Creative Expression

An Introduction to Copyright and Related Rights
for Small and Medium-sized Enterprises

Intellectual Property
for Business Series
Number 4

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Disclaimer: The information contained in this guide is not meant as a substitute for professional legal advice. Its purpose is limited to providing basic information on the subject matter.

Introduction

This is the fourth in the series of guides on "Intellectual Property for Business." It provides an introduction to copyright and related rights for business managers and entrepreneurs. It explains in simple language aspects of copyright and related rights law and practice that affect the business strategies of enterprises.

Many enterprises depend on copyright and related rights. Traditionally, this has been the case for those involved in sectors such as printing, publishing, music and audiovisual (film and TV) production, advertising, communication and marketing, crafts, the visual and performing arts, design and fashion, and broadcasting. In recent decades, businesses working in digital content-driven industries have also come to rely on effective copyright and related rights protection. In practice, in a typical business day, the owners and employees of most businesses are therefore likely to create or use materials that are protected by copyright and related rights.

This guide is intended to help small and medium-sized enterprises (SMEs) to:

- understand how to protect the works that they create or in which they own rights;
- get the most out of their copyright and/or related rights; and
- avoid violating the copyright or related rights of others.

This guide provides a comprehensive introduction to copyright and related rights. It also refers you to other WIPO products which can all be freely downloaded from www.wipo.int/publications. However, neither this guide nor the other sources referred to are a substitute for professional legal advice.

National and local institutions are welcome to produce their own translations and adaptations of this guide. In fact, anyone can. It is freely available under a Creative Commons license.

Copyright and related rights

What is copyright?

Copyright law grants authors, composers, computer programmers, website designers and other creators – all of whom it calls "authors" – legal protection for their literary, artistic, dramatic and other types of creations – which are usually referred to as "works."

Copyright law protects a wide variety of original works, such as books, magazines, newspapers, music, paintings, photographs, sculptures, architectural designs and buildings, films, plays, computer programs, videogames and original databases (for a more detailed list, see page 16).

Most businesses print brochures or publish advertisements that contain material (such as images or text) protected by copyright

Source: Left-hand photo by Alan Levine (available online under CC BY 2.0)

Copyright law gives the author of a work a diverse bundle of exclusive rights over that work for a limited but sometimes long period of time. These rights enable the author to control the economic use of their work in a number of ways and to receive payment. Copyright law also provides "moral rights," which protect, among other things, the author's reputation and connection to the work.

Maintenance manuals and presentations may be protected by copyright

Copyright and business

Copyright can be used to protect everyday creations, as well as literature, music and art. As a result, the business of most companies will involve material that may be protected by copyright. Examples include computer programs; web content; product catalogues; newsletters; instruction sheets or operating manuals for machines or consumer products; user, repair or maintenance manuals for various types of equipment; artwork and text on product literature, labels or packaging; marketing and advertising material; billboards; and websites. In most countries, copyright may also be used to protect sketches, drawings or designs of manufactured products.

What are related rights?

In many countries, especially those in which copyright developed from a civil law tradition, the terms "related rights" or "neighboring rights" refer to an area of law that is different from, though connected to, copyright. This is the case, for example, in Brazil, People's Republic of China, France, Germany and Indonesia. Whereas copyright is understood to protect the works of authors, related or neighboring rights protect certain people or businesses that play an important role in performing, communicating or disseminating content to the public, whether or not that content is protected by copyright. In other countries, especially those in which copyright developed from a common law tradition, all or some of these rights are treated as part of copyright. This is the case, for example, in Australia, India, Nigeria, the United Kingdom and the United States of America. Such countries might instead distinguish between different kinds of copyright, e.g., copyright over "works of authorship" and copyright over "entrepreneurial works."

A note on terminology

This guide uses the terminology of "related rights." At the same time, because in many situations the rules that govern related rights are the same as those that govern copyright, unless otherwise stated, references in the guide to "copyright" should also be taken to apply to related rights, references to "works" should also be taken to apply to the subject matter of related rights, and references to "authors" should also be taken to apply to the owners of related rights.

The most common related rights are the following:

- **The rights of performers** (e.g., actors and musicians) in their performances. This includes live or fixed performances of pre-existing artistic, dramatic or musical works and live recitations and readings of pre-existing literary works. A performance may also be an improvised one, whether original or based on a pre-existing work.
- **The rights of producers of sound recordings** (or "phonograms") in their music productions for instance when they are played in a club, streamed online, or distributed in physical formats (e.g. vinyl or CDs);
- **The rights of broadcasting organizations** in their transmissions of, e.g., radio and television programs, whether through analogue or digital means, both over the air and, in some countries, via cable systems (so-called cablecasting).

In all cases, the work performed, recorded or broadcast need not have been previously fixed in any medium or form. It may be protected by copyright, or it may be in the public domain (see page 69).

Additional related rights are recognized in some countries (see page 36).

More information on related rights can be found on page 31.

Example

In the case of a song, copyright protects the music created by the composer and the lyrics written by the lyricist.

Related rights would apply to the:

- performances of the song by one or more musicians and/or singers;
- sound recordings of performances of the song made by producers;
- broadcasts of performances of the song done by broadcasting organizations; and
- (in some jurisdictions) published editions of the sheet music and lyrics published by a publisher.

How are copyright and related rights relevant to your business?

Copyright protects the literary, artistic, dramatic or other creative elements of products or services. Related rights protect certain performative, technical and organizational elements of products or services. Copyright and related rights enable their owners to prevent these elements (their "works") from being used by others. Copyright and related rights therefore enable a business to do the following:

- **Control the commercial exploitation of works.** Works protected by copyright and related rights may not be copied or exploited commercially by others without the prior permission of the rights owner unless a limitation or exception applies. Such exclusivity over the use of works protected by copyright and related rights helps a business to gain and maintain a sustainable competitive edge in the marketplace.
- **Generate income.** Like the owner of physical property, the owner of copyright or of a related right may use their right, or transfer it to others by way of sale, gift or inheritance. There are different ways to commercialize copyright and related rights. One possibility is to make and sell multiple copies of works protected by copyright (e.g., prints of a photograph) or of the subject matter of related rights (e.g., copies of a sound recording); another is to sell (assign) copyright or related rights to another person or company. Finally, a third – often preferable – option is to license the use of works, which means permitting another person or company to use the copyright or related right in exchange for payment, on mutually agreed terms and conditions (see page 58).
- **Raise funds.** Companies that own copyright and related rights (e.g., a portfolio of distribution rights to a number of films) may be able to borrow money from financial institutions by using their rights as collateral so that investors and lenders can take a "security interest."
- **Take action against infringers.** Copyright and related rights enable rights owners to take legal action against anyone encroaching on their exclusive rights (called an "infringer") to obtain a remedy. Remedies can include monetary relief, injunctive relief (e.g., a court order to refrain from further infringement), the destruction of infringing works, or the recovery of attorneys' fees. In some countries, criminal penalties may be imposed on willful copyright violators. Legal action against those helping others to infringe or providing them with the means used to infringe may also be available.
- **Use works owned by others.** Using works based on copyright and related rights owned by others for commercial

purposes may enhance the value or efficiency of a business, including its brand value. For example, playing music in a restaurant, bar, retail shop or airport adds value to the experience of customers using a service or visiting a business outlet. But, in most countries, unless a limitation or exception to copyright applies (see page 71), the use of music in this manner requires a license. Understanding copyright and related rights laws is important in order to know when a license is required and how to obtain one. Obtaining a license from the owner of copyright and/or related rights when one is needed will help avoid disputes, which could result in potentially time-consuming, uncertain and expensive litigation.

How are copyright and related rights obtained?

Almost all countries have one or more national laws on copyright and related rights. As there are important differences between the copyright and/or related rights laws of different countries, it is advisable to consult the relevant national provisions. Before taking key business decisions involving copyright and/or related rights, it may also be necessary to seek legal advice from a competent professional.

However, many countries are signatories to several important international treaties that have helped to achieve considerable international harmonization of copyright and related rights. A list of the main international treaties in the area of copyright can be found in Annex 2.

As a result of these international treaties, in a very large number of countries, copyright and related rights protection arises without any formalities, such as a requirement for registration, depositing copies of the work, issuing a copyright notice or payment of a fee. Instead, in most countries, works are protected automatically upon their creation. However, certain thresholds for protection must be met before a work can be protected. In the area of copyright, the most important of these is that the work must be original (see page 21).

Are there other legal means for protecting intellectual property?

Depending on the nature of a business, it may also be possible to use one or more of the following types of intellectual property (IP) rights to protect its interests:

- **Trademarks.** A trademark provides exclusivity over a sign (such as a word, logo, color or combination thereof) which helps to distinguish the products or services of one business from those of other businesses.
- **Industrial designs.** Exclusivity over the ornamental or aesthetic features of a product may be obtained through industrial designs (also known as "design patents" in some countries).
- **Patents.** Patents may protect inventions that meet, among other requirements, the necessary standards of novelty, inventiveness and industrial applicability.
- **Trade secrets.** Business information of commercial value may be protected as a trade secret, as long as reasonable steps are taken to keep the information confidential.

- **Unfair competition.** These laws may allow action against the unfair business behavior of competitors. Protection under unfair competition law will often grant some additional protection against the copying of different aspects of products beyond what is possible using other types of IP rights. Even so, the protection provided by other IP rights is generally stronger than the protection available under unfair competition.

Walt Disney and Mickey Mouse

Source: The U.S. National Archives, https://catalog.archives.gov/id/7741408

Use of different rights to protect the same material

Sometimes, different IP rights are used simultaneously or sequentially to protect the same material. For example, while works about Mickey Mouse will generally be protected by copyright, in many countries Mickey's image and name have also been registered as trademarks. Depending on the national rules on the term of protection, copyright in works featuring Mickey will eventually expire, if it has not done so already (for more on the term of protection of copyright, see page 37). However, as long as its registration remains valid in a given country, a trademark will be protected indefinitely. It is important to note that copyright and trademark law protect against different uses: a use may amount to copyright infringement but not trademark infringement, and vice versa.

Scope and duration of protection

What types of works are protected by copyright?

In most countries, the history of copyright law is one of a gradual expansion of protectable types of works. Some countries provide a "closed list" of the categories of works that are protected under national copyright law. In such countries, if a work does not fall within a category on the list, it cannot be protected. More often, national copyright laws rely on open-ended definitions of the notion of a "work," usually supplemented by non-exhaustive lists of protectable categories of works. Either way, the categories of works that are protected by copyright are usually broad and relatively flexible. The kinds of works protected in most countries include:

- literary works (e.g., books, magazines, newspapers, technical papers, instruction manuals, catalogues, tables and compilations of literary works);
- musical works or compositions, including compilations;
- dramatic works (e.g., plays for theater, cinema, television or radio);
- artistic or visual art works (e.g., drawings, paintings, sculptures, architectural designs and buildings, cartoon images and computer artwork);
- photographic works (both on paper and in digital form);
- choreographic works (i.e., works of dance);
- computer programs, including software (see box on page 19);
- some types of databases (see box on page 21);
- maps, globes, charts, diagrams, plans and technical drawings;
- advertisements, commercial prints and labels;
- cinematographic or audiovisual works, including motion pictures, television shows and webcasts;
- videogames (see box below); and
- in some countries, works of applied art (such as artistic jewelry, wallpaper and carpets, see page 23).

With the exception of one notable Dutch court decision which granted copyright protection to the smell of a perfume,[1] it is generally accepted that tastes and smells are not protected by copyright.

It is important to emphasize that the categories of works recognized by copyright do not always correspond to the artifacts and other objects which we commonly think of as the results of creativity. Moreover, a single object may incorporate **multiple layers of works**. For example, a book may incorporate a literary work in the form of a novel, as well as artistic or photographic



Music, maps and movies may all be protected by copyright

works, in the form of illustrations or cover art. Related rights in the typographical arrangement of the published edition might also come into play, as may the rights of voice actors appearing in the audio book version or the rights of the producers of that audio book. An adaptation of the book into a film will result in the addition of yet more layers of rights. An excellent example of the complexities that may arise is given by the example of videogames.

Copyright protection for videogames

Videogames generally combine several types of works, such as software, text, a story and characters, animation and other artwork, graphics, video and music. Each of these elements may be entitled to copyright protection in its own right, if the conditions for such protection are met. The result is in what can be described as "distributive copyright protection": separate protection for each of the different elements comprising a videogame. This is recognized in the legal treatment of videogames in many jurisdictions, such as Brazil, the European Union, Egypt, India, Japan, Singapore, South Africa, the United Kingdom and the United States of America. Related rights may also protect the contributions made by any performers appearing in sound recordings or films used in a videogame, as well as the producers of such sound recordings or films.

In addition, the videogame itself may also receive copyright protection. In jurisdictions that rely on open-ended definitions of the notion of a "work" (such as the European Union, Brazil or the Republic of Korea), this is unproblematic – although whether a videogame qualifies as a specific type of work (e.g., software, an audiovisual work or something else) may have legal consequences – for example, it might affect the term of copyright protection, the ownership of rights and which acts infringe those rights.

The protection of a videogame as such is more challenging in countries whose copyright laws establish "closed lists" of protected categories of works (see page 16). In such cases, one solution is to view videogames as falling within a category on the closed list. This is what happens, for example, in India and Kenya, which treat videogames as cinematographic works. To the extent that the people recognized as the co-authors of audiovisual or cinematographic works in national law – generally, the (principal) director(s), scriptwriter(s) and composer(s) of the original soundtrack – are not necessarily the same people involved in the development of videogames, the fit might not always be a comfortable one (for more on authorship in copyright see page 50). Otherwise, protection of the videogame as such might not be possible. For example, the United

Kingdom does not recognize a concept of audiovisual or cinematographic works in its closed list of protectable works. It has also rejected the protection of videogames as "dramatic works" on the basis that videogames do not satisfy the condition of sufficient unity that allows them to be performed before an audience – instead, the sequence of images displayed on the screen will differ from one game to another, even if the game is played by the same player.

In almost all jurisdictions, the software underlying a videogame will be protected as a literary work. Attention is needed given the frequent use in the industry of what is known as "middleware" – flexible and reusable software developed and tested by a third-party provider. This may be used as the technical basis for a videogame and might therefore be shared across multiple games. For example, the popular videogames Civilization VI and Fortnite offer very different user experiences but are built on the same middleware source code, DirectX 12. Videogame developers who rely on such third-party software will generally only own copyright in any tailor-made code written on top of the middleware – meaning that they cannot take action against others copying the middleware.

Importantly, copyright does not protect the ideas underlying a videogame (see page 22). This means that a company that has developed, for example, an online game of pool will not be able to stop others from also creating their own online games of pool. To the extent that any similarities in the appearance of the game on the screen ("outputs") are attributable to the nature of the game, no copyright infringement will have occurred – much as the mere fact that two cakes taste the same does not mean that the recipe for one is a copy of the recipe for the other. Instead, such outputs may amount to "scènes à faire," or commonplace elements in which no copyright subsists. This means that very simple videogames (for example, card games) that lack original audiovisual elements or original storylines may only attract protection for the underlying software.

In recent years, so-called "e-sports" have become popular – the competitive playing of videogames, often in organized multiplayer tournaments between professional players, whether individually or in teams. Such tournaments may be recorded and broadcast or otherwise communicated to the public, or they may be made available online for livestreaming. The emergence of e-sports adds new layers of rights for producers and broadcasters and raises the question of whether players or commentators may qualify as authors for the purposes of copyright or performers for the purposes of related rights. The need to clear rights for the commercial exploitation of such events raises the stakes for definitive answers on the copyrightability of videogames and the elements that comprise them.

Protection of computer programs

After considerable debate during the 1970s and 1980s, the international consensus is now that computer programs may be protected by copyright. This conclusion is firmly entrenched in the provisions of the WIPO Copyright Treaty (WCT), adopted in 1996, which requires that computer programs be protected as "literary works." This is true not only of human-readable instructions (source code), but also of binary machine-readable ones (object code). It is important to keep in mind that the same conditions for protection apply to computer programs as to any other work. Computer programs will, therefore, only enjoy copyright protection if they are original, according to the standard set in national law on originality in copyright (see page 21).

Note that copyright cannot protect the ideas underlying a work (see page 22). This means that the functions, systems, procedures, processes, algorithms, and methods of operation or logic used in computer programs cannot be protected by copyright. Similarly, programming languages and the format of data files used in computer programs are generally understood to fall outside of the reach of copyright. It is also necessary to distinguish computer programs from other related elements. For example, some courts have found that a graphical user interface (GUI), i.e., an interface that allows a user to interact with a computer program, is not itself a computer program and therefore is not protectable as a literary work. However, a GUI may qualify for copyright protection as an artistic work, for example, provided it is sufficiently original. In jurisdictions where a fixation requirement exists (see page 22), arguably the recording of a GUI in computer code should be sufficient.

The lack of copyright protection for the functionality of a computer program may have significant practical implications, as the economic value of computer programs is largely derived from the functional ends they are written to achieve. However, the software market exhibits lead-time effects, so that the copyright protection of the source and object code may allow producers to extend the window of time during which they can gain an advantage over competitors. Of course, in cases of word-for-word copying or unauthorized distribution of copies of a computer program, the question of whether any similarities amount to expression (protected by copyright) or function (not protected by copyright) will rarely need to be considered.

