



# ICLG

The International Comparative Legal Guide to:

# Copyright 2017

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A practical cross-border insight into copyright law

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With contributions from:

Atsumi & Sakai

Bereskin & Parr LLP

Deep & Far Attorneys-at-Law

Dumont Bergman Bider & Co., S.C.

East & Concord Partners

Goroditsky & Partners (Ukraine)

Güzeldere & Balkan Law Firm

Hamdan AlShamsi Lawyers & Legal Consultants

HOYNG ROKH MONEGIER

J Pereira da Cruz

KG Law Firm

LPS L@w

Meisser & Partners AG

MinterEllison

Pereira da Cruz e Associados, R.L.

S. P. A. Ajibade & Co.

Schwärzler Attorneys at Law

Sheppard Mullin Richter & Hampton LLP

SyCip Salazar Hernandez & Gatmaitan

Tay & Partners

Tilling Peters LLC

Weisselberg Avocat



global legal group

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**Group Consulting Editor**  
Alan Falach

**Group Publisher**  
Richard Firth

**Published by**  
Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
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URL: www.glgroup.co.uk

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# Senegal

Léon Patrice Sarr



Ndèye Khady Youm



LPS L@w

## 1 Copyright Subsistence

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

Under Senegalese law, for copyright to subsist in work, the work must be a “work of mind” (“*œuvre de l’esprit*”) and it must be original. Under Article 7 of the Act n°2008-09 dated January 25, 2008 relating to copyright and related rights (the Copyright Act), “originality” is defined as the footprint of the personality of the author.

### 1.2 On the presumption that copyright can arise in literary, artistic and musical works, are there any other works in which copyright can subsist and are there any works which are excluded from copyright protection?

Under Article 6 of the Copyright Act, “work of mind” includes literary, artistic and musical work, as well as maps, plans, sketches and plastic works relating to geography, topography, architecture and science.

The Copyright Act provides that copyright also subsists on works derived from a pre-existent work provided that it is original. Therefore, copyright subsists in:

- translations and adaptations; and
- anthologies and collections of works or diverse data, such as databases and computer programs.

However, under Articles 9, 10, and 11 of the Copyright Act, copyright protection is excluded from:

- the official legislative, administrative or judicial texts and their official translations;
- ideas, procedures, methods of functioning or mathematical concepts as such; and
- information; specifically, daily information.

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

There is no system of registration. Article 2 of the Copyright Act provides that a work is protected as of its creation. However, in practice, authors may be well advised to seek registration of their work in order to secure proof of their ownership and priority. The best practice is to register their work with the Senegalese Copyright Office (“*Sénégalaise du Droit d’Auteur et des Droits Voisins SODAV ex Bureau Sénégalais du Droit d’Auteur BSDA*”).

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

The Copyright Act distinguishes between moral rights and patrimonial rights. A moral right is imprescriptible. The duration of patrimonial rights is the entire life of the author and 70 years after their death.

In the case of a “collaboration work”, the duration of patrimonial rights is the entire life of the last surviving collaborator and 70 years after his death.

In the case of a “posthumous work”, the duration is 70 years starting from the publication of the work.

In the case of an anonymous or pseudonym work, the duration of patrimonial rights is 70 years starting from the publication. If the work has not been published during the 70 years following its completion, the duration of the patrimonial rights is 70 years starting from the completion date of the work.

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

Yes, there is an overlap between copyright and other intellectual property rights. An author can accumulate copyright, design rights and a trademark provided the work meets the conditions required.

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

There is no specific provision contained in the Copyright Act which restricts the protection of a work made by an industrial process.

## 2 Ownership

### 2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

The first owner of copyright is the author. The author, pursuant to Article 12 of the Copyright Act, is the person who created the work. However, in the case of publication of the work, the author is, under Article 14 of the Copyright Act, the person under whose name the publication is created, unless the contrary is proven.

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

Article 22 of the Copyright Act provides that, when a work is commissioned, the transfer of the ownership on the material support of the work does not include the transfer of patrimonial rights. This means that the author remains the owner of the copyright.

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

There are two types of employees: those employed by an individual or a private entity called “*salarié*”; and those employed by the State called “*fonctionnaire*”.

Employees are the owners of the copyright on works that they create.

However, pursuant to Article 18 of the Copyright Act, patrimonial rights on works created by *salarié* in the course of employment are presumed assigned to the employer by reason of the employment agreement to the extent justified by the normal activities at the time of creation of the work. The employer must pay *salarié* an additional amount different from the salary in the case he exploits the work. If the employer and the *salarié* fail to agree on the amount of the additional payment, the amount is fixed by the Courts.

Furthermore, pursuant to Article 20 of the Copyright Act, to the strict extent necessary to the accomplishment of a public interest mission, patrimonial rights on works created by *fonctionnaire* in the course of employment or under instructions received are presumed assigned to the administration to which they belong, starting from the creation date.

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

The Copyright Act recognises the concept of joint ownership on collaborative work (“*œuvre collaborative*”). Pursuant to Article 23 of the Copyright Act, “collaborative work” is defined as a work that is created by two or several authors without consideration of the fact that the work is undivided or is composed of separate works.

