

International **Comparative** Legal Guides



Copyright **2021**

A practical cross-border insight into copyright law

Seventh Edition

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Brazil

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Eduardo Ribeiro Augusto

1 Copyright Subsistence

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

The Brazilian Law n.º 9.610/98 regulates the rights of the authors and its neighbouring rights in Brazil. According to this law, the creations of the mind are intellectual protected works, whatever their mode of expression or the medium, tangible or intangible, known or susceptible of invention in the future. In practical terms, these works should be new and original.

1.2 Does your jurisdiction operate an open or closed list of works that can qualify for copyright protection?

Brazil operates an open list of works that can qualify for the right of the author protection.

1.3 In what works can copyright subsist?

Copyright can subsist in the following works: the texts of literary, artistic or scientific works; lectures, addresses, sermons and other works of the same kind; dramatic and dramatico-musical works; choreographic and mined works whose stage performance is set down in writing or otherwise; musical compositions with or without words; audiovisual works, with or without accompanying sounds, including cinematographic works; photographic works and other works produced by a process analogous to photography; drawings, paintings, engravings, sculptures, lithographs and works of kinetic art; illustrations, maps and other works of the same kind; drafts, mock-ups and three-dimensional works relating to geography, engineering, topography, architecture, park and garden planning, stage scenery and science; adaptations, translations and other transformations of original works, presented as a new intellectual creation; computer programs; and collections or compilations, anthologies, encyclopaedias, dictionaries, databases and other works which, by virtue of the selection, coordination or arrangement of the subject matter, constitute intellectual creations.

1.4 Are there any works which are excluded from copyright protection?

Yes, the following works are excluded from copyright protection, according to Brazilian law: ideas, normative procedures,

systems, methods, projects or mathematical projects or concepts as such; diagrams, plans or rules for performing mental acts, playing games or conducting business; blank forms intended for completion with all kinds of scientific or other information, and the instruction appearing thereon; the texts of treaties or conventions, laws, decrees, regulations, judicial decisions and other official enactments; information in common use such as that contained in calendars, diaries, registers or legends; names and titles in isolation; and the industrial or commercial exploitation of the ideas embodied in works.

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

Yes, there is a system for registration of copyright in Brazil and the author of the work has the option to register it. However, it is not mandatory to register in order to enforce the copyright against a third party. The protection of copyright in Brazil exists independently of the register.

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

The duration of copyright protection is 70 years counted from 1st January of the year following the death of the copyright owner. The only exception is audiovisual works with a term of protection of 70 years counted from 1st January of the year following the year of launch.

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

Yes, some works are protected by copyright and design rights. For instance, a chair or a woman's shoe. There is also overlap between copyright and figurative trademarks.

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

Yes, there are restrictions, since Brazilian law considers that only a natural person can be an author of a work protectable by copyright.

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 author and the owner of moral rights of copyright will always be a natural person. A company can be the owner of the right to explore a work protectable by copyright.

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

The commissioner could be the owner of the right to explore the work, but the author will always be the owner of the moral rights upon the work.

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

The Brazilian Law n.º 9.610/98 does not bring any rule about this situation, so it must be analysed case by case and the employment contract should regulate if the employee or the employer should be the owner of the right to explore the work. Furthermore, as already explained above (question 2.1), the owner of moral rights will always be a natural person, as will the employee.

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

Yes, there is a concept of joint ownership and the co-author of the work has all the rights of the author, except for uses that may damage the combined exploration of the work.

3 Exploitation

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

The transfer of ownership must always be in writing and it is presumed onerous.

3.2 Are there any formalities required for a copyright licence?

A copyright licence should always be in writing.

3.3 Are there any laws which limit the licence terms parties may agree to (other than as addressed in questions 3.4 to 3.6)?

The Brazilian Law disposes that if the licence contract does not specify the type of utilisation, the contract should be interpreted restrictively, and the utilisation should be limited to an essential one in view of the purpose of the contract.

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

Music and audiovisual works have collective licensing bodies. The ECAD (in English, the Central Office for Collection and Distribution of Royalties) is the licensing body for music and the DBCA (in English, the General Association of Brazilian Directors and Authors) is the licensing body for audiovisual works.

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

The collective licensing bodies are regulated by the Brazilian Copyright Law, who exercise public activities and observe its social function.

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

The licence terms offered by a collective licensing body can be challenged when the owner of the licensed work is not associated with the licensing body.

4 Owners' Rights

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

On the grounds of Brazilian law, the rights holder can restrict any kind of unauthorised use of its copyright work.

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?

Yes, there are moral rights according to Brazilian law. The moral rights establish, for instance, that in any kind of utilisation of the work, the named author should be informed. The moral rights cannot be waived or assigned.

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?

A copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent.

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?

No, there are no statutory enforcement agencies used by rights holders as an alternative to civil actions.

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

If duly authorised by the contract, the licensee can bring a claim for infringement of the copyright work.

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?

In Brazil, an action cannot be brought against the secondary infringers. However, anyone that commercialises, exposes to sale, acquires, distributes, maintains in a storehouse or utilises a counterfeited work will be considered a primary infringer.

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

Yes, there are some exceptions that can be relied upon as a defence to a claim of infringement and they are listed in articles 46, 47 and 48, of the Brazilian Copyright Law. For instance, any reproduction of small parts of the work to be used by the copyist and without commercial purposes will not be considered an infringement situation.

5.5 Are interim or permanent injunctions available?

Yes, there are interim and permanent injunctions available in order to restrict any kind of unauthorised use of work protected by copyright.

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

The damages are calculated by the criteria of article 103, of the Brazilian Copyright Law. This article establishes that when it is not possible to know the number of counterfeit products that were commercialised, the defendant should pay the amount of money corresponding to 3,000 products beyond the number of products that were apprehended.

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

The court expenses are the typical costs of infringement proceedings, and they take between two and seven years on average.

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?

Yes, there is a right of appeal from a first instance judgment, and any undue interpretation or application of the law will be grounds on which an appeal may be brought.

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

An action must be commenced within a three-year term after the infringement situation.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Yes, any kind of copyright infringement is considered a criminal offence by Brazilian law.

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

The threshold for criminal liability is four years of reclusion, plus financial sanction.

7 Current Developments

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

The bill n.º 3992/2020 suggests a modification of the Brazilian Copyright Law to authorise the use of works protected by copyright by hotel rooms without any kind of compensation. The owners of copyrights, such as Brazilian musicians, are currently rallying to question this bill.

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.)?

The Brazilian Copyright Law already restricts any kind of unauthorised use or sharing, by any means or proceedings, of works protected by copyright.

7.3 Have there been any decisions or changes of law regarding the role of copyright in relation to artificial intelligence systems, including the use of copyright in those systems and/or any work generated by those systems?

No, there are no changes or decisions with regard to the role of copyright in relation to artificial intelligence systems.



Eduardo Ribeiro Augusto has over 15 years of work experience in the intellectual property area, with a focus on trademark registration, anti-piracy measures and border measures. His work on Course Conclusion Work in the Graduate Course in Intellectual Property of the Getúlio Vargas Foundation (FGV/SP) is recommended for publication. He is a member of the Brazilian Bar Association and a member of the Lawyers Association of São Paulo. Eduardo is also a member of the Brazilian Intellectual Property Association (ABPI).

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