
Copyright

Introduction

Copyright is an important asset of creators that gives them legal rights and opportunities to generate income irrespective of the ownership of their physical creation, and irrespective even whether that creation still exists. This information sheet provides basic information on copyright, including dealing with copyright.

What is copyright?

Copyright is a bundle of economic rights which give their owner the exclusive right to do certain things in relation to the object it protects.

Copyright protection is automatic upon creation of the work. There is no need to register a work in some official register. The symbol © is used for notification purposes, to put people on notice that the work is protected by copyright, but is not required for the protection to exist.

What does copyright protect?

Object of protection

Copyright only protects specific things or "**subject-matters**" mentioned in the *Copyright Act 1968* (Cth). Copyright protects "**works**", being:

- literary works;
- dramatic works;
- musical works; and
- artistic works including works of artistic craftsmanship.

Copyright also protects "**subject-matter other than works**", being:

- films;
- sound recordings;
- broadcasts; and

- published editions.

The Copyright Act defines only some of the above categories, for example "artistic works", "dramatic works" and "broadcast". If a creation of the mind does not fall into any category of works or subject-matters other than works, copyright does not apply.

Requirement for protection

In order to attract copyright protection, a subject-matter must satisfy the following conditions:

1. The subject-matter must be expressed in a **material form**: Copyright does not protect information, ideas, concepts, styles and methods. It only protects the expression of ideas in any of the categories mentioned above. As a result, copyright arises when an idea, concept or information is written down, expressed visually, filmed, recorded or stored on the hard drive (eg. computer, USB stick, etc). What is important is that the information or idea has been put down in some kind of data.

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 or contracts. For more information, see Arts Law's information sheet on [Protecting your ideas](#).

2. The work must be **original**: The work does not have to be innovative or artistic to be original but must be attributable to the author's skill and labour, and not copied. This requirement does not apply for subject matters other than works.

Ownership of copyright

General principle

Generally, the **author** of a literary, dramatic, musical or artistic work owns copyright in the work.

Generally, the **maker** of a film, a sound recording, or a television or sound broadcast owns the copyright.

- The maker of a film is the person who makes the 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.
- The maker of a sound recording (other than a sound recording of a live performance) is the person who owns the medium which embodies the recording at the time it was made. This has been interpreted to mean the person who made the arrangements for the recording to be created with the payment of the costs being an important signifier. For example, the record company is often the owner of a sound recording. If the sound recording is made from a live performance, the maker (and owner of copyright) is the person who made the arrangements for the recording to be created and each performer on the sound recording who was not performing as part of their terms of employment. In other words, employed musicians will not usually own copyright in sound recordings of their live performances.
- The maker of a broadcast is the person or entity who provides the broadcasting service.

The **publisher** owns copyright in the published edition of a work.

People providing creative or technical services on a sound recording (e.g. music producers or sound engineers) or a film (e.g. the director, 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) as to who is the owner or owners of the copyright.

Exceptions

There are several exceptions to the general principle stating that the author of a work or the maker of a subject-matter other than work owns copyright:

- **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 subject-matter of copyright 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.

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 their employed journalists or photographers create for their newspaper, magazine or periodical, 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**).

If the author is a contractor (or freelancer), or a volunteer, the exception does not apply. In order to determine who owns or will 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.

- **Some commissioned works:** If someone is paid to take or make a photograph, portrait or engraving for the private or domestic purposes of the person paying (the "commissioner"), for example wedding photographs, the commissioner owns copyright in the work even though the artist or photographer is not an employee.

The commissioner owns copyright in a film or a sound recording made for remuneration or some other form of payment.

Film directors have a limited copyright that is given to them so that they can receive payment from pay TV operators exercising their statutory right to re-transmit free-to-air broadcasts.

Contracts affecting ownership

The general principle as well as the exceptions can be modified by agreement. It is good practice to have written agreements with all the contributors involved in your publication project to ensure copyright ownership is clearly determined.

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 author. Being recognised as a joint author or co-author requires a person to provide a "significant and original" contribution (which is not necessarily an equal contribution) with the intention that their contributions will be merged into the copyright material.

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 percentage share of the copyright depending on the extent of each author's contribution to the creation of the copyright material and the amount of skill and labour each contributes. The best practice is for co-authors to have a written agreement as to the percentage share of copyright each author owns.

If authors jointly own copyright, each owner must get the consent of the other(s) before exercising copyright rights (e.g. licensing someone else to use the jointly owned material).

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

Situations of joint authorship must be distinguished from situations where individual copyright exists in various subject-matters forming the work. Copyright material often contains material by third parties which is itself protected by copyright. For example, with the permission of the copyright owner of the relevant material (see below, **Use of copyright material**), you quote a poem in your novel, or reproduce a painting as an illustration in your brochure. Ownership of copyright in the newly created work, the novel or brochure, does not affect ownership in the original material reproduced.

