company (QVOD), which marked a milestone in China's efforts to fight online piracy. The Chinese Government did not slacken thereafter. In July 2016, a campaign named Sword Net 2016 was carried out jointly by four Chinese administrative departments (NCAC, the Internet Information Office of China, the Ministry of Industry and Information Technology of China and the Ministry of Public Security of China (MPS)).

The Sword Net 2016 campaign began in July 2016 and was mainly against copyright infringements (i) of online literature and movies; (ii) committed through apps; and (iii) conducted by the online advertisement alliance. Sword Net 2016 was a great success. According to the Government's official report, 514 online copyright infringement cases were investigated during this campaign and 290 infringing websites were shut down by the Government. Fines totalling RMB4.67 million were imposed on those infringers.

With the success of Sword Net 2016, the Government has continued with Sword Net 2017, which started in late July 2017. This time, besides the infringements of online literature and movies, and those committed through apps, the Government has shifted its focus to e-commerce platforms such as Tmall, Taobao and JD.com, etc.

Additionally, the Chinese Government is maintaining its strong copyright protection for the movie and literature industries, and endeavours to significantly reduce copyright infringement through administrative mechanisms, which it hopes will deter infringers. For instance, each month, the NCAC publishes a warning notice on its official website, listing all movies and TV programmes that will be specially focused on and protected in the following months.

Chinese courts support increased damages in 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 damages 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 RMB3 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 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 RMB500,000. In this case, the court held that the plaintiff's damages were over RMB500,000 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 RMB3 million.

This case is a good indication 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. The revised draft has been submitted to the State Council for review and is pending its further submission to the Standing Committee of the National People's Congress for examination and approval. The most recent news is that the Standing Committee has listed the revision of Copyright Law as one of the preparatory projects in its Legislation Work Plan for 2017. So we are expecting to see its developments in 2018.

A few main revisions are listed below:

- clarification 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 on technological protection measures and rights management information has been added
- statutory damages have been increased to RMB1 million
- punitive damages (double or triple) are possible for repeated bad faith infringements.

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 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 at protecting folklore, promoting communication of folklore, and encouraging 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.

8. Neighbouring rights

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 their performance
- to disseminate their 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 10th year after the first publication date of the book or periodical that uses the typographical arrangement.

Performers' 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 Denmark is 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 protected 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, and 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 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 and shorthand writing).

Maps, drawings and other works of a descriptive nature executed in graphic or three dimensional form are considered literary works. Further, 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 etc (irrespective of quality), 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.

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

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 a film.

Musical works cover any musical composition, including nodes 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 – it is not the same as mere noise.

A film is a recording from which a moving image may be produced (including TV programmes and movies). The protection of film works includes soundtracks, manuscripts and other works created for the purpose of creating the film.

Neighbouring rights

Neighbouring rights appear from chapter five in the DCA, and are not works within the meaning of the DCA but enjoy similar protection to 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 protected by copyright, and if the performance is of artistic character.

The protection of sound and picture recordings is 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 insubstantial parts of the contents of catalogues available to the public 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 3.1 for a description of who the author is) has created the work through their own skill, judgement and individual effort and has not imitated 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 part 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 copyright 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
- make it available to the public.

This is regardless of whether it is 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. In any case the rights holders hold the moral rights described in 2.4 below.

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 named as the author of a copyright work
- integrity right: the right to object to derogatory treatment of the rights holder's 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: • 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 for 15 years 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 at the same time as the expiry of the copyright: 70 years after the death of the author. However, once the copyright has expired for a literary or artistic work, it may not be altered or made available to the public contrary to moral rights described above in 2.4 if cultural interests are thereby violated.

3. Ownership

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 copyright 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 ordinary 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, chapter five of the DCA 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 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 an assignment requires participation of more than one person for the whole or a 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 copyrights. 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 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 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.

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.

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: • 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 purposes that are directly or indirectly commercial. However, 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 (or another work or performance) can be criticised or reviewed provided that 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 is always deemed to be a permitted act 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. A reference to the 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 right to object to derogatory treatment of a work cf. 2.4 concerning moral rights.

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 correcting errors. 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 permissible to make a back-up copy insofar as it is necessary for the proper 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: • 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 above 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. So, 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 if 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 a copyright is licensed, the authority to bring an infringement action depends on the licence agreement between licensee and licensor.

5. Remedies

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 notified of the person using their services to infringe copyright-protected material 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 available to the public 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 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, which 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, cf. The Danish Act on Customs enforcement of intellectual property rights no. 177 of 21 February 2017 implementing Regulation (EU) No. 608/2013 concerning Customs enforcement of intellectual property rights.

Criminal proceedings

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

Copyright Licence Tribunal

An alternative method of bringing proceedings is the Copyright Licence 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? 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 other bodies promoting copyright in Denmark, including the Joint Council for Copyright (www.samraadetforophavsret.dk).

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

Furthermore, there is *RettighedsAlliancen* (The Rights Holder Alliance) in Denmark, which looks to enforce against online copyright infringements and improve conditions for copyrights online. *RettighedsAlliancen* is a co-operation of 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 arts, broadcasting, TV and movies for educational purposes, and blank levy remuneration)
Agency
KODA
Who it represents
Society for the rights of composers and songwriters
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 represents
Film and TV producers and distributors

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

Copyright levies are to some extent payable in Denmark related to the exception for private copying. Private consumers pay blank levy remuneration when purchasing blank media such as tapes, CDs, DVDs, USB sticks, memory cards etc. The blank levy 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 recent copyright development?

New recommendation on the revision of the Danish copyright blank levy scheme suggests blank levies on integrated storage devices such as smartphones, TVs, laptops, etc.

On 1 September 2017, a recommendation on the revision of the Danish copyright blank levy scheme was published by the Blank Media Committee (the Committee), which was established in March 2017 by the Danish Ministry of Culture.

The mandate of the Committee was to consider a revision of the Danish copyright blank levy scheme in the light of technological developments and changed consumer patterns, and to provide a recommendation to the Danish Ministry of Culture, including which storage media should be covered by a new blank levy scheme, and what amount of compensation the rights holders should receive.

Currently, the Danish copyright blank levy scheme only requires blank media levies as compensation to the rights holders on separate storage media such as tapes, CDs, DVDs, USB sticks and memory cards. However, hardware with integrated storage such as laptops, smartphones, computer hard drives and TVs are not subject to copyright blank levies.

In Denmark, blank media levies theoretically only apply to legal private reproduction, according to the Danish Consolidated Act on Copyright, Article 12, which allows for private reproduction under certain conditions, including reproduction of sound and images.

It is a condition in Art. 5 (2) (b) of the InfoSoc Directive, that limitations to the 'reproduction' right by allowing private reproduction are followed by a fair compensation to the rights holders.

The current blank media scheme is based on the hypothetical consideration that the rights holders lose revenue because of the legal access to private reproduction.

In *C-437/12 Nokia*, the Court of Justice stated that a different treatment of storage types under the blank media solution has to be justified, and that blank media levies should not be paid where it is apparent that the users of a media rarely use it for reproduction and the damage to the rights holder is minimal. However, the Court of Justice did not provide guidelines as to how a revised blank media solution should be structured or financed.

With reference to *C-437/12 Nokia*, the Danish Eastern High Court decided on 12 October 2016 that blank levies applied to memory cards for mobile phones, as – based on the evidence in the case – it could not be determined that the use of memory cards only resulted in minimal damage to the rights holders.

The market and consumer patterns have changed significantly since the introduction of the current blank media scheme in 1993, as the market is now dominated by streaming services.

The Committee recommends a generic categorisation of 'comprised storage media' in a new Danish copyright blank levy scheme. In connection with this, a blank media levy of DKK 1.49 is suggested for the category 'separate storage media' (CDs, DVDs, Blu-ray and flash storage, including USB and memory cards), and DKK 15.42 is suggested for the other category, 'integrated storage media' (eg smartphones, tablets, computers, external hard drives, devices with built-in storage and devices with a recording function).

Any further progress on the revision of the Danish copyright blank levy scheme is now political, and it is expected that a Bill will be introduced based on the recommendations of the Committee.

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France

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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 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.

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. Infringement

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 that 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: • 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.

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? 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)

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. Copyright reform

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.

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Germany

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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 the Federal Republic of Germany is the Act on Copyright and Related Rights (Copyright Act of 9 September 1965). There are some further legal statutes like the *Verwertungsgesellschaftengesetz* (VGG) 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?

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.

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.

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 state covered by 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 rights holder?

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 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 the 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 exploitation 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 the fact that they might be protected by copyright. They include (amongst others):

Act
Temporary acts
Description
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
Description
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
Description
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
Description
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, or of 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
Description
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
Description
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
Description
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
Description
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
Description
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
Description
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, or 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
Description
It is permissible for small, limited parts of a published 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
Description
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
Description
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
Description
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
Description
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
Description
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
Description
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 on their homepage, via 'framing', content that is available on another homepage for every user of the internet with the permission of that content's rights owner (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 conjunction 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 articles
- 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, 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 of the rights holder's knowledge of the infringement. Without such knowledge, the limit is 10 years. Interim injunctions must be brought immediately upon rights holders becoming aware of the infringement. The 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 shall 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? 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 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 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 represents
Musicians
Agency
GVL Gesellschaft zur Verwertung von Leistungsschutzrechten mbH
Who represents
Artists, phonogram producers and video producers
Agency
VG-Wort Verwertungsgesellschaft Wort – Rechtsfähiger Verein kraft Verleihung
Who represents
Creators and publishers
Agency
VG Bild-Kunst Verwertungsgesellschaft Bild – Kunst
Who represents
Artists, photographers and graphic designers

Agency
VG Musikedition Verwertungsgesellschaft – Rechtsfähiger Verein kraft Verleihung
Who represents
Musicians
Agency
GÜFA Gesellschaft zur Übernahme und Wahrnehmung von Filmaufführungsrechten mbH
Who represents
Film
Agency
VFF Verwertungsgesellschaft der Film- und Fernsehproduzenten mbH
Who represents
Film and TV producers and distributors
Agency
VGF Verwertungsgesellschaft für Nutzungsrechte an Filmwerken mbH
Who represents
Film
Agency
GWFF Gesellschaft zur Wahrnehmung von Film- und Fernsehrechten mbH
Who represents
Film and TV
Agency
AGICOA Urheberrechtschutz Gesellschaft mbH – Association de Gestion Internationale Collective des Œuvres Audiovisuelles
Who represents
Film
Agency
VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH
Who represents
Media companies

Agency
VG TWF Verwertungsgesellschaft Treuhandgesellschaft Werbefilm GmbH
Who represents
Film
Agency
GWVR Gesellschaft zur Wahrnehmung von Veranstalterrechten mbH
Who represents
Artists, filmmakers, 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. Copyright reform

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

Urheberrechts-Wissensgesellschafts-Gesetz (UrhWissG)

On 30 June 2017, the German parliament (*Bundestag*) passed the *Urheberrechts-Wissensgesellschafts-Gesetz* (UrhWissG). The law will enter into force on 1 March 2018. It will change the existing regulations for using protected works for education and research to reflect the digital age. The existing regulations are complex and they include legal concepts which are not precisely defined. The new law is supposed to be structured and more concrete. Thus, the law will create legal certainty for researchers and students.

Image search via search engines does not qualify as copyright infringement (Thumbnails III)

The German Federal Supreme Court (*Bundesgerichtshof*) ruled on 21 September 2017 that the displaying of protected pictures that were found by search engines is basically not infringing copyright.

The claimant offered pictures on his website. Any registered user could download pictures from the claimant's website if they paid a fee and entered a password. The defendant offers image searching by using keywords. By offering that service, the defendant provides a link to Google's search engine. The search engine identifies existing image files that are then displayed on the defendant's website. The claimant argued that protected pictures were displayed on the defendant's website as a result of the image search. He argued that this action infringes his copyright concerning those pictures. The court ruled that the defendant could not have expected that the pictures displayed on its website as result of the image search were uploaded illegally. It cannot be expected of a provider of search functions that the provider verifies the pictures before displaying thumbnails on its website, because the pictures are displayed as results of an automatic procedure by search engines. However, if the provider is aware of the fact that the pictures were published illegally, displaying those pictures might infringe copyright.

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

Copyright in the digital age

In 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. A first legislative proposal deals with cross-border portability of online content services to ensure that consumers who travel to other EU countries have access to e-books, music or films they have bought.

In the course of implementation of a new European Copyright Law there has also been a discussion about implementing upload filters for online services. These automatic upload filters are supposed to control online content and combat illegal online content.

Depending on what the Commission decides, changes to the German Copyright Act might become necessary.

GEMA/YouTube

The German collection society GEMA and YouTube still hold their different legal positions as to who is responsible for licensing musical works which are used on the site. GEMA has appealed to politicians to clarify the legal situation, which is in fact already being considered on a European level (Draft "Commission Staff Working Document – Impact Assessment on the modernisation of EU copyright rules").

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Hong Kong

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Background on HKSAR Basic Law

No articles on the laws of Hong Kong Special Administrative Region (HKSAR) should be written without a brief introduction to the Basic Law. The Basic Law was adopted on 4 April 1990 by the Seventh National People's Congress (NPC) of the People's Republic of China (Mainland China). It came into effect on 1 July 1997, the day the sovereignty of HKSAR reverted to Mainland China.

Under Article 5 of the Basic Law, HKSAR shall continue with its capitalist system and way of life for 50 years from 1997, to 2047. Furthermore, under Article 8 of the Basic Law, the laws previously in force in HKSAR – that is, the common law, rules of equity, ordinances, subordinate legislation and customary law – shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of HKSAR.

To put it simply, HKSAR maintains its own set of laws despite being part of China.

1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright law in HKSAR is the Copyright Ordinance, which came into effect on 27 June 1997. It has been amended several times in the last 20 years by virtue of the Copyright (Amendment) Ordinance 2007 & 2009 (collectively referred to as the 'Copyright Ordinance'). In addition, the Prevention of Copyright Piracy Ordinance and the body of decided cases form part of the sources of copyright law in the HKSAR.

HKSAR is a signatory to a number of international conventions and treaties relating to copyright law, including: the Berne Convention, the Universal Copyright Convention, the World Trade Organization (WTO) – Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), the Phonograms Convention, the World International Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The types of work which can be protected by copyright include:

- original literary, dramatic, musical or artistic works
- sound recordings, films, broadcasts or cable programmes, and
- typographical arrangements of published editions.

These definitions according to the Copyright Ordinance are set out below:

Literary works

A literary work is any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes: (a) a compilation of data or other material, in any form, which by reason of the selection or arrangement of its contents constitutes an intellectual creation, including but not limited to a table; (b) a computer program; and (c) preparatory design material for a computer program.

Dramatic works

Dramatic work includes a work of dance or mime.

Musical works

A musical work is a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.

Artistic works

An artistic work is: (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality; (b) a work of architecture, being a building or model for a building; or (c) a work of artistic craftsmanship.

Building includes any fixed structure, and a part of a building or a fixed structure.

Graphic works include: (a) any painting, drawing, diagram, map, chart or plan; and (b) any engraving, etching, lithograph, woodcut or similar work.

Photograph means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film.

Sculpture includes a cast or model made for the purposes of sculpture.

Sound recordings, films, broadcasts and cable programmes

Sound recording means: (a) a recording of sounds, from which the sounds may be reproduced; or (b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.

Film means a recording on any medium from which a moving image may by any means be produced.

Broadcast means a transmission by wireless telegraphy of sounds or of visual images and sounds or of representations thereof which: (a) is capable of being lawfully received by members of the public in Hong Kong or elsewhere; or (b) is transmitted for presentation to members of the public in Hong Kong or elsewhere, otherwise than through a service for making available to the public of copies of works or fixations of performances.

Cable programme means any item included in a cable programme service. A cable programme service means a service which consists of – wholly or mainly – the lawful sending by any person, by means of a telecommunications system (whether run by himself or by any other person), of sounds, visual images, other information or any combination of them either: (a) for lawful reception, otherwise than by wireless telegraphy, at two or more places in Hong Kong or elsewhere, whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service; or (b) for lawful reception, by whatever means, at a place in Hong Kong or elsewhere for the purposes of their being presented there either to members of the public or to any group of persons. It includes such a service that has as a component a multipoint microwave distribution system.

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

If the work falls within the category of literary, dramatic, musical or artistic work as set out in 2.1 above, it will be protected by copyright if it is original. A work is original if the author (see 3.1 below 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. A work qualifies for copyright protection if the author was at the material time (a) an individual domiciled, resident or having a right of abode in Hong Kong or elsewhere; or (b) a body incorporated under the law of any country, territory or area; or if the work is published in Hong Kong or elsewhere.

2.3 What rights does copyright grant to the rights holder?

The Copyright Ordinance 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
- issue copies, rent or make available the work to the public
- perform, show, play or broadcast 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 at 2.4 below.

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 Hong Kong, moral rights must be asserted before they can be enforced on literary, dramatic, musical or artistic works or films. The following moral rights are provided for by the Copyright Ordinance:

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

2.5 What is the duration of copyright in protected works?

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 50 years from the end of the calendar year in which the author dies. Where a work has joint/co-authors, copyright expires 50 years from the end of the calendar year in which the last known author dies.
Category of work
Broadcasts and cable programmes
Duration
Copyrights in a broadcast and cable programme expire 50 years from the end of the calendar year in which the broadcast was made. Where the author's identity is unknown, copyright expires 50 years from the end of the calendar year in which the work was made or was 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 was made or, if the recording was published lawfully, 50 years from the end of the calendar year in which it was first released.
Category of work
Films
Duration
For films, the reference point is the end of the calendar year in which the last living (a) principal director, (b) author of the screenplay, (c) author of the dialogue or (d) composer of music specially created for and used in the film dies. Copyright then lasts for 50 years after that date.
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 rights to be identified as the author, to object to derogatory treatment and to privacy last for the life of the author plus 50 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 this 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.

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

- for sound recordings, the author is the producer
- 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 cable programmes, the person providing the cable programme service
- 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(s), 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 Hong Kong; 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. 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 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 making available the work to the public
- performing, showing or playing a copyright work in public
- broadcasting or inclusion of the work in a cable programme service
- 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 an intention to infringe that right.

4.2 What acts constitute secondary infringement of copyright?

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

- Imports or exports infringing copies
- Possesses or deals with infringing copies
- Provides means for making infringing copies
- Permits use of premises for infringing performance
- Provides apparatus for infringing performance.

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 they might be protected by copyright. They include (amongst others):

Act
Incidental inclusion in an artistic work, sound recording, film, broadcast or cable programme
Description
Making available to the public of copies, or playing, showing or broadcasting, of anything whose making of which is not an infringement of copyright by reason of it being an incidental inclusion in an artistic work, sound recording, film, broadcast or cable programme, is also not an infringement.
Act
Fair dealing with a work for research and private study
Description
In determining fair dealing, the factors to be considered include: • the purpose and nature of the dealing • the nature of the work • the amount and substantiality of the portion dealt with in relation to the work as a whole • the effect of the dealing on the potential market for or value of the work.
Act
Fair dealing with a work for criticism, review and news reporting
Description
An acknowledgement of any copyright work used in a criticism, review or the reporting of current events is required. No acknowledgement is required when reporting current events, by means of a sound recording, film broadcast or cable programme.
Act
Things done for the purpose of instruction or examination
Description
Copying in the course of instruction or of preparation does not infringe copyright if the copying is done by a person giving instruction and is not by means of reprographic process. Equally, copyright is not infringed if the copying is for the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions. However, anything done beyond this scope will be considered as infringement of copyright.

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

At the time of writing, there has been no case concerning disputes over hyperlinks in Hong Kong. The position of the Hong Kong courts towards hyperlinks is yet to be confirmed.

Given that the internet is a massive information exchange system, uploading a webpage to the internet usually means giving an implied licence to the rest of the world to access the webpage. However, there is a certain scope of this implied licence and that does not mean one can do anything one may want with others' webpages.

Hyperlinks are special tags allowing internet users to go from one webpage to another simply by clicking it. Hyperlinks are generally divided into (1) surface links and (2) deep links. The former take the user to the homepage of another website, and the latter take the user to, say, a featured article, inside the other website, skipping the homepage.

While surface links are generally permitted under the implied licence (by creating a website, one would welcome others getting access to the website through hyperlinks to the homepage), the situation with deep links may be more controversial. A homepage usually contains information such as the website's terms and conditions, privacy policy and also advertisements. Bypassing the homepage may mean skipping important information that the website owner wants to convey to visitors or terms and conditions that the website owner wants the visitors to accept, and most important of all, may deprive the owner of potential advertising revenue. These may arguably go beyond the scope of the implied licence.

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

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

An exclusive licence is a licence in writing signed by or on behalf of the copyright owner authorising 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.

In the case where a copyright infringement action brought by an exclusive licensee relates to an infringement in respect of importation of infringing copies into Hong Kong, the exclusive licensee cannot proceed with the action unless the copyright owner is joined as a plaintiff.

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?

Under the Copyright Ordinance, in an action for infringement of copyright, the following remedies are available to the rights holders:

- injunction against the infringer
- delivery up of infringing copies or articles
- disposal of infringing copy or other articles
- detention order
- disclosure of information of infringer
- account for profits
- damages.

Additional damages may be awarded by the court in consideration of the following factors:

- flagrancy of infringement
- any benefit accruing to the defendant by reason of the infringement
- the completeness, accuracy and reliability of the defendant's business accounts and records.

5.2 Are there any specific remedies for online copyright infringement?

Hong Kong does not have any specific remedies for online copyright infringement. When it appears that a website is displaying infringing materials, the copyright owner can seek an injunction order from the court ordering the internet service provider (ISP) to remove the material from the website and, if applicable, claim damages.

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

A number of criminal acts have been stipulated in the Copyright Ordinance in relation to copyright. Any person who commits an offence relating to copyright is likely to be subject to a fine and/or a prison sentence.

If an offence is committed by a company and it is proven that the offending act has been committed with the consent of or the connivance of, or to be attributed to, any officer of the company, then the officer concerned, as well as the company, can be liable for the criminal act.

Criminal act
Making a copy of a copyright work for sale or hire
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright
Maximum penalty
On conviction on indictment: a fine at level 5 (HK$25,001-HK$50,000) for each copy and imprisonment for 4 years
Criminal act
Importing or exporting from Hong Kong a copyright work other than for private and domestic use
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright
Maximum penalty
On conviction on indictment: a fine at level 5 (HK$25,001-HK$50,000) for each copy and imprisonment for 4 years
Criminal act
Selling or 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
Maximum penalty
On conviction on indictment: a fine at level 5 (HK$25,001-HK$50,000) for each copy and imprisonment for 4 years
Criminal act
Possessing a copy of a copyright work with a view to its being sold or let for hire, or exhibited in public or distributed 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
Maximum penalty
On conviction on indictment: a fine at level 5 (HK$25,001-HK$50,000) for each copy and imprisonment for 4 years

Criminal act
Distributing an infringing copy of a copyright work to such an extent that it prejudices the rights owner
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright
Maximum penalty
On conviction on indictment: a fine at level 5 (HK$25,001-HK$50,000) and imprisonment for 4 years
Criminal act
Possessing a copy of a copyright work that is a computer program (excludes a printed form), a movie, a television drama, a musical sound recording, or a musical visual recording with a view to it being used by any person 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
Maximum penalty
On conviction on indictment: a fine at level 5 (HK$25,001-HK$50,000) for each copy and imprisonment for 4 years
Criminal act
Making, importing into or exporting from Hong Kong, possessing, selling or letting for hire an article specifically designed for making copies of a copyright work
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the article is to be used to make infringing copies for sale
Maximum penalty
On conviction on indictment: a fine of HK$500,000 and imprisonment for 8 years
Criminal act
Possessing a reprographic copy of a copyright work published in a book, magazine or periodical whilst in the course of a copying service business
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright
Maximum penalty
On conviction on indictment: a fine at level 5 (HK$25,001-HK$50,000) for each copy and imprisonment for 4 years

Criminal act
Making and distributing a copy of a copyright work in printed form on a regular or frequent basis in the course of business, resulting in a financial loss to the copyright owner
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copies made or distributed are infringing copies
Maximum penalty
On conviction on indictment: a fine at level 5 (HK$25,001-HK$50,000) for each copy and imprisonment for 4 years
Criminal act
Making articles outside Hong Kong for import to Hong Kong or making articles outside Hong Kong specifically designed for making copies of copyright work
Relevant intention, knowledge or belief
The knowledge that it would constitute an infringing copy of a copyright work if the articles were made in Hong Kong, or the articles were intended to be used in Hong Kong for making an infringing copy of the copyright work for sale or hire in the course of business
Maximum penalty
On conviction on indictment: a fine of HK$500,000 and imprisonment for 8 years

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 Hong Kong, after a case has been concluded, the unsuccessful party shall pay the costs of the successful party as well as its own costs. However, this is subject to the wide discretion of the court. As a general rule, a successful party would only be able to recover two-thirds of its costs, and the amount of costs would be for the court to assess either at the end of the hearing ('summary assessment') or after the trial ('taxation').

