



CHAMBERS
Global Practice Guides

Copyright

Serbia – Law and Practice

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SERBIA

LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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SERBIA LAW AND PRACTICE

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BDK Advokati is a full-service law firm for corporate, institutional and high net-worth clients, with more than 30 fee-earners. The firm's approach assumes specialisation in different areas of law and knowledge of specific industry regulations, yet requires its lawyers to be broad-minded, aware of developments in inter-related fields and equipped to recognise legal issues and trends in clients' industries. BDK's diverse IP and IP-related practice covers trade-mark protection, copyright protection (including collective protection of copyright), industrial design protection, patents, IP litigation, drafting and negotiating IP-related agreements

(trade-mark licensing and assignments, know-how licensing, patent licensing and assignments, distribution agreements, sponsorship agreements, franchising agreements), protection of unregistered rights (unfair competition and other available legal mechanisms), cyber space issues, and advertising. Based in Belgrade, but with offices also in Podgorica (Montenegro) and Banja Luka (Bosnia & Herzegovina), BDK Advokati is a member of the South East Europe Legal Group (SEE Legal), an organisation assembling leading independent law firms from 12 jurisdictions in South East Europe.

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1. General Information

1.1 Historical Roots

Copyright law in Serbia traces its origin back to 1929 when the parliament of Yugoslavia, of which Serbia was a part, adopted a Copyright Protection Act. In the post-World War II period, Yugoslavia enacted four copyright acts, in 1946, 1957, 1968 and 1978. After the break-up of the country in 1991-92, Serbia and another former Yugoslav republic, Montenegro, joined in a short-lived state union (1992-2006). Two copyright acts were enacted during that period, in 1998 and 2004. In 2009, Serbia (now an independent state) enacted the copyright act currently in force. Serbia is a candidate country for EU accession, and the copyright law is – to a great extent – aligned with EU law.

1.2 Principal Sources

The most important piece of legislation regulating copyright is the Copyright and Neighbouring Rights Act, adopted in 2009 and amended in 2011 and 2012 ("Copyright Act").

Other laws and bylaws of relevance for copyright protection include the following:

- the Special Powers for Efficient Protection of Intellectual Property Rights Act (2006);
- the E-Commerce Act (2009, provisions on mere conduit, caching, hosting and linking);
- the Obligations Act (1978);
- the Organisation and Jurisdiction of State Authorities for Combating Cybercrime Act (2005);
- the Criminal Code (2005);
- the Decree on Requirements to be Met by the Copies of Copyrighted Works and Subject Matters of Neighbouring Rights Intended to be Deposited (2010);
- the Decree on Laying Down the List of Technical Appliances and Devices Subject to Obligation of Payment of A Compensation to Copyright and Neighbouring Rights Holders (2010); and
- the Decree on Maintaining Electronic Records of Broadcast and Rebroadcast Works of Authorship (2014).

As regards customs seizure of counterfeits, the relevant regulations are the Customs Act (2010) and a Decree on Terms and Conditions for Implementation of Border Measures for Protection of Intellectual Property Rights (2015).

1.3 International Conventions/Treaties

Serbia is a party to the following copyright law treaties:

- the Berne Convention for the Protection of Literary and Artistic Works (1886);
- the Universal Copyright Convention (1952);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961);
- the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of Their Phonograms (1971);
- the WIPO Copyright Treaty (1996); and
- the WIPO Performances and Phonograms Treaty (1996).

Serbia is not a party to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, but some provisions in the Copyright Act and the amendments adopted in 2011 were drafted after the example of specific TRIPS provisions.

1.4 Protected Holders

A foreign copyright-holder is protected if (i) the author is a person whose copyright is recognised on the basis of an international agreement ratified by the Republic of Serbia, or (ii) there is reciprocity between the Republic of Serbia and the author's country. The principle of national treatment applies to the works of foreign authors.

2. Copyright Works

2.1 Essential Elements

In order to be protected by copyright, the work has to be an original intellectual creation of the author, and it has to be expressed in a certain form. The two elements apply to all works of art. The requirement of form does not mean that the work must be fixed in a tangible medium; consequently, pantomimes and choreographic works do not have to be fixed in a film, video, computer animation or other means in order to enjoy copyright protection. A work of authorship enjoys copyright protection irrespective of its artistic, scientific or other value, or its purpose, size, content and mode of expression. Also, a work enjoys copyright protection even if its communication to the public would be impermissible under laws prohibiting defamation or incitement to racial discrimination, or other laws.

2.2 Access Copyright Protection

A work of authorship is not subject to any formal requirements in order to enjoy copyright protection. The work is protected as such from the moment of its creation.

2.3 Copyrighted Works Register

The deposit of a copyrighted work proves the existence of the work and its content at the time of registration. However, the deposit is not a prerequisite for copyright protection of the work.

2.4 Categories of Copyrightable Works

The Copyright Act contains an open-ended list of categories of copyrightable works, which includes the following categories:

- written works (eg, books, brochures, articles, translations and computer programs);
- oral works (lectures, speeches, orations, etc);
- dramatic, dramatic-musical, choreographic and pantomime works, as well as works originating from folklore;
- musical works, with or without words;
- films (cinematographic and television works);
- works of fine art (paintings, drawings, sketches, graphics, sculptures, etc);
- works of architecture, applied art and industrial design;
- cartographic works (geographic and topographic maps);
- drawings, sketches, models and photographs; and
- theatre directing.

