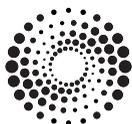


The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

15th EDITION



THOMSON REUTERS

REDFERN LEGAL CENTRE PUBLISHING

Published in Sydney
by Thomson Reuters (Professional) Australia Limited
ABN 64 058 914 668

19 Harris Street, Pyrmont NSW 2009
First edition published by Redfern Legal Centre as *The Legal Resources Book (NSW)* in 1978.
First published as *The Law Handbook* in 1983
Second edition 1986
Third edition 1988
Fourth edition 1991
Fifth edition 1995
Sixth edition 1997
Seventh edition 1999
Eighth edition 2002
Ninth edition 2004
Tenth edition 2007
Eleventh edition 2009
Twelfth edition 2012
Thirteenth edition 2014
Fourteenth edition 2016
Fifteenth edition 2019

Note to readers: While every effort has been made to ensure the information in this book is as up to date and as accurate as possible, the law is complex and constantly changing and readers are advised to seek expert advice when faced with specific problems. *The Law Handbook* is intended as a guide to the law and should not be used as a substitute for legal advice.

ISBN: 9780455243689

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This edition is up to date as of 1 October 2019.

The Law Handbook is part of a family of legal resource books published in other states:

Vic: *The Law Handbook* by Fitzroy Legal Service, ph: (03) 9419 3744

SA: *Law Handbook* by the Legal Services Commission of South Australia, ph: (08) 8111 5555

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NT: *The Northern Territory Law Handbook* by Northern Territory Legal Aid Commission, Australasian Legal Information Institute and Darwin Community Legal Services, ph: (08) 8982 1111

Editor: Newgen Digitalworks

Product Developer: Karen Knowles

Printed by: Ligare Pty Ltd, Riverwood, NSW

This book has been printed on paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests.

Copyright

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What is copyright?

[12.10] Copyright is a bundle of rights that enable their owner to control, and be paid for, uses made of the material in which the copyright subsists. Cultural material such as literature, visual art, music and film are copyright protected – but so are some commercial products, such as computer programs and broadcasts.

Like other property, copyright can be assigned (ie, transferred or sold), licensed or bequeathed in a will.

In Australia, copyright is governed by the *Copyright Act 1968* (Cth), and Australian copyright owners have rights internationally by virtue of treaties to which Australia is a signatory, in particular the *Berne Convention for the Protection of Literary and Artistic Works*. These laws seek to balance the public interests in both rewarding creators and encouraging them to continue to produce copyright material on the one hand; and in giving society access to such material on the other.

Copyright law is complex. Specialist advice should be sought on any copyright-related matter. The Australian Copyright Council, whose contact details appear at the end of this chapter, provides detailed information, including answers to frequently asked questions, about copyright law.

[12.20] What material is protected?

Copyright protects the expression of ideas in material form – there is no copyright in ideas.

These material forms are set out in the *Copyright Act – works* (which are literary, dramatic, artistic or musical) and *other subject matter* (sound recordings, films, broadcasts and published editions of works).

Copyright material appearing on the internet or any other digital platform (Facebook, Instagram, YouTube, Twitter) is not regulated by specific provisions in the *Copyright Act*. The same legal protections apply to material online as to material offline. This is subject to any terms and conditions that a person who has uploaded copyright material to an online platform has agreed to.

Literary works

This category includes poems, books (fiction and non-fiction), articles, short stories, lyrics, written

interviews, letters, emails, the rules of games, instructions, compilations of words, numbers or symbols such as anthologies and tables, and computer programs (which probably include the underlying source code in e-books and websites, although this specific question is yet to be tested in an Australian case).

Short bits of text such as titles, taglines and slogans are unlikely to be protected as literary works. For example, there is no copyright in newspaper headlines (*Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109).

However, this type of text may be protectable in certain circumstances as a trade mark or by laws that protect commercial reputation – passing off and the *Australian Consumer Law* (Cth).

Dramatic works

This category includes plays, film scripts, scenarios and choreography that have been reduced to writing or otherwise recorded in material form (such as choreography that has been captured on video).

Musical works

This category embraces written or recorded music of all kinds, from hip hop to symphonies. An unrecorded performance of improvised, folk or traditional music (ie, music that has not been reduced to writing or some other material form) would not likely attract copyright protection as a musical work.

Artistic works

These are paintings, sculptures, drawings (including sketches, architectural drawings, cartoons, dress patterns, maps, technical drawings), engravings, photographs, buildings, models of buildings and works of artistic craftsmanship (such as ceramics and tapestries).

Only in the case of works of artistic craftsmanship does the *Copyright Act* impose any requirement of artistic merit in order to qualify as material that is protected. The concept of artistic craftsmanship is not defined in the Act. When a court is asked to determine the question – which

does not happen often, given the prohibitive cost of litigation for most practitioners – it focuses on two issues: that there has been “real or substantial effort” in creating the object in question and that that effort is directed more to its artistic, rather than functional, elements. The court must be satisfied that there is a craftsman whose input is fundamental to the resulting artistic work (*Burge v Swarbrick* (2007) 232 CLR 336).

