

# Overview<sup>\*</sup>

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## Introduction

The balance to be achieved in copyright law traditionally can be described as follows: Whose liberties should be given priority? Those of creators or those of the rest of society? In other words, how is the balance to be achieved between the interests of copyright holders and those of the users of works? The reality principle actually dictates a broadening of the circle of players, so as to refine the naming of stakeholders: creators and artistic performers, investors and professional users (employers, publishers and producers, distributors), end-users, creative and amateur users, etc. Nevertheless, one has to bear in mind firstly that every creator, by creating, uses what he has learnt and experimented with thanks to works of former creators; secondly that copyright policies actually have to enhance scientific progress and the spreading of culture.

The achievement of a balance in copyright law proceeds mainly through tailoring the scope of protection. It appears in the lawmaking process *a priori* by designing the protection and answering the question of which works and which uses are protected<sup>1</sup> (meaning which use of which object requires right-owner consent) and for how long.<sup>2</sup> Lawmakers adjust the balance also *a posteriori*. After the settlement of protection principles, copyright acts remove certain uses from the scope of pro-

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<sup>\*</sup> Reports received from **Argentina**, D. LIPSZYC and P. WEGBRAIT; **Australia**, A. CHRISTIE and J. LIDDICOAT; **Belgium**, B. VANBRABANT and A. STROWEL; **Bosnia and Herzegovina**, I. MEŠEVIĆ; **Brazil**, A. ROCHA de SOUZA; **Canada**, Y. GENDREAU; **Chile**, S. SCHUSTER and J. MAHÚ; **China**, L. XIUQIN and T. LIU; **Colombia**, E. RENGIFO; **Croatia**, I. GLIHA; **Cyprus**, T. SINODINOU; **Egypt**, A.H. AL-SAGHIR and H.A. RASLAN; **France**, S. CARRE; **Germany**, T. DREIER and L. SPECHT; **Greece**, D. KALLINIKOU; **Hungary**, P. MEZEI; **India**, M. CHOUDHARY; **Israel**, G. PESSACH; **Italy**, S. SICA and V. D'ANTONIO; **Japan**, R. KOJIMA; **Korea**, I. H. LEE; **Lithuania**, V. MIZARAS; **Macao**, R.J. NEUWIRTH and L. MIN; **Netherlands**, L. GUIBAULT and K. VAN'T KLOOSTER; **Poland**, J. BLESZYŃSKI; **Portugal**, D.M.L. MOURA VICENTE; **Russia**, V. SCHÖTTLE; **Scandinavia (Denmark, Norway and Sweden)**, O.-A. ROGNSTAD; **Serbia**, I. MEŠEVIĆ; **Singapore**, W.L. NG-LOY; **Slovenia**, M. TRAMPUŽ; **Spain**, R. XALABARDER; **Switzerland**, R. M. HILTY and M. J. WEBER; **Taiwan**, C.-H. HSU; **Turkey**, G. OKUTAN; **Uganda**, R. ALEMU; **UK**, J. GRIFFITHS; **USA**, P. MAGGS. This overview considered also the European Copyright Code of the Wittem Group.

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<sup>1</sup> See questions 1 and 2a.

<sup>2</sup> See question 1b.

tection.<sup>3</sup> Thereby, they grant realms of freedom,<sup>4</sup> the so-called *limitations and exceptions* to the copyright; in other words and from the point of view of users, *user rights*.<sup>5</sup>

As in many areas of law, digitization and the Internet have shifted benchmarks in copyright law. In the early stage of copyright policies, a fundamental (and obvious) distinction was laid between “public” and “private”. Only the public uses, meaning those intended to reach a public, were protected. Nowadays, as a matter of fact, a simple e-mail can reach more addressees than a theatre in the 18th century. Furthermore, technical protection measures make it possible to control and numerate every use. This puts the essence of copyright into question. How far does this shift in balance provoked by new technological possibilities make it necessary for lawmakers to grant new rights, and to which right holders? To put it in a nutshell: since the 1990s by revolutionizing the way in which copyright-protected works are dealt with, new technologies have induced changes which have confronted copyright law – and the trade of related products (mainly industries of entertainment, news and scientific publications) – with profound challenges. The obvious balance underlying copyright law, which was till then implicit, has since become disruptive in international law.

The balance first appeared in the TRIPS Agreement of 1994:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.<sup>6</sup>

It concerned the whole intellectual property spectrum and applies to all WTO members, therefore, to the 41 countries concerned by this report.<sup>7</sup>

<sup>3</sup> See questions 2c, 2d, 2e.

<sup>4</sup> On the way lawmakers handle this issue, see question 3.

<sup>5</sup> See answers to questions regarding user rights free of charge, subject to compensation and mandatory licences, 2c, 2d, and 2e, and under Question 6.

