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1 Copyright Subsistence

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

Any work of the mind created by an author may be protected by authors' rights, whatever their kind, form of expression, merit or purpose (articles L111-1 and L112-2 of the Intellectual Property Code, hereafter IPC). The IPC and the Berne Convention refer to a non-comprehensive list of works protected by copyright. In accordance with the Berne Convention authors may enjoy intellectual property rights for their work by the mere fact of its creation with no requirement of copyright notice or registration. Therefore, what is known in common law countries as copyright is called in continental law the Author's Law, even if for some academics the concepts are not comparable in their substance.

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?

Under French law and practice any work can be protected by copyright as long as it is the expression of the author's personality. This condition precludes protection by copyright of ideas, of concepts and of technical works. Consequently, fish bait has been held as protectable (Appeals Court of Toulouse, May 28, 2014, case n° 2013/00100), as well as the interior of restaurants (Appeals Court of Aix en Provence, May 6, 2014, case n° 2012/11545) and shoes (Supreme Court, May 6, 2014, case n° 2011/22108). But, the idea of an aluminium lampshell with holes (Paris Court of First Instance November 8, 2014, case n° 2011/17689) and the rules of a game (Paris Court of First Instance, October 15, 2010, case n° 2009/01123) were held not to be protectable because they were mere ideas. Also, perfumes are still not protectable by copyright as held by the Supreme Court (Supreme Court December 10, 2013, case n° 11-19.872).

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

There is no system for copyright registration. Copyright law protects a work from the moment it is created, regardless of its registration. For practical purposes of identifying and dating a work, right holders may register their works at the authors' societies or the Agency for the Protection of Programs, or APP, as well as request a recordal to bailiffs or public notaries. Industrial designs and topographies of semi-conductors may be registered at the INPI in order to benefit from protection in France. Industrial Designs may also be registered at the Office for Harmonization of the Internal Market for protection throughout the EU and at the WIPO to obtain an international design registration. Under the penalty of a fine under criminal law, published works (not private documents) must be deposited at the National Public Library, at the National Audiovisual Institute or at the National Cinema Centre, or at habilitated libraries (article L133-1 of the Inheritance Code). Such deposit is required for conservation and public policy reasons and is independent from copyright law. Cinema films available in movie theatres and corresponding contracts on these films must be registered at the Public Registry of Film and Broadcasting. Such registration establishes ownership of rights and is necessary to enforce contracts upon third parties.

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

Moral rights have no time limit and may be exercised by heirs.

Regarding economic rights, the duration of copyright protection comprises the author's entire life plus the 70 years following the year of his or her death. Collaborative works are protected during the authors' entire life plus during 70 years from the death of the last contributor. Published pseudonymous, anonymous (unless the author's identity is then known) or collective works are protected for 70 years starting the year following their publication. When such work is published in instalments, the 70-year term runs from 1 January of the calendar year following the date on which each instalment was published. Pseudonymous, anonymous or collective works published at least 70 years after their creation are protected for 25 years from the year of publication. Registered Industrial designs are protected during a five-year term, which can be renewed five times. Unregistered Industrial Designs are protected for a period of three years from the date on which the design was first made available to the public within the territory of the European Union. Databases may be protected for a 15-year term from the establishment of the database. Topographies of semi-conductors are protected for a 10-year term from the end of the calendar year in which the application for registration was filed or from the end of the calendar year in which the layout was first commercially exploited, whichever comes first.

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

Yes. In the European Union, and more specifically in France, in addition to copyright law, intellectual property law includes the following rights which are closely associated with copyright law:

neighbouring rights; rights for sport event organisers; industrial design law; database rights; or the law specific to topographies of semi-conductors. The additional conditions required by each right are the following:

- Neighbouring rights: there must be a performance for performers' rights; there must be initiative and responsibility for the initial fixation of a sequence of sounds for phonogram producers; there must be initiative and responsibility for the initial fixation of a sequence of images for videogram producers; and there must be a programme for an audiovisual communication enterprise.
- Rights for sports event organisers: there must be a sports event or competition.
- Rights for industrial designs: there must be novelty and individual character.
- Database rights: there must be substantial investment in the content, presentation or checking of the content of the data base.
- Rights for topographies of semi-conductors: must be the result of the creator's own intellectual effort and not commonplace in the semi-conductor industry.

Depending on the circumstances of each case, intellectual property protection may involve only one, several or all of the above-mentioned rights.

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

The required condition for copyright protection is that the work is the expression of the author's personality, whatever the form of expression. It does not matter if the work is made by an industrial process, as long as it shows the expression of the author's personality. For instance, industrially manufactured furniture or clothing may be protected by copyright if it is established that the shape of the product is the expression of the author's personality.

