

INTELLECTUAL PROPERTY 1

Copyright Act 1968 (Cth)

Copyright Regulations 1969 (Cth) and Copyright (international protection) Regulations 1969 (Cth)

Copyright Act 1968 (Cth) governs IP in Australia.

It is divided into 2 separate parts.

Part III – COPYRIGHT IN ORIGINAL LITERARY, DRAMATIC AND ARTISTIC WORKS

‘works’ =deals with traditional works of authorships

31-35 KEY SECTIONS

36-39B INFRINGEMENT OF COPYRIGHT WORKS

44 -77A: EXCEPTIONS TO INFRINGEMENTS

Part IV- COPYRIGHT IN SUBJECT-MATTER OTHER THAN WORKS

→ incorporates films, sound recordings, broadcasts and published editions

Important: s113: copyrights to subsist independently

→ the same thing that you observe, may contain multiple copyright works, and multiple subject matters other than works

ie: you can watch a video of something which is a film, and film may contain a literary work or a sound recording of a musical work.

S 113 allows overlapping copyright works.

PART IV establishes different protection

PART V: REMEDIES - don't look at in course.

S 115A- new and controversial provision that allows owners of copyright to go to court to get an injunction to block access to foreign website (ie piratebay)

PART VA- allows schools and universities to make copies of literary works

PART VB-allows schools and universities to make copies of literary works

189 onwards- moral rights- ie right to be identified as the author etc
(part 3 &4 more economic rights)

PART XIA- performers rights.

Right to object to an unauthorised recording and disseminating online and reproducing it

Eg: go to a concert and video it, and then put it online

Expression versus ideas, facts, systems and methods of operation

- When required to arbitrate on the limits to protection afforded by statute, judges formulated the principle of the idea/expression dichotomy.
- **Ideas, and facts are free for all to use, and only the expression is capable of receiving protection.**

The idea/expression dichotomy is embodied in a number of treaty provisions, including Art 2 of the *WIPO Copyright Treaty* and Art 9 of the TRIPS Agreement, which both state that ‘copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such’.

	Hollinrake v Truswell [1894] - Represents 1 attempt to use copyright to protect a ‘procedure’ or ‘method of operation’. In justifying denial of protection, the court evoked the idea/expression dichotomy.
Facts	<ul style="list-style-type: none"> • Section 2 of the <i>Copyright Act 1842</i> (UK) conferred protection on a ‘map, chart, or plan’. • The plaintiff was an assignee under an assignment in writing of 1 Feb 1891, ‘of the copyright in a book, to wit, a map, chart, or plan’ • The chart was in fact a cardboard device used by tailors to accurately measure and cut inner sleeves.
Held	<ul style="list-style-type: none"> • Lord Herschell LC: The object of the <i>Copyright Act</i> was to prevent any one publishing a copy of the particular form of expression in which an author conveyed ideas or information to the world. • Lindley LJ: it is a direction on a tool or machine, and cannot be monopolized by its inventor under the <i>Copyright Act</i>. • The defendant may have got her own idea from the plaintiffs chart, but the defendant has not copied more than the plaintiffs method of measuring. Copyright does not extend to ideas, or schemes or systems, or methods. It is confined to their expression; and if their expression is not copied the copyright is not infringed.