<sup>6</sup> Art. 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) adopted in Marrakesh, Agreement Establishing the World Trade Organization, Annex 1, (1994).

<sup>7</sup> In the absence of explicit references, articles (Art.) and sections (Sec.) quoted in this report refer in following countries to following acts: **Argentina**: Copyright Act N° 11.723 1933; **Australia**: Copyright Act 1968 (Cth); **Belgium**: loi du 30 juin 1994 relative au droit d’auteur et aux droits voisins; **Bosnia and Herzegovina**: Law on Copyright and Related Rights (August 2010); **Brazil**: Copyright Act (Law 9.610 1998); **Canada**: Copyright Act, L.R.C. 1985, ch. C-42; **Chile**: Chilean Copyright Law: Law 17.336 (1970); **China**: Copyright Act (adopted in 1990, revised in 2001); **Colombia**: Law 23 of 1982; **Croatia**: Copyright and Related Rights Act of October 1<sup>st</sup> 2003; **Cyprus**: Copyright Law 59/1976; **Denmark**: *Lovbekendtgørelse* (Consolidated Act) No. 587/20.6.2008 *om ophavsret*; **Egypt**: Intellectual Property Law No. 82/2002 (EIPL); **France**: *Code de la propriété intellectuelle* 1992; **Germany**: German Copyright Act of September 9, 1965; **Greece**: Copyright Law (Law 2121/1993); **Hungary**: Copyright Act LXXVI of 1999; **India**: Copyright Act, 1957; **Israel**: Copyright Act, 2007; **Italy**: Law for the Protection of Copyright and Neighbouring Rights 1941; **Japan**: Copyright Act, Act No. 48 of May 6, 1970; **Korea**: Copyright Act of Korea (from 2006, came into force on June 28 2007);

Moving closer to our issue, the WIPO treaty of 1996 regarding copyright (WCT) reveals that the balance was already achieved in the Berne Convention (1886). Furthermore it directly refers to the balance between creators and copyright owners on the one hand, and the users of works on the other. It thus recognizes “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”.<sup>8</sup> This provision applies to 31 of the countries observed in this paper;<sup>9</sup> whereas, the Berne Convention has been implemented in all countries.

Moreover, regarding the law applicable to 16 countries considered in this report,<sup>10</sup> the European Directive on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive)<sup>11</sup> of 2001 states:

A fair balance of rights and interests between the different categories of right holders, as well as between the different categories of right holders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment.<sup>12</sup>

In addition, the balance to be achieved regarding the dealing with copyright-protected works can also be assisted by external measures. Copyright law does not exist in isolation. Fundamental rights like the freedom of speech and expression and the right to be informed can help, especially when the application of copyright rules appears as a hurdle against the dissemination of works. Besides this, more trade-

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**Lithuania:** Law of the Republic of Lithuania on Copyright and Related Rights 1999; **Macao:** Author's Rights and Neighbouring Right Act 1999); **Netherlands:** Copyright Act 1912; **Norway:** *Lov om opphavsrett til åndsverk*, May 12, 1961; **Poland:** Act of February 4, 1994 on Copyright and Neighbouring Rights; **Portugal:** Code of Copyright and Related Rights, last amended by Law No. 16/2008, of April 1, 2008; **Russia:** Art. 1225 of the Civil Code of the Russian Federation (2008); **Serbia:** Serbian Copyright Act (Law on Copyright and Related Rights, December 2009); **Singapore:** Copyright Act 1987; **Slovenia:** Slovenian Copyright and Related Rights Act (adopted in 1995; last amendment in 2007); **South Africa:** South African Copyright Act 98 of 1978; **Spain:** *Texto Refundido de la Ley de Propiedad Intelectual* (Royal Legislative Decree 1/1996 of April 12); **Sweden:** Swedish Copyright Act (December 30 1960); **Switzerland:** *Bundesgesetz über das Urheberrecht und verwandte Schutzrechte*, Act of October 9, 1992; **Taiwan:** Copyright Act last amended on February 10, 2010; **Turkey:** Turkish Law on Intellectual and Artistic Works no. 5846; **Uganda:** Copyright and Neighbouring Rights Act, Act No. 19 of 2006; **UK:** Copyright Designs & Patents Act 1988; **USA:** title 17 of the *United States Code*, Copyright Act of 1976. **Witem** refers to provisions of the European Copyright Code.

<sup>8</sup> Preamble of WCT, December 20, 1996.

<sup>9</sup> **Brazil, Egypt, India, Macao, Norway, Taiwan** and **Uganda** are not contracting parties. **Canada, Israel** and **South Africa** are signatories, but the WIPO treaties are not in force yet. **Canada** will probably begin parliamentary work this year.

<sup>10</sup> Additionally, 3 countries are official candidates, and therefore influenced by the European Directives.

