ICLG

The International Comparative Legal Guide to:

Copyright 2017

3rd Edition

A practical cross-border insight into copyright law

Published by Global Legal Group, in association with Bird & Bird LLP

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Published by
Global Legal Group Ltd.
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London SE1 3PL, UK
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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
October 2016

ISBN 978-1-911367-17-8
ISSN 2056-4333

Strategic Partners

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France

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1 Copyright Subsistence

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

Under French law, any work is eligible for copyright protection, provided that the work is original. The French Intellectual Property Code (CPI) does not include any definition of the originality of the work (namely designated as a "work of the mind" ("*oeuvre de l'esprit*")). It is at the discretion of the French courts to decide originality on a case-by-case basis. French courts consider that a work is original when the personality of the author of the work is evidenced in the work ("*empreinte de la personnalité de l'auteur*") or when one can appreciate the author's personal efforts in the work ("*apports personnels de l'auteur*").

1.2 On the presumption that copyright can arise in literary, artistic and musical works, are there any other works in which copyright can subsist and are there any works which are excluded from copyright protection?

The originality, no matter how subjective, is to be appreciated whatever the kind, form of expression, merit or purpose of the work. However, French law does not protect ideas or concepts. Therefore, work needs to be sufficiently materialised in a developed form to be eligible for copyright protection. This is all the more important to keep in mind for intellectual works, for example. In this respect, we note that French Courts – even if such solutions are sometimes challenged – have in the past denied protection for rules of a game, cooking recipes and perfumes.

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

There is no system of registration. The CPI provides that a work is protected as of its creation. In practice, authors may be well advised to seek registration of their material or work in order to secure proof of their ownership and priority. Among the means or devices available, we can mention the filing of an "envelope soleau" with the French Intellectual Property office ("*Institut National de la Propriété Industrielle*"), notarisation with a public notary and a filing with the APP ("*Agence pour la Protection des Programmes*"), a French agency promoting and protecting copyrights.

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

The CPI distinguishes between moral rights and patrimonial rights. A moral right is imprescriptible. The duration of patrimonial rights is 70 years after the death of the author. The duration is identical whatever the type of work. (In the case of "collaborative work" (see question 2.4 below) or "collective work" (see question 2.1 below), the starting point of the period of 70 years changes; it becomes the date of the death of the last contributors to a "collaborative work" and the date of the first publication of the work for a "collective work".)

In exceptional cases, the 70-year period might be extended where facts of war or temporary provisions may be taken into account.

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

Yes, we can find several cases where there is an overlap between intellectual property rights. Here are some examples:

An author can accumulate copyright and design rights for the same work, provided that the work fulfils the conditions required by each provision.

A database can be protected under copyright, but the owner of a database can also claim for a specific protection – a *sui generis* system also provided by the CPI – covering his financial, human or technical investments, provided those are considered as substantial.

A shape eligible to copyright or design could also be protected by a three-dimensional trademark. A title of a book or a comic book character could also be registered as a verbal or figurative trademark.

Cumulated protections raise various procedural issues but also issues on the merits, especially when protections come into conflict or when one protection is used to bypass another unfavourable provision.

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

No. The principle that any original work is eligible to be copyrighted is not affected by the fact that a work has been made by an industrial process. In this respect, the CPI expressly mentions, as examples of protected work, applied art and articles of fashion.

2 Ownership

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

The CPI provides a strong principle according to which the owner of the copyright is the author of the work. There are few specific cases where copyright is vested or transferred to another person.

In this respect, the collective work ("*oeuvre collective*") is the only French system where ownership is initially vested with another person (individual or company). The owner of the copyright is the person who has – on his sole initiative – conceived, supervised, edited, published and disclosed the work. In the case of collective work, one cannot identify the personal contributions of each of the authors involved in a creation, and, therefore, it is not possible to attribute a separate right to each of the authors.

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

The ownership of the copyright is irrespective of whether or not a work is commissioned. The author remains the owner of the copyright and will need to be assigned to the commissioner.

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

Ownership of a copyright is also irrespective of whether or not the author is an employee. Therefore, where there is potential for an employee to create a work eligible for copyright, assignment of rights needs to be implemented. The CPI provides few exceptions to this principle, such as software when software is created by an employee in the course of his mission or pursuant to his employer's instructions. The employer who edits software is in this case legally bound to be the owner of the copyright on such software. Other specific regimes to note apply to public agents and to journalists where patrimonial rights are – to some extent – automatically vested to the employer.

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

There are several cases of joint ownership. A "collaborative work" ("*oeuvre de collaboration*") does exist when several persons contribute to the work and each of the contributions is specific and identifiable. In this case, the ownership is shared equally by each of the authors.

Joint ownership can also exist between the heirs of an author after his death. In such a case, common provisions shall apply to the exploitation of the jointly owned work.

3 Exploitation

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

French courts, in compliance with article L.131-2 of the CPI, used to decide that the publishing contracts, audiovisual production contracts and performance contracts shall be executed with authors in written form. A new law voted on 7 July 2016 (see article 7.1) amends the wording of the article L.131-2 of the CPI. It is possible that such amendment enlarges the obligation to any contract executed with authors and not only to the three above-mentioned contracts.