The ownership of the copyright is undivided between the authors. Thus, the exercise of copyright must be done on mutual agreement. In the case authors fail to find the mutual agreement, Courts are competent. However, in the case of breach of the copyright on the collaborative work, each co-author is entitled to go to Court and claim compensation.

Pursuant to Article 25 of the Copyright Act, each co-author whose contribution is identifiable can, unless agreed otherwise, exploit it separately to the extent that the exploitation does not harm the exploitation of the collaborative work.

## 3 Exploitation

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

Only patrimonial rights can be assigned. Pursuant to Article 62 of the Copyright Act, with respect to the author, the assignment is proved by written or an equivalent mode. In addition, Article 63 of the Copyright Act provides that each patrimonial right must be namely assigned, whereas the assigned right must be specified as to its scope and purpose, its duration and its territory of use.

The assignment can be free. However, pursuant to Article 65 of the Copyright Act, when a price is fixed, it must be, proportional to the revenue made out of the exploitation of the work. The Copyright Act provides exceptions when means of calculation do not exist, the use of the work is an accessory to the object exploited or the control fees are above the expected result.

The above-mentioned formalities do not apply to a commissioned work.

### 3.2 Are there any formalities required for a copyright licence?

Licence agreements are subject to the above-mentioned formalities.

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

There is no specific provision restricting the licence terms parties may agree, except for the general principle which states that moral rights cannot be assigned.

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

Pursuant to Article 112 of the Copyright Act, collective licensing bodies can be created for each directory of copyright work. Since February 4, 2016, the “*Senegalaise des Droits d’Auteurs et des Droits Voisins, SODAV*” has been the collective licensing body in charge of activities relating to the collection and distribution of copyrights. However, the Copyright Act provides that authors are free to create other collective licensing bodies.

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

Collective licensing bodies are constituted and regulated under the provisions of the Senegalese Civil and Obligations Code relating to civil companies. Specific provisions included in the Copyright Act and its application decree (Decree N°2015-682 dated May 26, 2015) also apply. The Ministry of Culture can control the validity of their statutes. Their common control is done by the “*Commission Permanente de Contrôle des Sociétés de Gestion Collective*”.

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

The Copyright Act does not cover this issue. However, collective licence terms are subject to common law and can be challenged on any available pertinent ground.

## 4 Owners’ Rights

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

As mentioned above, any exploitation of a copyright work shall be namely assigned. Therefore, any act not included into the assignment is capable of being restricted by the rights holder and considered as an act of infringement.

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#### 4.2 Are there any ancillary rights related to copyright, such as moral rights, and if so what do they protect, and can they be waived or assigned?

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The Copyright Act provides moral rights and related rights to copyright. Pursuant to Article 27 of the Copyright Act, moral rights are the expression of the link between the work and its author.

Moral rights are divided into four components: disclosure; authorship; respect of the work; and a right of reconsider.

The author shall solely decide when the work shall be made available to the public. The author must be displayed to the public – whatever the use of the work – and has the right to control and prevent any change capable of affecting the integrity and the quality of the work. The right of reconsider allows for the author to claim for the withdrawal of the work from the market following compensation.

Article 86 of the Copyright Act lists relating rights. They are granted to: performers; phonogram and video producers; radio-television organisations; and publishers. Relating rights are divided into moral rights and patrimonial rights. Moral rights are subject to the same restriction and characteristics listed above, but patrimonial rights can be assigned.

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#### 4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

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The copyright owner cannot restrain subsequent dealings in works that have been put on the market with his consent.

## 5 Copyright Enforcement

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#### 5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

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The statutory enforcement agency is the “*Brigade Nationale de Lute contre la Piraterie et la Contrefaçon, BNLCF*” and has been created by Decree N°2006-1398 dated December 28, 2006 and is vested with the power to investigate, establish and prosecute violations relating to copyright. However, the BNLCF has no power of sanction. It reports the violations and their authors to the Prosecutor who can refer the case to a Criminal Court or an Investigating Judge. BNLCF is used alternatively or in addition to civil actions. The customs also control and seize upon request, or on their sole initiative, the goods they detain.

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

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Yes. Pursuant to Article 127 of the Copyright Act, in addition to the copyright owner, collective licensing bodies and professional associations legally constituted can also claim for their members the assignee of a copyright to the extent of the right assigned.

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#### 5.3 Can an action be brought against ‘secondary’ infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

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The Copyright Act does not provide for concerning “secondary” infringers. However, anyone infringing copyrights can be prosecuted.

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

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Yes. Articles 38 to 46 of the Copyright Act provide limited exceptions which can be relied upon as a defence to a claim of infringement. They are: free communication in a family circle or during a religious service in rooms reserved for that purpose; copies or reproductions strictly reserved for private use; backup copies of a computer program; analyses and quotations, parody and educational use; press reviews; and use of graphic and plastic work located in a public area.

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#### 5.5 Are interim or permanent injunctions available?

