

Copyright

IS THE MATERIAL PROTECTED BY COPYRIGHT? -----

1. Consider the basic requirements for Copyright to exist:

1. Must fall within one of the categories of subject matter.
2. Must be in 'material form' – Part III works only.
3. Connecting factors (with Australia).

NB: copyright protects the expression of ideas and information NOT the idea itself or the underlying information.

Donoghue v Allied Newspapers [1938] Ch 106: journalist was the author and was responsible for the literary creation; Donoghue was just the original source of the ideas – no copyright of the ideas.

1a. Which subject matter does it fall into?

NB: it must fit into one of the below categories otherwise no copyright protection will be available.

Example, a 'scene' for a photograph does not fall within a category therefore has no protection per *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR – involved a photoshoot for an album cover.

1. Does it fall under Part III of the *Copyright Act 1968* (Cth)? *Only Part III works have creators*

a. Literary Works (s 32):

- i. Per s 10(1) definition includes:
 - a. a table, or compilation, expressed in words, figures or symbols (whether or not in a visible form);
 - b. a computer program or compilation of computer programs.
- ii. A headline or short phrase is simply too short and insubstantial to qualify for protection per *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 88 IPR 11:
 - a. F publishes the Australian Financial Review and R delivers subscriptions known as ABIX. F sued R claiming infringement of its copyright in 10 selected articles including their headlines. Held R did not infringe.

b. Artistic Works (s 32):

- i. Per s 10(1) definition includes:
 - a. a painting, sculpture, drawing, engraving or photograph;
 - b. a building or a model of a building;
 - c. a work of 'artistic craftsmanship' to which neither of the last two paragraphs applies.
- ii. Needs to have both craftsmanship and aesthetic quality.
 - a. A full scale mould for a yacht was not an artistic work because it was basically the work of an engineer and was designed to be functional and was not driven by artistic expression: *Burge v Swarbrick* (2007) 232 CLR 336
- iii. Copyright will be lost when it is registered or industrially made i.e. in large quantities, and works of artistic craftsmanship maintain copyright protection and are excluded from s 77. *this corresponds to a corresponding designs argument*
- iv. Examples:
 - a. Graphic reproduction of letters as a logo is held to be artistic work: *Roland Corporation v Lorenzo & Sons Pty Ltd* (1991) 33 FCR 111.
 - b. The layout of letters and numbers in a particular way could be categorised as artistic work as could be held as a drawing: *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2008) 172 FCR 580.

c. Musical Works (s 32):

- i. Includes:
 - a. Sound; Melody; Rhythm; Harmony.
- ii. BUT NOT the lyrics – lyrics are treated as literary works.
- iii. Need a licence from APRA to play music if not the author and a licence from PBCA if using a sound recording.

d. Dramatic Works (s 32):

- i. Per s 10(1) definition includes:
 - a. a choreographic show or other dumb show;
 - b. a scenario or script for a cinematograph film.
- ii. Plots can be copyrighted if there is a very strong similarity between the characterisation and events: *Zeccola v Universal City Studios Inc* (1982) 67 FLR 22:
 - a. Z produced the film Great White and U produced the film Jaws. Argued breach of copyright. Held that notwithstanding the use of different dialogue in Great White, the situation and characters of the Jaws properties were substantially reproduced in Great White and the similarities went far beyond the generic idea of a huge shark terrorising a sea-side town.

2. Does it fall under Part IV of the Copyright Act 1968 (Cth)? Part IV have no creators; only investors

a. Cinematograph Film (s 90):

- i. Meaning visual images embodies in an article or thing so as to be capable of being shown as a moving picture.
- ii. NB: includes the soundtrack associated with such visual images.
- iii. A computer video game is a film: *Galaxy v Sega* (1997) 75 FCR 8:
 - a. S made video games and G displayed these games for sale on their premises. Held the computer game fell within the category of cinematograph film.

b. Sound Recordings (s 89)

c. Broadcasts (s 91)

d. Published Editions (s 92):

- i. The typographical arrangement i.e. the layout and formatting of a published LDMA work.

1b. If falls under Part III works, is it Original and in Material Form?

1. Originality

- a. Originality threshold: needs some intellectual and independent effort of authorship.
 - i. Need some originality in the expression of the work and some human intellectual endeavour, copying over titles and times is not enough: *IceTV v Nine Network Australia* (2009) 239 CLR 458:
 - a. N claimed that its TV program schedules were infringed by I's electronic program guides. I accepted that copyright subsisted in each Weekly Schedule as an original literary work but denied that it had reproduced a substantial part and denied that its use of information from "Aggregated Guides". Held it was infringement.
 - ii. Need to show effort was put into it: *Desktop Marketing Systems Pty Ltd v Telstra Corp* (2002) 119 FCR 491.
- b. Must have identifiable authors:
 - i. Telstra failed to identify the author that contributed to the intellectual effort: *Telstra Corporation Limited v Phone Directories Company Pty Ltd* (2010) 194 FCR 142:
 - a. T created phone directories and P had similar phone directories.
 - ii. Struggled to show authorship because data came from elsewhere and other users: *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173: