Copyright

Copyright is a bundle of rights which protects certain subject matter from being copied or used in particular ways without the copyright owner's permission. Copyright protects two categories of subject matter: 'works', being literary works (textual material), dramatic works, musical works and artistic works; and 'subject matter other than works', being sound recordings, films, television and sound broadcasts and published editions. Copyright does not protect ideas, but instead it protects the particular expression of the ideas in a material form. Importantly, copyright exists separately from the physical work, and as such the sale of the physical work does not automatically include the copyright.

In Australia, as in most countries, copyright is an automatic right – it is free and there is no need to register copyright. It is not required to display the copyright symbol ©, but it is a good idea to do so together with the name of the copyright owner to put people on notice that the material is protected by copyright.

There are rules in the Copyright Act setting out who owns copyright, which depends on the particular subject matter. Generally, it is the creator of a literary, dramatic, musical or artistic work who is the copyright owner. Generally, it is the 'maker' of a sound recording, film or broadcast who is the copyright owner. (The meaning of 'maker' depends on the particular subject matter and the circumstances in which it was made.) For published editions, the publisher is the copyright owner. However, there are exceptions to these general rules of copyright ownership, and ownership can be changed by written agreement. Also there can be more than one copyright owner depending on the circumstances.

The copyright owner has certain exclusive rights to use the copyright material in certain ways, and control the use of it by anyone else. Different exclusive rights apply to different subject matter. Depending on the subject matter, some of the exclusive rights include the right to control the use and reproduction of the material, the right to put the material online, the right to make copies available to the public for the first time and the right to perform the material in public.

A copyright owner can give permission to someone to use their copyright (known as a 'licence'). A copyright owner can also transfer their copyright to someone (known as an 'assignment'), for example by sale. Assignments and licences can be restricted, for example by duration and geographical area and to cover certain uses only.

A copyright owner is free to choose whether or not to license their material, and whether to license the user directly or instead join a copyright collecting society which collects copyright licence fees (or royalties) on their behalf for certain uses of their copyright material. However, there are certain licences which a copyright owner must grant for certain uses of their material, which include uses by the educational and government sectors. These are known as 'statutory licences' and are collected by certain collecting societies.

Generally, in Australia, copyright lasts for the life of the creator plus 70 years. However, there are different duration periods depending on the subject matter, when it was created, when it was made public, and whether the creator is known. So, it is important to consider all of the circumstances to determine the exact copyright duration. Once copyright expires it is in the 'public domain', which means it can be used without permission.

As a personal property right, copyright forms part of a copyright owner's estate and is transferred to his/her heirs under the laws of inheritance.

Copyright infringement occurs when copyright material is used in one of the exclusive ways controlled by the copyright owner, without the copyright owner's permission. Infringement can also occur when a 'substantial part' (ie. a significant or important part) of the material is used. There are a number of exceptions to copyright infringement including fair use for research, study, criticism, review, parody, satire and reporting the news. There are further exceptions for artistic works including incidental filming of artistic works and certain uses of sculptures and other artistic works located permanently in public. There are also special exceptions for libraries, educational institutions and government. If you believe your copyright has been infringed, it is important to seek legal advice before you contact the alleged infringer. For infringing material online, copyright owners can make use of the 'notice and takedown' provisions of the Copyright Act in circumstances where they

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believe that their material has been posted to websites without their consent.

Australia and a number of other countries are members of international copyright treaties which require members to give ‘national treatment’. This means Australian copyright law applies to most foreign copyright material used in Australia. Similarly, where an Australian copyright work is used in a foreign country which is a member of the copyright treaties, the copyright law in that country will apply.

In addition to copyright, moral rights are granted to creators of works and films and to certain performers. Moral rights are the right to be attributed, the right not to be falsely attributed, and the right of integrity to prevent derogatory treatment of the material. Moral rights are separate to copyright and cannot be given away, however you can consent to activities that may infringe your moral rights.

Contents:

1. What is copyright
2. What does copyright protect
3. Requirement for copyright protection
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7. Collecting societies
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9. Copyright infringement
10. Copyright and jurisdiction
11. Moral Rights

1. What is copyright?

Copyright is a bundle of rights in relation to certain types of subject matter. Copyright protects the subject matter from being copied or used in certain ways without the copyright owner’s permission.

As such, copyright is a mechanism for artists to protect and monetise their creativity.