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Yes. Article 132 of the Copyright Act provides that the court may order the following injunctions:

- suspension of manufacturing of unauthorised reproduction;
- seizure at any moment of unauthorised reproduction copies, already manufactured or in the course of manufacturing, of incomes, as well copies illicitly used;
- suspension of any unauthorised communication to the public; and
- seizure of income deriving from any unauthorised reproduction or communication to the public.

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

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Pursuant to Article 152 of the Copyright Act, damages are calculated by the losses and the moral prejudice, as well the profits illegally made and the expenses, including court costs, caused by the act of violation.

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

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Costs of infringement proceedings vary a lot depending on the circumstances of each case. There are no standard legal costs. A proceeding on the merits at first instance may take between two months and two years until a judgment is rendered.

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#### 5.8 Is there a right of appeal from a first instance judgment and if so what are the grounds on which an appeal may be brought?

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Yes. The Appeal Court will review the entire case. Therefore, the Appeal Court is entitled to reverse or confirm the first decision in all or part of its provisions.

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

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The statute of limitation is 10 years for civil actions, commencing from the date when the owner knows or should have known about the existence of the infringement. However, in the case that the owner starts proceedings with an infringement seizure, he has 30 days starting from the date of the seizure to refer the case to Court, and if not, the release of the seizure can be obtained.

The statute of limitation is three years for criminal actions. In principle, the starting point is when the infringing activity has ceased.

## 6 Criminal Offences

### 6.1 Are there any criminal offences relating to copyright infringement?

Yes. Criminal offences are listed by Articles 142 to 147 of the Copyright Act and include:

- infringement of the exploitation rights;
- distribution, import and export of illicit copies;
- infringement of moral rights;
- infringement of the technical measures; and
- failure to pay equitable remuneration and remuneration for private copying.

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

The Copyright Act has no provision relating to the threshold for criminal liability. It means that the claimant will only be required to demonstrate that the defender voluntarily infringes the copyright.

The sanctions of the infringement of the exploitation and moral rights and distribution, import and export of illicit copies are imprisonment of one month to two years and a fine between 1 to 5 million francs CFA. The sanctions for infringement of technical measures and failure to pay equitable remuneration and remuneration for private copying are imprisonment of one to three months and a fine of 500,000 francs CFA, respectively. In the case of recidivism, the sanctions are doubled.

In the case of condemnation on the ground of one of the above-mentioned offenses, the Court orders the destruction of illegal copies and the confiscation of the equipment specially installed to realise the infringement. The Court can order the display and publication of the judgment or extracts of the judgment. In the case of recidivism on the ground of infringement of the exploitation and moral rights and distribution, import and export of illicit copies, the Court can order the temporary or permanent closure of establishments operated by the infringer and his accomplices.

## 7 Current Developments

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

The significant developments have been the adoption of the Decree N°2015-682 dated May 26, 2015 and the licence granted to SODAV on February 4, 2016.

After the adoption of the Copyright Act, an application decree was supposed to follow in order to set out the conditions that are to be met by collecting licensing bodies in order for them to grant a licence, determine the exercise of the rights and fight against forgery. Awaiting that decree, several copyright owners adopted on December 17, 2013 the bylaws of the first collective licensing body, called the SODAV, which aimed to replace the BSDA.

The application decree was finally signed on May 26, 2015, and was warmly welcomed by copyright owners as it was the final step of an almost 10-year old process.

Immediately after, SODAV applied to be granted a licence to operate, and on February 4, 2016, that the licence was finally granted. Copyright owners much appreciated the introduction of the new act. Granting the licence to SODAV was also the death of the BSDA, created by the former Copyright Act N°73-52 dated December 4, 1973.

### 7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, etc.)?

To the best of our knowledge, there are no noteworthy issues regarding the application and enforcement of copyright in relation to digital content.



### Léon Patrice Sarr

LPS L@w  
12 Boulevard Djily MBAYE  
Immeuble Azur 15  
Dakar  
Senegal

Tel: +221 33 933 14 84 / +221 30 106 57 57  
Email: [lp.sarr@lps-law.com](mailto:lp.sarr@lps-law.com)  
URL: [www.lps-law.com](http://www.lps-law.com)

Léon Patrice is the Managing Partner of LPS L@w. His experience with various renowned Senegalese and foreign law firms and his ability to work in several branches of law gives him an international stature. His prompt capacity to understand and formulate innovative solutions allows him to complete very complex cases successfully.

His practice areas include:

- Information and Technology.
- Intellectual Property.
- Mergers and Acquisitions.
- Energy and Natural Resources.



### Ndèye Khady Youm

LPS L@w  
12 Boulevard Djily MBAYE  
Immeuble Azur 15  
Dakar  
Senegal

Tel: +221 33 933 14 84 / +221 30 106 57 57  
Email: [nk.youm@lps-law.com](mailto:nk.youm@lps-law.com)  
URL: [www.lps-law.com](http://www.lps-law.com)

Ndèye Khady is an Associate at LPS L@w. She is hardworking and always eager to serve. She always delivers a satisfactory performance.

Her practice areas include:

- Corporate and Commercial.
- Banking and Finance.
- Information and Technology.
- Intellectual Property.
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59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

[www.iclg.co.uk](http://www.iclg.co.uk)