

Copyright

In 23 jurisdictions worldwide

Contributing editors

Andrew H Bart, Steven R Englund and Susan J Kohlmann



2015

GETTING THE
DEAL THROUGH

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GETTING THE
DEAL THROUGH 

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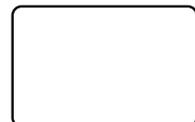


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CONTENTS

Overview	5	Japan	66
Andrew H Bart, Steven R Englund and Susan J Kohlmann Jenner & Block LLP		Takashi Nakazaki* Anderson Mōri & Tomotsune	
Australia	6	Malaysia	70
Kristin Stammer and Helen Macpherson Herbert Smith Freehills		Benjamin J Thompson and Hannah Ariffin Thompson Associates	
Austria	11	Mexico	75
Isabella Hoedl Piaty Müller-Mezin Schoeller Rechtsanwälte GmbH		Carlos Trujillo and Karla Alatríste Uhthoff, Gomez Vega & Uhthoff	
Belgium	15	Poland	81
Karel Nijs and Vicky Bracke LMBD Prioux		Dorota Rzażewska JWP Patent & Trademark Attorneys	
Brazil	22	Portugal	87
Joaquim Goulart, Attilio Gorini and Fernando De Assis Torres Dannemann Siemsen Advogados		Manuel Durães Rocha PMBGR – Trocado Durães Rocha & Associados	
Chile	28	Russia	92
Claudio Magliona García Magliona & Cía Limitada Abogados		Valeria Ivasikh and Alexander Yurchik CIS London & Partners	
China	34	Spain	97
Xie Guanbin, Zhang Bin and Che Luping Lifang & Partners		Jesús Arribas, Beatriz Bejarano and Guillem Villaescusa Grau & Angulo	
Dominican Republic	40	Switzerland	103
Jaime R Ángeles Angeles & Lugo Lovatón		Brendan Bolli and Sven Capol E Blum & Co AG	
France	45	Turkey	107
Olivia Bernardeau-Paupe Hogan Lovells LLP		Sídika Baysal Hatipoğlu, Gökhan Uğur Bağcı and Benan İlhanlı B+B Law Firm	
Germany	50	United Kingdom	111
Jasper Hagenberg and Christine Nitschke Buse Heberer Fromm Rechtsanwälte Steuerberater Partnerschaftsgesellschaft mbB		Paul Joseph, Jeremy Drew and David Cran RPC	
Greece	55	United States	117
Alkisti-Irene Malamis Malamis & Associates		Andrew H Bart, Steven R Englund and Susan J Kohlmann Jenner & Block LLP	
India	60	Venezuela	124
Pravin Anand and Tanvi Misra Anand and Anand		Matías Pérez-Irazábal and Jessica Borges Hoet Pelaez Castillo & Duque	

Overview

Andrew H Bart, Steven R Englund and Susan J Kohlmann

Jenner & Block LLP

Copyright law around the world continues to evolve to address advances in technology and adoption of new communications media. Judicial decisions, international treaties and proposed national legislation in various countries all reflect efforts to strike the appropriate balance between encouraging creativity by providing meaningful protection of intellectual property rights and encouraging continued growth and development of new technologies.

The unauthorised dissemination of copyrighted works over the internet continues to raise new questions for copyright owners worldwide, and last year was the subject of important judicial decisions in many countries. For example, in Brazil, an appellate court decided that internet webcasting of music does not implicate the public performance right because internet transmissions are directed to individual users. However, in *American Broadcasting Companies v Aereo*, the United States Supreme Court reached a contrary result, finding that a service transmits a performance to the public when it communicates the same images and sounds to multiple people, regardless of the number of discrete transmissions involved. The Court of Justice of the European Union has recently confronted several cases involving the status of internet linking under the right of communication to the public, and recently received a referral from the Dutch Supreme Court posing another such question. Courts in China have recently addressed the status of system caching and 'webpage snapshots', and the Australian Federal Court recently authorised a procedure for copyright owners to learn the identity of customers that allegedly had made infringing downloads of a motion picture.

Two major international copyright treaties remain pending. The 2012 Beijing Treaty on Audiovisual Performances is a multilateral treaty that would, for the first time, comprehensively bring audiovisual performers into the international copyright framework. Four countries (China, Japan, Slovakia and United Arab Emirates) ratified or acceded to that treaty in

2014. The 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled focuses on copyright exceptions relating to the creation and dissemination of materials accessible to the blind and other print-disabled persons. Five countries (El Salvador, India, Mali, United Arab Emirates and Uruguay) ratified or acceded to that treaty in 2014, and as of this writing three (Argentina, Paraguay and Singapore) have already done so in 2015. Mexico recently implemented the treaty in its national law. Both treaties are yet to enter into force.

