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# Copyright

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Kvale Advokatfirma DA

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## Law and Practice

Contributed by Kvale Advokatfirma DA

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**Kvale Advokatfirma DA** advises on all aspects of ownership, protection, exploitation and enforcement of copyright in a wide range of industries. This includes advising on digitalisation/Industry 4.0, online use/e-commerce, new technology, copyright levies, licensing, copyright dispute litigation, audits and policy programmes; the firm has particular strengths in the tech, marketing, pharma and media/entertainment sectors. Copyright matters are handled in Kvale's leading seven-partner IP/TMT department. Advising a diverse and high-profile list of clients, the firm under-

takes a comprehensive range of advice, clearance, conflict resolution, enforcement and portfolio management services. Kvale also handles all aspects of international transfer, licensing and collaboration arrangements, conducts detailed due diligence and drafts/negotiates contracts from confidentiality agreements to global cross-licensing and co-development agreements, additionally advising on the acquisition, restructuring and disposal of IP in the context of corporate M&A and financings.

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## 1. General Information

### 1.1 Historical Roots

The Norwegian copyright system has historically been influenced by continental legal systems and developments, most notably by German law. Norway's first 'modern' copyright law was passed in 1876.

As creative culture, science and statutory legislation became increasingly pervasive in western societies, new developments were introduced in the next Norwegian Copyright Act, of 1930. This was considered a modern law at its time. Society's interests and rights in intellectual work, particularly in its use and development, were emphasised, leading to numerous limitations in copyright being established, with allowances for private use and strengthening privacy, freedom of expression and incentives for progress, all limiting the exclusive rights of the author.

Norway's current Copyright Act dates from 2018. It replaced the 1961 Copyright Act, which, after being revised time and again, was finally due for the history books.

### 1.2 Principal Sources

The principal sources of law regulating copyright are the Copyright Act of 2018, regulations pursuant to the Copyright Act, preparatory works and case law. Furthermore, since Norway is a member of the EEA, it is obliged to implement relevant directives and regulations, such as Directive 2010/13/EU (the AMT Directive), Directive 2009/24/EC (the 'Software Directive'), Directive 2001/29/EC (the 'Copyright Directive'), and Directive 93/83/EEC (the 'SatCab Directive').

The Norwegian courts will adhere to case law from the European Court of Justice when assessing Norwegian copyright matters.

### 1.3 International Conventions/Treaties

Norway is party to several international conventions, including the Berne Convention, the WIPO Copyright Treaty, the TRIPS Agreement, the WIPO Performances and Phonograms Treaty, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the Universal Copyright Convention and several corresponding UNESCO treaties, as well as the EEA Agreement.

### 1.4 Protected Holders

The Copyright Act applies to the Norwegian territory and to all Norwegian citizens, regardless of where they reside. Foreign works that are entitled to protection by certain international agreements and conventions, such as the EEA Agreement, the Berne Convention and the Rome Convention, are protected through regulations pursuant to the Copyright Act.

## 2. Copyrighted works

### 2.1 Essential Elements

The essential elements required for a work to gain copyright protection are human spirit, originality/individuality/creativity (in Norwegian, '*verkshøyde*') and fixation. Due to specific characteristics that may limit the scope of creative freedom, some types of work will be subject to a stricter assessment of originality than other types of work, including arts and crafts, buildings, and scenography directions. Case law from the Norwegian Supreme Court also indicates that the level of originality and distinctiveness affects the extent of the protection. In a recent decision, the Supreme Court found that a prefabricated house design may be copyright-protected, but only with regard to the original elements of the design of the house.

### 2.2 Access Copyright Protection

According to Norwegian copyright law, copyright protection for a work is gained at the same time as the work is fixated. There is no need (or way) to have a work registered or to meet other types of regulatory requirements.

### 2.3 Copyrighted Works Register

There is no register for copyrighted works.

### 2.4 Categories of Copyrightable Works

Pursuant to the Copyright Act, any literary, scientific and artistic work of any kind, irrespective of the manner or form of expression, may be copyrightable. Section 2 of the Act includes a list of specific works that are copyrightable, but this list is not exhaustive; other works may also be protected, subject to the general requirements.

### 2.5 Protection Requirements for Software

Software enjoys copyright protection and is specifically listed in the Copyright Act. It is subject to the same requirements as other copyrightable work. Software code is normally copyright-protected, even if in quite a rudimentary way. Software also enjoys additional protection relating to digital rights management schemes. The Act includes provisions relating to digital rights management, prohibiting anyone to bypass digital rights-management schemes and offer for sale any measure that makes it easier to remove or bypass digital rights schemes illegally.