<sup>11</sup> Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 on the harmonisation of certain aspects of Copyright and related rights in the information society, *OJ L* 167, June 22, 2001 p. 10

<sup>12</sup> Heading 31 of the InfoSoc Directive.

related areas of law interact with copyright law. The most well-known and actually closest to copyright law is antitrust law, since it shares the goal of defending individuals against conglomerates. General principles of contract and civil law also govern the relations between licence contracting parties.<sup>13</sup>

The scope of this report embraces several copyright traditions (from Africa, Americas, Asia, Australia and Europe as well as the Middle-East region): the common-law tradition (Australia, Canada, Cyprus, India, Israel, Uganda, South Africa, the UK and the USA); and the different authors' rights traditions to be found in continental Europe, including the Roman group, following the French dualistic model (Belgium, France, Greece, Italy, Lithuania, Poland, Portugal, Slovenia, and Spain), and the Central-European group, following the German monistic model (Croatia, Germany, Hungary), the Nordic countries group (Denmark, the Netherlands, Sweden and Norway), and the Swiss and Russian laws. The Turkish report presents an interesting synthesis of the common-law, the dualistic and monistic systems. Copyright law of some Latin-American countries is also reported: Argentina, Chili, and Colombia mainly following the European Roman group and Brazil featured by this model too, but moving in a maverick way. Asiatic countries are also observed. China and Taiwan are deeply featured by their recent membership in the WTO, India and Singapore are rather defined by their belonging to the common-law tradition countries; Japan and Macao have a tradition of copyright law quite close to the continental-European tradition, Korea appears to develop its own system, however featured by the recent free trade agreement with the USA. Lastly, Egyptian law also is taken into account, which shows traits of the French *droit d'auteur* law tradition.

The following presents an overview of issues and results revealed in the national reports.

**1. To what extent does national law differentiate in terms of the effects of copyright law: (a) according to the various work categories; (b) according to factual aspects, e.g. different markets, competitive conditions, other factual aspects; and (c) according to other criteria?**

Most reporters point out that the copyright of their country does not theoretically distinguish in terms of the effects of copyright law and, however, list exceptions to the principle. The dogma of the blind approach, related to considerations issued from the *unité de l'art* principle and supported by the condemnation of artistic or political censorship, yields to the need for adaptation to multifaceted reality which possibly establishes a differentiated approach.

***a) Differentiation according to the work categories***

All countries of our comparison distinguish copyright and neighbouring rights. This distinction corresponds to different kinds of objects; the former protect creation, and the latter protect the achievement of acts related to creation, such as performances,

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<sup>13</sup> On the interaction of these legal areas in copyright law, see answers to Question 12.

the production of cinematographic and audiovisual works, sound recordings and the broadcasting of protected works. The differences regard mainly the scope of granted rights. For instance, moral rights in respect of copyrighted works are significantly stronger, and the protection term of neighbouring rights is mostly shorter.<sup>14</sup>

Except for this basic distinction, the leading principle is to confer the same scope of protection to all works, as long as they fulfil the conditions of being copyrighted. Each jurisdiction, however, provides for exceptions to this principle. The most recurrent exception to this one-size-fits-all approach occurs concerning computer programs. Most reports mention special treatment for software.<sup>15</sup> The other categories of works vary significantly and overlap. But the distinctions at stake are due to the adaptation of the general requirement to the specificities of different works. Noteworthy is the fact that several countries require that objects to be copyright protected fit into determined works categories.<sup>16</sup>

A recurrent point among the reports is the exclusion of specific kinds of works from the scope of protection, such as official publications,<sup>17</sup> expressions of folk-

<sup>14</sup> Beside the protection of fixations of copyright protected works, several countries provide for neighbouring rights for non-original subject matters (*see* the protection of non-original photographs in **Germany**, or of non-original writings in the **Netherlands**)

<sup>15</sup> **Argentina** (special provisions for the vesting of rights: presumption they vest in the employer of the persons hired for the making of the program), **Australia** Art. 47b et seq., (only concerning some particular user rights, reserved to users of software), **Belgium** (specific Act), **Bosnia-Herzegovina**, **Brazil** (specific Act, shorter protection, specific provisions for the ownership of the work in case of employment contract), **Chile** Arts. 8 2<sup>nd</sup> and 3<sup>rd</sup> sentences, 10 2<sup>nd</sup> sentence, 3 No 16, 71N, **China** (specific Act but mentioned among the copyrighted work in the Copyright Act, specific provision for the rental right), **Colombia** Article 3 of Andean Decision 351 of 1993, **Croatia** Art. 17/6, 108 et seq., **Cyprus** Art. 7B, **Denmark** Arts. 36 and 37, **Egypt** Art. 147, **France** Arts. L. 122-6 et seq., **Germany** Sec. 69 et seq., **Greece** Art. 2 para. 3 and 45A, **Hungary** Arts. 58–60, **India** Sec. 2(o) and 63B, **Israel** Sec. 45 (no moral right), **Italy** Art. 64<sup>bis</sup>–64<sup>quarter</sup>, **Japan** Art. 47-2, **Korea** Arts. 101-2, **Lithuania** Art. 10 para. 1, **Macao** Sec. X Arts. 166–169, **Netherlands** Arts. 43–43g, **Norway** Sec. 39h and 39i, **Poland** Arts. 74–77, **Portugal** Art. 36 and a specific act, **Russia** Arts. 1261, 1262, 1296, and 1297, **Serbia**, **Singapore** Art. 39 et seq., **Spain** Act 16/1993, **Switzerland** Artt. 10 para. 3, 13 para. 4, 12 para. 2, 17, 19 para. 4, 24 para. 2, 29 para. 2, **Taiwan** Art. 59, **Turkey**, **UK** Sec. 50A–C, **USA** Secs. 109 and 117.

