



TERRALEX®

CROSS-BORDER COPYRIGHT GUIDE 2018



Brazil

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1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in Brazil is the Law No. 9610 of 19 February 1998 (LDA), which regulates copyright and neighbouring rights.

The LDA is the result of the Brazilian Government's effort to adapt previous Brazilian copyright law to the provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) of the World Intellectual Property Organization (WIPO). Besides the LDA, Brazilian Federal Constitutions and infra-constitutional laws have established the protection of copyright since 1827.

Brazil is also a signatory of the revised Berne Convention (ratified in Brazil in 1975) and of TRIPs (ratified in Brazil in 1994).

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The LDA establishes that any creation of the mind – by any way expressed and no matter the medium in which it is fixed (tangible or intangible, currently known or created in the future) – can be covered by copyright. The LDA offers a non-exhaustive list of examples of the intellectual works under protection:

Literary works

Literary works include texts of literary, artistic or scientific works, lectures, addresses, sermons and other works of the same kind.

Dramatic works

Dramatic works include dramatic and dramatic-musical works, and works of choreography or mime, whose stage performance is set down in writing or otherwise. This might be a script for a play, a dance routine that has been choreographed or a screenplay of a book for film.

Musical works

Musical works consist of musical compositions with or without lyrics, not including actions that are intended to be performed with the music. There is copyright regarding

the performance of a musical work but that is a separate and distinct right (see the section on neighbouring rights below).

Audiovisual works

Audiovisual works are those works that result from the fixing of images, with or without sound, whose purpose is to give, through their reproduction, an impression of movement, regardless of the processes used for capturing them, the medium initially or subsequently used for fixing them or the means used for disseminating the work. This category includes multimedia and cinematographic works.

Artistic works

An artistic work is a broad concept in scope and includes, amongst other things, photographs and works produced by a process analogous to photography, drawings, paintings, engravings, sculptures, lithographs and works of kinetic art, illustrations, maps and other works of the same kind, drafts, mock-ups, and visual arts relating to geography, engineering, topography, architecture, park and garden planning, stage scenery and science.

Adaptations

Adaptations, translations, and other transformations of an original work, presented as new intellectual creations. Protection granted to an adaptation is without prejudice to the copyrights of the original work.

Computer programs

A computer program is the expression of an organised set of instructions in natural or code language, contained in a physical medium of any kind, necessarily employed in automatic machines for the manipulation of data, devices, tools, or peripheral equipment, based on digital or analogue techniques, so they will operate in the way and with the purposes determined (with specific conditions regulated by Law No. 9609/1998).

Collections

Collections or compilations, anthologies, encyclopaedias, dictionaries, databases and other works which, by the selection, co-ordination or arrangement of the subject matter, constitute intellectual creations.

Neighbouring rights

The LDA also regulates neighbouring rights that protect the performance of interpreters and artists (eg actors, musicians, singers, dancers); the work of producers of phonograms and sound recordings; and the programmes of broadcasting companies.

2.2 What is required for works to qualify for copyright protection?

The LDA does not contain an express definition of 'work of authorship' and is silent about the prerequisites for its protection by copyright. Notwithstanding, the doctrine and jurisprudence understand that the concept of 'creations of mind by any way expressed' leads to the conclusion that, to be protected by copyright a work must be: (i) the result of creative activity and, consequently, original; and (ii) materialised in any kind of medium, tangible or intangible.

The requisite of originality is not absolute, and it is not necessary for the whole work to be original. In general, the threshold for originality is low in Brazil.

Additionally, the LDA expressly determines what shall not be object of copyright protection:

- ideas, normative procedures, systems, methods, projects or mathematical concepts
- schemes, plans or rules to carry out mental acts, games or businesses
- forms to be filled in with any type of information, scientific or not, and their instructions
- texts of treaties or conventions, laws, decrees, regulations, court decisions and other official acts
- information of common use, such as that contained in calendars, diaries, registers or legends
- isolated names and titles
- industrial or commercial exploitation of the ideas embodied in the works.

As a general rule, Brazil provides copyright protection if the author is a national of Brazil or is resident in a state which is a signatory to one of the various international conventions which Brazil is a party to, or resident in countries that assure Brazilians or persons resident in Brazil reciprocity in the protection of copyright or equivalent rights.