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 a copyright infringement action should be brought to, the two main considerations are the financial value of the amount of the claim and the type of remedy that the copyright owner is claiming for.

The District Court is responsible for handling claims exceeding HK$50,000 but not exceeding HK$100,000. In addition, the District Court entertains application of:

- order for delivery up of infringing copies
- order for disposal of infringing copies.

Claims exceeding HK$1,000,000 and application for other orders will be within the jurisdiction of the High Court. There will be no cap on the amount of costs recoverable in the High Court.

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

Seizure of works infringing copyright

The Customs and Excise Department of HKSAR has extensive powers of search and seizure relating to infringing copyright works under the Copyright Ordinance and may act upon request of a copyright owner.

Criminal sanctions

Criminal proceedings can be brought on the grounds prescribed in 5.3 below and pursued through the criminal courts.

Copyright Tribunal

Any dispute relating to licensing schemes, granting of licences or their operation (other than a single collective work or work made by a single individual, firm or a group of companies) can be referred to the Copyright Tribunal, an independent tribunal established by the Copyright Ordinance. The Copyright Tribunal does not deal with copyright infringement cases or with criminal 'piracy' of copyright works.

Arbitration and mediation

In appropriate cases, disputes concerning copyright infringement can be resolved by arbitration or mediation.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright?

The Intellectual Property Department (IPD) is the official governmental body in Hong Kong responsible for the protection, promotion and registration of trade marks, patents, designs, and copyrights.

The roles and functions of the IPD are as follows:

- advising on policies and legislation to protect IP
- providing civil legal advice on IP matters to government bureaux departments
- promotion of and education about the protection of IP.

The Customs and Excise Department (CED) is responsible for enforcing copyright and taking criminal sanctions against copyright infringement in Hong Kong. As a pre-requisite for criminal investigation by the CED, a rights owner shall prove the subsistence of copyright in the work alleged to have been infringed, and furnish sufficient evidence to show an infringement has taken place.

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

A person may use copyright materials without infringing the rights of the copyright owner if he/she obtains a copyright licence from one of the collective rights management agencies in Hong Kong, which are 'licensing bodies' under the Copyright Ordinance.

By charging the user of the work royalty fees, the licensing bodies provide lawful means for the public to use copyrighted materials. Once a copyright owner becomes member of a licensing body, they may either appoint the licensing body as their agent, or transfer their rights to the licensing body for administration purposes.

At present, the Copyright Licensing Bodies Registry has registered the following five licensing bodies:

Agency
Composers and Authors Society of Hong Kong Limited
Who represents
Music composers and lyricists
Agency
Phonographic Performance (South China Asia) Limited
Who represents
Music recording companies
Agency
Hong Kong Reprographic Rights Licensing Society
Who represents
Authors and publishers of books, newspapers, magazines, journals, periodicals, and musical works, dramatic works or artistic works embodied in hard copy form

Agency
The Hong Kong Copyright Licensing Services Limited
Who represents
Newspapers and magazine publishers
Agency
Hong Kong Recording Industry Alliance Limited
Who represents
Recording companies

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

Copyright levies are not payable in Hong Kong.

7. Copyright reform

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

Infringing Website List

The Hong Kong Creative Industries Association (HKCIA), a non-profit organisation established in Hong Kong, launched an 'Infringing Website List' Scheme in December 2016. A total of 14 overseas pirate websites that offer unauthorised access to copyright contents have been listed so far on the Infringing Website List. As reported by HKCIA, this has resulted in the removal of advertisements on infringing websites by 50 brands in Hong Kong and the reduction of traffic to the infringing websites by 14%. The HKCIA is looking forward to expanding the list to include up to 150 infringing websites by the end of first quarter of 2018.

New rules for the Copyright Tribunal

As discussed in 6.2 above, the Copyright Tribunal (the Tribunal) is an independent judicial body responsible for resolving specific types of disputes, mainly relating to the use or licensing of copyright works.

In order to modernise the practice and procedures of the Copyright Tribunal, a new set of Copyright Tribunal Rules (Cap. 528D) took effect on 1 May 2017. The new Rules empowered the Tribunal to exercise active case management and promote the use of alternative dispute resolution.

The major amendments include:

- if a respondent does not serve a response within the prescribed time limit, the Tribunal may treat the application as being uncontested and may proceed to deal with the application as it thinks fit
- the Tribunal may direct a party to serve on the other party interrogatories regarding the dispute and the other party shall give an answer
- where a party fails to comply with an order or direction given by the Tribunal, the Tribunal may order that the party be debarred from taking any further part in the proceedings without the Tribunal's leave and give any consequential orders that it thinks fit.

Moreover, the procedures and forms for all types of applications before the Tribunal have been standardised. With the enactment of the new Rules, the Copyright Tribunal is likely to be able to assist copyright holders in enforcing their rights in a more effective, flexible and cost-efficient manner.

7.2 What do you consider will be the top two upcoming copyright developments?

Copyright (Amendment) Bill 2014

On 18 June 2014, the HKSAR Government introduced the Copyright (Amendment) Bill 2014 (the Bill) to the Legislative Council with the aim of keeping the Hong Kong copyright regime in step with technological advancements (notably the internet). The key amendments proposed in the Bill were as follows:

- provide for fair dealing exceptions for the purposes of:
  - parody, satire, caricature and pastiche
  - commenting on current events
  - quotation
  - temporary reproduction of copyright works by online service providers
  - media shifting of sound recording
- provide for criminal sanctions against unauthorised communication of copyright works to the public
- introduce a new exclusive right for copyright owners to communicate their works to the public through any mode of electronic transmission
- establishing statutory safe harbour for online service providers so that their liabilities for copyright infringement occurring on their service platforms could be limited under certain conditions.

The Bill created a heated political debate and faced opposition by copyright work users, as they saw it as removing grey areas in copyright protection and encouraging copyright owners to take actions against common online activities such as parodies and the modification and adaptation of lyrics, thereby suppressing freedom of expression of the general public.

Consequently, the Bill was not passed by the Legislative Council in March 2016. Although the Government announced at the time that it would not persist with the Bill, there may be further developments with respect to this area of law following the election of a new Chief Executive.

Update on copyright exceptions for persons with print disability

The HKSAR Government launched a public consultation on 9 May 2017 to gauge views on areas in the Copyright Ordinance which might need to be amended to align with the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or print disabled.

Although the existing copyright exceptions in the Copyright Ordinance are, to a large extent, in conformity with the Marrakesh Treaty, the HKSAR Government considered that it is an appropriate time to conduct a review of Copyright Ordinance to ensure the latest international standards have been complied with. The issues that require review are:

- whether the definition of 'beneficiary person' should extend to include persons with perceptual or reading disability
- improvements regarding the scope of 'specified body'
- whether the types of copyright works covered by the print disability-related exceptions should include 'works in audio form'
- in relation to the acts which could be performed by persons with a print disability and/or specified bodies, whether 'supply of accessible copies to beneficiary persons' should cover 'distribution' and 'making available to the public', and whether there should be an additional exception regarding 'right of public performance'
- improvements regarding the conditions to be met under the existing provisions
- the application of anti-circumvention of technological measures provisions to beneficiary persons and whether they should be exempted from such measures, and
- provision for cross-border exchange (ie export and import) of accessible copies.

The three-month consultation period ended on 9 August 2017. The proposed amendments to the Copyright Ordinance with respect to print disability will hopefully be launched in the near future.

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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. Hence, the 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, 1999. 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' encompasses all 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; '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 can qualify for copyright protection. 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 into 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 either wholly or partially of 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 states that the right against distortion is available to the author 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, which is a right against distortion, mutilation, or any modification to a copyrighted work is available even after the expiry of the term of copyright.

3. Ownership

3.1 Who is the first owner of a copyright work?

Ordinarily, the author is first owner of the copyright in a work. However, concept of 'first owner' has further been elaborated under Indian copyright law 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 proprietor 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 value 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, in the absence of a contract to the contrary.

3.2 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. Equal rights are enjoyed by each author and each can assign their work independently. However, consent of each author is required for licensing or use of the copyright work. The duration of copyright for a work of joint authorship is calculated with respect to the author that dies last.

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?

Under Indian law, registration is not a prerequisite for acquiring a copyright in a work. A copyright in a work is an inherent right and is acquired by the author as soon as the work is created by him/her.

However, the Act does provide a procedure for copyright registration. Though such registration does not confer any special rights or privileges to the copyright owner, the 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. 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 the essence to obtain urgent orders, registration is of tremendous help. A copyright notice is not necessary under Indian law to claim protection; however, such display may be useful in evidencing the ownership of the copyright and date of creation of the work.

3.4 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.

3.5 Can moral rights be transferred, assigned or licensed?

No, moral rights cannot be transferred or assigned.

4. Infringement

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.

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 adaption.

4.2 What acts constitute secondary infringement of copyright?

Secondary infringement occurs where a person, with knowledge or reasonable grounds for such knowledge, carries out any of the following actions in relation to infringing copies of the work:

- 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.

4.3 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 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 utilise 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 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 licence 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 utilising 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, the provisions of this clause shall apply only if such reproduction is made at a time more than 60 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; 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
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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
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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 mould, cast, sketch, plan, model or study made by him for the purpose of the work
Conditions
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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 the works; or any organisation working for the benefit of persons with disabilities in the case that 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 organisation shall ensure that the copies are used only by persons with disabilities, and take reasonable steps to prevent their entry into ordinary channels of business

4.4 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 hyperlinking, the linking site is not reproducing any work. The reproduction, if 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.

4.5 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.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The Act provides the following remedies for copyright infringement:

- civil
- criminal
- administrative.

However, it is only the first two remedies, civil and criminal, which are of any real practical importance. Under civil remedies, one may file for interlocutory injunction, pecuniary remedies, *Anton Piller* orders, *Mareva* injunction 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.

5.2 Are there any specific remedies for online copyright infringement?

A court can direct that infringing websites 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.

5.3 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 of infringing copies or plates to the owner of the copyright.

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

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

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 the Act, the plaintiff can seek recovery under 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.

6. Enforcement

6.1 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 a District Court or above. The monetary/pecuniary threshold divides the court on a vertical basis. For example, in Delhi Courts, matters amounting to INR 10 million lie before the District Courts, and those above INR 10 million lie before the High Courts. However, the amount of pecuniary jurisdiction is different for all High Courts and this limit is decided by respective High Court Rules. In many states, the High Court has no pecuniary distinction. All civil suits go before District Courts, and only appeals before the High Court.

6.2 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.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? 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 Industrial Policy and Promotion (DIPP).

7. Copyright reform

6.4 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 these are:

Agency
The Indian Performing Right Society Limited (IPRS)
Who it represents
Musical works
Agency
Phonographic Performance Limited (PPL)
Who it represents
Sound recording
Agency
Indian Reprographic Rights Organization (IRRO)
Who it represents
Reprographic (photo copying) works
Agency
Indian Singers' Rights Association (ISRA)
Who it represents
Performers' (Singers') Rights

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

The Indian Copyright Act does not prescribe any copyright levies.

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

Delhi University photocopying case

The ongoing litigation between a group of leading publishers and a small photocopying shop attached to Delhi University in a 'fair dealing' debate has come to a conclusion. The judgment was passed in favour of the photocopier, underlining the principle that the utilisation of the copyrighted work would be fair use and justified if the same is used for the purpose of education. It would have no concern with the extent of the material used, both qualitative and quantitative, and the law is only concerned with whether the inclusion of the copyrighted material was justified by the purpose of the course pack and that the same is required during the course of instruction.

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

The Government of India has transferred copyright from the ambit of the Human Resource Development Ministry (HRD) to the Department of Industrial Policy and Promotion (DIPP). This is a strong step taken by the Government in the direction of strengthening the IP protection regime in the country and consolidating all IP-related functions under one body, to reduce possible conflicts owing to differing jurisdictions and to ensure uniformity in decision making at national and international levels.

Continuous developments in the copyright regime, such as facilitating e-filing of copyright applications, shifting of departments, availability of a list of pending applications and significant efforts taken by the judiciary to bring about a landmark change in IP jurisprudence, indicate that copyright law in India is strengthening.

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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 if 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 CRRA 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 CRRA 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 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 CRRA 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 a 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.

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 CRRA, moral rights can be waived.

4. Infringement

Owners/authors of copyright can take action if any of the acts restricted by copyright (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 restricted acts without the consent of copyright owner:

- copying the work
- making the work available to the public
- adapting the 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
- 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 CRRA 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 acknowledgement.

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, so linking to that work in a way that circumvents the paywall would, it appears from recent case law, constitute a communication 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. Pursuant to the CJEU judgment in *GS Media v Sanoma Media* (C160/15), posting hyperlinks to protected works which are available on other websites (but where such works are made available without the consent of the copyright holder), may amount to infringement where such hyperlinks are provided in return for financial gain.

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 the 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 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? 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 distributers
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). Last year the Government announced approval for the drafting of the Copyright and Related Rights (Miscellaneous Provisions) Bill 2016, which will seek to cover a number of recommendations in the Modernising Ireland report.

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 High Court 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 High Court ordered that such a detection system would be set up within 12-15 months. The judgment was subsequently appealed; however, the Court of Appeal ruled in July 2016 that the High Court decision be upheld.

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 European Commission is halfway through it's mandate and has identified areas where more work is needed in its mid-term review of the Digital Single Market Strategy. The review found that more action is needed in developing the European Data Economy, protecting against cybersecurity challenges, and promoting online platforms as "responsible players of a fair internet ecosystem.

The Strategy sets the Commission's agenda for EU-level copyright reform over its term and is worth watching closely.

Stichting Brein v Ziggo BV, XS4ALL Internet BV.

The ECJ returned a preliminary ruling holding that making available and managing an online platform for sharing copyright-protected works may constitute an infringement of copyright. The ruling comes after a seven-year legal battle, which has seen the BitTorrent site The Pirate Bay's offices blocked and seized, its offices raided, and its three founders fined and jailed.

Stichting Brein alleged that Pirate Bay infringed copyright by making works available to the public without authorisation and brought an action against two internet service providers seeking an order blocking access to the Pirate Bay. The case was referred to the CJEU by the Dutch Supreme Court. The question for the CJEU was whether there could be a communication to the public in circumstances where Pirate Bay did not host any infringing content but instead provided a way for its users to access such content from the computers of other users (i.e. peer-to-peer).

The court observed that Pirate Bay actively manages the torrent files on its platform, categorising them according to popularity/genre, removing faulty files and filtering some content, in order to make locating files easier. As a result, Pirate Bay cannot be said to be providing mere 'facilities' being used by third parties to make copyright works available.

The case will now be sent back to the referring Dutch court for a decision on the original request for an order requiring the ISPs in question to block access to Pirate Bay.

The Court emphasised that the principal objective of the Copyright Directive is to ensure a high level of protection for authors, meaning that the concept of 'communication to the public' should be interpreted broadly and to reflect modern technological developments. This decision is a welcome boost to the position of rightholders as they continue to battle infringement on the Internet.

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Italy

Carnelutti Studio Legale Associato, Margherita Bariè/Marco Annoni

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 Italy is 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 Art 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.

The abovementioned list of copyright-protected works is not exclusive. Therefore, other type of works, such as TV formats, can be covered by copyright protection as long as they possess the requirements outlined by the Law as detailed at 2.2.

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

A work may be protected by copyright if it contains:

- novelty
- creative character
- legitimate aim.

2.3 What rights does copyright grant to the rights holder?

The ICL sets out both the exclusive moral and economic rights of the rights holder arising from copyright (before any licence is granted).

In particular, the ICL provides to rights holders the right of:

- use of their work
- publication of the work
- communication of the work to the public, including the right to make the work available 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 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 the 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 architectural works, where the rights holder cannot oppose amendments that are necessary during their creation or 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 of the authorship of a copyright-protected work
- the right to disclaim the paternity of a 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. 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 are personal and inalienable, which means that they last for the life of the author. However, accordingly to Art. 23 ICL, the heirs of the author are entitled to start an action, without any time limitation, aimed at obtaining the ascertainment of the moral rights of the author provided by Art. 20 ICL.

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 the 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, save proof to the contrary. The main exception to the rule is to be found 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're 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 the use of the copyright-protected 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 any 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.

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. 22 ICL, moral rights cannot be waived or 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. 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 a 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 an 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 been 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 procedures 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 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 for 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 CJEU. Among the most recent, reference is made to the decision related to the case *Nils Svensson v Retriever Sverige* (C-466/12). This 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 they published the work. As a result, when a person uploads copyright-protected material to the internet, the public to which this material is communicated 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 constitute a communication to the public, resulting in an infringement of the rights of the rights holder.

The *Svensson* decision left unresolved issues. For example, it has been wondered which reasoning should be applied in the eventuality that a link, provided on a website, leads to material that has been published without the author's authorisation. By applying the abovementioned CJEU reasoning of the *Svensson* case, the author has no 'new public' in mind when his work was published without his previous authorisation, which means that every public has to be considered 'new'. Hence, hyperlinking to an unauthorised work should presumably result in an unauthorised communication to the public.

In contrast with the above said reasoning, but accordingly with the concept of linking as communication to the public as expressed in *Svensson* case, the CJEU recently ruled on the abovementioned matter in *GS Media BV v Sanoma Media Netherlands BV* (C-160/15). In its decision, the Court stated that posting a hyperlink to a protected work that has been published on another website without the previous authorisation of the copyright owner does not constitute an infringement of the 'communication to the public' right.

However, this pronouncement has been mitigated by certain requirements. In this respect, the Court established that the hyperlink must be provided without the pursuit of financial gain, by a person who was not aware of, or could not reasonably have been aware of, the illegal nature of the publication of the protected work. If the hyperlink is provided for such purpose (that of financial gain), knowledge must be presumed (these requirements have been recently applied in the CJEU decision of 26 April 2017 *Stichting Brein v Wullems t/a Filmspeler*, C-527/15 – see section 7.1).

Notwithstanding the CJEU's attempt to provide for some guidance in reference to hyperlinking, it must be stressed that the abovementioned requirements have not been further specified. This means that national courts will have the challenging task of defining both the concept of 'financial gain' and of 'reasonably aware', with results that may vary according to the facts involved.

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

Under ICL, 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 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.

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. Enforcement

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 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? 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 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 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?

Further developments on hyperlinking and 'communication to the public'

On 26 April 2017, the CJEU rendered its decision in case C-527/15, *Stichting Brein v Wullems t/a Filmspeler*, where it was requested to establish whether, among other things, it constitutes a communication to the public with the sale of a product (a multimedia player named 'Filmspeler') in which the seller installed certain add-ons containing hyperlinks to websites on which copyright-protected works were made directly available to the public without the prior authorisation of the rights holder.

The CJEU stated that, as already confirmed in previous cases such as the *Svensson* and the *GS Media* decisions (highlighted above at 4.4), in order to establish whether there is a communication to the public, it is necessary to determine if the contested behavior constitutes an 'act of communication' and if said communication is aimed to a 'public'.

With reference to the concept of an 'act of communication', the CJEU considered that there is an act of communication by a user when he "intervenes, in full knowledge of the consequences of his action, to give access to a protected work to his customers and does so, in particular, where, in the absence of that intervention, his customers would not be able to enjoy the broadcast of the work".

Moreover, the CJEU specified that, notwithstanding the fact that according to Recital 27 of Directive 2001/29/EC the mere supply of physical facilities for enabling or making a communication does not by itself amount to an 'act of communication', there is an act of communication where said physical facilities allow their users to access copyright-protected works.

In light of the above, the Court concluded that the seller's behaviour constituted an act of communication. This was due to the fact that he installed in the multimedia player 'Filmspeler', with full knowledge of the consequences of his action, add-ons that allowed the purchasers to enjoy the copyright-protected works published on streaming websites without the prior authorisation of the rights holders.

With reference to the concept of 'public', the CJEU stated that there is a communication to the 'public', when the work is communicated to "a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work".

Moreover, by referring to the case in suit, the CJEU also considered the further requirements set forth by the *GS Media* decision in order to establish whether the hyperlinks posted by the user constituted an act of communication to the 'public'. More specifically, the CJEU considered:

- whether the seller "knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet";
- whether the link "allows users of the website on which it is posted to circumvent the restrictions put in place by the site where the protected work is posted in order to restrict the public's access to its own subscribers";
- whether "the posting of the link is carried out for profit", as in this case "it must be presumed that that posting has occurred with the full knowledge of the protected nature of the work".

On this point, the CJEU concluded that there were no doubts that the sale of the multimedia player 'Filmspeler' constituted an act of communication to the public. Such sale was made for profit and the seller had full knowledge of the fact that the hyperlinks provided through the add-ons allowed the users to access copyright-protected works made available on the internet without authorisation.

The abovementioned decision provides further guidance on how the connection between hyperlinking and communication to the public has to be interpreted.

Legislative Decree no. 35 of 15 March 2017

On 11 April 2017, the Legislative Decree no. 35 of 15 March 2017 (Decree 35/2017) entered into force. The decree imposed the European Parliament Directive 2014/26/UE on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

Decree 35/2017 provides the requirements that are necessary for granting the proper functioning of collective management organisations and independent management entities with reference to the managing of the authors' copyright and related rights, as well as the requirements that said entities must meet for granting multi-territorial licences.

Therefore, the aim of the abovementioned Directive was to establish a specific set of rules for collecting societies in order to ensure a high standard of governance, financial management, transparency and reporting, as well as to boost competition amongst said entities in the European Union.

In this respect, it was expected that Decree 35/2017 would have ended the long-discussed monopoly of the Italian collecting society (SIAE), allowing authors to entrust the management of all their rights to other entities. However, said expectations have been disappointed. In fact, according to Article 4 of the Decree 35/2017 "the rights holders may entrust the management of their rights (which include both copyright and related rights) [...] to a collective management organisation or to an independent management entity, irrespective of the Country of the European Union, of nationality, residence or establishment of the collective management organisation or of the independent management entity or of the rights holder, except as provided for by Article no. 180 of the Italian Law of April 22, 1941, no. 633 (Italian Copyright Law, ICL), with exclusive reference to the activity of intermediation of the authors' copyright".

In this respect, Article no. 180 of ICL establishes that "The right to act as an intermediary in any manner [...] shall belong exclusively to the SIAE [...]".

Hence, according to the abovementioned provisions, it seems that SIAE will maintain its monopoly with reference to the activity of intermediation related to copyrights, whilst the other entities will be able to act as intermediary with exclusive reference to related rights.

