



# ICLG

The International Comparative Legal Guide to:

# Copyright 2019

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A practical cross-border insight into copyright law

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# Ukraine

Oleg Zhukhevych



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## 1 Copyright Subsistence

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

Copyright exists in every original work, published or unpublished, once the work is in a fixed form, without the requirement for registration or any other formalities. Copyright does not protect any ideas, theories, principles, methods, procedures, processes, systems, techniques, conceptions and discoveries regardless of the form in which they are expressed, described, explained, and illustrated in the work. Copyright also protects a part of a work that can be used individually and the original name of a work.

### 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?

Copyright can subsist in the following works in the domain of science, literature and art, namely: literary written works of fiction, journalistic, scientific, technical or other nature (books, brochures, articles, etc.); speeches, lectures, orations, sermons and other oral works; computer software; databases; musical works with or without lyrics; dramatic, musical drama works, pantomimes, choreographic and other works created for stage presentation and staging versions thereof; audiovisual works; works of fine art; works of architecture, city construction, garden and park art; photographic works, including works made by methods similar to photography; works of applied art, including works of decorative weaving, ceramics, carving, casting, of art glass, jewellery, etc.; illustrations, maps, layouts, drawings, sketches, plastic works relating to geography, geology, topography, engineering, architecture and other spheres of activity; stage interpretations of works and folklore versions that can be presented on stage; derivative works; compilations of works resulting from creative work; texts of translations for dubbing, sound tracking and adding Ukrainian and other language subtitles to foreign audiovisual works; and others.

Copyright protection will not be extended to daily news that refers to press information; folklore; administrative, political, or legislative documents executed by state authorities (laws, rulings, decrees judgments, state standards, etc.) and translations thereof; state symbols, state awards, symbols and signs of authority, military forces, symbols of local authorities, symbols and signs of

enterprises, organisations and institutions; banknotes; and transport schedules, TV schedules, telephone directories and other databases that do not meet the requirement of *sui-generis*.

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

Copyright registration in Ukraine is possible, but not mandatory. The Ministry of Economic Development and Trade of Ukraine is the authority entitled to grant registration to the works. An official fee for copyright registration is approx. EUR 6.00 for legal entities and EUR 2.00 for individuals. The benefit of registration is that the registration certificate is considered *prima facie* evidence of copyright ownership and evidence of the date of creation. Failing to register a copyright does not deprive a copyright owner of the right to enforce a copyright.

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

The duration of copyright protection lasts for the lifetime of the author and for 70 years following the author's death (or the death of the last co-author), starting from the date of creation. The duration is identical whatever the type of work.

The duration of performers' rights is 50 years from the date of the first record of the performance. The duration of sound/video recording producers' rights is 50 years from the date of first publication of the sound/video recording or first record, if the record was not published during this period. Broadcast organisations' rights last 50 years from the first public transmission of the broadcast.

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

Yes. A copyrighted work can be registered as an industrial design or as a trade mark.

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

No. The law of Ukraine does not provide for any restrictions on the protection for copyrighted works which are made by an industrial process.

## 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 first copyright owner of a work is the author, i.e. the natural person who creates the work. Also, two or more persons may be joint authors and joint owners of copyright.

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

Under Ukrainian copyright law, the author and the commissioner own the copyright jointly, where a work is commissioned, unless it is otherwise prescribed by an agreement between them. The author of an artistic work retains the copyright, unless it is otherwise prescribed by an agreement between the author and 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?

Copyright to a work created by an employee belongs to the author and the employer jointly, unless a labour contract or other contract between the employer and employee provides otherwise. The employer should pay to the employee an author's fee for the creation and use of a copyright. The amount and terms of such payment should be regulated by an agreement between the employee and the employer.

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

The law of Ukraine recognises joint ownership of two or more authors who created a single work and the contribution of each author is not distinct from that of the other(s). Each of the authors can use the work at his own discretion, unless it is otherwise agreed. Copyright royalties are equal unless otherwise prescribed by an agreement between the co-authors. Each co-author has a right to bring proceedings for copyright infringement.

## 3 Exploitation

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

The copyright owner has a right to transfer/assign copyright to any person by means of a written agreement signed by both parties. Under this agreement, the copyright owner transfers copyright to the assignee. The scope of rights that are subject to transfer should be specified in the agreement; otherwise, these rights are not deemed to have been transferred. The official registration of such an agreement or any other formalities is not required.

