

Copyright

IS THE MATERIAL PROTECTED BY COPYRIGHT? -----

1. Consider the basic requirements for Copyright to exist:

1. Must fall within one of the categories of subject matter.
2. Must be in 'material form' – Part III works only.
3. Connecting factors (with Australia).

NB: copyright protects the expression of ideas and information NOT the idea itself or the underlying information. *Donoghue v Allied Newspapers* [1938] Ch 106: journalist was the author and was responsible for the literary creation; Donoghue was just the original source of the ideas – no copyright of the ideas.

1a. Which subject matter does it fall into?

NB: it must fit into one of the below categories otherwise no copyright protection will be available.

Example, a 'scene' for a photograph does not fall within a category therefore has no protection per *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR – involved a photoshoot for an album cover.

1. Does it fall under Part III of the *Copyright Act 1968 (Cth)*? Only Part III works have creators

a. Literary Works (s 32):

- i. Per s 10(1) definition includes:
 - a. a table, or compilation, expressed in words, figures or symbols (whether or not in a visible form);
 - b. a computer program or compilation of computer programs.
- ii. A headline or short phrase is simply too short and insubstantial to qualify for protection per *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 88 IPR 11:
 - a. F publishes the Australian Financial Review and R delivers subscriptions known as ABIX. F sued R claiming infringement of its copyright in 10 selected articles including their headlines. Held R did not infringe.

b. Artistic Works (s 32):

- i. Per s 10(1) definition includes:
 - a. a painting, sculpture, drawing, engraving or photograph;
 - b. a building or a model of a building;
 - c. a work of 'artistic craftsmanship' to which neither of the last two paragraphs applies.
- ii. Needs to have both craftsmanship and aesthetic quality.
 - a. A full scale mould for a yacht was not an artistic work because it was basically the work of an engineer and was designed to be functional and was not driven by artistic expression: *Burge v Swarbrick* (2007) 232 CLR 336
- iii. Copyright will be lost when it is registered or industrially made i.e. in large quantities, and works of artistic craftsmanship maintain copyright protection and are excluded from s 77. *this corresponds to a corresponding designs argument*
- iv. Examples:
 - a. Graphic reproduction of letters as a logo is held to be artistic work: *Roland Corporation v Lorenzo & Sons Pty Ltd* (1991) 33 FCR 111.
 - b. The layout of letters and numbers in a particular way could be categorised as artistic work as could be held as a drawing: *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2008) 172 FCR 580.

c. Musical Works (s 32):

- i. Includes:
 - a. Sound; Melody; Rhythm; Harmony.

- ii. BUT NOT the lyrics – lyrics are treated as literary works.
- iii. Need a licence from APRA to play music if not the author and a licence from PBCA if using a sound recording.

d. Dramatic Works (s 32):

- i. Per s 10(1) definition includes:
 - a. a choreographic show or other dumb show;
 - b. a scenario or script for a cinematograph film.
- ii. Plots can be copyrighted if there is a very strong similarity between the characterisation and events: *Zeccola v Universal City Studios Inc* (1982) 67 FLR 22:
 - a. Z produced the film Great White and U produced the film Jaws. Argued breach of copyright. Held that notwithstanding the use of different dialogue in Great White, the situation and characters of the Jaws properties were substantially reproduced in Great White and the similarities went far beyond the generic idea of a huge shark terrorising a sea-side town.

2. Does it fall under Part IV of the Copyright Act 1968 (Cth)? Part IV have no creators; only investors

a. Cinematograph Film (s 90):

- i. Meaning visual images embodies in an article or thing so as to be capable of being shown as a moving picture.
- ii. NB: includes the soundtrack associated with such visual images.
- iii. A computer video game is a film: *Galaxy v Sega* (1997) 75 FCR 8:
 - a. S made video games and G displayed these games for sale on their premises. Held the computer game fell within the category of cinematograph film.

b. Sound Recordings (s 89)

c. Broadcasts (s 91)

d. Published Editions (s 92):

- i. The typographical arrangement i.e. the layout and formatting of a published LDMA work.

1b. If falls under Part III works, is it Original and in Material Form?

