

PART 1: EXAM SUMMARY

COPYRIGHT: PART I & II

Issue: Are there any copyright issues with the _____?

Rules and Application

Rules: *Copyright Act 1968* (Cth) (Act)

Application:

1. Identify which category of copyright the material falls in? Is it a Pt III LDMA work or is it a Pt IV 'other subject matter'?

For copyright protection to apply, _____ must fit into one of the categories of protected works or other subject matter under Part III or IV of the Act. If the _____ does not fall within one of these recognised categories, no copyright protection will be available (*Creation Records v News Group Newspapers*).

As held in *Donoghue v Allied Newspapers*, it is the form of expression that is protected, not the idea itself. Thus, it is the form of _____ expression that must fall within a recognised work or other subject matter category to trigger the copyright protection.

Part III Works

Category 1: Is it a literary work?

Pursuant to s 10(1) of the Act, the definition of 'literary work' includes _____. Therefore, _____ is a Pt III LDMA literary work and is protected under s 32(1) of the Act.

Note: S 10(1) Literary work includes:

1. a table, or compilation, expressed in words, figures or symbols; and
2. a computer program or compilation of computer programs

*not an exhaustive definition

Note: _____ only has single words and titles. Single words and titles are too insubstantial and too short to qualify for copyright protection as a literary work (*Fairfax Media Publications v Reed International Books Australia*). More facts are needed.

Category 2: Is it an artistic work?

_____ is an artistic work under s 32(1) of the Act. Pursuant to the exhaustive definition in s 10(1) of the Act, artistic work includes 'drawing'.

Note: S 10(1) defines 'artistic work' as:

- a) a painting, sculpture, drawing, engraving or photograph
- b) a building or a model of a building

- c) a work of 'artistic craftsmanship' whether or not mentioned in (a) or (b)

BUT does not include a circuit layout – separate regime

- a. **Note:** A work of 'artistic craftsmanship' in (c) of the definition must have **both** craftsmanship **AND** aesthetic quality which requires an 'objective assessment' (*Burge v Swarbrick*)
 - i. A special purpose boat designed by an engineer to fit functional requirements will not have an aesthetic quality and thus was not an artistic work.
- b. **Note:** Design / copyright overlap ss 74 – 77A *Copyright Act 1968* (Cth)
 - i. Copyright lost when registration or industrial application of corresponding design occurs
 - ii. However, works of 'artistic craftsmanship' maintain copyright protection even if registered or industrially applied - excluded from s 77.

Note: Arrangement of words and number can be drawings that create a visual function, and thus an artistic work (*Elwood Clothing v Cotton On*). Therefore the _____ would come under as drawings to create a visual look and feel.

Category 3: Is it a musical work?

_____ is a musical work protected under s 32(1) of the Act. Musical work includes sound, melody, rhythm & harmony, but NOT the lyrics. Lyrics are literary work.

Category 4: Is it a dramatic work?

Pursuant to the definition of provided in s 10(1) of the Act, dramatic work includes _____ and thus _____ is a dramatic work protected under s 32(1) of the Act.

Note: S 10 (1) *Copyright Act 1968* (Cth) definition includes:

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

Note: A film, themes, plots and common materials can be protected if they are very similar (*Zeccola v Universal City Studios Inc*)

- The situation and characters of Jaws protection were substantially reproduced in Great White production and the similarities went far beyond the generic idea of a huge shark terrorising a sea-side town.

Part IV: Subject matter other than works

Category 5: Cinematograph film – s 90

- Pursuant to s 10(1), cinematograph film means the visual images embodied in an article or thing so as to be capable of being shown as a moving picture.
- This includes the sound-track associated with such visual images in which *Galaxy v Sega* held video game to be a film.

Designs and Designs/Copyright Overlap

Issue: Copyright issues regarding _____'s drawings and designs/copyright overlap with _____ drawings

Rules and application

1. Identify in which category of copyright the material falls

For copyright protection to apply, _____ must fit into one of the categories of protected works or other subject matter under Part III or IV of the Act. If the drawings do not fall within one of these recognised categories, no copyright protection will be available (*Creation Records v News Group Newspapers*).

A drawing is an artistic work under s 32(1) of the Act. Pursuant to the exhaustive definition in s 10(1) of the Act, artistic work includes 'drawing'.

2. If there is a LDMA work, consider and identify whether the material:

Is original?