2. What does copyright protect?

Under the Copyright Act, copyright protects only the following 2 categories of **subject matter**:

- ‘**Works**’, namely:
  - Literary works (ie textual material such as poems, lyrics, stories, computer programs, anthologies).
  - Dramatic works (eg screenplays, choreography).

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- Musical works (ie the music separate from the lyrics).
- Artistic works (eg visual art, craft works, photographs, sculptures).

To get copyright protection these works must be '**original**', which means the works are not mere copies but were created with the requisite skill and effort.

- '**Subject matter other than works**', namely:
  - Sound recordings.
  - Films.
  - Television and sound broadcasts.
  - Published editions of literary, dramatic, musical or artistic works. (This includes the stylistic details particular to a published edition of a work, and may include items such as layout and the typographical arrangement.)

If your material does not fall into one of the above categories, copyright does not apply. Importantly these subject matter need to be original and expressed in a material form (see below Requirement for copyright protection).

In Australia, as in most countries, copyright is an automatic right. Copyright is free and there is no need to register copyright. You don't have to display the copyright symbol ©, but it is a good idea to do so together with the name of the copyright owner, to put people on notice that the material is protected by copyright.

Importantly, copyright exists separately from the physical work. This means that the sale of a physical work (such as a painting) does not automatically include the copyright, and so the copyright owner might be different to the owner of the painting.

3. Requirement for copyright protection: material form and originality

Copyright does not protect ideas, styles, data, information, methods or concepts. Instead, copyright protects the particular expression of the idea which has been recorded in a material form in any medium – whether it be written down or otherwise recorded. So, for example, there is no copyright in an idea expressed in a conversation unless it has been recorded, for example, in writing, on a sound recording, filmed, or on a USB stick. Therefore, a creator cannot rely on copyright law if someone stole his/her idea if it had not yet been expressed in a material form. Other areas of the law might provide protection such as the law of confidential information, contracts or patents. For more information, see Arts Law's information sheet on Protecting your Ideas.

In addition to the requirement of material form, literary, dramatic, musical and artistic works must be **original**. Originality, for the purposes of copyright, does not require artistic skill or innovation. Rather the work must be attributable to the creator's skill, labour or judgment. Examples of things which are not considered original, and so do not get copyright protection, include names, titles, and slogans. Note, this requirement of 'originality' does not apply for 'subject matter other than works', ie sound recordings, films, broadcasts and published editions.

4. Ownership of copyright

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General principles

Generally, the '**author**' of a work (ie a literary, dramatic, musical or artistic work), owns the copyright in the work. The Copyright Act does not define who is an 'author'; however the author will usually have put in creative skill and effort in creating the work.

Generally, the '**maker**' of a sound recording, a film or a television or sound broadcast, owns the copyright. The meaning of 'maker' depends on the material and the circumstances in which it was made, as set out in the following:

- The 'maker' of a sound recording: If it is a commissioned sound recording (ie made for remuneration or some other form of payment), the general rule is that the maker (or copyright owner) is the commissioner. If it is an uncommissioned sound recording, the maker is the person who owned the medium embodying the recording (eg the disc) at the time it was made (such as a recording studio, record producer, or record label). However, if it is an uncommissioned sound recording of a 'live' performance made after 1 January 2005, the 'makers' are: the person who owned the medium embodying the recording (eg the disc), each of the performers and the conductor (if any) who were not performing/conducting as part of their terms of employment, otherwise their employer will own their copyright share. (A one off payment to a session musician is not usually 'employment'.) These people will each own an equal share of copyright in the sound recording. These rules can be changed by written agreement.
- The 'maker' of a film: If it is a commissioned film, the 'maker' in the final version of the film is the commissioner. So the commissioner owns the copyright in the final version. If it is uncommissioned, then the general rule is that the 'maker' is the person who makes the financial or administrative arrangements to make the film, such as paying or arranging for the payment of the costs of the film and organising the production and post-production activities that are necessary to complete the film. This is usually the producer. Note, for films made after 19 December 2005, the director (or if employed, their employer) also has a copyright interest, but only in respect of the right to include the film in a retransmission of a free-to-air broadcast. (As such they can receive payment from pay TV operators exercising their statutory right to re-transmit free-to-air broadcasts.) These rules can be changed by written agreement.

People providing creative or technical services on a sound recording (e.g. sound engineers) or on a film (e.g. the actors, cinematographer or camera operator) do not usually qualify as being the maker of that sound recording or film. However, to avoid any uncertainty, the best approach is to have all creative and technical service providers agree in writing (such as in their contracts) who owns copyright in the work being created. Performers have rights in respect of their live performances, including the right for their consent to be sought to be recorded. These are recognised separately to copyright. For more information see Arts Law's information sheet Performer's Rights.