Various countries have ongoing legislative efforts to update and modernise their copyright laws. For example, over the last two years, the United States House of Representatives' Judiciary Committee has conducted over 20 hearings comprehensively reviewing the full range of copyright issues. In the European Union, the Commission is considering a copyright modernisation initiative to address the 'Digital Single Market'. Another issue being examined legislatively in multiple countries is orphan works, particularly as it relates to so-called 'mass digitisation.' Implementation of the 2012 EU Orphan Works Directive has been proceeding slowly, but it was implemented in several countries last year. Other internet-related legislative proposals are pending in various countries.

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

United States

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Legislation and enforcement

1 What is the relevant legislation?

The main copyright statute in the United States is the Copyright Act, which is codified in Title 17 of the United States Code (17 USC section 101 et seq), and is also sometimes referred to as the Copyright Act of 1976. It originally took effect on 1 January 1978, and has been amended numerous times since. An important amendment to the Copyright Act was the Digital Millennium Copyright Act of 1998 (DMCA). This legislation, which relates primarily to World Intellectual Property Organization (WIPO) treaty implementation, online service provider liability, circumvention of technological protection measures, streaming of sound recordings and protection of vessel hull designs, is codified at 17 USC sections 114, 512, 1201–1205 and 1301–1332, among other sections. In addition, 18 USC section 2319 provides for criminal penalties for certain copyright infringement actions.

2 Who enforces it?

The copyright laws of the United States are generally enforced in the federal courts through civil lawsuits initiated by copyright owners. In certain circumstances, the United States federal government may initiate a criminal copyright enforcement action against an alleged infringer at the request of the copyright owner. Copyrights are occasionally enforced against imported goods through actions at the US International Trade Commission. A copyright owner can also record its rights with US Customs and Border Protection (CBP). CBP will then seek to stop the infringing products at the border and prevent them from entering the United States.

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

As noted in question 1, the provisions of the US Copyright Act especially addressing exploitations online or in digital formats were primarily added to the Act by the DMCA.

First, the DMCA provides civil and criminal remedies for certain circumventions of technological protection measures that control access to works or protect works from copying or other infringement (digital rights management).

Second, the DMCA also creates a conditional safe harbour for online service providers by shielding them from money damages and limiting injunctive relief for certain acts of direct and secondary liability when they meet certain requirements. In particular, safe harbours are provided for transitory digital network communications, system caching, storage of information at the direction of a user and the provision of information location tools, subject to detailed requirements for each safe harbour and certain generally applicable requirements.

Third, the DMCA expanded the statutory licence for sound recording performance to include internet webcasting, as well as a related statutory licence for ephemeral copies made in connection with the statutory performance licence. This statutory performance licence was originally created by the Digital Performance Right in Sound Recordings Act of 1995.

Various other provisions of the Copyright Act that were not added by the DMCA address additional specialised aspects of digital exploitation. Among others, section 106(6) provides a sound recording performance right limited to performances by means of a digital audio transmission; section 115 provides a statutory licence for 'mechanical' reproduction and distribution of musical works with special provisions for 'digital

phonorecord deliveries'; section 117 addresses certain reproduction and adaptation of computer programs; and the Audio Home Recording Act of 1992 (codified in Chapter 10) addresses certain digital audio recording devices and media.

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

US copyright law generally does not have extraterritorial effects. However, US law would not view as extraterritorial the enforcement of the Act against infringing transmissions from a foreign-operated website into the US. Accordingly, there has been successful enforcement of the US Copyright Act against foreign-based sites.

The Prioritising Resources and Organization for Intellectual Property Act of 2008 extended generally applicable civil forfeiture provisions to include seizure of property used to facilitate criminal copyright infringement. Recent successful enforcement activities have included seizing internet domain names associated with foreign-owned and foreign-operated websites that infringe US copyrights by targeting distribution of infringing copies into the US.

Agency

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

The Copyright Office is the centralised copyright agency in the US. It administers various provisions of the Act and serves as the office of record, where private parties' claims to copyright are registered and where documents relating to copyright may be recorded to give notice thereof.

The Copyright Office also:

- furnishes information to the general public about copyright law;
- provides expert assistance to Congress and the Executive Branch on copyright matters;
- analyses and assists in drafting copyright legislation and undertakes studies for Congress;
- assists the Executive Branch's Department of State, the US Trade Representative's Office and the Department of Commerce in negotiating international intellectual property agreements;
- provides advice to Congress on compliance with international agreements; and
- provides technical assistance to other countries in developing their own copyright laws.

Additionally, a separate unit of the Library of Congress, the Copyright Royalty Board, determines royalty rates and terms, and distributes royalties, under statutory licences in the music, cable and satellite television industries.

Subject matter and scope of copyright

6 What types of works are copyrightable?

US Copyright law protects any qualifying 'original works of authorship' that are fixed for more than a transitory duration in a tangible medium of expression. The fixation need not be directly perceptible so long as it may be communicated with the aid of a machine or device. Copyrightable works include the following categories:

- literary works, including characters;
- musical works, including any accompanying words;
- dramatic works, including any accompanying music;
- pantomimes and choreographic works;
- pictorial, graphic and sculptural works;
- motion pictures and other audiovisual works;
- sound recordings created on or after 15 February 1972 (earlier recordings are generally protected under state law); and
- architectural works created on or after 1 December 1990 (or created but not published or constructed prior to that date, and constructed by 31 December 2002).

