

# LEXOLOGY<sup>®</sup>

## Navigator

Download Date: 13 February 2019

# Copyright

in Spain



# Table of contents

## Recent developments

- Legal developments
- Technological developments

## Legal framework

- Domestic law
- International law
- Online and digital regulation
- Government authorities

## Protection

- Copyrightable works
- Related IP rights

## Establishment of rights, registration and deposit

- Establishment of rights
- Registration and deposit – procedure and effects

## Ownership

- Eligibility
- Joint and collective ownership
- Employee and commissioned work

## Exercise of rights

- Owners' rights
- Ancillary rights
- Duration

## Transfer, assignment and licensing

- Transfer and assignment
- Licensing

## Enforcement

- Jurisdiction
- Infringement
- Actions
- Injunctions
- Remedies
- Customs enforcement
- Defence
- Appeal

## Online/digital considerations

- Protection and enforcement measures



## Contributors

### Spain



**Santiago Mediano Abogados**  
Santiago Mediano  
smediano@santiagomediano.com



**Santiago Mediano Abogados**  
Sara de Román Pérez  
sderoman@santiagomediano.com



**Santiago Mediano Abogados**  
Scarlett Poy



**Santiago Mediano Abogados**  
Miguel Angel Aguayo

## Recent developments

### Legal developments

#### Have there been any notable recent legal developments regarding copyright in your jurisdiction, including any regulatory changes and recent case law?

Yes, there have been some relevant developments regarding collective management of rights, namely:

- The Supreme Court recently declared null and void Order ECD/2574/2015, which sets down the methodology for collective management organisations to follow to set the general tariff for the remuneration rights.
- On 13 April 2018 the Spanish government approved Royal Decree 2/2018, which modifies the Copyright Act with respect to the collective management of copyright and related rights. By this royal decree Spain completed the transposition of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market into national law, and transposed Directive 2017/1564/EU on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled.

### Technological developments

#### Have there been any notable technological advances or developments to assist copyright owners in protecting and enforcing their rights?

Fernando Alonso, Spanish Formula 1 champion, has protected his image rights using KodakOne, a blockchain-based platform created by Kodak and Wenn Digital. The platform may also be used to protect other rights, including copyrighted material such as audiovisual works. Audiovisual authors and other artists can use it to locate users, control licences and prevent possible infringements.

## Legal framework

### Domestic law

#### What is the primary legislation governing copyright in your jurisdiction?

Royal Legislative Decree 1/1996 which enacted the consolidated text of the Copyright Act (as amended on 14 April 2018).

### International law

#### Is your jurisdiction a party to any international agreements relating to copyright?

Yes, Spain is party to the following international agreements:

- the Berne Convention for the Protection of Literary and Artistic Works (5 December 1887);
- the Convention Establishing the World Intellectual Property Organisation (26 April 1970);
- the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms (24 August 1974);
- the Protocol to the European Agreement on the Protection of Television Broadcasts (1983);
- the European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories (11 March 1988);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (14 November 1991);
- the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (1 January 1995);
- the World Intellectual Property Organisation (WIPO) Copyright Treaty (14 March 2010);
- the WIPO Performances and Phonograms Treaty (14 March 2010);
- the
- (2 April 1993);
- the
- (26 September 1992); and

- the
- (4 August 1982).

#### Online and digital regulation

### Are there any legal provisions specifically covering digital and online content?

Yes; the Spanish Copyright Act was modified in 2006 (and several times since) to adjust it to new ways of exploitation through digital means and online content. One of the main provisions in this regard is Article 195, which establishes a procedure to restore legality in the digital environment.

#### Government authorities

### Are any government authorities charged with regulating and enforcing copyright law?

Yes, namely the Intellectual Property Mediation and Arbitration Commission of the Ministry of Culture, which is divided into two sections. The first section performs the mediation and arbitral functions, and the second section protects works from online infringement.

#### Protection

#### Copyrightable works

### What works are eligible for copyright protection in your jurisdiction?

All literary, scientific or artistic creations if they are original and expressed by any means.