In conclusion, in light of the abovementioned exception, it seems that Decree 35/2017 did not completely fulfill the objectives set forth by Directive 2014/26/UE of boosting competition amongst collecting societies. Therefore, it can be expected that there might be further developments on this subject in the near future.

7.2 What do you consider will be the top copyright development in the next few years?

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.

On 9 September 2016, the European Commission issued a proposal of a Directive on Copyright in the Digital Single Market.

Although the provisions contained therein may be subject to further amendments, the underlying principles are worth mentioning. In particular, among other things, the proposed Directive aims to:

- introduce three new mandatory exceptions related to i) text and data mining (Article No. 3); ii) use of works and other subject matter in digital and cross-border teaching activities (Article No. 4); and iii) preservation of cultural heritage (Article No. 5)
- impose that Member States grant publishers of press publications the right of 'reproduction' and of 'making available to the public' with reference to the digital use of their press publications (Article No. 11)
- impose on information society service providers (ISSPs) storing and providing a large amount of works or other subject matter uploaded by users (eg YouTube) to take, in cooperation with the rights holders, appropriate and proportionate measures to ensure the functioning of the agreements concluded with the rights holders and/or preventing the availability, on their service, of works or other subject matter identified by the rights holders through the cooperation with the ISSPs (Article No. 13)
- introduce provisions ensuring that authors and performers will, on a regular basis, receive adequate and sufficient information concerning the exploitation of their works and performances from those to whom their rights were licensed (Article No. 14)
- introduce provisions ensuring that authors and performers will be entitled to request additional and appropriate remuneration from the party with whom they entered into a contract for the exploitation of their rights (Article No. 15).

It will be interesting to follow the future developments of the Directive to see if the abovementioned proposed provisions will be maintained or amended, as well as to see if other provisions will be introduced.

The impact of blockchain technology on copyright

Blockchain is probably one of the most discussed technologies of the last few years. Originally known primarily as the technology behind the Bitcoin, today it is seen as the key to a new era of technology.

Before going through the implications blockchain has relating to copyright, it is important to understand what this technology does. Blockchain technology is essentially a database (or ledger) of virtually any type of recordable information, made up of 'blocks', or stored data, chained together to form a cohesive, unbroken record of that information.

The reasons for its rapid and uncontrollable development are its characteristics and simplicity. Once a piece of information is stored on a block of the chain, it will also be shared with the other blocks belonging to the same chain. Every successive alteration of the data stored in the blockchain will be recorded on all the blocks of the chain in order to create a timestamp or history of the information. Since the information and its successive modifications will be recorded on all the different blocks of the chain, it would be nearly impossible to hack or falsify the information in suit.

Blockchain, in fact, is an incorruptible digital ledger of economic transactions that can be programmed to record not just financial transactions but virtually any information of value. This means that, for the first time, technology will allow consumers and suppliers to connect directly and perform digital transactions without need of a third party.

The arrival of blockchain forms the foundation of a revolution around value transactions, whether those transactions are based on money, goods or (intellectual) property. Its importance is not limited to this. Since every transaction and/or piece of information is recorded and distributed on a public ledger, its potential uses may be almost limitless.

Therefore, blockchain technology might also be a turning point in copyright. The implementation of this technology in the copyright field would allow, for instance, to:

- simplify the cataloging and storing of original works of art, documents, manuscripts, photographs and images, as it does not require the activity of any central authority, such as collecting societies
- recover a verifiable copy of an original work stored on the blockchain system. These verifiable copies would still remain on the blockchain even if the blockchain copyright service provided by a third party should cease to exist
- easily trace and verify the ownership of copyrighted works (especially where multiple authors are involved, eg works composed of sound, video and text elements). Traceable ownership is a problem domain that blockchain is especially well suited for

- grant the power to authors and rights holders to track online the usage of their works and to control whether there is any unauthorised use. In fact, this tool provides copyright owners with a timestamp of their works, creating a permanent record of their work and issuing a copyright certificate.

Blockchain is currently a technology used only by private companies around the world. In this respect, there are already many websites implementing blockchain technology, which allow rights holders to register their works and, hence, to protect them against possible infringements.

As yet, blockchain technology remains unregulated by Member States. However, considering the implications that this technology might have for various areas, including copyright, an increasing acceptance of this tool will probably follow.

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Japan

Yuasa and Hara, Kozo Yabe

1. Legislation and regulation

1.1 What are the main sources of copyright law?

Copyright law in Japan is governed by the Copyright Act (Act No. 48 of 6 May 1979 as amended). In 1899, Japan joined the Berne Convention. The Copyright Act (Act No. 39 of 1899) [the Old Copyright Act] was enacted.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

"A production in which thoughts or sentiments are creatively expressed and which falls within the literary, academic, artistic or musical domain" is the definition for copyrightable work. This excludes simple data, ideas, imitations or industrial products. In addition, the Copyright Act provides a non-exhaustive list of significant examples of copyrightable works:

- novels, scenarios, articles, lectures and other literary works
- musical works
- works of choreography and pantomime
- paintings, woodblock prints, sculptures and other works of fine art
- works of architecture
- maps and other diagrammatic works of an academic nature, such as plans, charts and models
- cinematographic works
- photographic works
- works of computer programming.

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

To be protected as a copyright work, in addition to satisfying the definition of copyrightable work set forth above in 2.1, it is necessary for work to fall into one of the following categories (but this does not require any specific registration or procedure):

(i) a work by a Japanese national (including a corporation established based on Japanese law or regulations or a corporation with a principal office in Japan; the same applies hereinafter)

(ii) a work that is first published in Japan (including one first published abroad and published in Japan within 30 days from the date of its first publication) or

(iii) a work other than one set forth in the preceding two items, which Japan is under an obligation to protect pursuant to an international treaty.

The international treaties as provided in (iii) above now comprise the Berne Convention, the Universal Copyright Convention, WIPO Copyright Treaty and TRIPs Protocol. Under the coverage of such international treaties, a foreign national who is not a Japanese citizen can enjoy copyright protection in Japan.

2.3 What rights does copyright grant to the rights holder?

The following are copyrights as property rights under the Copyright Act. These rights should be protected in any copyright works, either in analogue or digital form.

- right of reproduction
- stage performance rights and musical performance rights
- right of on-screen presentation
- right to transmit to the public
- right to publicly communicate the work being transmitted to the public through a receiver
- recitation rights
- exhibition rights
- right of transfer
- right to rent out
- distribution rights
- rights of producing derivative works
- rights of using derivative works

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. Moral rights include the following:

- right to make a work public
- right of attribution
- right to integrity.

2.5 What is the duration of copyright for protected works?

The duration of copyright begins at the time the work is created. A copyright subsists for a period of 50 years after the death of the author (or the death of the last surviving co-author, for a joint work).

The copyright to an anonymous or pseudonymous work is protected for a period of 50 years after the work is released to the public. Copyright in a work whose authorship is attributed to a corporation or other organisation exists for a period of 50 years after the work is released to the public. The copyright to a cinematographic work survives for 70 years after the work is made public.

These durations equally apply to foreigners' copyright works under the principle of National Treatment as provided by the Berne Convention and the Universal Copyright Convention. However, some exceptions of extension exist due to wartime, the duration of translation rights and reciprocity, etc.

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

A moral right exists for the lifetime of an author. In addition, even after the death of the author, it is prohibited for a person who offers or presents the author's work to the public to engage in conduct that would be prejudicial to the moral rights of the author if the author were still alive.

3. Ownership

3.1 Who is the first owner of a copyright work?

The first owner of a copyright work is usually the first person who actually created the work. Therefore, if someone asks for such creation of a work from another party, the other party (ie the party actually doing the creating) must become the first owner of a created copyrightable work even though they can obtain monetary consideration for their creation. Therefore, it is necessary for the party who placed the order of creation to specifically clarify the transfer of the ownership in contractual terms if they would like to retain the ownership of the copyrightable work, rather than it being automatically granted to the creator. An exception can be found in copyrightable works which are made under an employment relationship supervised by the appropriate direction and guidance of an employer.

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

There are two types of joint ownership of a copyright. In the first, in a work created by two or more persons whose contributions to the work cannot be separated so as to allow each part of the work to be used independently, the copyright is jointly owned by such persons. In this case, the copyright work itself is considered as the joint work. Therefore, the joint owners mandatorily own all copyrights, including moral rights, and must enforce such copyrights by their unanimous consent.

In the second, the ownership of copyright can be partly assigned by contract and jointly succeeded by the inheritance of individuals/merger of organisations. The content of joint ownership by contract and the inheritance of individuals/merger of organisations depends on the contractual terms and conditions and/or other terms of inheritance/merger.

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. The following (in the table below) can be registered to the Copyright Registry as provided by the Cultural Affairs Bureau as an affiliate agency of the Ministry of Culture, Sports, Science and Technology (MEXT). This Copyright Registry aims to encourage the public notification of copyright transactions and transfer of ownership by public recognition. Any application for copyright registration as set forth below assumes that the copyright work was already placed in the public and dealt with in the transfer referred to, etc except for copyrights of computer programs.

Types of registration
Registration of true names
Benefits
A person whose true name has been registered is presumed to be the author of the work to which the registration pertains.
Types of registration
Registration of the date of first publication, etc
Benefits
A work whose date of first publication or date first made public is registered is presumed to have been first published or first made public on the registered date.
Types of registration
Registration of the date of creation
Benefits
A work of computer programming that has been registered is presumed to have been created on the registered date.
Types of registration
Registration of transfer, etc of copyright & neighbouring rights of copyright Registration of establishing a pledge on copyright & neighbouring rights of copyright
Benefits
Secured effects of such transactions against third parties.
Types of registration
Registration of establishment, transfer, etc of the right of publication Registration of establishing a pledge on the right of publication
Benefits
Secured effects of such transactions against third parties.

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

No formality is required to transfer, assign or license if this is done by contractual terms and conditions between the copyright owner/rights holders and transferee/assignee/licensee, etc. The contract can be made not only in writing but also verbally under the Civil Code. However, in reality, most business persons execute a written contract as evidence of an agreement in the usual course of business. Payment and non-payment of such transactions also depends on the terms and conditions of the contract. Registration as mentioned above is not required but protects the secured effect of transfer, assignment, licensing etc against third parties.

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights of copyright are not assignable.

4. Infringement

4.1 What acts constitute direct infringement of copyright?

If a suspicious work is created i) by relying upon another copyright work and ii) shows similar expression to the copyright work and iii) is not authorised to utilise such expression in the suspicious work, it is a direct infringement of copyright.

Reliance on another copyright work means that the suspicious work is based on that copyright work. There is no infringement if a similar expression to a copyright work is coincidentally found, without any access to that copyright work.

Similarity of expression should be an identical or similar expression to another's copyright work.

'To utilise' means each type of conduct which needs to have authorisation by the copyright owner/rights holder as provided and specified by the Copyright Act. For example, reproduction, public play and performance, public view, public transmission, broadcasting of TV/radio programmes, streaming or on-demand on the internet, adaptation and arrangement, translation, movie making, transfer and rental to the public, utilising a derivative work, etc.

4.2 What acts constitute indirect infringement of copyright?

The following do not create a direct infringement but are considered an 'infringement' by the Copyright Act. These are so-called 'indirect infringements'.

- the importation, for the purpose of distribution in Japan, of an object that is made through an act that, were the object to be made in Japan at the time of its import, would constitute an infringement of the moral rights of the author, the copyright, the print rights, the moral rights of the performer, or the neighbouring rights
- the distribution, possession for the purpose of distribution, offering for distribution, exportation in the course of trade, or possession for the purpose of exportation in the course of trade, of an object made through an act that infringes the moral rights of the author, the copyright, the print rights, or the neighbouring rights (including an object imported as referred to in the preceding item), with knowledge of such infringement
- the use of a copy made through an act that infringes the copyright to a work of computer programming on a computer in the course of business is deemed to constitute an infringement of the copyright, but only if the person using such copy had knowledge of such

infringement at the time that the person acquired the title to use the copy

- the intentional addition of false information as rights management information
- the intentional removal or alteration of rights management information
- the distribution, importation, or possession for the purpose of distribution, of copies of a work or performance, etc with the knowledge that an act referred to in one of the preceding two items has been carried out on such work or performance, etc; or the transmission to the public or making available for transmission of such work or performance, etc with knowledge of such an act
- the import, distribution, or possession of commercial-use music CDs, which are identical to music CDs of others already placed in the local market, with an awareness of the statutory prohibition against such conduct
- the exploitation of a work in a way that is prejudicial to the honour or reputation of the author is deemed to constitute an infringement of the author's moral rights.

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

Use
Private use, etc
Conditions
Reproduction for private use, reproduction or adaptation of a minor shot object in photos, etc
Use
Education
Conditions
Reproduction or transmission to the public in schools and other educational institutions, reproduction as examination questions, printing of works in textbooks, etc
Use
Reproduction in libraries or museums etc
Conditions
Reproduction in libraries, production of electronic records of materials of the National Diet Library, etc
Use
Welfare works
Conditions
Reproduction in Braille for persons with visual impairments, reproduction of a visual work with the aural sounds for persons with hearing impairments, etc
Use
Press reports
Conditions
Exploitation for the purpose of reporting events in the news, exploitation for disclosure pursuant to the Act on Access to Administrative Organs' Information, etc
Use
Legislative, judicial or administrative organs
Conditions
Reproduction of a work for internal use of a legislative, judicial or administrative organ, etc
Use
Stage performances for non-commercial purposes
Conditions
Stage performances, musical performances, on-screen presentations, or recitations etc for non-commercial purposes and without charging fees.
Use
Quotations or printing
Conditions
Quotations in a manner consistent with fair practices, reprinting of public relations materials, etc
Use
Artistic, photographic or architectural works
Conditions
Exhibition of an artistic work by the owner of the original, exploitation of an artistic work which is permanently installed in an outdoor location, etc
Use
Computers or networks

Conditions
Reproduction by the owner of a copy of a work of computer programming, temporary reproduction for the purpose of maintenance or repair, reproduction for the prevention of difficulty in transmission, etc
Use
Broadcasting stations or cable outlets
Conditions
Making an ephemeral sound or visual recording of a work by a broadcasting station or a cable outlet for its own broadcasts

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

The act of providing a hyperlink does not constitute any infringement of copyright under normal conditions. On the other hand, the act of framing has the potential to infringe the rights of reproduction, the adaptation rights, or the moral rights of authors.

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

Generally, no. A licensee of copyright has no right to take an injunction against the infringer. However, it is possible for a copyright licensee to be able to claim damages under tort on his/her rights endorsed by the licence contract.

5. Remedies

5.1 What remedies are available against a copyright infringer?

Civil remedies, damages, injunctions, measures against unjust enrichment and rebuilding social trust are available under the Copyright Act and the Civil Code. Based on these, the copyright owner/rights holder can file a civil law suit and a preliminary injunction at the court.

Criminal punishments are also available according to the Copyright Act. Please see 5.3 below.

As a form of alternative dispute resolution, the Cultural Affairs Bureau of the Ministry of Education, Sports & Science provides a dispute resolution mediation procedure, while the Japan Intellectual Property Arbitration Centre also provides arbitration and mediation rules and procedures.

5.2 Are there any specific remedies for online copyright infringement?

No. There are no specific or special remedies under the Copyright Act regarding online copyright infringement aside from to the general remedies as set forth in 5.1. However, a copyright owner/rights holder can urge an internet service provider (ISP) to review and take down an infringer's website that is committing copyright infringement.

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

These criminal punishments apply only to intentional conduct. Unintentional conduct is not subject to criminal penalties. Some require a private complaint by the copyright owner/rights holder.

Criminal Act
A person or a corporation that infringes a copyright, print rights, or neighbouring rights. (119 I)
Penalty
Imprisonment for a term of up to 10 years, a fine of up to ¥10 million, or both. (A fine of up to ¥300 million in the case of a corporation.)
Criminal Act
• A person who infringes the moral rights of an author or the moral rights of a performer. (119 II①) • A person who, for commercial purposes, sets up an automated duplicator for use by the public and causes it to be used to reproduce a music CD, etc (which constitutes an infringement of a copyright, etc.)

Penalty
Imprisonment for a term of up to 5 years, a fine of up to ¥5 million, or both.
Criminal Act
A person or a corporation that imports products infringing a copyright, etc for the purpose of distribution in Japan, that distributes such products with knowledge of such infringement; that possesses such products for the purpose of distribution, that exports such products in the course of trade or that possesses such products for the purpose of exportation. (119 II③) A person or a corporation that uses a copy of a work of computer programming on a computer. (119④)
Penalty
Imprisonment for a term of up to 5 years, a fine of up to ¥5 million, or both. (A fine of up to ¥300 million in the case of a corporation.)
Criminal Act
A person or a corporation that infringes the moral rights after the death of authors or performers. (120)
Penalty
A fine of up to ¥5 million. (A fine of up to ¥300 million in the case of a corporation.)
Criminal Act
A person who distributes, manufactures, imports or possesses a device or a computer program whose principal function is to circumvent technological protection measures of works, or who uploads such computer program onto the net. (120-2①) A person who circumvents technological protection measures, etc in the course of trade. (120-2②) A person who engages in an action that is deemed to constitute infringement of copyrights, etc for commercial purposes. (120-2③④)
Penalty
Imprisonment for a term of up to 3 years, a fine of up to ¥3 million, or both.
Criminal Act
A person who downloads a work delivered illegally for the purpose of private use. (119II③)

Penalty
Imprisonment for a term of up to 2 years, a fine of up to ¥2 million, or both.
Criminal Act
A person who distributes copies of a work that use the fake name of the author. (121) A person who reproduces or distributes a commercial phonogram produced from a master. (121-2)
Penalty
Imprisonment for a term of up to 1 year, a fine of up to ¥1 million, or both.

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

A damages claim shall expire in accordance with the statute of limitations if it is not exercised within three years from the time of acknowledgment of the infringing conduct and the infringer, or within 20 years from the time of the infringing conduct. A claim for unjust enrichment shall expire in accordance with the statute of limitations if it is not exercised within 10 years from the time of the infringing conduct. There is no provision regarding injunction claims.

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?

According to the majority view of the Copyright Act and the Civil Code, there is no specific provision for the recovery of legal costs incurred. Only a small amount of attorney fees can be recovered if they are considered as part of the damages arising from the infringer's intentional conduct.

6. Enforcement

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

Any district courts at a trial level can be the venue of copyright infringement if the court has proper regional and subject jurisdiction under the Civil Procedure Code. If the amount of a claim is ¥1.4 million or less, the case should be filed to a summary court. The appealed case is brought to the Intellectual Property High Court (IP H. Ct.), which is an appellate court specialising in intellectual property.

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

As set forth above in 5.1, if the parties of a dispute agree, mediation and arbitration procedures are available via the Cultural Affairs Bureau and Japan Intellectual Property Arbitration Centre.

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

As mentioned above in 6.1 and 6.2, the court is the primary agency of the government responsible for promoting/enforcing copyright, except for a few alternative dispute resolutions offered by the Cultural Affairs Bureau and the Japan Intellectual Property Arbitration Centre. The Cultural Affairs Bureau, as an affiliate agency of the Ministry of Education, Sports & Science, is in charge of copyright registry and other promotional government activities relating to copyright protection. The Bureau as an administrative agency is also handling a legislation bill and international treaty matters regarding copyrights.

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

JASRAC is the most well-known collective rights management agency for the authors/copyright owners of sound recordings, media and musical works. It represents the sound recording industry, composers, lyricists, arrangers and novelists.

APG-Japan is the collective rights management agency for artistic works, photography and graphical art. Its members include artists, photographers and graphic designers.

In addition to these conventional major agencies, NexTone (formerly JRC and E-License) is on the rise as a leading agency for all types of digital content on TV, the internet, CDs and DVDs, including movies, karaoke sound, etc.

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

A copyright levy is adopted for digital recording media and machines of video and sound contents under the Copyright Act. The levy applies to each type of media and machines of mainly analogue technology including DAT, MD, CD-R, DVD-RW, DVD-R, DVD-RAM and Blu-ray disc. The manufacturer of the machine is obliged to pay the levy to the collective rights management agency depending on the nature of the technology.

This means that no digital media and machines fall within the subjects under the Act and this was confirmed by court precedents of the Intellectual Property High Court and the Supreme Court. Therefore, any sound and video recording from one type of digital media to another type of digital media is beyond the scope of this levy system. With the recent boom in the digital media and machines market, this system no longer works and is suspended in de facto situations while SARAH, which was designated as a collective agency, has been dissolved. As of 2017, the system is under serious discussion regarding its reform or abolishment at the governmental council for copyright policy hosted by the Cultural Affairs Bureau.

7. Copyright reform

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

The amendment of the Copyright Act in 2012 became effective on 1 January 2013 and has been enforcing the following additional illegal conduct and criminal penalties:

- digital protective measures as provided by the Copyright Act can include not only the additional signal pattern for VHS media etc but also the encryption technology used for DVDs, etc. Any technical conduct to break down these protective measures is illegal
- a criminal penalty was adopted for the illegal downloading of digital content which, while available on the internet, normally requires payment.

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

After the Trans-Pacific Partnership (TPP) is ratified, will the criminal penalty be stricter than before due to the non-private complaint requirement? Under the current criminal penalty of the Copyright Act, the burden is on a private complainant to start a criminal prosecution.

Derivative works of digital content on the internet are currently illegal. This issue is currently under discussion by the governmental council.

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Lithuania

GLIMSTEDT, Asta Macijauskienė/Raminta Stravinskaitė

1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in the Republic of Lithuania is the Law on Copyright and Related Rights (LCRR). Its last revision came into effect on 1 August 2017.

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

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The subject matter to which copyright applies includes original literary, scientific and artistic works which are the result of the creative activities of an author, whatever the objective form of their expression.

The subject matter to which copyright applies shall comprise the following:

- books, brochures, articles, diaries and other literary works, whatever the form of their expression, including in electronic form, as well as computer programs
- speeches, lectures, sermons and other oral works
- written and verbal works of science (scientific lectures, studies, monographs, deductions, scientific projects and documented project material, as well as other works relative to science)
- dramatic, dramatic-musical, pantomime, choreographic and other works intended to be performed on the stage, theatrical productions, scenarios and shooting scripts
- musical works with or without accompanying words

- audiovisual works (motion pictures, television films, television broadcasts, video films, diafilms (filmstrips) and other works expressed by cinematographic means), radiophonic works
- works of sculpture, painting and graphic art, monumental decorative art, other works of fine art and works of scenery
- photographic works and other works created by a process analogous to photography
- works of architecture (projects, designs, sketches and models of buildings and other construction works, as well as completed buildings and other construction works)
- works of applied art
- illustrations, maps, charts, projects of gardens and parks, sketches and three-dimensional works relative to geography, topography and exact sciences
- other works.

The subject matter covered by copyright shall also include the following:

- derivative works created from the basis of other literary, scientific or artistic works (translations, dramatisations, adaptations, annotations, reviews, essays, musical arrangements, static and interactive internet homepages, and other derivative works)
- collections of works or compilations of data, databases (in machine-readable form or other form) which, by reason of the selection or arrangement of their contents, constitute an author's intellectual creations
- unofficial translations of legal acts, and of official documents of administrative, legal or regulative nature.

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

As mentioned in 2.1 above, all intellectual creations may be protected by copyright, whatever their kind, form of expression, merit or purpose. However, to benefit from copyright, the work must be original.

As a general rule, Lithuania provides copyright protection if:

- the rights holder is a national of Lithuania
- the work was first published in Lithuania.

The author of the work must be a natural person who has created the work. A natural person whose name is indicated on a work in the usual manner will be regarded as the author of the work. This rule applies even if the work is disclosed under a pseudonym, where it leaves no doubt as to the identity of the author.