Designs may be protected as artistic works under the *Copyright Act* if they fall into one of the categories of artistic works.

The protection of designs for functional articles is also dealt with under separate legislation – the *Designs Act 2003* (Cth).

To be protected (for up to 10 years) under the *Designs Act*, designs must be registered with IP Australia before they are shown to anyone: the opportunity for design registration is lost if there is a prior disclosure.

Copyright and design protection may exist at the same time, but copyright protection may be lost for products that are or could be protected by design registration.

This area of the law, known as the “copyright/design overlap”, is very complex. Anyone who intends to manufacture products based on an artistic work should get legal advice about the implications under copyright and design law before doing so.

Cinematograph films

This category covers the moving images and soundtrack in all films – documentaries, feature films, home movies, animations, TV programs, DVDs and videos – as well as in computer games.

The copyright in a film is separate from the copyright in each of the screenplay, music and

other works recorded in a film that may be separately protected. These are often referred to as *underlying works*.

Sound recordings

This category includes vinyl records and CDs, audio tapes and cassettes, as well as digital files of music.

Copyright in a sound recording only relates to the recording itself. Material fixed on a recording, such as music and lyrics, are separately protected as musical and literary works.

Published editions of works

This category protects the typographical design and layout of publications such as books, magazines and printed music published in volume (hard copy) format.

The copyright in the edition is separate from any copyright in the content of the publication (such as photographs, articles or short stories).

Broadcasts

This category covers radio and television broadcasts, and protects the cost and skill involved in assembling, preparing and transmitting material to be broadcast.

An internet simulcast of a radio broadcast is not a broadcast (*PPCA v Commercial Radio* (2013) 209 FCR 331). Neither is internet live streaming of television programming (*WIN Corporation v Live Network Australia* [2016] NSWSC 523 (28 April 2016)).

Again, the broadcast is protected separately from any copyright in the material that is broadcast such as a feature film or the music played during a broadcast of a performance.

Requirements for copyright protection

[12.30] Protection is automatic

Copyright protection does not depend on any formalities, and there is no system of registration of copyright in Australia. So long as certain conditions are met, material is protected from the moment it is made or put into a *material form* (eg, filmed or otherwise recorded, written down or saved in a digital file).

[12.40] Conditions for works

The conditions that must be met for copyright protection in works are that:

- The *author* was a *qualified person* – that is, a citizen or resident of Australia or a country belonging to an international copyright convention to which Australia is party – at the time of creating the work.

- The work was first published in Australia or a country belonging to an international copyright convention to which Australia is party.
- The work must be *original*.

In the case of copyright in buildings, the building must also be in Australia.

Author

The only definition of *author* in the *Copyright Act* clarifies that the author of a photograph is the person who took the photograph.

In all other respects, the concept of authorship is linked to *originality* – see below.

Originality

As a general statement, to be original in a copyright sense means that the subject matter should be the product of the author's skill or labour – that is, "originating" with a human author.

Compilations of data without evidence of clear independent intellectual effort may not satisfy this test, as was the case for electronic guides to the scheduling of television programmes (*IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458) and telephone directories (*Telstra Corporation Ltd v Phone Directory Company Pty Ltd* (2010) 194 FCR 142). There must be sufficient "skill, judgment or labour" involved in the selection and arrangement of information into a compilation by a person to satisfy the requirement that the compilation "originates" with a human author (*Tonnex International Pty Ltd v Dynamic Supplies Pty Ltd* (2012) 99 IPR 31).

[12.50] Conditions for subject matter other than works

The conditions for copyright protection of other subject matter are that:

- For sound recordings and cinematograph films:
 - the maker was a *qualified person* (ie, a citizen or resident of, or body corporate incorporated in Australia or a country belonging to an international copyright convention to which Australia is party) at the time the recording or film was made; or
 - the recording or film was made in Australia; or
 - the recording or film was first published in Australia.
- For broadcasts – they are made from a place in Australia by authority of a licence under the *Broadcasting Services Act 1992* (Cth) or by the ABC or SBS.
- For published editions – the first publication took place in Australia or the publisher was a *qualified person* at the date of first publication.

[12.60] Protection in other countries

As a result of international treaties to which Australia is party, in particular the *Berne Convention for the Protection of Literary and Artistic Works*, Australian copyright owners are protected in most other countries under the laws of those countries (including the US, the UK, China, Japan, India, Korea and all European countries) and vice versa.

Who owns copyright?

[12.70] The general rules

Copyright ownership other than government ownership of copyright can always be decided by agreement. If there is no agreement, the rules set out in the *Copyright Act* apply. The general rules are relatively straightforward, but there are several exceptions to them, as set out in this section.