### 2.6 Protection Requirements for Databases

Databases benefit from limited copyright-like protection, pursuant to the Act. Database-exclusive rights include the right to make copies of the database and the right to make the database available to the public. The protection has certain limitations compared to ordinary copyright; protection is granted only for the database as such or significant parts of it, and the rights only persist for 15 years.

The requirements for database protection are that the database organises a large amount of data or that the database is the result of a significant effort and/or investment.

### 2.7 Protection Requirements for Industrial Design

Industrial design may benefit from copyright protection if the design meets the requirements for copyright. However, it has traditionally been held that these requirements are applied somewhat more strictly in relation to industrial design. In a Supreme Court decision from 2012 regarding a chair (Tripp Trapp), it is (again) stated that works with notable functional elements are subject to a stricter assessment than purely artistic works.

Industrial design may be registered at the Norwegian Industrial Property Office, based on the Designs Act. Design rights do not affect copyright in any way.

### 2.8 Peculiar Works

It is generally held that works such as fictional characters, multimedia works and websites may represent human spirit, originality/individuality/creativity and are fixated and thus may enjoy copyright protection. According to Norwegian law, maps shall also be considered as a copyrightable work.

Further, sporting events will usually be protected, but a TV production from the event will obtain protection through neighbouring rights.

A recipe merely listing different ingredients will not, as a rule, enjoy copyright protection but a particularly original and creative recipe may obtain copyright. Cookbooks will enjoy copyright.

TV formats may be protected, provided that the composition and structure of the format, or elements of it, display the necessary level of originality. The issue relating to TV formats, however, is that copyright does not exist for ideas, facts, concepts, etc, and these types of works lack being final and fixated.

In 2010, the Oslo City Court delivered a judgment relating to TV format issues. The plaintiffs in the case argued that their TV format relating to the TV show 'Come Dine With Me' was copyright protected, and that it was infringed by the defendant's TV show. However, the court did not agree that the concept or idea of four people dining together and then selecting a winner was a copyright protected work.

While there have been copyright disputes in other jurisdictions in Europe (ie, Switzerland and the Netherlands) with regard to perfumes, this is a matter that has not yet been tried by the Norwegian courts, and neither have Norwegian courts determined whether museums and/or exhibitions may be considered copyrighted work, although it generally

seems clear that museums and exhibitions may be structured and composed in a manner that is original and fixated.

When it comes to other contentious works, examples do exist. In a Supreme Court decision from 2012, copyright protection was rejected for a two-minute performance that included dance/choreography, acting, scenography and music, all presenting a traditional folktale story and figures, due to lack of originality. The decision was seen as confirmation of Norway's relatively hard line with regards to granting copyright. Other than this, arts and crafts have been under continuous discussion in the legal community.

## 3. Authorship and Copyright Ownership

### 3.1 Author of Copyrightable Work

The author of a copyrightable work is the physical person who fixated the work.

### 3.2 Corporate Body

A corporate body cannot be the author of a work, but rights to exploitation of the work can be held by a corporate body (see also 3.6 Work for Hire Doctrine, below).

### 3.3 Identification of the Author

The author is generally identified by name, but it is accepted that literary works are sometimes published under pseudonyms.

According to Section 9 of the Copyright Act, if the person behind the pseudonym is not known to the public, Section 9 allows the publisher to act in the name of the person behind the pseudonym.

### 3.4 Regulation on Collaborated Works

In Norway, collaborative works that are created by more than one author are regulated by the Copyright Act. If it is not possible to identify each individual contribution to the work, the authors hold joint copyright to the work. In cases where it is possible to identify each individual contribution, such as music and lyrics, there is separate copyright, but exploitation of the combined work must be pursuant to consent from all rights-holders.

### 3.5 Collective Works

Any person who combines several works and thereby creates a collective literary, scientific or artistic work shall have the copyright to the collective work. This new right does not impact the copyright in the individual works.

### 3.6 Work for Hire Doctrine

Norway does not have a statutory work-for-hire doctrine.

With regard to employers and employees, and companies and consultants/freelancers, the main rule in Norway is that the commercial rights to a copyrighted work can be freely regulated and transferred by agreement. If no agreement exists, the general principle is that the employer will obtain a right to exploit a work created by an employee to the extent necessary for the company to perform its ordinary business activities (as they were at the time when the work was created). No such principle applies for consultants/freelancers, and it will therefore be a question of what is explicitly or implicitly agreed between the parties with regard to copyright. This is an issue that is at high risk of becoming contentious if a significant value is at stake.

For software, there is a specific rule in the Copyright Act that ensures that copyright automatically transfers to the employer for software created by employees as part of their work assignment. This is not the case for a non-employee, such as a consultant. Conflicts may still rise, for example if the work is performed at home, outside of working hours, outside of the scope of work description and work assignment.