<sup>16</sup> It regards mostly common-law tradition countries, actually more related to the **UK** copyright than to the **US**: **Australia**, **Canada**, **India**, and **UK**. But also the **Italian** copyright law, in which the work list is longer. The actual feature of the common law approach is that the list of works categories is exhaustive.

<sup>17</sup> **Belgium** Art. 8 Sec. 1 para. 2 and Sec. 2 (mentions also any public speech delivered in political assemblies), **Brazil** Art. 8, **Croatia** Art. 8, **Germany** Sec. 5, **Greece** Art. 2 para. 5, **Hungary** Art. 1 paras. 4–5, **Lithuania** (which views as belonging to this category also: their official translations, official State symbols and insignia the protection whereof is regulated by other laws, officially registered drafts of legal acts, and folklore works, **Macao** Art. 6 para. 1 and para. 2 (in the same category: texts of treaties, laws and regulations and those of reports or decisions by authorities of any kind, and translations thereof), **Portugal** Art. 7 and 8, **Switzerland** Art. 5 (Art. 5 also excludes patent specifications and published patent application), **Wittem** Art. 1.2. **French** law, on the opposite, urges works of State employee do not receive any derogatory treatment Art. L. 111-1.

lore,<sup>18</sup> news information,<sup>19</sup> standards, facts and daily news items underlying announcements released in the printed press,<sup>20</sup> ideas, procedures, processes, systems, methods of operation, concepts, principles, discoveries or mere data,<sup>21</sup> means of payment and patent applications.<sup>22</sup> This list is somewhat longer in Brazil (projects and mathematical concepts as such and schemes, plans or rules for mental acts, games or business schemes, blank forms independent of the sort of information to be filled in, common use information such as calendars, isolated titles and names).<sup>23</sup> In jurisdictions where those works are not expressly excluded, users' rights on the one hand, and the general principle of the sole protection of expressions and not of ideas on the other hand, lead to a comparable scope of free access to and use of administrative and judicial documents, as with mere facts, methods and ideas.

One also has to note that the definition of some peculiar copyrights and of most users' rights expressly focus on specific categories of works due to the nature of the works and of the uses at stake. It is obviously the case of specific provisions for publishing contracts (*contrat d'édition*) only regarding texts and pictures<sup>24</sup> and for performing contracts only affecting dramatic and musical works.<sup>25</sup> Specific licensing rules also are foreseen for audiovisual works<sup>26</sup> and other categories.<sup>27</sup> Thereby, lawmakers have paid attention to a mix of considerations regarding the single nature of some categories of works and the economic conditions of their exploitation. It is typically the case of the resale royalty (*droit de suite*), that only regards works whose market value mainly relies on the original copy, such as works of

<sup>18</sup> **Croatia** Art. 8.2, **Greece** Art. 2 para. 5, **Cyprus** traditional folk dances were excluded from copyright protection on the basis of case law (Supreme Court of Cyprus, *Gregoris K. Ashiotis v. The Attorney General of the Republic and others*, (1967) 1 C.L.R. 83) because they are considered as the common heritage of the Cypriot nation.

<sup>19</sup> **Croatia** Art. 8 para. 2, **Greece** Art. 2 para. 5, **Japan** Art. 10 para. 2, **Lithuania**, **Macao** Art. 5 (in the same category: texts presented and speeches given to assemblies or other collegiate, political and administrative bodies, or in public debates, on topics of common interest; political speeches), **Wittem** Art. 1.1 para 3a.

<sup>20</sup> **Hungary** Art. 1 paras. 4–5.

<sup>21</sup> **Croatia** Art. 8 para. 2, **Cyprus** Art. 3 para. 3, **Italy**: Court of cassation, February 13, 1987, n° 1558, **Lithuania**, **Macao** Art. 1 para. 2, **USA** Art. 102(b), **Wittem** Art. 1.1 para. 3.

<sup>22</sup> **Switzerland** Art. 5.

<sup>23</sup> See Art. 8.