### Are there any special provisions for the protection of non-artistic works (eg, software and databases)?

Yes, the Copyright Act provides protection for the creators of a software (or the company that publishes under its name). For databases, the Copyright Act establishes a special sui generis protection right for databases, provided that the selection or arrangement of its content is original.

### Are any works explicitly excluded from copyright protection?

Yes. Article 13 of the Copyright Act expressly excludes from protection:

- any legal or regulatory provision and drafts thereof;
- judgments or decisions of jurisdictional bodies;
- acts, resolutions, discussions and rulings of public bodies; and
- the official translation of all such texts.

#### Related IP rights

### Can copyrightable works be protected by other IP rights (eg, trademarks and designs)?

Yes, by trademarks, designs and patents if such works comply with all requirements established by the corresponding acts.

#### Establishment of rights, registration and deposit

#### Establishment of rights

### How is copyright established in your jurisdiction? Is registration, deposit or any other formality required?

Copyright is established by the mere creation of the work; there are no formalities for the protection of the work.

#### Registration and deposit – procedure and effects

## What is the procedure for copyright registration and deposit (whether mandatory or voluntary)?

The procedure for copyright registration is easy and inexpensive. The steps are as follows:

- Complete the registration form, which can be obtained at the Copyright Office (Intellectual Property Registry) or found on the Copyright Office's official website.
- Present the form in person or submit it online (a legal person must present it online).

Depending on the type of work, certain other documents may be required.

## If voluntary, what are the benefits of registration/deposit?

Registration validates the information contained in the form and is considered to be qualified proof in cases of controversy over authorship. That is to say, in the event of any discrepancy regarding the authorship or ownership of the rights over a work, the information contained in the registration is presumed to be accurate and the burden of demonstrating authorship or ownership is shifted to the person claiming to be the author (who does not appear as the registered author).

### Ownership

#### Eligibility

## Who may own copyright in a work?

Primarily, the author or authors. Secondly or by way of assignment or legal provision, the legal person which makes the work available to the public, the author's assignees, heirs, licensors, publishers (sub-publishers or co-publishers) and producers (or co-producers).

#### Joint and collective ownership

## What rules and restrictions govern the joint or collective ownership of a copyright work?

In case of joint authorship, the Copyright Act establishes that the rights pertain to all authors in the proportion determined by them or, in absence of agreement, the proportion will be based on the number of co-authors. In addition, once the work has been made available to the public, the co-author cannot withhold its consent to exploit the work without a reasonable reason.

#### Employee and commissioned work

## What rules and restrictions govern the ownership of copyright in a work created in the course of employment (including works by employees and commissioned works by independent contractors)?

There are some rules established in the Copyright Act for the assignment of rights when the author is an employee (Articles 51 and 97.4 of the Copyright Act). The agreement between the parties is imperative and must be made in writing. Nevertheless, if there is no agreement between them, the law presumes that the exploitation rights over the work created by the employee pertain exclusively to the employer, provided that:

- all legal requirements for considering a person an employee are met (ie, voluntary service delivery, subordination and remuneration); and
- the work has been made as part of an employment contract or in the execution of duties.

### Exercise of rights

#### Owners' rights

## What rights are afforded to copyright owners (including rights to use and limit the use of the copyrighted work)?

Authors have:

- moral rights pursuant to Article 14 of the Spanish Copyright Act, such as the right to:
  - o decide how and when the first dissemination of a work will be made and by who; and
  - o claim authorship; and
- exclusive rights over the work, such as the right to:
  - o make or authorise (or prohibit) third parties to make copies;
  - o distribute or commercialise a work;
  - o communicate a work to the public; and
  - o transform or let a third party transform or modify a work (some limitation to these rights is set out by the law).

Moral rights cannot be waived or assigned, although some of them can be exercised on an author's death by the heir, the person designated by the author or the government (in certain cases).

Other secondary copyright owners are not entitled to moral rights, but only to the exclusive rights to the extent agreed between the owner and the author or the extent set down by the law.