	IceTV Pty Ltd v Nine Network Australia Pty Ltd HC 2009 – case about distinction of facts/expression, and key case on originality and authorship.
Facts	<ul style="list-style-type: none"> • Employees of Nine decided what TV programs would be shown and when; the results of this work were recorded in a ‘Master Paper Grid’ and in an internal Nine database. • 1 of Nine’s employees would generate a ‘weekly schedule’ from the database and send it out to 3rd party companies, which published aggregated TV guides. • The Weekly Schedule was a document in a tabular form, recording the time, title of the show, assorted information (eg classification) and a synopsis of the program. • IceTV produced an electronic program guide (EPG). Rather than copy the whole TV program directly, IceTV arranged for someone to watch TV for a period of time and record what programs were shown and when. • To produce the EPG thereafter, this information was updated by IceTV employees using the published TV guides derived from Nines Weekly Schedule. • Nine alleged that the copying of time and title information to update the EPG infringed copyright in Nines Weekly Schedule.
Held	<p>French CJ, Crennan and Kiefel JJ: The particular form of expression here was the Weekly Schedule (or the Nine Database). Generally speaking, no copyright could be claimed in a programme title or the time at which it is broadcasted.</p> <p>French: Copyright does not protect facts or information. Copyright protects the particular form of expression of the information, namely the words, figures and symbols in which the pieces of information are expressed, and the selection and arrangement of that</p>

	information. These facts are not being protected is a crucial part of the balancing of competing policy considerations in copyright legislation. Rewarding the author with commercial benefits and expression
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	<i>Victoria v Pacific Technologies (Australia) Pty Ltd (No 2) [2009]</i>
Facts	<ul style="list-style-type: none"> • Pacific Technologies claimed to be the owner of copyright in the phrase ‘<i>Help-Help-Driver-in-Danger-Call-Police-Ph.000</i>’ (‘Help Words’), to be displayed on the outside of a taxi when a driver duress alarm was activated by the driver. • The phrase was included in PT’s patent specifications. • The state of Victoria made regulations requiring taxi owners/licence holders to fit duress alarms using the phrase. • PT sought equitable remuneration for use of the phrase in the Copyright Tribunal
	<p><u>The tribunal proceedings</u></p> <ul style="list-style-type: none"> • Emmett J rejected the claim. The phrase was ‘too insubstantial’ to constitute a copyright work, but also invoking the idea/expression dichotomy. • copyright is concerned with the protection of the <i>expression of ideas</i> and not with the protection of ideas as such. The Help Words are not a form of literary expression, but a setting down of several simple words in the nature of saying something in ordinary parlance. • There are no more than a simple instruction and cannot gain protection under the <i>Copyright Act</i>

Idea/expression- plays out in infringement context

Work that may have original/unoriginal elements

Looking at what the defendant copies- has the defendant taken a substantial part?

Has the defendant just copied an idea (ie mood/themes)? Or copied the actual expression?

Chapter 3: CRITERIA FOR SUBSISTENCE OF COPYRIGHT

**FIRST STEP: Can we point to a PART III or IV work, in which copyright subsists?
This is a statutory question under Australian law**

Criteria for subsistence:

- Requirement of originality (Part III works)
- Requirement for human authors (Part III works)
- Requirement for copyright subject matter to be fixed in material form (Part III works) or 'made' (Part IV works)
- Associated 'country of origin'

3.1 Authorship and originality of works

- s 32(1)-(3) and s 10(1) definition of 'author'

s 32 Original works in which copyright subsists

(1) Subject to this Act, copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author:

(a) was a qualified person at the time when the work was made; or

(b) if the making of the work extended over a period--was a qualified person for a substantial part of that period.

→ Who is the author, was that person a qualified person?

(2) Subject to this Act, where an original literary, dramatic, musical or artistic work has been published:

(a) copyright subsists in the work; or

(b) if copyright in the work subsisted immediately before its first publication—copyright continues to subsist in the work; if, but only if:

(c) the first publication of the work took place in Australia;

(d) the author of the work was a qualified person at the time when the work was first published; or

(e) the author died before that time but was a qualified person immediately before his or her death.

Architecture/models etc: (not usual)

(3) Notwithstanding the last preceding [subsection](#) but subject to the remaining provisions of this Act, copyright subsists in:

(a) an original artistic work that is a building situated in Australia; or

(b) an original artistic work that is attached to, or forms part of, such a building.

(a) Originality: labour alone? or intellectual creation?