- The 'maker' of a television or sound broadcast: This is the person or entity who provides the broadcasting service.

The **publisher** owns the copyright in the published edition of a literary, dramatic, musical or artistic work.

Exceptions to the general principles

There are several exceptions to the general principles of copyright ownership:

- Contract: The author or maker has entered into a contract under which copyright is assigned (i.e. transferred) to another party. In order for an assignment of copyright to be effective, it must be in writing and signed by the copyright owner.
- Crown rights: The Commonwealth or a State owns copyright in any copyright subject matter created by, or under the direction or control of the Commonwealth or the State.
- Employment: The author of a literary, dramatic, artistic or musical work has created the work "in pursuance of the terms of his or her employment by another person under a contract of service". In that situation, the employer owns copyright in the work created in the course and within the scope of the employment.
  If the author is a contractor, freelancer or volunteer, the exception does not apply. In order to determine who owns or will

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own copyright in a given situation, it is therefore necessary to ascertain the author's status. For more information on the distinction between employee and contractor, see Arts Law's information sheet on Employment Issues for NSW Employees. People or organisations who use volunteers should, if necessary, secure ownership of copyright in any material the volunteers create while carrying out their activities by obtaining a written assignment of any copyright. Employees of a newspaper, magazine or periodical proprietor such as journalists and photographers are in a slightly different situation than employees generally. Instead of the employer solely owning copyright in the material created for their newspaper, magazine or periodical by their employed journalists or photographers, copyright in such materials is divided between employer and employee: the author of the work retains copyright for book publication and photocopying purposes, and the newspaper, magazine or periodical proprietor owns copyright for all other purposes (see below, Rights of a copyright owner). This means that digital reproductions of works are owned by the proprietor of the newspaper, magazine or journal, and hardcopy rights, such as the right to reproduce works in printed books or as photocopies, are owned by the author.

- Some commissioned works: If a person pays (ie commissions) someone else to take a photograph for a private or domestic purpose (eg wedding photographs), or to paint/draw a portrait, or to make an engraving, then the commissioner owns copyright in the commissioned work.

The general principles of copyright ownership as well as the exceptions can be modified by written agreement.

Joint authorship or co-authorship

Two or more people can own copyright jointly if they are joint authors of copyright material. People are joint authors if their contribution to the work is inseparable from the contribution of each other. Being recognised as a joint author or co-author requires a person to provide a "significant and original" contribution with the intention that their contributions will be merged into the copyright material.[i]

Joint owners normally own the copyright in equal shares unless they have agreed otherwise, and in partnership relationships there is a presumption of equality of sharing. Unequal sharing of copyright can exist by agreement, with each author owning a different proportion of the copyright, often reflecting their relative contributions to the creation of the copyright material. The best practice is for co-authors to have a written agreement as to the percentage share of copyright each author owns in each work they create jointly.

If authors jointly own copyright, each owner must get the consent of the other(s) before exercising any of the copyrights (e.g. licensing someone else to use the jointly owned material). They will however be able to independently assign or sell their copyright share. If an owner of copyright passes away, their share of copyright ownership, and any royalties, passes to the beneficiaries of their estate.

Works or other subject-matter containing copyright material by third parties

Situations of joint authorship must be distinguished from situations where individual copyright exists in various components forming the work, referred to as 'underlying works'. Copyright material often contains material created and contributed by third parties, which is itself protected by its own copyright. For example, with the permission of the relevant copyright owner, you could quote a poem in your novel. You may own copyright in the novel, but it does not mean you own copyright in the underlying work (ie the poem) reproduced in your novel.

This situation arises regularly in relation to films. The film might include pre-existing artistic works, musical works and sound recordings. The script of the film is protected as a literary or dramatic work in itself, but might be based on a pre-existing novel which is protected by copyright as a literary work. The fact that the filmmaker owns copyright in the film itself, does not mean that they own the separate copyrights in the underlying material in the film, such as the script, or novel, music score, artistic works or sound recordings.

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Copyright in translated works

To translate a work, permission needs to be obtained from the copyright owner of the work, not only to translate it (which means exercising their exclusive right to adapt the work), but also to exercise any of the other rights of a copyright owner, such as reproducing or publishing the work.

The translation itself is protected by copyright as a literary work, and separately the underlying work is protected by its own copyright.

