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Comparative
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Practical cross-border insights into copyright law

Copyright 2023

Ninth Edition

Contributing Editors:
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Expert Analysis Chapters

Q&A Chapters

From the Publisher

Dear Reader,

Welcome to the ninth edition of *ICLG – Copyright*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to copyright laws and regulations around the world, and is also available at www.iclg.com.

This year, there are two Expert Analysis chapters focusing on recent developments in copyright exceptions in UK law, and Cyprus as a tax efficient IP location.

The question and answer chapters, which in this edition cover 18 jurisdictions, provide detailed answers to common questions raised by professionals dealing with copyright laws and regulations.

As always, this publication has been written by leading copyright lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editors Phil Sherrell and Rebecca O'Kelly-Gillard of Bird & Bird LLP for their leadership, support and expertise in bringing this project to fruition.

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1 Copyright Subsistence

1.1 What are the requirements for copyright to subsist in a work?

Irrespective of their value or purpose, works are literary and artistic intellectual creations with an individual character. Unlike for other intellectual property rights, there are no formal requirements such as registration.

1.2 Does your jurisdiction operate an open or closed list of works that can qualify for copyright protection?

The Federal Act on Copyright and Related Rights ("CopA") gives – in a non-exhaustive list – examples of works that could qualify for copyright protection (insofar as they are intellectual creations with an individual character [see question 1.1]). These are, in particular:

- literary, scientific and other linguistic works;
- musical works and other acoustic works;
- works of art, in particular paintings, sculptures and graphic works;
- works with scientific or technical content such as drawings, plans, maps or three-dimensional representations;
- works of architecture;
- works of applied art;
- photographic, cinematographic and other visual or audiovisual works;
  NB: photographic depictions and depictions of three-dimensional objects produced by a process similar to that of photography are considered as works, even if they *do not have individual character*;
- choreographic works and works of mime;
- computer programs; and
- drafts, titles and parts of works, insofar as they are intellectual creations with an individual character.

1.3 In what works can copyright subsist?

See questions 1.1 and 1.2.

1.4 Are there any works which are excluded from copyright protection?

Copyright does not protect: acts, ordinances, international treaties and other official enactments; means of payment; decisions, minutes and reports issued by authorities and public administrations; patent specifications; and published patent applications.

Furthermore, copyright does not protect official or legally required collections and translations of the aforementioned works.

1.5 Is there a system for registration of copyright and, if so, what is the effect of registration?

The validity of a copyright is not dependent on registration; moreover, there is no registration process at all. Copyright always originates in the person of the creator. The author is the natural person who created the work, meaning that the right arises from the creation of the work itself and commences with the very moment the work comes into being (if the requirements for copyright protection are met).

1.6 What is the duration of copyright protection? Does this vary depending on the type of work?

A work is protected by copyright as soon as it is created, irrespective of when it has been fixed on a physical medium. In the case of a computer program, protection expires 50 years after the death of the author, and in the case of all other works, 70 years after the death of the author. Where it is assumed that the author has been dead for more than 50 or 70 years respectively, protection no longer applies. The term of protection is calculated from 31 December of the year in which the event determining the calculation occurred.

Where two or more persons have contributed to the creation of a work (joint authorship), protection expires according to the paragraph above with regard to the last surviving joint author. Where the individual contributions may be separated, protection for each contribution expires separately.

Where the author of a work is unknown, protection for that work expires 70 years after it has been published or, if it has been published in instalments, 70 years after the final instalment. If the identity of the person who has created the work becomes publicly known before the expiry of the aforementioned term, protection for the work expires according to the paragraph above.

1.7 Is there any overlap between copyright and other intellectual property rights such as design rights and database rights?

A work can be protected simultaneously by copyright and other intellectual property rights (i.e., trademark rights or design

rights, which both depend on a registration). Additional protection is also possible according to the Federal Act against Unfair Competition ("UCA").