### 3.2 Are there any formalities required for a copyright licence?

In general, a copyright licence should be in a written form. Nevertheless, a copyright licence agreement granting a right to

use a work in a periodically printed publication (e.g. newspapers, magazines, etc.) may be concluded in oral form. A licence can be exclusive or non-exclusive. The scope of rights that are subject to the licence should be specified in the agreement; otherwise, such rights are reserved by the licensor.

### 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)?

The period of licence shall not exceed the validity term of copyright. In case the period of licence is not defined in the agreement, the licence agreement shall be considered concluded for the term remaining until the expiration of the validity of copyright, but not more than for five years. Meanwhile, parties should agree at least the following terms: the licence period; the ways the work may be used; the licence territory; the amount and terms of a payment; and other terms upon request of a party.

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

There are 19 collective licensing bodies, covering all types of copyright works, namely the following:

- Ukrainian Union of Copyright and Related Rights Owners "Oberig".
- State Organisation "Ukrainian Agency of Copyrights and Related Rights".
- Enterprises Union "Ukrainian Musical Alliance".
- Enterprises Union "Ukrainian League of Musical Works".
- Association "Musical Authors' House".
- Ukrainian Public Organisation "The Author".
- Association "Guild of Videograms and Phonograms Producers".
- Ukrainian Public Organisation "Ukrainian Agency of Copyright and Related Rights".
- Ukrainian Public Organisation "Ukrainian Agency of Copyrights".
- Ukrainian Public Organisation "Agency of Protection of Performers' Rights".
- Private Organisation "Collective Licensing Body for Copyrights and Related Rights".
- Ukrainian Public Organisation "CINEMA".
- Ukrainian Public Organisation "Music Authors' Treasury".
- Ukrainian Public Organisation "Ukrainian Authors' League".
- Private Organisation "Ukrainian League of Copyrights and Related Rights".
- Citizens Association Society "Film Managing Association ARMA-Ukraine".
- Ukrainian Public Organisation "Management of Intellectual Property".
- Public Organisation "Organization of collection, distribution and collective management of neighboring rights in Ukraine".
- Public Organisation "Ukrainian Copyright Service".

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

Collective licensing bodies should be registered with the Ministry of Economic Development and Trade of Ukraine and act on the grounds of laws on non-commercial organisations, their statutes

and authorities entitled by copyright owners. Collective licensing bodies cannot be engaged in commercial activities. They should be entrusted by copyright owners on the grounds of written agreements.

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

Licence terms offered by a collective licensing body can be challenged on the following grounds: (i) the collective licensing body is not authorised by the copyright owner; and (ii) licence terms offered by a collective licensing body exceed the powers granted by the copyright owner.

## **4 Owners' Rights**

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

The rights holder is entitled to prohibit or restrict unauthorised exploitation of his works. The Law of Ukraine on Copyright and Related Rights prescribes the following list of acts that require rights holders' authorisation:

1. reproduction of works;
2. public performance and broadcast of works;
3. public demonstration and public display of works;
4. any repeated promulgation of works, if carried out by an organisation other than the one that carried out the first promulgation;
5. translations;
6. versions, adaptations, arrangements and other similar alterations to works;
7. inclusion of works as components into collections, databases, anthologies, encyclopedias, etc.;
8. distribution of originals of works by first sale or in another manner, or transferring for property lease and/or commercial rental or by transferring a work in another manner prior to the first sale of specimens of a work;
9. communication of the works to the public in such a manner that any person can access them at any place and at any time at his own discretion;
10. transfer for property lease and/or commercial rental after the first sale of the original or specimens of audiovisual works, computer software, databases, musical works such as sheet music, as well as works on a phonogram, videogram or in a computer-readable form; and
11. import of specimens of a work; import of translations and/or other alterations of a work.

This list is not exhaustive. The rights holder is eligible to prohibit other acts that concern exploitation of his works.

### **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?**

The author enjoys the legal protection of his personal non-proprietary rights to a work, namely:

1. to require recognition of authorship by indicating the author's name on a work and its specimens and during any public exploitation thereof, if practicable;
2. to prohibit the disclosure of the author's name in the course of a public exploitation of a work, if the author wishes to remain anonymous;

3. to select a pseudonym, to indicate it and require its indication instead of the author's real name with regard to a work and its specimens and during any public exploitation thereof; and
4. to request preservation of the integrity of a work, and to counteract any twisting, distortion or other alteration of a work, or any other encroachment thereon that may prejudice the author's honour and reputation.