Works of art not explicitly included in the list enjoy copyright protection if they meet the general requirements for protection: originality and the quality of being expressed in a certain form.

2.5 Protection Requirements for Software

Software enjoys copyright protection under Serbian copyright law. The requirements for protection of software are the same as in relation to any other work of authorship.

Software cannot be patented, although an invention that includes software as a component may be patented. Such inventions account for between 5% and 10% of the national patent applications submitted each year. Upon expiry of a patent that includes software, the software continues to benefit from copyright protection.

2.6 Protection Requirements for Databases

Databases may benefit from copyright protection, as a collection of information. A database is considered a work of authorship if the essential requirements for copyright protection are met. Originality of database subsists in the selection and arrangement of the contents.

The Copyright Act also provides for the so-called right of a database producer, as a neighbouring right, the purpose of which is to protect the databases that fail to reach the copyright's originality threshold. The right of a database producer only arises if there has been a substantial investment in obtaining, verifying or presenting the contents of the database. The duration of the right of a database producer is 15 years from the creation of the database or, if the database has been disclosed, 15 years from the date of disclosure.

2.7 Protection Requirements for Industrial Design

Industrial design also benefits from copyright protection. For an industrial design to be protected as a copyrighted work, it must fulfil the essential requirements for copyright protection.

Industrial design may also be protected under the Legal Protection of Industrial Design Act, if it meets the requirements of novelty and individual character. In contrast to copyright protection, industrial design protection requires registration of the design with the Serbian IP Office.

Copyright and industrial design protections cumulate. The industrial design protection may last for a maximum of 25 years. After that, the author continues to benefit from copyright protection.

2.8 Peculiar Works

Fictional characters can arguably be protected separately from the underlying works in which they appear, provided that the characters are sufficiently original and unique. However, in Serbia, the case law in relation to fictional characters is virtually non-existent.

Copyright protection cannot be granted to the basic concept of a TV format, as such format does not exceed the confines of a non-copyrightable idea. On the other hand, in the opinion of some Serbian legal scholars at least, aspects of a TV format may enjoy copyright protection, if developed with sufficient detail (the so-called 'bible' – ie, the show's script). In any event, the producer of a TV format may prevent imitation of the format by relying on the laws prohibiting unfair competition.

Organisers of sports events are free to permit the broadcasting of the events only to those broadcasting organisations who have acquired such right from the organiser on an exclusive basis. The exclusivity is somewhat attenuated by the power of the Regulatory Agency for Electronic Media to draw a list of events of major interest to the general public, in respect to which the competing broadcasters may lawfully use short extracts (not exceeding 90 seconds) from the original broadcast, in news programmes only.

The Copyright Act does not mention multimedia works as a category of copyrightable works. However, components of multimedia works – music, text, photography, film – and a selection and arrangement of these elements enjoy copyright protection.

Museums and exhibitions can benefit from copyright protection if they are original. The originality subsists in the selection and arrangement of the contents.

Most components of a website enjoy copyright protection, including text, design, graphics, layout, music, photographs or any database that may be included in the website.

3. Authorship and Copyright Ownership

3.1 Author of Copyrightable Work

The author of a copyrightable work is the natural person who created the work. Special provisions deal with the situation of joint authorship, where more than one person is involved in the creation of a work.

3.2 Corporate Body

Under Serbian copyright law, a corporate body cannot be the author of a work.

3.3 Identification of the Author

The author is usually identified by his or her name, pseudonym, or sign. The Copyright Act provides for rebuttable presumption of the authorship, in as much as a person is considered the author if his or her name, pseudonym or sign is indicated on the copies of the work or is referred to when the work is published.

3.4 Regulation on Collaborated Works

The Copyright Act contains rules on two types of works that result from a collaboration between two or more authors.

The first set of rules concerns co-authorship (joint authorship). Such authorship exists when the creative contributions of the individual authors are inseparable from each other and the authors act with an intention to use the results of their work as one. The co-authors hold joint copyright in the work, unless they agree otherwise. For the exercise of copyright, the consent of each co-author is necessary. However, a co-author may not withhold his or her consent in a way that would run against the principle of good faith, nor do anything that might be harmful to the interests of the co-authors. Co-authors share economic benefits from exploiting the work in proportion to the actual contribution each of them made to the creation of the work, unless they agree otherwise. Each co-author may file an action for the

protection of copyright, but only in his or her name and on his or her behalf.

In the second type of collaborative work, it is possible to identify each individual contribution – eg, different authors write different chapters in the book as a collaborative work. Individual contributors are not co-authors; each author has copyright in the particular part of the work which he or she created. The authors must regulate their mutual obligations by an agreement, which is a type of partnership agreement.

3.5 Collective Works

Copyright law in Serbia protects works such as anthologies, encyclopedias, photo collections, databases or other collections of other works or parts of work, selected and arranged in a particular way. The originality of such collective work subsists in the selection and arrangement of the contents. Protection of the collective work does not in any way restrict the separate rights of the authors of copyrighted works that are included in the collective work.