Aside from copyright, different elements of a computer program may

also be protected through other areas of law:

- In some countries, functional elements of computer programs may be protected by patents, if certain conditions are met. In other countries, all types of computer programs are explicitly excluded from the purview of patent law.
- It is also common commercial practice to treat the source code of computer programs as a trade secret.
- Certain features created by computer programs, such as icons on a computer screen, may be protected, in some countries, as industrial designs.
- Agreements governed by contract law provide a central form of legal protection for computer programs, complementing or possibly even substituting IP rights. Such additional protection through contracts, for example license agreements, is sometimes termed "super-copyright."
- In many countries, criminal law offers additional protection against copyright infringement, including that of software.

Beyond legal protection, as with other kinds of protected works (see page 43), another way of protecting software is via technology itself – for example, through lockout programs and use of encryption methods. In this way, producers can craft their own extra-legal protection. Protection against circumventing technological protection measures (TPMs) is often incorporated into national copyright laws (see page 75).

Each of the above legal and technological tools for protecting software has its advantages and disadvantages. Protecting computer software through copyright:

- does not require registration (see page 42);
- is, therefore, inexpensive to obtain;
- lasts a long time (see page 37);
- does not extend to ideas, systems, functions, procedures, processes, algorithms, methods of operation or the logic used in software – these elements might however be protected by patents, or by treating the program as a trade secret; and
- can therefore provide only limited protection, covering the particular way the ideas embodied in software are expressed in a given program (see page 22).

In many countries, the preparatory design material for a computer program is also protected alongside the computer program itself.

It should be noted that although the terms are often used interchangeably, national legislation will sometimes distinguish between "computer programs" and "software," with the first including programs incorporated into hardware. Both are generally eligible for copyright protection.

Protection for databases

A database is a collection of information that has been systematically compiled and organized for easy access and analysis. It may be in paper, electronic or another form. Copyright law is the primary means of legal protection for databases. However, not all databases are protected by copyright, and even those that are may enjoy limited protection.

- In most countries, copyright protects databases if their contents are selected or arranged in such a way that they are sufficiently original. As with software, this is mandated by the WCT. The bar for originality differs from country to country (see below), but databases in most countries that are arranged according to basic rules (e.g., alphabetically or chronologically, as in a phone directory or television schedule) will not meet the originality requirement. An example of a database that would qualify as original in most countries would be an anthology of stories, poetry or essays.
- In some countries, mostly Member States of the European Union, non-original databases are protected by a *sui generis* right (a right comparable to, but distinct from copyright) called the database right. This allows makers of databases to sue competitors if they extract and reutilize the whole or a substantial (quantitatively or qualitatively) part of the database, provided there has been a substantial investment (quantitatively or qualitatively) in obtaining, verifying or presenting the contents.

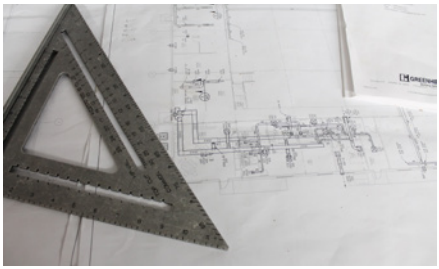
Cumulative protection of a database by both copyright and the *sui generis* right is possible, provided the conditions for each right are met. When a database is protected by copyright, this protection extends only to the manner of selection and presentation of the database and not to its contents, which may or may not have separate copyright protection. Additional protection outside of copyright, for example by the law of unfair competition, may also be possible.

What criteria must a work meet to qualify for protection?

To qualify for copyright protection, a work must be original. An original work is one that "originates" from the author – that is, one that was independently created by them and was not copied from the work of another or from material in the public domain (see page 69).

The exact definition of originality under copyright law differs from one country to another. So, depending on national law, creating an original work may involve a "minimum degree" or "modicum of" creativity; intellectual effort; own (personal) intellectual creation; individual character; or mere skill, labor and effort. Even so, a work enjoys copyright protection irrespective of its creative/aesthetic merit or effect.

Copyright may therefore (though will not always) also protect, for example, packaging labels, recipes, technical guides, instruction manuals or engineering drawings, as well as the drawings of, say, a three-year-old child.



Sketches and technical drawings for architectural works, engineered items, machines, toys, garments and so on may be protected by copyright

In all cases, originality relates to the expression of the author and not to the underlying idea (see below).

Depending on the country, the work may also have to be fixed in a material form, i.e., embodied in a medium. If so, both physical media and electronic or digital media generally qualify. The fact that a work in its digital form can only be read by a computer – because it consists only of ones and zeros – does not affect its eligibility for copyright protection. So, a work may be fixed, for example, by writing on paper, storing on a disk, painting on canvas or recording on tape. In countries with a fixation requirement, improvised choreographic works, speeches or music performances that have not been notated or recorded are not protected. If a fixation requirement exists, a work may be fixed by the author or by somebody else.

Copyright protects both published and unpublished works.

What aspects of a work are not protected by copyright?

- **Ideas or concepts.** Copyright law only protects the way in which the author expressed themselves. It does not protect any underlying idea, concept, discovery, method of operation, principle, procedure, process, formula or system, regardless of the form in which it is described or embodied in a work. It is for this reason that it is usually understood that copyright does not protect tastes or smells. While a concept or method of doing something is not subject to copyright, written instructions or sketches explaining or illustrating the concept or method may be.

A fundamental principle underlying copyright law is the so-called "idea–expression dichotomy" – this means that ideas are not protected by copyright, although an individual author's expression of an idea might be

Example

Your company has copyright over an instruction manual that describes how to brew beer. The copyright in the manual will allow you to prevent others from copying the combination of words that comprise the manual, and the illustrations that you have used. However, it will not give you any right

to prevent competitors from (a) using the machinery, processes and merchandising methods described in the manual; or (b) writing another manual for brewing beer.

- **Facts or information.** Copyright does not protect facts or information – whether scientific, historical, biographical or news – but it may protect the manner in which such facts or information are expressed, selected or arranged (see also protection of databases, page 21).

Example

A biography includes many facts about a person's life. The author may have spent considerable time and effort discovering things about that person's life that were previously unknown. Still, others are free to use such facts as long as they do not copy the particular manner in which the facts are expressed.

- **Names, titles, slogans and other short phrases** are generally excluded from copyright protection, although some countries do allow protection if they display sufficient originality. While this means that the name of a product or an advertising slogan will usually not be protected by copyright, they may be protected under trademark law (see page 13) or the law of unfair competition (see page 14). In other cases, protection may be cumulative. So, a logo may be protected under copyright, as well as by trademark law, as long as the respective requirements for such protection are met.
- **Some or all official government works** (such as copies of statutes or judicial rulings) are not protected by copyright in some countries (see page 55).
- **Works of applied art.** In some countries, copyright protection is not available to works of applied art. Instead, the appearance of the work may be protected under the law of industrial designs (see box below). However, even in such countries, copyright protection may extend to pictorial, graphic or sculptural features that can be identified separately from the utilitarian aspects of an article. In other countries, copyright and design rights may apply cumulatively.

Works of applied art

Works of applied art (sometimes called "works of artistic craftsmanship") are artistic works used for practical purposes as everyday, useful products. Typical examples are jewelry, lamps and furniture. The term is used as distinct from the "fine arts," which are understood to produce objects with no practical use, whose only purpose is aesthetic appeal or intellectual stimulation. Works of applied art thus have a double nature: they may be regarded as artistic creations, but they also serve a practical purpose. This places them on the borderline between the laws of copyright and industrial design. The protection given to works of applied art differs greatly from one country to another. While copyright and industrial design protection may apply cumulatively in some countries, this is not the case everywhere. Therefore, it is advisable to consult a national IP expert to be sure of the situation in a particular country.

What protection does copyright provide?

Copyright provides two sets or bundles of rights. Economic rights protect the owner's economic interests. Moral rights protect an author's non-economic interests, such as their connection to the work and creative integrity.

Economic rights

Economic rights give the owner of copyright the exclusive right to authorize or prohibit certain uses of a work. This means no one may exercise these rights without the copyright owner's permission. The scope of these rights, and their limitations and exceptions, differ depending on the type of work and the applicable national copyright law. The economic rights go beyond the simple "right to copy" and cover several different rights to prevent others from unfairly exploiting a creative work.

Different countries provide different lists of exclusive economic rights. However the rights are described or divided, most countries provide the copyright owner with the exclusive right to do the following:

- **Reproduce (i.e., create "copies" of) the work** in various forms. Reproduction covers, for example, copying music on a CD, photocopying a book, downloading a computer program, uploading a song, digitizing a photo and storing it on a disk, scanning a text, printing a cartoon character on a T-shirt, incorporating a portion of a song into a new song or 3D printing a copy of a sculpture. This is one of the most important rights granted by copyright.

- **Distribute copies of the work to the public ("right of first sale").** This right allows the owner of a work to prohibit others from selling or otherwise transferring the ownership of copies of the work. In most countries, there is an important exception to the distribution right known as the "first sale doctrine" or the "principle of exhaustion." According to this, the distribution right does not apply after the "first sale" or other transfer of ownership of a particular copy. The copyright owner can therefore only control the timing and terms and conditions of that action. After the first sale, the right is said to have been "exhausted," so that the copyright owner has no say over how that particular copy is further distributed in the relevant jurisdiction. Importantly, while the buyer can resell the copy or give it away, they cannot make any copies of it or engage in any other actions that fall within the owner's exclusive rights (e.g., uploading it to the internet).

The right of first sale and digital copies

The first sale or exhaustion principle does not apply smoothly to digital copies of works, such as e-books or digital audio files. This is because the resale of such copies usually involves the creation of a new copy, with the original owner able to retain their copy. As the reproduction right is not subject to an exhaustion rule, while the copy transmitted is not the one initially sold and in which the distribution right has therefore been exhausted, copyright owners are able to retain control over the resale of "used" digital copies of their works. As a result, the first sale doctrine is generally not considered to extend to digital copies – there is no "digital exhaustion."

Whether the first sale doctrine should be reconfigured to cover digital copies is the subject of considerable debate in many countries. One consideration is that, while physical copies deteriorate with use, so that secondhand copies are often less attractive than new ones, this is not the case for digital copies. It is also much easier to organize the onward sale of used digital copies over the internet than it is to sell secondhand physical copies. These realities suggest limiting the application of the first sale doctrine to tangible copies of works; permitting a market in used digital copies would arguably affect the interests of copyright owners much more than permitting a market in secondhand tangible copies. At the same time, solutions might include the use of technical tools to ensure that only one "used" copy of a work can be resold.

Some countries do recognize a limited application of the first sale doctrine to digital copies, at least under certain circumstances. So in the European Union, for example, the resale of licenses for the use of software downloaded from the internet is allowed, where the license was granted in return for payment and for an unlimited period.

Given the complications surrounding the legal issues, where the resale of digital copies is part of a company's business strategy, a local IP practitioner should be consulted.

- **Rent copies of a work to the public.** "Renting" generally means making copies of a work available to the public for use, for a limited period of time, in exchange for a fee or other economic

advantage. It can therefore be distinguished from acts of public lending, which are not done for economic advantage (see below). In some countries, the rental right applies only to certain types of works, such as cinematographic works, musical works or computer programs. In the case of computer programs, the right may not apply where the program itself is not the essential object of the rental, as is the case, for example, for computer programs that control the ignition in a rental car. As opposed to the distribution right, the rental right is generally not subject to an exhaustion principle, meaning that the copyright owner can control all acts of rental of a copy of a work. The rental right generally extends only to physical, not electronic, copies.

Public lending, digital copies and the Public Lending Right

In many countries, the lending of a work is covered by the distribution right. In such countries, the operation of public libraries is grounded in the first sale doctrine. The lack of a first sale doctrine for digital copies of works therefore has consequences for the public lending of such copies: e-books and other digital works remain under the control of the copyright owner even after they have been sold, so that libraries and other lending institutions cannot freely lend them post-purchase. Instead, e-book publishers sell licenses to libraries that allow e-books to be lent out a certain number of times.

Other countries take very different approaches. Some countries, such as the Member States of the European Union, recognize a separate exclusive right that grants copyright owners control over acts of lending to the public (the "public lending right"). This covers making copies of a work available for use, for a limited period of time, other than for economic advantage, when this is done through establishments that are accessible to the public. Like the rental and reproduction rights, this may not be exhausted, including in digital copies.

To safeguard the operation of public libraries, such countries will usually counterbalance the exclusive public lending right with an exception that allows for the public lending of copyright-protected works under certain circumstances. This exception may be dependent on the payment of remuneration to the copyright owner(s) or to the creator(s). This is usually administered by a collective management organization (CMO, see page 61). Authors of books, illustrators, editors, translators and photographers will commonly qualify. Payments may also extend to publishers. In some countries, audiovisual materials are also covered, so that audiobook

narrators, composers and producers may receive payments.

In certain countries, such as Denmark and the United Kingdom, the exception extends to digital copies of works, such as e-books. In this way, a solution to the problem of digital exhaustion and public lending is provided. In the European Union, this is possible as long as each digital copy of a work can only be loaned out from a library to one borrower at a time and that copy cannot be used by the borrower after the lending period has expired (the so-called "one copy/one user" model, to be contrasted to the "one copy/multiple users" model).

The international copyright treaties do not require that countries provide copyright owners with the public lending right. This flexibility has given rise to the introduction in some countries of a remuneration right for authors (commonly also called the "Public Lending Right" or PLR) that is separate from copyright law. This model allows for payments to be made to authors for the public lending of their works while maintaining flexibilities that would not be permissible within copyright. For example, in Australia, Canada, Israel and New Zealand, payments are limited to national or resident authors and/or to authors who write in the national language. This would be contrary to the principle of national treatment that underpins the international copyright framework (see page 91). Such schemes may operate with or without any underpinning legislation.

In recent years, an increasing number of countries around the world have started introducing PLR systems. Some countries in Africa, such as Burkina Faso, recognize lending as an exclusive right of the copyright owner, but have not yet established PLR schemes. Others, such as Malawi and Zanzibar (an autonomous region of Tanzania), are working on implementing draft PLR schemes. Similar developments are also underway in Asia (e.g., in Bhutan and Hong Kong).

Whether operating within or without of copyright, the Public Lending Right can provide a vital source of revenue for authors and publishers. In most countries, remuneration payments are covered by regional or national governments.

For more information on the Public Lending Right see: *www.wipo.int/wipo_magazine/en/2018/03/article_0007.html* and *www.plrinternational.com/*

- **Make adaptations of a work**, for example a translation of an instruction manual from one language into another, a dramatization of a novel, the porting of a computer program into a new computer language, or a new arrangement of a piece of music. In some countries, the adaptation right is a general right to control all derivative works (all works based on a pre-existing copyright-protected work). In others, it is restrictively defined to only apply to certain types of works (literary, dramatic and musical works) and cover only certain kinds of

transformative uses (e.g., translations or dramatizations). At the same time, the boundary between the reproduction right and the adaptation right differs from country to country and may not be clear even within a given country. This means that, depending on national law, the creation of a derivative work may infringe the adaptation right, the reproduction right, both rights or neither right.

- **Perform the work in public.** A work is generally considered to be performed in public when it is performed in a place that is open to the public, or where people who are not close family and friends are present. The performance right is usually limited to literary, dramatic, musical and audiovisual or cinematographic works.
- **Communicate the work to the public.** In contrast to the distribution right, the right of communication to the public focuses on the non-tangible dissemination of works and, in contrast to the public performance right, communications at a distance. It therefore covers broadcasting by wire ("cable broadcasting" or "cablecasting") and by wireless means ("free-to-air"). Both terrestrial and satellite transmissions are included, whether analogue or digital. The right extends to radio and television (TV) broadcasts, as well as (non-interactive) internet transmissions.

In addition, in most countries, the copyright owner also has the exclusive right to make the work available to the public for "on-demand" (interactive) access – that is, in such a way that members of the public may access it from a place and at a time individually chosen by them. In most countries, uploading a work to the internet will infringe the making available right, as will making works available to the public for on-demand streaming, such as via video-on-demand systems, vlogs or video-sharing platforms. By contrast, livestreaming will, in most countries, qualify as a communication to the public, but not making available to the public, because the stream is only available for a limited time.

Depending on the country, the making available right may be part of the right of communication to the public or a standalone right. In certain countries, it may also be incorporated within a different right (e.g., the distribution right).

Hyperlinks and copyright

Many argue that the creation and posting of hyperlinks should remain outside of the reach of copyright law. The suggestion is that linking to information – including copyright-protected works – is analogous to a citation or reference, something which has traditionally never been understood to amount to an infringement of copyright.