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 copyright, which can be assigned once the work has been created, is owned by the author of the work. Under French law, the global assignment of future works is prohibited. The person under which the work has been published is deemed to be the author.

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

Firstly, a hiring party may own authors' rights once they have been created and assigned according to the provisions of the IPC, which contain compulsory provisions regarding the form of the assignment (in writing most of the time), the specification of each assigned right as well as the determination of royalties. Secondly, a hiring party may also own authors' rights on collective works; collective works are works created on the initiative of a person in which the personal contributions of the various authors who participated in it are merged in the overall work, without it being possible to attribute to each author a separate right in the work as created. Thirdly, a hiring party may own rights under simplified assignments in case of audiovisual production contracts, works created for advertising or in case of computer programs. In any case, in France, copyright is independent of any property right associated with a physical object.

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

Under French law, an employee who creates a work remains the owner of the copyright of such work. Exceptionally, the economic rights in software and its documentation created by one or more employees in the execution of their duties or following the instructions given by their employer shall be the property of the employer, and he or she exclusively shall be entitled to exercise them. As an exception, works created by civil servants during the exercise of a civil servant's functions, or as a result of following instructions, are subject to the following rules:

- the state is the owner of the patrimonial rights on the use of works strictly necessary for a mission relating to public service; and
- the state shall own a preference right for the commercial use of the work.

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

Yes. Jointly owned works are subject to general civil law rules. Thus, co-ownership may be subject to agreements between right holders. Furthermore, the IPC provides that collaborative works must be exercised jointly, and that when there are different types of contribution from different authors, each of the joint authors may exploit separately his own personal contribution, provided it does not prejudice the exploitation of its own work.

3 Exploitation

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

Yes. The IPC provides mandatory provisions regarding the transfer of copyright. The agreement must mention each right assigned, the scope of the assignment and proportionate royalties, unless the conditions set by the IPC that allow payment of a lump sum are met (not possible to calculate the proportional royalties, assignment regarding a computer program, first edition of a scientific work, and so on). Audiovisual contracts must be in writing.

3.2 Are there any formalities required for a copyright licence?

Copyright licences are subject to general contract law. Audiovisual contracts must be in writing. The IPC also provides that rights may be licensed with no financial charge (articles L122-6, L122-7 and L131-2).

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)?

Under general contract law, licences with an indefinite duration have been cancelled by courts.

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

Musical works may be licensed to the musical composers' society (SACEM: www.sacem.fr), drama and audiovisual works may be licensed to the drama composers' society (SACD: www.sacd.fr), multimedia works to the multimedia authors' society (SCAM: www.scam.fr) and written works to the society for authors of the written word (SDGL: www.sgdl.org). Also, the Computer Programs Agency (APP: app.legalis.net) contributes to the protection of the rights of computer programmers, and can carry out the seizure of computer programs and databases.

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

The above-mentioned collecting societies are privately regulated and subject to general law provisions such as European competition law (ECJ case n° C 351/12).

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

Licence terms can be challenged on any legal grounds. For instance, provisions that have an anti-competitive effect can be cancelled (CFI, case n° T-422/08 and ECJ case n° C 351/12).

4 Owners' Rights

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

Any damage to moral rights, which include respect of the author's name, authorship and work, may be restricted. Regarding economic rights, any unauthorised representation, reproduction, communication to the public, adaptation and distribution of protected works may be restricted.

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?

Both authors and performers have moral rights. Authors have the right to divulge their work, as well as the right to respect for their name, authorship and work. More particularly, authors may reconsider or withdraw after publication their work, provided that case the assignee is indemnified. Moral rights are perpetual, inalienable and imprescriptible. Civil servants who are authors have restrictions with regards to the right of disclosure and use of their work.

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?

Yes. European law provides that once the sale of physical objects of a work has been authorised by the right owner in the EU, the subsequent sale of such object cannot be prohibited by the latter.

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?

The French government agency against frauds, DGCCRF, may initiate investigations of infringement, seize infringing goods and send the file to the Public Prosecutor who may then initiate infringement proceedings. The French and the European Observatories on Infringements of Intellectual Property Rights have no direct enforcement powers and are focused on collecting data and promoting IP rights. Regarding digital infringement, the HADOPI is a French government agency that sends warning messages to internet users to monitor their internet access so that it is not used to spread or copy digital content protected by copyright. This agency also ensures that the existing technical protection measures to protect copyright or related rights do not, due to their mutual incompatibility or inability to inter-operate, cause unjustified limitations to the use of a work.