2.3 What rights does copyright grant to the rights holder?

According to the LDA, the author has the exclusive right to use, explore and dispose of the work. Moreover, the use of a work shall depend on the author's express prior authorisation, including for the following purposes:

- complete or partial reproduction
- publication
- adaptation, musical arrangement or any other transformation

- translation into any language
- incorporation in a phonogram or in an audiovisual production
- distribution
- incorporation in databases, storage in a computer, microfilming and any other storage format
- any other form of use currently existing or that may be created in the future.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In Brazil, the LDA affords the author the following moral rights:

- the right to claim authorship of the work at any time
- the right to have his or her name, pseudonym, or conventional sign to appear or to be announced as the author when the work is used
- the right to keep the work unpublished
- the right to ensure the integrity of the work by objecting to any modification or any derogatory treatment of the work or to any act that may be prejudicial to his/her reputation or honour as an author
- the right to modify the work either before or after it has been used
- the right to withdraw the work from circulation or to suspend any kind of use that has already been authorised where the circulation or the use of the work may have adverse impact on the reputation or image of the author
- the right to have access to the sole or a rare copy of the work that is lawfully in a third party's possession

In an audiovisual work, the director shall exercise the moral rights.

Moral rights are inalienable and irrevocable. Moreover, upon death of the author, the first four moral rights listed above shall be transferred to his or her successors.

Moral rights do not apply to computer programs, except for the right to claim authorship.

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works varies according to the type of work and the date of creation. In general, the duration of copyright protection is as follows:

Category
Literary, dramatic, musical or artistic works
Duration
Copyright expires 70 years as from 1 January of the year following the death of the author. The rights of the joint author who dies without heirs shall be added to the rights of the surviving authors. Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was released to the public
Category
Audiovisual and photographic works
Duration
Copyright expires 70 years from 1 January of the year in which the work was released to the public
Category
Neighbouring rights
Duration
Protection expires 70 years from 1 January of the year following fixation for phonograms, transmission for broadcasts and public performance in other cases
Category
Computer program
Duration
Copyright expires 50 years from 1 January of the year in which it was released to the public or, in the absence of such date, the date of its creation

2.6 For how long do moral rights subsist in copyright works?

An author's moral rights (see 2.4) are perpetual.

3. Ownership

3.1 Who is the first owner of a copyright work?

Pursuant to the LDA, the first owner of the copyright is the author of the work (ie the natural person who created the work). This means that a person who is shown as the author (or is announced as such) in the use of a work shall be deemed to be the author of the work, absence proof to the contrary. The main exception to this rule is where the work consists of a computer program, which shall belong to the employer or the contractor of the author, unless there is an agreement to the contrary.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where there is an assignment of the whole or of part of a work.

The joint author whose contribution can be used separately shall enjoy all the faculties inherent in its creation as an individual work, but is prohibited any use that may prejudice the exploitation of the whole work.

Unless otherwise agreed, the joint authors of a work shall jointly exercise their rights upon mutual agreement. The consent of all joint authors is required for licensing or using of the protected work.

When the work is done by the initiative, organisation and responsibility of one person and consists of the participation of different authors whose contributions merge into an autonomous creation, this is considered a collective work. In this case, each individual contribution shall be protected.

Regarding a collective work, any of the contributors may invoke their moral rights to prohibit indication of their name in connection with the collective work, without prejudice to their right to receive the remuneration accordingly.

The economic rights of a collective work shall belong to the organiser, and the agreement signed with each participant shall specify their contribution, delivery date, compensation and other conditions in relation to their work.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright protection is independent of registration; it arises automatically upon creation of the work.

However, authors and rights holders may register their work before the relevant public entity. The main registration authority in Brazil is the Copyright Office of the National Library. Regarding artwork, it is also possible to file pictures, paintings, and images before the Belas Artes School of the Federal University of Rio de Janeiro.

Although registration is optional, it is useful to ensure presumption of anteriority and/or to evidence authorship, date of creation and term of the relevant copyright.

3.4 What steps should you take to validly transfer, assign or license copyright?

According to the LDA, only economic rights can be assigned, transferred or licensed. The relevant agreement must be in writing, signed by or on behalf of the copyright owner, subject to the conditions of the LDA.

The assignment of the economic rights regarding future works shall encompass a maximum period of five years.

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights are inalienable and irrevocable and cannot be assigned or waived.

4. Infringement

Rights holders of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed.

This can be infringement of rights of exploitation or appropriation of a work under its own name (plagiarism). Often rights are infringed by producing and commercialising unlawful copies of works.