When a pseudonym of an author appears on the work that raises doubt as to the identity of the author, or the name of an author does not appear on a work, the publisher whose name appears on the work is deemed to represent the author, and in this capacity the publisher is entitled to protect and enforce the author's rights until the author of such work reveals their identity and establishes their claim to authorship of the work.

Copyright does not protect:

- ideas, procedures, processes, systems, methods of operation, concepts, principles, discoveries or mere data
- legal acts, official documents, texts of administrative, legal or regulative nature (decisions, rulings, regulations, norms, territorial planning and other official documents), or their official translations
- official State symbols and insignia (flags, coats of arms, anthems, banknote designs, and other State symbols and insignia), the protection of which is regulated by other legal acts
- officially registered drafts of legal acts
- regular information reports on events
- folklore works.

2.3 What rights does copyright grant to the rights holder?

The LCRR 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 any of the following acts:

- reproduction of a work in any form or by any means
- publication of a work
- translation of a work
- adaptation, arrangement, dramatisation or other transformation of a work
- distribution of the original or copies of a work to the public by: sale or targeted advertising of the original or copies of the work encouraging users to purchase them; rental; lending; or by any other transfer of ownership or possession, as well as by exporting and importing
- public display of the original or copies of a work
- public performance of a work in any form or by any means
- broadcasting, retransmission of a work, as well as communication to the public of a work in any other way, including the making available to the public of a work over computer networks (on the internet).

The author of a work, independently of his or her economic rights and even after the transfer of these rights to another person, has the moral rights described in 2.4 below.

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 Republic of Lithuania, the following moral rights are provided for by the LCRR:

- the right to claim authorship of the work, by indicating the author's name in a prominent way on all copies of a published work, and in connection with any other public use of the work (the right of authorship)
- the right to claim or prevent mentioning of the author's name in connection with any use of the work, or the right to claim that the work be disclosed to the public under a pseudonym (the right to the author's name)
- the right to object to any distortion or other modification of a work or the title thereof, as well as to any derogatory action in relation thereto which would be prejudicial to the author's honour or reputation (the right to the inviolability of a work).

The moral rights of an author of computer programs and databases may not be used in a manner which unreasonably prejudices the rights of the holder of the author's economic rights in these computer programs and databases, including the right to carry out adaptation, alteration and distribution of these works at their discretion, with the exception of those cases where such actions would be prejudicial to the author's honour or reputation.

2.5 What is the duration of copyright in protected works?

An author's economic rights last for the life of the author and for 70 years after his or her death, irrespective of the date when the work is lawfully made available to the public.

Category of work
Joint work
Duration
The duration of the authors' economic rights in a joint work lasts for the life of co-authors and for 70 years after the death of the last surviving author.
Category of work
Anonymous and pseudonymous works
Duration
In case of anonymous and pseudonymous works, the term of protection of the author's economic rights lasts for 70 years after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his/her identity, or if the author discloses his/her identity during the prescribed period, the term of protection of the author's economic rights lasts for the life of the author and for 70 years after his/her death.
Category of work
Collective works
Duration
In the case of collective works, the term of protection of the authors' economic rights lasts for 70 years after the work is lawfully made available to the public. In cases where the natural persons who have created the work leave no doubt as to their identity, the duration of the authors' economic rights in a collective work lasts for the life of the co-authors and for 70 years after the death of the last surviving author.
Category of work
Audiovisual work
Duration
The term of protection of authors' economic rights in an audiovisual work extends over the lifetimes of the principal director, author of the screenplay, author of the dialogue, art director, director of photography and the composer of music specifically created for the audiovisual work, and for 70 years after the death of the last of them to survive.
Category of work
Music compositions with lyrics
Duration
Authors' economic rights to a music composition with lyrics last the lifetime of the authors of the whole musical composition with lyrics (the composer and author of the lyrics) and 70 years after the last surviving author's death. This is regardless of whether these persons are designated as co-authors, on the condition that their parts of the work (music or lyrics) were specially developed to be a musical composition with lyrics.

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

The protection of the author's moral rights is of unlimited duration.

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 this rule is where the work was made by a person in the course of their employment.

It is considered that the author of a work created in the execution of their duties or fulfilment of work functions is the natural person (or group of natural persons) who has created that work. However, an author's economic rights in a work (other than a computer program) created by an employee in the execution of their duties or fulfilment of work functions is transferred to the employer for a period of five years, unless otherwise provided for by an agreement. The owner of an author's economic rights in a computer program created by an employee in the execution of their duties or fulfilment of work functions is the employer, unless otherwise provided for by an agreement.

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

When a work is created by two or more natural persons in joint creative endeavour, they are regarded as co-authors, irrespective of whether such a work constitutes a single unitary whole, or consists of parts, each of which has an autonomous meaning. A part of a joint work is considered as having an autonomous meaning if it can be used independently of the other parts of that work.

Mutual relations of the co-authors and their remuneration are determined by an agreement between them. In the absence of such an agreement, copyright in the joint work is exercised jointly by the co-authors, and the remuneration is divided among them in proportion to the creative contribution of each co-author. None of the co-authors have the right to prohibit, without a valid reason, the use of the joint work.

Each co-author is entitled to use, according to their own discretion, the part of the joint work created by them and having an autonomous meaning, unless otherwise stated in the agreement between the co-authors.

A person who has rendered material, technical or organisational assistance in the process of the creation of a work is not considered to be its co-author.

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 Republic of Lithuania; 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?

The author's economic rights may be transferred by an agreement, by testamentary succession or by other procedures prescribed by law. The established practice is that an author's economic rights are transferred by a written agreement.

A copyright agreement must stipulate the following terms and conditions:

- the title of a work (titles of works by foreign authors shall be indicated in the original language), except the licences issued by associations of collective administration
- description of a work (type, title of work, principal requirements for the work)
- the author's economic rights that are being transferred or granted (modes of the exploitation of a work) and the type of licence (an exclusive or non-exclusive licence)
- the territory in which the transfer of the rights or the licence granting the right to exploit a work is valid
- the term of validity of the transfer of the rights or the licence
- the amount of remuneration, and the procedure for and terms of payment
- dispute settlement procedure and liability of the parties
- other conditions of the agreement.

It must be presumed that under a copyright agreement only as many rights are transferred as are necessary for the accomplishment of the purposes of a concrete agreement. If a copyright agreement does not specify the time limits of transfer or granting of the economic rights, a party to the agreement may terminate the agreement by informing the other party in writing of the termination thereof one year in advance. If a copyright agreement does not indicate the territory covered, it shall be considered that the economic rights are transferred or granted within the territory of the Republic of Lithuania.

If all an author's economic rights are transferred under a copyright agreement, it is considered that such rights are transferred only for the modes of use of a work stipulated in the agreement. If the modes of use of a work are not stipulated in a copyright agreement, it is considered that the copyright agreement is concluded only for those modes of use of the work necessary for the parties to achieve the purpose for which the agreement has been concluded.

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) have been infringed.

4.1 What acts constitute primary infringement of copyright?

Lithuanian law does not differentiate between primary and secondary infringements as, for example, UK law does.

4.2 What acts constitute secondary infringement of copyright?

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

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

Any limitations on economic rights are permitted only in those cases provided for in the LCRR. They must not conflict with the normal exploitation of a work and must not prejudice the legitimate interests of the author or other owner of copyright.

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
Reproduction of works for personal use
Description
It is permitted for a natural person, without the authorisation of the author or any other owner of copyright, to reproduce, exclusively for his or her individual use, not for direct or indirect commercial advantage, in a single copy a work published or communicated to the public in any other mode, where the reproduction is a single action.
Category of work
Quotation
Description
It is permissible, without the authorisation of the author or any other owner of copyright, to reproduce a relatively short passage of a published work or a work made available to the public, both in the original and translated language, in the form of a quotation in another work, provided that such reproduction is compatible with fair practice and its extent does not exceed that justified by the purpose. When quoting, mention must be made of the source and of the name of the author, if it appears thereon.
Act
Use of a work for the purposes of public security
Description
It is permissible, without the authorisation of an author or any other owner of copyright and without remuneration, to reproduce and communicate to the public a work for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.
Act
Display of works
Description
The public display of an original work of fine art or a copy thereof shall be permitted without the authorisation of the author or his/her successor in title, if a work has been sold or its ownership has been otherwise transferred to another natural or legal person and where the author or his/her successor in title knows or has reasonable grounds to know that such a public display (exhibition) of works constitutes part of the regular activities of the natural or legal person who has acquired the work.

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

It is prohibited to use any content without the owner's permission. The owner has exclusive rights to authorise or to prohibit any of acts described in 2.3 above.

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

Under the LCRR, an infringement of copyright is actionable by the owners of copyright, related rights and *sui generis* rights, licensees of exclusive rights, as well as associations which handle the collective administration of rights.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The LCRR provides for two types of civil remedies: protective and compensatory.

Protective remedies:

- recognition of rights
- injunction with the aim of prohibiting the continuation of unlawful acts
- preventive action
- redress of the infringed moral rights
- injunction against the intermediary
- interim measures (including freezing orders and cease and desist orders), measures for preserving evidence, recovery of evidence
- non-party disclosure
- corrective measures (including recall, removal from the channels of commerce and destruction of infringing articles).

Compensatory remedies:

- action for compensation for material damage
- action for payment of compensation
- action regarding the recovery of remuneration for the unauthorised use of the work
- action for compensation for non-pecuniary damage.

5.2 Are there any specific remedies for online copyright infringement?

The rights holders can seek an injunction from the court against an intermediary, ordering them to cease provision of services to third parties who infringe a copyright by using these services. An injunction to provide the said services includes suspension of a transmission of information related to the infringement of copyright or elimination of such information, if an intermediary has the technical means to carry this out, or removal of access to information that is infringing copyright.

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

There are four criminal acts established by the Criminal Code of the Republic of Lithuania in relation to copyright.

A legal entity might be also held liable for the commission of the below listed criminal acts.

The Criminal Code of the Republic of Lithuania provides the following types of criminal acts:

Criminal act
Misappropriation of authorship
Relevant intention, knowledge or belief
Direct intention
Penalty
• Community service • Fine • Arrest • Restriction of liberty, or • Imprisonment for a term of up to three years.
Criminal act
Reproduction of copyright work for commercial purposes or distribution, transportation or storage for commercial purposes of illegal copies thereof, where the total value of the copies exceeds the amount of €3,800.
Relevant intention, knowledge or belief
Direct intention
Penalty
• Community service • Fine • Restriction of liberty • Arrest, or • Imprisonment for a term of up to two years, or three years in the case that the total value of the copies exceeds the amount of €9,500.
Criminal act
Destruction or alteration of information about management of copyright
Relevant intention, knowledge or belief
Direct intention
Penalty
• Fine • Arrest, or • Imprisonment for a term of up to one year.
Criminal act
Unlawful removal of technical protection means of copyright

Relevant intention, knowledge or belief
Direct intention
Penalty
• Fine • Arrest, or • Imprisonment for a term of up to two years.

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

The time limit is three years to bring a claim for damages related to the copyright infringement and 10 years for other claims. Time begins to run from the date the rights holder found out, or should have found out, about 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 Lithuania, the general rule is that the unsuccessful party pays the costs of the successful party. The court in each individual case follows the recommendations as regards the amounts of ordered legal costs established by the Ministry of Justice of the Republic of Lithuania. Therefore, it is impossible to assess the typical percentage of recovered legal costs.

6. Enforcement

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

County courts have exclusive jurisdiction over claims worth €40,000 or more (except actions for compensation for non-pecuniary damages) and claims related to moral rights of authors. All other actions must be brought to district courts.

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

Administrative proceedings

A rights holder is entitled to initiate administrative proceedings in the case of infringement of copyright. The offender might be punished by a fine and forfeiture of articles.

Customs detention

A copyright holder may request suspension of the release or detention and destruction by Customs of infringing copies being imported into Lithuania.

Criminal proceedings

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

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

The Ministry of Culture of the Republic of Lithuania is the official government body responsible for the execution of the state policy on copyright and coordination thereof.

Rights management agencies, as non-governmental, non-profit organisations, play an important role in copyright protection and promotion.

There are no agency bodies that actively enforce copyright. The 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 the 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 transfer the right to administer their copyright to the collecting society.

The key collecting societies in each sector are as follows:

Agency
Association LATGA
Who it represents
Musicians, visual artists, audiovisual artists, artists in the dramatic arts, writers
Agency
Association of the Music Right Holders NATA
Who it represents
Musicians
Agency
Lithuanian Related Rights Association (AGATA)
Who it represents
Related rights holders
Agency
Related Rights Association GRETA
Who it represents
Related rights holders
Agency
Audiovisual Works Copyrights Association AVAKA
Who it represents
Audiovisual artists

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

Copyright levies are not payable in the Republic of Lithuania where an exception applies, such as the exception for private copying. The levies are paid in respect of devices and blank media used for personal reproduction of copyrighted works. The levies are paid by the vendors selling the equipment or blank media for the first time in the territory of the Republic of Lithuania.

7. Copyright reform

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

Reform of collective administration

LCRR has been harmonised with Directive 2014/26/EU of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

The key aspects of the reform are as follows:

- enabling collective management organisations to choose their legal form
- clear requirements in respect of the administration of property of collective management organisations, transparency and reporting
- enabling collective administration organisations to grant multi-territorial licences for online usage of music.

Stichting Brein v Ziggo

On 14 June 2017, in Case C 610/15 *Stichting Brein v Ziggo*, the CJEU explained that "the concept of 'communication to the public', within the meaning of Article 3 (1) of Directive 2001/29, 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 which, by means of indexation of metadata referring 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."

This was the first time at the European level that the liability of the operators of the online sharing platform for the copyright infringement has been considered. Until the adoption of the said judgment, CJEU mainly concentrated on the question of injunctions against intermediaries whose services are used by third parties for copyright violations.

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

Portability regulation

Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market has been adopted. The said regulation will become applicable in all EU Member States from 1 April 2018.

The portability regulation enables consumers to access their portable online content services when they travel in the EU.

Guidelines and principles for online platforms

On 28 September 2017, the EU Commission presented guidelines and principles for online platforms to increase the proactive prevention, detection and removal of illegal content inciting hatred, violence and terrorism online (*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling Illegal Content Online Towards an enhanced responsibility of online platforms*).

The guidelines will contribute to making the fight against illegal content more effective.

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Netherlands

Kennedy Van der Laan N.V., Alfred Meijboom/Lotte Oranje

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*). The Copyright Act was enacted in 1912. Since then, many changes have been made. A body of case law is available to interpret the legislation.

Because the Netherlands is a member of the European Union, the Copyright Act must be read and interpreted in accordance with European Directives and Regulations, such as the Copyright Directive (Directive 2001/29/EC of 22 May 2001). Therefore, directives were implemented in the Copyright Act and courts interpret the Copyright Act in accordance with European case law.

Apart from the copyright legislation, other laws are relevant. The Neighbouring Rights Act (*Wet op de Naburige Rechten*) contains rules for protection of preforming artists, producers of phonograms or films and broadcasting companies, and the Database Act (*Databankenwet*) provides protection for certain databases. These two Acts are relevant, but are technically not a part of copyright law. Therefore, they will be left out of this guide.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The categories of work that are protected by copyright are works of literature, science or art. These are very broad categories. Article 10 of the Copyright Act provides a non-exhaustive list of categories of works, 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 visual arts, relating to architecture, geography, topography or other sciences
- photographical works
- films
- works of applied arts and drawings and industrial designs
- computer programs, including preparatory materials

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

A work qualifies for copyright protection if it has an original character and carries the author's personal stamp. This means that the work may not be copied from another work and creative choices must have been made by the author. The European Court of Justice (ECJ) considered that a work must be the expression of the intellectual creation of its author. Both criteria have the same meaning in practice under Dutch law.

As a general rule, the Netherlands 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 the Berne Convention and/or the International Copyright Convention.

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 two broad rights to:

- reproduce the work, which means to copy, revise, adapt and translate a work
- publish the work, which means to make the work or copies thereof available to the public

What these rights imply is further explained in 4.1. Authors also have the moral rights described in 2.4.

The Copyright Act contains a few limitations to the exclusive rights, which shall be discussed in 4.3.

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 Netherlands, the following moral rights are provided by the Copyright Act:

- 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 the author, to object to amendment of the name of the work or in the indication of the author in the event that these are included on or in the work or have been published in connection with the 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 malformation, mutilation or other impairments of the work, which would result in defamation of the author or his/her reputation.
- these moral rights apply to all copyright works. For films, certain additional moral rights exist:
- the right to have the author's name mentioned in the film, including his/her capacity or contribution to the film
- the right to demand that the part of the film where the name of the author is mentioned is screened
- the right to object against mentioning the name of the author in the film, unless such objection is unreasonable.

Therefore, moral rights are rested in the actual author of the work, who can rely on his/her moral rights after assignment of the copyright in the work. Consequently, the acquirer of the copyright cannot exercise moral 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. In general, for works created on or after 29 December 1995, the duration of copyright protection is as follows:

Category of work
Works of literature, science or art (general)
Duration
Copyright expires 70 years from the end of the calendar year in which the actual author dies. Where a work has joint/co-authors, copyright expires 70 years from the end of the calendar year in which the last known actual author dies. Where the author's identity is unknown or the author is a legal entity, copyright expires 70 years from the end of the calendar year in which the work was first made available to the public. Copyright expires when a work has not been made available to the public within 70 years, from the end of the calendar year in which the actual author dies.
Category of work
Films

Duration
For films, the reference point is the end of the calendar year in which the last of the following persons die: the chief director, screenwriter, writer of the dialogue and the composer of film music. Copyright then lasts for 70 years after that date.

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

Moral rights expire when the author dies, unless the author passes the rights to a named beneficiary in their last will or handwritten disposition (*codicil*). The moral rights then expire when the copyright expires (see 2.5).

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 actual 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, in which case that person is regarded as the first owner
- was made by a person in the course of their employment. In those circumstances, the employer is the first owner
- has been made public by a legal entity in their name, without mentioning the name of the original author who created the work, unless such publication was unlawful.

The author is defined as the person who creates the work. The Copyright Act provides guidance for films, where the creator is less clear. Everyone who made a creative contribution to the film is regarded as an author. However, the exploitation rights from the authors are deemed to have been transferred to the producer of the film. Therefore, the authors remain first owner, but the producer can exercise the exclusive rights. This special arrangement is a legal presumption, and parties can agree otherwise in writing. The producer is required to pay the authors a fair compensation.

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 in the case of an assignment of a 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(s), 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 Netherlands and comes into existence automatically upon creation of the work. There is no registration system.

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

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

An exclusive licence of copyright must also be in writing, signed by the copyright owner.

A non-exclusive 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?

Some moral rights can be waived but they cannot be transferred, assigned or licensed. The author cannot waive his/her right to object to impairment of the work.

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. The exclusive rights include two broad categories; reproduction and publication.

4.1 What acts constitute infringement of copyright within the scope of reproduction?

Infringement occurs where a person performs any of the following acts without the consent of the rights holder:

- copying the work
- making an adaptation of the work, including translation, transliteration, or transposition.

4.2 What acts constitute infringement of copyright within the scope of publication?

Infringement occurs where a person performs any of the following acts without the consent of the rights holder:

- providing copies of the work to the public
- renting or lending the work to the public
- performing, showing, exhibiting or playing a copyright work in public
- otherwise communicating the work to the public
- doing any of the acts listed above in relation to an adaptation of the work.

It is sufficient that (a copy of) the work was made available to the public, even if members of the public did not take notice of the work.

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

There are a number of acts that can performed as an exception to the exclusive copyright. The Information Society Directive (2001/29/EC) contains what has been termed a 'shopping list' of exceptions and limitations, all of which were implemented in the Copyright Act. These permitted acts are wide in variety but often relate to very specific scenarios. They include:

Act
Making temporary copies
Description
A copy that is transient or incidental which: • 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 the sole purpose of legitimate use; and
- has no independent economic significance (eg internet service providers who use caching).

Act

Personal copies for private use

Description

The making of a copy made for the individual's personal and private non-commercial use. The exception to the rights holder's exclusive right is further restricted to a limited part of magazines, newspapers, books and musical works, unless there are no commercially available copies, or it concerns short articles or other pieces in newspapers and magazines.

Levies are in place for several devices whose function is to store personal copies.

This exception of private copying 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. Therefore, the Netherlands has adapted the scheme for levies.

Act

Research, education and private study

Description

Reproducing or publication of the work is permitted where a person is researching for a non-commercial reason or using it for supplementary notes to non-commercial education. In addition, a fair compensation must be paid to the copyright holder. It 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

Reporting current events

Description

A short recording, showing or presentation of a work in public in a photographic, film, radio or television report is permitted insofar as this is justified for giving a proper account of the current event that is the subject of the report. Adopting a news report from one medium by a separate medium is also allowed, when the copyright is not explicitly reserved.

When it is possible, the source, including the author's name, must be clearly indicated. The reporting must be done in a medium related to reporting news.

Act

Quotation

Description

Including where the use is for criticism and review, quotations are a permitted act provided they relate to a work that has already been lawfully made available to the public. One may also quote an image if it supports the accompanying text. The quotation must be in accordance with standards which are generally considered reasonable. For example, a quotation is not allowed when it is used for decoration only.

An acknowledgement of the 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. A form of humour must be present, but this does not have to relate to the adapted work or its maker. An acknowledgement of a copyright work used is not required.

It should be noted that parodied work does not excuse defamatory remarks or negate the moral right to object to derogatory treatment of a work.

Act

Music during worship

Description

Singing in a congregation with instrumental accompaniment during a service of worship is permitted without the rights holders' consent.

Act

Images of works of architecture and sculpture

Description
It is permitted to make images of buildings and sculptures situated in public places and as they are situated there. It is therefore not permitted to make changes to the buildings or sculptures or to make a three-dimensional copy of the architectural works unless permitted elsewhere (eg for an individual's personal non-commercial use or parody)

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 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 constitute a communication the public and infringe the rights of the rights holder.

The situation is different where the hyperlinked-to work infringes copyright. This is discussed further at 7.1 below.

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 of action.

5. Remedies

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 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 Copyright Act in relation to copyright. The main offences relate to intentionally selling or making available for sale copies of a copyright work but there are also offences for communicating the infringing copy to the public or spreading an adapted work. The sanction for committing a criminal offence in relation to copyright is likely to be a fine and/or a prison sentence.

Each offence requires a level of intention, knowledge or belief on the part of the culprit.

Criminal act
Intentional infringement of exclusive rights
Relevant intention, knowledge or belief
The intent (*opzet*) to infringe a person's copyright
Maximum penalty
Six months' imprisonment or a fine of €20,500 (natural persons) or €82,000 (companies)

Criminal act
Publicly offering, possessing for illegal purposes, importing, exporting or forwarding in transit, or keeping for profit an infringing copy of a work
Relevant intention, knowledge or belief
The intent (*opzet*) to do one of the above-mentioned acts
Maximum penalty
Six months' imprisonment or a fine of €20,500 (natural persons) or €82,000 (companies)

Criminal act
Publicly offering, possessing for illegal purposes, importing, exporting or forwarding in transit, or keeping for profit an infringing copy of a work
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright
Maximum penalty
Six months' imprisonment or a fine of €8,200 (natural persons) or €20,500 (companies)

Criminal act
Publicly offering, possessing for illegal purposes, importing, exporting or forwarding in transit, or keeping for profit any resources to unlawfully remove or evade technical security measures on software programs
Relevant intention, knowledge or belief
The intent (*opzet*) to do one of the above-mentioned acts
Maximum penalty
Six months' imprisonment or a fine of €20,500 (natural persons) or €82,000 (companies)

Criminal act
Infringement of the moral right to bring malformation, mutilation or other impairments to the work, which would result in defamation of the author or his/her character
Relevant intention, knowledge or belief
The intent (*opzet*) to infringe a person's moral right
Maximum penalty
Six months' imprisonment or a fine of €20,500 or €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 owner has knowledge of the damage and the person responsible for the damage.