Nevertheless, depending on the country, creating a clickable hyperlink to a work may infringe copyright if done without the permission of the copyright owner. For example, in the European Union, the provision of a hyperlink of any kind to a work posted online with the permission of the copyright owner will amount to a communication to the public of that work if it allows for the circumvention of restrictions, such as paywalls or anti-embedding measures. This will also be the case where the hyperlink leads to content uploaded without the permission of the copyright owner and the provider of the hyperlink knew or ought to have known that that is the case. If the posting of the hyperlink was done for profit, a rebuttable presumption of knowledge applies, so that the burden of proving lack of knowledge falls on the link provider. In Germany, a European Union Member State, the creation of hyperlinks by search engines has been held not to give rise to such a rebuttable presumption, as search engines cannot be expected to check whether the content to which they link in their search results has been lawfully posted on the internet, unless they receive a notification that the content infringes copyright.

Other countries take different approaches. For example, in China and the United States of America, the creation of a hyperlink by a search engine has generally been found to be subject to the "server test." According to this, where the work to which the link leads is stored on a third-party server, rather than by the link provider, the provider will not be liable for direct copyright infringement. This principle usually covers any kind of linking, whether simple linking, deep linking or "inline" linking (i.e., the embedding on a website of content taken from another website).

Even if the creation of a hyperlink does not amount to direct copyright infringement, depending on the country, the provider of a link may be liable for "secondary" copyright infringement (see page 79). If the provider is found liable, special "safe harbor" provisions may protect them from liability (see page 82).

National rules on linking and copyright can be important to, among others, search engines, the operators of social networking websites, the publishers of online newspapers and magazines, news aggregators or any other business that wishes to link to information uploaded by others.

Freedom to link?

Tim Berners-Lee, inventor of the worldwide web, in 2019 at a moderated talk at Digital X in Cologne

Source: Photo by Marco Verch (available online under CC-BY 2.0)

Tim Berners-Lee, best known as the inventor of the worldwide web, considered that a universal freedom to link was essential to its proper operation:

> "The Web was designed to be a universal space of information, so when you make a bookmark or a hypertext link, you should be able to make that link to absolutely any piece of information that can be accessed using networks. The universality is essential to the Web: it loses its power if there are certain types of things to which you can't link. There are a lot of sides to that universality. You should be able to make links to a hastily jotted crazy idea and to a beautifully produced work of art. You should be able to link to a very personal page and to something available to the whole planet."[2]

Other than the rights listed above, certain countries and territories (for example, Australia, the European Union, the Philippines and the United Kingdom) also recognize the so-called artist's resale royalty right or *droit de suite*. The term *droit de suite* literally translates as "the right to follow (the work)" and refers to the right to receive a share of the proceeds from the resale of a work. It is usually limited to original works of art (e.g., paintings, drawings, prints, collages, sculptures, engravings, tapestries, ceramics or glassware), but may also extend to original manuscripts of writers and composers. The objective is to allow artists to benefit, as their reputation develops, from the increasing value of earlier works sold at lower prices. Shares generally vary from 2 percent to 5 percent of the total sales price. In some countries, the right is not assignable or waivable. It is therefore sometimes considered to be a moral right (see below). Special rules may govern the type of resale to which the right applies, and collection may be through a CMO (see page 61).

Any person or company wishing to engage in any use of protected works restricted by one of the rights listed above must normally obtain prior authorization from the copyright owner(s). However, a copyright owner's exclusive rights are limited in time (see page 37) and are subject to some important limitations and exceptions (see page 71).

It is important to remember that these rights cover not only acts in relation to the whole of a work, but also a part of the work. The details differ from country to country, but this must usually be a "substantial part" of the work. There is no general quantitative rule on how much of a work will amount to a substantial part. The question has to be determined on a case-by-case basis, depending on the actual facts and circumstances of each case. In most countries, a part is considered substantial when it shares in or represents an important part of the originality of the whole of the work. An element of the work which fails this test (such as an idea or a trite title) will not amount to a substantial part.

Moral rights

The term "moral rights" is a translation of the French *droit moral*. This connotes not morality, but non-pecuniary interests. Moral rights originated in civil law traditions, which see intellectual creations as embodiments of the personality of the creator. By contrast, common law countries have historically regarded copyright merely as a property right, thus emphasizing financial reward over creative recognition and integrity. Nowadays, most countries recognize moral rights, but the scope of these rights varies widely and not all countries treat them as

part of their copyright law. Most countries provide at least the following two types of moral rights:

- **The right to be named as the author of the work ("attribution right" or "paternity right").** This requires that, when a work is reproduced, published, exhibited in public, made available or communicated to the public, the person responsible for these acts makes sure that the author's name appears on or in relation to the work, whenever reasonable; and

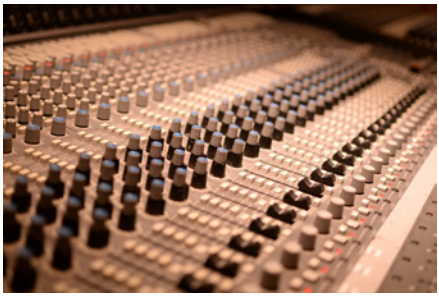
- **The right to protect the integrity of the work ("integrity right").** This prohibits any derogatory treatment of a work that would damage the author's honor or reputation.

What protection do related rights provide?

In most countries, performers (e.g., actors, singers, musicians, dancers) enjoy protection against "bootlegging," that is, the fixation (recording) in any medium of their "unfixed" (live) performances without their consent, as well as the communication to the public and broadcasting (but not rebroadcasting) of such performances. In relation to their "fixed" performances (performances recorded in a sound recording or film), performers usually enjoy the following rights: (a) the right to authorize reproduction of a fixation of a performance; (b) the right to authorize the distribution of the original and copies; (c) the right to authorize the rental of the original and copies; and (d) the right to authorize the making available by wire or wireless means of fixed performances in such a way that members of the public may access them from a place and at a time individually chosen by them.

Performers may also have an exclusive right to authorize the broadcasting and communication to the public of their fixed performances. However, in many countries, a fixation may be used for broadcasting or for communication to the public without the permission of the performer, on condition that the performer is paid a fair ("equitable") remuneration. In some countries, the right of performers to authorize the broadcasting and communication to the public of their fixed performances or to receive equitable remuneration for such uses is limited (as is the case, for example, in relation to performances in sound recordings in Chile, which only grants equitable remuneration for direct use, but not for rebroadcasting or communication to the public of a broadcast) or does not apply at all, so that the broadcasting and communication to the public of fixed performances is entirely free (as is the case, for example, in People's Republic of China in relation to both performances in sound and audiovisual recordings). In the case of performances fixed onto sound recordings, this equitable remuneration may have to be shared with the producer (see page 32).

In most countries, a performer's rights may be transferred, in whole or in part, to someone else. In some countries, once a performer has consented to the audiovisual recording of a performance, their rights in the fixed performance belong or are exercised by the producer of the recording, unless otherwise agreed by contract. A performer may enjoy a right to receive royalties or equitable remuneration for any use of a performance independent of such a transfer of rights.



Producers of sound recordings (i.e., record producers or manufacturers) generally enjoy the exclusive right to authorize the reproduction, distribution and rental of their sound recordings, as well as the making available of those sound recordings to the public by wire or wireless means in such a way that members of the public can access them at a place and time of their choosing.

As with performers (see page 31), producers of sound recordings may also have an exclusive right over the broadcasting or communication to the public of their sound recordings or they may enjoy a right to an equitable remuneration for the use of their sound recordings in broadcasting or communication to the public. In the latter case, the remuneration may have to be shared with the performer(s). As for performers, in some countries this right may be limited or not apply at all.

Broadcasting organizations have, in most countries, exclusive rights to authorize the rebroadcasting (the simultaneous broadcasting by another broadcasting organization) of their wireless broadcasts, the fixation of their wireless broadcasts and the reproduction of such fixations. Wireless broadcasts are generally understood to include both terrestrial and satellite broadcasts, whether analogue or digital. Broadcasters also have the exclusive right to authorize or prohibit the communication to the public of their wireless broadcasts, if such communication is made in places accessible to the public (e.g., by playing them on a television set or other device in a bar) against the payment of an entrance fee.

In some countries, broadcasters have the right to authorize or prohibit the distribution of fixations of their broadcasts, as well as the making available to the public of fixations of their broadcasts, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. Broadcasters also sometimes have the right to authorize or prohibit the cable retransmission of their broadcasts. In some countries, however, such cable retransmissions are instead subject to a statutory license pursuant to a payment. In others, cable operators can retransmit broadcasters' signals by cable without any authorization or payment. Protection against unauthorized retransmission of broadcasts over the internet is occasionally available.

The right given to broadcasters is separate from any copyright in the films, music and other material that is transmitted

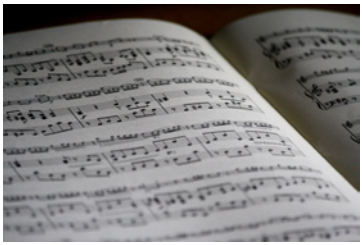
Depending on the country, some or all of the above protections may encompass not only wireless broadcasts, but also broadcasts transmitted by cable. The extension of broadcasters' protection beyond traditional signal transmission to digital and other new modes of transmission – such as via internet protocol TV (IPTV), which allows for transmissions not only to televisions but to computers and mobile phones, and other simultaneous (live), near-simultaneous (catch-up) or deferred (on-demand) streaming services – has proven controversial, due in part to the difficulty in separating the provision of internet transmissions by broadcasters from webcasting.

Copyright and related rights protection for music

A business may use music for various reasons: to attract customers, for the benefit of its employees or to positively affect customer behavior. Music may help the business obtain an edge over its competitors, provide a better working environment for its employees, help establish a core of faithful customers, and even enhance people's perception of its brand or of the company as a whole.

With these objectives in mind, a variety of different businesses may wish to obtain rights to use music. These include major television networks, local television and radio stations, restaurants, bars, pubs, nightclubs, fitness and health clubs, hotels, trade shows, concert organizers, stores and shopping centers, amusement parks, airlines, businesses with websites and background music suppliers.

Copyright and related rights protection for music often involves layers of rights and, as a result, a range of rights owners and administrators, including lyricists, composers, publishers of musical scores, record companies, broadcasters, website owners and copyright collecting societies.



Particular attention is needed in the case of works that combine music and lyrics, such as songs or operatic works. If the music and lyrics are composed by two different people then, depending on national law, they may be treated as a

single work of joint authorship (see page 50) or as two independent works: a musical work and a literary work. Either way, in most countries a license can be obtained from a CMO (see page 61) for the use of the entire song. The rights covering the music and lyrics are together sometimes referred to as "composition copyright." Composers and lyricists are together referred to as "songwriters."

Composition copyright allows songwriters to translate their work into revenue. To facilitate this commercial exploitation, songwriters will often assign (transfer) or license their rights to a "music publisher," pursuant to a music publishing agreement. In exchange for a cut of the income generated by the exploitation, a music publisher will promote the work of the songwriters they represent, issue licenses for the use of their work and collect the royalties to which the songwriters are entitled. Music publishers should not be confused with record producers (record labels). The role of a music publisher is related to the administration of the rights in lyrics and musical works, whereas the record producer will generally concern themselves only with the sound recording ("master," see below).

A distinct commercial terminology has evolved around the types of rights tied to musical works and lyrics within the music industry. These are briefly explained below:

- **The print right** refers to the right of songwriters to authorize the printing and selling of lyrics and sheet music. Print rights are less commercially significant than they once were, but still useful.
- **The mechanical right** refers to the right of songwriters to authorize performing artists and record producers to record copyright-protected music and lyrics, reproduce such recordings and distribute them to the public. The term has its origins in the piano rolls – "mechanical" embodiments of musical works – on which music was recorded in the early 20th century. Nowadays, sound recordings take many different forms, both analogue and digital, including vinyl records, digital files stored on computers, compact discs and flash drives, and any other medium in which sounds are fixed, except those accompanying motion pictures and other audiovisual works. The licenses granted to the user to exploit the mechanical rights are called mechanical licenses. Mechanical licenses must also usually be obtained by streaming services to cover so-called "streaming mechanicals."
- **The public performance right** is generally the most lucrative source of income for composers and songwriters. It refers to the right of songwriters to authorize live performances of their work; terrestrial, satellite and cable broadcasting; the playing of a sound recording in public; or the playing of a broadcast of a sound

recording in public, as well as digital transmissions (streaming).

- **The synchronization ("synch") right** is the right to record a musical composition in synchronization with the frames or pictures in an audiovisual production, such as a motion picture, television program, television commercial or music video. A synchronization license is required to permit the music to be fixed in an audiovisual recording.

In addition to the composition copyright, any implicated related rights must also be considered. These may include the rights of performers of the music and lyrics (such as singers or session and other musicians), the producers of sound recordings and any broadcasting organizations that broadcast sound recordings or live performances. The term "master recording" ("master" for short) refers to the first recording of sounds from which a record manufacturer or producer makes copies (such as CDs, vynyls or, more commonly, digital files), which it sells or whose use it licenses to the public. Master recording rights or master use rights are required to reproduce and distribute a sound recording embodying the specific performance of a musical composition by a specific artist. Performance and/or synchronization royalties may also need to be paid to some or all owners of related rights.

In many countries, exceptions to these related rights cover the playing in public (e.g., in a store or restaurant) of sound recordings or broadcasts of sound recordings or live events. Whether that is the case will sometimes depend on whether an entrance fee is charged. In some cases, an equitable remuneration must be paid (see page 31). In a small number of countries (notably the United States of America) there are no related rights for traditional terrestrial (over-the-air) broadcasting. Even in the United States, however, royalties need to be paid to performers and producers for use of sound recordings in non-interactive digital streaming services (e.g., Spotify or Pandora).

In recent years, subscription-based on-demand music streaming services have emerged as a significant source of revenue for the music industry. These services enable users

to listen to tracks of their own choice on the internet without purchasing a file for download. Often such services follow the "freemium" model, whereby basic features are free, but restricted or accompanied by advertisements that finance the platform's operation, while additional features, such as offline listening and ad-free listening, are offered to paid subscribers. As indicated above, streaming services must pay both mechanical and performance royalties for use of the composition copyright and master recording. How these are split between songwriters and publishers will differ from country to country. Notably, while the sale of sound recordings, whether physical (e.g., in the form of CDs) or via downloads, generates a fixed royalty per song or album sold, regardless of whether the consumer listens to a given track, streaming services are consumption-based, so that the rights owners' income depends on the number of times a work is streamed. With consumers in recent years turning away from the purchase of physical copies toward streaming services, this has implications for revenue. At the same time, after years of concern following the advent of digital technologies, many in the music industry are now optimistic that subscription-based streaming has the potential to ensure the industry's long-term sustainability.

Additional related rights are recognized in some countries. For example, producers of films may, depending on the country, be protected by a special set of related rights over the "first fixations of films" (sometimes referred to as "videograms"), i.e., the master copies of their film. These rights usually allow film producers to exclusively authorize or prohibit the reproduction, distribution and making available to the public of their films in such a way that members of the public can access them at a place and time of their choosing. This is the case in many Member States of the European Union. In other jurisdictions, related rights protection for film producers is not necessary, as film producers will hold the copyright in the film itself. This is the approach taken, for example, in the United Kingdom and the United States of America. In the case of the former, the principal director and the producer are considered joint authors – and therefore also joint first owners (see page 50) – of the film. In the case of the latter, the doctrine of "works made for hire" (see page 56) means that the producers of films generally own copyright in the contributions to the film made by the people they hired to create the film (such as the director(s), actors, set designers and other crew members).

In some common law countries, such as Australia, Ireland, South Africa and the United Kingdom, the published editions of literary, dramatic or musical works are protected. Rights in published editions belong to the publisher and protect the typographical arrangement of the edition – the typesetting, composition, layout and general appearance of the words on the page. As is the case for performances, sound recordings and broadcasts, the underlying work may be protected by copyright or it may be in the public domain.

The exercise of related rights leaves intact, and in no way affects, any underlying copyright protection in the works being performed, recorded, broadcast or published.

While there is no originality requirement for related rights, most countries require that the subject matter (the performance, sound recording, broadcast, etc.) of these rights has not been copied in order to enjoy protection. As with copyright, an infringement might relate to the whole or part of the subject matter. Different countries will take different approaches to determining when a part is sufficiently substantial.

While all authors of works enjoy moral rights (see page 30), this is not the case for the owners of most related rights. The exception is performers, who in most countries, enjoy at least the following moral rights with regard to their live performances, as well as performances fixed in sound and audiovisual recordings:

- the right to be identified as the performer of their performances, except if this is not reasonably practicable; and
- the right to object to any distortion, mutilation or other modification of their performances that would be prejudicial to their reputation.

How long do copyright and related rights last?

For most works, and in most countries, protection of the economic rights of the copyright owner lasts for the lifetime of the author as well as an additional period of at least 50 years. In many countries, this period is even longer (for example, in India copyright lasts for 60 years after the death of the author; in Ecuador, Burkina Faso, the European Union, Indonesia and the United States of America, it lasts for 70 years after the death of the author; and in Mexico it lasts for 100 years after the death of the author). It is therefore not only the copyright owner who benefits from the work but also the owner's heirs. Exceptions may apply. For example, in Russia, works whose authors fought or worked during the war of 1941–1945 are protected until 74 years after the death of the author, while in France works whose authors died in active service enjoy an additional 30 years. Once copyright protection over a work has expired, it enters the "public domain," which means the body of works over which no copyright applies (see page 69).