3.6 Work for Hire Doctrine

There is no work-for-hire doctrine in Serbia. In relation to a work of authorship created in the course of employment, the employer has exclusive economic rights to exploit the work in relation to his or her business activity, for a period of five years following the completion of the work, unless provided for otherwise in a general enactment or the employment agreement. In the employment agreement, therefore, the employer and the employee may stipulate that all economic rights vest in the employee, although such arrangements are rare. The employee (the author) is entitled to remuneration from the employer, in proportion with the effects of the commercial use of the work.

As an exception to the general rule on the ownership of economic rights in a work created by an employee, when the work is a computer program the employer continues to hold the economic rights permanently, unless an agreement between the employer and employee stipulates otherwise.

There is a significant distinction between works created by employees and works created by consultants. The consultant has all economic rights in the work, unless provided for otherwise in the service agreement concluded with the company.

When a company engages a consultant for the specific purpose of creating a work of authorship, and the contract of commissioning the work is silent on the issue of ownership of the copyright in the work, the ordering party has the right to publish and distribute the work. All other rights vest in the author, unless the contract provides otherwise. Exceptionally, when a computer program is developed in furtherance of the contract of commissioning a work, the ordering party

acquires all economic rights, unless the agreement stipulates otherwise.

Since the moral rights are inalienable, they vest in the employee or consultant, respectively.

There are no special rules in relation to public entities as employers.

3.7 Anonymous and Orphan Works

In relation to anonymous works, the copyright is exercised by the following persons, assuming that the author consented to the publication of the work: (i) the publisher, if the work has been published in a number of copies that satisfies the reasonable requirements of the public, or (ii) the person who has otherwise made the work public. Once the identity of the author is revealed, the rights of the publisher or person who has divulged the work cease to exist.

There are no specific provisions on orphan works in the Copyright Act. The last amendments to the Act, introduced in December 2012, did not address the issue of orphan works, which at the time had just been regulated in the European Union with the enactment of the orphan works directive (Directive 2012/28/EU) of 25 October 2012.

4. Copyright Protection and Management

4.1 Copyright-Owner's Economic Rights

The Copyright Act contains a comprehensive list of the economic rights granted to the author. The author may license – but not assign – these rights to another person or entity.

The author has an exclusive right to do the following:

- copy the work (reproduction right);
- put copies of the work in circulation (distribution right);
- rent the copies of the work (rental right);
- perform, present or play the work in public (public performance right);
- transmit performance or presentation of the work on stage (the right of public transmission);
- broadcast the work;
- rebroadcast the work;
- make the work available to the public;
- adapt, arrange or otherwise modify the work (adaptation right);
- communicate a broadcast to the public (public communication of broadcasts); and
- communicate to the public, by means of reproduction devices, a work that is fixed in a phonogram or videogram.

The law is silent on whether new rights that may arise due to technological progress would automatically vest in the author.

4.2 Duration of Economic Rights

Economic rights last for the life of the author and 70 years after his or her death.

In the case of joint authorship, economic rights expire 70 years after the death of the last surviving joint author.

In relation to anonymous works, economic rights expire 70 years after the date of disclosure of the work.

As regards collective works, the economic rights last for 70 years following the date of publication of the work.

In relation to a film, economic rights expire 70 years after the death of the last surviving of the following persons: the director, the author of the screenplay, the author of the dialogue, or the author of the music specifically composed for the film.

4.3 Alienable Economic Rights

The author may license but not transfer (assign) his or her economic rights. The doctrine considers that, due to the strong connection between the author's personality and the work created, the author cannot disassociate him or herself from the work by assigning the copyright as a whole to another person or entity. Due to the acceptance in Serbia of the monist concept of copyright, the prohibition of assignment of copyright extends to the parts of copyright as well. In other words, not only can moral rights not be assigned, but economic rights cannot be assigned either.

The author may license all or some of the economic rights. If all rights are included in the licence and the licence is exclusive, the licensee excludes the author and all third parties from any use of the copyrighted work in the given territory. A licence may be worldwide and for an indefinite period, but it may also contain limitations with respect to both the time and the territory within which the licensee may use the work.

While the author may not assign economic rights, the licensee may assign to a third party the right under the licence to use the work. In such a case, the assignee of the licence may use the work under the same terms as the assignor (ie, the licensee in the licence agreement with the author). The author continues to be the owner of the economic rights.

In contrast to the "author's rights," neighbouring rights are purely economic rights and are fully transferrable.

4.4 Transmissible Economic Rights

Economic rights are transmissible upon death. Upon the author's death, the economic rights pass to his or her successor or successors.

4.5 Moral Rights

The Copyright Act contains the following comprehensive list of moral rights:

- the right to be recognised as the author of the work (paternity right);
- the right to be indicated as the author on each copy of the work and in every communication of the work to the public (the right of attribution);
- the right to publish the work (disclosure right);
- the right to oppose modifications and destruction of the work (the right of integrity); and
- the right to protect the work against any use that prejudices or may prejudice the author's honour or reputation.

4.6 Duration of Moral Rights

Irrespective of the type of copyrighted work or the category of the holder of the right, all moral rights are of unlimited duration. Therefore, moral rights continue to exist after the expiry of the economic rights.

4.7 Alienable Moral Rights

Moral rights are inalienable.

4.8 Transmissible Moral Rights

Moral rights are not transmissible upon death.

However, some moral rights transform at the moment of the author's death and become suitable for use by the successors. Successors may oppose any use of the work when the author is not properly attributed; they may also oppose attempted modifications of the work, and divulge the work (provided that the author has not prohibited any disclosure).