7 What types of rights are covered by copyright?

The Copyright Act generally gives the owner of a copyright the exclusive right to:

- reproduce the work in copies or phonographic records;
- prepare derivative works based upon the work;
- distribute copies or phonographic records of the work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- perform the work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes and motion pictures and other audiovisual works;
- display the copyrighted work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work; and
- perform the work publicly by means of a digital audio transmission, in the case of sound recordings.

8 What may not be protected by copyright?

The following may not be protected by copyright:

- works that have not been fixed in a tangible form of expression;
- words and short phrases such as names, titles and slogans;
- familiar symbols or designs;
- mere variations of typographic ornamentation, lettering or colouring;
- mere listings of ingredients or contents;
- facts, ideas, procedures, processes, systems, methods, concepts, principles, discoveries, as distinguished from descriptions, explanations or illustrations;
- blank forms that are designed for recording information and do not themselves convey information; and
- works consisting entirely of information that is common property and containing no original authorship.

9 Do the doctrines of 'fair use' or 'fair dealing' exist?

The doctrine of fair use exists. Fair use is codified in section 107 of the Copyright Act. See question 10.

10 What are the standards used in determining whether a particular use is fair?

Under the fair use provisions of the US Copyright Act, courts are to use four non-exclusive factors in determining a question of fair use. Courts apply these factors to particular situations on a case-by-case basis. The outcome of any given question of fair use can therefore be difficult to predict. The four factors are:

- the purpose and character of the use (especially whether the use is 'transformative' in nature, and to some extent whether it is for commercial or for non-profit educational purposes);
- the nature of the copyrighted work;
- the amount and substantiality of the portion taken; and
- the effect of the use upon the potential market for or value of the copyrighted work.

11 Are architectural works protected by copyright? How?

Architectural works are protected by copyright. For this purpose, an architectural work is defined as 'the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.' Protection extends to 'the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.' Protection is generally provided on the same basis as for other types of works, except that pictorial representations of constructed buildings are permitted, and building owners are

permitted to alter or destroy their buildings without the consent of the author or copyright owner.

As noted in question 6, protection is available for any architectural work created on or after 1 December 1990. In addition, any architectural works that were not constructed, but were embodied in unpublished plans or drawings on that date and were constructed by 31 December 2002, are eligible for protection. Architectural designs embodied in plans published or buildings constructed prior to 1 December 1990 are not eligible for copyright protection.

12 Are performance rights covered by copyright? How?

The US Copyright Act currently provides a general right of public performance for literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works. The Act also provides public performance rights as to sound recordings, but these are limited to performances by means of a digital audio transmission. Sound recordings are defined in the law as 'works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work.' Common examples include recordings of music and 'talking books.'

To be a 'public' performance, the work must be performed to a 'substantial number' of people outside of the performer's family and social acquaintances, or be transmitted in such a way that members of the public are capable of receiving it. Thus, a public performance may be accomplished by rendering a work to an audience present in a public or semi-public place or by transmitting a work by radio, television, internet or other means.

Exemptions are provided for various kinds of performances in specialised circumstances. For example, live performances (not transmissions) of non-dramatic literary or musical works are exempted if they are not for commercial advantage; no compensation is paid to the performers or organisers; and admission is free; or where the copyright owner has not objected, any proceeds are used for charitable purposes.

13 Are other 'neighbouring rights' recognised? How?

Rights of performers and producers in audiovisual works and most sound recordings, as well as creators of photographs and many databases, are protected in the US as a matter of federal copyright law, and US law does not specifically include a concept of 'neighbouring rights.' However, US federal or state law does provide several other forms of protection that might be considered neighbouring rights:

- sound recordings created before 15 February 1972 are generally protected under a combination of state common law copyright, unfair competition and specialised statutory provisions;
- integrated circuit layouts (called 'mask works') are protected under specialised provisions in chapter 9 of Title 17;
- unauthorised fixation and trafficking in live musical performances are prohibited by chapter 11 of Title 17;
- designs of boat hulls and decks are protected under specialised provisions in chapter 13 of Title 17;
- hot news misappropriation is a recognised common law tort in some states, and covers the use of time-sensitive information by a competitor regardless of whether the information is protected by copyright law (although the scope of protection for hot news is likely fairly narrow due to federal copyright law pre-emption); and
- a majority of states recognise the right of publicity, which protects the use of a recognisable aspect of an individual's persona (such as his or her image or voice) in advertising or trade.