So, if you want to use (such as reproduce) a translation, you need permission from both the copyright owner of the underlying work and the copyright owner of the translation.

5. Rights of a copyright owner

Use of copyright material

Copyright owners have exclusive rights in relation to the use of their copyright material. As a copyright owner you can let ('license') someone else exercise one or more of your exclusive rights. You can also stop someone from exercising your rights if they do not have your permission. Displaying the © notice together with the copyright owner's name, assists anybody who wishes to use the material by identifying who they need to contact if they want to exercise any of the copyright, such as copying.

The table below is a summary of the exclusive rights of a copyright owner in relation to the different categories of copyright protected material. **X** indicates that the copyright owner has the exclusive right:

Exclusive Rights	**Literary works**	**Artistic works**	**Musical works**	**Dramatic works**	**Films**	**Sound recordings**	**Broadcasts**	**Published editions**
Reproduce / make a copy	**X**	**X** *	**X**	**X**	**X**	**X**	**X**	**X** **
Publish for the first time (supply reproductions to the public by sale or otherwise; excludes exhibiting an artistic work)	**X**	**X**	**X**	**X**				

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Exclusive Rights	Literary works	Artistic works	Musical works	Dramatic works	Films	Sound recordings	Broadcasts	Published editions
Communicate to the public (make available online or transmit electronically, eg by broadcasting, email or on the internet)	X	X	X	X	X	X	X	
Perform in public	X		X	X				
Adapt (eg translate, comic strip version of novel, transpose or arrange a musical work)	X		X	X				
Cause to be seen in public (eg screening)					X			
Cause to be heard in public					X	X		
Enter into commercial rental arrangements (to rent out items such as compact discs)	X ***		X ****	X ****		X		

* includes making 3D version of a 2D work and vice versa
** the right is limited to making a ‘facsimile copy’ (ie an exact copy)
*** applies to computer programs, and literary works embodied in a sound recording
**** applies to these works embodied in a sound recording

6. Dealing in copyright

There are two main ways of dealing with copyright: by assignment (this means transferring copyright eg by selling it) or by licence.

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Assignments and licences can be limited in many ways. They can cover certain of the exclusive rights comprised in the copyright, for example a license to reproduce in book format but not to put it online. They can be limited by territory, for example by only granting rights in Australia. They can also be limited to a certain time frame.

Assignment

An assignment of copyright is the transfer of copyright to a third party who then becomes the copyright owner. In order to be a legally valid assignment of copyright, it must be in writing and signed by or on behalf of the copyright owner. It is possible to assign future copyright in work that will be created in the future, provided it can be identified.

Licence

Copyright can also be licensed to a third party (licensee), meaning permission is given to the third party to exercise some or all of the exclusive rights of a copyright owner. There are three main types of licence:

- Exclusive licence: The licensee is the only one allowed to use the copyright material in the way set out in the licence. The copyright owner cannot use the material in this way, and cannot authorise others to do so. In order to be valid, the exclusive licence must be in writing and signed by the copyright owner.
- Sole licence: The licensee can use the copyright material in the way covered by the licence and the copyright owner remains free to exercise that right as well, however the copyright owner cannot license others to do so.
- Non-exclusive licence: The licensee can use the copyright material under the licence and the copyright owner remains free to exercise that right as well as authorise others to do so.

Unless you are entering into an exclusive licence (which must be in writing and signed by the copyright owner granting the licence), there is no requirement to enter into a written licence. Like most contracts, a licence can be verbal, implied, result from the parties' conduct or be in writing.

It is advisable to enter into a written licence to ensure that all the important aspects of the licence are covered, for further reference and for ease of evidence if there is a dispute about the licence.

Implied licences

In some circumstances, a licence to use copyright material is implied even in the absence of any contract. For example, if you commission someone to create a work for a specific purpose, such as an illustration for a book, while the artist may own the copyright in the illustration, you have the implied right to use the illustration in the manner and for the purpose agreed at the time of the commission.

