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4. Subject Matter

Introduction and the categories for protection

The Act provides an exhaustive set of categories of works and other subject matters which are protected by copyright law, coupled with categories of works and other subject matter which are (mostly) defined inclusively or in relatively broad, technology neutral terms.
i.e. If their "creation" doesn't fit into the category of works or subject matters other than works, then copyright won't protect it.

This has two results:

- Categories are sometimes stretched to fit new materials (*Sega Enterprises v Galaxy* (1996)); or
- Material which doesn't seem a 'natural fit' to the category (*Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd*).

On the other hand, sometimes a subject matter that might be protected if the list of categories was open is unable to find an appropriate niche (*Creation Records v News Group Newspapers* Ltd (1997)), and in some cases, the appropriate categorisation of an item is unclear (*ETAL v Critchley* [1997]).

Copyright creates a monopoly, so 'there just be certainty in the subject matter of such monopoly in order to avoid injustice to the rest of the world' (*Tate v Fullbrook* [1908]).

Type	Part III Works	Part IV Subject Matters
Subject matter	Literary works Artistic works Musical works Dramatic works	Sound recordings Cinematograph films Sound and television broadcasts Published editions
Made and owned by	Authors	Producers
Originality	Must be original	Need not be original
Infringement	Can be non-literally infringed	Literal infringement only
Moral rights	Creators get moral rights	No moral rights (except films)

4.1 Part III Works

Works require human authors.

Distinction between categories is important, as if the copyright was in the words of a video cover for example, then the visual layout could be used. On the other hand, if categorised as an artistic work, others might be able to use the words and not the visuals.

Literary works

Generally

The definition in s 10 clearly protects computer programs and tables, but it does not say anything about more traditional subject matters.

- Business documents, catalogues, advertisements, lists and newspaper reports have been considered literary works.
- Includes virtually any type of writing provided not too trivial.
- Single words or titles that are too trivial or inherently unoriginal generally do not have copyright protection.
- Numerals and figures included, even without letters.

The term 'literary' in defining types of original material in which copyright subsists would appear to be relevant possible to the form in which the work appears and the function it should perform.

- Not necessarily display any learning – literary merit is irrelevant.

- 'Covers work which is expressed in print or writing, irrespective of… whether the quality of style is high (*University Press* per Peterson J).
- Must simply amount to exercise of sufficient effort, and to effect a certain result – conveying information, instruction or pleasure in form of literary enjoyment (*Exxon Corp v Exxon Insurance Consultants International Ltd* [1981]).

Copyright Act 2001 (Cth) s 10(1)

10 Interpretation

> ***literary work*** includes [non-exhaustive]:
> (a) a table, or compilation, expressed in words, figures or symbols; and
> (b) a computer program or compilation of computer programs.
>
> ***writing*** means a mode of representing or reproducing words, figures or symbols in a visible form, and ***written*** has a corresponding meaning.

Examples of literary works:

- Telephone books (Desktop Marketing Systems v Telstra (2002))
- TV schedules (*IceTV v Nine* (2009)).
- Information and instructions on the back of seed packets (*Erica Vale P/L Thomspon & Morgan (Ipswich) Ltd* [1994]).
- Catalogues (*A-One*).
- Football betting coupons (*Ladbroke, HoL* (1964)).
- Prize tables (i.e. 5 letter sequence published on scratchies and in newspapers (*Express Newspapers P/L v Liverpool Daily Post* [1985]).
- Instruction manuals (Roland Corp v Lorenzo and Sons (1991)).
- Columns of birth and date announcements in a newspaper (*Fairfax v Australian Consolidated Press* [1960]).

Compilations: *Feist, Desktop, IceTV* and *Telstra* involved tables or compilations of data, which are expressly included in the definition of 'literary work' (s 10). The issue in these cases is usually originality, not literary work.

Single words, phrases and titles involve 3 strains of opinion:

1. Ricketson: 'the law is not concerned with trifling matters'; i.e. the work may be too small or trivial for protection.
2. Originality requires sufficient skill, 'independent intellectual effort and judgement, which may be absent for something small.
3. Intention to afford either 'information and instruction, or pleasure, in the form of literary enjoyment'.

*****IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 239 CLR 458*** – refer to page 12.

Exxon Corp. v Exxon Insurance Consultants International Ltd [1981] FSR 238

Facts

- P was initially called Standard Oil Co New Jersey, but it wanted a new name that had no meaning in any language, whilst short and distinctive.
- It spent a lot of time and money on develop the word (research and testing for over a year), 'Exxon', which was argued to be a literary work in which copyright subsists.
- D used the word.

Outcome: Not copyright work.

Judgement

Issue. Is the invented word, 'Exxon', regarded as literary work?

Graham J

- 'It is a word which although invested and therefore original, has no meaning and suggests nothing in itself. To give it substance and meaning, it must be accompanied by other words or used in a particular context or juxtaposition…' (at 503).

Stephenson LJ

- '[A] literary work would be something which was intended to afford either information and instruction, or pleasure in the form of literary enjoyment, whatever those last six words add to the word pleasure' (citing *Hollinrake v Truswell* per Davey J).

Note the date of the following case and question whether it would apply now:

Fairfax Media Publications v Reed International (2010) 88 IPR 11 **

Facts

- Fairfax Media Publications, as publisher of the Australian Financial Review (AFR), brought an action against Reed, alleging it had infringed copyright by taking headlines from AFR as part of its media monitoring service.
- Fairfax claims copyright in four different conceptions of the 'work':
  1. Each headline standing alone as a literary work.
  2. Each article together including its headline as a literary work.
  3. The compilation of articles in a single edition of the newspaper.
  4. Each single edition as a compilation.

Outcome: Judgement for Reed – no copyright.

Judgement

Issue. Whether each newspaper headline was an 'original literary work' per s 32?

Bennett J

- Social contract: copyright 'is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public' (referring to *IceTv* per French CJ at [24]).

- As D published a portion of the headlines of each AFR edition, unchanged, the subsistence of copyright in the headlines was a primary issue.

- Titles, slogans and other short phrases have been consistently refused separate protection under Australian and English copyright law – no copyright in program title alone (*IceTV* at [27]). Headlines are like titles in that they are too insubstantial, short and trivial to have copyright subsist.

- Insufficient aspects of title:
  - Clever
  - Indication of content of article
  - Grouping of words that convey subject matter, such that expression was inseparable from idea conveyed (e.g. *State of Victoria v Pacific Technologies*: Help-Help-Driver-in-danger-Call-Police-Ph.000').

- Copyright subsisted in headings in *Lamb v Evans* because there was 'sufficient literary labour' in their production, whereas here the headlines were more prosaic. They were generally short factual statements of the subject of the article.

- They are not proven by Fairfax to be original in the sense required by copyright law because Fairfax failed to identify the authors or the work which they did.