4.9 Minimum Age Requirement

There is no specific minimum age requirement for the exercise of the rights and for the validity of the transfer or license of copyrights. Other laws, however, prescribe in a general way that a child under 14 years of age ("junior minor") may undertake transactions that result in the acquisition of rights, transactions by which the child obtains neither rights nor obligations, and transactions of minor importance. A child 14 years old or older ("senior minor") may also undertake other transactions, with prior or subsequent parental consent. This would arguably lead to a conclusion that a junior minor could not license software developed by him or her, as the transaction exceeds the perimeters of "the minor importance." Conversely, the senior minor could license the software, with the consent of his or her parents.

4.10 Specific Types of Contract

The Copyright Act expressly regulates five specific types of copyright contracts.

Under a publishing contract, the author licenses to the publisher the right to reproduce the work in print and the right to distribute the copies, or the copyright-holder assigns or licenses the exercise of reproduction and distribution rights to the publisher. The publisher undertakes to make copies of the work and to put the copies into circulation, and to pay a fee. The publishing contract may also provide for a transfer of the right to translate the work.

By means of a stage presentation contract and performance contract, the author or other copyright-holder licenses to the user the right to present a scenic work on stage (ie, to perform a musical or literary work). The user undertakes to present on stage or perform the work within a specified time period, in the way and under the conditions prescribed by the contract.

Under a contract on adaptation of a copyrighted work, the author or his or her successor gives permission to another person to adapt the work in order to present it on stage, to perform it, to produce a film, or for other purposes.

In a film production contract, one or more persons undertakes to co-operate creatively in the production of a film, and the co-authors license their economic rights to the film producer. The author of the screenplay and the composer of the music created for the film retain the right to use their work separately from the film, unless the film production contract provides otherwise. If a joint author subsequently refuses to co-operate in the creation of the film or is unable to continue the co-operation, he or she cannot oppose further use of the result of his or her creative contribution for completion of the film.

In a contract for commissioning a work, the ordering party has the right to publish the work and put a copy of the work into circulation, while all other rights vest in the author, unless the contract provides otherwise. If a computer program is developed pursuant to the contract of commissioning a work, all economic rights vest in the ordering party, unless the agreement stipulates otherwise.

In the event of doubt as to the content and scope of the rights licensed or transferred, the copyright agreement should be construed so as to mean that fewer rights are licensed or transferred (in dubio pro auctore).

4.11 Exhaustion Doctrine

In Serbia, a doctrine of national exhaustion of copyright applies. This means that the owner of a lawfully acquired

copy of the copyrighted work may freely distribute the copy, where such copy was launched in circulation in Serbia.

4.12 Dealing with Rights

Serbian copyright law has introduced the right of making available, in the meaning of that right as articulated in the InfoSoc Directive (2001/29/EC). The Copyright Act prescribes that the author has an exclusive right to authorise or prohibit any communication to the public of his or her work, by wire or wireless means, including making available his or her work to the public in such a way that members of the public may access it from a place and at a time they choose.

The status of the right to link to copyrighted contents on the internet is not regulated by the Copyright Act, and there is no case law on the subject.

4.13 Synchronisation

There is no specific provision or case law concerning a synchronisation right, but the reproduction right arguably encompasses the synchronisation right as well. A person authorised to reproduce a musical work may therefore use the work (ie, music) as part of a film, video game or other audio-visual work.

4.14 Collective Rights Management System

There is a collective rights management system in Serbia. Through a collecting society, the copyright and neighbouring rights-holders collectively exercise the economic rights and obtain remuneration for the use of their copyrighted works (ie, the subject-matter of neighbouring rights). The IP Office gives license for the work of collecting societies and supervises their work.

The law allows for the existence of two or more collecting societies with regard to the same type of protected work, although each such society could be in charge of managing different rights.

At present there are six collecting societies in Serbia, all protecting the rights of authors or neighbouring rights-holders with regard to different types of works (ie, subject-matters of protection by a neighbouring right). The societies protect the rights of the following categories of authors:

- authors of musical works;
- producers of phonograms;
- interpreters;
- photographers;
- authors of written works contained in a print edition, as well as the authors of works of visual or applied art contained in a print edition; and
- authors of cinematographic and television films (the director, the author of the screenplay, the cameraman and the author of the animated film).

4.15 Powers of Societies

All collecting societies have the power to collect fees for the use of works on behalf of the rights-holders. Most societies can also collect fees from the importers and sellers of technical devices and recordable CDs likely to be used for reproduction of the protected works. A collecting society may also bring a case before a court of law for the infringement of the right.

4.16 Specific Feature

There are some specific features that apply to software. If software is developed pursuant to the contract of commissioning a work, all economic rights vest in the ordering party, unless the agreement stipulates otherwise. The private-use exception does not generally apply to the software. However, a person who has lawfully acquired a copy of software for his or her own ordinary use may lawfully do the following:

- store and run the software;
- correct errors in the software and make other necessary modifications which are in conformity with its purpose, unless a contract prohibits such acts;
- make one back-up copy of the software; and
- “decompile” (reverse engineer) the software strictly in order to achieve interoperability with other software or computer equipment, provided that the necessary information has not been previously available and that the decompilation is confined to the parts of the software that are necessary to achieve interoperability. The person who obtains the information through decompilation may not disclose it to others or use it for other purposes, in particular for the development or marketing of other software.