<sup>24</sup> **Belgium**, **Germany** German Act on Publishing (*Verlagsgesetz*) of 1901 (it concerns in Germany also musical works, which is to be explained by the date of this act, stemming from the era before the commercial development of phonograms, as musical works were mostly spread through book notes).

<sup>25</sup> **Belgium**, **Italy** Arts. 33–37 (near dramatic and musical works, one finds in that category the choreographic works and pantomimes).

<sup>26</sup> **France** Art. L. 121-5, **Germany** Sec. 88 et seq., **Greece** Art. 34, **Italy** Arts. 44–50, **Poland** Art. 70, **Spain** Art. 87.

<sup>27</sup> See in **Italy**: beside the cases already listed, collective works, magazines and newspapers (Arts. 38–43), works broadcast (Arts. 51–60), works recorded on mechanical devices (Arts. 61–64), software (Art. 64<sup>bis</sup>–64<sup>quarter</sup>), databases (Art. 64<sup>quinquies</sup>–64<sup>sexies</sup>). The Spanish law also distinguishes between works of collaboration, collective works and composite works.

(fine) art<sup>28</sup> including photographs.<sup>29</sup> The rights of exhibition and of presentation are, in some countries, only provided for concerning similar categories of works.<sup>30</sup> This last consideration depends on the need for adaptation of general rules to the specific nature of the works in question. This aim leads also to the fact that reporters evoke that the right to perform does not apply to artistic works or to typographical arrangements,<sup>31</sup> the right of distribution only applies to cinematographic work,<sup>32</sup> authors of typefaces do not have the right to be identified as such,<sup>33</sup> in two countries, this right does not exist either with respect of computer programs,<sup>34</sup> authors of which also do not have any right to object to the derogatory treatment of a work.<sup>35</sup> Reporters also notice here that among the differentiations of the protection depending on the categories of works, authors of the literary and musical parts of a cinematographic works may use their work separately.<sup>36</sup> Similarly, provisions addressing translation only concern written works and necessarily regard mostly foreign works that are therefore submitted to a specific treatment since their translation into a national language is protected by a narrower scope of protection in order to promote this use.<sup>37</sup>

The reasons for the specific design of the scope of protection depending on categories of works are always mixed. One can however list, apart from the specific treatment relying on the nature of the works, some differentiations provided because of economic reasons. Therefore, the rental right may be provided only for cinematographic work,<sup>38</sup> sound recordings<sup>39</sup> and computer software;<sup>40</sup> and the private copy exception/right may require a remuneration only for certain kinds of works.<sup>41</sup> Exclusive rights are limited for computer programs.<sup>42</sup> Similarly, some countries do not

<sup>28</sup> **Cyprus, Germany** Sec. 26, **Hungary** Art. 70, **Italy** Art. 145 para. 1, Art. 14<sup>ter</sup> Berne Convention.

<sup>29</sup> **Cyprus, Germany, Hungary** Art. 70, **Italy** Art. 145 para. 1.

<sup>30</sup> The right of exhibition is only provided for works of fine art and photographic works (**Canada, China, Hungary** Art. 69), architectural and applied art works (**Hungary** Art. 69), the right of presentation is only available for a work of the fine arts (**China**), a photographic work (**China**), a cinematographic work (**China**).

<sup>31</sup> **UK**.

<sup>32</sup> **Japan** Art. 26.

<sup>33</sup> **UK** Sec. 79 para. 2.

<sup>34</sup> **Israel** Sec. 45, **UK** Sec. 77.

<sup>35</sup> **Israel** Sec. 45, **UK** Sec. 81 para. 2.

<sup>36</sup> **Portugal, Spain**.

<sup>37</sup> **Egypt** Art. 148 expressly allowed for developing countries by the Annex to the Berne Convention Arts. I, II. This used to be the case in Turkey also, but the provision concerned has been removed in 2001 as Turkey joined the Paris Text of the Berne Convention.

<sup>38</sup> **China, Egypt, India**.

<sup>39</sup> **Canada, India**.

<sup>40</sup> **Canada, China, Egypt, India**.

<sup>41</sup> In countries where private copying is compensated, sound recordings are the objects most often charged (for which remuneration is foreseen and thereby the works used for the sound recording, like musical scores and texts). Apart from sound recordings, audiovisual and written works may also be concerned. See answers to Question 10.

<sup>42</sup> **USA** Sec. 117.



provide broadcasts and typographical arrangements for moral and rental rights<sup>43</sup> or grant them a shorter term of protection.<sup>44</sup> On the other hand, the first-sale doctrine can be excluded for cinematographic films<sup>45</sup> and sound recordings.<sup>46</sup> The specific provision most recurring is the fact that the author of a sound recording cannot prohibit it from public performance or covering but may only make a claim for remuneration.

We will see later that other factors influence the scope of protection, especially with respect of the circumstances of the creation.