Except in the case of commissioned material (see [12.80]), material made in the course of employment (see [12.90]) or for the government (see [12.100]), or as varied by agreement, the owner of the copyright is a:

- work is the creator. Where there is more than one creator and each person's contribution cannot be separated from the contributions of the others, the work is considered to be a work of *joint authorship* and copyright is owned by all authors jointly. This has implications for how the work can be exploited (see [12.160]);
- film – the visual footage and the sound recording that constitutes the soundtrack – is the *maker* (usually the producer). Since amendments made to the *Copyright Act* in 2005, directors of films made after 19 December 2005 are also considered to be a *maker* of the film

in respect of the right of retransmission of a free-to-air broadcast of the film. This right is administered collectively by Screenrights (see [12.170]);

- sound recording is the *maker*. The copyright in a sound recording of a live performance made since 2005 is owned by the maker together with the owner of the recording medium and any performers whose performances are recorded in it, in equal shares;
- broadcast is the broadcaster;
- published edition is the publisher.

[12.80] Commissioned works and other subject matter

Again, the provisions in the *Copyright Act* relating to ownership of copyright in commissioned works – as set out below – may be varied by agreement.

Photographs

Ownership of copyright in commissioned photographs is determined by when the photographs were taken.

If taken on or after 30 July 1998, the copyright owner in photographs for private or domestic purposes (such as weddings) is the client; for all other purposes (such as commercial shots) it is the photographer.

For photographs taken between 1 May 1969 and 30 July 1998, the client is the copyright owner, although the photographer has the right to stop them from being used for a purpose other than their original purpose, if the purpose for which they were commissioned was known at the time – this is the photographer's *right of restraint*. It is a weak right, which is very difficult to enforce in practice.

For photographs taken before 1 May 1969, the client owns the copyright.

Portraits, engravings, recordings and films

A person who commissions and pays for a portrait, an engraving, a sound recording or a film owns the copyright in it.

Note, however, in the case of a sound recording or film, that the person only owns copyright in that particular recording or film, not in underlying materials such as music or the screenplay.

Other commissioned works

In all other cases where copyright material is commissioned, the creator of the material is the first owner of copyright; any right the commissioning party may have to use the material will be by way of licence from the creator.

[12.90] Employee creations

Generally, if a creator is an employee (ie, not a freelance worker, independent contractor or volunteer) and the work is created in the course of their employment, the employer owns the copyright – subject to the exceptions that follow and if not varied by agreement.

Newspaper and magazine employees

For works created before 1 May 1969, the employer owns all of the copyright but the employee has the right to stop their work being used other than in the newspaper, magazine or periodical for which they were employed to create the copyright material.

For works created between 1 May 1969 and 30 July 1998, the employer owns the rights for newspaper and magazine publication and for broadcasting; the employee owns all other rights (eg, book publication rights).

Since 31 July 1998, the position is that the employee owns book publication and photocopying rights, the employer owns the rest.

Film directors

If a director makes a film as part of their employment by another person, the employer is a maker of the film for the purpose of retransmission of a free-to-air broadcast of the film, and neither the director nor their employer has any other copyright interest in the film.

[12.100] Material created for government

If copyright material is created or first published under the *direction or control* of a government agency, the government is the copyright owner. The expression *direction or control* is not defined in the *Copyright Act*, but it does apply both to government employees and also to contractors and freelancers working for the government.

For copyright purposes, *government* means the executive government and includes State, Territory

and Commonwealth government departments and their dependent bodies. Local councils are not covered. They are in the same position as other organisations, such as companies.

It is often unclear whether other bodies such as statutory authorities are *government* for these purposes. Legal advice on the question should be sought.

Unless there is a written agreement that states otherwise, it is advisable to assume that any copyright in material that is created for a government is owned by the government.

[12.110] Material containing multiple copyrights

As set out above, many products contain separate underlying copyright materials. Each may have a different owner. For example:

- A book contains copyright in the writer's literary work, in the illustrator's artistic work (if any) and in the publisher's published edition.
- An anthology of illustrated short stories or poems will contain separate copyright in each literary and artistic work, the compilation (ie, the group of short stories or poems the editor selects) as its own literary work, and the published edition.
- A website contains separate copyright in the literary works (text, tables) and artistic works (photographs, drawings, cartoons, graphs), film, musical work and sound recording embedded in the website; the underlying

computer programs (source code and computer files) and probably, the layout as a published edition.

- A CD played on the radio will likely involve copyright in the recorded music, the recorded lyrics, the sound recording itself and the broadcaster's programming.

[12.120] Proving copyright ownership

Disputes about copyright ownership are rare.

However, if you own copyright because you created material in which copyright subsists, you could prove it in court by calling witnesses who know you created it and by producing your original drafts, manuscripts and working notes.

The *Copyright Act* also contains certain presumptions that make ownership easier to prove in certain circumstances. These include registering copyright in a country that has a system of copyright registration (such as the United States) or – and this is much more straightforward – using the copyright notice: the symbol © (or the word *copyright*), the author's name, and the year of creation or first publication; for example, © Matilda Rose 2016.