5. Exceptions to Copyright

5.1 General Clause

The Copyright Act contains a comprehensive list of exceptions to copyright. Serbian law does not contain a fair-use or fair-dealing doctrine.

5.2 Factors to be Considered

The Copyright Act contains an exhaustive list of free-of-charge uses of copyrighted work which the author may not prohibit. In all these cases, the author’s name and the source have to be stated. In addition, as a result of the incorporation of the Berne Convention’s three-step test into Serbian law, the statutory exceptions may neither conflict with a normal exploitation of the work nor unreasonably prejudice the author’s legitimate interests.

The exceptions are as follows:

- use of copyrighted work for the purpose of court proceedings or other proceedings conducted by state agencies, or

for the purpose of ensuring public safety (the exception applies to the right of reproduction and to the right of communication to the public);

- current events exception (reproduction, communication to the public);
- use for educational purposes (public performance, communication to the public);
- the right of public libraries, educational institutions, museums and archives to make copies of the copyrighted work for their archival purposes (reproduction);
- private copy (reproduction);
- exceptions for computer programs – running the program, error correction, back-up copy, and decompilation (reproduction);
- transient or incidental reproduction of a work, where such reproduction is an integral and essential part of a technological process and its sole purpose is to enable efficient transmission in a network (reproduction);
- use of short excerpts or short published works, for the purpose of illustration, verification or reference (reproduction, communication to the public);
- ephemeral recordings of works made by broadcasting organisations for the purpose of broadcasting (reproduction);
- two-dimensional reproductions of works located in public places (reproduction, distribution, communication to the public);
- use of exhibited works for the purpose of creation of a catalogue or public auction (reproduction, distribution);
- use in order to demonstrate the performance of equipment for recording, reproducing or transmitting audio-visual contents (reproduction, communication to the public, public communication of a broadcast);
- for the benefit of people with a disability, uses that are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability (reproduction, distribution);
- use for the purpose of parody or caricature (adaptation); and
- use of a published database, when necessary to access and regularly use its content (reproduction, adaptation).

There is also an additional list of exceptions in which one may use copyrighted work but has to pay a fee to the copyright-holder, including the following:

- reproduction by photocopying or other forms of copying of excerpts of published works or short published works, in order to create a chrestomathy intended for courses, exams or scientific research (reproduction);
- use of press articles concerning current events (reproduction, distribution, communication to the public); and
- three-dimensional reproduction of a work permanently displayed in the street, square or other public space, and placement of the copies in circulation (reproduction, distribution).

5.3 Exemption of Private Copy

Serbian copyright law expressly provides for the exception to copyright in cases of private copy. Under the exception, any natural person has the right to reproduce a published work for personal, non-commercial purposes, without the author's permission and without paying remuneration. The person who relies upon this exception may not distribute the work nor communicate the work to the public in any manner.

The private copy exception does not apply to a recording of a performance, interpretation, or live presentation of a work; this means that, for example, private individuals may not record a theatre play with their cameras. The private copy exception also does not apply to construction of a new building after an existing building. Finally, there is no private copy exception in relation to the reproduction of the following categories of works:

- three-dimensional models for works of fine art;
- computer programs and electronic databases;
- written works, when reproduction results in the creation of an entire book (unless copies of that book have been sold out for at least two years); and
- musical notations (except by manual reproduction).

5.4 Exemption of Cultural Goods/Buildings

There is an exception to copyright for reproductions of cultural goods or buildings in public places: one may lawfully make two-dimensional copies of works that are permanently displayed in streets, squares or some other open public places without the authors' permission and without paying remuneration. The exception also entitles the person to distribute the copies and to communicate them to the public in other ways.

5.5 Exemption of Intermediaries

One Copyright Act exception exempts intermediaries such as Internet Service-Providers from liability for reproduction of copyrightable contents. The exception applies to transient and incidental acts of reproduction, when such acts are an integral and essential part of a technological process. For the exception to apply, the purpose of reproduction has to be either to enable a transmission in a network between third parties via the intermediary or to enable lawful use of the work, and the reproduction cannot have independent economic significance. This provision transposes in Serbian law the exception from Article 5, paragraph 1 of the InfoSoc Directive.

Internet Service-Providers also benefit from defences contained in the e-Commerce Act (2009). A service-provider enjoys 'the hosting defence', meaning that the provider is not liable for the information stored by a recipient of the service if the provider (i) did not or could not know of the improper operation of the user or of the content of the information,

or (ii) removes or disables access to the information immediately upon learning of the improper operation or of the content of the information.

Similarly, if the information transmitted in a communication network by the recipient infringes copyright, the service-provider may rely on 'the caching defence'. The provider is not liable if the following conditions are met:

- the provider does not modify the information;
- the provider complies with conditions on access to the information;
- the provider complies with rules regarding the updating of the information;
- the provider does not interfere with the lawful use of technology to obtain data on the use of the information; and
- the provider acts expeditiously to remove or disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

5.6 Exemption of Satire/Parody

In a provision introduced in 2011, the Copyright Act states that "parody or caricature is permissible, provided that it does not and may not create confusion as to the origin of the work". The provision only utilises the concepts of parody and caricature, not satire. While a parody pokes fun at the copyrighted work itself, in a satire the target is something else. There is no case law or doctrinal opinion to shed light on whether the parody exception to copyright infringement should be understood to encompass satire as well.