4.1 What acts constitute primary infringement of copyright?

Brazilian law does not differentiate between primary and secondary infringement as, for example, UK law does.

4.2 What acts constitute secondary infringement of copyright?

As stated above, Brazilian law does not differentiate between primary and secondary infringement.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be carried out in relation to copyright works despite the fact that they might be protected by copyright. These permitted acts (exceptions and limitations) are wide in variety but often relate to very specific scenarios. They include (amongst others):

Act
Reproduction of news and articles by the press
Description
Reproduction in the daily or periodical press of news or informative articles, from newspapers or magazines, with the mention of author's name (if signed) and of the publication from which they have been transcribed
Act
Reproduction of public speeches
Description
Reproduction in the daily or periodical press of speeches given at public meetings of any kind

Act
Reproduction of portraits
Description
Reproduction of portraits or of other works of representation of personal image, made as a work for hire, where the reproduction is done by the owner of the original work and the represented person or his heirs have no objection to it
Act
Reproduction for visually disabled individuals
Description
Reproduction of literary, artistic or scientific works for the exclusive use of visually disabled individuals, provided that the reproduction is done without commercial intent, either in Braille or another process using a medium designed for such users
Act
Private use
Description
Reproduction in one single copy of short extracts of a work for private personal use, without commercial intent. Stage and musical performance, where carried out in the family circle
Act
Quotation
Description
Quotations are permitted for studies, criticism and review, as long as the quotation includes an indication concerning the name of the author and the origin of the work
Act
Private study
Description
Notes taken by attendees of lessons given in teaching establishments, provided that their complete or partial publication is prohibited without the express prior authorisation of the person who gave the lessons

Act
Demonstration
Description
Use of literary, artistic or scientific works, phonograms and radio and television broadcasts in commercial establishments for the sole purpose of demonstration to customers, provided that said establishments commercialise the materials or equipment that make the use of such works possible
Act
Teaching purposes
Description
Stage and musical performance carried out exclusively for teaching purposes in educational establishments, without intent for profit
Act
Proof in judicial or administrative proceedings
Description
Use of literary, artistic or scientific works to produce judicial or administrative proceedings evidence
Act
Short extracts
Description
Reproduction in any work of short excerpts from existing works, regardless of their nature, or of the whole work in the case of a visual art, on condition that the reproduction is not <i>per se</i> the main subject matter of the new work and does not jeopardise the normal exploitation of the work reproduced or unjustifiably prejudice the author's legitimate interests
Act
Parody
Description
Paraphrases and parodies shall be free where they are not actual reproductions of the original work and are not in any way derogatory to it. It should be noted that parodied work does not excuse defamatory remarks or the moral right to object to derogatory treatment of a work

Act
Public places
Description
Works permanently located in public places may be freely represented by painting, drawing, photography and audiovisual processes

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The LDA does not provide specific provisions on linking or 'framing' of work covered by copyright. The mere insertion of a hyperlink may not *per se* be considered as copyright violation as it does not reproduce protected works, but rather directs the user to a specific site where the protected work may be freely accessed by the public.

However, linking or framing copyright material without the necessary consent may infringe the rights holders' exclusive right of public communication; thus, it is likely to be considered as copyright infringement.

4.5 Is a licensee of copyright able to bring an infringement action?

Under the LDA, copyright infringement is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action depends on the licence agreement between licensee and licensor.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The LDA provides the following remedies for rights holders:

- injunctions against the infringers (including search orders, freezing orders, and non-disclosure orders)
- seizure of infringing articles
- forfeiture of infringing articles and payment of the price of infringing articles sold to third parties
- indemnification for damages resulting from the infringement.

5.2 Are there any specific remedies for online copyright infringement?

The LDA does not provide any specific remedies for online copyright infringement. Where it appears that a website is displaying infringing material, rights holders can seek an injunction from the court ordering the internet service provider to remove the material or block the website.

The Brazilian Internet Act (Law 12.965/2014), which establishes the basic principles that govern the use of the internet in Brazil, also does not mention a specific proceeding against online copyright infringement. However, Article 19 of the Brazilian Internet Act determines that the provider of internet applications can only be subject to civil liability for damages resulting from content generated by third parties if, after a specific court order, it fails to take any steps to make unavailable the content that was identified as being unlawful.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There is one specific crime regarding copyright, established in the Penal Code (Decree No. 2848/1940). There are some variations regarding copyright and neighbouring rights infringement. The sanction for committing a criminal offence in relation to copyright is likely to be a fine and/or a prison sentence.