The personal non-proprietary rights shall be vested with the author and shall not be alienated to other persons.

### **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?**

If specimens of a lawfully published work legally enter the market through their first sale in Ukraine, it is permissible to repeatedly introduce them at the market through sale, bestowal, etc. without the consent of the rights holder and without payment of remuneration thereto.

As regards works of fine art, the author is entitled to request access to a work with the aim of using it for reproduction purposes, if this does not prejudice the legitimate rights and interests of the owner of a work. At the same time, in this event the right to transfer for property lease or commercial rental belongs exclusively to the rights holder.

## **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 laws of Ukraine prescribe the possibility of applying to the following statutory enforcement agencies as an alternative or additionally to filing a court claim:

1. Police bodies are entitled to prosecute copyright violations that constitute administrative or criminal offences;
2. the Antimonopoly Committee bodies initiate investigations with regard to acts of unfair competition;
3. State Inspectors of Intellectual Property Matters investigate the acts of unlawful distribution, storage, transportation, circulation of specimens of audiovisual works, computer software and databases; and
4. customs bodies are entitled to initiate administrative actions and seize the counterfeit shipments imported to/exported from the country.

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

Apart from the copyright owners, the exclusive licensees are entitled to sue for copyright infringement. In certain cases, the non-exclusive licensees may sue for copyright infringement provided that such a right is granted thereto under the licence agreement, and the author confirms such authorisation in written form.

The collective management bodies may be entitled to sue for copyright infringement on behalf of a copyright owner on the basis and within the scope of authorities provided by the power of attorney or a written agreement.

### 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?

Ukrainian legislation does not provide for "secondary" infringement. An action for copyright infringement can be brought provided that the fact of infringement is established according to the relevant laws.

At the same time, since 2017 Ukrainian laws have prescribed for administrative liability of the hosting providers for non-performance of obligations, to assist the rights holders in stoppage of copyright infringements on the Internet. Although the hosting providers are not liable for copyright infringements revealed at the web pages they administer, they nevertheless are obligated to assist the rights holders in copyright enforcement activities.

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

Ukrainian laws prescribe a number of copyright exceptions and limitations.

The following uses of copyrighted works are permissible without the rights holder's consent subject to indicating the author's name and the source of reference:

- Free use of a work for a non-commercial purpose such as:
  - use of quotations (excerpts) from published works to the extent justified by the intended purpose;
  - use of literary works or works of art to the extent justified by the intended purpose as illustrations in publications, broadcasts and recordings of an educational nature;
  - reproduction in the press, public performances or broadcast of previously published newspaper or magazine articles, unless it has been specially prohibited by the author;
  - reproduction with the aim of presenting current events to the extent justified by the informational purpose;
  - reproduction of works displayed at exhibitions and other fairs open to the public in catalogues for coverage of these events, without any commercial use of the catalogues;
  - issue of works for the blind, in Braille characters;
  - reproduction of works for court and administrative proceedings, to the extent justified by this purpose;
  - public performance of musical works during official and religious ceremonies and funerals, to the extent justified by the nature of ceremonies; and
  - reproduction for informational purposes in newspapers and other periodicals, transmission by air or other broadcast of publicly delivered speeches, addresses, reports, other similar works, to the extent justified by the intended purpose.
- Reprographic reproduction by libraries and non-commercial archives if:
  - reproduction is not performed on a regular basis, and is made upon request of the private person for non-commercial purpose. The present exception does not apply to computer software and databases; or
  - reproduction is performed with the aim of replacing or substituting other specimens of work which have been lost, damaged, or otherwise cannot be used, and if such a reproduction is a one-time event.
- Reproduction of excerpts of works for educational purposes and one-time (not regular) reprographic reproduction by educational establishments to the extent justified by the intended purpose.