5.7 Freedom of Speech

The Copyright Act and the case law do not specifically address the relation between copyright on the one hand and freedom of speech or other human rights on the other. However, the exercise of freedom of speech is unlikely to serve as an effective defence to allegation of copyright infringement. Unlike most national copyright laws, the Serbian Copyright Act does not explicitly permit the use of quotes from copyrighted work for the specific purpose of criticism. Instead, the Act lists as an exception the use of short excerpts, or short published works, for the sole purpose of "illustration, verification, or reference." If the relevant provision in the Act expressly invoked criticism as a defence to the charge of copyright infringement, it would conceivably enhance the significance of criticism as a potential defence in the eyes of judges.

Another feature of this statutory provision that limits its usefulness as a free speech defence is the requirement that

the extract should be “short”, rather than “justified by the purpose to be achieved,” or similar.

6. Neighbouring/Entrepreneurial/ Copyright-Related Rights

6.1 Neighbouring Rights

The Copyright Act regulates the following neighbouring rights:

- performer’s right;
- the right of the phonogram producer;
- the right of the videogram producer;
- the right of the broadcast producer;
- the right of the database producer;
- the right of the first publisher of a previously unpublished work in the public domain; and
- the right of the publisher of print editions to special remuneration.

6.2 Content of Neighbouring Rights

All neighbouring rights are purely economic rights, with the exception of the performer’s right; performers have moral rights as well. The scope of their moral rights is the same as the scope of moral rights of authors.

The neighbouring rights may be assigned or licensed, and are transmissible on death.

The economic rights of the performer include the rights to record the performance, create copies of the recording, distribute and rent the copies, broadcast the performance and communicate the performance to the public, and the making available right. These rights last for 50 years from the date of the performance. If during that period the performance has been recorded and lawfully published or communicated to the public, the term of protection expires 50 years after the date of the first publication or communication to the public, whichever is earlier. The performer’s moral rights continue to exist even after the expiry of his or her economic rights.

The rights of a phonogram producer and a videogram producer last for 50 years following the production of the phonogram or videogram. If the phonogram or videogram has been lawfully published or communicated to the public within this period, the term of protection expires 50 years after the date of the first publication or the communication to the public, whichever is earlier.

The rights of the broadcast producer subsist for 50 years following the date of the first broadcasting.

The rights of the database producer last for 15 years following the date the database was created. If the database has

been disclosed to the public in whichever manner before the expiry of that 15-year term, the term of protection expires 15 years after the date of disclosure.

The rights of the first publisher of a previously unpublished work in the public domain last for 25 years from the date of the first publication.

Finally, the right to a special remuneration, owned by the publisher of print editions, lasts for 50 years following the lawful publication of the work.

6.3 Collecting Societies

There are two collecting societies specifically managing neighbouring rights: the Organisation for Collective Management of Performer’s Rights (PI) and the Organisation of Phonogram Producers of Serbia (OFPS).

6.4 Specific Types of Contracts

The Copyright Act expressly regulates only the transfer and license of performer’s economic rights by means of a performer agreement. The agreement must identify: the type of performance and the manner of its use; the name of the author and the title of the work to be performed; the amount of remuneration; and the mode and terms of the payment. When the performer’s agreement pertains to the right to broadcast the performance, the agreement has to specify the number of broadcasts and the period within which the performance may be broadcasted. If the subject matter of the performer’s agreement is the recording of the performance and reproduction of the copies, the agreement has to specify the number of copies to be made.

6.5 Exceptions to Copyright and Neighbouring Rights

The exceptions to copyright apply *mutatis mutandis* to the neighbouring rights.

7. Copyright Infringement and Litigation

7.1 Considering Copyrighted Work as Infringed

Copyright may be infringed in a direct and indirect manner. Direct infringement exists if a person takes any action encompassed by the copyright-holder’s exclusive rights, without authorisation from the copyright-holder, or if that third party fails to pay remuneration required under the Copyright Act or under an agreement.

Indirect infringement may exist in two main modes to which the Copyright Act explicitly refers. Under the first mode, another person has already infringed the work directly, and the indirect infringer uses the infringed copies in another way (communicates unauthorised copies of the work to

the public, or stocks such copies for commercial purposes while knowing or having reason to know that the copies were produced without authorisation). Under the second mode of indirect infringement, the indirect infringer removes electronic rights management information, circumvents protective technological measures, or produces, distributes, imports, sells, rents, holds for commercial purposes, or advertises equipment enabling or facilitating circumvention.

7.2 Defences Available Against Infringement

The alleged infringer may use any of the exceptions to copyright listed in 5.2 **Factors to be Considered** as a defence against infringement. If an exception is applicable, it means that the defendant was within his or her rights when he or she used the protected work in the particular way.

The defendant may also use other defences in order to escape a finding of infringement. When a work may be infringed only under the condition that the defendant had requisite knowledge of a fact or had reasonable grounds to know, the defendant may argue that he or she had no such knowledge, actual or constructive.

Also, the defendant may offer evidence to the effect that he or she created an independent creation, without copying the plaintiff's work, even though the two works resemble each other.

The defendant may also argue that the allegedly infringed work does not meet conditions for copyright protection, due to a lack of originality or because it has fallen into the public domain.