Depending on the national law, special provisions may govern the term of protection of certain categories of works. For example, this may be the case for the following:

- **Works made by employees and commissioned works** (see page 54). While in some countries such works enjoy the same term of protection as any other

work, in others their term is governed by different rules. For example, in the United States of America, protection for "works for hire" (see page 56) lasts for 95 years from publication or 120 years from creation, whichever is shortest.

- **Works of joint authorship** (see page 50) – works created by more than one author, for which the term of protection is generally calculated from the death of the last surviving author.
- **Cinematographic or audiovisual works.** For example, in the European Union such works are protected for 70 years after the death of the last to survive from among the following: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the work. In other countries, the term of protection is calculated from the date of publication or creation. For example, in Japan, cinematographic or audiovisual works are protected for 70 years after their publication or, if they are not published within 70 years after their creation, for 70 years after their creation.
- **Anonymous or pseudonymous works.** Unless there is no doubt as to the identity of the author, copyright in such works is often calculated from a different trigger point to the author's death, such as the date at which the work was created or made available to the public. Where they exist, the same rule often applies to collective works (see page 51).
- **Photographic works and works of applied art**, which sometimes have a shorter term of protection.
- **Works created by the government**, where these are covered by copyright (this is not always the case, see page 55).
- **Works published after the death of the author**, whose term of protection may be calculated from the date of publication.

In all cases, the term of protection is calculated from the end of the calendar year in which the triggering event occurred.

Example

Many authors publish their works under pen names. For example, poets Marguerite Annie Johnson and Ricardo Eliécer Neftalí Reyes Basoalto became famous under the names Maya Angelou and Pablo Neruda, respectively. As their identities were known, the term of protection for their works will, in most countries, be calculated based on the date of their deaths. By contrast, the identity of Elena Ferrante, the author of works including the four-book series the Neapolitan Novels, remains secret. As a result, the term of protection of the copyright in the novels will, in most countries, be calculated as of the date of their publication.

Maya Angelou in 2008

Source: Photo by Talbot Troy, available online under CC-BY 2.0 Generic

Pablo Neruda in 1950

Source: Photo via Archivo Histórico del Ministerio de Relaciones Exteriores de Chile, available online under CC-BY 2.0 CL

A complicated rights picture

Care is needed when calculating the term of protection of a work, as rules differ from country to country and complicated transitional provisions may apply. For example, Anne Frank's famous diary exists in a number of versions: two versions of Anne's manuscripts were combined to create the book published in 1947. These manuscripts were published in 1986. A "definitive edition," including new material from the manuscripts, was published in 1991. In the Netherlands, where Anne grew up, copyright currently lasts for 70 years after the death of the author. However, this rule is recent, having been adopted in the mid-1990s, while transitional provisions preserve longer terms of protection granted under older rules. According to these rules, works which were first published posthumously before 1995 are protected for 50 years after their initial publication. As a result, the manuscripts will remain under copyright until 1 January 2037, much longer than 70 years after Anne's death.

Different rules apply in other countries. For example, in Spain the current term of 70 years after the death of the author was preceded by a longer term of 80 years after the death of the author. Transitional provisions require that this longer term governs works such as Anne's, whose authors died before 7 December 1987. This means that the diary will enter the public domain in Spain on 1 January 2026.

Attention is also needed in identifying the authorship and ownership of different versions of a work for each of which a different term may apply. For example, disagreements surrounding the authorship of Anne's diary affect its term of protection. According to the Anne Frank Fonds, a Swiss foundation established in 1963 and the current owner of the copyright, the printed version of the diary was compiled by Anne's father, Otto Frank, from the two manuscripts left by his daughter. The Fonds maintains that, as a result, Otto qualifies as an author of his compilation so that copyright should be calculated from his death in 1980. It also claims authorship on behalf of Mirjam Pressler, the editor of the 1991 "definitive edition," who died in 2019.

Anne Frank in 1940 at Montessori-school, Niersstraat 41–43, Amsterdam, the Netherlands

Source: Photograph by unknown photographer, part of the collection of the Anne Frank Stichting Amsterdam, released on Wikimedia Commons for reuse after email confirmation from the copyright holder, see https://commons.wikimedia.org/wiki/File:AnneFrankSchoolPhoto.jpg

The term of protection of moral rights is a different matter. In some countries, moral rights, whether of authors or performers, are perpetual – they do not expire after a fixed term. In others, they expire at the same time as the economic rights or upon the author's death.

The duration of protection for related rights is usually shorter than for works of copyright. In some countries, related rights are protected for a period of 20 years from the end of the calendar year in which the performance occurred, the recording was made or the broadcast was transmitted. Most countries, however, protect related rights for at least 50 years and some for up to 70 years from these trigger points.

Where they exist, publishers' rights in their published editions generally last only 25 years from publication. The European Union's sui generis database right lasts for 15 years, although a substantial modification of the database may give rise to further protection.

There is considerable variety in the term of protection of photographs. Where photographs meet the requirements for copyright protection, national laws often afford them the same term of protection as other works. However, the Berne Convention permits terms of protection as short as 25 years from when the photo was taken. Some countries also grant protection to non-original photographs. The term for such rights is usually between 15 and 50 years and may be calculated from either the date of production or of publication.

Notes

1 Koelman, Professor K. (2006). "Copyright in the courts: perfume as artistic expression?" WIPO Magazine. Available at: https://www.wipo.int/wipo_magazine/en/2006/05/article_0001.html

2 Berners-Lee, T. (1997). "Realizing the full potential of the web." Available at: www.w3.org/1998/02/Potential.html

Protecting your original creations

How do you obtain copyright and related rights?

Copyright and related rights protection is granted without any formalities. Instead, an original work is automatically protected as soon as it is created, though some countries require that it be fixed in some material form (see page 22). The subject matter of related rights is also protected upon creation.

How do you prove that you are the owner of copyright?

The absence of formalities may pose some difficulty when trying to enforce copyright and related rights in case of a dispute. If someone claims that the author has copied a copyright-protected work, how can the author prove that they were the actual creator? Taking some precautions can help create evidence of authorship at a particular point in time. For example:

- Some countries have a national copyright office that allows for the deposit and/or registration of works for a fee.[1] Such deposit or registration will usually create a rebuttable presumption that the person registered is the copyright owner. In some such countries, a lawsuit for copyright infringement can be more effectively pursued if the author has registered the work at the national copyright office. In these countries, prior optional registration is therefore strongly advisable.
- Another option is to deposit a copy of the work (such as a printout or photograph) with a bank or lawyer. Alternatively, an author may send themselves a copy of the work in a sealed envelope (using a method which results in a clear date stamp on the envelope), leaving the envelope unopened upon delivery. Sending an email containing a digital copy or photograph of the work or saving time-stamped copies of work-in-progress are more modern alternatives. However, not all countries accept these practices as valid evidence.
- Works that are published should be marked with a copyright notice (see page 47). This will remind users that the work is protected. Adding the name of the copyright owner and the year in which the work was first published will provide information about when copyright protection began and to whom it belongs. Moreover, in many countries, adding the name of the author to copies of the work creates a rebuttable presumption of authorship.
- For digital works, adding metadata (hidden descriptive information about the work embedded into the digital file) on their authorship is good practice. An example of metadata is the EXIF data included in photographs. Like a copyright notice, metadata can also remind users that the work is protected by copyright, as well as providing them with information on how to obtain a license if they wish to use the work.
- It is also advisable to mark works with specific standard identification numbering systems. Examples include the International Standard Book Number (ISBN) for books; the International Standard Recording Code (ISRC) for sound recordings; the International Standard Music Number (ISMN) for printed music publications; the International Standard Musical Work Code (ISWC) for musical works (the primary purpose of this is to

facilitate administration by CMOs); and the International Standard Audiovisual Number (ISAN) or the Entertainment Identifier Registry (EIDR) for audiovisual works.

- Recently, the use of non-fungible tokens (NFTs) has attracted attention. These are units of data on a digital ledger called a blockchain which represent a unique digital item. NFTs are non-interchangeable and, due to the lack of a central storage location, very difficult to forge. They can therefore be used by artists to tokenize their work. If this is done prior to publication, the token can be used as proof of creation and, consequently, first copyright ownership and therefore authorship. NFTs can then be transferred along with any copyright, tracking the chain of copyright owners.
- Creators who wish to exploit their artistic works online might opt only to upload lower-resolution versions of those works. In addition to protecting the full resolution version from infringement, this can provide evidence of authorship and, by extension, ownership.

How do you protect works in electronic or digital form?

Works in electronic or digital form (e.g., CDs, DVDs or digital files containing text, music or movies) are especially vulnerable to infringement, as they are easy to copy and transmit over the internet, without loss of quality. The measures outlined above, such as registration or deposit at the national copyright office, also apply to such works, but additional technological and legal protections also exist.

One example is the "click-wrap contracts" (also called "click-through contracts") that businesses often employ when providing copyright-protected works online. These seek to limit what a user can do with the content. Such contracts invite users to accept or decline the terms and conditions set by the manufacturer by clicking on a button in a dialogue box or pop-up window. Similarly, if the work is sold on a medium (e.g., a CD) terms and conditions may be contained in a "shrink-wrap contract" attached to the packaging (the "shrink-wrap"). A notice is generally attached to the outside of the packaging notifying the purchaser that usage of the product will be deemed to be acceptance of the contract. The full terms are then included inside the box. Click-wrap and shrink-wrap contracts typically limit use to a single user and that user to a single copy – redistribution or reuse is generally prohibited. Click-wrap and shrink-wrap contracts are very common in the software industry (see page 70).

In addition, many businesses employ what are known as digital rights management (DRM) tools and systems to protect their copyright in digital content. These can be used to define, track and enforce permissions and conditions through electronic means throughout the life cycle of the content.

There are two ways in which DRM tools and systems can help control copyright in digital works:

- by marking the digital works with rights management information (RMI) – information, including metadata, which identifies the work, its author, the owner of the copyright or related rights,

information about the terms and conditions of use of the work, etc.; and
- by implementing technological protection measures (TPMs) that help to control (permit or deny) access or use of the digital works. TPMs, when used in relation to different types of copyright works, can help control the user's ability to view, hear, modify, record, excerpt, translate, keep for a certain period of time, forward, copy, print, etc., in accordance with the applicable copyright or related rights law. TPMs also ensure privacy, security and content integrity.

Choosing the right DRM tools

There are many techniques that can be used to reduce the likelihood of copyright infringement through the application of DRM tools and systems. Each has different strengths and weaknesses, as well as acquisition, integration and maintenance costs. The choice of technique is best made through an assessment of the level of risk associated with the use of the work.

Rights management information

There are various ways to mark copyright-protected material with RMI:

- Digital content may be labelled, for example, with a copyright notice, metadata, standard numeric identifier (where available; see page 71) or a warning against unauthorized use. It is good practice also to include a copyright statement on every page of websites onto which protected content is uploaded that spells out the terms and conditions for use of the content on that page.
- The digital object identifier (DOI) is a persistent handle used to identify objects (e.g., copyright-protected works) in the digital environment, standardized by the International Organization for Standardization (ISO). DOIs are used to provide current information about an object, including where it can be found on the internet. Information about a digital work may change over time, including its location, but its DOI remains fixed.[2]
- A time stamp is a label attached to digital content (including protected works), which can prove what the state of the content was at a given time. Time is a critical element when proving copyright infringement: when a particular email was sent, when a contract was agreed to, when a piece of IP was created or modified, or when digital evidence was taken can prove important. A specialized time-stamping service may be used to certify the time at which a document was created.
- Digital watermarks use software to embed copyright information into the digital work itself. Like traditional physical watermarks (such as those used on banknotes), digital watermarks may be readily perceptible (e.g., a copyright notice on the edge of a photograph or a watermark embedded throughout a document). Alternatively, they may only become perceptible under certain conditions, e.g., after using an algorithm. While visible watermarks are useful for deterrence, invisible watermarks are useful for proving theft and tracing the online use of a copyright work.

Technological protection measures

Some businesses use technology to limit access to their works only to those customers who accept certain terms and conditions for the use of them. Such measures may include the following:

- **Encryption** is often used to safeguard software products, sound recordings and audiovisual works from unlicensed use. For example, when a customer downloads a work, DRM software can contact a clearing house (an institution that manages copyright and related rights) to arrange payment, decrypt the file and assign an individual "key" – such as a password – to the customer for viewing, or listening to, the content.
- **An access control or conditional access system**, in its simplest form, checks the identity of the user, the content files and the privileges (reading, altering, executing, etc.) that each user has for a particular work. An owner of a digital work may configure access in numerous ways. For example, a document may be viewable but not printable, or may be used only for a limited time.
- **Releasing only versions of lower quality.** For instance, businesses can post photographs or other images on their website with sufficient detail to determine whether they would be useful, for example in an advertising layout, but with insufficient detail and quality to allow reproduction in a magazine.

Take care with TPMs

Businesses that offer digital content may consider implementing TPMs if there is a need to protect against unauthorized reproduction and distribution. The use of TPMs, however, should be balanced with other considerations. For example, TPMs should not be used in ways that violate other laws that may apply, such as the laws of privacy, laws protecting consumers, or laws against anti-competitive practices. There is also increasing attention in some jurisdictions to the need to prevent TPMs from interfering with the operation of exceptions and limitations for copyright and related rights.

Businesses that make use of other people's digital content are encouraged to obtain all licenses or permissions necessary for the desired use (including authorization to decrypt a protected work, if necessary). This is because a business or individual that circumvents a TPM and then uses the protected work may be liable for vi-

olating an anti-circumvention law as well as for copyright infringement (see page 75).

Case study: Content ID

Internet intermediaries may offer copyright owners technical tools they can use to protect and benefit from their protected works. One example is the Content ID system operated by the video-sharing platform YouTube. This employs filtering (see page 83) to allow copyright owners to manage their content on YouTube's website. Videos uploaded by end-users onto YouTube are scanned against a database of reference files that have been submitted by content owners. If a match is found, this is treated as a potential copyright infringement. Copyright owners are asked to decide between a range of different responses. They may choose to block the video from being viewed, track its viewership statistics or monetize the video by running ads against it. Sometimes this revenue may be shared with the uploader. These actions can be country specific, so that a video may be blocked in one country but monetized in another.

Content ID is only available to copyright owners who own exclusive rights to a substantial body of original material that is frequently uploaded by end-users. This excludes uploaders of public domain content, content which has been released under a Creative Commons license (see page 65) or content made up of parts where copyright is owned by others, including mash-ups, compilations or other derivative works (see page 51). YouTube also sets guidelines on how to use Content ID and monitors users for compliance. Content owners who repeatedly make erroneous claims may be blocked from using the system. Content ID usually operates automatically, without human intervention, but a manual review option is available. This can be tailored to certain situations using match policies, for example to allow for claims to be reviewed where a match is over a low proportion of the content.

Like all filtering tools, Content ID can be misused. While it is usually accurate in identifying matches, false positives may result in claims where there has been no infringement. This could happen, for example, where a use has been licensed or is protected by a limitation or exception to copyright (see page 71). Rights owners who choose to use tools such as Content ID should make sure that they are not excluding others from permitted uses and that they are not claiming as their own content in which they do not own exclusive rights.

How do you obtain protection in other countries?

Most countries are contracting parties to one or more international treaties in the area of copyright. The most important international treaty on copyright is the Berne Convention for the Protection of Literary and Artistic Works (see Annex 2). With 179 contracting parties currently, this has almost universal acceptance. If an author is a national or a resident of a country that is party to the Berne Convention, or if the work was published in such a country, all other countries that are party to the Convention will be obliged to grant the work the minimum protection guaranteed by the Convention, as well as the level of copyright protection they provide to works authored by their own nationals.

However, copyright protection remains territorial in nature. Therefore, a work will only enjoy copyright protection if it meets the legal requirements of the national copyright law of a given country. For this reason, it is important to remember that, although international treaties have helped to harmonize minimum standards, copyright law varies considerably from country to country.

Is a copyright notice on the work obligatory?

In most situations, a copyright notice is not required for protection. Nevertheless, it is strongly advisable to place a copyright notice on or in relation to a work, because it reminds people that the work is protected and identifies the copyright owner. Such identification also helps those who may wish to obtain prior permission to use the work. Placing a copyright notice is a very cost-effective safeguard. It costs little, but may end up saving costs or even generating revenue by deterring others from copying the work. It also facilitates licensing by making it easier for users to identify the rights owner(s).

Furthermore, in certain jurisdictions, most notably the United States of America, including a valid notice means that an infringer is deemed to have known of the copyright status of the work. As a result, a court will hold them accountable for willful infringement, which carries a much higher penalty than innocent infringement.

There is no formal procedure for putting a copyright notice on a work. A copyright notice can be written, typed, stamped or painted. It generally consists of:

- the word "copyright," "copr." or the copyright symbol ©;
- the year in which the work was first published; and
- the name of the copyright owner.

Example
Copyright 2022, ABC Ltd.

If the author significantly modifies a work, it is advisable to update its copyright notice by adding the year of each modification. For example, "2016, 2018, 2022" indicates that the work was created in 2016 and modified in 2018 and 2022.