### 3.7 Anonymous and Orphan Works

Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works is an EEA relevant Act, and the provisions of the Regulation were incorporated into the Norwegian Copyright Act on 1 June 2015. Based on this, certain institutions of public interest are given certain rights to exploit orphan works, after having performed and documented extensive good faith searches in order to find the author.

## 4. Copyright Protection and Management

### 4.1 Copyright Owner's Economic Rights

The economic rights granted to the copyright-owner follow from Section 3 of the Copyright Act and consist of two main components – the exclusive right to make copies of the work, and the right to publish and make the work available to the public. How to exploit these exclusive rights for financial gain is not regulated in detail in the Act.

### 4.2 Duration of Economic Rights

The duration of economic rights is the same as copyright, ie, the lifetime of the author and 70 years after their death.

For joint works (see 6 Neighbouring/Entrepreneurial/Copyright-Related Rights, below), the term is 70 years after the death of the longest surviving author.

### 4.3 Alienable Economic Rights

In principle, economic rights are alienable. According to Section 67 of the Act, the author may – wholly or partly – assign the right to exploit the work.

Such assignment shall only be considered agreed for rights clearly agreed. Lack of clarity will be the risk of the party acquiring copyright.

Assignment of copyright does not include a right to alter the work, unless clearly agreed. Moreover, further assignment of copyright shall not be made without the consent of the copyright-holder, unless the copyright belongs to a business and is assigned together with the business.

### 4.4 Transmissible Economic Rights

In principle, economic rights are transmissible upon death. Upon the death of the author, the rules in relation to inheritance, the community property of the spouses and the right of the surviving spouse to remain in possession of the undistributed estate shall apply to the copyright of the author.

### 4.5 Moral Rights

The moral rights of the right of attribution and the right of integrity are set out in Section 5 of the Act. The right of attribution allows the author to demand attribution, prevent misattribution and require that the authorship of the work not be disclosed (ie, remain anonymous). The right of integrity bars distortion, mutilation, destruction or other modification of a work if that distortion, etc, is likely to harm the author's reputation.

### 4.6 Duration of Moral Rights

The Norwegian system does not establish different terms depending on the moral right, the type of copyrighted work or the holder of the right.

The moral rights of the author shall, in principle, persist after the author's death, even if the term of protection of the copyrighted work has expired.

A copyrighted work may not be made available to the public in a manner or context that is prejudicial to the author's reputation or individuality, or to the reputation or individuality of the work itself, or in a way that otherwise may be considered harmful to general interest.

### 4.7 Alienable Moral Rights

The moral rights of the author are not alienable.

### 4.8 Transmissible Moral Rights

The moral rights of the author are not transmissible upon death.

However, it should be noted that the right to take action vests with the spouse or heirs after the death of the copyright-holder, and until the term of protection expires. Further, the Norwegian Ministry of Cultural Affairs also has a right to take action after the death of the author. In contrast to the right of the spouse and heirs, the right of the Ministry lasts after the expiry of the term of protection.

### 4.9 Minimum Age Requirement

The Act itself is silent on the subject of a minimum age requirement. Persons who are legally not of age (18 years) may not, as a rule, enter into legally binding agreements concerning their assets. Since under-aged people do not, in principle, have legal capacity, the minimum age requirement for the exercise of the rights for the validity of the transfer/license/sale of copyrighted work is 18 years.

### 4.10 Specific Types of Contract

Norwegian copyright law does not provide for specific types of contracts in order to transfer, license or sell copyright, although there are some specific provisions that apply to certain types of contracts, such as publishing agreements and film productions, which are partly mandatory.

### 4.11 Exhaustion Doctrine

Norway has a copyright exhaustion doctrine. The relevant provisions are Sections 27 and 28 of the Copyright Act, which state that the copyrighted work (or copy) may be freely distributed or viewed once it has been sold with the consent of the copyright-holder.

However, Norway does not recognise global exhaustion. As a party to the EEA Agreement, Norway undertakes to apply the principle of EEA regional exhaustion, meaning that if a copyrighted work has lawfully been placed on the market outside the EEA, it will not confer a right to distribute the work freely within the EEA area, enabling copyright-holders to react to imports from countries outside the EEA area.

The principle of EEA regional exhaustion became a part of the 1916 Copyright Act in 2005, when the copyright directive of 2001 was implemented under the EEA Agreement. Previously, Norway recognised global exhaustion of copyright.

Please note that exceptions to the principle of EEA regional exhaustion apply if the work has been acquired by a physical person for private use or is further distributed through loan or lease. It should be underlined that Section 27 of the Copyright Act does not confer a right to rental or a lending right in respect of machine-readable copies of computer programs.