Another potential defence to an infringement claim is the defendant's status as a co-author, which entitles him or her to exercise the economic or moral rights in the work.

Some specific defences for Internet Service Providers are included in the e-Commerce Act (2009). The hosting and caching defences are described above, under 5.5 **Exemption of Intermediaries**.

7.3 Role of Privacy

Privacy concerns place significant limitations on the efforts to curb the forms of copyright infringement that are typical of an information society. If copies of a protected work are distributed online and the right-holder wishes to take legal action against the infringer, it may be difficult to obtain information from the Internet Service-Providers (intermediaries) as to the identity of the infringing parties. There is no provision in the Copyright Act or any other legislation to authorise the judicial authorities in civil cases to order a person providing services used in infringing activities on a commercial scale to furnish information on the origin of the infringing goods or services; the court may order such

disclosure of information about the defendant in criminal cases only.

7.4 Proceedings Available

The copyright-holders have both "urgent proceedings" and proceedings on the merit at their disposal.

Urgent proceedings are proceedings for the issuance of an interim injunction. The copyright-holder may obtain an interim injunction by establishing a likelihood of success on the merits. If there is a genuine risk that the right-holder might suffer irreparable harm, the court may issue an interim injunction without first hearing the other side.

In proceedings on the merit, the copyright-holder may request the court to declare that the defendant infringed copyright and to order cessation of the infringing activities. In addition, the lawsuit may include requests for the seizure, definitive removal, or destruction or alteration of the infringing goods, destruction or alteration of the tools and equipment used to manufacture the infringing goods, compensation of damages and reimbursement of costs, and publication of the judgment at the expense of the defendant. The plaintiff may request in the lawsuit that the defendant pay the pecuniary and non-pecuniary damages, the latter based on the infringement of moral rights. Finally, the court may order that the defendant furnishes information about any third party involved in the copyright infringement.

7.5 Neighbouring Rights Versus Copyrights

The neighbouring rights are subject to the same remedies and judicial procedure as the "author's rights" (copyright).

7.6 Moral Rights in Court

The author and performer may enforce their moral rights in court proceedings, and frequently seek and obtain moral damages for infringement of their rights of integrity and attribution.

7.7 Non-Declaratory Infringement Proceedings

The alleged infringer may file a lawsuit seeking a declaratory judgment of non-infringement in the absence of any pending proceedings initiated by the copyright-holder.

7.8 Court Handling Copyright Proceedings

The legislative changes in Serbia in 2013 conferred an exclusive jurisdiction in copyright cases to the High Court in Belgrade, with appeals heard by the Appellate Court in Belgrade. However, if both parties are commercial entities – which is rare in practice – the jurisdiction to try the case in the first instance belongs to the Commercial Court in Belgrade; the Appellate Commercial Court in Belgrade decides on the appeals.

7.9 Necessary Parties

The only necessary party to an action for infringement is the infringer. Apart from the author, the author's legal successors and the licensee in an exclusive licence may also initiate a suit for infringement.

7.10 Involvement of Third Parties

The lawsuit may include a request for seizure, definitive removal, or destruction or alteration of the infringing goods which may be in possession of a third party. The court may also order the defendant to furnish information about any third party involved in the copyright infringement.

7.11 Court Fees

The plaintiff has to pay a court fee for bringing an infringement suit. When the court renders the first-instance judgment, the plaintiff again has to pay a fee. In the proceedings on the appeal, the obligation to pay the fees at the beginning and the end of the proceedings falls on the moving party. Ultimately, the party who won the case may receive compensation for the court fees from the unsuccessful party.

7.12 Formalities Required Before Intiation

There are no prerequisites to filing a lawsuit, such as issuing a formal demand letter or cease-and-desist letter, or engaging in mediation. Also, there is no obligation to wait a certain period of time before initiating infringement proceedings.

7.13 Urgent Measures for Right-Holders

Urgent measures are available for copyright-holders, and may be requested and obtained before filing infringement proceedings on the merits. If the court issues the preliminary injunction, the right-holder has to file a lawsuit within 30 days.

7.14 Available Urgent Measures

At the request of the right-holder who makes it probable that his or her copyright has been infringed or might be infringed, the court may order provisional seizure of the infringing item or its removal from the market, or provisional cessation of the infringing activities.

7.15 Obtaining Information and Evidence

Serbian civil procedure law does not provide for a pre-trial procedure enabling each party to obtain evidence from the other party. However, both before and during the proceedings, the court may order a measure to secure the evidence, without giving prior notice to the person in possession of the evidence. This measure may be directed against the alleged infringer or against a third party. The various forms in which evidence may be secured include inspection of premises, books, documents and databases, seizure of documents and infringing items, and questioning of witnesses and expert witnesses. The court may order some or all of these measures at the request of the right-holder who makes

it probable that his or her copyright has been infringed or might be infringed, or that there is a threat of irreparable harm, or that evidence could be destroyed or impossible to obtain at a later stage.

7.16 Requesting Urgent Seizure

The right-holder may request and obtain the urgent seizure of the infringer's goods or their removal from the market. For this to occur, the right-holder has to make it probable that his or her copyright has been infringed or might be infringed.

7.17 Addressing Intermediaries with Urgent Measures

The internet service-providers can be addressed with urgent measures as requested by the copyright-holder. In practice, the copyright-holders rarely rely on this, possibly because the intermediaries are often located abroad and a court-ordered injunction might be difficult to enforce.