For a work that is constantly updated, such as the content of a website, it may be better to indicate the years from first publication

to the present: for example, "© 2016–2022, ABC Ltd." It is also advisable to supplement the notice with a list of acts that may not be performed by users without permission.

For protected sound recordings, the sound recording copyright symbol ℗ or the letter "P" (for phonogram) in brackets (P) is used. As with the copyright notice, few countries require its use, but it is nevertheless advisable. The symbol is usually attached to physical copies of the sound recording (e.g., CDs or vinyl) or added to metadata or other information attached to digital copies. Usually, the symbol is accompanied by the year of first publication.

Notes

1 See WIPO Directory of National Copyright Administrations: https://www.wipo.int/directory/en/
2 See www.doi.org

Ownership of copyright and related rights

Who is the author of a work?

The meaning of "authorship" and of "ownership" is often conflated. The author of a work is the person who created the work. The issue of authorship is especially relevant in connection with moral rights (which always belong to the author, see page 30) and in order to determine the date on which protection expires (which often depends on the author's date of death, see page 37).

Copyright ownership is a different issue. The owner of the copyright in a work is the person who enjoys the exclusive economic rights granted by copyright law (for example, the right to copy the work, communicate it to the public or sell copies, see page 24). In many countries the author has to be a human being, the owner may be a natural or a legal person.

The author of a work will not necessarily be the person who put pen to paper or paint on canvas. Usually, the author is the person who made a contribution to the work of the kind that is protected by copyright – i.e., the person who contributed the originality (or part of it) to the work (see page 21). So, a stenographer or amanuensis will generally not be considered the author; that would be the person who dictated the work. Conversely, if somebody gives an interview, copyright will generally belong to the journalist who writes the interview up – unless the interview subject is allowed to edit, correct or otherwise control the final product.

Works with multiple authors

In most cases, identifying the author of the work is straightforward. Difficulties can arise, however, in cases where the work was created by more than one person. The following possibilities exist.

- **Joint works or works of joint authorship.** When two or more authors agree to merge their contributions into an inseparable or interdependent combination, a "joint work" is created. The authors do not have to work in concert or be in physical proximity to each other, and they do not need to have an express intention to create a joint work. However, they must be united by a common design or plan to produce the work, and the contributions made by the joint authors must be absorbed or combined to form a unitary whole. This means that no single author must be able to identify a significant part of the work as their own creation. If, for example, one author were to write the first four chapters of a book and the other the remaining three, the book would not qualify as a joint work. Instead, each author would have copyright in the chapters that they contributed. By contrast, in a joint work, the contributing authors become the joint owners of the entire work. The copyright law of many countries requires that all joint owners must consent to the exercise of copyright. In other countries, any one of the joint owners may exploit the work without the permission of the other joint

author(s), but they may have to share the resulting profits. A written agreement among the joint authors is usually the best course of action, specifying such issues as ownership and use, rights to revise the work, marketing and sharing of any revenue, and warranties against copyright infringement.

- **Collective works.** Some countries recognize the concept of "collective works." A collective work is a work in which a number of contributions are assembled into a collective whole. Depending on the country, the contributions to a collective work may or may not be required to qualify as separate and independent works. If they do, then each author owns the copyright in the part they created. Copyright in the collective work belongs to the person who selected and organized the contributions. Examples generally include anthologies, encyclopedias, dictionaries, compilations of songs by various composers, or magazines containing articles by freelance authors.
- **Derivative works.** A derivative work is a work based on one or more pre-existing works, such as a translation of a poem, an arrangement of a piece of music or a motion picture version of a novel. Depending on national law, a derivative work may constitute a reproduction or an adaptation of the pre-existing work, and therefore its creation may amount to an act restricted by an exclusive right of the owner of that work (see page 24), as long as the term of protection has not expired and a limitation or exception does not apply (see page 71). However, a derivative work can itself also qualify for copyright protection, although the copyright will then extend only to those aspects which are original to the derivative work. This means that a derivative work may be both infringing and protected by copyright.

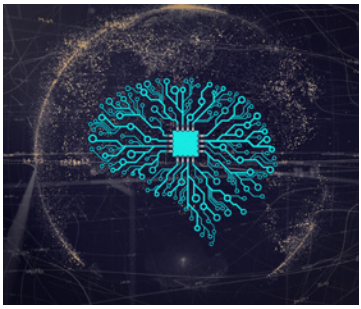
In practice, it is not always easy to distinguish a joint work from a collective or a derivative work. The various authors of a joint work often make their respective contributions independently and at different times, so that there may be "earlier" and "later" versions of the work. It is important to consider carefully the relevant national rules. Often, the qualification of a work as joint, collective or derivative will determine not only who owns the work, but also how long its term of protection will be.

Example

The Expanse is a series of science fiction novels written by James S. A. Corey, the joint pen name of authors Daniel Abraham and Ty Franck. As joint authors, Abraham and Franck share copyright in the novels. The series was adapted for television, also under the name *The Expanse*. The television series is a derivative work based on the literary works, meaning that the adaptation would have required the permission of the joint authors of those works.

Artificial Intelligence and Copyright: Should Copyright Protect AI-Created Works?

Artificial intelligence (AI) refers to the use of computer science to develop machines and systems that are capable of mimicking functions associated with human intelligence, such as learning and problem-solving. AI can be used to create works, including novels or artwork. Although methods of machine learning (being ideas) are not eligible for copyright protection, AI software will, in almost all countries, be protected by copyright as a literary work. To the extent that a work is made by a human using low-autonomy AI as a tool (in the same way that an artist may use a graphics editor or a photographer may use a camera), that work may also be protected just as any other. But what about works created by the AI itself? The national copyright laws of most countries do not easily apply to such situations. In particular, the rules on originality (see page 21) often presuppose a human creator, for example by requiring that a work reflect the author's personality. In such cases, it is likely that copyright does not extend to the output of AI systems. In Australia, courts have held that it is not sufficient that the originality requirement be satisfied during the preparatory stages by controlling the data fed into a machine; instead originality must be reflected in the creation of the work itself.



Machine learning and artificial intelligence

Source: Image via Mike MacKenzie at www.vpnsrus.com, available online under CC-BY 2.0

Some countries have special rules for what they term "computer-generated works" – works generated by computers in circumstances such that there is no human author. In the United Kingdom, Hong Kong, India, Ireland, New Zealand and South Africa, for example, the author of a computer-generated work is understood to be the person who made the arrangements necessary for the creation of work. Copyright in such works usually lasts for 50 years from creation. How useful these rules are for AI-created works is questionable. Arguably, the reliance of provisions for computer-generated works on human-made arrangements indicates that they were intended to cover only situations where a computer is controlled by a human creator. With wholly AI-created works, by contrast, programmers may set certain parameters to guide output, but arguably the form of the work is autonomously determined by the machine-learning algorithms themselves. Applying the rules on computer-gener-

ated works to such cases would divide authorship from creativity. This would make difficult importing this solution to jurisdictions, such as the European Union, which define an original work as one that is its author's "own intellectual creation" (see page 21). Indeed, to the extent that the concept of originality has evolved in the countries that recognize provisions on computer-generated works since these were first introduced (as is the case in the United Kingdom), the result may be internally inconsistent law. Even where it is clear that a human did intervene to make the arrangements necessary for the creation of a work, it may not be obvious whether that would be the programmer who created the software or the user of the software. More fundamentally, the rules on computer-generated works still presuppose intervention by a human to whom authorship can be traced. They therefore do not lend themselves well to application to the creations of completely autonomous AI.

The application of copyright law to AI-generated works is likely to continue to evolve. Important policy considerations underpin the choices to be made. Some argue that copyright should be limited to protecting human creativity and that AI-created works belong in the public domain, free for all to use. On the other hand, protection for AI-generated works may incentivize investment in AI. A radical solution would involve the recognition of "electronic personality" that could allow more sophisticated autonomous robots to own works. A middle way may be offered by the introduction of a new related or sui generis right that recognizes the investment AI developers make in their technology. Unlike copyright, related rights do not require originality (see page 37). At the same time, the protection afforded by related rights is not as extensive as that granted by copyright. Another option would be the introduction of a "disseminator's right" that rewards those who publish AI-created works.

For more information see: www.wipo.int/about-ip/en/artificial_intelligence

AI artists

Machine learning algorithms are a type of artificial intelligence that improve automatically through exposure to "training data" – that is, through experience. This can also include exposure to literary, musical and artistic works. For example, the "Next Rembrandt" project trained AI to produce a 3D-printed painting in the style of the famous Dutch Master Rembrandt van Rijn almost 350 years after his death. This was done using high-resolution 3D scans and digital files of Rembrandt's works. The project involved data scientists, developers, engineers and art historians from Microsoft, the Delft University of Technology, the Mauritshuis in The Hague and the Rembrandt House Museum in Amsterdam.

The "Next Rembrandt"

Source: Image via ING Group, available online under CC-BY 2.0

Older AI is less sophisticated. An example would be Racter (short for "raconteur"), a program written by William Chamberlain and Thomas Etter. In 1984, a book titled *The Policeman's Beard Is Half Constructed* was published that had been generated by Racter. The program relied on what its creators called a "syntax directive," as well as a wide range of inputted words and the ability to maintain certain randomly chosen variables in order to generate seemingly coherent and thoughtful prose. It is perhaps such programs that legislators had in mind when adopting rules on "computer-generated works," in those countries that recognize the concept.

Who owns copyright?

Generally, the author of the work will also be the first owner of that work. However, in many countries exceptions apply, in particular in the following cases:

- if the work was created by an employee as a part of their job; or
- if the work was specially ordered or commissioned.

Note that in most countries, contractual agreements may override or clarify the default rules established by the law on the ownership of copyright.

Works created by employees

In many countries, if a work was created by an employee in the course of their employment, then the employer automatically owns the copyright, unless otherwise agreed. This is not always the case; under the law of some countries, the transfer of rights to the employer may not be automatic and may have to be specified in the employment contract. In fact, in some countries the actual deed of assignment of copyright may have to be executed for every copyright work created in this manner.

Example

A computer programmer is employed by a company. As part of her job, she makes videogames during normal working hours and using the equipment provided by the company. The economic rights over the software will, in most countries, belong to the company.

Disputes may arise in the event that an employee creates a work at home or after hours, or other than in the course of their ordinary employment. To avoid disputes, it is good practice to have employees sign a written agreement that clearly addresses all predictable copyright issues.

Works created for governments

In some countries, some or all official government works are exempt from copyright protection (see page 23). In other countries, the government will own copyright in works created or first published under its direction or control, unless otherwise agreed in a written contract. Small businesses that create work for government departments and agencies need to be aware of this rule and arrange, by written contract, to clarify copyright ownership.

Commissioned works

If a work was created in the course of a commission contract by, say, an external consultant or creative service the situation is different. In most countries, the creator owns the copyright in the commissioned work, and the person who ordered the work will only have a license to use the work for the purposes for which it was commissioned. Many composers, photographers, freelance journalists, graphic designers, computer programmers and website designers work on this basis. The issue of ownership most often arises in connection with reuse of commissioned material for the same or a different purpose.

Example

You outsource the creation of an advertisement for your company. At the time, you intend to use it to promote your new product at a trade show. Under most national laws, the advertising agency will own the copyright, unless it was expressly agreed otherwise in the contract, while you will enjoy a license to use the work. Sometime later, you want to use parts of the advertisement (a graphic design, a photo or a logo) on your new website. You may have to seek the permission from the advertising agency to use the copyright material in this new way. This is because the use of the material on your website was not necessarily envisaged at the time of the original contract, so it may not be covered by your existing license.

Exceptionally, in some countries, such as South Africa and Singapore, the party which commissions and pays for certain types of work – such as photographs, portraits or engravings – owns the copyright in the work, unless agreed otherwise. In some countries (such as the United Kingdom), it is also possible that an equitable assignment of rights is implied where a work is commissioned and the commissioner requires ownership of the copyright to give "business efficacy" to the commission contract.

Works made for hire

In some countries, such as the United States of America, copyright law defines a category of works called

"works made for hire." The term covers: (a) works created by an employee within the scope of their employment; and (b) certain limited categories of works specially ordered or commissioned by another person as long there is a written agreement between the parties specifying that the work is a work made for hire. These categories include works such as contributions to collective works, parts of a cinematographic or audiovisual work, translations, instructional texts, tests and answer material for tests, and atlases. When a work is made for hire, unless agreed otherwise, the copyright owner is the employer or the person who commissioned the work, not the person who created it.

As in the employer–employee context, it is important in the case of commissioned works to address copyright ownership issues in a written agreement.

Ownership of moral rights

Unlike economic rights, moral rights are personal to the creator or performer and therefore cannot be transferred to someone else – however, they are transmissible on death and so may be inherited by the creator's heirs. This means that, even if an author or performer assigns the economic rights to a third party, they will retain the moral rights in the work or performance. This is also true of commissioned works and works created by employees, although, in some countries, moral rights may not apply where the employer has granted permission for the use of the work. In some countries moral rights may also be waived by the author or performer. In addition, it may be necessary for the author or performer to assert their moral rights before they can be enforced.

Companies cannot have moral rights. This means that if, for example, the producer of a film is a company, then only the human creators of the film, for example the principal director and/or screenwriter, will have moral rights in the film.

Who owns related rights?

Usually, the ownership of related rights is much more straightforward than the ownership of copyright. The first owner of rights in a performance will be the performer. As with copyright, performers' rights may be shared among multiple performers, they may be assigned, and national law may grant first ownership to the person who hired the performer. Unless assigned, rights in sound recordings will belong to the producer and rights in broadcasts to the broadcasting organization. Where they exist, the first owner of rights in films will be the film producer and the first owner of rights in published editions will be the publisher.

Benefiting from copyright and related rights

How can you generate income from creative works and related rights?

The owner of copyright in a work enjoys the full bundle of exclusive rights. This means that they may reproduce the protected work, sell or rent copies of the work, prepare adaptations of the work, perform and display the work in public, and do other acts restricted by copyright. If others want to use the work in a way that is restricted by copyright, the owner may license or assign (sell) the copyright in exchange for payment. Such payment can happen once or be recurring.

The exclusive rights can be divided and subdivided and licensed or assigned to others in any way the owner wishes. Among other options, they may be licensed or assigned by territory, time, market segment, language (translation), media or content. For example, the owner of a novel may decide to license or assign the copyright in the novel to somebody else in its entirety. They may also license or assign the publishing rights to a book publisher, the film rights (the rights to create a film adaptation of the book) to a film company, the right to broadcast a recitation of the work to a radio station, the right to adapt the work dramatically to a drama society and the right to create a television adaptation to a television company.

There are various ways to commercialize creative works:

- One option is to simply sell the protected work itself (e.g., a painting), or make copies of the work and sell the copies (e.g., prints of a painting); in both cases, the owner retains all or most of the rights arising out of copyright ownership (see below).
- It is also possible to allow someone else to reproduce or otherwise use the work. This can be done by licensing the exclusive economic rights over the work.
- The owner may also assign (sell) the copyright over the work, either in its entirety or partly.

Can you sell your work and still keep the copyright in it?

Copyright is distinct from the property rights over the physical object in which the work is fixed. Merely selling the physical object in which the work is fixed (e.g., a painting or a manuscript) or a copy of that work (e.g., a poster or a book) does not automatically transfer copyright to the buyer. Copyright in a work generally remains with the author unless they expressly assign it by a written agreement to the buyer of the work.

However, in certain countries, if the owner sells a copy of a work or the original (e.g., a painting), they may lose ("exhaust") some of the exclusive rights associated with copyright. For example, the buyer may have the right to further dispose of the work or copy, for instance by selling it to somebody else (for more on this see "first sale doctrine," page 24). What rights will be lost or kept varies from country to country. It is advisable to check the applicable copyright rules before selling copies of a work in a given country.

What is a copyright license?

A license is a permission that is granted to others (individuals or companies) to

exercise one or more of the exclusive economic rights over a work that are restricted by copyright. The advantage of licensing is that it allows the rights owner to retain ownership of copyright and related rights while allowing others to, for example, make copies, distribute, download, broadcast, webcast, simulcast, podcast or make derivative works in exchange for payment. Licensing agreements can be tailored to fit the parties' specific requirements. Thus, the rights owner may license some rights and not others. For example, a copyright owner may choose to license the right to copy and use a computer game, but retain the rights to create derivative works based upon it (e.g., a motion picture).

Depending on the terms of the license agreement, a license fee may be imposed. This is a fee paid by the licensee for the privilege of licensing the use of the work. Royalties may be paid instead of or in addition to a license fee. Royalties are usage-based payments made to the rights owner for the use of a work. These usually take the form of percentages of the gross revenue or net profit brought in by the use of the work or of a fixed price per copy sold.

Exclusive and non-exclusive licenses

A license may be exclusive or non-exclusive. If a rights owner grants a licensee an exclusive license, the licensee alone has the right to use the work in the ways covered by the license. In most countries, an exclusive license must be in writing to be valid. An exclusive license may be restricted – for example, to a specified territory, for a specific period of time or for limited purposes – or the continuation of the exclusivity may be conditional upon performance requirements. Exclusive licenses are often a good business strategy for getting a copyright product distributed and sold on a market if a rights owner lacks the resources to effectively market the work themselves.