A court has determined that the producer of a film had an implied licence from the writer/director of the film that allowed the producer to distribute the film in circumstances where the parties did not have a written agreement that assigned the copyright in the film to the producer. The producer had an oral agreement with the writer/director that included the fees that the producer was to pay the writer/director.[ii]

For freelancers and journalists who submit content to media outlets of which they are not employees, there is generally an implied licence for the media outlet to publish that content.[iii]

7. Collecting societies

Copyright owners are free to negotiate copyright licences with users. Alternatively, they can join a collecting society which will negotiate those licences on their behalf. Copyright collecting societies make it easier for copyright owners to license the use of their work to third parties. They also simplify the process of licensing for prospective users of copyright material who would

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otherwise need to identify and locate the copyright owner and negotiate a licence on an individual basis. Collecting societies negotiate licences of their members' works, collect the royalties, retain a proportion of the fees that they collect as a commission, and then distribute the remainder to their copyright owner members.

Copyright collecting societies are sometimes referred to as copyright management companies or rights management organisations. They have been established to manage their members' copyright, typically where there are many users of many authors' works, such as replaying songs, and where it would be inefficient for the trade in these works to be undertaken individually by the authors or users of works. Often the individual uses are of low value, and so the role of collecting societies is to represent a broad number of copyright owners and provide licensees with access to many works.

Statutory licences

Under the Copyright Act, copyright owners must grant a licence for certain uses of their works, provided fair payment is made by the user. These are known as 'statutory licences' and include uses by the educational and government sectors covered by the **statutory licence for education** and **statutory licence for government**. There is also the **statutory licence for retransmission of free-to-air broadcasts**. There are collecting societies who collect and distribute fees under these statutory licences.

The Federal Government, which has responsibility for copyright, has established statutory licences for circumstances where it considers it is in the public benefit for particular sectors to be granted the right to copy works without having to seek the permission of individual rights owners, on the condition that fair remuneration is paid to the authors of those works through collecting societies.

Collecting societies appointed by government to run statutory licences operate under strict guidelines established by the Federal Attorney-General, including having to report on their operation of the statutory licences annually to the Federal Government. They must comply with trust fund accounting regulations contained in the Attorney-General's guidelines for declared collecting societies. They must also subscribe to the Code of Conduct for Collecting Societies which articulates mandatory standards of service.[iv]

The Copyright Agency operates statutory licences that enable the education sector (including schools, TAFEs, Universities and private educational bodies) and Government (Federal and State) to copy and communicate text and visual art works (and sheet music) for educational and government purposes respectively.[v] Its members include Australia's authors and visual artists.[vi]

Copying and communication under the statutory licences run by the Copyright Agency is monitored by surveys which determine the volume and type of use of different works. Over time, rates have developed that distinguish between categories of works – poetry for instance, is paid at twice the page rate of novels. Licensees pay the Copyright Agency licence fees based on their monitored usage of works. The Copyright Agency distributes licence fees it receives after deducting its administrative costs and the 1.5% deduction it makes for its Cultural Fund.

Screenrights is the audio-visual collecting society that manages licences that allow educational institutions to copy and communicate online radio and TV broadcasts[vii] and for State and Federal Government departments to copy from radio and television broadcasts and from the internet. Screenrights also administers licences to retransmit free-to-air TV and radio broadcasts. Screenrights members include screen producers, writers, directors, visual artists and broadcasters. Licence fees are collected based on monitored usage and distributed to members less Screenrights' administrative costs.

8. Copyright duration

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There are different copyright duration periods depending on the material and circumstances. Once copyright expires, the work is in the '**public domain**', which means that anyone can use it without infringing copyright.

Copyright duration in material (other than government copyright material) varies depending on a number of factors including whether the work was made before or after 1 January 2019 and the type of copyright material involved; whether and when the material was first made public; and for works, whether the identity of the author is generally known. For works, these factors affect whether copyright duration in a work will be the life of the author plus 70 years, or 70 years after first made public or 70 years after first made. For films and sound recordings, these factors affect whether the duration will be 70 years after the material was first made public or 70 years after the material was first made. (See the table below Copyright Duration Rules)

Works – where the identity of the author is generally known

Generally, where the identity of the author is generally known, copyright exists from the moment a new work (ie a literary, dramatic, artistic or musical work) is created and lasts for 70 years after the death of the author of the work, regardless of whether the work is made public or not. The identity of an author is 'generally known' if it can be ascertained by reasonable inquiry. For example, it is likely that an author is not 'generally known' if he/she writes under a pseudonym and does not authorise their publisher to disclose their identity.

As a result of changes to the rules in 2005, copyright has expired for works where the creator died before 1 January 1955 and the work was made public before 1 January 1955. Prior to 2005, the general period of copyright was the life of the author plus 50 years. In January 2005 the Australian law relating to duration of copyright in works was amended as part of Australia's Free Trade Agreement with the US, to extend the general period of copyright from the life of the author plus 50 years to the life of the author plus 70 years. This extended term of copyright applied to material which was still in copyright on 1 January 2005. However, if copyright had expired by 1 January 2005, copyright was not revived (unlike in the UK).