### **Are there any limits or restrictions on the rights holder's exercise of its rights, including any fair use allowances and parody exceptions?**

Yes. The Copyright Law includes an exhaustive list of limitations on the exclusive rights of authors and owners, including:

- provisional reproductions;
- private copies;
- the distribution or communication of works for public security purposes;
- quotations and summaries for educational or scientific purposes;
- the use of works reporting current events;
- cable and satellite transmissions or retransmissions for technical purposes;
- parody exceptions; and
- works used in official acts and religious ceremonies.

#### **Ancillary rights**

### **What ancillary or neighbouring rights arise in relation to copyright (if any)? Are there any rules or restrictions on their exercise?**

Reproduction, distribution and public communication rights are recognised for performers (eg, actors and musicians), producers, photographers (when their photographs are not original) and publishers of musical and audiovisual recordings. Different rules apply to each.

#### **Duration**

### **When does copyright protection begin and what is the duration of protection?**

Generally, works are protected based on mere creation and the protection lasts for the life of the author plus 70 years.

#### **Transfer, assignment and licensing**

##### **Transfer and assignment**

### **What rules, restrictions and procedures govern the transfer and assignment of copyright? Are any formalities required to secure the legal effect of the transfer or assignment?**

A copyright assignment must be put in writing. If the assignment is made on an exclusive basis this must be expressly indicated in the agreement. If nothing is specified, copyright assignment will last five years, will be non-

exclusive and limited to the Spanish territory. There is no need to register a copyright agreement to secure the legal effect of the transfer assignment.

## Licensing

### What rules, restrictions and procedures govern copyright licensing?

See above. In addition, assignment of copyright on an exclusive basis allows the assignee to grant non-exclusive licences to third parties (unless otherwise indicated in the agreement). Exclusive assignees of copyright can assign their rights on an exclusive basis to third parties with the assignor's express consent. Non-exclusive assignees of copyright are not allowed to grant licences to third parties.

### Are there any special provisions governing sub-licensing?

See above.

### What collective licensing bodies operate in your jurisdiction and how are their activities regulated?

There are eight different collective management organisations:

- Sociedad General de Autores y Editores for authors of music and compositions, music publishers and other literary authors;
- Centro Español de Derechos Reprográficos for literary authors and publishers;
- Visual Entidad de Gestión de Artistas Plásticos for authors of plastic and graphic works;
- Derechos de Autor de Medios Audiovisuales for audiovisual and cinematographic works' authors;
- Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España for musical performers and musical artists;
- Artistas Intérpretes, Sociedad de Gestión for actors, choreographers and dancers;
- Asociación de Gestión de Derechos Intelectuales for the producers of musical works; and
- Entidad de Gestión de Derechos de los Productores Audiovisuales for audiovisual content producers.

The Ministry of Culture is responsible for ensuring that these entities comply with all of the obligations and requirements set by the Copyright Act. The ministry has the power to carry out inspections and audits and to appoint a representative to attend their general meetings, among other faculties.

## Enforcement

### Jurisdiction

### Which courts are empowered to hear copyright disputes?

The Mercantile and Commercial Courts.

### Infringement

### What acts constitute copyright infringement in your jurisdiction (including with regard to online and digital content)?

The following constitute copyright infringement:

- unauthorised reproduction;
- distribution;
- public communication (including making available to the public); and
- transformation.

Examples of these include making illicit copies of works, making available copyrighted material without authorisation by uploading it to the Internet and giving access to users through links.

### Is contributory infringement recognised in your jurisdiction (including liability for internet services providers and other online/digital actors)?



Yes.

#### Actions

### What actions can be taken against copyright infringement (eg, civil, criminal or administrative), and what are the key features and requirements of each?

The Spanish legal system offers various options to authors to protect their work against infringers:

- The author can request the cessation of the unlawful activity before the mercantile courts – this can also be requested from internet service providers without filing a claim against the infringers.
- There can be a criminal action, provided that the criminal law requirements are met.

With respect to online infringement, the Spanish legal system provides two main approaches to seek the blocking of sites:

- by initiating an administrative procedure to be carried out by the Commission of Intellectual Property; or
- by bringing an action directly against the infringers through the Ministry of Education, Culture and Sport.

### Who can file a copyright infringement action?

According to Article 138 of the Spanish Copyright Act, copyright holders are entitled to seek an injunction restraining the unlawful activity of an infringer. Similarly, they are entitled to claim reparation for material and moral damages suffered.