If an offence is committed by a company and it is proven that an individual officer of the company consented to committing the offence, that officer must also be liable for the criminal act.

In order to characterise each criminal act, evidence is required of different levels of intention, knowledge or belief on behalf of the potential offender, and each carries various penalties:

Criminal act
5.3.1 Copyright and neighbouring rights infringement.
Penalty
Three months to one year of criminal detention, or a fine.
Criminal act
5.3.1.1 If the violation consists of a total or partial reproduction of intellectual work, interpretation, performance or phonogram for profit, by any means, without the express authorisation of the author, performer, or producer, or of who represents them.
Penalty
Two to four years' imprisonment, and a fine.
Criminal act
5.3.1.2 If someone distributes, sells, exhibits for sale, rents, introduces into the country, acquires, hides or stores an original or copy of intellectual work or phonogram reproduced in violation of copyright or neighbouring rights; or rents an original or copy of intellectual work or phonogram, aiming at profit and without the express authorisation of the right holders or who represents them.
Penalty
Two to four years' imprisonment, and a fine.
Criminal act
5.3.1.3 If the violation consists in the offer to the public by cable, optic fibre, satellite, waves, or any other system that allows the user to make the selection of the work or production to receive it at a time and place previously determined by the one who formulates the demand, for profit, without express authorisation of the author, performer, phonogram producer or who represents them.
Penalty
Two to four years' imprisonment, and a fine.
Criminal act
5.3.1.4 Items 5.3.1.1, 5.3.1.2 and 5.3.1.3 above shall not apply in the case of an exception or limitation to copyright or neighbouring rights, or in case of copying an intellectual work or phonogram (only one copy) for the private use of the copyist, with no intention of direct or indirect profit.

6. Enforcement

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is three years to bring a claim for breach of copyright. Time begins to run from the date on which the rights holder became aware of the violation.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In Brazil, the general rule is that the unsuccessful party pays the statutory attorneys' fees and court costs of the successful party. However, this is subject to the very wide discretion of the court, who can order otherwise, and the costs could be shared by the parties should the final decision only partially grant the claims of one party.

6.1 What courts can you bring a copyright infringement action in, and, what monetary thresholds, if any, apply?

Copyright litigation matters can be brought to ordinary state civil courts.

The special courts for small claims (*Juizado Especial Cível* – JEC) provide an alternative for less complex cases that involve claims worth less than R\$35,200 (approximately US\$10,000).

Copyright litigation matters resulting from employment relationships will probably be directed to the relevant labour courts.

6.2 Are there any other ways in which you can enforce copyright?

Criminal proceedings, although rare, can be brought on the grounds described in 5.3 above, and pursued through the criminal courts.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? What do they do?

The Brazilian Ministry of Culture is the official government body responsible for the promotion of copyright protection in Brazil.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the rights holder.

However, as a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to all those seeking them, rights holders participate in collection schemes by signing up as members of the collecting societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent.

7. Copyright reform

The key collecting societies in each sector are as follows:

Agency
ECAD - Central Office for Collection and Distribution
Who it represents
Authors, performers, musicians; publishing and recording companies
Agency
UBEM – Brazilian Union of Music Editors
Who it represents
Music editors
Agency
ABMI – Independent Brazilian Music Association
Who it represents
Musicians

6.5 Are copyright levies payable? By whom, and in what circumstances?

Copyright levies are not payable in Brazil.

7.1 What do you consider to be the top recent copyright development?

Collective copyright system

In 2013, a proposal to reestablish the Ministry of Culture as the responsible authority to manage the collective copyright system was approved. Law No. 12853/2013 establishes that ECAD, the organisation that collects and distributes royalties for public performance rights, will be regulated and monitored by the Brazilian Ministry of Culture. The scope of the Law was the transparency, efficiency, modernisation and regulation of the collection and distribution of royalties.

ECAD challenged the constitutionality of Law No. 12853/2013 before the Brazilian Supreme Court, which ruled against ECAD.

7.2 What do you consider will be the top copyright development in the next year?

Revision of Copyright Law

The Copyright Reform Bill has been under analysis by the Brazilian Congress since 2012. The Reform Bill includes, among others changes, the increasing of exceptions and limits to copyright protection as well as the regulation of use and exploitation of copyrighted works on the internet.

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