This situation arises regularly in relation to films. The script of the film, protected as a literary or dramatic work, might be based on a pre-existing novel, itself copyright protected by copyright as a literary work. Similarly, the film might include musical works, and reproduce artistic works. The fact that the filmmaker owns copyright in the film does not mean that he owns the separate copyright in the script, in the underlying novel or in any music. For more information, see below **Film projects**.

Copyright in translated works

A translation is protected independently by copyright as an original literary work, which co-exists with copyright in the original work. As a result, you need permission from the copyright owner of the initial (underlying) work not only to translate it (which means exercising the exclusive right to adapt the work; see below **Rights of a copyright owner**) but also to exercise any of the other rights of a copyright owner, such as reproducing or publishing the work.

If you want to use an existing translation, you need permission from both the owner of copyright in the underlying work and in the translation.

Duration of copyright

Copyright lasts for 70 years after the death of the author of the work. In the case of subject-matters other than works, copyright lasts for:

- 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; and
- 25 years from the year of first publication of a published edition of a work.

Copyright lapses after the relevant time and the work is in the "**public domain**". This means that anyone can use it.

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 do certain things with your work, let someone else do these things as well as stop someone from doing them.

Copyright owners have the exclusive right to:

- reproduce or copy their work;
- communicate their work to the public (make available online or transmit electronically, for example by broadcasting, by email or on the internet);
- first publish their work;
- perform their work in public; and
- adapt their work (such as a comic strip version or film script adaptation of a novel of a novel; or in relation to a musical work an arrangement or transcription).

The table below indicates the exclusive rights of a copyright owner in relation to the different categories of copyright material:

	Literary works	Artistic works	Musical works	Dramatic works	Films	Sound recordings	Broadcasts	Published editions
Reproduction in material form	✓	✓	✓	✓	✓	✓	✓	✓
Publication	✓	✓	✓	✓	✓	✓	✓	✓
Communication	✓	✓	✓	✓	✓	✓		
Performance in public	✓		✓	✓				
Adaptation	✓		✓	✓				
Cause to be seen in public					✓			
Cause to be heard in public					✓	✓		

Enter into commercial rental arrangements	✓		✓	✓		✓		
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Dealing with copyright

There are two main ways of dealing with copyright: assigning or licensing.

By **assigning** your copyright, you transfer it to a third party which then owns it with all the rights deriving from copyright ownership. In order to be valid, an assignment of copyright must be in writing and signed by the person assigning copyright.

By **licensing** your copyright, you allow someone else to exercise some or all of the exclusive rights of a copyright owner. Without a licence, the use of your copyright material by a third party is illegal.

Common terms of licence

If you licence copyright material, it is important to determine:

- the **permitted uses**

Which rights of a copyright owner can the licensee exercise? The parties (copyright owner or licensor and licensee) should consider which rights have to be exercised for a specific purpose. For example, you might agree with another organisation to license the right to reproduce and publish an information booklet in hard copy, but retain the right to communicate the information in the booklet via your website only;

- the **territory**

In which area (such as State, country, region of the world) can the licence be exercised? If you have a publication which contains information relating to the laws of NSW, you might agree to use by other similar organisations in NSW but not to those in other States;

- the **term** of the licence

For how long is the licence valid? It can be for the duration of copyright but also for a much shorter period;

- any **sub-licensing** right

Does the licensee have the right to allow others to use the material in the manner contemplated by the licence? In some circumstances, it is necessary to have the right to sublicense, for example where a publisher sends the text to a printer for reproduction;

- the **nature** of the licence

Is the licence exclusive, sole or non-exclusive (see below, **Nature of the licence**)?

- any **payment** by the licensee

The copyright owner can ask for money for the use of his copyright material. Payment can be in the form of a flat fee, a periodic fee or on a royalty basis, or a combination of all of those depending on the nature of the transaction.

Nature of the licence

There are three main types of licence:

- **Exclusive licence**

The copyright owner authorises the licensee to exercise an exclusive right of the copyright owner in relation to copyright material to the exclusion of anyone else, including the copyright owner. In order to be valid, the exclusive licence must be in writing and signed by the copyright owner;

- **Sole licence**

The copyright owner authorises the licensee to exercise an exclusive right of the copyright owner in relation to copyright material to the exclusion of anyone else except the copyright owner; and

- **Non-exclusive licence**

The copyright owner authorises the licensee to exercise an exclusive right of the copyright owner in relation to copyright material and remains free to exercise that right as well as authorise others to do so.

Form of licence

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 licence in writing. 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, for reward, a work for a specific purpose, such as an illustration for a book, you have the right to use the illustration in the manner and for the purpose agreed at the time of the commission.