On the other hand, if a rights owner grants a licensee a non-exclusive license, this gives the licensee the right to exercise one or more of the exclusive rights but does not exclude allowing others (including the rights owner) to exercise the same rights at the same time. Non-exclusive licenses allow the rights owner to give any number of individuals or companies the right to use, copy or distribute the work at the same time. As with exclusive licenses, non-exclusive licenses may be limited and restricted in various ways. In most countries, a non-exclusive license may be oral or in writing. However, a written agreement is preferable.

Licensing strategy

By granting a license, the copyright owner gives the licensee the permission to do certain things as specified in the license agreement that otherwise would not be permissible.

Therefore, it is important to clearly define the scope of the activities permitted under the license agreement as precisely as possible. Generally, it is better to grant licenses that are limited in scope to the specific needs and interests of the licensee. It is also important to recall that granting a non-exclusive license makes it possible to grant licenses to other interested users for identical or different purposes on identical or different terms and conditions.

Sometimes, however, absolute control over a work represents business security for the other party or an essential part of their business strategy. In such situations, an exclusive license or an assignment in exchange for a one-time fee may be the best deal. Such negotiations should generally only be considered after exhausting all possible alternatives. It is also important to make sure that adequate payment for them is secured, as once an owner assigns the copyright in a work they lose all its future income-earning potential.

Merchandising copyright

Merchandising is a form of marketing whereby an intellectual good (typically a trademark, an industrial design or a copyright-protected artistic work) is used on a product to enhance its attractiveness in the eyes of consumers. Cartoon strips; photographs of actors, pop stars or sports celebrities; famous paintings; statutes and many other images commonly appear on a variety of products, such as T-shirts, toys, stationery, mugs or posters. Merchandising requires prior permission to use the relevant intellectual good on the merchandised good. The merchandising of products that use a copyright-protected work can be a lucrative additional source of income for the copyright owner:

- For businesses that own protected works, licensing out copyright to potential merchandisers can generate lucrative license fees and royalties. It also allows the business to generate income from new product markets in a relatively risk-free and cost-effective way.
- Companies that manufacture low-priced mass-produced goods, such as mugs, candy or T-shirts, may make their products more attractive by using a famous character, painting or other appealing element on them.

Extra caution is necessary when images of people, such as photographs of celebrities, are used for merchandising, as in some countries, in addition to any copyright belonging to, for example, the photographer, they may be protected by privacy and publicity rights.

Licensing your works

It is up to the owner of copyright or related rights to decide whether, how and to whom to license the use of their works. There are various ways in which licensing is managed by rights owners.

The rights owner may decide to handle all aspects of the process of licensing. They may negotiate the terms and conditions of the licensing agreement individually with

every single licensee or may offer licenses on standard terms and conditions that must be accepted as they are by the other party interested in exploiting the copyright or related rights.

Administering all copyright and related rights usually involves considerable administrative workload and costs to gather market information, search for potential licensees and negotiate contracts. Therefore, many rights owners entrust the administration of some or all of their rights to a professional licensing agent or agency, such as a book publisher, music publisher or record producer, who will then enter into licensing agreements on their behalf. Licensing agents are often in a better position to locate potential licensees and negotiate more favorable prices and licensing terms than rights owners can on their own.

In practice, it is often difficult for a rights owner, and even for a licensing agent, to monitor all the different uses made of a work. It is also quite difficult for users, such as radio or TV stations, to individually contact each author or copyright owner to obtain the necessary permissions. In situations where individual licensing is impossible or impracticable, rights owners may consider joining a CMO, if one is available in the relevant country for the relevant category of work. CMOs monitor uses of works on behalf of rights owners and are in charge of negotiating licenses and collecting payments. Rights owners may join a relevant CMO in their own country, if one exists, and/or in other countries. In some cases, management by a CMO may be mandated by law.

Options for managing copyright and related rights

The rights granted by copyright and related rights may be managed by:

- the owner of the rights;
- an intermediary, such as a publisher, producer or distributor; or
- a CMO – in some cases, management by a CMO may be mandated by law.

Collective management organizations (CMOs)

Collective management organizations act as intermediaries between users and the copyright owners who belong to them. Generally, although not always, there is one CMO per country for each type of work. However, CMOs exist for only some types of works – usually film, television and video, music, photography, reprography (printed material) and the visual arts. On joining a CMO, members notify the CMO about the works in which they own rights. The core activities of a CMO are documenting the works of members, licensing and collecting royalties on behalf of members, gathering and reporting information on the use of members' works, monitoring and auditing, and distributing royalties to members. The works included in the repertoire of the CMO are consulted by people or companies interested in obtaining a license for their use. The CMOs then grant licenses on behalf of their members, collect the payments, and redistribute the amounts collected to the copyright owners based on an agreed formula.

Collective licensing has many practical advantages for users and rights owners. These include the following:

- The one-stop shop that CMOs provide greatly reduces the administrative burden for users and rights owners; collective management provides rights owners with access to economies of scale not only with respect to administration costs but also with respect to investment in research and the development of digital systems that enable more effective action against piracy.
- It also allows owners of protected works to use the power of collective licensing to obtain better terms and conditions for the use of their works, as CMOs can negotiate from a stronger position with numerous, powerful and often distant and dispersed user groups.
- Businesses that want to use works of a specific type can deal with only one organization and may (depending, among other factors, on national law) be able to get a blanket license. A blanket license allows the licensee to use any item in a CMO's catalogue or repertoire for a specified period of time, without the need to negotiate the terms and conditions for the rights of each individual work.
- Although CMOs tend to operate on a national level, to enable rights owners to be represented internationally, they will often enter into "reciprocal representation agreements" with other CMOs across the world. This allows them to collect royalties on each other's behalf. In practice, this means that a single national CMO may manage within its territory the whole world's repertoire.
- Many CMOs also play an important role outside of their immediate licensing business. For example, they are involved in enforcement (anti-piracy activity), provide education and information dissemination services, interface with legislators, stimulate and promote the growth of new works in different cultures through cultural initiatives, and contribute to the social and legal welfare of their members. In recent years, many CMOs have been developing DRM components for managing rights (see page 43). Also, many CMOs actively participate in international fora to promote the development of common, interoperable and secure standards that respond to their needs for managing, administering and enforcing the rights they represent.
- Details of the relevant CMOs in a country may be obtained from a national copyright office[1] or from a relevant industry association or international non-governmental organization.

Collective management in the music industry

Collective management of rights plays a central role in the music business due to the different types of rights in the music business chain: mechanical rights and performance rights collected on behalf of songwriters and publishers, and master recording rights and performance rights collected on behalf of performers and producers of sound recordings (see page 33). This is why thousands of small and medium-sized record companies, music publishers and artists across the globe rely on local and/or foreign collective licensing organizations to represent their interests and negotiate with powerful users of music (e.g., large communication groups, radio, TV, telecom

groups or cable operators) to ensure an adequate reward for their creative activities. Collective management also means that all licensees, regardless of size, have access to entire CMO repertoires without the need to negotiate with many individual rights owners.

For example, in most countries, a broadcasting corporation must pay for the right to broadcast a performance of a musical work. The payment is made to (among other potential rights owners) the composer of the musical work. This is usually done in an indirect way. The composer assigns their rights to a CMO, which negotiates with all those interested in publicly performing music. The CMO represents a large membership of composers and pays royalties to these members in accordance with the number of times a particular work is performed in public. Broadcasting organizations negotiate an overall annual payment to the CMO and provide the CMO with sample returns from individual stations, which enable the calculation, for the purpose of paying royalties to composers, of the number of times a record has been played. Other CMOs may represent other relevant rights owners, such as the performer(s) or the producer of any sound recording.

Examples of CMOs involved in licensing music are Australasian Performing Right Association (APRA), which represents songwriters, composers and music publishers in Australia and New Zealand, and PRS for Music, based in the United Kingdom. Both societies are in a position to give copyright licenses to broadcasters for virtually any music composed anywhere in the world. APRA, for example, controls within Australia and New Zealand not only the music which its own members assign to it, but also the music written by composers and publishers based in the United Kingdom who are members of PRS for Music. Similar agreements allow APRA to manage the use in Australia and New Zealand of musical works written by composer members of CMOs in countries across the world, including Brazil, Chile, China, Greece, Pakistan, South Africa, Tanzania, Turkey and Viet Nam.

The popularity of online streaming services has led to pressure to develop multi-territorial licensing solutions that can allow platforms more easily to stream music across multiple countries. Particular progress in this area has been made in the European Union. In order to ensure that owners of rights in musical works in all its Member States have access to multi-territorial licenses, the European Union requires, under certain conditions, that CMOs which provide multi-territorial licenses for music agree to manage, when requested and under the same conditions that they apply to their own repertoires, the repertoire of other CMOs that do not themselves issue such licenses.

Collective management in reprography

Many businesses make massive use of all types of copyright-protected printed material. For example, they may need to photocopy, scan or make digital copies of books, articles from newspapers, journals and other periodicals, encyclopedias, dictionaries and other resources, as well as to disseminate such copies among their employees for information and research purposes. It would be impractical, if not impossible, for companies to ask for permission directly from authors and publishers all over the world for such use. In response to the need to license large-scale reprographic copying of this kind, in many countries authors and publishers have established reproduction rights organizations (RROs) – a type of CMO that operates in the publishing sector – to authorize on their behalf certain uses of their published works.

RRO licenses typically grant permission to reproduce portions of previously published printed and digital works, in a limited number of copies, for internal use by institutions and organizations – including libraries, public administrations, copy shops, schools, universities and other educational institutions, as well as a wide variety of businesses in trade and industry. Licenses may cover uses such as photocopying; scanning; printing for distribution; document delivery, projection to whiteboards, storing digital copies; making available on intranets, closed networks and virtual learning environment (VLE) platforms; and internet downloads. Copies may not be transmitted to other institutions or commercialized.

As with CMOs in the music industry, RROs often have mandates to administer the rights of foreign rights owners through agreements with sister RROs based in other countries.

Public copyright licenses

If a rights owner wishes to allow users to engage in certain or all restricted acts in relation to a work, but would prefer to avoid the administrative burden of negotiating individual licenses, they may opt to use a public copyright license. Public copyright licenses are standardized licenses that allow the owner as licensor to grant certain permissions to any other person as licensee. There is a large array of public copyright licenses available. While some impose conditions on the licensee, e.g., requiring that the author be acknowledged or that the use be non-commercial, the most permissive impose no restrictions at all, in effect releasing the work into the public domain. Some licenses allow users to distribute and modify works freely, but require that any derivative works be released under the same terms.

Depending on their terms, public copyright licenses may be problematic in countries with unwaivable moral rights. If an author does not intend to take action against an infringement of a moral right, the practical implications may be minimal. Some public domain licenses explicitly preserve moral rights. In such cases, licensees should take care to attribute the work to the author and avoid impinging on the work's integrity, for example. Given the split in ownership between economic and moral rights that will result once the economic rights have been assigned by the author to another party, licensors should ensure that they own all rights before attaching a public copyright license that requires that moral rights be waived or not asserted.

Rights owners who attach public copyright licenses to their work can obtain remuneration in various ways, such as through advertisements accompanying the content they upload to the internet for free, by reserving for themselves the right to sell copies of their works commercially, through remunerated public speaking, or through live performances that charge an admissions fee. Rights owners who are financially dependent on their copyright and related rights should make sure that they have a clear plan for how to generate income before releasing their work under a public copyright license.

Creative Commons licenses and the GNU General Public License

Perhaps the most widely used public copyright licenses are the Creative Commons (CC) licenses. Creative Commons is a non-profit organization that has developed a set of licenses intended to allow creators to indicate which rights they wish their works to carry and which they wish to relinquish. The objective is to enable the free use of works by users, within the parameters set by the licensor. The following options are provided:

- **Attribution (BY)**. Licensees must credit the author in the manner requested in the license. This is a mandatory feature of all CC licenses.
- **NonCommercial (NC)**. Licensees may use the work only for non-commercial purposes.
- **NoDerivatives (ND)**. Licensees are not allowed to create derivative works based on the licensed work.
- **ShareAlike (SA)**. Any derivative work must be distributed under identical terms as those applied to the original work.

Mixing and matching these conditions results in the six basic CC licenses:

- **Attribution (CC-BY)**. Others may reuse the work, including commercially, as long as they credit the original author.
- **Attribution-ShareAlike (CC-BY-SA)**. Others may reuse the work, including commercially, as long as they credit the original author and license any derivative works under the same terms.

- **Attribution-NoDerivatives (CC-BY-ND)**. Others may reuse the work, including commercially, as long as they credit the original author, but they may not create derivative works.
- **Attribution-NonCommercial (CC-BY-NC)**. Others may reuse the work, including by creating derivative works, as long as such uses are non-commercial and the original author is credited.
- **Attribution-NonCommercial-ShareAlike (CC-BY-NC-SA)**. Others may reuse the work, as long as such uses are non-commercial, the original author is credited and any derivative works are licensed under the same terms.
- **Attribution-NonCommercial-NoDerivatives (CC-BY-NC-ND)**. Others may reuse the work, as long as such uses are non-commercial, the original author is credited and no derivative works are created.

The CC licensing suite also includes a "No Rights Reserved" (CC0) tool, which allows licensors to waive all rights and place a work in the public domain, and a Public Domain Mark, which allows any person to "mark" a work as being in the public domain.

The Creative Commons licenses are non-exclusive, royalty-free, perpetual and irrevocable, and granted for worldwide use. Although web-based, they can be applied to works in all media, including print. They come into effect upon use of the work by the licensee and are automatically terminated when any of the terms of the license are breached. In such cases, the rights of the authors of any derivative works are not affected. The licensor may change the license terms or stop distributing the work at any time, although this will not affect licenses granted up to that point.

CC licenses have become very popular in recent years. The online encyclopedia Wikipedia uses the CC-BY-SA license, meaning that it is necessary to attach this license or one with the same terms to any work which incorporates content taken from its website. Wikimedia Commons, the multimedia repository of Wikipedia, and Europeana, Europe's digital library, release their metadata into the public domain using CC0. The Metropolitan Museum of Art of New York City, one of the largest art museums in the world, shares all public domain images in its collection under CC0. The World Intellectual Property Organization (WIPO) releases its publications under CC licenses. Search engine Google and image hosting platform Flickr allow users to search for content licensed under Creative Commons.

Creative Commons was preceded and inspired by the open-source movement in software. This arose in the 1980s in response to the way in which new computer programs are created by building on existing ones. One of the most well-known open-source licenses is

the Free Software Foundation's GNU General Public License (GNU GPL). This was written by Richard Stallman in 1989 for use with software programs released as part of the GNU project, a mass-collaboration software project. The GPL grants licensees the so-called "four freedoms" of free software: to use, study, share and modify software. It remains one of the most popular open-source licenses. The Linux kernel is licensed under the GPL. Public copyright licenses that provide the four freedoms in relation to other types of works are known as "open content licenses." An example is the GNU Free Documentation License (GFDL), developed by the Free Software Foundation in 2000. This was initially designed for software documentation, but may also be used for other text-based works. Some of the Creative Commons licenses (specifically, CC-BY, CC-BY-SA and CC0) are also open content licenses.

What is copyright assignment?

An alternative to licensing is to sell the copyright or related rights to someone else, who then becomes the new rights owner. The technical term for such a transfer of ownership is an "assignment." Whereas a license only grants a right to do something which in the absence of the license would be unlawful, an assignment transfers the total interest in the rights. It is possible to either transfer the entire bundle of rights or just part of it. In most countries, an assignment must be in writing and signed by the rights owner to be valid, although in some countries assignment may be implied by, for example, a commission contract (see page 56).

In a few countries, copyright cannot be assigned at all. Importantly, only the economic rights may be assigned, as moral rights always remain with the author or performer or their heirs (although in some countries they may be waived, see page 56).

An assignment or exclusive license must be in writing

Note

1 See WIPO Directory of National Copyright Administrations: https://www.wipo.int/directory/en/

Using works owned by others

Businesses often need to use material protected by copyright or related rights to support their business activities. Where they do not own these rights themselves, they will need to find out whether permission is needed to use that material and, if that is the case and it is available, obtain this. Permission will be necessary for use both outside the business premises (e.g., in investor "road shows," on a company website, in an annual report or in a company newsletter) and inside the business premises (e.g., for distribution to employees, product research, in-house meetings or training). Prior permission may be necessary even for use of part of a protected work (see pages 30 and 79).

What can be used without permission?

Authorization from the rights owner is not needed:

- for use of a work or an aspect of a work which is in the public domain (see below);
- if the use amounts to an act which is not restricted by any of the exclusive economic rights granted to rights owners by national law or if the relevant right has been "exhausted" (see page 24);
- if a valid public copyright license allows the intended use (see page 64); or
- if the use is covered by a limitation or exception recognized in national copyright law (see page 71).

The public domain

If no one has copyright in a work, that work is in the public domain and anyone may freely use it for any purpose whatsoever. The public domain includes:

- ideas, as opposed to expressions of ideas – as noted on page 22, copyright does not protect the former;
- creations that do not qualify for copyright protection (e.g., non-original works, see page 21);
- works for which the term of copyright protection has expired (see page 37); and
- works for which the copyright owner has explicitly abandoned their rights, for example, by putting a public domain notice on the work (see page 66).