14 Are moral rights recognised?

The Copyright Act provides only limited moral rights of attribution and integrity to authors of a narrowly defined class of works of visual art, under the Visual Artist Rights Act (VARA). VARA provides to authors of limited edition works of the fine arts and exhibition photographs the right to claim or disclaim authorship in a work; limited rights to prevent distortion, mutilation or modification of a work; and the right, under some circumstances, to prevent destruction of a work that is incorporated into a building. The legislation provides for waiver of these moral rights, but only by a signed, written agreement specifying the work and the precise uses to which a waiver applies. The exclusive right to prepare derivative works protects all types of works against modification, but is freely assignable. Moral rights are also protected indirectly by state tort, privacy and publicity laws, and by the federal Lanham Act. As a general matter, moral rights are much

more narrowly defined and of less effect in the US as compared to other jurisdictions.

Copyright formalities

15 Is there a requirement of copyright notice?

Although use of a copyright notice was once required as a condition of copyright protection, it has been optional on copies of works published since 1 March 1989. A copyright notice generally consists of the symbol or word 'copyright' (or 'copr' or '©'), the year of first publication and the name of the copyright owner (for example, '© 2012 John Smith').

16 What are the consequences for failure to display a copyright notice?

The only current legal consequence of a failure to use a copyright notice is that it makes it easier for an infringer of the work to claim that he or she is an 'innocent infringer.' However, if a work was published without notice before 1 March 1989, the omission may have caused copyright to be lost.

17 Is there a requirement of copyright deposit?

The owner of copyright or of the exclusive right of publication in a work published in the US generally is required to deposit two copies of the best edition of the work within three months after the date of publication. Such deposit is not a condition of copyright protection.

Such deposit is generally accomplished in connection with copyright registration (see questions 19 to 23). Copyright registration is optional. If the copyright owner chooses to register his or her work with the Copyright Office, the applicant must submit specified copies of the work along with the application. Upon their deposit in the Copyright Office, all copies and identifying material, including those deposited in connection with applications that have been refused registration, become the property of the US government. The details of the deposit requirement vary depending on the type of work involved.

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

If a mandatory deposit is not made on demand, a fine may be levied, and the relevant person may be required to pay the Library of Congress' cost of buying the copies demanded. In addition, when registration is sought, the underlying work will not be registered unless the required deposit copy or copies are submitted to the Copyright Office.

19 Is there a system for copyright registration?

Yes, copyright registration can be obtained by following the procedure described in question 21.

20 Is copyright registration mandatory?

There is no requirement that a work be registered. Copyright protection exists from the moment the work is created. However, for 'US works' (generally works first published in the US or unpublished works where all the authors are US nationals), registration is a prerequisite to suing for infringement.

21 How do you apply for a copyright registration?

To apply for a copyright registration, the author must submit a completed application form, a non-refundable filing fee, and a non-returnable deposit copy or copies of the work to be registered. The primary means of registration is to use the Copyright Office online system called 'eCO.' When using the online system, the filing fee is paid online, and deposit copies of certain categories of works can be uploaded directly. Otherwise, hard copy deposits are submitted with a shipping slip that allows the Office to associate the deposit with the online record. Paper forms can also be used for copyright registration, but require payment of a higher filing fee and involve a longer processing time. Forms can be downloaded from the Copyright Office website (www.copyright.gov), picked up in person or requested by post.

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

The standard registration fee for simple applications submitted through the eCO online system is US\$35. When there are multiple authors, different claimants, multiple works, or a work made for hire, the fee for an online application is US\$55. When paper forms are used, the standard fee is US\$85. The fee for expedited service is US\$800.

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

As noted in question 20, a US work must be registered to bring a suit for infringement. In addition, attorneys' fees and statutory damages will be unavailable if the author has not registered the work within certain time requirements. Registration is also recommended because it gives the public notice that the copyright owner claims copyright protection in the work. Finally, if registration occurs within five years after first publication, the registration certificate is considered prima facie evidence of copyright validity and of the facts concerning authorship and ownership stated in the certificate. This presumption is important, because it can greatly simplify proving copyright ownership in a court of law, particularly when it is necessary to do so many years after the creation of the work.

Ownership and transfer

24 Who is the owner of a copyrighted work?

The general rule is that the author of the work initially owns the copyright. As discussed in question 25, a corporate entity can be considered the author in the case of a work made for hire. The initial owner of copyright may assign its rights (see question 28).

25 May an employer own a copyrighted work made by an employee?

An employer will be considered the author of a work, and will initially own the copyright, when the work is a 'work made for hire'. A work will be considered a work made for hire if it is prepared by an employee within the scope of his or her employment. Traditional common law agency principles are applied to determine who constitutes an employee. As an alternative to the 'work made for hire' doctrine, an employer may own a copyrighted work as the result of an assignment from its employee.

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

A hiring party may own a copyrighted work made by an independent contractor either by assignment, or in some circumstances, as a work made for hire. If a work prepared by an independent contractor is considered a work made for hire, the hiring party will be considered the author of the work. For a work created by an independent contractor to be considered a work made for hire: (i) the parties must expressly agree in a written document signed by them that the work will be considered a work made for hire; and (ii) the work must be specially ordered or commissioned for use as:

- a contribution to a collective work;
- a part of a motion picture or other audiovisual work;
- a translation;
- a supplementary work;
- a compilation;
- an instructional text;
- a test;
- answer material for a test; or
- an atlas.