7.18 Role of Experts in Copyright Proceedings

Involvement of experts in copyright proceedings depends on the type of copyrighted work and the type of infringement. For example, in proceedings concerning works of architecture or photographs, the role of experts has been more substantial than in the frequent cases arising from the failure to pay remuneration to a collecting society for the use of musical works or phonograms.

7.19 Regimes Regarding Burden of Proof

Different types of copyrighted works do not have different regimes regarding the burden of proof in infringement proceedings. However, if a work has been deposited in the public registry maintained by the IP Office, the deposit serves to prove the existence of the work and its content at the time of registration. The burden of proof then shifts to the adverse party to show that his or her work had been created before the date of the deposit.

7.20 Sanctions

The sanctions available to the copyright-holder include declaration of infringement, cessation of the infringing activities, seizure, permanent removal, destruction or alteration of the infringing goods and the means for manufacturing such goods, compensation of damages and reimbursement of costs, publication of the judgment at the expense of the defendant, and provision of information about any third party involved in the infringement.

In the case of intentional infringement or infringement caused by gross negligence, the copyright-holder may claim damages in the amount of three times that of the licence fee the copyright-holder would have reasonably obtained.

7.21 Party Responsible for Paying Fees

The losing party is required to reimburse the prevailing party for the costs of litigation, including court fees and attorney fees.

7.22 Average Duration of Proceedings

Depending on the complexity of the case and the expediency of the parties to the proceedings, first-instance proceedings may take any time between six months and one year, and in exceptional cases up to two years. In practice, the appellate court decides any time between four months and nine months after the trial court rendered the first-instance judgment.

7.23 Decisions Enforced

Enforcement of the judgment depends on the nature of the defendant's obligation as determined by the judgment. If the defendant has to pay damages and fails to do so, the public bailiff may enforce the judgment. However, if the judgment orders the defendant to do something, such as destroy the infringing goods, the court is in charge of enforcing the judgment. Courts are notoriously slow in enforcing the judgments.

7.24 Administrative or Criminal Means

The Copyright Act prescribes that a legal entity that has infringed copyright or neighbouring rights is responsible for a commercial offence, punishable by monetary fine.

The Criminal Code provides for three specific criminal offences in relation to infringement of copyright and neighbouring rights:

- infringement of author's and performer's moral rights;
- unauthorised use of the copyrighted work or of the subject matter of the neighbouring right; and
- unauthorised removal or alteration of electronic rights-management information.

In relation to all criminal offences, indirect intent (*dolus eventualis*) on the part of the defendant is required. The penalty is a monetary fine or up to three years' imprisonment.

7.25 Customs Seizure of Counterfeits and Parallel Imports

The Serbian legal system provides for customs seizure of counterfeits. The copyright-holder may submit a request for implementation of protective measures against counterfeited goods, which may refer to a single shipment or the shipments in general. The Customs Authority may grant the request for an initial period of one year. When the Customs Authority suspects that the goods held at the customs might infringe intellectual property rights, it suspends the release of the goods and notifies the copyright-holder. The holder may inspect the goods and take photos and samples. The

copyright-holder may request destruction of the goods at his or her expense or commence infringement proceedings before the court. If the copyright-holder requests destruction of the goods, the Customs Authority will interpret any failure on the part of the customs declarant to respond as the declarant's consent. If the declarant opposes the destruction, the copyright-holder may file a lawsuit seeking a court declaration that the copyright has been infringed. In this case, the declarant bears the expenses of the storage, maintenance and destruction of the goods.

As a result of the principle of national exhaustion, the copyright-holder may oppose import of the goods, if the owner first placed the goods, or consented that the goods be placed, in a foreign market. However, there are no regulations in place detailing the procedures for customs seizure of parallel imports, equivalent to the elaborate rules governing the seizure of counterfeits.

7.26 Special Provisions

There are no special provisions concerning the appellate procedure for copyright proceedings.

Depending on whether in the first instance the case was heard by the High Court in Belgrade or the Commercial Court in Belgrade, the appeals are heard by the Appellate Court or the Appellate Commercial Court, both located in Belgrade. The Supreme Court of Cassation may hear a copyright case if the party that lost on the appeal proves that conditions are in place for filing an extraordinary legal remedy (revision, application for review of the final and binding judgment, or application for reopening of the proceedings).

7.27 Full or Factual Review

In the appellate proceedings, if the appeal is based on allegedly incomplete or erroneous findings of facts on the part of the trial court, the appellate court reviews the facts to the extent necessary to determine whether the appeal is well-founded. If, after a retrial, the case again reaches the appellate court and the court again agrees with the appellant that findings of facts are incomplete or erroneous, the appellate court itself must hold the hearings in order to establish the facts.

However, if the appeal is based on procedural issues or an erroneous application of the substantive law, rather than on incomplete or erroneous findings of fact, the court may not review the facts of the case.

7.28 Providing the Court with All Necessary Evidence

The appellant may not present new facts or provide new evidence, unless the appellant makes it probable that, through no fault of their own, they were unable to bring or propose

facts and evidence until the conclusion of the trial before the first-instance court.

7.29 Alternative Dispute Resolution

Alternative dispute resolution is neither compulsory nor common as a way of settling a copyright dispute.

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