### 4.12 Dealing with Rights

As in many other jurisdictions, there has been legal debate in Norway concerning whether linking to content on the internet constitutes making the work available to the public. This question made it to the Supreme Court in 2005, when TONO (the collective rights management body for composers, songwriters, lyricists and music publishers) et al sued tech-company Napster for making music available to the public through links, without having a licence. The Supreme Court did not conclude on whether Napster was indeed making the work available to the public, and moreo-

ver was rather reluctant to state that linking constituted an act of making work available to the public when the work had already been made available online. Instead, it concluded that Napster was contributing to illegal file-sharing, by creating links that allowed users to download music files that were illegally uploaded on the internet.

However, due to the development of case law from the ECJ, including cases such as C-466/12 (Svensson) and C-348/13 (BestWater), it is now clear that linking may be considered an act of making a work available to the public. This has been concluded in two cases from the City Court of Oslo in 2015 and 2016, where copyright-holders sued internet service-providers and required them to block access to online platforms for illegal file-sharing. Following the doctrine set out by the ECJ, the court found in both cases that file-sharing platforms were making the content available to a new public, and thus infringed the copyright-holders' copyright to the content.

### 4.13 Synchronisation

Use of music in audio-visual productions requires a licence or consent from the copyright-holders. Synchronisation rights must be obtained either directly from the copyright-holder or from the copyright-holders' publisher, and in some cases from NCB (Nordic Copyright Bureau), which handles mechanical rights on behalf of composers, copywriters and music publishers.

### 4.14 Collective Rights Management System

There is a collective rights management system. The Act sets out rules that allow collective societies to clear rights on behalf of authors. The rules comprise provisions on compulsory licences and collective licences. The licences established under the provisions will also clear the rights for non-members of the collective society and unknown copyright-holders. In addition to provisions relating to specific sectors, such as educational institutions, libraries, museums, public archives and the Norwegian public broadcaster, there is a provision for a general collective licence, which allows for specific agreements with an approved collecting society for limited areas of use.

The system allows for several collecting societies. Such societies must represent the majority of the authors within the relevant category of works, and must also have formal approval from the relevant public body. The main collecting societies are as follows:

- TONO (composers, copywriters and music publishers);
- BONO (visual artists);
- Gramo (broadcasting rights of producers and performing artists);
- Kopinor (writers, authors and publishers of literary works); and

- Norwaco (mechanical rights, secondary use of audio-visual works).

#### 4.15 Powers of Societies

Please see 4.14 **Collective Rights Management System**. In addition to clearing rights, the collecting societies have the power to act legally before the courts in order to stop unlawful exploitation of works, or to claim compensation. The collection societies are regularly engaged in political discussions and also give opinions on law amendment proposals.

#### 4.16 Specific Feature

There is no specific feature applying to software rights.

## 5. Exceptions to Copyright

### 5.1 General Clause

The Norwegian legal system does not provide a general clause similar to the fair use doctrine, but there are a number of specific carve-outs from the author's exclusive copyright. These are listed under the heading 'Limitations on Copyright' in chapter three of the Copyright Act. The list of exceptions is quite extensive – see 5.2 **Factors to be Considered**.

### 5.2 Factors to be Considered

The carve-outs from copyright provided for under Norwegian law include the following (the list is not exhaustive):

- for private use, physical persons have the right to make copies of published work without any consent or consideration;
- published works may be quoted from, provided that this is done fairly and only to the extent necessary to achieve the desired purpose of quoting;
- a published work may be performed publicly at religious services and in educational contexts. Exemptions apply in particular circumstances;
- several provisions on collective licences apply, for institutions, archives, libraries, museums, etc;
- under certain conditions, orphan works may be used in cultural heritage institutions such as libraries, educational institutions, museums, archives, film- and audio-visual institutions and public broadcasting enterprises;
- published works may to some extent be copied by disabled persons;
- published works of art and published photographic works may be reproduced in connection with text of critical or scientific treatise of a non-generally informative character, when it is done in connection with proper usage and to the extent necessary to achieve the desired purpose. Such works may also be reproduced in newspapers, periodicals or broadcasts in connection with the reporting of a current event. Furthermore, published works of art and published photographic works that form part of a collection, or are exhibited or offered for sale,

- may be depicted in catalogues of the collection and in announcements of the exhibition or sale. Exemptions to the above-mentioned apply in particular circumstances;
- buildings and, to some extent, works of art and photographic works that are permanently located in or near a public place or thoroughfare, may be depicted;
- brief parts of a copyrighted work (or the entire work if it is minor) may be included in a broadcast or film when the work forms part of a current event that is broadcast or filmed. If the work is only in the background or plays a minor role compared to the main topic of the reporting, the entire work can be reproduced;
- public proceedings held to discuss questions of public interest may be made available to the public without the consent of the copyright-holder. Certain exemptions apply; and
- buildings and works of applied art may be altered without the consent of the copyright-holder when this is done for technical reasons or utilitarian purposes.

