

## French Copyright Law

by

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Copyright is a territorial protection based on the national laws of the countries. Most countries offer a protection to foreign works of art under certain conditions simplified by international copyright treaties or conventions.

Thus the Berne Convention for the Protection of Literary and Artistic Works, adopted on 1886, established a Union encompassing currently 164 countries members. The Convention contains a series of provisions determining the minimum protection to be granted and rests on basic principles including the principle of "national treatment" which states that works originating in one of the contracting states must be given the same protection in each of the other contracting states as the latter grants to the works of its own nationals.

The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) introduces intellectual property rules into the multilateral trading system and covers copyright. The principles of "national treatment" and the "most-favored nation" treatment are provided. Pursuant the "most-favored nation" treatment, countries cannot discriminate between nationals of other countries and when a country grants a special favor to the nationals of another country, he has to do the same of all the countries' nationals.

### **I. Subject of copyright protection**

#### **A. What is protected by copyright?**

- A work of an author
- A work «original» (for technical works, the work is considered «original» once there is an «intellectual contribution»)

Pursuant to the French law, all works of the mind may be protected, whatever their form of expression, merit or purpose.

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## B. How to secure copyright?

The copyright is secured automatically when the work is "created" and the work is "created" when it is fixed in a material object (book, film, phonorecords...)

Thus the ideas or concepts are not protected by copyrights. However the use of an original idea may be pursued for unfair competition.

No registration is required to secure copyright. However a work can be filed in the French intellectual property office (INPI) to secure a proof of existence, date and authorship of the creation.

## II. What is copyright ?

The author has patrimonial rights and a moral right on his works.

Copyrights benefit only to authors of an « original » works. The artist-interpret, the producers of phonorecords or audiovisual works are protected by "neighboring rights" more limited than copyrights.

### A. Patrimonial right

#### 1. Copyright

The owner of a copyright has the exclusive right to do and to authorize others to reproduce the copyrighted work, to perform and to display it publicly.

#### 2. Copyright limitations

The French Copyright Law provides limited cases in which the owner of a copyright cannot prevent others from using his work.

One of these limitations is the copy or reproduction reserved strictly for a private use and not intended for collective use.

However these uses of copyright are only allowed if they don't affect the "normal exploitation" of the work and don't damage the "legitimate interests" of the copyright's owner.

### B. Moral right

#### a) What is the moral right?

The moral right is limited for the author of software and audiovisual work.

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## 1. Respect of the disclosure

The author only is entitled to make his work available to the public for the first time.

## 2. Respect of the authorship

The author's name has to be mentioned on each use of the copyright work.

## 3. Respect of the work

A copyrighted work can't be modified without the author's authorization.

## 4. Withdrawing right

Despite the assignment of his copyright, the author has the right to reconsider or to withdraw the transfer of his rights. However, in this case, he has to indemnify the assignee.

### b) **Feature of the moral right**

The moral right is perpetual.

The moral right is inalienable. The author cannot renounce to his moral right. He cannot assign his moral right beforehand.

The moral right is imprescriptible. An action based on the moral right can perpetually be brought before a judge.

### **III. Owner of the copyright**

Mere ownership of the material object that embodies a copyrighted work doesn't give the possessor the copyright. The transfer of the ownership of the material object doesn't of itself convey any rights in the copyright.

In principle the owner of the copyright is the author. The quality of author is a public policy. It means that the quality of author cannot result from a contract.

However there are specific rules concerning ownership of the copyright in the software (the employer is automatically owner of the copyright in the software, except opposite provision), and the copyright in the works of civil servant and public agents also.

Moreover, in case of a work ordered to several authors, the work is called a "collective work" ("oeuvre collective"). The authors work under the control of a person or a company that is the owner of the copyright in the collective work as a whole. The ownership of the copyright in each separate contribution remains to the author of the contribution.

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When several authors contribute to the same work without being under the control of a person or a company, the work is called "work of collaboration" ("œuvre de collaboration"). The co-authors are co-owners of the copyright in the work. The audio-visual works, as a movie, are presumed to be "works of collaboration".

## IV. Term of the copyright protection

### 1. Patrimonial right

The patrimonial right endures for the life of the author plus an additional 70 years after author's death.

Since the author did not appoint an executor, his heirs are owner of the patrimonial right after his death.

### 2. Moral right

The moral right is perpetual.

If the author did not appoint an executor while he is alive, the law provides a list of heirs.

## V. Transfert of copyright's ownership

The copyright may be transferred. In case of dispute concerning the transfer, the copyright contracts are construed in favor of the author, party in the contract.

The French Copyright Law sets specific rules concerning the contracts concerning the right to display a copyrighted work, the right to publish it and an audiovisual production.

In any case, the French Copyright Law provides a minimum protection of the author when he transfers his copyright.