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 Netherlands, the general rule is that the unsuccessful party pays the costs of the successful party. However, the courts have put together a list of indicative costs for 'standard' IP infringement proceedings. Unless the unsuccessful party does not oppose a specific costs order requested by the successful party 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 may 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?

In principle, the court of first instance is the district of the defendant's residence or, at the claimant's choice, the district where the infringement occurred. When a fast decision is desired, the claim will be brought before the court in preliminary relief proceedings (*voorzieningenrechter*).

When no fast decision is required, full proceedings on the merits can be brought before the district court. Appeal to the Appellate Court or, in latest stage, the Supreme Court is available.

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

The public prosecutor can bring criminal proceedings, on the grounds described in 5.3 above and pursue them through the criminal courts. In practice, unless it concerns large-scale counterfeit involving criminal money and/or other criminal activities, copyright infringement is not often prosecuted.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright?

There are no specific agencies responsible for promoting and/or enforcing copyright in the Netherlands. However, the agencies mentioned below at 6.4 have a certain responsibility for standing up for several authors.

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 those seeking them, copyright holders participate in collection schemes by signing up as members of collecting societies. Once members, they

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

The key collecting societies in each sector are as follows:

Agency
Lira
Who it represents
Writers
Agency
SENA
Who it represents
Artists and record producers (rights under the Neighbouring Rights Act)
Agency
Reprorecht
Who it represents
Authors of books, magazines, newspapers and other publications for copies of such works made by companies and governmental agencies
Agency
VEVAM
Who it represents
Directors
Agency
Leenrecht
Who it represents
Libraries
Agency
Pictoright
Who it represents
Illustrators, graphic artists and designers, photographers, architects
Agency
SEKAM
Who it represents
Producers of film and television works broadcast outside the Netherlands
Agency
Thuiskopie
Who it represents
It collects the private copy levies
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

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

Copyright levies are payable by manufacturers or importers of certain categories of hardware.

Copyright levies are not payable in the Netherlands where an exception applies.

7. Copyright reform

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

GS Media BV v Sanoma Media Netherlands BV (Case C-160/15)

Previously, in *Svensson* (Case C-466/12), the CJEU held that hyperlinking to works that are freely available on another website was not an act of 'communication to the public' and therefore did not constitute a copyright infringement. The proviso was that the hyperlink did not circumvent public access restrictions (eg a login page or paywall) and make the works freely available where previously they were not. In *GS Media BV v Sanoma Media Netherlands BV*, the CJEU considered whether hyperlinking to copyright-infringing content (ie content posted online without the consent of the rights holder) constituted a 'communication to the public' (Article 3 (1) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society).

The CJEU focused on the knowledge of the person hyperlinking to the infringing content. It decided that if the person "knew or ought reasonably to have known" that the hyperlinked-to content infringed copyright, then hyperlinking to that content was itself a 'communication to the public' and therefore an infringement of copyright.

The CJEU found that:

- where a person hyperlinks to infringing content for financial gain, it is presumed that the person knows the linked-to content is infringing, as that person is expected to have carried out the necessary checks to ensure the work hyperlinked to is not infringing (although it should be possible to rebut that presumption)
- where a person is notified of the fact that the hyperlinked-to content is infringing, hyperlinking to that content will constitute an infringement (this is good news for rights holders – notifying a person who has hyperlinked to their content could convert the hyperlink from non-infringing to infringing)
- where a person hyperlinks to copyright content in a way that circumvents the public access restrictions put in place by the site where the protected work is hosted, that will also constitute an infringement (as per the judgment in *Svensson*).

Digital Single Market Strategy for Europe

On 14 September 2016, the Commission published its proposed EU copyright reform package. A proposed directive on copyright in the Digital Single Market and a regulation are designed to ensure:

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

The proposals are designed to help copyright industries flourish in the Digital Single Market and to help European authors reach new audiences, while making European works widely accessible to European citizens. The aim is to ensure "a good balance between copyright and other public policy objectives such as education, research, innovation and the needs of persons with disabilities".

In addition, the Marrakesh Treaty for people with print disabilities will be implemented via Directive (EU) 2017/1564 of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and Regulation (EU) 2017/1563 of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled. Both the directive and the regulation entered into force on 12 October 2017.

7.2 What do you consider will be the top upcoming copyright development?

The directive on copyright in the Digital Single Market is still being debated and the European Parliament proposed a number of amendments. Considering these, it is likely that the directive will be published in 2018, introducing at least three new exceptions which will require amendment of the Dutch Copyright Act (as well as the Database Act), as follows:

- the right for research organisations, such as universities, to perform text and data mining in relation to works or other subject matter to which they have lawful access for the purposes of scientific research
- the use of works for the sole purpose of illustration for non-commercial teaching, if such use takes place either on the educational establishment's premises or via a secure closed network, and is accompanied by an indication of the source
- allowing cultural heritage institutions, such as public libraries and museums, to make copies of works which are permanently in their collections in order to preserve cultural heritage.

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New Zealand

Duncan Cotterill, Scott Moran

1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in New Zealand is the Copyright Act 1994 (Copyright Act).

The Copyright Act replaced and repealed the Copyright Act 1962, which in turn replaced and repealed the Copyright Act 1913. The previous Acts still apply where a work was created at a time when those Acts were in force and transitional provisions between the Acts can be relevant when considering older works.

As a common law legal system, New Zealand 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 New Zealand.

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, communication works and typographical arrangements of published editions. These 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 include tables, compilations and computer programs.

Dramatic works

Dramatic works include works of dance or mime, as well as scenarios or scripts for films.

Musical works

These are works consisting of music, without any words or actions that are intended to be performed with the music. Words intended to be spoken or sung with the music would be categorised as either literary or dramatic works.

There is copyright in the sound recording of a musical work but that is a separate and distinct right (see below).

Artistic works

A graphic work, photograph, sculpture, collage or model (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 includes paintings, drawings, diagrams, maps, charts, plans, engravings, etchings, lithographs, woodcuts and prints.

A work of artistic craftsmanship must have some level of skill or craftsmanship.

Sound recordings, films and communication works

A sound recording includes any recording of sounds capable of being reproduced. It does not matter what is on the recording as it is the recording itself that attracts copyright.

A film is a recording on any medium from which a moving image may by any means be produced and is itself separate from other copyright works that may underlie it, such as the soundtrack and script.

A communication work is a transmission of sounds, visual images or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme.

Typographical arrangements of published editions

This category covers 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.

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 is original. A work is original if the author (see 3.1 for how to decide on who is the author) has independently 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 requisite that work is of artistic merit. It is also not necessary for the whole of a work to 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, New Zealand provides copyright protection if the author is a national or resident of, or the work was first published in, New Zealand. However, due to international treaties, copyright for works created in New Zealand also automatically arises in most other countries in the world and vice versa.

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 rights to:

- copy the work
- issue copies of the work in public (whether by sale or otherwise)
- perform, show, play or communicate the work in public
- make an adaptation of the work or do any of the above in relation to the adaptation
- authorise another person to do any of the acts referred to above.

The author also has the moral rights described in question 2.4 (see 3.5 re succession).

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 New Zealand, the following moral rights are provided for by the Copyright Act:

- the right, once it has been asserted, to be identified as the author or director 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, with some exceptions detailed in the Copyright Act.

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 January 1995, the duration of copyright protection is as follows:

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 50 years from the end of the calendar year in which the author dies. Where a work has a joint author/co-author, copyright expires 50 years from the end of the calendar year in which the last known author dies. Where the author's identity is unknown, copyright expires 50 years from the end of the calendar year in which the work was first made available to the public by an authorised act. Note, however, that for artistic works which have been industrially applied the infringement term is shorter than the duration of copyright.
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 and films
Duration
Copyright expires 50 years from the end of the calendar year in which the recording or film is made or, if the recording or film is published by an authorised act, 50 years from the end of the calendar year in which it was so made available (whichever is later).
Category of work
Communication works
Duration
Copyright in a communication work expires 50 years from the end of the calendar year in which the communication work was first made available to the public. Copyright in a repeated communication work expires at the same time as copyright in the initial communication work expires.

Category of work
Typographical arrangement of published editions
Duration
Copyright expires 25 years from the end of the calendar year in which the edition 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 of the work and to privacy lasts for the duration of the copyright protection of the work.

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 exceptions to this rule are where (unless there is an agreement to the contrary):

- a literary, dramatic, musical or artistic work is made by a person in the course of his/her employment, in which case the employer is the first owner
- a photograph, computer program, painting, drawing, diagram, map, chart, plan, engraving, model, sculpture, film or sound recording is made pursuant to commission, in which case the commissioner is the first owner.

The author is defined as the person who creates the work. The Copyright Act provides guidance as to who is deemed to have created specific categories of work as follows:

- for literary, dramatic, musical or artistic work that is computer-generated, the person by whom the arrangements necessary for the creation of the work are undertaken
- for sound recordings or films, the person who undertakes the necessary arrangements for the making of the work
- for communication works, the person who makes the communication work
- for typographical arrangement of a published edition, 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 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(s).

If the contributions of each author are distinct then each distinct work will have separate copyright.

Joint owners generally hold copyright as tenants in common, as opposed to joint tenants. The Copyright Act holds that joint owners have their own independent rights with respect to their own aspect of copyright in the work. This is, of course, subject to any agreement between the parties.

A joint owner cannot grant a licence which is binding on its co-owners, and a co-owner can sue each of the co-owner(s) for infringement of copyright in circumstances where the co-owner(s) have done an act restricted by copyright without its licence.

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 New Zealand; it arises automatically upon creation of the work. There is no registration system.

A copyright notice is not required for the purposes of enforcement; however, use of a notice is recommended as it creates a presumption of ownership and of knowledge on the part of the defendant. In the absence of knowledge, a plaintiff is not entitled to damages but remains entitled to an account of profits.

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

Copyright is transmissible by assignment, testamentary disposition or other operation of law, and can be done wholly or partially.

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

A licence can be granted in writing or orally, except that an exclusive licence must be agreed to in writing.

3.5 Can moral rights be transferred, assigned or licensed?

Moral rights cannot be transferred, assigned or licensed, except that on the death of an author, moral rights will:

- pass on to the person to whom the moral rights have been specifically directed by testamentary disposition
- pass on to the person to whom copyright has passed as part of the estate; or
- be exercisable by the author's personal representative(s).

4. Infringement

Owners of copyright can take legal action if any of their exclusive rights (as set out in 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
- performing, showing, playing or communicating a copyright work in public
- making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation
- authorising another person to do any of the acts listed above.

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, other than pursuant to a copyright licence, with knowledge or reasonable grounds for such knowledge of infringement:

- imports an infringing copy of the copyright work other than for private and domestic use (though note that, in the case of sound recordings, films and computer programs, knowledge is assessed objectively, and infringement will be made out where the person ought reasonably to have known that the object in question was an infringing copy)
- possesses an infringing copy of a work in the course of business
- sells or lets an infringing copy of a work for hire
- offers or exposes an infringing copy of a work for sale or hire in the course of business
- exhibits in public or distributes an infringing copy of a work in the course of business
- distributes an infringing copy of a work to such an extent as to prejudicially affect the copyright owner
- provides means for making infringing copies by dealing in an object specifically designed or adapted for making copies of copyright work
- gives permission for use of premises for a performance that infringes the copyright
- provides an apparatus for playing or showing a performance of a copyright work in public.

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

The Copyright Act lists 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
Transient reproduction of work
Description
A copy that is transient or incidental which: • is an integral and essential part of a technological process for making or receiving a communication that does not infringe copyright, or enabling the use of, or lawful dealing in, the work, and • has no independent economic significance.
Act
Research or private study
Description
Fair dealing for the purpose of research or private study. Whether use amounts to 'fair dealing' depends on the purpose of the copying, the nature of the work, the nature of the copying, whether the work could have been obtained within a reasonable time for an ordinary commercial price, and the effect of the copying on the potential market for the work.
Act
Criticism, review and news reporting
Description
Fair dealing with a copyright work for the purpose of: • criticism or review, whether of that copyright work or another work, or of a performance of a work, accompanied by sufficient acknowledgement • reporting current events by means of a sound recording, film or communication work • reporting current events by any means (unless the work is a photograph), accompanied by sufficient acknowledgement.

Act
Incidental copying of copyright work
Description
The incidental copying of a work in an artistic work, a sound recording, a film or a communication work or the issue to the public of copies of an artistic work, the playing of a sound recording, the showing of a film, or the communication of a work to the public, in which a copyright work has been incidentally copied. Literary works cannot be incidentally copied, and musical works, words spoken or sung with music, sound recordings or communication works are not incidentally copied if deliberately done.

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

The New Zealand courts have not considered hyperlinking or framing.

It is likely New Zealand will follow the line of reasoning in the CJEU decision of *Nils Svensson v Retriever Sverige* (C-466/12), in that hyperlinking does not typically constitute fresh publication of a work, and linking to a work freely available on the internet would be permissible as it 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, as it appears from recent case law elsewhere, constitute a communication to the public and infringe the rights of the rights holder.

That said, in cases where hyperlinking causes users to be misled or deceived into thinking that the copyrighted material is owned by the person who published the hyperlink, action could be brought by the rights holder under the Fair Trading Act 1986 or the tort of passing off.

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 or exclusive licensee.

The exclusive licensee must be the exclusive licensee of the copyright allegedly infringed, and need not be the exclusive licensee of all rights in the relevant copyright work.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The Copyright Act provides the following remedies for infringement:

- interlocutory or final injunctions (including search orders and freezing orders)
- delivery up of infringing articles
- seizure of infringing articles
- forfeiture of infringing articles
- either compensatory damages or an account of profits arising from the infringement (though, where a defendant is an innocent infringer, an account of profits will be available to the plaintiff, but damages will not)
- nominal damages
- additional damages in light of the flagrancy of the breach or benefit accruing to the defendant by reason of the infringement.

5.2 Are there any specific remedies for online copyright infringement?

Sections 122A to 122U of the Copyright Act provide rights holders with a special regime for taking enforcement action against people who infringe copyright through file sharing.

At the instigation of rights holders, internet protocol address providers (IPAPs) must issue infringement notices to alleged copyright infringers.

There are three types of infringement notices that can be issued, given in the order of:

- detection notice
- warning notice
- enforcement notice.

Once an enforcement notice is issued, the rights holder may take enforcement action by seeking an order from:

- the Copyright Tribunal for up to NZ$15,000, or
- the District Court, requiring the IPAP to suspend the account holder for up to six months.

The Copyright Act excludes liability for internet service providers (ISPs) for copyright infringement:

- by users merely because the user has infringed, without more, or
- for storage of infringing material.

However, an ISP can be liable for storing infringing material if the ISP has knowledge or reason to believe the material infringes copyright in a work and has failed to delete the

material or prevent access to it as soon as possible after becoming aware of it. Rights holders can seek an injunction from the court ordering the ISP to remove the material.

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. These, and their penalties, are set out in the table below.

If an offence is committed by a company and it is proven that an individual officer of the company permitted the offence, had knowledge or could reasonably be expected to have knowledge of the offence and failed to take all reasonable steps to prevent it, then that officer can also be liable for the criminal act.

Criminal act
Making a copy of a copyright work for sale or hire
Relevant intention, knowledge or belief
The knowledge that the object is an infringing copy of copyrighted work. If the object is an illicit recording; knowledge that the recording is an illicit recording.
Penalty
If the object is an infringing object: A fine not exceeding NZ$10,000 for every infringing copy to which the offence relates (but not exceeding NZ$150,000 in respect of the same transaction), or Five years in prison. If the object is an illicit recording: A fine not exceeding NZ$5,000 for every illicit recording to which the offence relates (but not exceeding NZ$50,000 in respect of the same transaction), or Three months in prison.
Criminal act
Importing a copy of a copyright work into New Zealand other than for the person's private or domestic use
Relevant intention, knowledge or belief
The knowledge that the object is an infringing copy of copyrighted work. If the object is an illicit recording; knowledge that the recording is an illicit recording.
Penalty
If the object is an infringing object: A fine not exceeding NZ$10,000 for every infringing copy to which the offence relates (but not exceeding NZ$150,000 in respect of the same transaction), or Five years in prison. If the object is an illicit recording: A fine not exceeding NZ$5,000 for every illicit recording to which the offence relates (but not exceeding NZ$50,000 in respect of the same transaction), or Three months in prison.
Criminal act
Possessing a copy of a copyright work with a view to committing an infringing act in the course of business
Relevant intention, knowledge or belief
The knowledge that the object is an infringing copy of copyrighted work. If the object is an illicit recording; knowledge that the recording is an illicit recording.
Penalty
If the object is an infringing object: A fine not exceeding NZ$10,000 for every infringing copy to which the offence relates (but not exceeding NZ$150,000 in respect of the same transaction), or Five years in prison. If the object is an illicit recording: A fine not exceeding NZ$5,000 for every illicit recording to which the offence relates (but not exceeding NZ$50,000 in respect of the same transaction), or Three months in prison.
Criminal act
Selling or letting for hire or offering or exposing for sale or hire a copy of a copyright work in the course of business
Relevant intention, knowledge or belief
The knowledge that the object is an infringing copy of copyrighted work. If the object is an illicit recording; knowledge that the recording is an illicit recording.

Penalty
If the object is an infringing object: A fine not exceeding NZ$10,000 for every infringing copy to which the offence relates (but not exceeding NZ$150,000 in respect of the same transaction), or Five years in prison. If the object is an illicit recording: A fine not exceeding NZ$5,000 for every illicit recording to which the offence relates (but not exceeding NZ$50,000 in respect of the same transaction), or Three months in prison.
Criminal act
Exhibiting in public a copy of a copyright work in the course of business
Relevant intention, knowledge or belief
The knowledge that the object is an infringing copy of copyrighted work. If the object is an illicit recording; knowledge that the recording is an illicit recording.
Penalty
If the object is an infringing object: A fine not exceeding NZ$10,000 for every infringing copy to which the offence relates (but not exceeding NZ$150,000 in respect of the same transaction), or Five years in prison. If the object is an illicit recording: A fine not exceeding NZ$5,000 for every illicit recording to which the offence relates (but not exceeding NZ$50,000 in respect of the same transaction), or Three months in prison.
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 that the object is an infringing copy of copyrighted work. If the object is an illicit recording; knowledge that the recording is an illicit recording.

Penalty
If the object is an infringing object: A fine not exceeding NZ$10,000 for every infringing copy to which the offence relates (but not exceeding NZ$150,000 in respect of the same transaction), or Five years in prison. If the object is an illicit recording: A fine not exceeding NZ$5,000 for every illicit recording to which the offence relates (but not exceeding NZ$50,000 in respect of the same transaction), or Three months in prison.
Criminal act
Making or possessing an object specifically designed or adapted for making copies of a copyright work
Relevant intention, knowledge or belief
The knowledge that the object is to be used to make infringing copies for sale or hire or for use in the course of business.
Penalty
A fine not exceeding NZ$150,000, or Five years in prison.
Criminal act
Causing a work protected by copyright to be performed, played or shown in public
Relevant intention, knowledge or belief
The knowledge that copyright in the work would be infringed by the performance, playing or showing.
Penalty
A fine not exceeding NZ$150,000, or Five years in prison.
Criminal act
Communicating, playing or showing an illicit recording to the public
Relevant intention, knowledge or belief
Knowledge the recording is an illicit recording.
Penalty
A fine not exceeding NZ$150,000, or Three months in prison.

Criminal act
Copying a recording without the consent of the performer (otherwise than for that person's private use)
Relevant intention, knowledge or belief
Knowledge that the copy was made without the performer's consent.
Penalty
A fine not exceeding NZ$150,000, or Three months in prison.
Criminal act
Copying a recording for purposes different to which the performer gave their consent (otherwise than for that person's private use) Knowledge that the performer has not consented to the copying of the recording for different purposes.
Penalty
A fine not exceeding NZ$150,000, or Three months in prison.
Criminal act
Commercial dealing in devices, services or information designed to circumvent technological protection measures (TPMs)
Relevant intention, knowledge or belief
Knowledge that the TPM circumvention device will, or is likely to, be used to infringe copyright in a TPM work.
Penalty
A fine not exceeding NZ$150,000; and/or Five years in prison.
Criminal act
Commercial dealing in works where the copyright management information (CMI) has been removed or altered
Relevant intention, knowledge or belief
Knowledge that the CMI has been removed or modified without the authority of the owner and knowledge that dealing in the work will facilitate an infringement of the copyright.
Penalty
A fine not exceeding NZ$150,000, and/or Five years in prison.

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 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 New Zealand, the successful party will typically recover 70-80% of their costs.

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 value of any claim filed in the District Court must be lower than NZ$350,000. Any claim that exceeds this amount must be filed in the High Court.

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

Seizure

A copyright owner may lodge a notice in writing with the Chief Executive Officer of Customs, who then authorises a Customs officer to seize copies of allegedly infringing copyright material (similar to in other countries).

A copyright holder may request seizure by the New Zealand Customs Service of infringing copies being imported into New Zealand on the basis of that Customs Notice.

Criminal proceedings

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

Copyright Tribunal

An alternative method of bringing proceedings is the Copyright Tribunal. This is an independent tribunal which was originally established by the Copyright Act 1962. Its main role is to adjudicate in commercial licensing disputes between collecting societies and users of copyright material in their business, but it also hears applications about illegal uploading and downloading of copyrighted work (see remedies relating to online infringement at 5.2).

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

IPONZ

The New Zealand Intellectual Property Office (IPONZ) is the official government body responsible for intellectual property rights including patents, designs, trade marks and plant variety rights in New Zealand. It is an executive agency of the Department for Business, Innovation and Skills.

In relation to copyright, IPONZ is responsible for:

- implementing international IP agreements
- conducting dispute hearings about intellectual property registrations
- IP policy development
- educating businesses and consumers about IP rights and responsibilities
- supporting IP enforcement.

IPONZ is also empowered, through the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) to prosecute offences related to manufacturing, importing and selling counterfeited goods and pirated works.

New Zealand Copyright Council

The New Zealand Copyright Council is an independent, non-profit society that represents the interests of many copyright owners and advocates for the importance of copyright. It provides an online copyright advisory service, lobbies for law reform, publishes educational material on specific copyright matters, and maintains close affiliations with international and national copyright organisations around the world.

New Zealand Police

The New Zealand Police will also target criminal activity (see 5.3) but it is generally 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.

New Zealand Customs

New Zealand Customs also have enforcement powers under the Copyright Act (see 6.2).

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
Australasian Performing Rights Association (APRA)
Who it represents
Musicians
Agency
Australasian Mechanical Copyright Owners Society Ltd (AMCOS)
Who it represents
Musicians
Agency
Copyright Licensing New Zealand
Who it represents
Publishers and authors
Agency
Phonographic Performances New Zealand Ltd (PPNZ)
Who it represents
Musicians
Agency
Screenrights
Who it represents
Broadcasting
Agency
Recorded Music NZ
Who it represents
Recording labels and recording artists
Agency
Print Media Copyright Agency
Who it represents
Print media publishers
Agency
OneMusic
Who it represents
Record companies and musicians
Agency
Viscopy
Who it represents
Visual artists
Agency
Playmarket
Who it represents
Playwrights
Agency
Christian Copyright Licensing International
Who it represents
Musicians

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

Copyright levies are not payable in New Zealand.

7. Copyright reform

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

Copyright (Infringing File Sharing) Amendment Act 2011

The NZ Government introduced new enforcement measures against the unauthorised sharing of copyright material via the internet under the Copyright (Infringing File Sharing) Amendment Act 2011 (Amendment Act) (see 5.2).