Unpublished and orphan works

Further amendments to copyright duration came into force on 1 January 2019 which effect the duration of unpublished and of orphan works (ie. works where the author is not known).

The changes limit the duration of copyright in **unpublished works**, which were previously protected indefinitely. Now, generally copyright will subsist in unpublished works for the life of the author plus 70 years. This means generally there is now a standard term for all works – life of the author plus 70 years – regardless of whether the work is made public or not.

Where the identity of the **author is not generally known**, and the copyright material is not made public, the copyright duration lasts for 70 years from when the material is first made. However, if the copyright material is made public within 50 years of its making, the copyright duration lasts for 70 years after it was first made public.

Subject matter other than works

In the case of 'subject matters other than works', in general copyright lasts as follows:

- 70 years from the year of first publication of a sound recording or film.
- 50 years from the year a television or sound broadcast was made.
- 25 years from the year of first publication of a published edition of a work.

Government works

For works, sound recordings and films in which the Commonwealth, State or Territory government owns copyright (or would own copyright but for an agreement to the contrary), copyright lasts for 50 years after the year they were made. The life of the

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author is irrelevant.

Copyright duration rules

The following table summarises the different durations for each combination of circumstances for some of the most common works and situations.

If the work is/was…	Type of material	Factors	Copyright duration
Made *before* 1 January 2019	**Works**	Identity of author is generally known **+** never made public or made public before death or made public after death and on/after 1 January 2019	Life of author + 70 years
		Identity of author is generally known **+** made public after death but before 1 January 2019	Year first made public +70 years
		Identity of author is NOT generally known **+** made public before 1 January 2019 or made public on or after 1 January 2019 and within 50 years of its creation	Year first made public + 70 years
		Identity of author is NOT generally known **+** Never made public or made public on or after 1 January 2019 but not within 50 years of its creation	Year first made + 70 years
	Sound recordings and films	Made public before 1 January 2019	Year first made public + 70 years
		Never made public OR made public on or after 1 January 2019 within 50 years of its creation	Year first made + 70 years
Made *on or after* 1 January 2019	**Works**	Identity of author is generally known	Life of author + 70 years
		Identity of author is NOT generally known **+** made public within 50 years of its creation	Year first made public + 70 years

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If the work is/was…	Type of material	Factors	Copyright duration
		Identity of author is NOT generally known **+** NOT made public within 50 years of its creation	Year first made + 70 years
	Sound recordings and films	Made public within 50 years of creation	Year first made public + 70 years
		NOT made public within 50 years of being made	Year first made + 70 years
Owned, or would have been owned, by the Government	**Works, sound recordings, or films (if the film is made on or after 1 May 1969)**	N/A	Year first made + 50 years

For the purposes of the above, the identity of the author is **generally known** if it can be ascertained by reasonable enquiry.

Material is **made public** when:

- It is published (making copies available to the public, by sale or otherwise), performed in public, broadcast, communicated to the public, or exhibited in public.
- An artistic work in a cinematographic film is seen by the public.
- A building is constructed.
- A record or adaptation of the work is offered to the public or exposed for sale to the public.

Copyright and inheritance

As a personal property right, copyright forms part of a copyright owner's estate and is transferred to his/her heirs under the laws of inheritance. For many works, this estate will last for 70 years after the copyright owner's death. For this reason, it is a good idea for creators to have wills and to state clearly how they want their copyright to be handled after their death. Some creators appoint literary, musical or artistic executors under their wills to handle the copyright (and other associated rights) in their works after their death. This is a particularly good idea where copyright forms a valuable part of an artist's assets.[x]

9. Copyright Infringement

General rule

The use of copyright material without the copyright owner's consent amounts to a copyright infringement if:

- copyright has not expired;
- there is an unauthorised use of a **substantial part** of the work; and

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- an exception permitting the use does not apply.