An Australian 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.

Copyright infringement

General rule

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

- there is an unauthorised use of a **substantial part** of the work; and
- an exception permitting the use does not apply.

"Substantial part" means a vital or important part of the copyright material, based on the quality rather than the quantity of copyright material used. It is assessed by reference to the copyright material allegedly used, not the new work.

Exceptions

The use of a substantial part of another's copyright material without the copyright owner's consent is allowed in limited situations such as:

- fair dealing purposes. Fair dealing purposes include research or study, criticism or review, parody or satire as well as reporting the news;
- incidental use in film and television broadcast; and
- certain uses of artwork (eg. sculptures that are permanently in place in a public space).

Remedies

If you think someone has infringed your copyright, you should contact them, possibly by sending a letter of demand. For more information, see Arts Law's information sheet on [Copyright infringement and letter of demand](#).

If a court agrees that your copyright has been infringed, you can get an order from a court that:

- the person must stop the infringement (an injunction); and
- you are paid money for the use of your work (damages or account of profits);

If the person wants to continue using your copyright material, you can grant a licence under terms you should agree mutually.

Infringing material online

The Copyright Regulations 1969 set out 'take down' notice procedures that a copyright owner, or an agent of the owner, can follow in relation to infringing copyright material residing on a carriage service provider's system or network. A 'carriage service provider' is an internet service provider (ISP). If the copyright owner or their agent believes, on reasonable grounds, that the material is infringing; and the owner or agent wishes the ISP to remove or disable access to the material, then they can issue a notice of claimed infringement in relation to the copyright material to the ISP's designated representative. Look on the website of the ISP to identify how to contact the 'Designated Representative', who is appointed by the ISP to receive notices and notifications issued under the Regulations.

The ‘take down’ notice form set out in [Part 3 of Schedule 10 of the Copyright Regulations](#) must be used. On receiving the notice the ISP must promptly remove, or disable access to, the copyright material. The person uploading the material may issue a counter-notice if they dispute that the material is infringing and the ISP must restore, or enable access to, the copyright material on its system or network; unless the copyright owner gives notice, within 10 working days of receiving the counter-notice, that the owner or agent has brought an action seeking a court order to restrain the activity that is claimed to be infringing. <<See Arts Law's information sheet, *Issuing a takedown notice when your copyright is infringed online* >>

In 2015 the Communications Alliance Limited (which represents ISPs) developed the [Copyright Notice Scheme Industry Code](#) (C653:2015) that is intended to be an industry code when it is approved by the Australian Communications and Media Authority ([ACMA](#)). The Code is primarily educative, with the obligation remaining with rights owners to identify residential fixed internet users who are alleged to have infringed copyright. The obligations on the ISPs include the delivery of infringement notices and to assist rights owners to identify persistent infringers. However the obligation remains with the rights owners to issue legal proceedings against any infringing user of a copyright material. Independent artists will find it difficult to meet the operational requirements of the Code for the reasons described in the Arts Law submission on the draft Code, [ISP Industry Code to combat online copyright infringement](#). The ‘take down’ notice procedures remain available to independent artists when infringing material is identified and the artist wishes an Australia ISP to remove or disable access to the infringing material.

You can find additional information about copyright on the websites of the following organisations:

- [Australian Copyright Council](#) (www.copyright.org.au)
- Australian Copyright Council information sheets:
 - [An introduction to Copyright in Australia](#)
 - [Artists & Copyright](#)
 - [Assigning & Licensing Rights](#)
 - [Copyright Protection in Other Countries](#)
 - [Duration of Copyright](#)
 - [Exceptions to Copyright](#)
 - [Indigenous Artists](#)
 - [Infringement – What Can I Do?](#)
 - [Ownership of Copyright](#)
 - [Permission – Do I Need It?](#)
 - [Protecting Your Copyright](#)
- **Attorney-General's website** – [Copyright information](#)
- Arts Law publishes ‘*Visual Artists and the Law*’ by Shane Simpson. 3rd Edition by Annabel Clemens (2013) in [EPUB format](#), [MOBI format](#) & [eBook - PDF format](#); which provides a commentary on: the basics of copyright (Ch 1); trading copyright (Ch, 2); protecting your copyright (Ch 3); moral rights (Ch 4); contracts (ch 5); collecting societies (Ch 7); resale royalties (Ch 8); securities, sales and galleries (Ch 9); art and the internet (Ch 10); Aboriginal and Torres Strait Islander artists (Ch 11); photography (Ch 12); sculptures (Ch 13); design (Ch 14); insurance and liability (Ch 16); debt (Ch 17); and tax (Ch 18).

Other Arts Law publications on copyright issues include:

- [Copyright infringement and letter of demand](#) information sheet
- [Moral rights](#)
- [Resale royalty rights](#)

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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