- NO DEFINITION OF ORIGINALITY IN ACT
- Section 32: Copyright subsists in 'original' works of authorship.
- Originality is not just a criterion for subsistence- it is a core concept in copyright, relevant to determining whether infringement has occurred
- AUSTRALIA rejected the idea that a work had to be novel or inventive in order to be 'original':
University of London Press Ltd v University Tutorial Press Ltd [1916] UK HC
 - i. Could a Uni have copyright in maths exam papers? Defendant published a book including maths papers/questions saying we arnt infringing copyright because

maths exams cant be original. Its drawing on mathematical knowledge that's been around for ages

- ii. **Held:** that's not the right way to approach originality. Did it originate from the authors? Yes- they devised them themselves (they've drawn on a common body of knowledge to do that), but its not copied.
- iii. "The word 'original' **does not mean** that the work must be the expression of original or inventive thought. Copyright acts are not concerned with the originality of ideas, but with the expression of thought. But the act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work- that it should originate from the author".
- *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49
 - A map was sufficiently original as it was created by drawing on the common stock of information, in circumstances where the maps author had applied 'independent intellectual effort' to create a map with distinct differences from existing maps.

	<i>Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd</i> [2002] FCAFC 112; (2002) 119 FCR – set a very low threshold of originality, deciding that mere labour or investment of effort was sufficient. 'Sweat of the brow' standard. It has been overturned-not an accurate reflection of Aust Law.
Facts	DMS produced searchable marketing and residential directories on CD-ROM using data and categories from Telstras White and Yellow Pages phone directories. Telstra sued for copyright infringement, and succeeded in first instance.
Issue	Whether 'industrious collection was sufficient to establish 'originality'; such that copyright subsisted in comprehensive sets of data like Telstras phone directories which exhibited no creativity or judgement in selection or arrangement of information. (US supreme court had held, that copyright did not subsist in a phone directory: at least a 'modicum of creativity' or some 'minimal creative spark' was needed).
Held	<p>Sackville J: Principle consideration: 'innovation threshold'.</p> <p>Such compilations consisting exclusively of a record of facts can be the subject matter of copyright, does it not follow that Telstra should be rewarded for its substantial investment of time and resources by being accorded copyright protection?</p> <p>In summary, the authorities support these propositions:</p> <p>→A compilation will ordinarily be an original literary work for copyright purposes if the compiler has exercised skill, judgement or knowledge in selecting the material for inclusion in the compilation or in presenting or arranging the material</p> <p>→A compilation of factual information will be an original literary work, if the compiler has undertaken substantial labour, or incurred substantial expense in collecting the information recorded in the compilation.</p> <p>→Compiler must show that the labour or expense exceeds a minimum threshold: <i>Cramp v Smythson, Victoria Park v Taylor</i></p> <p>→labour and expense can be taken into account regardless of whether they were directly related to the preparation of the compilation in material form, provided it was for the purpose of producing the compilations</p> <p>Held: Telstra had copyright in the White Pages and Yellow Pages directories, as the compiler had undertaken substantial labour and incurred substantial expense in collecting the information recorded in the compilation.</p> <p>1.the plaintiffs work as a whole is 'original' and protected by copyright 2.whether the part taken by the defendant is substantial</p>