The transfer doesn't require a written agreement to be valid. However the transfers need to be in writing to be proved because the law sets a series of mandatory provisions to protect the author's agreement. If these mandatory provisions are not included, the contract is invalid. Thus the contract has to define the copyrights conveyed and their use. The territory and the term of the transfer have to be specified. The royalties of the author have to be proportional to the revenue of the exploitation of the copyrights conveyed.

## VI. Infringement

The infringement of the copyright can be sued in front of the criminal court or the civil court.

In criminal matter, the bad faith is deemed and the suspected counterfeit needs to prove that he wasn't aware of the copyrighted work. In civil matter, the good or bad faith doesn't affect the determination of the infringement.

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In any case, it doesn't matter whether or not the counterfeit get a monetary profit from the infringement.

## American Copyright Law

Copyright Law is based on the Copyright Act of 1976

### I. How to secure a copyright?

Copyright provides protection to the authors of "original works of authorship" that are fixed in a tangible form of expression.

No publication or registration is required to secure copyright protection.

A copyright is secured automatically when the work is fixed in a copy or phonorecord for the first time. "Copies" are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm. "Phonorecords" are material objects embodying fixations of sounds, such as cassette tapes or CDs.

However the publication and the registration in the United States Copyright Offices offer certain advantages.

### II. Publication

The publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rent, lease or lending.

When a work is published, it may bear a notice of copyright to identify the year of publication and the name of the copyright owner and to inform the public that the work is protected by copyright. In the event that a work is infringed and the defendant in a copyright infringement lawsuit had access to the copyright notice, then the defendant cannot argue an "innocent infringement" to obtain a mitigation of damages.

Moreover the publication of a work can affect the limitations on the exclusive rights of the copyright owner (see below).

### III. Registration

The registration in the United States Copyright Office is not a condition of copyright. However the copyright law provides several advantages to encourage copyright owners to make registration.

The registration is necessary for work of United-States origin before an infringement lawsuit may be filed in court. If registration is made before or within 5 years of publication of the work, registration will establish a prima facie evidence of the validity of the copyright. If registration is made within 3 months after the publication of the work or prior to an infringement of the work, the statutory damages and attorney's fees

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will be available for the owner of the copyright in court actions. Otherwise only an award of actual damages and profits is available to the copyright owner.

Registration can be made at any time within the life of the copyright.

#### IV. Limitations of the copyright

Unlike French Copyright Law, the American Copyright Law doesn't provide a general moral right. However the American Copyright Law provides a limited moral right to the authors of a plastic art work.

The exclusive rights provided by the Copyright Law to the owner of copyrights are subject to certain limitations. In some cases, the limitations are exemptions from copyright liability.

One of the most important limitations is the doctrine of « fair use ». The difference between fair use and infringement can be unclear and not easy defined. There are various purposes for which the reproduction of a copyrighted work can be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research. Moreover four factors have to be considered in determining whether or not a particular use is fair: (1) the purpose and the character of the use, including whether such use is for a commercial or a nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, (4) the effect of the use upon the potential market for, or value of, the copyrighted work.

In other instances, the limitation of the copyright take the forms of « compulsory license », under which certain limited uses of the work are permitted upon payment of specified royalties and compliance with statutory conditions.

#### V. Owner of the copyright

The copyright in work of authorship becomes the property of the author who created the work.

In the case of a « work-made-for-hire », the employer is considered to be the author. The « work-made-for-hire » is created by an employee within the scope of his employment, or an order or a command for a specific use, such as a contribution of a collective work or a part of an audiovisual work. The parties have to sign a written agreement which states that the work shall be considered a « work-made-for-hire ».

#### VI. Term of the copyright protection

A work that was created on or after January 1, 1978, is automatically protected from the moment of its creation and is ordinarily given a term enduring for the author's life plus an additional 70 years after the author's death.

For the « works-made-for-hire », and for anonymous and pseudonymous works, the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter.

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## VII. Copyright contracts

The owner of copyright can transfer all of his exclusive rights or a subdivision of those rights. To be valid, the transfer of exclusive rights has to be in writing. Transfer of a right on a non-exclusive basis doesn't require a written agreement.

The specific French rules concerning the copyright contracts signed by the author are not provided by the American Copyright Law.

Recordation of the contracts in the Copyright Office is not required to make a valid transfer between the parties. However it provides certain legal advantages and may be required to valid the transfer as against third parties.

Copyright law permits termination of a transfer of rights in a copyright after 35 years under certain conditions by serving written notice on the transferee within specified time limits. Notwithstanding, substantial limitations on the right of termination exist and this right doesn't apply to « work-made-for-hire ».

## VIII. Infringement

Anyone who violates a right of the copyright owner may be pursued for infringement.

An infringement lawsuit may be brought in front of a criminal court or a civil court.

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