### 5.3 Exemption of Private Copy

Physical persons are allowed to make single copies of works that have been published for 'private use'. The right to make copies within the private sphere without consent or any consideration is considered to be a fundamental principle under Norwegian law.

The provision allows individuals to make copies for their own private and personal use, including private work-related use, and includes a right to share copies with family and close friends.

There are certain limitations to the right to make private copies. It is forbidden to make such copies for the purpose of economic gain. The provision does not allow, for example, copying an architectural work by way of constructing a building; making machine-readable copies of computer programs; copying databases in a machine-readable form; or making copies of works of art by means of photocopying, taking a cast or impression, or by other similar means of reproduction if the copy may be perceived as an original.

There is a general prohibition in place against making further copies of unlawful copies, or of copies made by circumvention of systems for technical protection of a work. The reproduction of musical works, audio-visual works, sculptures, tapestries, articles of artistic handcraft, applied art or other works of art is not permitted if it is done with outside assistance.

### 5.4 Exemption of Cultural Goods/Buildings

Buildings may freely be depicted.

The same applies to works of art (and photographic works) that are permanently located in or near a public place or thoroughfare, provided that the works are not the main

motive and that the reproduction is not to be exploited commercially.

The phrase 'public place or thoroughfare' refers to any outdoor location that is readily accessible to the public. Therefore, the right of reproduction of works of art does not apply, for example, in relation to sculptures and other cultural pieces located inside churches, museums, town halls, and so on.

### 5.5 Exemption of Intermediaries

There are exemptions to the exclusive rights to temporary digital copies of works, which apply to the use of protected works in computer systems, such as browsing and caching. The exemption applies to temporary copies if the sole purpose is to facilitate a legal exploitation of the work, or communication of the work on behalf of third parties, provided that the temporary copy has no independent economic value.

### 5.6 Exemption of Satire/Parody

The Norwegian Copyright Act does not expressly provide for an exception to copyright for satire and/or parody; however, such an exemption follows from case law. Satires and parodies may also be considered new and independent works. If the purpose of the parody is to exploit the copyrighted work for commercial gain, the exemption will probably not apply.

### 5.7 Freedom of Speech

Even though this is not expressly stated in the Act, human rights are factored in to the principles that form the basis for the Act's balancing of the interest of the copyright-holders and the interest of society and the public at large. The limitations to the exclusive rights of the copyright-holders are not considered as exemptions subject to a narrow interpretation, but rather as provisions that are equally important as those protecting the works. Furthermore, arguments on freedom of speech and right of information, etc, are often relevant in disputes regarding exploitation of copyright, particularly with regard to the use of protected works in the digital environment.

## 6. Neighbouring/Entrepreneurial/ Copyright-Related Rights

### 6.1 Neighbouring Rights

Several neighbouring rights are listed under chapter 2 of the Copyright Act, making the scope of the related rights quite broad.

There are neighbouring rights for performing artists and producers of photographic pictures (including photographic pictures that do not fulfil the requirement for originality), and for sound recordings, music and film productions and broadcastings.

Additionally, there are rights for creators of a database, formula, catalogue, table, etc.

### 6.2 Content of Neighbouring Rights

The content of the neighbouring rights varies, depending on the specific right.

The exclusive right to a photographic picture is in force for the lifetime of the photographer and for 15 years after the end of the year in which he or she died, but for no less than a period of 50 years from the end of the year in which the picture was produced.

The performance rights of performing artists are protected until 50 years after the end of the year in which the performance took place. However, if a film has been issued during this period, the term of protection is 50 years after the end of the year in which the film was first issued; if a sound recording has been issued during this period, the term of protection is 70 years after the end of the year in which the sound recording was first issued. The same applies for sound recordings and films.

A broadcast may not be transferred to another device without the consent of the broadcasting organisation before 50 years have passed since the end of the year in which the first transmission took place.

The exclusive rights to a database, formula, catalogue, table, program or similar work last until 15 years have passed since the work was published.

The rights of performing artists and the producers of photographic pictures are of both moral and economic character, and are transmissible on death.

The rights of producers of sound recordings, producers of films and broadcasting organisations are of a more economic character. The same applies to the right of a database, formula, catalogue, table, program or similar work, and the right concerning press reports. These rights are generally not transmissible on death, with some exceptions.

### 6.3 Collecting Societies

The Norwegian Actors' Equity Association is an organisation founded for the purpose of protecting the artistic, judicial and financial interest of actors in Norway. It negotiates work agreements for its members as well as functioning as a service organisation.

