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Ownership and infringement of copyright

What is copyright?

Copyright is a form of intellectual property protection for a variety of literary and artistic endeavours. Australian law recognises that individuals have the right to protect the moral and economic interests arising from their creative works. It is not ideas but their expression that is protected by copyright law.

In Australia, copyright law is set out in the Copyright Act 1968 (the Act), and in court decisions which have interpreted the provisions of the Act. From time to time the Act is amended to keep the law relevant and up to date. The most recent amendments were passed by Parliament on 5 December 2006.

The law gives owners of copyright exclusive rights to do certain things with their material. Copyright is intended to protect creative works from being used without the agreement of the owner and to provide an incentive for creators to continue to create new materials.

What does copyright protect?

Literary works including books, newspaper articles, computer programs and compilations including anthologies and directories.

Dramatic works including plays, dance and mime.

Musical works including scores and combinations of melody and harmony.

Artistic works including paintings, drawings, cartoons, photographs, sculpture and craft work.

Cinematograph films including films, videos and TV programs.

Sound recordings including compact discs, tapes and records.

Broadcasts which are sound broadcasts and television programs.

Published editions which are publishers' typographical arrangement.

It is important to note that copyright protects films, sound recordings, broadcasts and published editions separately from the works, such as music and scripts, contained in them.

Requirements for protection

There is no requirement for registration of copyright in Australia. Copyright protection does not depend on publication, a copyright notice, or any other procedure - the protection is free and automatic. A creative work is protected from the time it is first written down or recorded in some way, provided it has resulted from the creator's skill and effort and is not merely copied from another work. By virtue of international copyright treaties, Australian copyright law protects works created in most countries and Australian works receive protection in most countries.

The copyright notice

To remind people that a work is protected, and to identify the copyright owner, it is recommended that creators put a copyright notice on their work. The notice consists of the international copyright symbol, the name of the copyright owner and the year of first publication (or the year of creation, if not published); for example © Jane Brown 2005.

Duration of copyright

The duration of copyright protection varies according to the type of material protected. In most cases, copyright lasts for the life of the creator plus 70 years. After expiry of copyright, the work enters what is known as the 'public domain' where it can be freely used without permission.

Ownership of copyright

The general rule contained in the Act is that the creator of a work is the first owner of copyright. The exceptions to this rule are:

- material created by most employees in the course of their employment (with the exception of people working freelance, who generally own copyright in their work);
- some commissioned artistic material; and
- material made or first published by, or under the direction or control of, the Commonwealth or State Governments.

Also, where the work is the product of collaboration copyright may be owned jointly.

However, the rules about ownership of copyright as set out in the Act can be varied by an agreement between the parties concerned.

Certain rights in works created by print media employees.

Ownership of copyright in works created by staff journalists who write for a newspaper, magazine or similar periodical is usually divided between the author and the employer. For works created before 30 July 1998, the proprietor owns copyright for the purposes of publishing in newspapers and magazines and broadcasting, and the author owns copyright for other purposes. For works created after 30 July 1998, the author owns copyright for the purposes of book publication and photocopying, and the proprietor owns copyright for all other purposes, including publishing in newspapers and magazines, broadcasting and electronic publication.

Certain commissioned works

Where a photograph was commissioned before 30 July 1998, the client is the owner of copyright unless there was an agreement to the contrary. For photographs commissioned after 30 July 1998, the photographer is the owner of copyright except if the photograph was commissioned for a private or domestic purpose.

Commonwealth or State publications

Copyright in material made or first published by, or under the direction or control of the Commonwealth or State Governments is owned by the Commonwealth or the State. The 'Commonwealth or State' includes departments but may not extend

to independent statutory authorities. The same rules extend to external Territories of Australia.

Exclusive rights of copyright owners

Owners of copyright have exclusive rights to deal with their works in certain ways, as set out below. The type and extent of the rights differ according to the type of material protected.

Literary, dramatic and musical works: the right to reproduce (including digitising hard copy material and vice versa), publish, perform in public, communicate to the public and adapt (includes translation and dramatisation).

Artistic works: the right to reproduce, publish, and communicate to the public.

Cinematograph films: the right to make a copy, communicate the film to the public, cause to be seen in public.

Sound recordings: the right to make a copy, communicate the recording to the public, cause to be heard in public.

Broadcasts: the right to make a film of a television broadcast, to make a sound recording of a sound broadcast, and the right to re-broadcast or communicate to the public by other than broadcast.

Published editions: the right to reproduce.

As of 1 January 1996, owners of copyright in computer programs and sound recordings have the exclusive right to rent these items.

Copyright owners may assign or license these rights to others, with or without limitations (such as type of use or period of time) and conditions (such as payment).

Assigning and licensing copyright

Ownership of copyright is often varied by agreement. Copyright owners may sell, donate, bequeath or permit the use of the whole or part of their copyright.

A transfer of ownership is referred to as an "assignment" and must be in writing and signed by or on behalf of the copyright owner. A permission to use copyright material is a "licence".

Both assigning and licensing may affect your right to share in the proceeds from exploitation of a work. For example, the publisher of a work may be entitled to share in proceeds from a work in return for their investment in publishing that work.

Where rights are controlled by a publisher

Under a contract, such as a book publishing contract, the publisher may control the "reprographic" right in the work, which is the right to copy the work by reprographic means including photocopying. The contract will often state how proceeds from the exploitation of this right are to be divided.