1.8 Are there any restrictions on the protection for copyright works which are made by an industrial process?

The author is the natural person who created the work, meaning that there is no general restriction, provided that the work was created by a natural person. Nevertheless, the author can use any available technology, as long as the work itself was created by the author himself and not entirely by an industrial process.

2 Ownership

2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

The first copyright owner of a work is the author defined as the natural person who created the work. In Switzerland, the creator principle applies, i.e. copyright always originates in the person of the creator or the author. An exception (contrary to the system) is found in the law regarding publishing contracts. Legal entities cannot acquire copyrights originally, but can do so derivatively, e.g. through legal transactions.

Unless proven otherwise, the author is the person whose name, pseudonym or distinctive sign appears on the copies or the publication of the work. As long as the author is not named or remains unknown in the case of a pseudonym or distinctive sign, the person who is the editor of the work may exercise the copyright. Where such person is also not named, the person who has published the work may exercise the copyright.

Swiss law also grants copyright-related rights (so-called "neighbouring rights") to performers, phonogram and audio-visual fixation producers and broadcasting organisations.

2.2 Where a work is commissioned, how is ownership of the copyright determined between the author and the commissioner?

The sole right owner is always the author himself, and the author has the exclusive right to decide whether, when and how his work is used. The commissioner will not automatically acquire ownership of the copyright in the work created for him (for the exception, see question 2.1). The copyright in this case needs to be assigned to the commissioner. The assignment of a right subsisting in the copyright does not include the assignment of other partial rights unless such has been agreed. The assignment of the ownership of a copy of a work does not include the right to exploit the copyright, even in case of an original work.

2.3 Where a work is created by an employee, how is ownership of the copyright determined between the employee and the employer?

A dependent work creation is the creation of a work in the context of an employment contract, an agency contract (see question 2.2) or a contract for work and services. In contrast to patent and design law, copyright law does not contain any provisions on works created within the framework of an employment relationship.

Exceptions are the rights to computer programs. Where a computer program has been created under an employment contract in the course of fulfilling professional duties or contractual obligations, the employer alone shall be entitled to exercise the exclusive rights of use.

Apart from the above, the owner of the work is always the author himself. In practice, the rights to the works created under a contract must be transferred to the employer, client, etc., who acquire the copyrights derivatively. In the absence of an explicit provision, the theory of purpose transfer takes effect as a rule of interpretation, according to which only those rights are transferred to the employer, etc. which are necessary for the fulfilment of the contract.

2.4 Is there a concept of joint ownership and, if so, what rules apply to dealings with a jointly owned work?

Where two or more persons have contributed as authors to the creation of a work, copyright belongs to all such persons jointly (joint authorship). Unless they have agreed otherwise, they may only use the work with the consent of all authors; consent may not be withheld for reasons contrary to the principles of good faith.

Each joint author may independently bring an action for infringement but may only ask for relief for the benefit of all. Where the individual contributions may be separated and there is no agreement to the contrary, each joint author may use his own contribution independently, provided such use does not impair the exploitation of the joint work.

3 Exploitation

3.1 Are there any formalities which apply to the transfer/assignment of ownership?

There are no formalities which apply to the transfer or assignment of ownership. Copyright is, in general, assignable and may be inherited. However, as with any legal transaction, written form is recommended. In the context of inheritance law, relevant formal requirements must be considered.

3.2 Are there any formalities required for a copyright licence?

There are no formalities required for a copyright licence. However, as with any legal transaction, written form is recommended, especially for evidence reasons and in order to avoid possible interpretation disputes.

3.3 Are there any laws which limit the licence terms parties may agree to (other than as addressed in questions 3.4 to 3.6)?

There are no specific laws limiting the licence terms, but the general limitations to contracts also apply to licence terms. Accordingly, a (licensing) contract is void if its terms are impossible, unlawful, or immoral. In addition, the law prohibits any excessive restrictions within contracts.