Norwegian collecting societies such as Norwaco and Gramo manage the exclusive rights of the copyright-holders as well as the neighbouring rights.

The main job of Norwegian collecting society Gramo is to manage and administrate the rights of performers and

producers to receive remuneration when recorded music is played in public places. Gramo collects remuneration from radio stations and other users of music in public places.

Norwaco is an organisation that licenses use of audio and audio-visual content in Norway on behalf of both Norwegian and foreign authors, performing artists and producers.

#### **6.4 Specific Types of Contracts**

Transfer of copyright is generally regulated under the Copyright Act. There are special rules regarding the interpretation of contracts on the transfer of neighbouring rights, but the provisions do not provide for specific types of contract.

#### **6.5 Exceptions to Copyright and Neighbouring Rights**

The exceptions and limitations to copyright are not generally applicable in relation to neighbouring rights. Instead, each specific provision in the neighbouring rights expressly refers to the applicable exceptions/limitations. However, the suitable exceptions/limitations will apply for most of the neighbouring rights, such as the right to private use and quotation from the work, and the provisions on extended collective licences.

## **7. Copyright Infringement and Litigation**

### **7.1 Considering Copyrighted Work as Infringed**

A copyrighted work is considered as infringed upon when the exclusive rights of the copyright-holder have been exploited without the consent of the copyright-holder, provided that none of the exceptions limiting the exclusive rights is applicable.

### **7.2 Defences Available Against Infringement**

Any rights-holder who believes that their copyright has been infringed can pursue their claim before the courts in accordance with the Act and the Norwegian Dispute Act. A judgment will, in the final instance, then be able to be enforced.

The defences that are available to protect against infringing use include a demand that such use stop, and that economic compensation be paid. Prison and fines are possible, but rare. The copyright-holder may also enforce their moral rights, demanding integrity of the work and identification as the author.

In light of the information society, certain steps have been taken by legislators to strengthen the enforcement of illegal bootlegging. In 2013, a new statutory provision was included in the Norwegian Copyright Act concerning ISP responsibilities with regard to access to websites that make bootlegged content available on the internet. This provision gives rights-holders the option to file a petition to the Oslo

City Court in order to prevent access to websites that are evidently making bootlegged content available. After this provision was introduced in 2013, the City Court of Oslo has in two cases decided that Norwegian ISPs must block users' access to certain websites.

### **7.3 Role of Privacy**

Privacy plays a role in relation to copyright infringements and the information society.

Since 2013, the Norwegian Copyright Act has contained a chapter with specific provisions relating to the copyright-holders' right to process personal data and to access subscription information, such as IP addresses, when a copyrighted work is considered to be infringed.

Provided that it is necessary for the determination or defence of a legal claim, the copyright-holder shall, as a rule, be able to process the personal data used in connection with a copyright infringement without a licence.

The provision stipulating the right of the copyright-holders to access personal data such as an IP address is of a more complex character. As a basis, the copyright-holder may place a request with the Oslo District Court for access to the personal data of the individual infringing the copyrighted work, regardless of the internet service-provider's professional secrecy under the Norwegian Electronic Communications Act. In order to find in favour of the copyright-holders' claim, the court must find that the considerations speaking for disclosure of the information are weightier than the professional secrecy concerns. In its assessment, the court shall look to the severity, scope and adverse effect of the infringement.

### **7.4 Proceedings Available**

If the copyright-holder considers that their copyrighted work has been infringed, they may seek an injunction, if the matter is urgent. Injunctions are typically intended to prevent or stop actual actions. They do not concern monetary claims. One specific type of injunction is requesting customs seizure.

At the same time, the copyright-holder may submit a writ, where a monetary claim can also be included. The writ may also be filed by itself, without any injunction.

### **7.5 Neighbouring Rights Versus Copyrights**

Neighbouring rights are subject to the same remedies and judicial procedure as copyright.

### **7.6 Moral Rights in Court**

Moral rights, such as the right of the author to have his or her name stated in the manner required by proper practice, may be enforced by the copyright-holder in court proceedings.

### 7.7 Non-declaratory Infringement Proceedings

The alleged infringer is allowed to file non-declaratory infringement proceedings.

### 7.8 Court Handling Copyright Proceeding

In a major change, the ordinary Norwegian district courts no longer have competence to handle copyright proceedings otherwise in their jurisdiction.

Oslo City Court is now the fixed venue for copyright cases in Norway.

The new rule does not apply to injunctions, which are handled by all courts under the old ordinary rules of choice of venue.

### 7.9 Necessary Parties

The copyright holder and the alleged infringer are considered to be the necessary parties to the infringement proceedings. On the basis of transfer of rights to the work, however, the licensees may also be allowed to participate, and to file infringement proceedings. This depends on the character, as well as the scope, of the licence issued by the copyright holder.