1. Originality

- a. Originality threshold: needs some intellectual and independent effort of authorship.
 - i. Need some originality in the expression of the work and some human intellectual endeavour, copying over titles and times is not enough: *IceTV v Nine Network Australia* (2009) 239 CLR 458:
 - a. N claimed that its TV program schedules were infringed by I's electronic program guides. I accepted that copyright subsisted in each Weekly Schedule as an original literary work but denied that it had reproduced a substantial part and denied that its use of information from "Aggregated Guides". Held it was infringement.
 - ii. Need to show effort was put into it: *Desktop Marketing Systems Pty Ltd v Telstra Corp* (2002) 119 FCR 491.
- b. Must have identifiable authors:
 - i. Telstra failed to identify the author that contributed to the intellectual effort: *Telstra Corporation Limited v Phone Directories Company Pty Ltd* (2010) 194 FCR 142:
 - a. T created phone directories and P had similar phone directories.
 - ii. Struggled to show authorship because data came from elsewhere and other users: *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173:

- a. A and U are competitors in the business of producing Material Safety Data Sheets which set out prescribed categories of information about particular hazardous substances and dangerous goods. A's sheets were made by employees, clients and outside sources.

2. Material Form

- a. Works must be 'reduced to writing or some other material form' to attract copyright (s 22(1)).
 - i. I.e. must be physically embodied – mere ideas cannot be copyrighted.
- b. Per s 10(1) definition includes:
 - i. Any form whether visible or not of storage e.g. includes stored in computer memory.

1c. Does it have a Connection to Australia?

- a. E.g. the Author must have been a 'qualified person' when the work was made or when the work was first published in Australia (s 32(4)).
- b. Connecting factors vary according to the type of subject matter and whether the work was published or unpublished.
- c. Foreign works are protected via the Berne Convention and the principle of reciprocity – this also protects Australian copyright overseas.

NOTE: copyright comes into existence automatically at the point you have produced the material, it is in an appropriate form and there's a connection to Australia.

No need for registration or notification, however '© Bill Smith 2017' wouldn't hurt.

CONCLUDE: given that the work falls within (state the category), (if under Part III) is original, in a material form and has a connection to Australia, then the requirements for copyright have been met, therefore copyright exists.

2. What Rights are attached?

NB: the exclusive rights and control by the copyright owner varies depending on the subject matter.

NB: if the original creator is not the copyright owner, they may still have performer rights and moral rights see below.

ASK: is the client breaching any of these rights of the copyright owner?

a. Rights associated with Literary, Dramatic and Musical Works (s 31(1)(a), (c), (d))

- a. Reproduce the work in a material form (can be in a different form to the original);
- b. Publish the work;
- c. Perform the work;
- d. Communicate the work to the public ("to make available online or electronically transmit");
- e. Make an adaptation of the work i.e.
 - i. Literary to dramatic form and vice versa
 - ii. Translation
 - iii. Arrangement of musical works
 - a. NB: once an adaptation has been made, the new work depending on the circumstance may attract copyright in its own right.
- f. Some rental rights i.e. sound recordings and computer programs.

b. Rights associated with Artistic Works (s 31(1)(b))

- a. Reproduce the work in a material form (includes a change in form i.e. 2D to 3D);
- b. Publish the work;
- c. Communicate the work to the public.

c. Rights associated with Sound Recordings (s 85)

- a. Make a copy;
- b. Cause the recording to be heard in public;
- c. Communicate the recording to the public;

- d. Enter into a commercial rental arrangement.
- d. Rights associated with Published Editions (s 88)**
 - a. Make a facsimile copy i.e. an exact copy only.
 - b. NB: for literary, dramatic, musical or artistic works.
- e. Rights associated with Film (s 86)**
 - a. Make a copy;
 - b. Screen it in public;
 - c. Communicate it to the public.
- f. Rights associated with Broadcasts (s 87)**
 - a. TV broadcast – make a film of the broadcast or a copy of such a film;
 - b. Sound element of a sound of TV broadcast – make a sound recording of the broadcast or a copy of such a sound recording;
 - c. Re-broadcast and communicate it to the public.