In any case, however, each patrimonial right shall be namely assigned, whereas the assigned right shall be specified as to its scope and purpose, its duration and its territory of use.

The contract can eventually be free, but when a price is agreed, such price shall be proportional to the revenues made out of the exploitation of the work. The CPI provides exceptions to this proportional rule, including in the field of software, or when means of calculation do not exist, etc.

Those protective formalities only apply to contracts executed by the authors and therefore do not apply to subsequent contracts executed by author's assignees.

3.2 Are there any formalities required for a copyright licence?

Licence agreements are subject to the above-mentioned conditions.

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

In addition to limits provided for under the common rules, the CPI prohibits perpetual undertakings. In practice, this limit is usually bypassed by stipulating that the assignment is made for the entire duration of the copyright.

The CPI also prohibits the assignment and licensing of future works. In this respect, parties shall provide a specific clause dealing with this hypothesis and including additional proportional compensation.

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

Collective licensing is carried out by French companies entitled to manage copyrights for their members – (SPRD).

Some companies specialise in types of work such as: SACEM for authors, composers and music editors; SACD for authors of drama and audiovisual works; SCAM for multimedia works; and ADAGP for artistic works. Others are dedicated to the management of one specific right, such as the SDRM for the right to reproduce musical works, PROCIREP for the representation of cinematographic film, etc.

In principle, authors are not obliged to adhere to these collective licensing bodies and remain free to manage their rights by themselves. In a few cases, however, the authors are required to devote their right to collective licensing bodies.

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

Collective licensing bodies are constituted and regulated under common law applicable to civil companies. Specific provisions included in the CPI also apply. The ministry of culture can control the validity of their statutes.

The European directive dated 26 February 2014, to be implemented by 10 April 2016, will help to make uniform the regulation of licensing bodies throughout Europe.

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

Collective licences are subject to common law and can be challenged on any available pertinent ground. We note that French courts have decided on several occasions that the fact that only a small part of the material is used is not pertinent in challenging the licence since the user pays for a potential use of the material no matter the actual use of such material.

4 Owners' Rights

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

As mentioned above, any exploitation of a copyright work shall be namely assigned/transferred or licensed. Therefore, any act not included into the assignment/licence is capable of being restricted by the rights holder and considered as an act of infringement. However, it is remarkable that more and more French courts take into account good faith and deduct implicit authorisations from the terms of the assignment contract and take the circumstances of each case into account to identify the exact scope of the assignment.

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

Under French law, moral rights and patrimonial rights are related to a copyright. CPI qualifies moral rights as inalienable, perpetual and imprescriptible.

Legal doctrine usually divides moral rights into four components: disclosure; authorship; respect of the work; and a right of reconsider. Pursuant to this definition, the author shall solely decide when the work shall be made available to the public for the first time. The author must be displayed to the public – whatever the use of the work – and has the right to control and prevent any change capable of affecting the integrity and the quality of the work.

The right of reconsider allows the author to claim for the withdrawal of the work from the market. This right is not easily implementable and is certainly subject to the compensation of the owner of the copyright.

Subject to their express consent and in very specific cases, the French Court has permitted authors to waive their moral rights, for example by abandoning the mention of their name.

Lastly, French law also enshrines related rights for performers.

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

Subject to the respect of moral and patrimonial rights as described above, exhaustion of rights is applicable to copyright so that an author or a copyright owner could not restrain subsequent dealings in works which have been put on the market with its consent.

Therefore, if a writer expressly limited the assignment of its publishing rights to its editor and to the French market, he could prohibit his editor from assigning these rights to an English editor, but could not prevent a book edited in France from being sold on the English market.

The question is, in each case, what is the extent of the consent given by the author, keeping in mind that French courts shall interpret the assignment contracts in favour of the author.

5 Copyright Enforcement

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

Hadopi is a statutory agency, which has been put in place to monitor illegal downloading from the Internet. The CNC (The National Cinematographic Center) and the APP are also empowered to handle reports for establishing infringement acts. In addition, criminal jurisdiction or administrative bodies such as customs or DGCCRF are legally empowered to seek and punish copyright infringement acts. They are used alternatively or in addition to civil actions.

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

In addition to the copyright owner (the author himself or its assignee), the CPI provides several cases where another person can bring a claim for infringement, including an exclusive licensee of a video producer and an exclusive licensee of a phonograms producer, subject to any contradictory provisions of the licences.

Collective licensing bodies are also legally empowered to start legal action for their members, provided that such action remains within the limits of their statutes.

A new regulation voted in on 7 July 2016 (see article 7.1) empowers the CNC to file a criminal complaint – or exercises rights of the victim when the prosecutor started the criminal action – when an audiovisual work is concerned.

We can also mention the author's special agent, who is also able to bring a claim for infringement, provided he is expressly empowered to do so.

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

Anyone infringing a copyright incurs civil liability towards the copyright owner. French law does differentiate between primary infringers and secondary infringers, and both are liable towards the copyright owner regardless of their good faith or awareness of the infringing acts. Facts are appreciated differently when criminal action is concerned (see below section 6).