Under Norwegian copyright law, as under EU law, there is a distinction between exclusive and non-exclusive licences. In an exclusive licence, the parties (ie, the copyright holder and the licensee) agree that the licensee acquires all exclusive rights to the copyrighted work, meaning that no one other than the licensee can exploit the work. A non-exclusive licence only provides the licensee with rights on a non-exclusive basis, meaning that the copyright-holder may also allow other licensees to exploit the same copyrighted work.

Consequently, the exclusive licence provides the licensee with a disposal right over the work and the right to prohibit others from exploiting the work. On the other hand, the non-exclusive licence only provides the licensee with a right of disposal.

Only licensees with an exclusive licence may file infringement proceedings, not licensees with a non-exclusive licence.

### 7.10 Involvement of Third Parties

The involvement of third parties in proceedings depends on the circumstances. If a third party has contributed to infringement, both a prohibition against further contributory actions and liability for damages could, in principle, be imposed upon such a party. If the third party is a licensee with a loss of profit caused by an act of infringement, the licensee could be entitled to damages from the infringer, again based on the circumstances.

In addition to this, there are some specific provisions whereby an internet service-provider can be sanctioned to block

access to a website making a large amount of copyright-protected material available to the public.

### 7.11 Court Fees

There are court fees that should be paid by the complainant or the appellant, with the amount depending on the scope of the case. For example, when a case is brought in the District Court, the complainant should pay an entry fee corresponding to five times the court fee. Up to the fifth day in court, the fee increases by three times the court fee each day. From day six, the fee increases by four times the court fee.

### 7.12 Formalities Required Before Intiation

According to Section 5-2 of the Norwegian Dispute Act, it is mandatory to give a written notice/warning of the claim, hereunder the basis for the claim, to the person or persons against whom the action is being brought. The notice shall invite the opposite party to respond to the claim, and the response shall be given within 'reasonable time'. Breach of this rule does not have any bearing on the merits of the case, but it may be taken into consideration in awarding costs.

Furthermore, both parties are obliged to provide information relating to important evidence of which they are aware and cannot expect the opposite party to be aware of.

It is not mandatory to engage in mediation. However, according to the Dispute Act, the parties shall investigate whether it is possible to reach an amicable settlement before initiating court proceedings, and try to settle the dispute outside court.

As a matter of form, please note that the above-mentioned does not apply when filing for an interim injunction in accordance with chapter 34 of the Dispute Act.

### 7.13 Urgent Measures for Right Holders

Injunctions are available for the copyright-holder in urgent matters and may be requested before filing proceedings on the full merits.

### 7.14 Available Urgent Measures

The copyright-holder may file for an interim or preliminary injunction to secure a claim. In order to request an injunction, the copyright-holder must substantiate (a) the existence of the claim and (b) provide a reason for an injunction, and finally (c) substantiate that the injunction (if granted) is not disproportionately damaging to one party compared to the other party's interest – a balancing test.

If there is a need for urgent relief, such as imminent risk of loss or damage in case of delay, an injunction may be granted ex parte without the opposing party being heard in writing or orally. The main rule is that there is both a written reply and an oral hearing.

An injunction may also be made subject to the petitioning party providing security (ie, a bank guarantee) for any claims that may arise for the defendant due to the injunction.

In the so-called *Mein Kampf* case of 11 September 2003, the Norwegian Supreme Court stated that the requirement for a specific reason to demand an injunction ((b) above) will be considered fulfilled as long as a copyright infringement persists.

### **7.15 Obtaining Information and Evidence**

The parties to a copyright dispute are entitled to present and obtain all evidence that they wish. Both parties can obtain relevant information and evidence from the other party, as well as from parties not involved in the proceedings. Norway has normal rules of discovery and disclosure, and the parties are obliged to present all information that may constitute evidence in the proceeding, regardless of its likely effect on the outcome of the case.

To get access to relevant evidence, either party may as a first-step challenge the other to present the evidence voluntarily. If this is not complied with, a request may be made to the court to impose disclosure.

A fairly practical rule that may allow for withholding evidence, at least partially, is if the evidence is or contains trade secrets or confidential information.

### **7.16 Requesting Urgent Seizure**

There are no particular rules regarding seizure based on copyright-holders' claims – the general rules concerning injunctive relief apply as well as rules concerning customs seizure. Injunctive relief cannot be requested for monetary claims. Monetary claims can be secured urgently by so-called 'arrest'.

The requirements for filing arrest proceedings are that the defendant's conduct makes it likely that enforcement of the claim may otherwise risk being evaded or considerably impeded, or that it would have to take place in a different venue.

