

1. CRITERIA FOR SUBSISTENCE

| | Part III Works | Part IV Subject Matter |
|---|--|--|
| 1 | Work is original | (no equivalent) |
| 2 | Author was a qualified person at the time work was made/published (s32) | Maker was a qualified person at the time work was made/published (ss89-92) (or broadcaster is one of those identified as rights holders under Part IV) |
| 3 | Work is in material form. | Requires the making of a record, first copy of a film, or broadcast. |
| 4 | Copyright rights have not expired due to time since author's death/ publication (ss33-35). | Copyright rights have not expired due to time since publication (ss 93-96). |

1. Originality

- ❖ Independent intellectual effort by human author (*IceTV v Nine Network*)

a) Independent intellectual effort

- *University London Press: Maths question* – copyright subsists because of skill, labour and judgment involved
- *Sands v Robinson: Map* – copyright subsists because of independent intellectual effort
- *Desktop Marketing* (overturned): **telephone directories** – sweat of brow sufficient, i.e. substantial labour and expense
- *IceTV v Nine: TV guide* – rejected sweat of brow- protects skill directed to particular form of protected expression – skill in selecting what time to show not relevant. Arrangement of show time relevant, but no skill here as it was arranged merely according to time
- *Hyperiod Records v Lionel Sawkins: Music* – only small addition to work copied is sufficient – low bar
- *Interlego v Croner: Drawing* of lego blocks using different scale and small changes in appearance – sufficient originality
- *Antiquesportfolio.com v Rodney Fitch: photograph* of static item – sufficient originality as long as demonstrate small degree of time, skill, labour (judgment in angle, lighting, film speed and filter)

b) Originated from human author

- Stressed in *IceTV* that independent intellectual effort has to be from human author
- *Cummons v Bond* – **spirit** cannot be author
- *Telstra Corp v Phone Directories*:
 - Must be authorship resulting in material form (i.e. telephone directories) – not creative preparatory step (i.e. collection phase – updating database with information)
 - If extraction of information from database done by human authors (could have been original)
 - Test: Human author directed/fashioned material form (control nature of material form produced and contributed sufficient intellectual effort)
 - Cf. with novelist using Word Doc.

2. Territorial connecting factors/ qualifications

- ❖ Unpublished work: author must be qualified person (s 32(4) – Australian citizen or a person resident in Australia) at time work was made: s 32(1)
- ❖ Published work: Must be 1st published in Australia OR author qualified person at time work was 1st published or at time of death: s 32(2)
- ❖ Building or artistic work attached to building: building must be situated in Australia: s 32(3)
- ❖ Sound recordings (s 89) & cinematograph films (s 90): maker or publisher be qualified person OR subject matter made in Australia/1st published in Australia
- ❖ Broadcasts: made by qualified broadcasters, i.e. public broadcasters and holders of commercial broadcasting licenses (s 90)
- ❖ Published editions: 1st publication in Australia or publisher a qualified person (s 91)

3. Material Form

- ❖ S 10(1): Material form – any form of storage, whether visible or not. Includes fixation in computer memory, whether permanent or temporary
- ❖ Not demanding requirement

4. Duration

Refer to table in comprehensive notes (pages 17-19)

2. PART III SUBJECT MATTER

1. Literary Work

- ❖ Literary work: something intended to afford either information or instruction or pleasure in the form of literary enjoyment (*Hollinrake v Truswell*)
- ❖ *Exxon Corp v Exxon* (UK): **single invented word 'Exxon'** – not LW because does not provide info/instruction & lacks 'coherency' of work as it is made up of only one word
- ❖ *Fairfax Media v Reed* (OZ agreeing): **news headline** – Hollinrake definition not exhaustive – too insubstantial/short (*Francis Day v 20th Century Fox*).
 - Cf. whole page of title can be protected (*Dick v Yates*)
- ❖ But note, UK departing:
 - *Infopaq v Danske* – 11 word extract protected
 - *Newspaper Licensing Agency v Meltwater Holding*: Headlines can be LW

S 10 (1) literary work includes:

- (a) a table, or compilation, expressed in words, figures or symbols; and
- (b) a computer program or compilation of computer programs

a) Compilation (difficulty in establishing copyright)

- E.g. database, catalogues, list of fixtures, TV schedules, encyclopaedias, anthologies of poems
- *IceTV: phone directories* – Human authorship has to be directed to expression embodied in final material form
- *Fairfax Media v Reed: compilation of news articles* – originated from AFR's editors but no infringement as copyright only subsist in selection/coordination and arrangement of articles and not the articles themselves

b) Computer programs

S 10 (1) Computer program means a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result

- *Data Access v Powerflex: Reserved words used to generate source code* – not computer program – not a set

of instructions (but note that expression of reserve words in source code can be computer program)