Absence of a copyright notice does not imply that a work is in the public domain. Likewise, absence of a public domain notice does not mean that the work is protected by copyright. Moreover, works that are in the public domain in one jurisdiction may continue to enjoy copyright protection in another jurisdiction. It is also important to remember that derivative works might still be protected even if the work on which they were based has fallen into the public domain. In such cases, elements of the derivative work that were taken from the earlier work can be freely used, but elements contributed by the author of the derivative work cannot be.

Example

Frédéric Chopin died in 1849. Music and lyrics written by him are in the public domain. Therefore anyone can copy, play in public or otherwise use the music of Chopin. However, as performances and sound recordings are protected separately from musical compositions, recent recordings of Chopin's musical compositions may still be protected by rights belonging to the performers and producers.

Digital use of the works of others

Copyright protection applies to digital works and to the creation and use of digital copies of works just as it does to physical works and copies. Therefore, users will generally need prior permission from the rights owner to, for example, scan a work, upload it to or download it from the internet, insert a digital copy in a database, or create a clickable hyperlink to the work on a website.

Current technology makes it easy to use material created by others – film and television clips, music, graphics, photographs, software, text, and so on – on your website. The technical ease of using and copying works does not give you the legal right to do so.

Using your copy of a protected work

As explained above, copyright is separate from the ownership of the physical item embodying the work (see page 58). Buying a copy of, for example, a book, CD, DVD or computer program does not therefore generally give the buyer the right to engage in acts that are restricted by copyright, such as making further copies of the work by photocopying, scanning or uploading it, or playing or showing it in public. The right to do these things will instead remain with the copyright owner. Therefore, unless a limitation or exception applies, prior permission for these uses is usually needed.

Licensing software

Standardized packaged software is often licensed to the consumer upon purchase (so-called "click-wrap" and "shrink-wrap" licenses are common, see page 43). This means that, while the consumer purchases the physical or digital copy of the software, they only receive a license for certain uses of the software contained within it. If a purchaser requires use by multiple people (e.g., multiple employees within a company), they may be able to obtain volume licenses.

In recent years, there has been increasing debate concerning the validity of software licenses, as some manufacturers try to extend the boundaries of their rights through additional contractual provisions that go beyond what copyright and related rights laws permit.

Users should carefully go through the licensing agreement to find out what they may and may not do with the software

they have bought. In addition, there may be exceptions in the applicable national copyright law that allow certain uses of the computer program without permission, such as creating interoperable products, correcting errors, testing security and making back-up copies.

Determining whether a work is protected

Finding out which rights apply to a work may require research. Although the work itself will often contain information that can provide a starting point. An author's name will normally be indicated on copies of published works, while the year in which the author died may be available in bibliographic works or public registers. Digital works may include useful RMI, for example in the metadata, or the work may have a DOI (see page 44). Another option is checking for any relevant information on the copyright register of the national copyright office (if there is one), as well as consulting the publisher of the work or any relevant CMO (see page 61) or database. If the work has a numeric identifier (see page 44), this may be useful; for example, https://iswcnet.cisac.org/search offers a database for musical works which allows users to search for works by title, creator, agency work code or ISWC. Remember that several copyrights and related rights may converge on a single product and that these rights may have different owners and different terms of protection. For example, a book may contain both text and images that are protected by several and separate copyrights, each expiring at different dates.

What are limitations and exceptions to copyright and related rights?

National copyright laws usually include a number of limitations and exceptions, which limit the scope of copyright protection, and which allow either free use of works under certain circumstances, or use without permission but against a payment. This is because the use of a copyright-protected work by another person without the permission of the copyright owner may be necessary to, for example, use basic modern technology or allow that person to exercise their freedom of expression.

The exact provisions vary from one country to another, but limitations and exceptions will commonly cover the use of a quotation from a published work, non-commercial private uses, uses for the purpose of parody, caricature or pastiche, uses for the purpose of reporting on current events, certain reproductions in libraries and archives (e.g., of works that are out of print or of copies that are too fragile to be lent to the general public) and uses for research or teaching, as well as the making of accessible copies for use by people with a disability, such as people who are visually impaired.

Copyright exceptions and digital technologies

Copyright may pose problems for the use of digital technologies, which often rely on the creation of copies of content. This is the case, for example, for browsing content on the internet (which requires the creation of copies of the content on the user's computer screen and in the memory of the device used) or for "caching" (storing and therefore copying) content to enable future access requests (for example, by the user of a search engine) to be served more efficiently. Because such functions are generally desirable and do not have an obvious impact on the economic interests of rights owners, many countries use limitations and exceptions to enable them to operate effectively. For example, some countries rely on what is known as the temporary copying exception. This allows for the creation without the permission of the copyright owner of temporary copies of protected works that are transient or incidental to other activities, such as a use of the work that – like reading or viewing it – has not traditionally been restricted by copyright. The applicable conditions are often complicated and require attention.

National copyright laws may also include exceptions for the purpose of text and data mining (TDM). TDM is the computational analysis of large amounts of content for the purpose of detecting previously unknown patterns and correlations that are useful from a scientific point of view. For example, TDM might help researchers identify links between a particular symptom and a medical condition. Such processing generally involves the digitization of content and thus potential copyright infringement. Like temporary copying exceptions, TDM exceptions are often subject to significant constraints.

While limitations and exceptions such as these mitigate the problem of copyright infringement for the use of digital technologies, many uses will remain subject to obtaining permission from the copyright owner. Expert legal advice is therefore recommended.

One question concerns the extent to which copyright poses an obstacle to machine learning and other artificial intelligence (AI) (see page 52). AI systems learn from the data fed into them, which may include content protected by copyright and related rights. For example, the "Next Rembrandt" project (see page 53) relied on the use of copies of paintings by the Dutch Master. While these have long been out of copyright, exclusive use of public domain material for AI would be severely restrictive. Where it exists, the temporary copying exception can provide some protection, but it will not apply to copies stored permanently by the AI. TDM exceptions cover permanent storage, but are often limited in other ways – for example, they may only cover non-commercial research. Neither exception will apply to works integrated into the AI's output. Where it exists, fair use (see below) may provide a defense. Otherwise, licensing solutions may have to be sought.

Quite often, the limitations and exceptions to copyright and related rights are described exhaustively in national law, which should be consulted for guidance. In addition to such listed exceptions, in certain countries, such as the United States of America, South Africa and Israel, copyright is subject to "fair use." As opposed to exhaustive lists, fair use depends on a fact-specific proportionality test – although indicative permitted uses may be listed in the relevant provisions. The scope of fair use varies from one country to another. In the United States of America, the applicable proportionality test considers the purpose and character of the use, the nature of the work, the amount and substantiality of what was used in relation to the work as a whole, and the impact on the market for or value of the original work. This means that copying by private individuals of works for their own personal use is generally more likely to fall under fair use than copying for commercial purposes. Transformative uses are also more likely to enjoy protection than reproductions of a work as is. Moreover, the smaller and less substantial the part of the work used, the more likely that the use will be considered fair. Examples of activities that have been found by courts to amount to fair use include distributing copies of a picture from a newspaper in class for educational purposes, imitating a work for the purpose of parody or social commentary, making quotations from a published work, and the creation and storage of lower-resolution "thumbnails" of images in order to provide an image search facility.

In certain other countries, including Australia, Canada, India and the United Kingdom, some limitations and exceptions to copyright fall under the concept of "fair dealing." This recognizes a set of possible "dealings" with (uses of) protected works which are permissible as long as they are found to be "fair." Fair dealing should not be confused with fair use, as it does not protect any use of the work that is fair if that use does not amount to a recognized "dealing."

Note that, even if a use of a protected work is permitted under these rules, in most countries moral rights must still be respected (see page 30).

Levy systems for private copying

Individuals often copy large amounts of copyright material for private, non-commercial purposes. Such copying creates a profitable market for the manufacturers and importers of recording equipment and media. However, it cannot by its very nature be easily detected, making it difficult to manage by contract or enforce its prohibition. To address this practical obstacle, in some countries, copying for private, non-commercial use is permitted under an exception. In exchange and to avoid economic harm to rights

owners, such countries often set up levy systems to reimburse artists, writers, musicians, performers and producers for the private reproduction of their works. The levy model was first developed in Germany in the 1960s and has since been implemented in many countries. In some countries, levies cover, beyond

private copying, reprographic copying by legal persons, including for educational purposes, and professional use by natural persons.

Levies generally take two forms:

- **Equipment and media levies.** These involve the addition of a small charge to the price of blank recording media, such as photocopying paper, CDs and DVDs, memory cards and hard drives. Some countries also impose levies on recording and reproduction equipment of various kinds, such as photocopying, CD and DVD burners, scanners, computers, tablets and mobile devices.
- **Levies on operators.** Usually called "operator fees," these involve charges that supplement equipment and media levies and are paid by public or private sector institutions that own or operate reprographic equipment which they use to reproduce or authorize the reproduction of protected works on a large scale. This may include libraries, universities, schools and colleges, government and research institutions, or private businesses. Operator fees may be flat fees or fees proportional to the number of copies made. They resemble, but are distinct from, the license fees charged by RROs (see page 64), which are not tied to a limitation or exception.

Levies are usually collected by CMOs (see page 61) from manufacturers, importers, operators or users, and then distributed to the relevant rights owners. In most countries, levies are not currently collected for copying that occurs using cloud storage services (although they may apply to the servers used in the provision of such services). Depending on the wording of the applicable legal provisions, it may be that these can be interpreted as applying to or expanded to encompass such copying. The issue is controversial and subject to ongoing debate and development. In such a case, presumably only services limited to copying would be affected and not those that also make copies available to the public (as happens, for example, with certain online video recording systems). This is because levy-based exceptions are generally targeted at the reproduction right and cannot provide a defense against an infringement of the right to make available to the public.

For more information, see:

- WIPO International Survey on Text and Image Copyright Levies (2016): www.wipo.t/publications/en/details.jsp?id=41&plang=EN
- WIPO International Survey on Private Copying – Law and Practice (2016): www.wipo.int/publications/en/details.jsp?id=4183

Can you use works protected by Digital Rights Management (DRM)?

Businesses are advised to take care when making commercial uses of works protected by DRM (see page 43). Use of the work may require circumventing TPMs, an action that is prohibited by law in many countries. For instance, bypassing password controls or payment systems that limit access to a work to authorized or paying users or decrypting a protected work without authorization to copy the content would constitute TPM circumvention. The unauthorized removal of RMI is likewise

often prohibited. National laws in some countries consider not only the act of circumventing TPMs itself to be an illegal practice, but also any preparatory act or the making available of circumvention equipment. Similarly, the distribution, importation, broadcasting or communicating to the public of copies of a work from which the RMI has been removed or altered is often illegal. In some countries, these actions are only illegal if the perpetrator is aware that they are circumventing TPMs or inducing, enabling, facilitating or concealing an infringement.

In most countries, liability for these violations is separate and distinct from liability for infringing copyright in the protected works. This means that even when DRM removal or circumvention is authorized or permitted, the regular rules of copyright infringement still apply. Thus, any exploitation of the work will likely still have to be licensed from the copyright owner.

Similarly, it may not be lawful to remove or circumvent DRM to engage in a permitted use of the work, for example, one that is covered by a limitation or exception to copyright. TPMs may interfere with the creation of copies of works for private, non-commercial purposes (see page 45) or that enable access for people with disabilities (e.g., text-to-speech "read-aloud" tools). Some countries recognize measures that allow users to engage in permitted uses of TPM-protected works. This may, for example, involve simply allowing TPM circumvention by certain people for certain purposes, or more complex solutions, such as complaints procedures designed to ensure that the owner of the work makes available to the complainant the means of carrying out the permitted use. In many countries, the legality of the circumvention of TPMs to enable a permitted use is unclear. In such cases, it may be up to the courts to decide whether TPMs that are alleged to disproportionately exclude legal uses are protected.

How can you get authorization to use protected works?

There are two primary ways to go about obtaining permission to use protected subject matter:

- contacting the rights owner directly, if contact details are available; or
- using the services of a CMO.

It is often best to first check whether the work is registered in the repertoire of the relevant CMO, as collective management considerably simplifies the process of obtaining licenses. CMOs generally offer different types of licenses for different purposes and uses (see page 61).

If copyright or related rights in the work are not managed by a CMO, contacting the owner or their agent directly may be necessary. The person named as author in the copyright notice or registered as such with the national copyright register (where this exists) was probably the initial copyright owner, but the economic rights may in the meantime have passed on to another person. In some countries, the national copyright office may operate a copyright recordation system that allows for the filing and indexing into public records of transfers of copyright ownership. Metadata, DOIs or other RMI may be useful in tracking the owner.

Otherwise, the publisher of a written work or the producer of a sound recording will often own the relevant rights or know who does.

As there might be several layers of rights (see page 16), there may be several different rights owners, and licenses are required from each. For example, the rights in a musical work may belong to the music publisher, the rights in a recording of a performance of the musical work may belong to the recording company, and the performer(s) may also own rights in the performance.

For important licenses, it is advisable to obtain expert advice before negotiating the terms and conditions of a license agreement, even when this is offered on standard terms and conditions. A competent licensing expert may help to negotiate the best licensing solution for a given user's needs.

In order to use a work, authorization from the owner of the

copyright in the work is needed. Authors often transfer their rights to a publisher or join a CMO that manages the economic exploitation of their works.

Locating the copyright owner

The long term of protection enjoyed by copyright and related rights in combination with the lack of a registration requirement means that it may not always be possible to locate the owner of the rights in a work. For example, it may be that the work was published anonymously or pseudonymously, the author's heirs or other subsequent owner or the exclusive licensee of the work cannot be traced, or the business that employed the author to create the work (and which is therefore likely to hold the copyright) has been dissolved. The low threshold of originality that determines whether a work is protected might also mean an author did not appreciate that they had created something protected by copyright law and, consequently, the benefit of remaining traceable by potential licensees.

In the face of such obstacles, in certain countries, special rules apply to so-called "orphan works," or works whose owners cannot be identified or located. The European Union, for example, allows cultural heritage institutions (such as museums, libraries and archives) to submit certain kinds of works to be registered as orphan works with the European Union Intellectual Property Office (EUIPO) after a "diligent search" for the owner has proven unsuccessful. Such registration allows cultural heritage institutions to use the work in certain defined ways. If a copyright owner comes forward post-registration, they can stop the use of the work and ask for a retrospective payment for past uses. Other countries, such as Canada, India, Japan and the United Kingdom, operate schemes that allow anybody, not only cultural heritage institutions, to apply to an authorizing body for a license to use an orphan work. The conditions, types of works and types of acts covered by such systems differ from country to country. It should

be noted that, although these solutions are useful, they can also be administratively burdensome and, in practice, don't tend to result in the use of large numbers of orphan works.

In some countries, it is also possible for certain entities (usually cultural heritage institutions) to obtain permission (usually from RROs, see page 64) to exploit so-called "out-of-commerce" works – works whose author is known, but which are not available to the public through the usual channels of commerce.

How can your business reduce the risk of infringement?

Litigation for copyright infringement can be an expensive affair. It is therefore wise to implement policies that help avoid infringement. The following are recommended:

- educating employees so that they are made aware of the possible copyright implications of their activity;
- where necessary, obtaining written licenses or assignments and ensuring that employees are familiar with what is permitted under each license or assignment;
- marking any apparatus that could be used to infringe copyright (such as photocopiers, computers, CD and DVD burners) with a clear notice that it must not be used to infringe copyright;
- prohibiting employees explicitly from downloading any copyright-protected material from the internet on office computers without authorization; and
- if a business makes frequent use of products protected by TPMs, developing policies to ensure that employees do not circumvent these without authorization from the rights owner and do not exceed the scope of the authorization.

Every business should have a comprehensive policy for copyright compliance, which includes detailed procedures for obtaining copyright permissions that are specific to its business and usage needs. Creating a culture of copyright compliance within a business will reduce the risk of copyright infringement.

Enforcing copyright and related rights

When is your copyright infringed?

Anyone who engages in an act restricted by copyright(i.e., one covered by one of the exclusive economic rights of the copyright owner or by one of the author's moral rights) without the prior permission of the owner is violating the copyright, unless an exception or limitation applies. In copyright terminology, they are "infringing" the copyright. As explained earlier, there may be copyright infringement even if only part of a work is used, as long as that part is substantial (see page 30).

In addition to such "direct" or "primary" infringement, the person who provided that primary infringer with support may be liable for "secondary" or "accessory" copyright infringement. The details on secondary copyright infringement will differ from country to country. In general, a person may be liable for secondary infringement when they facilitated somebody else's copyright-infringing acts. As opposed to primary copyright liability, which is generally understood to be "strict," i.e., independent of the knowledge or intention of the infringer to engage in the infringement, secondary copyright liability, in most countries, incorporates a "mental element." This usually requires showing that the accessory, at the very least, ought to have known that they were supporting copyright infringement.