The differentiations mostly affect the scope of granted rights, then the scope of some of users' rights, the term of the granted protection, the criteria for protection and finally licensing rules.

One should lastly point out here the fact that some legislation observed by the reporters which is not mentioned here does not thereby mean that such a specific treatment does not exist. It only means that the national reporter of this legislation did not find it appropriate to consider it as a specific treatment due to a category of work. In that regard, we should bear in mind that the task is indeed arduous to list such exceptional considerations since even in civil-law countries used to synthetic provisions, copyright acts all increasingly look the same, after they implemented the same international instruments and definitively more resemble a list than a declaration of principles.

### ***b) Differentiations according to factual aspects such as different market, competitive competition***

Here again, most reporters answered that their jurisdiction does not, in principle, distinguish according to any market or competitive consideration; although, they mentioned some provisions bound to such concerns.

There are, however, situations where market and competitive considerations underlie specific rules. The reporters for Scandinavia and Bosnia-Herzegovina evoke here the exhaustion-of-rights doctrine.<sup>47</sup>

Courts in Australia have recently indicated that when assessing whether a "substantial part" of the copyrighted work has been reproduced for the purposes of infringement,<sup>48</sup> this assessment may include considerations of broader "interests" being protected by copyright.<sup>49</sup> The High Court has indicated that such interests may include commercial and competition-based considerations such as industry standards and the market to which the work belongs (which might include whether

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<sup>43</sup> **UK.**

<sup>44</sup> **Canada.**

<sup>45</sup> **India.**

<sup>46</sup> **India.**

<sup>47</sup> **Bosnia-Herzegovina** Art. 71, **Norway** Sec. 19. The Swiss report mentions here that audio-visual works are subject to special provision concerning exhaustion.

<sup>48</sup> **Australia** Sec. 14 para. 1.

<sup>49</sup> **Australia** *Desktop Marketing Ltd v Telstra Corporation Ltd* (2002) 55 IPR 1, 107; *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 80 IPR 451, 491.



or not the work/subject-matter is substitutable).<sup>50</sup> Yet, without more guidance from a court it is unknown how much weight can be attributed to these considerations, and how they can be used to determine whether or not a “substantial part” of a work or subject matter has been reproduced.

Furthermore, the Spanish report mentions the specific provisions ruling the licensing of rights to audiovisual works and films. The scope of the transfer presumption regarding the exploitation rights in favour of film producers is broader in respect of audiovisual works<sup>51</sup> than in respect of cinematographic films (that is, an audiovisual work initially intended for exploitation in theatres).<sup>52</sup>

In many cases, limitations/exceptions/users’ rights do differentiate according to the use made of copyrighted works in different markets.

It is the point of privileges in favour of uses for educational or scientific purposes, or within the frame of such institutions. Most reporters did not analyse this feature as a market or competitive consideration, the German and the Swiss did. One can indeed consider certain uses, which otherwise might form a market, have been exempted from copyright’s exclusive rights (but not necessarily of the payment of a levy/fee), so far as the education and the scientific research do constitute a parallel market, being privileged in order to promote the transmission of knowledge and culture. Also following this idea, one should mention here some uses are allowed without right-holders’ consent only when undertaken by (or in) public libraries or archives and the limitations or exceptions in favour of uses for information and news reporting, for the benefit of social welfare, or for disabled people. The market issue appears obvious when considering that such a privilege can be restricted concerning works specifically made for such use.<sup>53</sup>

We regard following cases also as market or competition considerations. Some uses are allowed without authorization only when there is no commercial offer to acquire the work in question. Such figures appear in European countries essentially for online uses, since the InfoSoc Directive permits it.<sup>54</sup> Belgian law also provides a similar requirement for libraries, archives, educational institutions or museums to be allowed to make works available on dedicated terminals.<sup>55</sup>

<sup>50</sup> **Australia** *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (see footnote 49), at 490–491.

<sup>51</sup> **Spain** Art. 86.

<sup>52</sup> **Spain** Art. 88 para. 1 *in fine*.

<sup>53</sup> See e.g. **Germany** Sec. 46 para. 1 allowing the reproduction, the distribution and the making available of brief works, or works excerpts, in school textbooks but requiring right-holder consent for the making available of works intended for teaching in schools; **Canada** Art. 32 para. 3, and **USA** Sec. 107 excluding works intended for disabled persons from the privilege for works in favour of handicapped people.

<sup>54</sup> See Art. 6 para. 4 al. 4 of the InfoSoc Directive, stating the scope of the user rights can be reduced in respect of works made available online when there is a commercial offer to access to those works. It has been implemented in **Belgium** Arts. 23<sup>bis</sup> al. 3 and 79<sup>bis</sup> Sec. 3, **Germany** Sec. 53a, and **Greece** Art. 22 *in fine*.

<sup>55</sup> **Belgium** Art. 22 para. 1 9°.