○ Definition of computer program: expression in any language, code or notation of a set of instructions used directly/indirectly to cause a device having digital information processing capabilities to perform a particular function (or bring about certain result)

- *Dais Studio v Bullet Creative*: **table files 1% of WebStable system** – can be computer program as they are considered ‘set’ – discrete manageable entities (can be included and excluded from system) – functions cooperatively with software
 - Does not have to be intended to bring about certain result – as long as it is used cooperatively to bring about result (i.e. interrelation rather than ability, the fact that they require other components not disqualifying)
- *Status Card Australia v Rotondo*: **computer interface** – not computer program – no content – no information

2. Dramatic Works

S 10 (1) dramatic work includes:

- (a) a choreographic show or other dumb show; and
- (b) a scenario or script for a cinematograph film

But **does not include a cinematograph film** as distinct from the scenario or script for a cinematograph film

- ❖ Includes written plays, screen plays (for film/ TV show/ads), choreograph (in material form), but not films (Part IV)
- ❖ Cases:
 - *Aristocrat Leisure v Pacific Gaming*: **specification for electronic pokie machine** – not dramatic work – unpredictability and randomness – need some type of performance, i.e. plot, choreography, script, interaction (can be by cartoon characters)
 - *Nine Network v ABC*: **fireworks display** – most likely not DW – although scripted – timing errors/ misfiring rockets prevents accuracy
 - *Green v Broadcasting Corp of NZ*: **TV talent show claimed script and dramatic format are DW** – same show made under same title – original work had no script and only characteristic features, i.e. clap-o-meter and catchphrases – DW must have certainty and sufficient unity capable of performance (features of show unrelated and used only as accessories not sufficient)
 - *Nine Films v Ninox* (no contention on subsistence): **Reality show copying** – no substantial reproduction as there are large elements of unscripted dialogue and interaction – further -mood, tone, structure of two programs no substantial similarity
 - *Zeccola v Universal City Studios*: **Jaws film** – no copyright in central idea or theme – copyright originality subsists in grouping and arrangement of incidents, scenes, characters, in a manner that presents a new concept or novel arrangement of those events and characters (i.e. expression rather than idea dichotomy)

3. Musical Works

- ❖ No statutory definition. *Sawkins v Hyperion Records*: dictionary – essence of music is combining sounds for listening to. Different from mere noise. Intended to produce effects on listener’s emotions and intellect
- ❖ Can be in music score, or recorded (material form)
- ❖ Note: statutory licensing scheme – owner of music work once published, loses right to exclude others from work but can ask for compulsory revenues (cover versions of songs are not infringement)
- ❖ Cases:

- *CBS Records v Gross*: Trackdown version (**cover of original song but not yet published**) & CBS version of same song and same singer
 - Originality – differences in arrangement to suit qualities of singer’s voice not original – but here, sufficient as there is embellishment of melody, different harmonic range & instrument backing
 - CBS did not infringe Trackdown version – originality contained only in myriad of differences from original version (not any specific feature, not singer’s voice) because it is a cover – CBS did not duplicate instrumental backing (insufficient)
- *Coffey v Warner/Chappel Music (England)*: Author claimed Madonna infringed copyright of her **song containing repeated words ‘does it really matter’** – substantial part copied? – claimant cannot choose which work to claim – to claim one part of a larger song the part needs to be separable from material, not the case here

4. Artistic Works

❖ Must fit into one of the categories (Exhaustive)

S 10 (1) artistic work means

- (a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
 - (b) a building or a model of a building, whether the building or model is of artistic quality or not; or
 - (c) a work of artistic craftsmanship whether or not mentioned in paragraph (a) or (b)
- But does not include a circuit layout

1. Paintings, drawings and photographs

S 10 (1)

Photograph is a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography.

Drawing includes a diagram, map, chart or plan

No definition for painting

- Cases
 - *Merchandising Corp v Harpbond*: **face painting** – not painting
 - *Painting*: is an object with paint on surface in a permanent arrangement
 - *Elwood Clothing v Cotton On*: **T-shirt design with word and text** – court said it is a ‘drawing’ as they were not telling story/give instructions, but there to form visual look and feel - drawing does not have to be pictorial lines — importantly, must have visual (i.e. understood as a design) rather than semiotic function (i.e. read as text communicating message to reader)

2. Sculptures and Engravings

S 10 (1)

Engraving includes an etching, lithograph, product of photogravure, woodcut, print or similar work, not being a photograph

Sculpture includes a cast or model made for purposes of sculpture

- Cases:
 - *Greenfield Products v Rover Scott*: **moulds and machine parts** – industrial mould not engraving and industrial model not sculpture – suggest that cannot be