- Use of computer software, if no damage is caused by the use of the software and the rights holder's rights and legitimate interests are not violated by:
  - making changes in order to ensure its operation with the user's technical equipment, including recording and storing such software in computer memory and correcting evident errors;
  - making one software copy for archival purposes;
  - decompiling the software with the aim of obtaining the information required for the achievement of its interaction with independently developed software; or
  - studying software functioning.
- Reproduction of works for private use, except for:
  - works of architecture (buildings and facilities);
  - computer software, except in aforementioned cases; and
  - reprographic reproduction of books, sheet music and original works of fine art, except for the use previously mentioned.
- Reproduction of works and performances on phonograms, videograms, audiovisual works and specimens thereof, at home for private purposes or for use within the family circle, subject to remuneration to the author.

### 5.5 Are interim or permanent injunctions available?

Both interim and permanent injunctions are available under the Ukrainian law.

As regards interim injunctions, the rights holder may request their applying prior to filing a court claim or at any stage of the court proceedings.

The interim injunctions, *inter alia*, may include:

- an order for inspection of premises of the alleged infringers;
- the arrest and seizure of specimens of the counterfeits, materials and equipment used for unauthorised manufacturing or reproduction of the counterfeits;
- the arrest and seizure of invoices and other documents that may serve as evidence of copyright infringement or actions creating such an infringement (or intention to infringe);
- an order to prohibit certain activities of the suspected party, such as manufacturing, reproduction, sale, rental, importation, etc. of specimens of work, as well as transportation, storage, etc. of specimens of work for the purpose of issuing into civil turnover; and others.

If the alleged actions constitute an administrative or criminal offence, the enforcement bodies may issue an order for search and/or arrest of specimens of works suspected in counterfeiting, materials and equipment used for unauthorised manufacturing or reproduction of such works, or documents that may serve as evidence of copyright violation.

As regards permanent injunctions, they can be granted by a final decision of the court, such as orders to do or cease from doing certain activities, e.g. prohibiting unauthorised publishing, performance, staging of works, etc.

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

Proprietary and moral damages are calculated based on the merits of an infringement, the rights holders' actual damages and/or lost profit as well as profits derived by the infringer as a result of infringing activities.

Alternatively, the rights holder may request payment of compensation instead of the damages or collection of the infringer's profits. The amount of compensation is calculated based on the merits of an infringement and alleged intentions of the infringer. The copyright law prescribes that the amount of compensation shall be based on the doubled or tripled amount of remuneration that should have been paid for the exploitation of copyrighted works.

In addition to damages or compensation, the plaintiff is entitled to request compensation of all expenses related to the court proceeding (including compensation of the state fees, the attorney fees, the fees of expert authorities and others).

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

The amount of state fees for submitting the civil court claim on the grounds of copyright infringement, on the nature and amount of stated claims, and the selected jurisdiction.

In case of monetary claims, the official fees amount up to two per cent from the claimed amount.

The official fees for non-monetary claims are up to approx. EUR 80. Additional official fees are prescribed for the request of interim injunctions, for filing the appeal and/or second appeal.

Further, the courts may request deposit payment by a certain party of a court proceeding (e.g., as a guarantee of available funds for compensation of the other party's court expenses, etc.).

No official fees are prescribed for applying to the state enforcement bodies (e.g., the Police, the customs bodies, etc.).

The average timeframe of the civil court proceeding is from six months up to one-and-a-half years at the first instance.

The average timeframe of a criminal proceeding, including the court proceedings at the first instance, is from three months to one year.

The average timeframe of an administrative offence proceeding, including the court proceedings at the first instance, is from two to six months.

The average timeframe of an administrative proceeding initiated by the customs bodies is up to one month followed by the court proceeding with the duration of up to three months (at the first instance).

#### **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?**

The party to the proceeding at the first instance and/or any party whose rights and interests are influenced by the court decision have a right to file an appeal. The appeal may be brought if the claimant has the grounds to consider the decision of a first instance court to be unlawful and/or to be issued with the lack of grounds.

The second appeal can be filed on the point of law only (i.e. improper application of substantive and/or procedural laws).

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

The general limitation period for bringing a civil lawsuit is three years following the date when the plaintiff became aware of the circumstances giving rise to the claim.

The limitation period for initiating an administrative offence procedure is two months; for a criminal offence procedure it is two years from the date the claim arose.

