

Copyright infringement is the unauthorised use of works or other subject matter protected by copyright. This article provides a general overview of copyright law and copyright infringement.



Copyright is one part of an area of law known as intellectual property, designed to reward and encourage intellectual creativity and innovation. Copyright provides legal protection for the form or way an idea or information is expressed. Copyright is an important asset to creators as it allows them to generate income.

It is important to remember that copyright does not protect the physical property in which the work exists but the way in which the work 'subsists', by granting rights to do certain things with the work that only the owner of the copyrighted work can have.

Unlike trademarks, in Australia, there is no need to register a work as copyright protection is granted automatically from the time an original work is created. While the © symbol is often used to notify others that the work is protected by copyright, it is not necessary for protection to exist.

### **A. WHAT IS PROTECTED?**

The Copyright Act sets out the works and other subject-matter that may be copyrighted.

Works include:

- Literary works;
- Dramatic works;
- Musical works; and
- Artistic works including works of artistic craftsmanship.

Other subject-matters include:

- Sound recordings;
- Cinematograph films;
- Broadcasts; and
- Published editions.

To be protected, the work must be original, ie a product of the creator's own intellectual skill and labour, and not copied from

another person's work. Copyright does not protect ideas or information and therefore the work must be expressed in material form.

The creator of the copyrighted work must be a resident or citizen of Australia, or made or first published in Australia, or has a specified connection with a country which is a member of a relevant international copyright treaty such as the Berne Convention for the Protection of Literary and Artistic Works.

### **B. WHO OWNS THE COPYRIGHT?**

As a general rule, copyright vests in the 'author' of the work or subject matter, the person who created the copyrighted work or subject matter. Joint authorship results in joint ownership of the copyright as tenants-in-common. However, there are several exceptions to this principle, being:

- Commissioned works where the person who commissioned the work is the copyright owner;
- Employee works where the work is made during the course of employment under an employment contract; and
- Crown ownership where the work created was under the direction of the Commonwealth or a State government

Ownership of copyright can always be modified by agreement.

### **C. WHAT RIGHTS DOES THE COPYRIGHT OWNER HAVE?**

The rights of the copyright owner are set out under section 31(1) of the Copyright Act. This includes the rights to:

- Reproduce the work in a material form;
- Publish the work;
- Perform the work in public;
- Communicate the work to the public;
- Make an adaptation of the work; or



- Enter into commercial rental arrangements.

The copyright owner can also assign the copyright (transfer to a third party the ownership and all rights deriving from the ownership) and licence the copyright (allow a third party to exercise some or all of the exclusive rights without giving the ownership and rights deriving from the ownership). Assignment and licensing of the copyright is often under certain conditions such as payment of a fee or royalty. Similar to real property, copyright can also be sold, left by will or passed on according to the laws relating to intestacy or bankruptcy.

#### **D. WHEN IS COPYRIGHT INFRINGED?**

Copyright in the work or subject-matter is infringed (directly) when the rights to deal with copyrighted work granted to the copyright owner (subject to licence) is done by someone without permission of the copyright owner. Direct infringement is a strict liability offence which means that the intention to infringe is not relevant, but the lack of knowledge may influence the remedy ordered.

When deciding whether copyright has been infringed, the court will assess whether the 'copied' work is similar to the original based on a comparison of the works. The question of whether the alleged infringer had access to the original work is also asked. Finally, the test for copyright infringement is whether a 'substantial part' of the copyrighted work is involved. This means whether it is a vital or important part of the copyrighted work, based on quality rather than quantity though quantity may be relevant for the remedy granted to the copyright owner. Whether there has been copyright infringement is decided on a case by case basis.

Indirect infringement can occur when an act of direct infringement has taken place, and involves a further dealing as a result of that infringing act. This includes importation and sale of infringing works ("pirate goods") or the act of permitting a place of public entertainment to be used for infringing performances. Recently, courts have also imposed an obligation on Internet Service Providers to adopt and reasonably implement a policy that provides for termination of the accounts of repeat copyright infringers. There are also restrictions on importation of certain legitimate copyrighted works into Australia without the permission of the copyright owner ("parallel importation").

#### **E. WHAT ARE THE EXCEPTIONS TO INFRINGEMENT?**

Depending on the facts of the case, there are some exceptions / "defences" to the exercise of the rights of the copyright owner without constituting copyright infringement. Some of these are:

- Fair dealing, for purposes of research or study, criticism or review, parody or satire, reporting the news, or giving of professional advice by a lawyer or a patent or trademarks attorney;
- Format-shifting or time-shifting for private or domestic use or special purpose such as use by libraries or archives, educational institutions and by persons with a disability; or
- Incidental use in film and television broadcast

#### **F. WHAT CAN THE COPYRIGHT OWNER DO?**

If the copyright owner thinks someone has infringed their copyright, the copyright owner should take action quickly against the person to enforce the copyright, either on their own behalf or through a lawyer.

The copyright owner may be granted an injunction to swiftly stop the person from infringing or continuing to infringe the copyright. The copyright owner may also seek damages or account of profits for the unauthorised use of their copyrighted work. The Copyright Act also contains a number of criminal

**Comasters is able to issue a Letter of Demand on behalf of the client as a first step if a copyright has been infringed, and pursue the matter further through litigation if and as required. Comasters is also able to draft and review a range of copyright agreements and**

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