3.4 Which types of copyright work have collective licensing bodies (please name the relevant bodies)?

The following are subject to federal supervision: the management of exclusive rights for the performance and broadcasting

of non-theatrical works of music, and the production of phonograms and audio-visual fixations of such works; the assertion of exclusive rights of certain works; and the assertion of certain rights to remuneration provided for in the CopA. The Federal Council may subject other areas of collective rights management to federal supervision if public interest so requires. Personal use of exclusive rights by the author or his heirs is not subject to federal supervision.

In Switzerland, the following collective licensing bodies exist:

- SUISA (musical works with the exception of theatrical works);
- ProLitteris (literary and dramatic works as well as works of fine art and photography);
- SUISSIMAGE (visual and audio-visual works specifically for film authors and producers);
- SWISSPERFORM (rights of performers, producers of audio and video recordings and broadcasting companies); and
- Société Suisse des Auteurs ("SSA") (theatrical and audio-visual works, choreography and multimedia).

3.5 Where there are collective licensing bodies, how are they regulated?

Any person who exploits rights which are subject to federal supervision requires authorisation from the Swiss Federal Institute of Intellectual Property ("IPI").

Authorisation is only given to collective rights management organisations which: (1) have been founded under Swiss law; (2) are domiciled in Switzerland and conduct their business from Switzerland; (3) have the management of copyright or related rights as their primary purpose; (4) are open to all holders of rights; (5) grant an appropriate right of participation in the decisions of the society to authors and performers; (6) guarantee compliance with the statutory provisions, in particular in terms of their articles of association; and (7) give rise to the expectation of the effective and economic exploitation of rights. In general, authorisation is only granted to a single collective rights management organisation per category of work, and to a single collective rights management organisation for related rights.

Authorisation is granted for five years; on expiry, it may be renewed for the same term.

3.6 On what grounds can licence terms offered by a collective licensing body be challenged?

The Federal Arbitration Commission for the Exploitation of Copyrights and Related Rights ("Arbitration Commission") is responsible for approving the tariffs drawn up by the collective rights management organisations.

The decision of the Arbitration Commission may be appealed to the Federal Administrative Court and further to the Federal Supreme Court on limited grounds. Before the Federal Administrative Court, the appellant may contend that there has been a violation of federal law including: exceeding or abusing discretionary powers; that there has been an incorrect or incomplete determination of the legally relevant facts of the case; or that the ruling is inadequate (a plea of inadequacy is inadmissible if a cantonal authority has ruled as the appellate authority).

Further, the appeal can be brought before the Federal Supreme Court to challenge violations of federal and international law. The determinations of the facts of the case can only be challenged if they are obviously incorrect or are based on an infringement of rights, and if the remedying of the defect can be decisive for the outcome of the proceedings.

4 Owners' Rights

4.1 What acts involving a copyright work are capable of being restricted by the rights holder?

The author or the rights holder has the exclusive right to decide whether, when and how his work is used. The following acts therefore may be restricted: producing copies of the work; offering, transferring or otherwise distributing copies of the work; reciting, performing or presenting a work; broadcasting the work by radio, television or similar means; retransmitting works by means of technical equipment; and making works that have already been made available, broadcasted works and retransmitted works perceptible. The author of a computer program may also restrict the rental of the work. Further, the author has the exclusive right to decide whether, when and how the work may be altered and whether, when and how the work may be used to create a derivative work or may be included in a collected work.

Even where a third party is authorised by contract or law to alter the work or to use it to create a derivative work, the author may oppose any distortion of the work in violation of his personal rights.

4.2 Are there any ancillary rights related to copyright, such as moral rights, and, if so, what do they protect, and can they be waived or assigned?

The moral rights of the author specifically protect the relationship to his work and thus go beyond the rules of general personal rights. They include the right to recognition of authorship, the right of first disclosure and the right of integrity of the work.