The reporter for Bosnia-Herzegovina and Serbia also notices that several provisions obviously distinguish between online and offline markets, as well as according to the economic relevance of the work.

Apart from digital uses, the scope of concerned countries increases. Thus Israeli copyright law requires “that it is not possible to purchase an additional copy of said work within a reasonable period of time and on reasonable terms”,<sup>56</sup> for a public library or an archive to copy a work without the authorization of right holders. Also, the fact that a work has been sold out for over two years broadens the scope of user rights.<sup>57</sup> And Italian copyright law allows the public lending right for phonograms and videograms only after 18 months have elapsed since the first exercise of the right of distribution, or after 24 months following the making of the works if the distribution right has not been exercised.<sup>58</sup>

One should mention the German, Italian and Spanish reporters provided answers as to the competitive considerations considering the possible competition among authors (regulated via the originality criterion, by ruling the relations among co-authors of a collective work, by defining the boundary of adaptations and free uses of another author’s work, also by exceptions and limitations and by the prohibition for collective management societies to discriminate among authors). Those points will be further analysed under question 11.

Before leaving this field, one should mention the first and fourth parts of the Chapter about the limitations in the Wittem copyright code, respectively dedicated to the “Uses with minimal economic significance”<sup>59</sup> and the “Uses for the purpose of enhancing competition”.<sup>60</sup> The latter comprises the use for the purpose of advertising public exhibitions or sales of artistic works or goods which have been lawfully put on the market, the reverse engineering in order to obtain access to information, by a person entitled to use the work, and the use of news articles, scientific works, industrial designs, computer programs and databases.

Finally, the regulation of parallel importations in Singapore is very interesting, as it is “in favour of parallel importation because genuine goods imported from abroad by parallel importers compete with the goods sold by the copyright owners (themselves or through authorised channels) and this tends to lead to lower prices, a consequence that can only benefit consumers in Singapore”.<sup>61</sup>

### *c) Other factual aspects/ According to other criteria*

A last group of criteria matters for the scope of protection: factual aspects concerning circumstances of creation, of disclosure and of uses, and finally features of works.

<sup>56</sup> Israel Sec. 30a.

<sup>57</sup> Croatia Art. 32, Germany Sec. 53 para. 2 1<sup>st</sup> sentence 4.b, Israel Sec. 30a.

<sup>58</sup> Italy Art. 69 para. 1.

<sup>59</sup> See. Wittem Art. 5.1

<sup>60</sup> See. Wittem Art. 5.4

<sup>61</sup> Cf. the Singapore report.

Creation circumstances as such matter the most when the creator is employed and creates the work in the course of duties.<sup>62</sup> For example, the copyrights vest in the employer and the term of duration is, in certain countries, shorter.<sup>63</sup> Where the employer is the State (or the Crown)<sup>64</sup> or a newspaper<sup>65</sup> this leads to some more specific provisions.

Independent of labour contracts, where the creator was not isolated is also considered by copyright acts. When the work was created by a collective under the leadership of a single person (be it a natural person or a legal entity, on the initiative and under the direction and organization of which the work has been done), the rights vest in that person. Such a situation is exceptional in *droit d'auteur* countries, since it can lead to the original right vesting in a legal entity.<sup>66</sup> As such, in China collective works enjoy a shorter period of protection.<sup>67</sup> French law distinguishes three cases of plural works, stating different regimes.<sup>68</sup> Collective works are the exceptional case, in which ownership originally vests in a legal entity. In case of collaborative works, meaning when several creators participate in the process of creation without a subordination relationship, copyright vests in all co-authors,<sup>69</sup> requiring the consent of all for exercising the copyright. Lastly, concerning derivative works, the Copyright Act states the copyright vests in the creator of the new work, requiring that he/she respects the original author's rights.<sup>70</sup>

Disclosure circumstances also participate in tailoring the scope of protection. The anonymity, that is to say the fact the author is unknown, impacts the method of calculation of the duration of protection, or on the person in which the rights vest.<sup>71</sup> It is obviously a way to deal with the uncertainty regarding the regular running point of the term protection. Since the alternative calculation process leads to a shorter protection, one also may interpret such special regulation as an incentive for authors to disclose their real identity.

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<sup>62</sup> **China** Art. 21, **Cyprus** Art. 11 para. 1b (private employment, commissioned works and works ordered for advertising), **Greece** Art. 8, **Hungary** Art. 30 (and in case of works ordered for publicity purposes Art. 63), **India** sec. 17 (a), **Macao** Art. 12 para.1, 13 para. 1, 164 para. 1.

<sup>63</sup> **Brazil**, **China**.

<sup>64</sup> **Canada** Art. 12, **Israel** Secs. 38–42 (shorter duration, 50 years after the making instead of 70 pma), **UK** Secs. 163–167.