The purpose of the amendment was to:

- deter file sharing that infringes copyright
- educate the public about the problem
- compensate copyright owners for damage sustained from copyright infringement by file sharing
- provide sanctions for serious copyright infringers
- limit ISP liability that may result from account holders' infringing file sharing.

Karum Group LLC v Fisher & Paykel Financial Services Ltd [2014] NZCA 389

A recent case law development of note is the Court of Appeal's decision in *Karum Group LLC v Fisher & Paykel Financial Services Ltd*, which confirmed that copyright protection in computer programs can extend to a program's underlying rules and structure, to at least a limited extent.

That said, the Court held that the scope of protection in such elements will be constrained, because plaintiffs will likely find it difficult to establish that the structural elements in computer programs are:

- expressions (not ideas)
- original
- substantively copied by the alleged infringer; and
- not merely for function, business rules, or 'matters of external necessity'.

So, while it's possible a New Zealand court may find copyright to exist in computer program elements that are considered functional or ideas rather than expression, the likelihood of successfully being able to enforce those rights appears limited.

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

Copyright and the TPP

New Zealand is a party to the Trans-Pacific Partnership (TPP), which has resulted in the instigation of the Trans-Pacific Partnership Agreement Amendment Act 2016 (TPPAA Act), which will come into force when/if the Trans-Pacific Partnership Agreement enters into force in New Zealand.

At this stage, it is uncertain whether the TPP will come into force.

Both New Zealand and Japan have ratified the TPP, but it won't come into force until it is ratified by four other signatories. The United States pulled out of the agreement in January 2017, which has stalled implementation, though the remaining members have said they remain committed to the deal.

However, if the TPP does come into force as it currently stands, the TPPAA Act will effect changes to our copyright laws. Most notably, the TPPAA Act would extend copyright by a further 20 years than under the current Act.

Copyright Review

In June 2017, the Minister of Commerce and Consumer Affairs released terms of reference for a review of the Copyright Act 1994.

The objectives of the review are to:

- assess how well the Copyright Act 1994 is meeting our objectives for copyright
- identify any barriers to achieving the objectives and how these affect creators, publishers, distributors, users and consumers
- put together a plan to address any issues that are identified.

An issues paper is due to be released for public consultation in early 2018.

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Norway

Advokatfirmaet Hjort DA, Monica Syrdal

1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in Norway is the Copyright Act of 1961, as later amended.

In addition to the wording of the Act, case law and the Ministry's preparatory work in respect of the Act and amendments thereto are also relevant sources when interpreting the law.

A proposal for a new Copyright Act was presented to the public in March 2016 and has been subject to extensive hearings and much debate. The purpose of the proposal was to modernise the legislation, but the Ministry has also proposed certain changes to the Act with the aim of strengthening the protection of the rights holders. A new Copyright Act may be expected in 2018 (see 7 below).

As a member of the European Economic Area (EEA), Norway is part of the EU internal market with respect to copyright issues. The EU Directives and Regulations relating to copyright are thus implemented (through the EEA Agreement) in Norwegian law. European Union legislation and jurisprudence from the European Court of Justice are therefore relevant sources of law in respect of the interpretation and application of Norwegian legislation. Norwegian courts can refer questions of law relating to the interpretation of EU/EEA copyright legislation to the EFTA Court.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

According to the Copyright Act, copyright shall apply to all literary, scientific or artistic works of any kind, irrespective of the manner or form of expression. The Act lists the following examples of work protected by copyright:

- writings of all kinds
- oral lectures
- works for stage performance, dramatic and musical, as well as choreography and pantomime; radio plays
- musical works, with or without words
- cinematographic works
- photographic works
- paintings, drawings, graphic and similar pictorial works
- sculpture of all kinds
- architectural works, drawings and models, as well as the building itself
- articles of artistic handicraft and applied art (the prototype as well as the work itself)
- maps, drawings and graphic and three-dimensional representations or portrayals of a scientific or technical nature
- computer programs
- translations and adaptations of the above-mentioned works.

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

A work may be protected by copyright if it is the result of an individual creative effort, requiring a minimum of individuality or originality of the work. It is not a requisite that the work has a certain artistic merit or quality. In general, the threshold for copyright protection can be considered as fairly low in Norway.

Norway provides copyright protection if the author is a Norwegian national or a person who is resident in Norway, or if the work was first published in Norway.

As a general rule, Norwegian copyright law also extends its protection to nationals from a state which is a signatory to one of the various international conventions which Norway is a party to on the condition that such state extends similar protection to Norwegian works as it does to works originating in its own country.

2.3 What rights does copyright grant to the rights holder?

The Copyright Act grants the rights holder the exclusive rights (before any licences are granted) to:

- produce copies of the work
- make the work available to the public (both in its original form and in an altered form) by distributing copies to the public, display the copies publicly or perform the work publicly.

The above described rights also include the right to lend or rent the work to the public and to make adaptations of the work. 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 Norway, the Copyright Act provides the following moral rights:

- the right to have the author's name stated in such manner as required by proper usage
- the right to object to alterations of a work or to making the work available in a manner or in a context prejudicial to the author's literary, scientific or artistic reputation or to his individuality, or prejudicial to the reputation or individuality of the work itself

Moral rights are applicable to all kinds of work that might be protected by copyright. The rights may not be waived by the author, unless the use of the work in question is of limited nature and extent.

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
Works protected by copyright (authors' rights)
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, the duration is 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
Performing artists
Duration
Rights expire 50 years from the end of the calendar year in which the performance took place.
Category of work
Producers of sound recordings and film
Duration
Rights expire 50 years from the end of the calendar year in which the recording is made or, if the recording is published later, 50 years from the end of the calendar year in which it was first published.
Category of work
Films
Duration
For films, copyright expires 70 years after the end of the calendar year when the last of the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic work, dies.
Category of work
Broadcasts
Duration
Rights expire 50 years from the end of the calendar year in which the broadcast was made.
Category of work
Photographs that are not protected by copyright
Duration
Rights expire 15 years from the end of the calendar year in which the photographer dies.

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

An author's moral rights subsist for the duration of the copyright.

After the death of the author, and regardless of whether the term of protection of copyright has expired, the Ministry of Culture may prohibit that a work is made available to the public in a manner or in a context which is prejudicial to the author's literary, scientific or artistic reputation or individuality. The same applies to use that violates the reputation or individuality of the work itself, or which may otherwise be considered harmful to general cultural interests. This provision is rarely used.

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 creator of the work, which is always a natural person. Copyright cannot originate in a legal person.

If the work is created by an employee in the course of his/her employment, copyright is presumed to have been transferred to the employer to the extent necessary to fulfil the purpose of the employment contract, taking into account the normal business operations of the employer at the time. Moral rights remain with the original author.

In respect of computer programs, the Copyright Act presumes that copyright in a computer program which is created by an employee as part of the execution of duties for which he/she is employed or in accordance with the instructions of their employer is transferred to the employer unless otherwise agreed.

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' contributions cannot be distinguished as separate works. Copyright can, in principle, also be jointly owned in the case of assignment of rights.

For the initial publication of a jointly owned work, consent of all authors must be given. The same applies to the publishing of such work in a different manner or in another form than previously. Each of the authors may, however, consent to a new publishing of the work in the same manner as it has previously been published.

Each of the authors may also pursue actions for 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 Norway; it arises automatically upon creation of the work. There is no registration system for copyright in Norway.

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

There are no formal requirements as to how to assign, transfer or license copyright. While oral or implied agreements are in principle valid, a written and signed agreement is advisable. Unclear copyright contracts where natural persons are original rights holders are generally interpreted in favour such natural persons.

3.5 Can moral rights be transferred, assigned or licensed?

Moral rights may not be transferred, assigned or licensed. Moral rights may only be waived by the author if the use of the work in question is of limited nature and extent.

4. Infringement

Authors can take legal action if any of their rights have been infringed.

Norwegian copyright legislation does not distinguish between primary and secondary infringement.

4.1 What acts constitute infringement of copyright?

An infringement occurs when a protected work is copied or made available (as described in 2.3) without the consent of the author. This can include acts such as physical or digital copying, making the work available to the public in physical or digital form, performing the work to the public or adapting the work etc.

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. Permitted acts include (amongst others):

Act
Making of temporary copies
Description
This includes making copies that are of transient or incidental nature and which: • are an integral and essential part of a technological process • have the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary, or • have no independent economic significance.
Act
Copies for private use
Description
The making of copies of a published work for private use, provided this is not done for purposes that are of a commercial nature. The exception does not confer a right to: • copy an architectural work through the construction of a building • make machine-readable copies of computer programs or of databases in machine-readable form • make copies of works of art by means of photocopying if the copy may be perceived as the original • take a cast or impression or by other similar means of reproduction if the copy may be perceived as an original. Further, the exception does not confer a right to engage third-party assistance in the reproduction of musical works, cinematographic works, sculpture, pictorial weavings and articles of artistic handicraft and applied art, or the artistic reproduction of other works of art.
Act
Educational purposes
Description
Teachers and pupils may make fixations of their own performances of works for educational use. A published work may be performed publicly at religious ceremonies and in an educational context.
Act
People with disabilities
Description
Certain rights of copying of literary, scientific and musical works to enable access for people with disabilities.
Act
Quotation
Description
A published work may be quoted, in accordance with proper usage and to the extent necessary to achieve the desired purpose.
Act
Parody
Description
There is no specific statutory provision governing parody, but parodies are generally considered as independent works.

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

Norwegian courts have in previous case law held that hyperlinking does not involve an act of copying and thus is not a copyright infringement in itself, but that hyperlinking to illegal content may involve so-called accomplice liability in respect of such illegal uploading of the material to the internet.

While the actual end result in terms of legality is not that different, the Norwegian courts have thus followed a different line of legal argument than what the CJEU has done in *Nils Svensson v Retriever Sverige* (C-466/12) (which introduced 'new public' as a new criterion in relation to Norwegian law) and later on in *BestWater* C-348/13 and *GS Media* (C-160/15). While it is not clear exactly how Norwegian courts will combine their previous jurisprudence with the CJEU's clarifications on EU/EEA law, Norwegian courts are, in our opinion, likely to follow the guidelines given by the CJEU.

See also section 7.

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

A licensee's authority to bring an infringement action depends on the type of licence involved and an interpretation of the licence agreement. Exclusive licensees are more likely to be in a position to bring an infringement action.

5. Remedies

5.1 What remedies are available against a copyright infringer?

Rights holders have the right to *inter alia* the following remedies:

- interim injunctions
- delivery up of infringing articles
- seizure of infringing articles
- forfeiture of infringing articles
- to elect between damages in the form of compensation of economic loss or profits arising from the infringement.

5.2 Are there any specific remedies for online copyright infringement?

Rights holders can seek an injunction from the court ordering the internet service provider (ISP) to disclose information about the identity of the provider of the infringing service or material.

Where it is evident that a website is, to a large extent, displaying infringing material, rights holders can also seek an injunction from the court ordering the ISP to block the website.

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

Most copyright infringements can amount to a criminal act provided that the offending act is carried out with (criminal) intent or negligence. The public prosecutor with the police decides whether criminal charges shall be brought against a potential infringer. The police will not act unless rights holders bring specific matters to their attention.

The sanction for committing a criminal offence in relation to copyright is a fine or imprisonment for a term not exceeding three months. If the infringement is wilful, and has been committed under particularly aggravating circumstances, the penalty shall be fines or imprisonment for a term not exceeding three years.

A corporation may be held criminally liable for a violation committed by a person acting on behalf of the company.

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, a monetary claim for compensation may be time barred after three years according to the Norwegian Act of limitation of claims. With regard to a non-contractual claim for damages, the time begins to run from the date the injured party gained or should have gained necessary knowledge of the claim and of the debtor.

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 Norway, the main rule is that the losing party pays what the court decides are the necessary legal costs of the successful party. It is subject to the discretion of the court to decide what costs are necessary, depending on, amongst other things, the nature and complexity of the case, hours spent and the amount involved. The court may also decide to exempt the opposite party from liability for legal costs in whole or in part if the court finds that weighty grounds justify exemption.

For claims worth up to NOK125,000, compensation for legal costs is limited to 20% of the amount in dispute, and never more than NOK25,000.

6. Enforcement

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

Copyright claims are filed before the ordinary Norwegian courts.

The courts have a small claims track for claims worth up to NOK125,000.

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

Seizure

A copyright holder may request seizure by the Norwegian Customs authorities in the case of infringing copies being imported into Norway.

Criminal proceedings

A copyright infringement can be reported to the police. The police prosecutor will decide whether criminal proceedings shall be pursued though the courts.

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

The Norwegian Ministry of Culture is the official government body responsible for copyright regulation in Norway.

There are no agency bodies that actively enforce copyright. The Norwegian police are responsible for any criminal charges in relation to copyright infringement (see 5.3 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 copyright necessitates consent from the rights holder.

As a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to all those seeking them, many copyright holders participate in collection schemes by signing up as members of the collecting societies. Once members, they may transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent. Other organisations only provide recommended terms and conditions for their members, but do not license rights on their members' behalf.

There are more than 35 organisations representing rights holders in Norway, including collecting societies. The most important organisations/societies are as follows:

Agency
Gramo
Who it represents
Performing artists' and phonogram producers' rights in relation to sound recordings
Agency
TONO
Who it represents
Music composers and authors of lyrics
Agency
NCB
Who it represents
Mechanical reproduction rights for music composers and authors of lyrics
Agency
Fondet for utøvende Kunstnere (FFUK)
Who it represents
FFUK is a fund that collects levies for use of certain performances not protected by copyright
Agency
BONO
Who it represents
Visual artists
Agency
Norwaco
Who it represents
Broadcasting retransmission rights
Agency
Kopinor
Who it represents
Authors and publishers for copying purposes
Agency
Den norske forfatterforening
Who it represents
Writers
Agency
IFPI
Who it represents
International music producers
Agency
Directors Guild of Norway
Who it represents
Directors
Agency
Norsk Filmforbund
Who it represents
Film workers, including directors, actors, cameramen etc

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

Copyright levies are not payable in Norway. For private copying, the authors receive compensation through annual grants via the State's annual budget.

7. Copyright reform

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

The most important copyright development in Norway is the proposal for a new Copyright Act. The aim of the proposal is to modernise the existing Act from 1961 and make it more accessible to the public.

The Ministry of Culture has proposed some changes that have caused much controversy between rights holders and users of rights, such as broadcasters and other media companies, distributors etc. The majority of the proposed changes are favourable to rights holders. Users claim that the proposal shifts the balance between the parties to an unreasonable extent and that the proposal (if implemented) will reduce investment initiatives in the sector to the detriment of both individual rights holders and professional media companies.

The proposed material changes to the Act include *inter alia*:

- new principles for contract interpretation of copyright licences and other copyright agreements that favour the rights holder and deviate from general Norwegian contract principles
- new principles for the burden of proof in copyright disputes that deviate from general Norwegian dispute law principles
- introduction of statutory provisions regarding transfer of rights in employment relationships
- introduction of a right of termination if licensed rights have not been exercised by the licensee after three years
- introduction of a new extended collective licence for audiovisual rights
- introduction of statutory provisions regarding rights holders' right to reasonable remuneration
- harmonising the sanctions for copyright infringement with the sanctions applicable to industrial IPR, hereunder a right of 'double' compensation for certain copyright infringements.

News media entities have also expressed strong objections to several minor changes on, for example, quotations, use of pictures in relation to media coverage, certain limitations to the private use exception etc, which they claim will limit the constitutional rights to information and freedom of expression.

A proposal for the new Copyright Act was presented to the Norwegian Parliament in spring 2017. Due to the controversy and debate following the proposal, Parliament eventually decided that it was not ready to vote on it before the general election that was held later that year. Parliament is expected to pass a new Copyright Act in 2018.

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Russia

Pepeliaev Group, Anastasiya Abaeva/Yuri Yahin/Tamara Gvimradze

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 are 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) and the *Review of judicial practice in cases related to the resolution of disputes on the protection of intellectual property rights* (approved by the Presidium of the Russian Supreme Court on 23 September 2015).

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.

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, visual arts used in geography, topology etc.

Other works, given that the list of objects of author's rights is open.

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 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 follows:

Category of work
Literary works (including computer programs), dramatic, choreographic, musical, audiovisual, artistic works, works of crafts and scenic design, architectural works, photographical 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. 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.

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.

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 licences 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.

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 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: • 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 • reproduction 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.

4.3 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 5.2.

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.

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 Russian Anti-Piracy Law, which was implemented step by step during 2014 and 2015, 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* (the 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 RUB100,000)
Relevant intention, knowledge or belief
Direct intention
Penalty
Criminal sanctions include payment of a fine up to RUB200,000; 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: • it has caused damage at an especially large scale (exceeding RUB1m) • it is committed by an organised gang,or • it is 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 RUB500,000 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 RUB100,000) 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 RUB200,000 or six months' correctional labour or arrest at the discretion of the judge.

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. 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.

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 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 RUB10,000 to RUB5m 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 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? 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 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: • public performance and broadcasting of musical works • public performance and broadcasting of musical works used in audiovisual works.
Agency
Russian Union of Rights 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. For more information, please refer to 6.5.
Agency
Non-commercial partnership "UPRAVIS"
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 Rights 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. Copyright reform

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

New order has been initiated in respect of disputes between rights holders (legal entities)

From 1 July 2017, a legal entity or individual entrepreneur whose exclusive rights have been violated by another legal entity or individual entrepreneur must send a cease and desist letter before filing a lawsuit with the court.

This only applies to cases of damages refunds and compensation. It is not required to file a cease and desist letter before filing a claim for recognition of the exclusive right, suppression of actions that violate or threaten to violate the exclusive right, or for the seizure of the digital media, or the seizure and destruction of funds used or intended to be used to infringe exclusive rights.

Higher Court's explanations on the free use of objects of copyright

On 25 April 2017, the Higher Court issued additional explanations on the free use of objects of copyright for cultural, educational, informational and scientific purposes. Under current legislation, such a use (in different forms, including quotation) is allowed without the author's consent or remuneration being paid. However, such a use must be accompanied by a reference to the author and source of the quotation.

The Higher Court has specifically indicated that quotation may only be applied to text and statements and may not relate to photos and other graphical objects of copyright.

However, the Higher Court has pointed out that all objects of copyright, including photos, are subject to free use under the following circumstances:

- the object is used only for cultural, educational, informational and scientific purposes
- the author and source of borrowing are clearly indicated
- the volume of such a borrowing is justified by its purpose.

Also, quotation is applicable to all objects, including photos that have become publicly available on lawful grounds.

Anti-piracy legislation amended

New regulations on the internet have been introduced to protect holders of copyright and related rights online. These new provisions continue the trend set in Russian legislation by the Anti-Piracy Acts, successfully enforced in 2013-2016, which included widening the list of objects of anti-piracy legislation to almost all objects of copyright (except for photos), and introducing the simplified procedure of actions against copyright infringement, preliminary injunctions.

Under these new regulations, the governmental agency *Roskomnadzor* is entitled to demand blocking a website within 24 hours of receiving a specific notice. Such a notice must contain proof of numerous violations of copyright and related rights on the given website.

Another issue is the existence of so-called 'mirror' sites that derive from the blocked site and allow internet users to gain access to information posted on the initial site that has been blocked.

The term 'copy of a blocked site' has been introduced. It can be defined as a site confusingly similar to the one blocked due to numerous violations of copyright and related rights. Such a site can be blocked within 24 hours upon the application of *Roskomnadzor*.

Apart from that, the law specifically forbids the activity of companies that provide services aimed at overcoming such blocking.

Roskomnadzor is also obliged to compile and publish a list of all blocked internet resources on its own website.

These provisions were enacted from 1 October 2017.

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

Widening the rights of directors of stage performances/shows

Amendments to the Civil Code of the Russian Federation have been made to protect the rights of the directors of stage performances. These amendments have already been accepted and will come into force on 1 January 2018.

The changes are aimed mainly at strengthening the mechanism for protecting the related rights (part of copyright) of stage directors of performances. Here are some of them:

- the terms 'performance' and 'show' are separated. Shows can only be reproduced and spread with the use of technical equipment. Performances can be repeated in public and be recognised by the audience

- the director of a performance/show gains the right of the inviolability of the performance/show; ie the performance/show is regarded as an independent object of copyright. For this, a new term has been introduced: 'public performance on stage'. It is related to the use of performance. The performer also gains the right to the inviolability of his/her individual acting in the public performance
- the right to publicly perform a performance/show (including live performance) is now indicated as a separate exclusive right to the performance/show
- a provision has been introduced on when the period of protection of the exclusive right of the director to the performance begins. Such period is determined based on the date of the first public performance of the production.

Amendments regarding the rights and obligations of collective rights management agencies will be enacted from May 2018.

These amendments are aimed at giving maximum protection to authors and users of exclusive rights and they clarify the provisions regarding the structure of such agencies.

The amendments establish that the collective rights management agencies may not refuse to conclude an agreement with the user of exclusive rights or other person obliged to pay funds for payment of remuneration without sufficient grounds.

The Government of the Russian Federation establishes strict rules of collecting and spending the income of such agencies through a system of funds and supervisory boards.

Collective rights management agencies shall also be obliged to consult rights holders online about the use of rights, the amount of the collected remuneration and the amounts withheld from such collected remuneration.

Also, the provisions of the Civil Code are supplemented by a rule establishing the procedure for allocating remuneration that is not claimed by the rights holder within three years.

Along with that, the Code on Administrative Violations is supplemented by an Article that establishes administrative responsibility of collective rights management agencies for any violation of their obligations.

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South Africa

Fairbridges Wertheim Becker, Waheeda Shreef/Gaby Meintjes

1. Legislation and regulations

1.1 What are the main sources of copyright law?

The main source of copyright legislation in South Africa (SA) is the Copyright Act 98 of 1978 (the Act) as amended from time to time and the Regulations issued in terms of the Act. The Act was last amended by the Companies Act 71 of 2008 with effect from 1 May 2011.

As a common law legal system, SA 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 SA.

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 works, musical works, artistic works, sound recordings, cinematograph film, broadcasts, programme-carrying signals, published editions, and computer programs. These are described in the Act as follows:

Literary works

Includes, irrespective of literary quality and in whatever mode or form expressed, novels, stories, poems, dramatic works, stage directions, cinematographic film scenarios, broadcast scripts, textbooks, treaties, histories, biographies, essays, articles, encyclopaedias, dictionaries, letters, reports, memoranda, lectures, speeches, sermons, tables and compilations (including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but not including a computer program).

Musical works

A musical work is a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music. The words or actions intended to be sung, spoken or performed with the music may be protected separately from the musical work as literary works and not as musical works or part of a musical work. Musical works also exclude sound recordings.

Artistic works

Paintings, sculptures, drawings, engravings, photographs, works of architecture (buildings or models of buildings), and works of craftsmanship.

An artistic work need not display any aesthetic quality to be classified as an artistic work.

Sound recordings

This means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a soundtrack associated with a cinematograph film. Soundtracks associated with cinematograph films enjoy copyright protection as part of the cinematograph film itself.

Cinematograph films

Cinematograph film means any fixation or storage by any means whatsoever on film or any other material of data, signals or a sequence of images capable, when used in conjunction with any other mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a soundtrack associated with the film, but shall not include a computer program. Video tapes and video games are protected as cinematograph films.

Broadcasts

The term broadcast, when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which takes place by means of electromagnetic waves of frequencies of lower than 3,000 GHz transmitted in space without an artificial conductor; and is intended for reception by the public or sections of the public; and includes the emitting of programme-carrying signals to a satellite; and, when used as a verb, shall be construed accordingly.