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

The author who has transferred copyright may still enforce moral rights. Also, article L321-1 of the IPC sets an exception in French procedural law and allows societies that collect and distribute authors' royalties, and the royalties of performers and phonogram and videogram producers, to take legal action before the Courts to defend the rights for which they are responsible under their statutes (article L321-1 of the IPC). The Customs and the Public Prosecutor may also initiate actions to enforce copyright and neighbouring rights.

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?

Yes. Under general French criminal law the accomplice is as liable as the main author of an offence. Furthermore, criminal law penalties may be more significant if the infringement is performed within an organised group. There is a significant amount of case law regarding the liability of internet providers.

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

Exceptions to copyright infringement have been harmonised within the EU, particularly in the EU Directive No. 2001/29 and are listed in article L122-5 of the IPC. They include private representations or reproductions, press reviews, dissemination of political speeches, parody and caricature, exceptions to authors' rights available to libraries and museums, the reproduction or representation of works for informative purposes and so on.

For instance, based on EU Directive No. 2001/29 and on the 'theory of accessory', the Supreme Court ruled that the appearance of protected illustrations within a movie was not subject to prior authorisation of the author, since the latter only appear as a usual element of the movie's set and are not shown in the normal course of their use (Cass Civ 1, 12 May 2012, RIDA No. 229 p.457).

As provided by international and EU laws, the exceptions listed in article L122-5 mentioned above must meet the conditions of the 'triple test' and must:

- correspond to one of the exceptions listed in the law;
- not conflict with a normal exploitation of the work; and
- not unreasonably prejudice the legitimate interests of the author.

French law provides specific conditions for the liability of internet service providers (due notification and delay in responding to notification). Thus, in cases where the service provider had an active role in treating the information or when the service provider has, after a due notification, delayed in withdrawing the infringing content, courts have considered that there was a liability for infringement.

5.5 Are interim or permanent injunctions available?

Preliminary injunctions may be granted prior to trials on the merits, should plaintiffs establish that the infringement is not seriously arguable (Supreme Court, December 19, 2013, case n° 12-29499). Successful plaintiffs on the merits are very commonly granted injunctive relief. Under French practice, injunctive relief is granted under penalties per day of delay or per infringement to the injunction with the benefit of immediate execution (there is no suspension of the injunction even if an appeal is lodged).

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

As a matter of principle, damages tend to repair the damage resulting from the infringement. Their assessment will determine whether the plaintiff is entitled to lost sales or to a "licence fee" depending on whether the work protected by copyright is used. In any case, upon the plaintiff's request, the jurisdiction may allocate a lump sum which shall be no less than the royalty fee the infringer would have paid if he had been authorised to do so. Furthermore, since the law n° 2014-315 of March 11, 2014, parties and jurisdictions must, when assessing the damages, distinguish between the negative economic consequences to the right holder, the moral damage to the latter and the profits made by the infringer (article L331-1-3 of the IPC).

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

There are attorney fees for requesting seizure orders, bringing an action, presenting court petitions, pleading the case and counselling the client. For first instance proceedings, these fees range from EUR 8,000 to EUR 30,000 or more depending on the case. There are bailiff fees of at least a couple of thousand euros for performing the seizure and a couple of hundred euros for executing the decision (notification, seizures of accounts, etc.). The legal costs of first instance proceedings range from a couple of hundred euros to a couple of thousand euros. There may be expert fees if an expert is appointed by the court, for instance to assess the damages. These fees range from EUR 5,000 to more than EUR 50,000 in cases involving complex issues. As a matter of principle, the loser has to pay the other party's legal costs and attorney fees (more and more French courts grant a lump sum for attorney fees close to the fees justified by produced invoices). In certain cases the judge may not order compensation for the fees and expenses to the other party if the judge decides to take into account the economic situation of the loser, or decides such payments would not be fair.

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?

An appeal may be filed within one month of the notification of the decision. A two-month extension to this deadline is granted to parties located outside of France. After a formal appeal, the appellant must present its motives within three months. In practice, most appeals cover the right to contest all aspects of the judgment. Once the appeal is filed, the non-appealing party may also contest the first instance ruling within the appeal proceedings.

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

The general five-year time limit for seeking remedies applies for authors' rights. The deadline starts from the last allegedly infringing act, which means that if the infringement has not stopped (i.e., an allegedly infringing piece of music, picture or piece of art still accessible on the internet), the deadline does not even start. As mentioned earlier, there is no deadline for exercising moral rights. In any case, a delay in initiating an action may lead to less important remedies because of a sort of tacit acceptance. In addition, in the case of a non-identical copy, it may be a persuasive element for lack of infringement, as the plaintiff has not immediately initiated proceedings.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Criminal law provisions cover infringement activity as well as actions that purposefully harm technical measures intended to safeguard works protected by authors' rights or neighbouring rights.