It is a good idea to use the copyright notice to alert people to the fact that the material is protected by copyright and to let them know who claims to own the rights.

For sound recordings, use the ® symbol instead of ©.

Rights of copyright owners

[12.130] Copyright is a bundle of rights

Copyright owners have certain exclusive rights to exploit their material. These rights vary according to the nature of the material in which their copyright subsists. All of the rights involve copying of some kind.

Artistic works

Copyright in artistic works comprises the following rights.

Reproduction in a material form covers all copying, including by hand, photocopier, recording, film, print out, scanning or storage in a computer retrieval system.

Publication means making the work publicly known in Australia for the first time, in any form. The concept of "publicly" means, essentially, not private, rather than the public at large.

Communication includes emailing, texting and broadcasting material, and uploading it to digital formats including websites, blogs, apps and other platforms. It is intended to be a technologically neutral term, so that new ways of disseminating

copyright materials always come within the statutory regime.

In the case of paintings, perhaps the most common commercial exploitation – their public display – is not a right comprised in the bundle of rights that forms copyright, as no copy is made. The owner of a painting (who usually is not the owner of the copyright in it) is entitled to display it in public without the copyright owner's permission. However, they would require the copyright owner's permission to reproduce the painting or communicate it to the public, unless one of the exceptions to infringement applies (see [12.200]).

Literary, dramatic and musical works

Owners of copyright in these works enjoy the same rights as owners of copyright in artistic works, and the following additional rights.

Performance in public covers both live and recorded performances and includes band performances, concerts, recitals and playing records and CDs in public places, including by way of background music.

Public in this context means non-domestic situations including workplaces and shops, restaurants, halls, pubs and clubs.

Adaptation includes:

- for literary works, a translation or dramatised version;
- for dramatic works, a translation or novelised version;
- for musical works, a transcription or arrangement.

The owners of copyright in computer programs and works contained on sound recordings and computer programs (eg, music) also own the legal right to exploit and control their *commercial rental*.

Other subject matter

Owners of copyright in films, sound recordings and broadcasts have exclusive rights over:

- copying (such as off-air taping and direct duplication);
- screening in public (this does not apply to broadcasts);
- *communication to the public* (as described above).

Owners of copyright in sound recordings also own the legal right to exploit and control their *commercial rental*.

The owner of copyright in published editions enjoys relatively limited rights: the exclusive right to make *facsimile* copies of the edition (such as by offset printing or photocopying).

Duration of copyright

[12.140] Works

Until 1 January 2005, the general rule was that copyright in works lasted for the life of the author plus 50 years. As a result of Australia's obligations under the Australia–United States Free Trade Agreement, this was increased to life of the author plus 70 years.

Further changes to the duration of copyright in unpublished works implemented by the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) came into effect on 1 January 2019.

Previously, unpublished works enjoyed indefinite copyright protection until the date they were published, at which point the copyright protection period would commence. Prior to 1 January 2019, if a literary work (apart from a computer program) or a dramatic or musical work

was not published during the author's lifetime, then copyright would subsist for 70 years from the date of first publication or from when records of the work were first offered for sale, whichever occurred first.

From 1 January 2019, any unpublished works are treated the same as published works, meaning that copyright will expire 70 years after the death of the creator, provided the author of the work can be identified. If the identity of the author of an unpublished work is not generally known (eg, if it is an anonymous work, and the identity of the author cannot be ascertained), copyright will expire 70 years after the calendar year in which the work was made. However, if the anonymous work is made public within 50 years of being made, copyright will instead expire 70 years after the work was made public.

In the case of works of joint authorship, copyright subsists for 70 years after the death of the longest living author.

[12.150] Other subject matter

From 1 January 2019, copyright in sound recordings and films subsists for 70 years from the end of the calendar year in which they were first made, or if made public within 50 years of being made, 70 years after the year in which they were

first made public. If a sound recording or film was made public before 1 January 2019, it will have copyright protection for 70 years from the date first made public.

Copyright in broadcasts subsists for 50 years from the end of the calendar year in which they were first made.

Copyright in published editions subsists for 25 years from the end of the calendar year in which they were first published.

Dealings with copyright

[12.160] Commercialisation

Copyright is an essentially commercial right that may be sold or licensed, like any other property right. Because it comprises a bundle of rights, copyright may be exploited by reference to territory, term and specific use. Because it is an exclusive right, the owner may enforce their rights against any infringing use made of them (see [12.190]).

Where copyright is owned jointly, all owners must agree to the exploitation of the material.

Therefore, it is in the interests of both owners and users of copyright that agreements to exploit copyright material are negotiated, and written.

Assignments

The *Copyright Act* provides that an assignment of copyright must be in writing and signed by or on behalf of the copyright owner. However, apart from these two elements, no other formality is required.

Assignments may be of the entire copyright, or they may be limited, for example, to:

- particular rights (eg, publication only);
- particular territories (eg, the UK);
- a specified time (eg, two years).

Assignments may also be retrospective – that is, effective from the date the copyright material was created, no matter when the assignment is recorded in writing signed by or on behalf of the copyright owner.