## **6 Criminal Offences**

### **6.1 Are there any criminal offences relating to copyright infringement?**

Actions such as unauthorised reproduction, distribution or other unauthorised exploitation of a copyrighted work constitutes a criminal offence provided that the damages caused thereof exceed a minimum amount as prescribed by the Ukrainian laws (approx. EUR 550).

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

Criminal liability occurs in case copyright infringement causes damages in the amount of at least approx. EUR 550. Otherwise, the alleged activities constitute an administrative offence.

The criminal offence penalty is from approx. EUR 110 to EUR 1,800, and/or correctional works for up to two years or imprisonment for up to six years.

The penalty for an administrative offence is up to approx. EUR 120 with the confiscation of the alleged products, tools and equipment used in the production thereof.

## **7 Current Developments**

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

Within the judicial reform launched in 2015, the establishment of the specialised High Court on Intellectual Property Matters as a court of the first and appeal instance for copyright, trademark and patent disputes is anticipated throughout 2019. The decisions of the noted court will be appealed to the Supreme Court.

The new Law on Effective Management of the Proprietary Rights in the Field of Copyright and Related Rights of May 2018 introduced considerable amendments to the state system of collective management. The law prescribes strict requirements as regards the establishment, operations and scope of authorities of the collective management organisations, clear procedure of their cooperation with the foreign collective management bodies, and the clear procedures of cooperation with the rights holders and distribution of the collected remunerations. The noted amendments considerably improved the system of collective management organisations.

The copyright legislation amendments of May 2018 have also introduced a new approach in the calculation of a compensation amount in copyright infringement cases. Previously, the rights holder could claim compensation for copyright violation of an amount from 10 up to 50,000 of minimum incomes with regard to each revealed fact of infringement. However, case law has confirmed that the application of such a principle has resulted in the growth of bad faith claims when the rights holders have used their title for claiming exorbitant amounts by proving the minor or moderate infringements. Now, the copyright laws prescribe that the amount of compensation shall be based on the doubled or tripled amount of remuneration that should have been paid for the exploitation of copyrighted works by the infringer.

**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.)?**

Since 2017, Ukrainian copyright laws and the laws on development of cinematography in Ukraine have prescribed the notice and takedown procedure as regards the unauthorised use of copyrighted works on the Internet. The procedure applies in case of the unauthorised use

of the following types of works: audiovisual works; music; computer programs; videograms; phonograms; and broadcasts. The rights holder is eligible to request immediate stoppage of unauthorised use of his works by sending a request to the owner of the website/web page. In case of non-fulfillment of the request by the infringer or if the infringer's details are not disclosed to the public, the rights holder can request assistance of the hosting provider in order to stop the infringement. The procedure is effective in case the request of the rights holder is followed by the copyright infringement claim filed with the court.



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Oleg Zhukhevych is the managing partner and one of the founders of Advance Partners law firm.

Since 2005, he has been practising law in the areas of intellectual property (patents, trade marks, trade names, copyright and related rights, domain names), corporate and commercial law, as well as dispute resolution and litigation.

Oleg is one of the most experienced IP litigators in Ukraine and represents clients before commercial courts, courts of general jurisdiction, and administrative and law enforcement bodies. He is regularly in charge of developing, reviewing and negotiating licensing and franchising agreements, assignment contracts and other contractual deals.

Projects handled by Oleg include the successful representation of large companies in patent, trade mark and copyright infringement cases, and the provision of legal support for many major Ukrainian and international companies in relation to various issues in the field of IP law.

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Elena Biloshuk is a partner at Advance Partners law firm located in Kyiv, Ukraine.

She advises clients on a broad range of transactional matters, develops complex enforcement strategies and provides risk management solutions that allow clients to safely operate in the Ukrainian market.

Elena enjoys collaborating with clients and their advisors to develop and implement highly efficient, complex enforcement strategies that combine various legal actions.

Elena has over 12 years' legal experience in dispute resolution and litigation, a proven track record of successful actions before the state enforcement agencies, as well as a high level of expertise in strategic counselling.

The key areas of Elena's expertise are intellectual property law, competition law, private international law and commercial law.

Elena was admitted as an Attorney at Law in Ukraine in 2012.



Advance Partners is a Ukrainian law firm practising in intellectual property, competition law, corporate and commercial law, as well as data protection and dispute resolution.

Our team of attorneys provides a whole range of legal services to local and international clients including multinational corporations, privately-owned companies, start-ups and individuals.

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