The question of what is a '**substantial part'** is not defined in the Australian Copyright Act 1968 but courts have made decisions about the meaning of 'substantial part' over many years and it has generally been interpreted as an important, recognisable, essential part of the whole. The test of what is substantial is qualitative, rather than quantitative. In other words, there's no rule that copying 5% of a work is okay. It depends on the quality of what is being copied, rather than the quantity. Case law can provide some guidance as to what would be considered substantial, but it will depend on the individual circumstances to determine whether a reproduced portion of a work is enough to be considered substantial and therefore a copyright infringement. Ultimately, substantiality can only be determined by a court. In some instances what may first appear to be a small percentage of a work will be considered so significant that it is substantial. In other cases, a 'substantial part' of a work will have been found to have been copied because a large proportion of a work was copied. Infringement is assessed by reference to the copyright material allegedly used, not the new work – it is irrelevant that what has been copied from the original work only represents 1% of the new work.

Other ways copyright can be infringed include by authorising someone else to infringe copyright and dealing commercially with infringing copies.

Exceptions to copyright infringement

Where material is still in copyright, there are exceptions allowing the copyright material to be used without the permission of the copyright owner.

Key among these permitted exceptions to copyright infringement are:

- Fair dealing purposes including for research or study, criticism or review, parody or satire, and reporting the news.
- Certain uses of artwork (eg sculptures that are permanently located in a public space).
- Providing legal advice and conduct of court cases.
- Format shifting of works (eg where the owner of an earlier copy of a sound recording makes a later copy for their private and domestic use).
- Time shifting of works (eg where the broadcast of a film or sound recording is copied for use at a more convenient time).
- Making accessible copies of works for the print disabled.

There are also exceptions for libraries, as well as statutory licences that permit the educational and government sectors to copy and communicate works for educational and government purposes on the proviso that fair compensation for this use is paid through collecting societies back to the copyright owners of these works.

Remedies for copyright infringement

If you think someone has infringed your copyright, you should contact them and assert your rights by sending them a notice asserting your ownership of the copyright. Alerting them to their infringing conduct may make them stop infringing, particularly where they were unaware the work was protected by copyright. However, before making any claims of copyright infringement, it's important to seek legal advice because if your claims are unfounded you could yourself be sued for making 'groundless threats'.

Where there is no satisfactory response, a letter of demand, asking them to cease infringing your work, and provide undertakings not to infringe is typically sent. It is important to seek legal advice on whether you have a genuine case of copyright infringement as a person threatened with unjustified threats of copyright infringement can take action and obtain damages for any loss they have suffered as a result of the threats. The copyright owner may also negotiate with the infringer, if they are open to it, to enter into an appropriate licence for the ongoing use of the work. If you enter into a licence, it would set out the terms on which they could use your work, including any licence fee payable.

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If you are unable to negotiate a satisfactory outcome where your work has been infringed, you may elect to sue the infringer in court. In determining whether to take a matter to court, you should balance carefully the cost of taking the action against the remedies you might receive – both financial and reputational.

If a court agrees that your copyright has been infringed, examples of orders you can get from a court include:

- the person must stop the infringement (an injunction); and/or
- you are entitled to be paid money for the use of your work (damages or account of profits); and/or
- you may be acknowledged as the author of the work (a declaration).

For more information see Arts Law's information sheet Copyright Infringement.

Infringing material online

The online environment increases the risk of infringement of copyright through the posting and public distribution of copyright material. In Australia authors of works can make use of the 'notice and takedown' provisions of the Copyright Act in circumstances where they believe that their works have been posted to websites without their consent.

The scheme (known as the 'safe harbour' scheme) applies to 'Service Providers', limiting their liability for infringement that occurs on their networks, provided they efficiently take down content once they have been notified that it is infringing. Service Providers include internet service providers (ISPs) and educational institutions, libraries, archives, key cultural institutions and organisations assisting the print disabled.

The scheme does not protect from liability, online platforms (like Facebook, Instagram, Twitter or eBay) that host infringing content. Online platforms rely on their terms of use with users that set out guidelines for use of their platforms. Provided such platforms respond quickly to allegations of copyright infringement, by removing offending material and other regulation of users and user content, such as restricting access to their platforms for repeat offenders, they have generally avoided liability for authorising infringement of copyright.

The form of 'take down' notice is set out in Part 3 of Schedule 2 of the Copyright Regulations[xi]. On receiving the notice, the Service Provider must promptly remove, or disable access to, the copyright material. The person uploading the material may issue a counter-notice within 3 months (in the form of Part 4 of Schedule 2 of the Copyright Regulations) [xii] if they dispute that the material is infringing. The copyright owner then has 10 days to bring an action seeking a court order to restrain the activity they claim is infringing. If they do not, or the action is unsuccessful, the material will be restored.