3. What is the Duration of the Copyright?

- a. Duration of Literary, Dramatic, Musical and Artistic works (ss 33, 34)**
 - i. Life of the author + 70 years.
 - ii. If unpublished at the time of the authors death – 70 years from first publication.
 - iii. Anonymous works – 70 years from first publication.
 - iv. If many authors – life of the last living author + 70 years.
 - v. NB: even if the works are owned by someone else, you use the life of the author.
- b. Duration of Sound Recordings (s 93) and Film (s 94)**
 - i. 70 years after first publication.
- c. Duration of TV and Sound Broadcasts (s 95)**
 - i. 50 years after first broadcast.
- d. Duration of Published Editions of works (s 96)**
 - i. 25 years after first publication.
- e. Duration of Crown copyright in original works, recordings and films (ss 180, 181)**
 - i. 50 years from the making/publication.

WHO OWNS THE COPYRIGHT? -----

1. Who is the First Owner?

- a. Literary, Dramatic, Musical and Artistic Works (s 35)**
 - i. The first owner is usually the creator (author) i.e. the writer, musician, artist, etc.
 - ii. The author is the person responsible for the form of the expression of the work:
 - a. The journalist was the author as he put the idea in the form of expression: *Donoghue v Allied Newspapers* [1938] Ch 106.
 - iii. Is there co-ownership?
 - a. Possible when it is possible to separate the contributors of 2 or more authors i.e. Sally wrote chapters 1-3 and Sam wrote chapters 4-6 of a book.
 - iv. Is there joint ownership?
 - a. Only possible where it is not possible to separate the contributors of 2 or more co-authors.
 - b. Multiple authors unable to be separated: *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 95 IPR 117.
 - v. Has the ownership been assigned or licensed?
 - a. Must be in writing and signed for ownership to be assigned.

- b. Can either be assigned or licensed in whole or in part e.g. for a term of years or for one geographical area only.

NB: copyright is also transferrable by will upon death per s 196

b. Films, Sound Recordings, Broadcasts and Published Editions

- i. Films (s 98) – the ‘maker’ (usually a producer), the person who made the arrangement (s 22(4)) and also the commissioning clients (s 98(3)).
- ii. Sound Recordings (s 97) – the ‘maker’, the person who owned the equipment (s 22(3)) and also the commissioning clients (s 97(3)).
- iii. Broadcasts (s 99) – the person who provided the broadcasting service (s 22(5)) e.g. SBS.
- iv. Published Editions (s 100) – the publisher.
- v. *NB:* the copyright may also be subsequently assigned or licensed *as above*.

c. Crown Copyright

- i. Crown owns copyright in material produced under its ‘direction or control’.
- ii. Crown owns copyright if the work was first published by the Crown.

2. Does an Exception to Ownership by an Author Apply?

a. Employees (s 35(6))

- i. Copyright in literary, dramatic, musical and artistic works created by employees in the course of their employment will be owned by their employer.

b. Journalists (s 35(4))

- i. Journalists retain copyright in their work for some specified purposes i.e. inclusion in a subsequent book and reproduction of a hard copy facsimile.
- ii. Only applies to literary, dramatic and artistic works only NOT musical works.

c. Commissioned works (s 35(5))

- i. Copyright is normally retained by the author but if photos/portraits/engravings are commissioned for a private purpose e.g. wedding photos, then the copyright is owned by the commissioner.
- ii. Given the author is the owner, the person using the work has a license to use it.

IS THERE AN INFRINGING USE? -----

1. Have the Rights attached to the Copyright been exploited?

NB: copyright is divisible – you can sell or lease only a part of the bundle of rights you hold or you can lease for a limited term.

1a. By the copyright owner

- a. The copyright owner has the right to exploit the rights attached to their copyright.

1b. Have the rights been assigned (sold) to someone else?

- a. If assigned, the copyright owner will have no further control over the use of the work.
- b. Must be in writing and signed.
- c. Can be partial assignment.
- d. Future copyright can also be assigned e.g. recording contracts (s 197(1)).

1c. Have the rights been licensed to someone else?

- a. May be expressed or implied; exclusive or non-exclusive; in whole or in part.
- b. Exclusive license:
 - i. Must be in writing and signed (s 10(1)).
 - ii. Note the term and scope as the owner cannot license to anyone else during this time.