Generally, moral rights are not assignable but are inheritable. This means that, for example, the right of first disclosure cannot be transferred as such. However, the author can allow a third party to exercise certain moral rights by contract. Further, the right of first publication can, if the author has agreed in principle, be exercised by a third party (e.g. by a publisher). Furthermore, the author can waive his rights of defence against violations of his moral rights in a specific case.

4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

The "Principle of Exhaustion" means that once a copy of a work has been put on the market by the author (or with his consent), the work can circulate freely. According to the Federal Supreme Court, exhaustion unfolds its effect not only if the copy of the work has been put on the market in Switzerland, but also anywhere in the world (international exhaustion). Therefore, copyright owners cannot prevent any import of copies of the work – which have been legally acquired abroad – into Switzerland, and any reselling of such copies in Switzerland.

An exception to this rule applies with regard to the protection of audio-visual works, more specifically to the performance of cinematographic works. Unless authorised by the author, copies of audio-visual works, such as movies, may not be further transferred or rented as long as the author is thereby impaired in exercising his right of performance, meaning the first broadcasting period in movie theatres.

5 Copyright Enforcement

5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

No, there are no statutory enforcement agencies. Under Swiss law, an alternative to civil and/or criminal actions does not exist. However, rights holders can request assistance from the customs authorities in case of unlawful import or export.

5.2 Other than the copyright owner, can anyone else bring a claim for infringement of the copyright in a work?

Apart from the owner, any person who holds an exclusive licence is entitled to bring a separate action unless this is explicitly excluded in the licence agreement. Furthermore, any (e.g. also non-exclusive) licensees may join an infringement action in order to claim for their own losses. All of the above only applies to licence agreements that have been concluded or confirmed after 1 July 2008.

5.3 Can an action be brought against 'secondary' infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

In principle, an action can be brought against anyone who participates in the infringement. This includes co-perpetrators, instigators, and abettors.

5.4 Are there any general or specific exceptions which can be relied upon as a defence to a claim of infringement?

The Copyright Act contains an enumeration of copyright exception and exemptions ("Chapter 5 Exceptions to Copyright", art. 19 *et seqq*. CopA). This chapter contains exceptions for private use of published works, decoding of computer programs, dissemination of broadcast works, use of broadcasting organisations' archived works, use of orphan works, making available broadcasted musical works, compulsory licences for the manufacture of phonograms, archive and backup copies, temporary copies, copies for broadcasting purposes, use of works by people with disabilities, use of works for the purpose of scientific research, inventories, quotations, museum, exhibition and auction catalogues, works on premises open to the public and for reporting current events. A potential defendant may also refer to the Principle of Exhaustion (see question 4.3).

5.5 Are interim or permanent injunctions available?

Both interim and permanent injunctions are available. The standard of proof to obtain a preliminary injunction is lower than in proceedings on the merits. The fulfilment of the requirements has to appear likely under a plausibility standard. The requirements are: probability of success on the merits; endangerment or infringement of rights; risk of serious harm; urgency; and balance of interests.

In case of urgency, the court may issue interim injunctions *ex parte*, that is, without hearing the party against whom the measure is requested.

A permanent injunction requires proceedings on the merits.

5.6 On what basis are damages or an account of profits calculated?

There are three bases for such claims:

- Tort (art. 41 Code of Obligations ("CO")): damages derived from tort can either be calculated using the common concrete calculation method (which is in many cases very hard to apply, especially because loss of profits is often hard to prove in copyright matters) or by way of the licence analogy, which is a hypothetical method. For the latter, damages are calculated on the basis of the licence fee which the infringer would have had to pay if he had asked for permission.
- Account of profits (art. 423 CO): this requires (*inter alia*) bad faith.
- Unjust enrichment (art. 62 CO): this basis is relevant in cases in which the infringer is not of bad faith.