### **7.17 Addressing Intermediaries with Urgent Measures**

Provided that the intermediaries are seen as aiding in a copyright infringement, they may be subject to urgent measures such as an injunction.

### **7.18 Role of Experts in Copyright Proceedings**

Experts are generally used as expert witnesses to testify on factual issues, not legal issues. They may be court-appointed expert witnesses or the expert witnesses of the parties. Court-appointed experts may be appointed on the court's own initiative or pursuant to a request by either party. One type of copyright case where expert witnesses are normally used is in matters of alleged copying of software. The experts

are used to assess how much of the software in question is identical or similar, and to assess the likelihood of copying. The use of expert witnesses varies depending on the issues at hand and case by case, and there are often no expert witnesses.

### **7.19 Regimes Regarding Burden of Proof**

Particular types of copyrighted works do not have different systems or rules regarding burden of proof.

### **7.20 Sanctions**

The sanctions available in relation to copyright infringement include:

- criminal sanctions – fines or imprisonment;
- monetary damages;
- seizure and destruction; and
- injunctions.

### **7.21 Party Responsible for Paying Fees**

According to the Norwegian Dispute Act, all costs of litigation shall, as a rule, be awarded to the prevailing party, including attorney fees and court fees. Compensation for expenses varies, but expert witness costs are normally also recoverable. The courts are restrictive in accepting the parties' own use of time as a basis for a claim.

### **7.22 Average Duration of Proceedings**

The Dispute Act has statutory rules stating that a case shall be heard within six months of the submission of the writ, but this is not necessarily adhered to in reality.

For a case brought before the ordinary courts, an average time in the first instance is somewhere around six to eight months. Large complex cases with a lot of procedural issues, for example, may take much longer. Second instance appeal court proceedings will take longer, normally more than one year from the appeal.

### **7.23 Decisions Enforced**

Court decisions are normally fully adhered to by the parties without the need for enforcement. If a party does not adhere to a judgment voluntarily, it will be subjected to enforcement in accordance with enforcement proceedings.

### **7.24 Administrative or Criminal Means**

Copyright infringement does not constitute an administrative offence, but it may constitute a criminal offence and therefore be enforced through criminal means.

The Copyright Act contains a criminal-offence provision stating that persons who wilfully or negligently infringe the exclusive rights of the copyright-holder shall be fined or imprisoned for a term of up to three months.

### 7.25 Customs Seizure of Counterfeits and Parallel Imports

The Norwegian legal system provides for customs seizure of counterfeits and parallel imports. Relevant provisions are found under the Norwegian Act on Customs Duties and Movement of Goods (Customs Act), where it is stated that the customs authorities may – notwithstanding the duty of confidentiality – notify the copyright-holder in cases of reasoned suspicion that imported or exported goods that are subject to control by the customs authorities will constitute a violation of an intellectual property right. From the date that the notice was given, the customs authorities are allowed to detain the goods for up to ten business days. The above-mentioned rule does not apply to private import and/or export.

Furthermore, provided that the general requirements to request a temporary injunction under the Dispute Act are fulfilled, the court may order a temporary injunction against the recipient and decide that the customs authorities shall detain the goods as long as the import or export of the goods constitutes an infringement of the copyrighted work. The court may also make such an order if the proprietor of the goods is unknown. According to the Customs Act, the courts shall notify the customs authorities of any preliminary order.

### 7.26 Special Provisions

Oslo City Court is the fixed venue for ordinary (not injunctions) copyright cases, which means that the fixed Court of Appeal is Borgarting Appeal Court.

Otherwise there are no special rules or special courts.

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### 7.27 Full or Factual Review

The procedure in the appeal court may concern the case-handling, the facts, and the application of law in the first instance.

Specifically, the parties may present additional means of attack or defence, including additional arguments or defences, additional facts and/or additional evidence. The appellate court also reviews arguments or defences, facts and/or evidence that were presented and investigated in the first instance.

In the third and final instance – the Supreme Court – there is a hard selection of cases admitted, and only a review of case-handling and law.

### 7.28 Providing the Court with All Necessary Evidence

The parties are allowed to provide the court of second instance with the evidence they deem necessary, including new documents, unless the evidence is prescribed due to primarily being privileged, confidential or set forth too late.

However, as a general principle under Norwegian law, all evidence shall be presented as soon as possible and may be prescribed if withheld inappropriately. The court will also set a cut-off date prior to the oral hearing, after which new evidence will not be allowed.

### 7.29 Alternative Dispute Resolution

One of the objectives of the Norwegian Dispute Act is that disputes shall be resolved outside court. To this end, all courts offer court-sponsored mediation in the first instance. This is often accepted by the parties, and many cases are mediated and settled under this system. Other forms of ADR are not widespread concerning copyright.