27 May a copyrighted work be co-owned?

Yes, copyrights can be co-owned either in the case of a joint work (described further below) or by assignment or other transfer of ownership (such as inheritance). In either case, unless the co-owners have agreed otherwise, a co-owner can exploit or license the work without seeking permission from the other co-owner(s), but would owe the other co-owner(s) a duty to account for the profits of such exploitation or licensing. Of course, a co-owner could not grant a licence that is exclusive as to the interests of another co-owner without the agreement of the other co-owner.

When one or more people create a single work together, the result is a joint work in which the copyright is initially co-owned by the joint authors. A joint work is defined by the Copyright Act as 'a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.' Under this definition, all the involved authors must intend that their contributions be combined, and this intention must exist at the time the contribution is created. It is not necessary that the contributions be equal in effort or value. Nor is it necessary that the joint authors work in the same physical area or at the same time. As defined in the statute, the only requirement is that both authors have the intention that the works are to be 'merged

into inseparable or interdependent parts of a unitary whole'. If a joint work exists, then both authors are co-owners of equal, undivided interests in the entire work.

However, not everyone who makes any contribution to a work will be considered an 'author' of the work. Whether a contribution rises to the level of authorship generally requires that a person contribute copyrightable expression and play a sufficiently important role in the creation of the work to be considered an author (based on factors such as an intention shared with other authors of the work to be co-authors, control over the work, credit commensurate with other authors, and contribution to the audience appeal of the work).

28 May rights be transferred?

Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred, but a transfer of exclusive rights (other than by operation of law) is not valid unless that transfer is memorialised in a writing signed by the owner of the rights conveyed or such owner's duly authorised agent. The writing, however, need not be made at the time of assignment. A letter or other writing confirming the agreement is sufficient. Transfer of a right on a non-exclusive basis does not require a written agreement. A copyright may also be conveyed by operation of law and may be bequeathed by will, or pass as personal property by the applicable laws of intestate succession.

Copyright is a personal property right, and is subject to state laws that govern the ownership, inheritance or transfer of personal property as well as the terms of contracts or conduct of business. Although the recording of a transfer in the US Copyright Office is not required to make the transfer valid between the parties, it does provide certain legal advantages against third parties, as described in question 33.

29 May rights be licensed?

Copyright rights can be licensed on an exclusive or non-exclusive basis. The holder of an exclusive licence becomes the owner of the licensed right and as such is entitled to sue any party that infringes the right while the exclusive licensee owns it. A non-exclusive licence gives the licensee the right to exercise one or more of the copyright owner's rights, but does not prevent the copyright owner from giving others permission to exercise the same right or confer standing to sue.

30 Are there compulsory licences? What are they?

The Copyright Act provides various compulsory licences (sometimes referred to in the US as 'statutory licences'):

- section 111 – secondary transmissions by cable systems;
- section 112 – ephemeral reproductions of sound recordings;
- section 114 – public performance of sound recordings by means of digital audio transmissions;
- section 115 – 'mechanical' reproduction and distribution of musical works;
- section 118 – use of certain works in non-commercial broadcasting;
- section 119 – secondary transmissions by satellite carriers; and
- section 122 – local retransmissions by satellite carriers.

These licences are all very different from each other, and their details are fairly complicated. The section 122 licence is generally royalty-free. Otherwise, royalty rates under these licences are determined, or subject to adjustment in certain circumstances, by the Copyright Royalty Board. Royalties under sections 111 and 119 are paid into the Copyright Office and distributed to copyright owners under the supervision of the Copyright Royalty Board. Royalties under the other licences are paid directly to copyright owners or to collecting societies representing copyright owners.

31 Are licences administered by performing rights societies? How?

The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc (BMI) and SESAC Inc grant and administer voluntary collective licences for the public performance of musical works on behalf of the copyright owners of such works. SoundExchange, Inc collects and distributes royalties under the sound recording statutory licences on behalf of the featured artists and copyright owners of such works, and also under some direct licence agreements.

32 Is there any provision for the termination of transfers of rights?

For transfers or licences executed by an author on or after 1 January 1978, the Act permits termination, generally after 35 years from first publication and under certain conditions, by serving written notice on the transferee within specified time limits. For works under statutory copyright protection before 1978, the statute provides similar rights of termination corresponding to the extensions of the renewal term of protection originally afforded to such works.

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

A document that transfers copyright ownership, and other documents pertaining to a copyright, may be recorded in the Copyright Office if the document filed for recording bears the actual signature of the person who executed it or if the document is accompanied by a sworn or official certification that it is a true copy of the original signed document. A recordation fee must be paid.

Recording of a document in the US Copyright Office gives all persons constructive notice of the facts stated therein (if the work has been registered), and recording a transfer also provides priority over certain conflicting transfers.