5.7 What are the typical costs of infringement proceedings and how long do they take?

The costs (court fees and attorneys' fees) of infringement proceedings in the first instance depend on the amount in dispute and the canton in which litigation is conducted. Usually, courts do not assume the amount in dispute to be lower than CHF 50,000 to 100,000. The costs also depend in particular on the complexity of the dispute, the number of court hearings and the number of submissions filed. The losing party has to bear the court fees and compensation for the attorney's fees.

A standard infringement proceeding in the first instance usually takes up to two years.

Costs for appeal proceedings (before the Federal Supreme Court) are usually lower than in the first instance, and such proceedings take less time than first instance proceedings.

5.8 Is there a right of appeal from a first instance judgment and, if so, what are the grounds on which an appeal may be brought?

In copyright matters, cantonal Appellate Courts and Commercial Courts rule as the sole cantonal instance. An appeal may therefore only be brought before the Federal Supreme Court.

The grounds for appeal are confined. Admissible grounds for appeal in copyright matters are especially the violation of federal and international law. There are additional restrictions for the application of foreign law. The facts can only be challenged if the previous instance established them in an obviously incorrect manner or in violation of the law.

Appeals against interim measures can only be challenged on the grounds of violation of constitutional rights.

5.9 What is the period in which an action must be commenced?

The period depends on the action and its legal basis.

A damage claim based on tort, for example, becomes time-barred three years after the date on which the claimant became aware of the damage and the identity of the infringer. In any event, a damage claim based on tort becomes time-barred 10 years after the damaging act.

An action for injunctive relief or a declaratory action is not subject to limitation *per se*. However, the corresponding conditions of the respective type of action must be met. *Inter alia*,

the claimant must have a current and legitimate interest in the proceedings.

Regarding interim measures, since urgency is a prerequisite, the applicant is obliged to act promptly upon discovery of the infringement.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Copyright infringement is a criminal offence. Omission of source, infringement of related rights, offences relating to technical protection measures and to rights-management information, and unauthorised assertion of rights are also considered criminal offences.

6.2 What is the threshold for criminal liability and what are the potential sanctions?

Negligent infringements are of no criminal relevance; the above-mentioned criminal offences require intentional acts, whereas second degree intent is sufficient.

Depending on the criminal offence, the sanctions can be a custodial sentence up to three years or a monetary penalty or a fine. If the copyright or related rights infringement was committed for commercial gain, the penalty is a custodial sentence of up to five years (which must be combined with a monetary penalty) or a monetary penalty alone.

7 Current Developments

7.1 Have there been, or are there anticipated, any significant legislative changes or case law developments?

On 1 April 2020, the revised CopA entered into force. This revision contains substantial changes. For example, according to the revised law, photographs of three-dimensional objects are considered works, even if they do not have individual character. The revised CopA also contains anti-piracy provisions such as an obligation of providers of internet hosting services to prevent a work from being unlawfully remade available ("duty of stay-down").

7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, in NFTs or the metaverse, etc.)?

Due to the mentioned "duty of stay-down" for hosting providers, these providers will have to ensure that removed copyright-infringing content remains off their servers. Furthermore, the revised CopA contains provisions stating that on-demand providers owe the authors/performers remuneration, which is collected for them by collective licensing bodies.

7.3 Have there been any decisions or changes of law regarding the role of copyright in relation to artificial intelligence systems, including the use of copyright in those systems and/or any work generated by those systems?

A work can only be created by a human being (see question 2.1). Since the CopA is technologically neutral, no special rules apply. There have been no changes of law in this regard.

Dr. Yannick Hostettler advises and represents Swiss and foreign companies as well as individuals in proceedings before state courts of all instances and arbitral tribunals. His practice focuses on commercial disputes, particularly in the areas of distribution, general contract, intellectual property and employment law. He also provides advice on non-contentious matters in these fields.
Yannick Hostettler has extensive experience in conducting complex cross-border litigation, in the recognition and enforcement of foreign judgements and in international mutual legal assistance in civil and criminal matters. He publishes regularly on topics concerning civil procedure and intellectual property law.

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