Copyright subsists separately in the broadcast even though the broadcast may contain other individual copyrighted works. A broadcast is subject to copyright despite the fact that it is in immaterial form.

A broadcast is deemed to have been made at the time at which it was first broadcast and qualifies from that moment as an object of copyright.

Programme-carrying signals

Programme-carrying signal means a signal embodying a programme which is emitted and passes through a satellite. A signal is an electronically generated carrier capable of transmitting programmes. A programme is a body of live or recorded material consisting of images or sounds or both, embodied in a signal. A signal transmitted to and relayed by a satellite becomes a programme-carrying signal once it has passed through the satellite.

The protection is intended to prevent the interception of signals – interception constitutes copyright infringement. The author of the programme-carrying signal is the person who first transmits the signal to a satellite.

Published editions

Published edition means the first print by whatever process of a particular typographical arrangement of a literary or musical work. Copyright in a published edition is additional to, and subsists independently of, any copyright in the basic literary or musical work from which the published edition is derived.

Copyright in a published edition concerns the typographical arrangement of that edition. For the typographical arrangement of the edition to enjoy copyright, however, it must be original and not a reproduction of some previous edition of the same literary or musical work.

Computer programs

This means a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result.

It is not a requirement that the result be correct (the result can be incorrect); it suffices that the program brings about a result to be eligible for copyright.

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

For the work to enjoy copyright it must:

- fall within the categories listed above (literary works, musical works, artistic works, sound recordings, cinematograph film, broadcasts, programme-carrying signals, published editions and computer programs)
- it must be original. Originality does not mean that the work must be novel or new. The work must be the author's own creation, and its production must require a substantial degree of skill, judgement or labour
- the work must be reduced to a material form. Broadcasts and programme-carrying signals are exempt from the requirement of being reduced to a material form.

The work will be eligible for copyright protection even if the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.

In addition to the above, the work must have been made by either a qualified person or first published in South Africa.

A qualified person, in the case of an individual, means a person who is a South African citizen or is domiciled or resident in South Africa or, in the case of a juristic person, a body incorporated under the laws of South Africa, or a citizen of or person domiciled or resident in a member country of the World Trade Organization (WTO).

A work will be deemed to have been published if copies of such work have been issued to the public with the consent of the owner of the copyright in the work in sufficient quantities to reasonably meet the demands of the public, having regard to the nature of the work. Publishing in South Africa qualifies as first publication if it takes place within 30 days of an earlier publication elsewhere.

Copyright protection is conferred on works made by or under the direction or control of the State or any prescribed international organisation, provided the work is original and in material form.

A work of architecture erected in South Africa or any other artistic work incorporated in a building or any other permanent structure in South Africa shall be eligible for copyright, regardless of whether the author was a qualified person.

2.3. What rights does copyright grant to the rights holder?

The Act recognises the authors' economic and moral rights. It vests the exclusive rights to do or to authorise the doing of any of the following acts in South Africa upon the copyright holder (before any licences are granted).

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 50 years from the end of the calendar year in which the author dies. Where a work has a joint author/co-author, copyright expires 50 years from the end of the calendar year in which the last known author dies. Where the author's identity is unknown, copyright expires 50 years from the end of the calendar year in which the work was first made available to the public by an authorised act. Note, however, that for artistic works which have been industrially applied the infringement term is shorter than the duration of copyright.
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 and films
Duration
Copyright expires 50 years from the end of the calendar year in which the recording or film is made or, if the recording or film is published by an authorised act, 50 years from the end of the calendar year in which it was so made available (whichever is later).
Category of work
Communication works
Duration
Copyright in a communication work expires 50 years from the end of the calendar year in which the communication work was first made available to the public. Copyright in a repeated communication work expires at the same time as copyright in the initial communication work expires.
Category of work
Typographical arrangement of published editions
Duration
Copyright expires 25 years from the end of the calendar year in which the edition was first published.

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 South Africa, the following moral rights are provided for by the Act:

- the right to be identified as the author of a copyright work
- the right to object to derogatory treatment of the copyright work
- the right to object to any distortion, mutilation or other modification of the work which is prejudicial to the author's honour and reputation.

Authors' moral rights comprise their paternity right and integrity right and arise only if a work is copyrightable. Moral rights are concerned with the relationship between authors and their works and are distinguished from personality rights. Only the authors of literary, musical and artistic works, cinematograph films or computer programs and works associated with computer programs enjoy moral rights.

2.5. What is the duration of copyright in protected works?

Copyright is of limited duration. When the term of copyright expires the work is no longer protected; it falls into the public domain and anyone may freely copy it.

Category of work
Literary, musical and artistic works
Duration of copyright
Copyright endures for the lifetime of the author and for a further period of 50 years commencing at the end of the year in which the author dies. But if, before the death of the author, a literary, musical or artistic work or adaptation of it has not been published, performed in public, broadcast or offered for sale to the public in the form of a record, copyright continues to subsist for a period of 50 years from the year in which the first of these acts was done.
Category of work
Cinematograph films, photographs, and computer programs
Duration of copyright
Copyright in cinematograph films, photographs and computer programs subsists for 50 years from the end of the year in which the work is made available to the public with the consent of the copyright owner or first published, whichever term is longer. If not so made available or published within 50 years of the making of the work, copyright subsists for 50 years from the end of the year in which the work was made.
Category of work
Sound recordings
Duration of copyright
Copyright endures for a period of 50 years from the end of the year in which the sound recording is first published.
Category of work
Broadcasts
Duration of copyright
Copyright endures for a period of 50 years from the end of the year in which a broadcast first takes place.
Category of work
Programme-carrying signal
Duration of copyright
Copyright endures for a period of 50 years from the end of the year in which the programme-carrying signals are emitted to a satellite.
Category of work
Published editions
Duration of copyright
Copyright endures for a period of 50 years from the end of the year in which the edition is first published.
Category of work
Anonymous and pseudonymous works
Duration of copyright
Copyright in an anonymous or pseudonymous work subsists for 50 years from the end of the year in which the work is made available to the public with the consent of the copyright owner or from the end of the year in which it is reasonable to presume that the author died, whichever term is the shorter. If the identity of the author becomes known before the expiry of this period, the term of the copyright is 50 years from the end of the year of the author's death.
Category of work
Works of joint authorship
Duration of copyright
Copyright in works of joint authorship subsists for a period of 50 years from the end of the year in which the last surviving contributing author dies.

In the case of joint authorship of anonymous and pseudonymous works, copyright endures for a period of 50 years calculated either from the end of the year in which the work was lawfully made available to the public or from the end of the year in which it is reasonable to presume that the last surviving author died, whichever term is the shorter.
Category of work
Works made by or under the control of the State
Duration of copyright
Copyright in literary, musical or artistic works (excluding photographs) so made endures for a period of 50 years from the end of the year in which the work is first published.

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

The Act is silent on this issue. There is an opinion that moral rights endure for the full term of the copyright in accordance with Article 6 *bis* of the Berne Convention.

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 and/or the co-authors, in the case of joint authorship.

Where a literary or artistic work is made by an author in the course of their employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall be the owner of the copyright in the work insofar as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the owner of any copyright subsisting in the work.

Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, unless he or she was doing so in the course of their employment, be the owner of any copyright subsisting therein.

Ownership of copyright in any work made by or under the direction or control of the State or such international organisation initially vests in the State or the international organisation concerned, and not in the author.

3.2 Who is the author?

'Author' in relation to

- literary, musical or artistic works, means the person who first makes or creates the work
- photographs, means the person who is responsible for the composition of the photograph
- sound recordings, means the person by whom the arrangements for the making of the sound recording were made
- cinematograph films, means the person by whom the arrangements for the making of the film were made
- broadcasts, means the first broadcaster
- programme-carrying signals, means the first person emitting the signal to a satellite
- published editions, means the publisher of the edition
- literary, dramatic, musical or artistic work or computer program which is computer-generated, means the

person by whom the arrangements necessary for the creation of the work were undertaken

- computer programs, the person who exercised control over the making of the computer program.

3.3. 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.

Co-ownership, ie ownership of an undivided share of the whole copyright in a work, must be distinguished from ownership of a part of the copyright in a work. In the latter situation, an owner of a divided share of the complete copyright enjoys unqualified rights of ownership in respect of that part of the copyright.

A co-owner of copyright in the strict sense must have the consent of the other co-owners in order to use or exploit the rights in his copyright, either himself or through a licensee. Each co-owner can, however, enforce the copyright without the co-operation of the other co-owners.

3.4. 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 SA; it arises automatically upon creation of the work. There is no registration system. It suffices if the work meets the requirements in 2.2 above.

However, one can register a cinematograph film, which is the only copyright work that can be registered in South Africa. Such registrations are governed by the Registration of Copyright in Cinematograph Films Act 62 of 1977 and the Regulations relating thereto. The main purpose of registration is to easily and effectively provide proof of the copyright owners' rights, which would assist them when necessary to enforce their rights in case of a dispute or litigation.

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

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

A non-exclusive licence to do an act which is subject to copyright may be written or oral, or may be inferred from conduct, and may be revoked at any time, provided that such a licence granted by contract shall not be revoked, either by the person who granted the licence or his successor in title, except as the contract may provide, or by a further contract.

3.6. 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. Copyright infringement may be direct or indirect.

4.1. What acts constitute direct infringement of copyright?

Direct infringement is when an infringer commits any of the acts specifically designated in the Act as acts which, in relation to the particular category of work concerned, are the sole prerogative of the copyright owner to do or authorise. For example:

- 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.

Direct 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 an intention to infringe that right.

4.2. What acts constitute indirect infringement of copyright?

Indirect infringement is when the infringer, while not actually committing any of the acts so designated, knowingly does something to further the commission of any of them, for example he or she:

- imports, possesses, exhibits, 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 a place of public entertainment for a performance that infringes the copyright
- supplies apparatus for playing recordings that would show a copyright work in public
- gives permission, as an occupier of premises, for such apparatus to be brought onto the premises
- 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)?

The Act curtails the copyright owner's monopoly on exploitation of the copyright in a particular work, in that under certain circumstances it, for example, permits other persons to make copies of the work without the copyright owner's prior permission. These exceptions are commonly referred to as statutory defences to actions for copyright infringement. They include (amongst others):

Act
Making of temporary copies
Description
A copy that is transient or incidental which: • 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, and • has no independent economic significance (eg internet service providers who use caching).
Act
Personal or private use
Description
Reproducing an illustration or drawing from a work for a *public* lecture on a particular topic constitutes personal use (but not private use since the work is used for a public lecture). Private use does not extend beyond the user's domestic circle; for example, reproduction of a drawing from a book in order to practise drawing.
Act
Research and private study
Description
Research is permitted where a person is researching for a non-commercial reason. 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 of another work or performance, provided the copyright work has been made available to the public. An acknowledgement of any copyright work used in a criticism or review is required.
Act
Quotation
Description
Including where the use is for criticism and review, quotations are a permitted act provided they relate to a work that has already been 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 negate the moral right to object to derogatory treatment of a work.
Act
Reproduction authorised by regulation
Description
Reproduction may be made as prescribed by regulation provided that it is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.
Act
Judicial proceedings
Description
Reproduction of the work for purposes of judicial proceedings or report of judicial proceedings.

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

Yes, online service providers are allowed to do so. Provided that the online service providers meet the prescribed statutory requirements, they are not liable for damages incurred by a person if they refer or link users to a webpage containing an infringing data message or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hyperlink, where the online services providers –

- do not have actual knowledge that the data message or activity relating to the data message is infringing the rights of a person
- are not aware of the facts or circumstances from which the infringing activity or infringing nature of the data message is apparent
- do not receive financial benefit directly attributable to the infringing activity, and
- remove or disable access to the reference or link to the data message or activity within a reasonable time after being informed that the data message or activity relating to such data message infringes the rights of a person.

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

Yes, an exclusive licensee and an exclusive sub-licensee shall have the same rights of action and be entitled to the same remedies as if the licence were an assignment, and those rights and remedies shall be concurrent with the rights and remedies of the owner of the copyright under which the licence and sub-licence were granted.

Before an exclusive licensee or sub-licensee institutes proceedings as provided above, he or she shall give notice in writing to the owner of the copyright concerned of the intention to do so, and the owner may intervene in such proceedings and recover any damages he or she may have suffered as a result of the infringement concerned or a reasonable royalty to which he or she may be entitled.

5. Remedies

5.1. What remedies are available against a copyright infringer?

The 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 infringer to have the infringing act removed from their webpage and/or refrain from the infringing activity, and/or ordering the internet service provider (ISP) to block the website. The common law requirements for the granting of an interdict would have to be satisfied.

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 Act in relation to copyright. The main offences relate 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 a fine and/or a prison sentence. The following are some of the offences in terms of the Act, if committed without the authority of the owner of the copyright, at the time when copyright subsists in the work.

- making of copies for sale or hire
- selling or letting for hire or by way of trade offering or exposing for sale or hire
- commercial exhibition in public
- importing into the Republic otherwise than for private or domestic use
- distributing for purposes of trade
- distributing for any other purposes, to such an extent that the owner of the copyright is prejudicially affected, articles which are known to be infringing copies of the work
- making or having in his possession a plate knowing that it is to be used for making infringing copies of the work
- causing a literary or musical work to be performed in public knowing that copyright subsists in the work and that performance constitutes an infringement of the copyright
- causing a broadcast to be rebroadcast or transmitted in a diffusion service knowing that copyright subsists in the broadcast and that such rebroadcast or transmission constitutes an infringement of the copyright
- causing programme-carrying signals to be distributed by a distributor for whom they were not intended knowing that copyright subsists in the signals and that such distribution constitutes an infringement of the copyright.

A person convicted of an offence in terms of the Act shall be liable –

- in the case of a first conviction, to a fine not exceeding R5,000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, for each article to which the offence relates
- in any other case (second or further conviction), to a fine not exceeding R10,000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, for each article to which the offence relates.

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

With regards to claims for damages, normal rules of prescription of a claim will apply and allow for a period of three years from the date the damages were incurred.

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 SA, the general rule is that the unsuccessful party pays the legal costs of the successful party based on various scales. However, this is subject to the very wide discretion of the court, who can order otherwise. As a general rule, a successful party will recover the costs as taxed by a Taxing Master in terms of the scale allowed by the court.

6. Enforcement

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

First and foremost, the court with jurisdiction is the court of the District, Region or Division where the copyright infringer resides, is domiciled, permanently employed or carries on business. In the case of juristic persons, it is wise to follow the registered address and/or main place of business.

The second consideration will be the financial value of the claim, the nature of the relief sought and complexity of the matter. The monetary jurisdiction of South African Courts is as follows:

- the Small Claims court can entertain claims not exceeding R15,000
- district Magistrates' Courts have jurisdiction over claims not exceeding R200,000
- regional Magistrates' Court can hear matters for monetary claims to the maximum of R400,000
- the High Court has the power to hear all matters without monetary limits; however, it is advisable to approach the High Court for monetary claims exceeding R400,000.

Generally, the Magistrates' Courts do not have the competency to hear claims for a specific performance. When the relief sought is a specific performance, for example delivery of infringing copies, it is important to claim in the alternative, payment of a certain sum which is within the monetary jurisdiction of the court in question.

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

Seizure

A copyright holder may request seizure, under the terms of the laws relating to customs and excise, of the infringing copies being imported into SA. If the goods constitute counterfeit goods such goods can be seized under the terms of the Counterfeit Goods Act 37 of 1997.

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. This is an independent tribunal which was established by the Act. Its main role is to adjudicate in commercial licensing disputes between collecting societies and users of copyright material in their businesses. 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?

The Companies and Intellectual Property Commission (CIPC) is the official government body responsible for intellectual property rights in SA, including patents, designs, trade marks and copyright. It is an executive agency, sponsored by the Department of Trade and Industry.

CIPC is, amongst other things, and in relation to intellectual property, responsible for:

- registration of Intellectual Property Rights (trade marks, patents, designs and copyright) and maintenance thereof
- promoting education around and awareness of intellectual property law
- promoting compliance with relevant legislation
- efficiently and effectively enforcing relevant legislation
- reporting, researching and advising the Minister of Trade and Industry on matters of national policy relating to intellectual property law.

There are no agency bodies that actively enforce copyright. The South African 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 those seeking them, copyright holders participate in collection schemes by signing up as members of collecting societies. Once members, they either transfer rights to the collecting society, which administers the rights for them, or appoint the society as their agent.

The key collecting societies in each sector are as follows:

Agency
Southern African Music Rights Organisation (SAMRO)
Who it represents
Primarily music composers, authors and publishers
Agency
National Organisation for Reproduction Rights in Music (NORM)
Who it represents
Artists
Agency
National Archives of South Africa (NASA)
Who it represents
Authors
Agency
Recording Industry of South Africa (RISA)
Who it represents
Artists and record companies/producers of music
Agency
Composers Authors & Publishers Association (CAPASSO)
Who it represents
Music publishers and composers
Agency
Music Publishers' Association of South Africa (MPA SA)
Who it represents
Music publishers
Agency
Publishers Association of South Africa (PASA)
Who it represents
Publishers
Agency
Documentary Filmmakers' Association (DFA)
Who it represents
Documentary filmmakers

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

Copyright levies are not payable in South Africa.

7. Copyright reform

7.1. What do you consider to be the top recent copyright development?

Moneyweb (Pty) Ltd v Media 24 Ltd and Another 2016 (4) SA 591 (GJ)

Moneyweb claimed that their copyright in a number of articles that they had published online was infringed by Media 24 when the latter reproduced portions thereof in articles published on its own online platform, Fin24. Each of the articles, seven in all, quoted and paraphrased portions of Moneyweb's original reports, and mentioned Moneyweb's articles as its source, using hyperlinks, ie links to the underlying Moneyweb article where the name of the author appeared.

At issue were the following — (1) whether Moneyweb had proved the originality of its articles; if so, (2) whether copyright was excluded by s12(8)(a) of the Act (which provides that "(n)o copyright shall subsist in...news of the day that are 'mere items of press information'"); if not, (3) whether Media24 had reproduced a substantial part of the relevant article; and if so, (4) whether Media24 was absolved from liability by virtue of the statutory defence in s12(1)(c)(i) of the Act (which provides that copyright shall not be infringed by any fair dealing with a literary work for the purpose of reporting current events in a newspaper, magazine or similar periodical, provided that the source was mentioned).

The following legal principles were discussed, and/or explained. Important in the summary below is the explanation given by the court with regards to the principles at issue.

Originality

Moneyweb's articles fell into the definition of literary works eligible for copyright in terms of the Act, provided they were original. It is possible to achieve originality even where the author of a work made use of existing material, provided that the time and effort spent involved more than a mechanical, or slavish, copying of the existing material. There must be sufficient application of the author's mind to produce a work that could be judged to be original.

Section 12(8)(a)

News of the day means current news, but the section does not exempt all current news articles from copyright — only 'mere items of press information' are exempted. This would include all information communicated to the media in material form or subsequently reduced to material form, such as (but not limited to) press statements and press interviews concerning news of the day, which journalists, and anyone else, would be free to use, in whole or in part, without restriction and without anyone's authorisation

being required. The items of information were given to the media with full knowledge that the information would be put into the public domain, and were therefore items of press information.

However, if an article were an original work, it would contain more than 'mere items of press information' because the author's contribution would have constituted more than mere copying. Therefore s12(8)(a) would not apply to any of the articles found to have been original.

Substantiality

A plaintiff in copyright infringement proceedings does not have to prove the reproduction of the whole work; it is sufficient if a substantial part of the work had been reproduced. In determining whether a substantial part of the work had been reproduced, a court must make a value judgement based on the work as a whole, focusing more on the quality of what had been taken than on the quantity.

Fair dealing

It is impossible to lay down any hard-and-fast definition of 'fair dealing'; it is a matter of fact, degree and impression. Fairness is an elastic concept. A determination of 'fair dealing' involves a value judgement and would depend on the particular facts or circumstances at the time of dealing. The test is subjective. The factors relevant to a consideration of fairness within the meaning of s12(1)(c)(i) include (but are not limited to) the nature of the medium in which the works were published; whether the original work had already been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that had been taken; and the extent of the acknowledgement given to the original work. In the context of online publications, a hyperlink substantially complied with the requirement in s12(1)(c)(i) that the source shall be mentioned, as well the name of the author of it as appears in the work. However, the provision of a hyperlink does not by itself discharge the burden of proving 'fair dealing'.

7.2. What do you consider will be the top upcoming copyright development?

The Copyright Amendment Bill

The Copyright Amendment Bill (the Bill) is currently being discussed in the National Assembly.

The major causes of concern are threefold.

- The first is the issue of who owns copyright: the body which paid for the work, or the person who composed the work. The Bill could see copyright rest with the institution which commissioned and funded the work – not the composer of the work. See item 20 of the Bill
- The second concern is what constitutes fair use. Fair use would include research, private study, criticism and review, and news reporting, among other things. There are concerns that the Bill places too much emphasis on giving free access to creative works, and not enough on the benefit to creators of those works. See item 10 of the Bill
- A third major concern is the copyright rights the Bill would grant to users as well as authors of creative works. The Bill's wording provides for royalties to be payable to the user of a literary or musical work in addition to its creator. See item 9A of the Bill.

The Bill has caused much public concern and debate, and as a result it has been returned for re-drafting. A date has not yet been set as to when it will be adopted into law.

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Spain

Roca Junyent, Anna Viladàs/Marta Rodés/Cristina Albiol

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[1].

As Spain is 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 dramatic-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

1. The Criminal Code has been recently modified in Spain by means of the Organic Act 1/2015, dated 30 March.

- projects, maps, models and drawings or architectural works and works of engineering
- 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 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 a third country who is 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 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 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 year 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.

Category of work

Databases

Duration

The 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 their 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. 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 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 insofar 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 to the participants of the community shall be presumed equal) shall apply to such works.

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.

4. Infringement

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: • 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 (but not for professional or entrepreneurial use, or for purposes that are directly or indirectly commercial.) Nevertheless, making a private copy will trigger a single and equitable compensation payment. This compensation shall be determined for each modality according to the equipment, apparatus and media material suitable for such reproduction, whether it was manufactured in Spanish territory or acquired outside it for commercial distribution or use within that territory. This payment shall be satisfied by the manufacturers and distributors* of the equipment, apparatus and media materials.

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.

*In this sense, the recent Royal Legislative Decree 12/2017, which amends the IPA in line with recent European and national judicial pronouncements which interpreted Directive 2001/29/EC, has left the current regulation on fair compensation for private copying (which, until now, was covered by the Spanish General State Budget) effectively unchanged, although replacing it with the aforementioned model.

Act

Quotations and reviews and illustrations with educational or scientific research purposes

Description

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 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 visual art 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, for the correct carrying out of administrative, judicial or parliamentary proceedings or for use by people with disabilities.
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. Any agreement contrary to the terms of this provision shall be *ipso iure* null and void. 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: • 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
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. 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.
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 does 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 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
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. 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 digitisation, offer to the public, indexing, cataloguing, 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: • 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 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-authorised 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 the 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 prevent 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 subject 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: • special economic importance of the profit • particular seriousness of the events, attending to the value of the objects produced unlawfully, the number of works, or the 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 explicit 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?

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
- safeguarding 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
Visual 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?

Report on the draft Bill to transpose the Directive on the collective management of copyright and multi-territorial licensing of rights

On 22 September 2017, the Council of Ministers agreed to urgently introduce a procedure to draft and approve a preliminary Bill to modify the IPA in order to incorporate the Directive 2014/26/EU of the European Parliament and of the Council, on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

Specifically, the draft Bill will:

- improve the control mechanisms of the collecting societies, by introducing measures such as creating an internal body to control each collecting society (formed both by members of the collecting society and by external people) that shall supervise its own governing bodies concerning the allocation of revenues and conduct disciplinary proceedings, among other things. Similarly, collecting societies shall be obliged to publish an annual transparency report and the audit of their annual accounts.