Licences

A copyright licence is a grant of permission to use copyright material in one of the ways reserved to the copyright owner without changing its

ownership. It is the most common means of exploitation of copyright. Licences may be exclusive or non-exclusive, and non-exclusive licences may be express (ie, written or agreed by discussion) or implied by the circumstances.

By granting an exclusive licence, the copyright owner gives the licensee the sole use of the right or rights involved. To be effective, an exclusive licence must be in writing and signed by the copyright owner – the requirements are exactly the same as for assignments.

Also as applies to assignments, an exclusive licence of copyright can be limited by reference to rights, territories and duration.

For example, an author who grants a publisher exclusive magazine publication rights in Australia for 15 years cannot give those rights to anyone else in Australia within that term, but could license the same rights to another party for the United Kingdom for any length of time in which copyright subsists, to someone else in Australia at the end of the term, and communication rights to anyone, anywhere for any length of time in which copyright subsists in the work.

Non-exclusive licences do not have to be in writing, but for practical reasons they should be.

Granting a non-exclusive licence enables the copyright owner to license the same rights to more than one person at the same time. For example, if an author grants a magazine publisher a non-exclusive licence to publish an article in a magazine, they can offer a licence of the same article to another magazine publisher in the same (or a different) territory for the same (or a different) term.

Non-exclusive licences can be implied by the circumstances, even if the copyright owner has

not expressly granted the rights. The test for implying terms is a tough one – essentially, that it “goes without saying” that such a term would be implied into the agreement in question.

Disputes about the scope of a copyright licence arise quite commonly so it is strongly recommended that the licence be put in writing at the outset. For example, a person who commissions a graphic designer to create a logo for their business stationery will have the right to use the logo for that purpose, even if there is no written agreement and the designer has not granted permission in so many words. But if the client wants to use the logo for other purposes (such as on their website or in a television advertisement), further permission might be needed, and the designer is entitled to refuse permission or to charge a premium for granting a licence for the additional use.

[12.170] Collective administration of copyright

Because copyright material is so widely, and variously, used, individual licensing of copyright is often impractical. To ensure that copyright is exploited lawfully in situations where significant amounts and types of copyright material are used, copyright collecting societies represent copyright owners’ rights collectively. In particular, collecting societies administer the statutory licences contained in the *Copyright Act* that allow governments and educational institutions to copy within certain limits in return for a fee and enter into voluntary agreements, such as for radio broadcast, public performance and the digital licensing of music from online music and movie stores and streaming services, including Spotify, iTunes, Apple Music, Pandora and Google Music.

Each collecting society represents owners of copyright in specific categories of work or other subject matter and has affiliations with similar organisations around the world to enable the collection of royalties for exploitation of Australian copyright internationally, and of international copyright in Australia.

APRA AMCOS

APRA (Australasian Performing Right Association) administers the rights to public performance and communication to the public (including radio and television broadcasting,

online and in live performance) of musical and associated literary works.

On becoming a member of APRA, copyright owners (usually composers, songwriters or music publishers) assign these rights to APRA. A person or organisation wanting to use their music must obtain a licence from the association, which distributes the fees it collects to its copyright owner members.

AMCOS (Australasian Mechanical Copyright Owners Society) is the collecting society responsible for administration of the reproduction right in musical and associated literary works – that is, copying of works to sell on CD, DVD, online, and for use as production music and in radio and television programmes.

APRA and AMCOS have been a single organisation since 1997.

Copyright Agency

Copyright Agency represents owners of copyright in literary, dramatic, musical and artistic works such as authors, songwriters, illustrators and publishers. It administers the schemes in the *Copyright Act* for the use of these types of material by educational institutions, and institutions assisting people who have a print or intellectual disability. Copyright Agency also offers voluntary copying licences to commercial entities.

Under the educational statutory licence schools, universities and colleges can make multiple copies of works for educational purposes without having to obtain permission from every copyright owner whose work is copied. They can, for example, make works available online, and in course packs to their students and staff.

In many cases, there are limits on the amount of commercially available material that can be copied, and procedures that must be followed. The institution pays a licence fee to Copyright Agency, which then distributes the money to the relevant copyright owners.

Copyright Agency also administers a significant proportion of copying by government and offers voluntary licences to other organisations such as companies, non-profit organisations, copying services and media monitoring companies.

Copyright Agency previously managed Viscopy, the collecting society for visual artists. However, the two rights management bodies merged on 30 November 2017. Copyright Agency offers licences of the copyright in artistic works to,

for example, advertising agencies, film production companies and book publishers.

Copyright Agency represents over 40,000 Australian writers, artists and publishers, as well as international artists through collecting societies in other countries.

Copyright Agency also administers the resale royalty scheme for visual artists, which came into effect on 9 June 2010. The royalty is payable, under the *Resale Royalty Right for Visual Artists Act 2009* (Cth), on certain resales of original works of art.

