



# INFORMATION SHEET

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## PROTECTING YOUR IDEAS

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### Introduction

Often artists, writers, filmmakers, game developers and other content creators need to communicate their original ideas to a third party before entering into a contract with the third party for the commercial use of their ideas. When disclosing your ideas to others, you should be mindful that the third party might copy your ideas or pass them on to others without your permission or providing payment to you.

The law of confidential information is the legal means available to protect secrets, including ideas. Other laws that protect intellectual property include copyright or passing off (which is, for example, when someone represents to the public that the work is their work although it is not). However, a breach of copyright or passing off may be more difficult to establish as copyright only protects the expression of ideas, not the idea itself and to argue a case of passing off successfully you must prove that you and your idea are already known in the market place.

### What is the law of confidential information?

#### Essential elements

In order to assert that there has been a breach of confidence you must satisfy 3 elements:

1. **Requirement of secrecy:** the information must be of a "confidential" nature;
2. **Communication in confidence:** the information must have been communicated in circumstances that indicate that the person receiving it must respect its confidential nature. For instance you told the third party that they were to keep the information confidential or they signed a written contract stating that they would keep the information confidential; and
3. **Misuse by the third party:** there must be unauthorised use, including unauthorised disclosure, of the information to the detriment of the party communicating it.

It is up to the person asserting confidentiality to establish these requirements.

#### Requirement of secrecy

The confidential information must not be public knowledge; there must be an element of secrecy. The distinction, however, between confidential information and information that is public knowledge is sometimes hard to determine. In assessing whether information is of a confidential nature, a court will look at:

- the value of the idea to the plaintiff (i.e. the person who communicated the information);
- the extent to which the idea is known or has been disclosed to others, and whether that disclosure was made on a confidential basis;
- the ease or difficulty with which those ideas could be duplicated independently by others;

The law of confidential information is not limited to any particular type of information but the information must be reasonably ascertainable. The law has been used to protect a broad range of information. For instance, it has been used to protect information about Aboriginal cultural and religious ceremonies; information concerning the genetic structure of a tree; a scenario for a series of television programs; and unpublished artistic works.

## Practical steps

Steps to protect confidential information include:

1. Mark all documents which contain confidential information "CONFIDENTIAL". If copyright subsists in your documents, also include the copyright owner's notice. You can go further and mark each document with this notice:

"The information in this document is confidential and must not be used or without first obtaining **[name]**'s written consent."

2. Begin any conversation with words to the effect that the information disclosed, including ideas, are confidential and must not be discussed with anyone without first obtaining your consent, possibly in writing. This is an oral contract.
3. Most importantly, have the person or organisation which is to receive the information sign a confidentiality deed **before** you communicate any idea or submit any confidential documents to them. This is a written contract. Arts Law has a sample [Confidentiality Deed](#). If you follow steps 2 and 3 you may also have an action for breach of contract against the recipient of the information if the information is used or disclosed without your permission.

Be aware that organisations can be reluctant to enter into confidentiality deeds. If you think that the third party to whom you wish to provide confidential information might not agree to sign the confidentiality deed, Arts Law recommends the following: include a clause in the deed stating that the third party is considered as having accepted the terms set out in the deed on receipt of your confidential information even if they have not signed and returned the deed to you. Alternatively, you might reconsider whether you really wish to disclose confidential information to that third party.

Arts Law recommends that, if you are posting the confidentiality deed, you send it by registered post to ensure that you can verify that the deed was received. If you are delivering it by hand, ask the receiving party to initial and date your copy of the deed to indicate that they have received it.

If possible, you should only submit **copies** of your confidential documents and **not** the originals.

## Indigenous Cultural and Intellectual Property (ICIP)

If the confidential information that you are going to communicate to a third party includes ICIP (see Arts Law's information sheet on [Indigenous Cultural & Intellectual Property](#)), you should include a statement in the confidentiality deed mentioning this and attach the ICIP information sheet so that the third party is familiar with the interests associated with ICIP.

## Further information

- [Arts Law Centre of Australia](http://www.artslaw.com.au) (www.artslaw.com.au), tel. (02) 9356 2566 or toll-free outside Sydney on 1800 221 457.
- [Australian Copyright Council](http://www.copyright.org.au) (www.copyright.org.au) for information and advice on copyright, tel. (02) 9318 1788.
  - [Ideas: Legal Protection](#)

## Sample short form Confidentiality Deed

[date]

Dear [name]

### Confidentiality of information provided

I have a proposal for **[brief description of the design/script/exhibition/game or other work that is confidential] (Proposal)**, which I believe will be of considerable interest to **[you/your company]**. **[The Proposal includes Indigenous Cultural and Intellectual Property (ICIP). Please review the attached document which summarises the interests associated with ICIP.]**

I would be happy to submit copies of the Proposal for **[you/your company]** to consider. In consideration of me submitting the Proposal to you, you undertake to:

- accept the Proposal copies in confidence and acknowledge that the information in the Proposal is secret;
- acknowledge that all rights and interests (including, without limitation, intellectual property rights and Indigenous Cultural and Intellectual Property) in connection with the Proposal belong to me;
- agree not to copy, use or disclose the Proposal (or any other information and material submitted in connection with the Proposal) without first obtaining my written consent; and
- immediately at my request, or if we do not enter into another contract about the Proposal, whichever happens first, return the Proposal and any other materials that I may submit in connection with it to me.

These confidentiality obligations continue until all of the information in the Proposal and any related materials cease to be confidential (other than because any breach of these confidentiality obligations are breached).

Please sign the enclosed copy of this deed and return it to me to indicate that **[you agree/your company agrees]** to these terms. I will then **[send/give]** the proposal (and any other materials) to you. If I do not receive a signed version of this deed from you and you obtain my confidential information, you will be considered as accepting the confidentiality terms as set out above.

Yours **[faithfully/sincerely]**

**[Signature]**

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EXECUTED AS A DEED BY THE PARTIES on **[insert date]**

by <b>[insert your name]</b>	by <b>[insert name and title]</b> for and on behalf of <b>[insert company/entity name]</b>
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<p>_____</p> <p>_____</p> <p>Date</p>	<p>_____</p> <p>_____</p> <p>Date</p>
<p>_____</p> <p>Witness Signature</p> <p>_____</p> <p>Witness Name</p> <p>_____</p> <p>Date</p>	<p>_____</p> <p>Witness Signature</p> <p>_____</p> <p>Witness Name</p> <p>_____</p> <p>Date</p>

**[\*\*note: if the deed is being signed by a company, it must be signed by 2 directors or a director and company secretary of the company, unless an employee of the company has been delegated the authority from the directors to sign the confidentiality deed on behalf of the company]**

### 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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*You may photocopy this information sheet for a non-profit purpose, provided you copy all of it, and you do not alter it in any way. Check you have the most recent version by contacting us on (02) 9356 2566 or toll-free outside Sydney on 1800 221 457.*

*The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.*