  The draft Bill will also apply to those collecting societies established outside the Spanish territory that are willing to provide their services in Spain, as well to any entity that collectively manages intellectual property rights in Spain.

- regulate the granting of multi-territory licences of rights in musical works for online use in the internal market. These licences will make it easier for online music service providers to obtain the necessary permission, through a single cross-border authorisation, to use the rights to musical works or repertoires in either the territories of several Member States or in the entire European Union.

There have been no further developments in drafting and approving the said preliminary Bill.

Royal Legislative Decree 12/2017, dated 3 July, which amends the consolidated text of the Intellectual Property Act, enacted by the Royal Legislative Decree 1/1996, dated 12 April, concerning the system of fair compensation for private copying.

In addition, the Royal Legislative Decree 12/2017, which amends the IPA in line with recent European and national judicial pronouncements which interpreted Directive 2001/29/EC., has introduced another development this year, since this new legislation changes the regulation of personal copies for private use.

Before the Royal Legislative Decree 12/2017 entered into force, the private copy compensation for the copyright payments that were not received (due to private copying) was paid using the General State Budget, according to the IPA provisions. Now, this payment must be satisfied by the manufacturers and distributors of the equipment, apparatus and media materials.

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

Comprehensive reform of the IPA

On 4 November 2014, the latest reform of the IPA was approved, the provisions thereof already being in force. Despite the Government announcing that the preliminary groundwork needed to conduct a comprehensive reform of the IPA would start the following year (ie 2015), it has not yet been approved.

It is likely that this comprehensive reform will take place over the coming year.

Developments on the EU initiatives adopted last year

As a key part of its Digital Single Market strategy (initially released on 6 May 2015), on 14 September 2016 the European Commission set out proposals on the modernisation of copyright, to increase cultural diversity in Europe and the online content available, at the same time as introducing clearer rules for all online stakeholders.

On 10 May 2017, the European Commission published the mid-term review of its Digital Single Market Strategy. It took stock of the progress made, made calls to legislators to swiftly act on all proposals already presented, and outlined further actions on online platforms, data economy and cybersecurity.

We believe these initiatives will lead to future developments regarding copyright.

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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 1 July 2017. 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.

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 lists numerous examples of work that can be protected by copyright, with the last example being works expressed in some other manner (ie other than those outlined below).

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
- 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 depends 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 industrial design. 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.

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 neighbouring 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 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 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 can be protected by copyright. In case there is more than one author or if the work in question has been made by the author in his or her 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 varies depending on 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 the author passed away. In general, for works created on or after 1 July 1961, the duration of copyright protection is as follows:

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
Duration
If music and lyrics have been created to be used together, copyright subsists until the end of the 70th year after the year of death of the last living of the composer and the lyricist. If the music and lyrics are to be used separately, copyright expires 70 years from the end of the calendar year in which the author passed away, in accordance with the main rule.
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 (not qualified as an artistic work)
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 protection. 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. Ownership

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 their employment is transferred to their 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 (or all) 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 at the time of 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. The extent (or existence) of copyright is ultimately decided by the 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.

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. 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/or making 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, as outlined below.

The making of copies shall include any direct or indirect, temporary or permanent reproduction of the work, irrespective of the form or through which method the reproduction is performed and irrespective of whether this occurs in whole or in part.

In the following cases, a work is deemed to have been made available to the public:

- when the work is communicated to the public. This occurs when the work is a made available to the public by wire or by wireless means from a place other than where the public may normally access the work. Communication to the public includes also acts of communication that occur in such a manner that members of the public may access the work from a place and time which they themselves choose
- when the work is publicly performed. Public performance includes only such cases where the work is made available to the public, with or without the use of a technical device, at the same place as where the public may normally access the work
- when copies of the work are publicly exhibited. Public exhibition includes only such cases where a copy of a work is made available to the public, without the use of a technical device, at the same place as where the public may normally access the copy. Where a technical device is used, the act is instead a public performance
- when copies of the work are offered for sale, leased, lent, or otherwise distributed to the public.

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

There are a number of explicit limitations. Many of these are based on the implementation of the Information Society Directive (2001/29/EC) which contains what has been known as 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: • 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: • preservation, completion or research • allowing library borrowers to obtain sections or brief sections of a 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 comparatively 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 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 lawfully 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 provided that such text is not in digital form; 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 on or at a public outdoor location; 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, provided that they are not in digital form.

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 holder's 'communication to the public' exclusive right. 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 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. Therefore, the act of linking to a work that would circumvent the paywall could constitute a communication to a 'new' public and infringe the rights of the rights holder.

According to the CJEU decision in G*S Media BV v Sanoma Media Netherlands BV*, (C-160/15), linking to a work which is freely available on the internet *without* the rights holder's consent might, under certain circumstances, constitute a 'communication to the public'. Whether such a linking will be deemed to constitute a 'communication to the public' depends on whether the person who provides the links *has knowledge* that the links will provide access to unlawful material. If the pupose of the linking is commercial, it is assumed that the person who is providing the links is aware that those links provide access to unlawful material. This kind of linking constitutes a 'communication to the public', provided that the person's knowledge of the fact that the links lead to material which has been published without consent from the rights holder cannot be refuted.

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. Remedies

5.1 What remedies are available against a copyright infringer?

The Copyright Act provides the following remedies for rights holders:

- interim injunctions (including infringement investigations, freezing orders and pre-action order to provide information)
- recalling from the market, alteration or destruction of infringing articles
- final and interim injunction under a penalty of a fine against the infringer (including disclosure)
- demand a public acknowledgement of the infringing act
- damages

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 to a website if they can show probable cause that the website is used to carry out 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 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 press charges.

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.

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 Sweden, the general rule is that the unsuccessful party reimburses the successful party for their legal costs in the proceedings as long as they are reasonable. It should 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. If the parties both win and lose in relation to various parts of the case (for example, the infringement claim is successful but the damage claim is not) the costs of the proceedings can be split between them.

6. Enforcement

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 the Patent and Market Court, a newly established specialised court in Sweden (Swedish: *Patent- och marknadsdomstolen*).

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 as outlined in 5.3 above.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? 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?

In Sweden there are a number of agencies who represent 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
Bildupphovsrätt i Sverige (BUS)
Who it represents
Visual artists, regardless of their chosen medium, including painters, photographers, illustrators designers, craftspeople and so on
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
Administration of Literary Rights in Sweden (ALIS)
Who it represents
Writers
Agency
Copyswede
Who it represents
Creators of culture participating in TV and radio productions – such as screenwriters, singers, musicians, composers, actors, writers, directors and photographers
Agency
Bonus Copyright Access
Who it represents
Authors, publishers and editors.
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 products covered by the private copying levy in accordance with the Copyright Act are products which can record sound and moving images and which are considered as being particularly suitable for private copying, eg computers with an internal hard drive, tablets with internal memory, CDs/DVDs, MP3-players, USB sticks, external hard drive, digital boxes with a built-in hard drive and certain types of mobile phones.

Manufacturers, importers or registered retailers (who have taken over the responsibility to report and pay the levy from an importer) who sell storage media to professional users or organisations for the disabled are not required to pay the levy in these cases. The same applies in cases where the products are exported. This is because the levy must only be paid for sales of products that are to be used for private copying.

7. Copyright reform

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

Since 1 September 2016, all intellectual property rights cases have been referred to the new specialised courts, the Patent and Market Court (*Patent- och marknadsdomstolen*) and the Patent and Market Appeal Court (*Patent- och marknadsöverdomstolen*). This is an important change aimed at improving the procedure both in relation to efficiency and to the quality of the judgments.

From a case law perspective, it is worth noting that in a recent judgment (*Case nos. T- 1963-15*), the Supreme Court discussed how to assess whether a work should be considered an adaptation of an existing work or a new and independent work (within the meaning of Section 4 of the Swedish Copyright Act).

If a work is considered an adaptation, the right to exploit the work is conditioned by the fact that the copyright holder of the original work gives their permission to the exploitation. A work which is deemed to be a new and independent work, on the other hand, can be freely exploited by its creator, regardless of the existence of any consent from the copyright holder of the original work. The question in the dispute was whether a painting of a photograph (protected by copyright) was a new and independent work or an adaptation.

The Court came to the conclusion that, even though the painting and the photograph were very similar to each other, the painting had been changed in such way that it expressed a different meaning than the photograph. The Court stated, among other things, that while the photograph was a portrait, the painting represented a criticism of society. Since the painting was deemed to have a purpose different from the purpose of the the original work (the photograph) it was to be deemed a new and independent work.

In two judgments from 2016, the free movement of goods was discussed. In one of the cases, *Textilis*, a UK-founded company sold textiles and textile-related products not protected by any IPRs in the UK, but protected by both copyright and trade marks in Sweden. The products were sold online and on the company's own website, and it was concluded that the products were offered for sale in Sweden. The court came to the conclusion that it was not possible to rely on the fact that the products were not protected in the UK and thus, the company was infringing copyright by selling them. In a later case, this principle was upheld by the Patent and Market Court (Case nos. T 14506-13 *Textilis* and B 6871-14 *Designers revolt*.).

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

As part of the new specialised court system, it will only be possible to appeal a judgment from the Patent and Market Court to the Patent and Market Appeal Court. Previously, it was also possible to file an appeal to the Supreme Court. With this new system, it will only be possible to appeal a judgment to the Supreme Court if the Patent and Market Appeal Court allows it (Sw. *ventil*). However, even if the Patent and Market Appeal Court decides to allow a case to be appealed, the Supreme Court will still need to grant leave for appeal. It will be interesting to see how the Patent and Market Appeal Court uses this possibility and how the Supreme Court grants that leave to appeal.

From a legislative perspective, it should be noted that the Swedish Government has ordered a special investigation to consider increasing punitive measures in regards to the most serious cases of copyright and trade mark infringement.The outcome of this investigation will be presented by 15 February 2018, at the latest.

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United Kingdom

RPC, Paul Joseph/Ciara Cullen/Holly Pownall

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. The CDPA replaced the Copyright Act 1956, which in turn replaced the Copyright Act 1911. Those 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.

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 of published editions. 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 also 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 of published editions

The sound recordings category is 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 are transmitted for simultaneous reception by members of the public.

Published edition means a published edition of the whole or any part of one or more literary, dramatic or musical works.

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

If the work falls within sections 1-4 above (literary, dramatic, musical or artistic works), it will only be protected by copyright if it is original. A work is original if the author (see 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 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 at 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 the 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. They 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 joint/co-authors, copyright expires 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 was 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 in which the last living author dies. Copyright then lasts for 70 years after that date.
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 edition 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 to 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 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. The 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(s), 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. 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 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 an intention to infringe that right.

4.2 What acts constitute secondary infringement of copyright?

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

- imports, possesses, exhibits, distributes, sells, lets or offers for sale or hire the copyright work
- deals in articles designed or adapted for making copies of copyright work
- transmits a copyright work via a telecommunication system
- gives permission for use of a place of public entertainment for a performance which infringes a copyright work
- supplies apparatus which is being used to perform, play or show a copyright work in public
- gives permission, as an occupier of premises, for such apparatus to be brought onto the premises
- supplies a copy of a sound recording or film which has been used with such apparatus to perform, play or show 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
A temporary copy that is transient or incidental which: • 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; and • has no independent economic significance (eg internet service providers who use caching).
Act
Personal copies for private use
Description
There was an exception for 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.
Act
Research and private study
Description
Research is permitted where a person is researching for a non-commercial reason. The research must contain an acknowledgement of the copyright work where it is referenced (ie identify it by title and author). Copying is allowed for private study.
Act
Criticism or review and reporting current events
Description
Where the copyright work is being used for the purposes of criticism or review, or for the purpose of reporting current events. It can be criticism or review of that copyright work, or of another work or performance, provided the copyright work has been made available to the public. An acknowledgement of the copyright work is required. No acknowledgement is required when reporting current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise.
Act
Quotation
Description
Quotations are a permitted act provided they relate to a work that has already been made available to the public, and the extent of the quotation is no more than required by the purpose for which it is used. An acknowledgement of the copyright work 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 negate 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 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 constitute a communication to the public and infringe the rights of the rights holder.

The situation is different where the work linked to infringes copyright. In *GS Media BV v Sanoma Media Netherlands BV* (Case C-160/15), the CJEU considered whether hyperlinking to copyright-infringing content (ie content posted online without the consent of the rights holder) constituted a 'communication to the public'. Focusing on the knowledge of the person hyperlinking to the infringing content, the CJEU decided that if the person "knew or ought reasonably to have known" that the hyperlinked-to content infringed copyright, then hyperlinking to that content was itself a 'communication to the public' and therefore an infringement of copyright.

In particular, the CJEU found that:

- where a person hyperlinks to infringing content for financial gain, it is presumed that the person knows the linked-to content is infringing, as that person is expected to have carried out the necessary checks (although it should be possible to rebut that presumption)
- where a person is notified of the fact that the hyperlinked-to content is infringing, hyperlinking to that content will constitute an infringement (this is good news for rights holders – notifying a person who has hyperlinked to their content could convert the hyperlink from non-infringing to infringing)
- where a person hyperlinks to copyright content in a way that circumvents the public access restrictions put in place by the site where the protected work is hosted, that will also constitute an infringement (as per the judgment in *Svensson*).

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

Under the 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 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 of action.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The CDPA provides the following remedies for rights holders:

- interim relief (including search orders, freezing orders, interim injunctions, and pre-action and 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 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 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 be personally liable for the criminal act.

Each offence requires a level of intention, knowledge or belief on the part of the culprit.

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
Maximum penalty
For an indictable offence: 10 years in prison and/or a fine On summary conviction: 6 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
Maximum penalty
For an indictable offence: 10 years in prison and/or a fine On summary conviction: 6 months in prison and/or a fine
Criminal act
Distributing a copy of a copyright work in the course of business or otherwise to such an extent that it 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
Maximum penalty
For an indictable offence: 10 years in prison and/or a fine On summary conviction: 6 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 communicating the work is infringing copyright
Maximum penalty
On conviction on indictment: 10 years in prison and/or a fine On summary conviction: 3 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
Maximum penalty
On summary conviction: 3 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
Maximum penalty
On summary conviction: 3 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
Maximum penalty
On summary conviction: 3 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 reason to believe, that the article is to be used to make infringing copies for sale or hire or for use in the course of business
Maximum penalty
On summary conviction: 3 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 reason to believe, that copyright would be infringed
Maximum penalty
On summary conviction: 3 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 ('summary assessment') or afterwards ('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, they will be 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. This 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 businesses. 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?

The Intellectual Property Office (IPO) is the official government body responsible for intellectual property rights in the UK, including patents, designs, trade marks and copyright. It is an executive agency, sponsored by the Department for Business, Energy and Industrial Strategy.

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 responsible for promoting copyright, there is the UK 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 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 the permission of the rights holder.

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

***Football Association Premier League Limited v British Telecommunications Plc and others* [2017] EWHC 480**

For the first time, the High Court has ordered six major internet service providers (ISPs) to block access to streaming servers giving unauthorised access to copyright footage. The governing body of the Premier League (FAPL) owned the copyright in the televised live footage of Premier League football matches and was aware of a situation whereby individuals were accessing copyright content by connecting directly to the streaming servers through devices such as set-top boxes, mobile phones and tablets rather than paying for subscription services.

Whilst the law governing obtaining blocking orders against websites that stream infringing content was fairly well-established, the law had not, until this case, been applied to infringements where devices connect directly to streaming servers via their IP addresses. FAPL sought a blocking order under s.97A CDPA, which permits UK courts to grant an injunction against a service provider "where that service provider has actual knowledge of another person using their service to infringe copyright". Five out of the six ISPs supported the order and the other did not oppose it.

Arnold J granted the order sought, finding that there was a communication to a 'new public' since the servers were communicating the footage to a large number of people who would otherwise not have been able to enjoy it without purchasing a subscription. The order was 'live' in the sense that it only had effect at the times when match footage was being broadcast and provided for the list of target servers to be re-set each match week during the season to allow new servers to be identified. This case is an excellent example of the courts applying established principles to combat new types of infringement facilitated by evolving technology.

***Stichting Brein v Wullems (t/a Filmspeler)* (C-527/15)**

The Court of Justice of the European Union (CJEU) has ruled that the sale of a multimedia player containing hyperlinks to websites illegally giving users access to protected works could amount to copyright infringement.

The ruling arose out of proceedings brought by Stichting Brein in the Dutch courts against Mr Wullems, who sold multimedia players under the name of 'Filmspeler'. The devices were pre-installed with add-ons whose function was to retrieve content from third-party streaming websites on which film, TV series and sporting events were made freely available to users without the consent of the rights holders. Stichting Brein sought an injunction to prevent Mr Wullems from selling the devices.

The CJEU found that there had been a 'communication to the public' within the meaning of Article 3 (1) of the Copyright Directive. Whilst the mere provision of physical facilities did not in itself amount to a 'communication' for the purposes of the Directive, that was to be distinguished from a situation in which Mr Wullems had pre-installed add-ons that enabled users to have access to protected works and to watch them on their television screens. Mr Wullems' actions were an intervention which enabled a direct link to be established between the websites broadcasting the works and the purchasers of the device. Without that link, the purchasers would have found it difficult to benefit from the copyright works, since the streaming websites were not readily identifiable and the majority of them changed frequently. The decision broadens the definition of what amounts to a 'communication to the public' and extends the classes of person who may be held liable for infringement to the suppliers of such devices.

7.2 What do you consider will be the top two upcoming copyright developments?

Brexit

There have been attempts to harmonise aspects of copyright law across the EU, such as the Information Society Directive and the Software Directive. However, copyright is essentially a national area of law, and there are still significant differences between Member States.

As a result, there will not necessarily be any immediate impact on this area when the UK exits the EU. UK copyright law is based partly on international conventions, the application of which is unlikely to be affected by Brexit. The CDPA 1988 is also likely to remain unchanged, unless repealed or amended by Parliament.

However, we are likely to see a divergence between copyright law in the UK and the EU in the medium to longer term. Post-Brexit, the UK will no longer be obliged to implement EU legislation or follow decisions of the CJEU. The extent of this divergence is likely to be shaped by the type of deal that the UK does with the EU post-Brexit.

Digital Single Market: Modernisation of the EU copyright rules

As we reported in last year's Copyright Guide, the European Commission has presented proposals for new legislation designed to ensure that the EU's copyright rules are fit for the digital age. A proposed directive on copyright in the Digital Single Market and a regulation are designed to ensure:

- better choice and access to content online and across borders – increasing the availability of works for people across Europe and providing new distribution channels for creators

- improved and modernised copyright rules applicable to the key exceptions and limitations in the areas of research, education and preservation of cultural heritage
- a fairer marketplace for online content, especially for press publications, online platforms and remuneration of authors and performers.

In addition, the implementation of the Marrakesh Treaty will make more books and texts available for people with print disabilities in a suitable format for them. The proposals are designed to help copyright industries flourish in a modern, digital age – helping authors to reach new audiences while making works widely accessible to European citizens. The proposals are currently being discussed by the European Parliament and the Council, but it is unclear what the UK will do in light of Brexit.

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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. In addition, pre-1972 sound recordings in certain instances are governed by common law existing prior to the first Copyright Act.

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?

It 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 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

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 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.

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 completely 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 of 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 and 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)
Agency
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)
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. Copyright reform

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

Supreme Court rules that a feature incorporated into a design of a useful article is eligible for copyright protection

On 22 March 2017, the US Supreme Court ruled, in *Star Athletica, L.L.C. v Varsity Brands, Inc.*, ___ U.S. ____ (2017), that a feature incorporated into a design of a useful article is eligible for copyright protection if the feature: (1) can be perceived as a two- or three-dimensional work independently from the useful article; and (2) would qualify as a protectable pictorial, graphic, or sculptural work under the Copyright Act if considered separately from the useful article. Copyright protection does not extend to useful articles.

However, the Copyright Act provides limited protection to "pictorial, graphic, or sculptural features" of the "design of a useful article" as artistic works if those features "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article" (17 U.S.C. § 101).

The Supreme Court's decision resolved disagreement by lower courts as to the proper test to determine whether a feature exists independently and separately from the useful article. This decision makes it possible for design elements incorporated into clothing (which is considered a useful article) to be protected by copyright if that design satisfies the Supreme Court's 'independently/separately' test.

Family Movie Act of 2005 did not exempt online streaming service from likelihood of copyright infringement

In *Disney Enterprises, Inc. v VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017), VidAngel, an online streaming service that removes potentially objectionable content from movies and televisions shows, was sued for copyright infringement by several movie studios for uploading a digital copy of movies created from a DVD to a computer, which movies were then made available for streaming to customers with 'objectionable' content removed. The movie studios moved for a preliminary injunction. VidAngel contended that it was exempt from copyright infringement under the Family Movie Act of 2005, which allows filtering, by or at the direction of a private member of a household, of limited portions of an authorised copy of a movie, because its filtering process began with an authorised DVD.

The Ninth Circuit disagreed, stating that the statute expressly states that the filtering must be done from the authorised copy of the movie itself, not an unauthorised uploaded digital copy of that movie. The Ninth Circuit further stated that VidAngel's interpretation of the statute would create a loophole in the copyright laws by allowing infringement so long as it filters content from a copy of a work lawfully purchased at some point – noting that all piracy of movies originates from a legitimate copy. Because VidAngel does not stream the filtered programming directly from an authorised copy of the DVD, but rather from a digital copy created from the DVD after circumventing the movie studios' technological protection measures, VidAngel's fair use defence under the Family Move Act failed.

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

Fourth Circuit to decide whether an internet service provider loses protection under the DMCA for failing to shut off service for 'repeat' infringers

BMG Rights Management, a music publisher, sued Cox Communications, an internet service provider (ISP), for copyright infringement, claiming that it had forfeited its right to claim immunity under the Digital Millennium Copyright Act's (DMCA) safe-harbour provision for the actions of its subscribers by ignoring requests to terminate Cox Communications' subscribers who repeatedly shared illegal music.

The Fourth Circuit Court of Appeals will interpret and decide what is meant by the DMCA's requirement for ISPs to 'adopt and reasonably implement' a repeat infringer policy to maintain safe-harbour protection. The lower court ruled in favour of BMG, stating that by failing to take a more aggressive stance towards repeat infringers, Cox was no longer protected under the safe harbour provision, which decision led to a jury awarding $25 million in damages to BMG.

State courts asked to decide whether state common law grants copyright owners of pre-1972 sound recordings an exclusive right of public performance

In the ongoing dispute between the copyright owners of pre-1972 sound recordings by the Turtles, a folk-rock band, and Pandora and Sirius XM streaming music services in several federal courts, the Second, Ninth, and Eleventh Circuit Courts of Appeals have certified to the highest state courts in Florida, New York, and California whether state statutory or common law for each state grants copyright owners of pre-1972 sound recordings an exclusive right of public performance.

Under the 1909 Copyright Act, an unpublished work was protected by state common law from the moment of creation until it was published with a proper copyright

notice, thereby affording it federal protection. In 1976, the Copyright Act was amended to afford federal protection to works from the moment of creation regardless of whether they were published. The 1976 Copyright Act, however, exempted pre-1972 sound recordings from federal protection and left common law protection in place for these recordings.

Owners of the Turtles' pre-1972 sound recordings sued Pandora and Sirius XM for copyright infringement because these services publicly performed the Turtles songs without paying a royalty. New York and Florida's highest courts have recently ruled that New York and Florida common law do not recognise an exclusive right of public performance for pre-1972 sound recordings, leaving no ability to seek back royalties. The California High Court has yet to rule on this issue.

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