Duration of copyright

34 When does copyright protection begin?

Copyright protection subsists from the time the work is created in fixed form. The copyright in the work of authorship immediately becomes the property of the author who created the work.

35 How long does copyright protection last?

The length of copyright protection varies according to when the particular work was created and published, and according to whether the author is an identified natural person, as discussed in question 36.

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

Yes. A work created on or after 1 January 1978 is automatically protected from the moment of its creation and is ordinarily given a term enduring for the author's life plus an additional 70 years after the author's death. In the case of a 'joint work prepared by two or more authors who did not work for hire', the term lasts for 70 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright is 95 years from publication or 120 years from creation, whichever is shorter.

For works created before 1 January 1978, the duration of copyright depends on whether the work was published, or the copyright in the work registered, before 1 January 1978. If so, the copyright term is 95 years from the date copyright was originally secured (usually the date of publication). Otherwise, the copyright term is generally computed in the same way as for works created on or after 1 January 1978. That is, the life plus 70, 95 or 120-year terms apply to these works as well. However, for works that were unpublished and unregistered on 1 January 1978 but were published on or before 31 December 2002, the term of copyright will not expire before 31 December 2047.

Both the requirements for copyright protection and the US copyright term have changed over time. In the past, many pre-1978 works fell into the public domain earlier than indicated by the term described above. Determining whether any particular work created before 1 January 1978 is still under copyright is thus fairly complicated, and depends on factors such as the source country of the work, when the work was created and published, whether the work was published with notice, and whether the copyright was renewed during the 28th year after publication or registration (see question 37).

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

Renewal does not apply to works created on or after 1 January 1978, or to earlier works that were not published or registered before 1 January 1978. Works first published or registered up until 1963 had to be formally renewed, through a renewal registration in the US Copyright Office, to maintain protection. Failure to renew placed the work in the public

Update and trends

Public performance over the internet

Application of the concept of 'public performance' to the internet has been a controversial issue in US copyright law. Unlike traditional over-the-air broadcasts or analogue cable television transmissions, internet streams are not transmitted unless a user does something to commence the streaming, and internet transmissions are always addressed to particular individual recipients. Courts have struggled with questions of who performs works so transmitted, and whether those transmissions are 'to the public'. That became clearer in 2014 with the Supreme Court's decision in *American Broadcasting Cos, Inc v Aereo, Inc*.

Aereo's service provided internet retransmissions of broadcast television programming. Aereo argued that it was the users of the service, rather than Aereo itself, that made the retransmissions. Aereo also argued that any performances were private rather than public, because each user was assigned a miniature antenna to capture the programming, and the service included digital video recorder functionality. The Court rejected both these arguments. While the Court acknowledged that, in some cases, a user's involvement may affect determination of who 'performs' within the meaning of the Copyright Act, the Court found that Aereo, like a cable system operator, performed the works transmitted by its system. The Court also found that Aereo transmitted its performances to the public, because it communicated the same images and sounds to a large number of people who were unrelated and unknown to each other, and were not acting as owners or possessors of the relevant product.

Time limits on infringement claims

Last year the Supreme Court also clarified the interplay between the Copyright Act's three-year statute of limitations and the equitable doctrine of laches. *Petrella v Metro-Goldwyn-Mayer, Inc* involved a claim that a motion picture released in 1980 infringed the copyright in a screenplay registered in 1963. The screenwriter's daughter acquired the renewal copyright in the screenplay in 1991. She did not assert an infringement claim based on the renewal copyright until 1998, and did not file an infringement case until 2009. While that case sought relief only for acts of infringement during the three years preceding the case filing, MGM argued that the delay between the copyright renewal and the case filing was unreasonable and prejudicial, and thus barred the case altogether under the equitable doctrine of laches. The district court and court of appeals agreed. The Supreme Court reversed, finding that laches cannot bar a claim as to acts of infringement within the three years preceding the filing of the case. The court noted, however, that in such a case, a delay in commencing suit may be taken into account in determining appropriate injunctive relief and assessing profits.

Use of a work for a new purpose as fair use

Resolution of fair use disputes has increasingly turned on whether the defendant's use of the plaintiff's work was 'transformative'. Within the Second Circuit at least, an even more recent trend has been finding that

a use is transformative, and hence fair, because it serves a new function or purpose without altering or adding to the work itself. That trend continued last year with the Second Circuit's decision in *Authors Guild, Inc v HathiTrust*. There, the court found, based primarily on the concept of transformative use, that fair use allowed a consortium of university libraries to create a full-text searchable database of the works in their collections. That decision was quickly followed in *Fox News Network, LLC v TVEyes, Inc*, in which a New York district court found fair the creation of a searchable database of recordings of television and radio broadcasts. However, it remains to be seen whether this trend will take hold elsewhere. In *Kienitz v Scottie Nation, LLC*, the Seventh Circuit recently expressed scepticism concerning the Second Circuit's embrace of the concept of transformative use, and a preference for deciding fair use cases based on factors more closely tied to the statutory text, and particularly market harm.