PPCA

PPCA (Phonographic Performance Company of Australia) performs a similar function to APRA, for copyright owners in sound recordings.

A licence from both APRA and PPCA is usually needed before recorded music (records, tapes, CDs, digital music files) can be played in, or communicated to, the public.

OneMusic

In 2018, APRA AMCOS and PPCA announced that they were working on a joint initiative, a licensing scheme with the aim of being a “one stop shop” to simplify the music licensing process for businesses. This service launched in mid-2019.

Screenrights

Screenrights (the Audio-Visual Collecting Society) administers the statutory licences under which educational institutions in Australia and New Zealand, and Federal and State government departments, are entitled to copy from radio and television. The collected fees are distributed to the copyright owners.

See the end of this chapter for the contact details of these organisations.

[12.180] Bequests

Being a property right, copyright forms part of a person’s estate and is dealt with in the same way as other personal property.

If there is no will, copyright is inherited according to intestacy laws – laws that apply when someone dies without leaving a will. Therefore, where copyright will form an important part of an estate, consideration should be given to appointing someone such as a literary executor.

For more information, see [40.10] in Chapter 40, Wills, Estates and Funerals or contact the Arts Law Centre of Australia, which offers a will writing service to Aboriginal and Torres Strait Islanders artists.

Infringement of copyright

[12.190] What is infringement?

Unless an exception or defence applies, anyone who uses, or *authorises* someone else to do any act that is comprised in the copyright in a work or other subject matter, without the permission of its owner infringes copyright.

It is also an infringement of copyright to:

- deal commercially with *pirated* (ie, infringing) material;
- import certain copyright material (including books, sheet music, art prints and films) for commercial purposes;
- permit a performance or screening to take place in a public place or venue if permission has not been obtained from all relevant copyright owners.

There is no exception or defence on the ground that the copyright owner is difficult to locate. However, because collective licensing is common

in the copyright industries, as set out at [12.170], getting permission is often easier than it might seem. See the Australian Copyright Council’s information sheet *Permission: How to Get It*.

Authorisation

A person who has the power or capacity to prevent copyright infringement and fails to take reasonable steps to do so authorises the infringement and thereby also infringes copyright.

In *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380, the Full Court of the Federal Court held that providing links from the website mp3s4free.net was sufficient to establish copyright infringement by *authorising* the copying and communication of copyright-protected songs against the website’s owner and operator, the ISPs and the director of the ISPs who hosted the website. The mp3s4free.net website did not contain any music files, but it was structured to

allow users to access copyright-protected music files that were directly transmitted from a remote server via hyperlinks. The court also found that legal disclaimers on the site were ineffectual, as it was clear that the purpose of the links was to assist users to download the infringing music files.

On the other hand, in *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42, the full bench of the High Court upheld the decision of the majority of the Full Court of the Federal Court, which had affirmed the finding at first instance that, even though an ISP had the power to suspend the accounts of its subscribers, it would impose a heavy economic burden on the ISP and would shut down legitimate non-infringing uses to do so, and therefore was not a “reasonable” step that the respondent was required to take.

There is an innocent infringement defence available under s 115(3) of the *Copyright Act* if a defendant can demonstrate that they were not aware and had no reasonable grounds for suspecting infringement. In *Dempsey Group Pty Ltd v Spotlight Pty Ltd* [2018] FCA 2016, both parties (distributors of quilt covers) had engaged the same manufacturer. The Court was satisfied that the defendant did not know that importing and selling certain quilt covers created by the manufacturer infringed the plaintiff’s copyright until the plaintiff told them, and the defendant was successful in raising the defence of innocent infringement. This defence only applies to the quantum of damages, and this case was a rare occurrence of this defence being successfully raised.

As a result of recently introduced legislation, where there is large-scale online copyright infringement enabled by websites operating outside of Australia, an injunction to block the website from being accessed by Australian consumers may be granted by the Federal Court. This regime was introduced by the *Copyright Amendment (Online Infringement) Act 2018* (Cth) and came into force on 11 December 2019.

Safe harbour scheme

Certain service providers are afforded a safe harbour which protects them from the liability of their users. The scheme previously applied to carriage service providers (such as internet service providers), however the introduction of the *Copyright Amendment (Service Providers) Act 2018* (Cth) expanded it to cover a wider

group; including archives, libraries, cultural and education institutions and organisations assisting persons with a disability. This legislation came into force on 29 December 2018.

Substantial part

Infringement of copyright is not limited to exact copying. Attempts to avoid claims of infringement by making changes to a work are rarely successful.

The test for infringement is whether a substantial part of the whole of the work or other subject matter has been reproduced. The test is an objective one of “impression and degree”, with both qualitative and quantitative elements. So a very small amount of something that is highly distinctive may infringe copyright – for example, two bars of music from “Kookaburra sits in the Old Gum Tree” reproduced in the Men at Work song “Down Under” (*EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444).