10. Copyright and jurisdiction

Australia and most countries in the world are signatories to the international copyright treaty, the *Berne Convention*,[xiii] and to the World Trade Office's Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement.[xiv] These set out basic standards with which member nations must comply.

While there are basic standards that must be implemented by member states, there are noticeable differences in the copyright laws of different jurisdictions, especially in relation to duration of copyright, exceptions to copyright, and recognition of the associated moral rights given to authors of works and films.

For creators it is important to know that through these international agreements member states agree to provide the same copyright protection to foreign creators as apply to local copyright owners. This is known as 'national treatment'.[xv] This means any copyright use of a work in Australia is governed by the copyright laws of Australia, whether the author is Australian or foreign. Where a work by an Australian author is used in a foreign country, the copyright law in that country will

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apply.

If an Australian artist believes that their work has been infringed in a foreign country, they would need to get advice about the copyright law in that country. It may be that there is an exception that applies in that country that does not exist in Australia. Similarly, if an artist has relied on an Australian exception to use a third party copyright work in their own copyright work (for example for parody or satire), that exception may not apply in a foreign territory, and therefore in that country the work may be considered an infringement. Again, the artist should get advice on the copyright law of a country in which they wish to display or sell such works.

11. Moral rights

Moral rights are personal legal rights of creators in respect of certain copyright material, that exist separately to copyright. They are rights which protect the creative reputation of certain artists, and unlike copyright they cannot be given away.

In Australia, there are three recognised moral rights:

- The right to be attributed as the author of your work, film or performance.
- The right not to have your work, film or performance, falsely attributed.
- The right of integrity also known as the right to prevent derogatory treatment of your work, film or performance.

Moral rights apply to:

- creators of literary, dramatic, musical and artistic works;
- principal director(s), principal screenwriter(s) and principal producer(s) of films; and
- performers of live performances including when the live performances are captured on a sound recording. (Performers in a film do not get moral rights.)

The right to be attributed requires the creator to be identified prominently where an 'attributable act' is undertaken – such as reproduction or performance. Where it is unreasonable to attribute, this can be a defence to an allegation of no attribution. An example where it might be considered unreasonable to attribute an artist could be a flyer for an exhibition where the works of many artists are reproduced and there is not sufficient space to name each artist.

The right of integrity prohibits acts which would amount to derogatory treatment of your material in a manner that is or that could be prejudicial to your honour or reputation. This includes activities like distortion or mutilation of works, or the exhibition of works in ways that diminish an artist's reputation because of the manner or place in which they are displayed. There is a defence to infringement of the right of integrity if in all the circumstances the treatment was reasonable.

Most moral rights last for the duration of the copyright – they stay with the creator through their lifetime and continue for a further 70 years (when they can be held and exercised by the creator's estate), until the copyright expires. Some moral rights, such as the right to integrity of authorship in relation to a film expires when the author dies.

As personal rights, moral rights cannot be dealt with like copyright and cannot be assigned to a third party. However, in Australia a creator can give their consent to activities that may otherwise infringe their moral rights. In some countries, moral rights can be waived by the author, for example in the UK and New Zealand. Agreements that deal with copyright also cover moral rights to ensure that copyright material can be used as intended and the interests of the creator are addressed.

For more information see Arts Law's information sheet Moral Rights.

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[i] *Hadley v Kemp* [1999] E.M.L.R. 589 at 643

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[ii] *Bourke v Filmways Australasian Distributors Pty Ltd (unreported, Supreme Court of NSW, 9 October 1979.*

[iii] *De Garis v Neville Jeffress Pidler Pty Ltd (1990) 37 FCR 99; 18 IPR 292*

[iv]https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/04/Code_of_Conduct_March_2017.pdf

[v] See generally Div 4 Copyright Act 1968

[vi] https://www.copyright.com.au/licences-permission/educational-licences/

[vii] https://www.screenrights.org/screen-audiences/screenrights-licences/

[viii] Sections 120 – 129 US Free Trade Agreement Implementation Act 2004 https://www.legislation.gov.au/Details/C2004A01355/

[ix] Section 131 US Free Trade Agreement Implementation Act 2004 https://www.legislation.gov.au/Details/C2004A01355/

[x] http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Lindsay_20161116_(02).pdf

[xi] Part 2 and 3 of Schedule 2 Copyright Regulations 2017

[xii] Part 4 of Schedule 2 Copyright Regulations 2017

[xiii] https://wipolex.wipo.int/en/text/283693

[xiv] https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

[xv] Article 3 Berne Convention

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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