<i>IceTV Pty Ltd v Nine Network Australia Pty Ltd [2009] HCA 14; (2009)</i>	
Facts	<ul style="list-style-type: none"> • Compilation by Channel 9 of TV programmes. • Argument: as a whole, the compilation is original, (but that's not to say that every element is original) • IceTV came up with the idea that an employee of IceTV would watch Channel 9 for 2 weeks, and wrote titles of programmes they were watching. Created this template. • IceTV comes up with its own table, that's identical to Channel 9's template (Hasn't copied it but has generated a document with the title and information of TV programmes) • Channel 9 sued IceTV
	<p style="text-align: center;">French, Crenna and Kiefel JJ</p> <p>Originality in the context of subsistence of copyright:</p> <ul style="list-style-type: none"> • Originality, for the purposes, requires that the literary work be <i>originated</i> with the author and that it was not merely copied from another work. • Originality means that the creation (ie the production) of the work required some independent intellectual effort, but neither literary merit nor novelty or inventiveness is required. <p>Originality in the context of infringement:</p> <ul style="list-style-type: none"> • In this appeal, the question of originality arises in the context of infringement (not subsistence). • In particular, the determination of the quality of the part of the weekly schedule alleged to have been reproduced. • A weekly schedule (the Nine database) contains both information and creative material. Information: time and title, creative: synopses • If the part reproduced did not originate with the author, so that the author would not have copyright in the part alone, the part reproduced will not be a substantial part. • The expression of the time and title information, is not a form of expression which requires particular mental effort or exertion. It lacks the requisite originality <p>Skill and labour in the context of subsistence:</p> <ul style="list-style-type: none"> • Requirement of the Act is only that the work originates with an author from some independent intellectual effort. <p>Skill and labour in the context of infringement:</p> <ul style="list-style-type: none"> • Whether a part reproduced is a 'substantial part' and the degree of originality of this part.- mandated by the Act. <p>Question: whether skill and labour was directed to the particular form of expression of the time and title information, including its chronological arrangement.</p> <p>IceTV was successful. The skill and labour devoted by Nine employees to programming decisions was not directed to the originality of the particular form of expression of the time and title information. The level of skill and labour required to express the time and title information was minimal. The original aspects were the last 2 columns (which were not copied by IceTV).</p>

Common theme between both cases (*Desktop* and *IceTV*): need to focus on identification of the author and any original expression contributed by that author.

These phrases are the standard of originality in Australia:

- **Importance of the author making 'some independent intellectual effort' and 'sufficient effort of a literary nature' as giving rise to authorship---- *IceTV***

Cf. EU law: Joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd v QC Leisure; Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083
Spectacle such as a football match would not meet the standard of ‘authors own intellectual creation’ (standard of originality required for copyright to subsist in all works under EU law).

	Canadian law: <i>CCH Canadian Ltd v The Law Society of Upper Canada</i> [2004] 1 SCR 339 - used language to describe the standard of originality similar to that of the HC in <i>IceTV</i> .
Facts	<ul style="list-style-type: none"> • CCH published law reports and other legal materials. • They alleged that a photocopy-on-demand service, offered by a research and reference library operated by the Law Society of Upper Canada, infringed copyright in their copyright works, namely headnotes, case summaries, topical indexes and compilations of reported judicial decisions.
Issue	Subsistence of copyright in the pleaded works
Held	<ul style="list-style-type: none"> • For a work to be ‘original’, it must be more than a mere copy of another work, but at the same time, it need not be creative or novel or unique. • What is required to attract copyright protection in the expression of an idea, is an exercise of skill and judgement. • The headnotes, case summaries etc are all works that have originated from their authors and are not mere copies. • They are the product of the exercise of skill and judgement that is not trivial. They are all ‘original’ works in which copyright subsists...

(b) Originality, slavish copying and photographs

- Courts frequently state that originality does not arise where a work has been ‘slavishly copied’ from another, even if significant skill and effort has been expended
- ***Interlego AG v Croner Trading Pty Ltd* (1993) 25 IPR 65:**
 - Lego employee had copied an earlier drawing of a Lego brick, using a different scale and making some small changes to the appearance of the brick in the drawing (took 2.5 days)
 - On appeal, Gummow j noted that ‘great skill’ was involved, and that the changes were sufficient to make the new drawings ‘visually distinctive’
 - Found in favour of the copier - found that their work was original
 - Compare the exercise of artistic skill that makes the changes. That was enough in this case.
- Photographs are specifically listed as ‘artistic works’ in s 10(1) of the Act, and s 10(1) further identifies the ‘author’ of a photograph as ‘the person who took the photograph’, courts have considered whether a photograph is sometimes ‘just a copy’.