<sup>65</sup> **France** Art. L. 132-35, **Portugal** Art. 173 para. 2.

<sup>66</sup> **France** Art. L. 113-5, **Lithuania** Art. 1 para. 1, **Macao** Art. 16 para. 1 and 162 para. 1.

<sup>67</sup> **China**.

<sup>68</sup> **France** Art. L. 113-2.

<sup>69</sup> **France** Art. L. 113-3.

<sup>70</sup> **France** Art. L. 113-4.

<sup>71</sup> See **Cyprus** Art. 11 para. 5: in the case of an unpublished work where the identity of the author is unknown, but where there are reasons supporting the view that he or she is a citizen of the Republic the copyright subsisting by virtue of the Law 59/1976 shall be deemed to vest in the Minister of Education; and **Macao** Art. 12 para. 3, where the name of the intellectual creator is not mentioned, it is presumed that the economic rights have been assigned to the entity for which the work was made. Regarding the protection term, see answers under Question 5.

Fixation is expressly required for copyright protection in countries from the common law tradition<sup>72</sup>, in China<sup>73</sup> and Singapore.<sup>74</sup> Otherwise jurisdictions only require an “outward manifestation of the work”<sup>75</sup> and fixation in a material carrier is only required in peculiar cases such as works of choreography or mime.<sup>76</sup> It is a consequence of the generally prevailing idea/expression dichotomy. This corresponds to the requirements of Art. 2.2 of the Berne Convention.

The recognition of copyrights is exempted from registration, deposit or any other formalities.<sup>77</sup> This absence of formalities is required by the Berne Convention.<sup>78</sup> That is why USA partly abandoned the registration requirement as a condition of copyright protection under Chapter 5 of the Copyright Act.<sup>79</sup> Yet, registration remains a precondition to suit for United States works, and a precondition to recovery of statutory damages for all works. Furthermore, registers regarding copyright works still exist for specific categories of works,<sup>80</sup> or intended to provide for prima facie proof.<sup>81</sup>

Lastly, to first publish the work after the death of the author<sup>82</sup> or after the expiration of copyright<sup>83</sup> gives the economic right to the publisher at stake and the protection is shorter than usual.<sup>84</sup>

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<sup>72</sup> **Australia** Sec. 22 para. 1, **Canada** expressly required by Art. 2 only for computer programs, choreographic works or mime although the case law established it for every kind of work, see *Canadian Admiral Corp. v. Rediffusion Inc.* (1954) Ex. C.R. 382, **Cyprus** Art. 3 para. 2a, **Egypt** lectures, speeches, sermons and any other oral works must be recorded in order to be protected Art. 140 para. 4, **Israel** Sec. 4 para. a, **Uganda** sec. 4 para 1, **UK** Sec. 3 para. 2, **US** Federal law (with the exception of Sec. 1101 on “unauthorized fixation” of performances) protects only fixed works. In the USA, unfixed works, such as ad lib public lectures, are protected, but only by state law. For a critical analysis of the issue, see GENDREAU (1994).

<sup>73</sup> The work shall be “capable of being reproduced in a tangible form”. A limit to this rapprochement to US law is that oral works are protected.

<sup>74</sup> **Singapore** Sec. 16 para 1

<sup>75</sup> **Macao** Art. 1 para. 3, **Poland** Art. 1, **Portugal** Art. 1 para. 1 and 2.

<sup>76</sup> **Brazil**, **Macao** Art. 2 para. 1d, **France** Art. L.112-2.4 (it used to be so in **Bosnia-Herzegovina** and **Serbia**).

<sup>77</sup> **India** *Satsang and Anr. v. Kiron Chandra Mukhopadhyay and Ors.* MANU/WB/0114/1972: AIR1972Cal533, **Macao** Art. 10, **Poland** Art. 1 Sec. 4, **Switzerland** Art. 29 Para. 1, **USA** Art. 102a.

<sup>78</sup> **BC** Art. 5 para. 2.

<sup>79</sup> On this matter, see GINSBURG (2010).

<sup>80</sup> **Brazil** for audiovisual works and software, **Columbia**, **France** for films (RCPA), **Germany** for anonymous works, **Macao** Publication Information Department for newspaper titles (Art. 163 para. 1), *Urheberrolle* for anonymous works (*Urheberrolle*), **Spain** Art. 145.3, **Turkey** for films and phonograms, this expressly to facilitate the pursuit of rights.

<sup>81</sup> **India** sec. 44-48.

<sup>82</sup> **Denmark** Sec. 64.

<sup>83</sup> **Cyprus** Art. 7 D, **Greece** Art. 51 A, **Hungary** Art. 32, **Italy** Art. 85<sup>ter</sup> (and 85<sup>quarter</sup> for scientific or critical editions), **Lithuania** Art. 36 para. 2, **Norway** Sec. 41a.

<sup>84</sup> 25 years from the publication.

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