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

Copyright infringement is ruled by criminal law provisions which have been applied to civil law proceedings. In criminal law proceedings it is important to show wilfulness. Potential sanctions include up to five years' imprisonment and a fine of EUR 500,000. Penalties also include the suspension of access to an online communications service for wrongdoings committed with an online communications service.

7 Current Developments

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

In July 2013, the French government substantially limited the powers of the French agency HADOPI, which had the power to cut online access to individuals who had performed illegal downloading. EU Regulations 608/2013 and 608/2013 have harmonised and set the conditions for seizures by customs authorities of infringing goods entering the EU. In February 2014, the European Court of Justice has ruled that the owner of a website may, without the authorisation of the copyright holders, redirect internet users, via hyperlinks, to protected works available on a freely accessible basis on another site (case n° C-466/12). A month

later, the same Court ruled that an internet service provider may be ordered to block its customers' access to a copyright infringing website and that such an injunction and its enforcement must, however, ensure a fair balance between the fundamental rights concerned (case n° C-314/12). The French law of March 11, 2014, specified copyright enforcement procedures with regards to the collection of evidence, the assessment of damages and actions by the customs for intra-EU commerce. In June 2014, the ECJ held a ruling that will have crucial implications for fashion and that has specified the conditions of validity of designs and what condition unregistered designs must meet to be enforced. A ruling from the European Court of Justice regarding libraries setting licensing conditions, the possibilities of digitalising works, printing them out and storing them on USB sticks (case n° C-117/13), is expected in the next months.

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.)?

There has been a lot of debate and case law in France regarding the liability of internet service providers in copyright infringement cases. Following EU harmonisation, French law provides specific conditions for the liability of internet service providers (due notification and delay in responding to notification). Thus, in cases where the service provider had an active role in treating the information or when the service provider has, after a due notification, delayed in withdrawing the infringing content, courts have considered that there was a liability for infringement. Also, as mentioned above, hyperlinking to content protected by copyright may not constitute infringement. In addition to this, article L122-5 of the IPC provides that copyright law cannot be used to prohibit acts necessary to access an electronic database, or a transitory or accessory reproduction that is an essential part of an electronic process whose sole purpose is to allow the legitimate use of the work or its transmission between intermediaries. This article also contains provisions regarding the electronic preservation of works. The law of 1 March 2012 regarding the digital use of unavailable books from the 20th century aims to facilitate the electronic reproduction of such books. There is also abundant case law regarding conflict of jurisdiction and conflict of laws rules regarding online infringement with international elements.

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Catherine Mateu, partner with Armengaud & Guerlain, has more than fifteen years of experience in French and European Intellectual Property law, serving clients that range from inventors, designers, non-profit groups and local start-ups to multinational corporations. Her practice focuses on finding timely and cost-effective solutions to a wide array of patent, copyright, trademark, design infringement, strategic advice and licensing matters. Catherine Mateu holds a post-graduate degree in Domestic and European Business Law from the Université de Nancy II, an LL.M. in Common Law from the University of East Anglia in Britain, a DESS in Industrial Property from the Université de Paris II, and a DEA in Private International Law from the Université de Paris I. She has been a lawyer at the Paris Bar since 1999, and has received Intellectual Property certification from the French Bar Association. She is bilingual in French and Spanish, and fluent in English and Basque. Catherine Mateu is a regular speaker at Intellectual Property conferences, and has been ranked in industry publications such as IP Stars, Legal 500, Les Décideurs, Women in Business Law, Chambers and Who's Who. She is a member of the following associations: AIPPI - Regular participant in AIPPI Working Committees, reporter of the French group Q230 and Co-President of the Designs Committee; APRAM - Member of the International and Community Relations Committee; INTA - Co-chair of the Public Resources Committee and former Chair of the Promotion and Outreach Subcommittee, former Chair of the Trade Dress Image Library Subcommittee, former member of the Small and Medium-Sized Enterprises Task Force, and the French contributor to Trade Dress International Practice and Procedures; ADIJ - Member of the Public Markets and New Technologies Committee; and EPLAW - Commentator and rapporteur to the drafts of the rules of procedure on the Unified Patent Court.

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Cabinet Armengaud & Guerlain, founded in 1993, is fully specialised in intellectual property (patents, trademarks, designs and models, and copyright) and the related issues of unfair competition, consumer law, advertising rights (particularly comparative advertising) and the Internet. Reflecting its well-recognised expertise, the firm has worked with a wide variety of French and international clients, from artists and inventors to blue-chip companies, governments and state-owned enterprises.

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