Music licensing

Change may be on its way to the legal framework for music licensing in the US. For several years, music publishers have been seeking freedom to negotiate individually with digital music services while preserving the efficiency of collective licensing through performance rights organisations for other uses of their works. After setbacks in the courts that supervise the judicial 'consent decrees' governing the performance rights organisations, publishers and songwriters prevailed on the US Department of Justice to review those consent decrees. As of this writing, it has been reported that the Department is considering major revisions to the consent decrees to allow music publishers partially to withdraw repertoire from the performance rights organisations. At the same time, a US House of Representatives Judiciary subcommittee has been undertaking a comprehensive review US copyright law. In connection with that effort, the Copyright Office recently completed a major study of the music licensing marketplace and recommended significant legislative changes to the 'mechanical' compulsory licence and other statutory provisions.

Circumvention

The US Copyright Office is conducting its sixth triennial rulemaking proceeding to determine whether to exempt certain classes of copyrighted works from the prohibition against circumvention of technological measures that control access to such works. Such exemptions can be granted if the Librarian of Congress finds that users are, or are likely to be, adversely affected in their ability to make noninfringing uses of certain classes of works due to the prohibition on circumvention of access controls. Currently, there are eight targeted exemptions. Twenty-seven exemptions have been proposed for consideration in the current proceeding. The Librarian is expected to decide on the exemptions that will apply for the next triennial period by the end of October 2015.

domain. However, copyright protection was later restored to certain works of foreign origin that had fallen into the public domain due to failure to renew. For works first published or registered between 1964 and 1977, renewal was automatic, but obtaining a renewal registration provides certain advantages.

38 Has your jurisdiction extended the term of copyright protection?

The US term of copyright protection has been extended many times. Most recently, the Sonny Bono Copyright Term Extension Act of 1998 extended copyright terms by 20 years to yield the terms described in question 36. While the extension was not applied to copyrights that had already expired, it did extend the terms of existing copyrights.

Copyright infringement and remedies

39 What constitutes copyright infringement?

Copyright infringement occurs when a party violates any of the copyright owner's exclusive rights described in question 7. Assuming ownership of a valid copyright and no applicable authorisation, infringement requires both of the following:

- the alleged infringer, as a factual matter, copied from the copyright

owner's work in the alleged infringer's activities of a type that implicates the copyright owner's exclusive rights described in question 7 (eg, reproduction, public performance); and

- the alleged infringer appropriated enough of the copyright owner's original expression to give rise to liability.

Application of these requirements in any particular case can vary widely depending on the nature of the defendant's activity. In a traditional case focused on a single work, where the defendant did not copy the plaintiff's work literally or in its entirety, there may be a substantial factual question as to whether the defendant even knew of the plaintiff's work, and even assuming the fact of copying, as to whether the defendant copied a sufficient amount of the plaintiff's work to consider the works 'substantially similar.' In a case involving the legality of an unlicensed online service, it is typically not disputed that the plaintiff's works were used in their entirety; the questions typically are, instead, whether the service is of a type that implicates the copyright owner's exclusive rights and whether the service provider is legally responsible for the activity.

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

Secondary liability for copyrighted infringement is not statutorily defined, but has been established by case law. Secondary liability can be found under several theories:

- vicarious liability, when the defendant has the ability to supervise the infringing conduct, and benefits financially from the infringement;
- contributory infringement, when the defendant has knowledge or reason to know of the infringement, and contributes to, authorises or induces the infringement; and
- inducement as discussed in the Supreme Court's *Grokster* decision, when the defendant acts with the object of promoting infringement, as shown by clear expression or other affirmative steps taken to foster infringement.

41 What remedies are available against a copyright infringer?

Remedies can include:

- payment to the copyright owner of any profits the infringer received and of any losses suffered by the copyright owner, or 'statutory damages' as an alternative to actual profits and losses;
- a court order restraining the infringer from continuing the infringing activity;
- confiscation and destruction of the infringing items; and
- attorneys' fees.

42 Is there a time limit for seeking remedies?

The statute of limitations for bringing a civil copyright infringement claim is three years (and five years for criminal actions). It is measured from the time the claim accrued. However, courts have disagreed as to when a claim should be considered to accrue. In some courts, a claim is considered to accrue at the time the plaintiff knew or had sufficient reason to know that the infringement occurred, and in other courts a claim is considered to accrue at the time the infringement occurred. If, at the time of suit, the infringement has been ongoing for more than three years, the copyright owner is able to pursue an injunction and monetary recovery for the infringements occurring within the past three years. However, where the essence of a copyright claim is a dispute concerning ownership of the copyright, courts have rejected the assertion of an ongoing wrong and have dismissed the claim if it was brought more than three years after it accrued.