On the other hand, where the copyright material has a functional purpose, or is “a means to an end” – such as architect’s plans, which are protected as artistic works – the court will scrutinise whether the part taken represents a substantial part of the skill and labour that determines the originality that is a necessary condition of copyright protection in the first place (*Tamawood Ltd v Henley Arch Pty Ltd* (2004) 61 IPR 378).

The overall “look and feel” of an artistic element may also be taken into consideration for assessment of whether a substantial part of an original work may have been reproduced (*Dempsey Group Pty Ltd v Spotlight Pty Ltd* [2018] FCA 2016).

In making this determination, courts focus on the similarities rather than the differences between the material in question.

[12.200] What is not infringement?

Fair dealing

There are some specific situations in which what would otherwise constitute an infringement of copyright of a work or adaptation is considered to be a *fair dealing*. These situations are:

- research or study;
- criticism or review;
- reporting the news;

- advice given by a legal practitioner, registered patent attorney or registered trade marks attorney;
- parody or satire.

The use has to fall within one of these categories and also be fair. The concept of fairness includes considerations such as:

- the purpose and character of the dealing;
- the nature of the work or adaptation;
- the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- the effect of the dealing on the potential market for, or value of the work or adaptation;
- where only part of the work is reproduced – the amount and substantiality of the part copied in relation to the whole.

The fair dealing provisions in the *Copyright Act* are complex and detailed, and the very little case law that has considered them does not provide a clear enunciation of their application: for example, in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 while the three judges agreed in principle, each applied the fair dealing defences of “criticism or review” and “reporting the news” differently.

Further, the “purpose” and “fairness” of the dealing will be scrutinised. In *Pokémon Company International, Inc. v Redbubble Ltd* (2017) 351 ALR 676, the fair dealing defence of “parody and satire” did not apply as the purpose of the dealing was for commercial exploitation.

The fair dealing exceptions should not be relied on in the absence of specialist legal advice.

Personal use

The following copying of copyright material solely for *private and domestic use* without the permission of the copyright owner is permitted under the *Copyright Act*:

- recording from radio to listen to, and television to watch at a later time (“time shifting”);
- copying books, newspapers, periodicals, photos and videos that you own into a different format (“format shifting”);
- copying sound recordings into any format so you can listen to the recording in different places – for example, copying a CD so you can have a copy to listen to in your car and another on your computer at home. A private use copy can be used inside or outside domestic

premises, but only if the copy is made from a non-infringing copy of the music that is not a podcast of a broadcast or program, for use on a device that the person making the copy owns.

There is no “private copying” for computer games.

Special purposes

Libraries, archives, educational institutions and people with disabilities are subject to their own provisions in the *Copyright Act*.

Importation

Certain articles can be imported without permission, provided that making them did not infringe copyright in the country in which they were made (ie, they are not *pirate* versions). These are:

- non-infringing sound recordings (such as CDs);
- items containing non-infringing computer programs (including computer games);
- non-infringing e-books and notated music in electronic form;
- items whose packaging or instruction manuals include copyright material.

Non-infringing books that are not available in Australia can also be imported without permission.

Other miscellaneous exceptions

There are several other exceptions to infringement of copyright scattered throughout the *Copyright Act* – for example, filming or photographing sculptures and buildings on permanent public display, making back-ups of computer programs and the public performance of a work by way of television, radio or record player to hotel guests.

See the Australian Copyright Council’s information sheet “*Exceptions to Copyright*”.

[12.210] Enforcement of copyright

Copyright is enforced by bringing an action in a court.

However, most copyright-related disputes are resolved without court action.

Copyright proceedings

Where the parties cannot resolve a dispute by agreement, an owner or exclusive licensee of copyright may bring proceedings in a State

Supreme Court, but will much more commonly do so in the Federal Court of Australia or the Federal Circuit Court of Australia.

In urgent matters, a court may grant *interlocutory relief* – orders made before the final hearing – usually, an injunction that preserves the status quo and prohibits further infringement pending the outcome of the trial.

Final orders a court can make include:

- compensation for loss to the copyright owner (*damages*) and orders for additional payment in appropriate circumstances, where the infringement is flagrant (*additional damages*); or
- at the election of the copyright owner, payment of the profits made by the infringer due to the infringing activity; and
- orders to prohibit further infringement.

Criminal proceedings

Some acts of infringement – generally those with a significant commercial element, such as making or importing pirate copies for distribution or sale, or commercial dealings in devices or services designed to circumvent *technological protection measures* (TPMs), see [12.230] – are also criminal offences, prosecutable by the police and, in the case of suspected infringing goods being imported into Australia, subject to seizure by the Australian Border Force.

There are also statutory offences for other acts which prejudice the economic rights of the copyright

owner, such as unauthorised access to encoded broadcasts, abuse of electronic rights management information and circumventing TPMs.

There are three levels of offences: *indictable* offences for serious crimes, summary offences for less serious crimes and *strict liability* for lower level offences. On-the-spot fines are available for certain strict liability offences such as those committed by street stall operators and first-time offenders.