	<i>Antiquesportfolio.com Plc v Rodney Fitch & Co Ltd</i> [2001] FSR 345 [CB pp 59-61]
Issue	Extent to which a photograph of a single static item, such as a jug or sofa, can be said to be protected by copyright.
Held	Copyright does exist in the photographs. 3-deminseial object- positioning of the object, the angle, lighting, colour and features...

(c) The requirement of an ‘author’

- HC judgement in *IctTV* highlighted the importance of identifying both the particular expression in which copyright is claimed AND the author responsible for that expression.
- Part III- copyright works- have ‘authors’ (whereas Part IV have ‘makers’)

Human Authors

- Usually easily identifiable.
- Issues: computer systems, computer-generated works

	<i>Cummins v Bond [1927] 1 Ch 167 [CB pp 61-63]</i>
Facts	<ul style="list-style-type: none"> • Miss Cummins (plaintiff), and Mr Bond (Defendant), wanted to attribute authorship of the work to someone other than a living human (spiritualism). • Bond wants some share in what has been generated by Cummins. Claims that the communication was a result of his hallucinations. • Miss Cummins recoded a conversation with a dead guy couple of millennia ago.
Issue	Whether what she translated could be protected under copyright Who is responsible for the expression here?
Held	Copyright rests with Cummins. Court was not comfortable with giving copyright with dead person/spirit. Have to focus on who is responsible for the expression. Need a human author

	<i>IceTV Pty Ltd v Nine Network Australia Pty Ltd [2009] HCA 14; (2009) 239 CLR 458 [CB pp 63-65]</i>
Held	<p>French CJ, Crenna and Kiefel JJ:</p> <ul style="list-style-type: none"> • Copyright legislation strikes a balance of competing interests and competing policy considerations. It is concerned with rewarding authors of original literary works with commercial benefits <p>Gummow, Hayne and Heydon JJ:</p> <ul style="list-style-type: none"> • Significance of authorship- key provisions of Pt III of the Act fix on ‘the author’ – s32(1), s 33, s 35 • The Act does not define the term ‘author’ beyond the statement that in relation to a photograph it is the person who took that photograph. • ‘author’ is ‘the person who brings the copyright work into existence in its material form’ • If the work is a ‘compilation’, the author will be those who gather or organise the collection of material • The authors’ of the Weekly Schedule were ‘qualified persons’ • Need a human act to give rise to authorship

	<i>Telstra Corporation Ltd v Phone Directories Co Pty Ltd [2010] FCAFC 149; (2010) 194 FCR 142</i>
Facts	<p>Listed the names, addresses, telephone numbers and other information. Numerous people contributed to the work. Process in creating:</p> <ol style="list-style-type: none"> 1. The collection phase- HC said it involved an intellectual effort. Needed updating/maintenance etc. That effort, undertaken by Telstras employees, wasn’t effort that went into the FORM/EXPRESSION of the white and yellow pages 2. The book extract phase- starting to see files with subscribers etc. starting to see material form at this stage. Wasn’t really humans that were creating the outcome, but can see some type of human involvement. Humans had set up the database in accordance with certain rules, but the act of generating the material

	<p>form of the directories, was computer generated. Any human involvement was too far removed and automated.</p> <p>3. The book production phase- gave rise to the layout. The layout itself wasn't original</p>
Issue	Who was the 'author' of the White and Yellow phone directories.
Held	<p>Copyright does not subsist in White Pages and Yellow Pages directories</p> <ul style="list-style-type: none"> • There is no authorship. • For authorship: you must identify authors, and those authors must direct their contribution (intellectual effort or sufficient effort of literary nature) to the particular expression of the work • There are humans, but they are just 'background work' that is unrelated to the expression. • 2/3 judges said: had some humans been involved in the middle stage, that wouldve been enough to give rise to authorship. • There was no 'creative spark' or 'skill and judgement' exercised by the people