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

Yes. The CPI provides a limitative list of exceptions which can be relied upon as a defence to a claim of infringement: private and free performances; copies or reproductions strictly reserved for private use; analyses and short quotations justified by the critical, polemic, educational, scientific or informative nature of the work in which they are incorporated; press reviews; public speeches; artistic works published in auction catalogues; parody, pastiche and caricature; and access to the contents of an electronic database.

5.5 Are interim or permanent injunctions available?

Yes. The CPI expressly provides interim and permanent injunctions, for example to cease the infringing acts, to seize the infringing products or profits made by the infringers, to destroy the infringing products or the material used for the infringement. Interim injunctions are, in principle, only applicable for obvious and/or urgent circumstances, and are undertaken at the risk and expense of the claimant.

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

CPI provides two methods for the calculation of financial damages. The victim can either (i) claim for damages assessed with respect to his losses on the one hand and the profits incurred by the infringers on the other hand, or (ii) claim a lump sum calculated with reference to the royalties he would have gained if he had authorised the use of the work.

The copyright owner and/or the author can also claim for damages related to the damage to his moral rights and prejudice of his image.

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

Costs of infringement proceedings vary a lot depending on the circumstances of each case. There are no standard legal costs. We could say, however, that typical costs may vary between €5,000 and €100,000 excluding VAT. A proceeding on the merits at first instance may take between one and two years until a judgment is rendered.

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

Yes. French courts of appeal can review the entire case. Therefore, courts of appeal are entitled to reverse or confirm the first decision in all or part of its provisions.

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

The statute of limitation is five years for civil actions, commencing from the date that the owner knows or should have known about the existence of the infringement. The statute of limitation is three years for criminal actions. The starting point may vary from one case to another since the principle is that the statute of limitations starts running only when the infringing activity has ceased.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Yes. Infringement is considered in France as a civil and a criminal offence. Victims are free to choose the civil or the criminal route.

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

Contrary to civil actions, criminal offences require the claimant to demonstrate that the defender was aware of the infringement and acted voluntarily in bad faith. If a legal assumption exists that infringers acted in bad faith, such assumption is challengeable so that infringers are entitled to demonstrate that they in fact acted in good faith. A judge shall appreciate on a case-by-case basis the particular circumstances of the case and the actual involvement of the defendants in the acts to rule on the liability of the defendant as the main perpetrator or as complicit in the offence.

The main sanctions are as follows: a maximum of three years of imprisonment and a maximum fine of €300,000, which can be increased if the offence is committed by an organised gang.

7 Current Developments

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

A case law rendered last year illustrated the influence of the European Human Rights Convention and case law (Civ1, 15 May 2015 n° 13-27.391) on the French judges who used the balance of interests test when assessing a breach of a copyright owner's rights rather than strictly applying the French system of exceptions as described above (see question 5.4). This case involved two authors, a photographer of several fashion photos and a painter who used these photos in a painting without obtaining the authorisation of the photographer. On the basis of article 10§2, the Supreme Court reversed the Court of Appeal's decision because the Court of Appeal did not qualify if and how the second work – the painting – attempted to infringe the photographer's rights in a manner worthy of prosecution.

The French doctrine minimised the impact of such decision considering that French judges will certainly maintain their previous case law based on the French system of exception; however, the judges will change the format of their motivation in order to fall within the format of the reasoning generated by the balance of interests test.

Such consideration shows how French doctrine and judges are firmly attached to the French copyright system. No pertinent decision is today available to confirm or reverse the impact of the above decision.

On 7 July 2016, a law named "Law for the freedom of creation, architecture work and heritage" was adopted. The stated objective of this Law – which also incudes numerous provisions regarding architectural, heritage and historic works and urbanism – is to protect the freedom of creation and IP rights.

The Law creates a new statute for the artists/performers based on the copyright model in order to increase their protection and ameliorate their position in the course of their relationship with producers bound to be legally assignees of their rights.

In the same spirit, the Law increases the music and film producers' obligations towards the authors in order to implement an effective transparency on the exploitation of the work and the benefits expected for the authors on such exploitation.

The Law also includes provisions on digital content (see article 7.2).

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

Recent case law confirms the system developing for digital content – again backed by European regulations – according to which the editors and/or the authors of content on the Internet are deemed liable in the case of infringement, whereas the website host (ISP) shall only remove the infringing content when they are notified of the infringement. Such a system of "notice down and take down" does not support a general obligation of surveillance.

More generally, liability of the professionals involved in offering content on the Internet is judged taking into account their actual role in offering the disputed content. It is only if they played an active role that they would be held liable for offering infringing content.

The above-mentioned Law dated 7 July 2016 contains several provisions in support of the fight against counterfeiting on the Internet. For example, the CNC is now entitled to start legal actions beside or at his own initiative against illicit websites of streaming.

The Law also provides a definition of the online service consisting of the automated referencing of artistic works and photos and entitles collective licensing bodies to negotiate licences with companies commercialising such service.

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