Criminal prosecutions can be brought in the Federal Court or any other court of competent jurisdiction. However, the Federal Court cannot hear prosecutions for indictable offences. For more information, see the Australian Copyright Council's information sheet *Infringement: Actions, Remedies, Offences & Penalties*.

[12.220] Setting equitable remuneration

Statutory licence fees and voluntary *blanket licence schemes* under the *Copyright Act* are the subject of negotiation between copyright collecting societies and licensees.

If these negotiations break down, either party can approach the Copyright Tribunal. The Tribunal is not a court, so its role is not one of enforcement. It is an independent body whose processes are governed by the *Copyright Act*. Its jurisdiction is to set the rates and terms of *equitable remuneration* for statutory licences and reasonable *charges and conditions* of voluntary licence schemes.

Technological measures for copyright protection

[12.230] Mechanisms

In addition to bringing infringement proceedings in a court, there are several (cheaper) ways of protecting copyright in online content by the use of TPMs, including:

- using *electronic rights management information*, which involves the insertion of information identifying the copyright owner and specifying the terms of use of the work;
- incorporating a digital watermark into the work;

- restricting access to protected material such as by software lock or password protection;
- making protected material accessible only on payment of a fee or acceptance of contractual terms of use;
- when uploading copyright material to an online platform, being aware of the terms and conditions and the scope of any licence being granted to the platform, and users;
- encrypting protected content.

The circumvention of TPMs may be unlawful, as set out in ss 116AK–116D of the *Copyright Act*.

[12.240] Performers' rights

Since 1989, performers including dancers, street buskers and circus acts, have had rights to control direct and indirect unauthorised recording, filming and communication to the public (such as broadcast and internet transmissions) of their live performances. Depending on the medium, the protection period starts on the date of the performance and lasts for either 50 years (in the case of an unauthorised sound recording of a live performance) or 20 years (for an unauthorised film of a live performance). Certain performances are exempt, for example, reading the news, playing sport and participation as a member of an audience. Also, certain uses are exempt, for example, a performer cannot rely on these provisions to prevent recording or filming for solely *private and domestic uses*.

Performers' rights to their live performances are separate from any copyright in the film or sound recording made of the performance, or of any other work which might be associated with the performance, for example, the song that is performed.

For more detailed information on the rights of performers, see the Australian Copyright Council's information sheet *Performers' Rights*.

[12.250] Moral rights

Moral rights are personal rights that belong to creators in relation to their work. Unlike copyright, these rights are non-economic – they cannot be assigned, licensed or bequeathed as copyright can be.

Outline of the rights

The protection of moral rights in Australia was established through amendments to the

Copyright Act made in 2000 and fall into two broad categories:

- *rights of attribution* – the creator's right to be named on their work and to object to certain false attributions;
- the *right of integrity* – the creator's right to object to alterations, modifications and other treatment of their work that may be damaging to their honour or reputation.

Works

Moral rights apply to all copyright works existing on and after 21 December 2000, and last for the term of the copyright in the work.

Films

Each of the principal director, producer and screenwriter has moral rights in films made after 21 December 2000.

The screenwriter will also have separate moral rights in the screenplay.

Performers

Performers who make sounds as part of a live performance that is recorded in a sound recording and is communicated to the public have moral rights in performances given or recorded on or after 26 July 2007.

Performers do not enjoy moral rights in performances that are filmed.

Performers' moral rights last, in the case of:

- rights of attribution, until the end of the term of the copyright;
- the right of integrity, for the performer's lifetime.

Contact points

[12.260] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Arts Law Centre of Australia

www.artslaw.com.au
 ph: 1800 221 457 or 9356 2566
artslaw@artslaw.com.au

Australasian Legal Information Institute (AustLII)

www.austlii.edu.au

Australasian Performing Right Association (APRA)

www.apraamcos.com.au
 music creators:
 ph: 1800 642 634 or 9935 7900
writer@apra.com.au
 music customers:
 ph: 1300 852 388
licence@apra.com.au
 general enquiries:
 ph: 9935 7900
apra@apra.com.au

Australian Copyright Council

www.copyright.org.au
 ph: 9101 2377
info@copyright.org.au

Australian Society of Authors (ASA)

www.asauthors.org
 ph: 1800 257 121 or 9211 1004
 queries relating to publishing,
 contracts, copyright and legal
 matters:
programs@asauthors.org
 general enquires:
asa@asauthors.org

Copyright Agency

www.copyright.com.au
 ph: 1800 066 844 or 9394 7600
memberservices@copyright.com.au

IP Australia

www.ipaustralia.gov.au
 ph: 1300 651 010 or 6283 2999

Ministry for the Arts

www.arts.gov.au
 ph: 6271 1000

OneMusic

www.onemusic.com.au
 ph: 1300 162 162
questions@onemusic.com.au

Phonographic Performance Company of Australia (PPCA)

www.pcca.com.au
 ph: 8569 1100
ppca.mail@pcca.com.au

Screenrights

www.screenrights.org
 ph: 8038 1300