You should check your contract for a clause dealing either with photocopying or "reprographic rights". If there is no such clause, look for a clause covering "miscellaneous" or "subsidiary" rights, or obtain legal advice.

Many contracts also refer to "electronic" or "digital" rights. With effect from 4 March 2001, the Act allows extends the reproduction right to include reproduction of electronic material and conversion to electronic form of print material. The Act also includes a new right, that of communication to the public. This includes broadcasting, transmission and making available to the public electronic material.

Rightsholders should check their contracts to clarify any references to electronic or digital rights.

Where rights are retained by the author

In some cases, the publisher of a work will not have a contractual right to share in payment for the photocopying of the work. For example, an author who submits an article to a journal for publication usually grants the publisher a licence to publish the work in the journal. The author does not normally grant any other rights in the work. In this situation, only the author would be entitled to moneys allocated for the copying of that work. Rights in a work may also revert to the author if a work goes out of print.

Journalists, whether freelance or employed, would usually be entitled to the entire amount collected for the copying of their works as they own the relevant rights.

Infringement of copyright

Dealing with copyright material in any of the ways listed above, without the copyright owner's permission, will usually be an infringement of copyright. Dealing with part of a work may also infringe copyright if that part is important to the work – it need not be a proportionally large part. Copyright may also be infringed by authorising the doing of any of the acts listed above; by importing articles containing copyright material; and by selling infringing articles.

Exceptions to infringement

There are exceptions to infringement which allow some uses of copyright material without permission. These exceptions include:

Fair dealing for the purpose of research or study, which allows a student or researcher to copy protected material. Copying 10% or one chapter of a published literary, dramatic or musical work, of 10 pages or more, and one article from a periodical, is deemed to be fair.

Fair dealing for the purpose of criticism or review. This exception allows reviewers to make a fair use of copyright material, provided they acknowledge the work.

Fair dealing for parody and satire. As of 11 December 2006, new amendments allow fair dealings for parody and satire. Parody may involve the imitation of an author or work for ridicule or comic effect. Satire may involve using irony or wit to comment on an idea, attitude, institution or social practice.

Statutory licences which allow educational institutions and institutions assisting people with disabilities to reproduce and to communicate to the public protected material for defined purposes, without the need to obtain the copyright owner's permission, The Commonwealth, State and Territory governments are allowed to reproduce material without permission.

Special purposes. New flexible dealing exceptions allow libraries, educational institutions and the disabled to copy works where there is no other exception or statutory licence they can rely on in the Act, so long as the use is not made for commercial advantage or profit, and the following criteria is met: the use amounts to a 'special case'; reproduction with a normal use of the work; and the use does not unreasonably prejudice the interests of the copyright owner.

Private copying. Amendments to the Act now allow for format-shifting, where certain types of material owned for private and domestic use may be copied into a different 'format' by the user. For example CDs copied to MP3, or hard copy newspaper articles digitally scanned for private use. To rely on this exception, the original copy you own must be kept, and must be a legitimate copy. You may also legally record broadcasts to view at a more convenient time for private use, but not for creation of home libraries of content.

Remedies for infringement

Where a person has evidence that his or her copyright has been infringed, he or she may bring a civil action against the infringer for compensation and other remedies. Infringement actions are generally brought in the Federal or State Supreme Courts which can award various remedies including:

- **Damages** This is payment of money to compensate for the infringement. Damages are often based on the amount that the copyright owner may have charged for the use of the work. In some circumstances a court may award additional damages if the infringement is particularly flagrant.
- **An account of profits.** This is payment of any profits the infringer has made from using the work.
- **An injunction.** This is a court order prohibiting the infringer from continuing to infringe copyright.

Under the Act some infringements are criminal offences, for which penalties, including fines and jail sentences, are prescribed.

Who may take action for infringement?

Only the copyright owner or an exclusive licensee of the copyright is entitled to commence proceedings for infringement.

What do I do if my copyright has been infringed?

If you know or suspect that your copyright has been infringed (for example someone has photocopied your work in a situation where no exception applies) and it is not a matter that can be resolved amicably, you should obtain some evidence of the infringement and seek legal advice as to your rights.

If your adviser considers you have a right of action, he or she will make contact with the other party, usually by sending what is known as a "letter of demand" requiring the other party to stop infringing copyright and possibly including a claim for compensation. If the other party fails to comply with your demand you should then consider commencing court action.

What constitutes good evidence of infringement?

In order to succeed in an infringement action you must show, using the best evidence available, that, on the balance of probabilities, your copyright has been infringed.

Recent changes to the Act relating to evidential presumptions have removed the burden that has until now rested with the copyright owner to prove copyright ownership. Therefore notices placed on copyright material by copyright owners to indicate ownership will now be assumed to be correct.

However, first hand evidence is still required, such as:

- infringing copies of copyright material,
- evidence from people who have copied, witnessed the copying of, or received copied material;
- documentation which shows that copying has taken place.

You should obtain the names and contact details of people who can give such evidence and would be prepared to do so in infringement proceedings.

Where do I go for advice?

You should consult a solicitor, preferably one with experience in dealing with copyright matters. The Law Society in your State can refer you to an appropriate solicitor.

Becoming a member of Copyright Agency Limited (CAL)

If you control copyright in a literary or artistic work, you may be eligible to join CAL. Membership is free. Contact CAL for more information.

More information

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