Material form

- Copyright subsists in a work from the time it is 'made' (for unpublished works: s 32(1) and for published works: s 32(2) and 29)
- S 29: a work is published if it has been supplied to the public
- A work is 'made' when it is reduced to writing or some other material form (s 22(1))
- "**Material form**", in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced) (s 10)

Qualification

3.2 Other criteria for subsistence: 'making' and 'qualification'

(a) For works

- **s 32(1)-(3)- FIRST QUESTION:** Does my work meet the requirements of originality and authorship, is it published? (s 32(1) or s 32(2))
- **s 10(1) definitions of 'material form' and 'writing'**
 - Material form: any form of storage of the work, whether visible or not.
- **s 22(1)-(2) ('making' of works)**
 - 22(1)- says reference to when a work was made, is a reference to when the work was first reduced to writing, or some other material form.
 - 22(2)- a literary, dramatic or musical work that exists in the form of sounds embodied in an article or thing shall be deemed to have been reduced to a material form and to have been so reduced at the time when those sounds were embodied in that article or thing. In one way you can reduce something to material form- is a sound recording of it.
 - If someone's playing some music, if that is recorded, that act of recording reduces the material into material form. Your act would bring the musical work into being.
- **s 29 (publication)**
 - S 29(1): STATUTORY DEFINITION OF WHAT PUBLISHED MEANS (If it doesn't fall within this definition, it will be unpublished)
 - Ie: s 29 says: has first published book been published in Aust
 - Ie in NZ has been published within 30 days of the first publication in Aust. S 29 says you can discount that

- **s 32(4) definition of qualified person**
 - Australia citizen or resident living in Australia
 - This could mean a large body of material will go unprotected?
 - What do we do for works, sound recordings, films made by foreign authors or makers, first published in other countries around the world?
 - ANSWER: Part 8 of the Act: S 184: regulations can be made that in effect extend the operation of the copyright act, so that it applies to foreign authors/makers.

(b) For subject matter other than works- NO REQUIREMENT OF ORIGINALITY AND AUTHORSHIP

- ss 89-92
 - EG S 89- sound recordings:
 - Ss(1) Who is the maker of the sound recording- can be resident but can ALSO be a body corporate (different from Part III). What does it mean for a sound recording to have been made. S 22 gives you the answer to those things
 - Ss (2)- if made in aust- copyright can subsist. Doesn't matter who the maker is
 - Ss (3)- copyright subsists if first published in Aust. Doesn't matter who the maker is or where it was recorded.
- s 84 definition of qualified person- Aust citizen or body corporate incorporated under the law of the Cth or a State
- s 22(3)-(5), (7) ('making' of other subject matter)
- s 29 (publication)

3.3 Protection of foreign authors, foreign works and foreign subject matter other than works

- **Section 184 (application of Act to countries other than Australia)**
- **Copyright (International Protection) Regulations 1969 (Cth), regs 4-8**
- Reg 4: when dealing with copyright act, go to s 32 (have a published original work).
- First publication took place in Aust (I know from reg 4- it means first publication anywhere in the world (WTO, Berne convention members))
- Reg 4 (5) - applies to body corporate.

Major simplifying effect. IMPROTANT TO IDENTIFY HOW IT APPLIES

REGULATION 4

(1) Subject to these Regulations, a provision of the Act that applies in relation to a literary, dramatic, musical or artistic work or edition first published, or a sound recording or cinematograph film made or first published, in Australia (an *Australian work or subject-matter*) applies in relation to a literary, dramatic, musical or artistic work or edition first published, or a sound recording or cinematograph film made or first published, in a Berne Convention country, a Rome Convention country, a [UCC country](#), a [WCT country](#), a [WPPT country](#) or a [WTO country](#) (a *foreign work or subject-matter*):

(a) in the same way as the provision applies, under the Act, in relation to an Australian work or subject-matter; and

(b) as if the foreign work or subject-matter were made or first published in Australia.