The line between primary and accessory copyright liability is not always easy to draw. Sometimes, expansive interpretations of the exclusive economic rights extend into acts of knowing facilitation of infringement. In the European Union, for example, knowingly operating a platform which allows users to share works via a peer-to-peer network is considered an act of communication to the public and therefore primary infringement. Similarly, in Australia, Canada and the United Kingdom, the authorization of a copyright-infringing act by somebody else is generally understood to give rise to primary liability. But in the United States of America, such acts tend to be treated as secondary infringements.

In some countries, national copyright law incorporates special rules governing secondary liability, for example for importing, possessing or dealing with infringing copies; providing the means for making infringing copies; or permitting the use of premises for infringing performances. These rules may only be relevant to physical rather than digital infringements. Even where this is the case, the general principles of tort law are also often relied upon to hold accessories to copyright infringement liable. For example, in the United States of America the rules on "contributory infringement," "vicarious infringement" and "inducement of infringement" have developed out of general tort law. In civil law countries, it may be possible to rely on the general duty of care to avoid causing harm to others. Other approaches also exist. Germany has developed an injunction-based system which holds that, where a person contributes to an infringement by violating a duty to review the infringing activity of somebody else, they can be ordered by the courts to abide by this duty. Due to the wide variety of approaches taken to secondary liability in different countries, consulting a national IP expert is advisable.

In addition to the exclusive economic rights, infringement may occur where the moral rights of the author are not respected (see page 30).

There may also be liability if someone removes or alters RMI that the owner has attached to a work or deals in copies of works from which such information has been removed. This may also be the case if someone circumvents TPMs that the owner has put in place to protect the work against unauthorized uses or deals in devices that enable such circumvention (see page 75).

Violation of multiple rights

It is important to remember that a single act may violate multiple layers of rights belonging to different rights owners. For example, in some countries it will be an infringement of the broadcaster's right in its broadcast to sell recordings of the broadcast. Of course, this action could also infringe the copyright of the composer of any musical work included in the broadcast and the related rights of the performer of that work and the producer of the sound recording of the performance. Each rights owner may take separate legal action.

What should you do if your rights are infringed?

The burden of enforcing copyright and related rights falls mainly on the rights owner. It is up to them to identify any violation of and take action to enforce the copyright.

A copyright lawyer or law firm will be able to provide information on the existing options and help the owner decide if, when and how to take legal action and of what kind against infringers, as well as how to settle any dispute through litigation or otherwise. It is important to make sure that any such decision meets the overall business strategy and objectives.

If copyright is infringed, the owner may begin by sending a letter (often called a "cease and desist letter") to the alleged infringer informing them of the possible existence of a conflict. It is advisable to ask a lawyer to help you write this letter.

Sometimes surprise is the best tactic. Giving an infringer notice of a claim may enable them to hide or destroy evidence. If an owner thinks an infringement is willful, and knows the location of the infringing activity, they may wish to go to court without giving any notice to the infringer to ask for an ex parte order that allows for a surprise inspection of the infringer's premises (or any other relevant location) and the seizure of relevant evidence.

Court proceedings can take a long time. To prevent further damage during this period, owners may want to take faster action to stop the allegedly infringing action and to prevent infringing goods from entering into the channels of commerce. The law in most countries allows the courts to issue interim injunctions with which an alleged infringer may be ordered, pending the final outcome of the court case, to stop the infringing action and to preserve relevant evidence.

National customs authorities may assist with preventing the importation of goods suspected to be copyright pirated goods, i.e., "goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation" (footnote 14 to Article 51 of the TRIPS Agreement).

Many countries have border enforcement measures in place, which allow copyright owners – and licensees in many jurisdictions – to request that customs authorities be on the look-out for the importation of potentially copyright pirated goods and, upon detection of such goods, suspend their release into free circulation. If the copyright owner or licensee does not, within a specific time frame, seek a preliminary injunction to prolong the suspension or start legal proceedings on the merits of the case, the goods will be released. Some countries, however, have established a simplified procedure that allows for the destruction of the goods if the importer (i) agrees that the goods are infringing or (ii) does not respond within a specific time frame, in which case the importer is deemed to have agreed to said destruction after having been notified about the suspension of release.

Bringing legal proceedings against an infringer is advisable only if:

- the claimant can prove that they own the copyright in the work;
- the claimant can prove infringement of their rights; and
- the value of succeeding in the legal action outweighs the costs of the proceedings.

The remedies that courts may provide to compensate for an infringement generally include damages, injunctions, orders to account for profits and orders to deliver up (give) infringing goods to rights owners. The infringer may also be compelled to reveal the identity of third parties involved in the production and distribution of the infringing material and their channels of distribution. In addition, the court may order, upon request, that infringing goods be destroyed without compensation for the infringer.

Most national copyright laws also impose criminal liability for willful copyright piracy on a commercial scale. The penalties may involve a fine or even imprisonment.

Internet intermediaries, notice-and-action procedures and filtering

When dealing with online copyright infringements, sending a cease-and-desist letter to the primary infringer, i.e., the person who makes available copyright-protected works online, may be difficult. They may be hard to reach; for example, their contact details may be difficult to obtain (particularly if they are operating under a pseudonym online) or they may be located in a different jurisdiction. In that case, approaching an internet intermediary whose services were used to commit the infringement may provide an effective alternative. Some countries have set up specific rules to guide such interactions known as "notice-and-action" regimes.

Although internet intermediaries of various kinds may, depending on national rules, meet the conditions for primary or (more likely) secondary liability when their services are used by end-users to infringe copyright, national rules often provide them with so-called "safe harbors," or immunities that shield them from liability, provided they meet certain conditions. This is because, while such intermediaries may provide the means used to infringe copyright online and are arguably well placed to take action against such infringement, they are often unaware of infringing uses occurring through their services. They are also not always in a position to recognize copyright infringement (particularly in less clear-cut cases), while the costs of evaluating every file they handle would impose an excessive burden on them, particularly in the case of small businesses.

Where they exist, safe harbors usually protect internet access providers, caching providers, search engines and/or hosting providers. The conditions for safe harbor protection differ from country to country and from provider to provider. They usually center on demonstrating the provider's neutrality toward the content – for example, a safe harbor may require that the provider does not select or modify the content.

A variety of approaches have emerged around the conditions for the hosting safe harbor – that is, the immunity offered to platforms and other providers that store information provided by end-users. This includes providers of website hosting services, but generally also extends to cloud storage providers; educational, cultural and scientific repositories; software development platforms; online encyclopedias; social networking platforms, and content-sharing platforms (such as blog publishing systems, image and video-sharing platforms, and platforms used to share digital design files used in, for example, 3D printing). In its "classic" form, established by early hosting safe harbors, such as that adopted in the United States of America, the hosting safe harbor revolves around what has been termed

a "notice-and-take-down" procedure. Under this system, when a rights owner encounters protected content hosted on a platform, they can send the platform a "take-down notice". If the platform, having received such a notice, takes no action to remove the file, it loses safe harbor protection and may be held liable for the infringement. Depending on the country, national law may establish detailed procedures to be followed by platforms, rights owners and end-users.

A number of variant regimes have emerged across the globe. One of these, first adopted in Canada, is called "notice-and-notice." This does not require that the platform take down the content brought to its attention by the notice, but that it forward the notice to the indicated end-user and inform the copyright owner that that person has been contacted. The notified party must choose whether to remove the content or object and potentially face legal action.

A middle way, sometimes called "notice-wait-and-takedown," is used in Japan. Following this mechanism, hosts are required to forward any notice they receive to the content provider and wait a week. If the content provider either consents or does not respond to the notice, the intermediary will proceed with the take-down.

In recent years, notice-and-action systems have been criticized as being too lenient against internet intermediaries, particularly hosting providers. The mandatory use of "content recognition" (sometimes called "content identification") technologies – filtering – has been suggested as an alternative. Under such proposals, providers would be obliged to filter the content appearing on their platforms to ensure that it is not infringing, or be held liable for any infringement.

There are various types of content recognition technologies. Some of the most common include metadata filtering (which looks at the metadata embedded into files), hash-based filtering (which generates a "hash," i.e., a unique code that can be used to identify a specific file) and content fingerprinting (which creates a unique digital representation ("fingerprint") of protected content). To be effective, filtering technologies must be applied to infringing and non-infringing content alike. This has proven controversial in light of rules that exist in many jurisdictions against the imposition of general monitoring obligations on intermediaries.

A combination option is what is known as "notice-and-stay-down." This requires that if a provider receives a notification of infringement, it must take the content down and ensure that it is not reposted on its platform in the future. An extended version of this approach has been adopted, for example, in the European Union for platforms that host large amounts of protected content in such a way that they are

accessible to the public and organize and promote that content for profit-making purposes. Social networking and content=sharing platforms are covered, as well as cloud storage providers, as long as they are not private or business-to-business. Under this system, to avoid liability, the platform has an obligation to ensure that infringements brought to its attention "stay down." It must also license the protected content from the rights owners or ensure that specific content brought to its attention by them is not infringed. In practice, complying with "stay down" obligations is generally understood to require filtering. Whether the imposition of notice-and-stay-down obligations should be permitted is therefore hotly debated.

Independent of any legal obligations in a given jurisdiction, many intermediaries will voluntarily offer technical tools (including filtering and stay-down options) to allow rights owners to manage their rights on their platforms. This is the case for example with YouTube's Content ID system (see page 46).

In addition to using the systems established by intermediaries to flag copyright infringements, right holders can also seek injunctions ordering intermediaries to stop infringements occurring using their services. For example, an internet access provider may be ordered to block access to certain websites or a hosting platform may be ordered to take down infringing material. Search engines may also be asked to de-list infringing websites in search results or "demote" them so that they do not feature among the first search results displayed. Depending on the country, such orders may incorporate stay-down requirements that oblige the intermediary to ensure that the infringing content does not reappear on its services. In many countries, special procedures have been established to obtain such injunctions, which are typically granted by a judicial authority or an administrative authority with judicial oversight. Where specialized procedures for such injunctions exist, right holders remain free to seek monetary compensation through judicial proceedings on the merits of the case.

Besides the primary infringement by the person who offers copyright-protected content online without the prior consent of the owner and the potential secondary infringement of intermediaries whose services are used in offering the content, additional infringement occurs on the part of end-users when they stream or download the offered materials. In practice, however, taking action against the intermediary is more effective as it prevents future infringements. In recent years, rights owners have therefore tended not to focus on enforcing copyright vis-à-vis end-users. Nonetheless, some countries, such as France or the Republic of Korea, have established so-called "three strikes" or "graduated response" systems. These enlist the help of intermediaries to send end-users suspected of infringing copyright online a series of warnings, potentially culminating in fines or other sanctions.

Additional initiatives exist to curb online piracy. In some countries, such as Denmark, Hong Kong, Malaysia, Taiwan and the United

Kingdom, infringing website lists (IWLs) are maintained to help reputable advertisers identify piracy sites, so that they can avoid placing advertisements on them through automated means and, in this way, providing them with financial support. Such systems may be administered by government agencies or the police or created through voluntary agreements – including codes of conduct or Memoranda of Understanding (MoU) – between rights owners and the relevant intermediaries.

At the international level, WIPO has created WIPO ALERT[1], an online platform to aggregate national lists of websites or apps that have been determined to infringe copyright according to national rules. Advertisers, advertising agencies and intermediaries can apply to access these lists and use them to avoid placing advertisements on such websites. This curbs the income of the providers of copyright-infringing websites and protects the reputation of the advertised brands from the negative impact of association with copyright infringement.

How do you settle an infringement of copyright without going to court?

In many instances, an effective way of dealing with infringement is through alternative dispute resolution (ADR), including arbitration and mediation. Arbitration refers to a procedure for the issue of a binding decision on a dispute by one or more arbitrators – neutral adjudicators that operate outside the judiciary system. Mediation, which may precede arbitration, refers to a non-binding procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute.

Arbitration and mediation are generally less formal, shorter and cheaper than court proceedings. An arbitral award is more easily enforceable internationally than a court judgement. Another advantage of both arbitration and mediation is that the parties retain control of the dispute resolution process. As such, arbitration and mediation can help to preserve good business relations between the parties. This can be important when a company wishes to continue to collaborate with the other party or enter into a new licensing arrangement with them in the future. It is generally good practice to include mediation and/or arbitration clauses in licensing agreements. For more information, see the website of the WIPO Arbitration and Mediation Center: www.arbiter.wipo.int/center/index.html

Note

1 https://www.wipo.int/wipo-alert

Copyright checklist

- **Maximize your copyright protection.** Where this is an option, register your works with the national copyright office. Put a copyright notice on your works and employ DRM to protect digital works.
- **Ascertain copyright ownership.** Have written agreements with all employees, independent contractors and other relevant people to address the ownership of copyright in any works that are created for your company.
- **Get the most out of your copyright.** Consider licensing your rights, rather than selling them. Grant specific and restrictive licenses, to tailor each license to the particular needs of the licensee. If one is available in your country, consider joining a CMO. Check whether online copyright management tools could help you monetize your rights.
- **Avoid infringement.** If your product or service includes any material that is not entirely original to your company, find out whether you need permission to use such material and, where needed and if available, obtain such permission. If permission is unavailable, do not use the material. Do not interfere with DRM.
- **Avoid false claims.** Try to avoid issuing claims against permitted uses of your content or of content in which you do not own the relevant rights.
- **Enforce your rights.** If you become aware that your protected content is being used by others in ways that infringe your rights, consider taking legal action. Alternatively, intermediaries may be willing to help stop or prevent infringements or may be required to do so by law.

Annex 1: Resources

World Intellectual Property Organization. www.wipo.int

WIPO Intellectual Property for Business. www.wipo.int/sme/en/

WIPO Copyright. Copyright and related rights. www.wipo.int/copyright/en/index.html

WIPO Building Respect for Intellectual Property. www.wipo.int/enforcement/en/index.html

WIPO Arbitration and Mediation Center https://www.wipo.int/amc/en/

WIPO Country Profiles. Directory of national copyright administrations. https://www.wipo.int/directory/en/

WIPO Publications. www.wipo.int/publications.

See in particular:

Collective Management Organizations Toolkit. https://www.wipo.int/publications/en/series/index.jsp?id=180

How to Make a Living in the Creative Industries. https://www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_2017_1.pdf

International Surveys on Copyright Levies. https://www.wipo.int/publications/en/series/index.jsp?id=145

International Surveys on Private Copying. https://www.wipo.int/publications/en/series/index.jsp?id=153

Alternative Dispute Resolution Mechanisms for B2B Digital Copyright- and Content-Related Disputes: A Report on the Results of the WIPO–MCST Survey https://www.wipo.int/publications/en/details.jsp?id=4558

Annex 2: Summary of the main international treaties dealing with copyright and related rights

The Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) (1886)

The Berne Convention is the most important international copyright treaty. It provides creators such as authors, musicians, poets, painters, etc. with the means to control how their works are used, by whom and on what terms. The Berne Convention establishes, among other things, the rule of "national treatment," meaning that in every country, foreign authors enjoy the same right as national authors. The Convention is currently in force in most countries in the world. A list of contracting parties and the full text of the Convention are available at: www.wipo.int/treaties/en/ip/berne/index.html

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) (1961)

The Rome Convention establishes protection for certain related (neighboring) rights, namely for performing artists over their performances, for producers of sound recordings over their sound recordings and for radio and television organizations over their broadcasts. For a list of contracting parties and the full text of the Convention, see: www.wipo.int/treaties/en/ip/rome/index.html

Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement) (1994)

Aiming at harmonizing international trade hand in hand with effective and adequate protection of IP rights, the TRIPS Agreement was drafted to ensure the provision of proper standards and principles concerning the availability, scope and use of trade-related IP rights. The Agreement also provides means for the enforcement of such rights. The TRIPS Agreement incorporates the substantive provisions of the Berne Convention, with the exception of those on moral rights – and in this way indirectly offers a means of enforcing that convention. The TRIPS Agreement is binding on all members of the World Trade Organization. The text can be read on the website of the World Trade Organization: https://www.wto.org/English/docs_e/legal_e/27-trips_01_e.htm

WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (1996)

The WCT and WPPT were concluded in 1996 in order to adapt the protection of the rights of authors, performers and phonogram producers to the opportunities and challenges posed by the advent of the digital world and the impact of the internet.

The WCT supplements the Berne Convention for the Protection of Literary and Artistic Works, adapting its provisions to the new requirements of the digital era.

For a list of contracting parties and the full text of the Treaty, see: www.wipo.int/treaties/en/ip/wct/index.html

The WPPT deals with holders of related rights, its purpose being the international harmonization of protection for performers and phonogram producers in the digital era updating certain aspects of the Rome Convention. It does not apply to audiovisual performances, which are instead covered by the Beijing Treaty.

For a list of contracting parties and the full text of the Treaty, see: www.wipo.int/treaties/en/ip/wppt/index.html

Beijing Treaty on Audiovisual Performances (2012)

The Beijing Treaty deals with the IP rights of performers in audiovisual performances. For a list of contracting parties and the full text of the Treaty, see: https://www.wipo.int/treaties/en/ip/beijing

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled (2013)

The Marrakesh Treaty creates a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired, and otherwise print disabled, including for cross-border transfer of published works in accessible formats. For a list of contracting parties and the full text of the Treaty, see: https://www.wipo.int/treaties/en/ip/marrakesh/

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