In this sense, the act recognises the following rights holders:

- authors of the works (Article 5);
- authors' heirs (Article 42); and
- any other physical/natural or juridical/legal legitimated by way of an assignment agreement made on an exclusive basis (Article 43).

Only authors have moral rights. However, heirs and expressly authorised third parties can exercise moral rights after the author's death.

### What is the statute of limitations for filing infringement actions?

Five years.

### What is the usual timeframe for infringement actions?

It depends on the court workload. As a general rule, it usually takes 12 to 18 months from the date of filing the statement of claim until a first-instance ruling is rendered.

### What are the typical costs incurred in infringement actions?

As a general rule, the costs incurred in infringement actions are:

- attorney fees;
- court representative fees;
- expert fees; and
- translation fees (all documentation must be submitted to the court in Spanish).

### How are attorneys' fees handled? Can they be claimed in infringement actions?

Yes, these can be claimed. As a general rule, according to the Spanish Procedural Law reasonable attorneys' fees are assumed by the losing party provided that the prevailing party had all of its pleas upheld. Litigation costs are fixed by the court in separate proceedings.



## Injunctions

### What rules and procedures govern the issuance of injunctions to prevent imminent or further infringement?

In accordance with Article 141 of the Spanish Copyright Act, which covers interim measures, there are two main scenarios:

- the infringement has already occurred; or
- there are reasonable grounds to fear that infringement is imminent.

In both scenarios, the judicial authority may, at the request of any rights holder, order any precautionary measures as may be necessary to deal with the specific circumstances. Article 141 of the act establishes an open list of injunctions, including:

- the seizure and deposit of revenues arising from the unlawful activity or, where appropriate, the deposit of the amounts payable by way of remuneration;
- suspension of the reproduction, distribution and communication of the work to the public, as appropriate, or any other unlawful activity which constitutes an infringement of the act, as well as the prohibition of any activities defined if these are yet to happen; and
- the seizure of the copies produced, or the devices used to execute infringing activities.

## Remedies

### What remedies are available to owners of infringed copyrights?

The following remedies are available to owners of infringed copyrights:

- the publication, in part or in full, of the judicial resolution, at the infringer's expense;
- suspending the infringing exploitation or the infringing activity;
- prohibiting the infringer from resuming the infringing exploitation or activity;
- withdrawing and destroying unlawful copies and equipment used for the infringing activity;
- removing instruments used for non-authorised suppression or neutralisation of any technical device used to protect works; and
- damages for:
  - o the loss suffered due to the infringement (direct damages);
  - o loss of profits; and
  - o all expenses incurred by the rights holder to secure reasonable evidence of infringement.

## Customs enforcement

### What customs enforcement measures are available to halt the import or export of pirated works?

The rights holder can complete the port intervention form to provide the authorities with information about the works to include it in their databases. The port authorities will then notify the rights holder if they discover potentially infringing content coming across the border.

Port authorities retain illicit copies for 10 days, giving the rights holder time to confirm whether such products are legitimate. If the rights holder confirms that such products are illegitimate, it can ask for their destruction.

## Defence

### What defences are available to infringers?

There is no precise answer for this since the defence depends on the case and facts. However, usually the defence is an issue of legal argument or evidence. For instance, an infringer could allege that it has not committed infringement because it has just made a parody of a work.



## Appeal

### What is the appeal procedure for infringement decisions?

An appeal must be lodged before the first-instance court within no more than 20 working days. The other party has 10 days to file an opposition to the appeal.

It is not possible to file new documents alongside the appeal unless such documents prove new facts or were incorrectly rejected at first instance. As a general rule, the appeal court renders its decision without hearing the parties – that is, no court hearings are held unless evidence needs to be assessed at second instance, which is unusual.

### Online/digital considerations

#### Protection and enforcement measures

### What special measures and safeguards should rights holders consider in protecting their online/digital content?

Using digital rights management measures is the most interesting option to protect works, and this technology is useful for controlling works. The implementation of blockchain technologies to manage rights is also interesting, as it allows rights holders to know who is using their works in real time.