43 Are monetary damages available for copyright infringement?

Yes, monetary damages are available for copyright infringement. A party found liable for copyright infringement may be found liable for either the copyright owner's actual damages and any additional profits of the infringer; or statutory damages, as provided by the Copyright Act. However, statutory damages are only available if registration for the infringed work was obtained within certain time requirements.

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

Both costs and attorneys' fees are available for copyright infringement. They may be awarded at the court's discretion if the work was registered with the US Copyright Office within certain time requirements.

45 Are there criminal copyright provisions? What are they?

Criminal copyright provisions exist. Under the Copyright Act, it is a criminal offence to wilfully infringe a copyright if the infringement was committed:

- for either commercial advantage or private financial gain;
- by the reproduction or distribution, including by electronic means, during a 180-day period, of one or more copies or phonographic records of one or more copyrighted works, which have a total retail value of more than US\$1,000; or
- by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

In addition, it is a criminal offence to place a fraudulent copyright notice on any article, or to publicly distribute or import for public distribution any article bearing such fraudulent notice. It is also a criminal offence to remove or alter any notice of copyright appearing on a copy of a copyrighted work with fraudulent intent. Moreover, it is a criminal offence to knowingly make a false representation of a material fact in an application for copyright registration, or in any written statement filed in connection with the application.

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

See question 3.

47 How may copyright infringement be prevented?

Copyright owners in the US employ a mix of strategies to control copyright infringement, including:

- discouraging infringement by applying to their works a statutory copyright notice and sometimes other warnings against infringement, and by registering their works with the Copyright Office;
- employing technological protection measures to frustrate infringement;
- recording their works with CBP as described in question 2 to try to keep infringing copies out of the US market;
- policing the market to identify infringements, including sometimes by hiring specialised contractors to identify online infringements;
- invoking statutory or informal notice and takedown procedures to remove infringing material from online services;
- sending 'cease and desist' letters demanding that infringers stop infringing activity;

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- bringing civil actions to pursue the remedies described in question 41; and
- in appropriate circumstances, working with law enforcement authorities concerning possible criminal enforcement.

Trade associations and collecting societies representing copyright owners also take various measures on a collective basis to control infringement, including:

- supporting programmes to educate and inform the public concerning copyright compliance and legitimate sources of copyrighted material;
- operating telephone 'tip lines' and investigating infringements;
- facilitating collective enforcement action; and
- working with US government trade officials to resolve significant infringement issues abroad.

Relationship to foreign rights

48 Which international copyright conventions does your country belong to?

The United States is a member of:

- the Buenos Aires Convention of 1910;
- the Berne Convention for the Protection of Literary and Artistic Works (1886, as revised);
- the Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms (1971);

- the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974);
- the Universal Copyright Convention (Geneva 1952 and Paris 1971);
- the World Intellectual Property Organization Copyright Treaty (1996);
- the World Intellectual Property Organization Performances and Phonograms Treaty (1996); and
- various bilateral copyright treaties.

The US has signed the Beijing Treaty on Audiovisual Performances (2012) and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013). However, at the time of writing, these treaties have not yet entered into force.

The United States is also a member of the World Trade Organization and a party to various free trade agreements containing copyright-related provisions.

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

Each of the treaties identified in question 48 has its own unique requirements. They generally require a certain minimum level of protection in terms of the rights recognised and the duration of protection, and also create an obligation to honour the copyrights of citizens of other treaty parties by affording them copyright protection in the US on the same basis as US citizens.

Getting the Deal Through

Acquisition Finance	Distribution & Agency	Life Sciences	Restructuring & Insolvency
Advertising & Marketing	Domains & Domain Names	Mediation	Right of Publicity
Air Transport	Dominance	Merger Control	Securities Finance
Anti-Corruption Regulation	e-Commerce	Mergers & Acquisitions	Securities Litigation
Anti-Money Laundering	Electricity Regulation	Mining	Ship Finance
Arbitration	Enforcement of Foreign Judgments	Oil Regulation	Shipbuilding
Asset Recovery	Environment	Outsourcing	Shipping
Aviation Finance & Leasing	Foreign Investment Review	Patents	State Aid
Banking Regulation	Franchise	Pensions & Retirement Plans	Structured Finance & Securitisation
Cartel Regulation	Fund Management	Pharmaceutical Antitrust	Tax Controversy
Climate Regulation	Gas Regulation	Private Antitrust Litigation	Tax on Inbound Investment
Construction	Government Investigations	Private Client	Telecoms & Media
Copyright	Insurance & Reinsurance	Private Equity	Trade & Customs
Corporate Governance	Insurance Litigation	Product Liability	Trademarks
Corporate Immigration	Intellectual Property & Antitrust	Product Recall	Transfer Pricing
Cybersecurity	Investment Treaty Arbitration	Project Finance	Vertical Agreements
Data Protection & Privacy	Islamic Finance & Markets	Public-Private Partnerships	
Debt Capital Markets	Labour & Employment	Public Procurement	
Dispute Resolution	Licensing	Real Estate	

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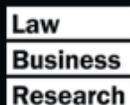
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