For works to obtain copyright protection, they must be original. Here, the author of the drawings is _____ (*Telstra Corporation Limited v Phone Directories Company*). The drawings were originated by _____ and were not copied (*Acohs v Ucorp*). Ellen is an actual person (*Telstra*). Although Ellen may have referred to the photographs of those bottles, but she has contributed 'independent intellectual effort' by spending time and effort to come up with the drawings using her own creativity. _____ is therefore qualified as an author. She has come up with the form of expression that took the drawings (*IceTV; Telstra*).

• **Consider reproduction issues:**

• **Reproduction in a material form**

Per s 22(1) of the *Copyright Act 1968* (Cth)(Act), the _____ must be reduced to 'some other material form'. 'Material form' is defined s 10(1) as including any form of storage. The work must be physically embodied to take it away from being a 'mere idea' to being a work that can be protected. The _____ (paintings?) physically embody the _____.

• **Reproduction in a 3D form > Copyright/Design overlap: could there be a copyright infringement by Ellen/our clients of copyright in Fiji/Preshafruit's 2D artistic works (drawings that sit behind the bottles) that includes the right to reproduce the work in a 3D form pursuant to section 21(3) of the C Act?**

In order to prevent copyright owners acquiring excessive rights to control the industrial application of their artistic works, ss74-77 of the Copyright Act limit copyright protection for works that are either registered or applied industrially as 'corresponding designs'

Copyright/design overlap

1. Is it a corresponding design?

Section 74 Copyright Act - 'corresponding design': **visual features of shape or configuration** which, when **embodied in a product**, result in a reproduction of an artistic work, **whether or not the visual features constitute a design capable of being registered under the Designs Act**

Break this definition down:

- **Visual features of shape or configuration:** corresponding design focuses on 3D aspects of a design – the visual features of shape and configuration – which when embodied in a product result in a *reproduction of the artistic work*. It does not matter whether or not those visual features constitute a design that is capable of being registered under the Designs Act. These are special overlap provisions.
- **Embodied in:** this reference in s 74(2) to 'weaving, impressed on or working into the product' is intended to clarify that the visual features of the corresponding design must be embodied in the product – that is woven into it or impressed on it RATHER than merely applied to the surface, such as a 2D surface print only - *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd (2008)*. For copyright in the artistic work to not be infringed pursuant to ss74- 77 of the Copyright Act, that is what we are looking for: the 3D aspects of a design being embodied in the product.

2. If yes, has the 'corresponding design' been registered?

- If registered, no infringement of copyright in artistic work by embodying that, or any other, corresponding design in a product: section 75
- However, where artistic work is just used on a flat or surface design (that is NOT embodied in the product), this will not be protected pursuant to section 75 and copyright protection will be retained
- No account taken of design falsely registered without owner's consent – section 76 *Copyright Act*

3. If the 'corresponding design' has not been registered, then consider whether or not the design has been applied industrially?

- **For 'applied industrially':** *Copyright Regulations 2017* (Cth) – Part 2, Reg 12 states that 'applied industrially' for the purposes of s77 of the *Copyright Act*, means a design applied to more than 50 articles or to one or more articles manufactured in lengths or pieces.

4. If the 'corresponding design' has been applied industrially

Section 77(1) Copyright Act:

- When corresponding design not registered (even if unregistrable) – section 77(1)(d)
- and design "industrially applied" – section 77(1)(b)
- and products to which the corresponding design has been so applied ... are sold, let for hire or offered or exposed for sale or hire – section 77(1)(c)
- **Then under section 77(2) Copyright Act:** not an infringement of copyright in the artistic work to reproduce that work by embodying that, or any other,

corresponding design in a product

- Note that section 77 does not apply to artistic works that are a building, model of a building or work of artistic craftsmanship
 - *Burge v Swarbrick*
- **Section 77(1A) Copyright Act:** also not an infringement of copyright in the artistic work where products are illustrated in published patent specifications or drawings submitted in a design application

5. Consider section 77A:

Section 77A(1) Copyright Act: Not an infringement of copyright to reproduce an artistic work if done in the course of, or incidental to, making a product that does not infringe because of these copyright / design overlap provisions.

Section 77A(2) Copyright Act: Also not an infringement to make a cast or mould embodying a corresponding design – *Digga Australia Pty Ltd v Norm Engineering Pty Ltd* (2008) 166 FCR 268

Step along the way:

If it is not an infringement of copyright to embody a corresponding design in a product, **it is also not an infringement to produce drawings, casts or moulds as part of the manufacturing process or depict the products in sales materials as considered in *Digga Australia Pty Ltd v Norm Engineering Pty Ltd* (2008) 166 FCR 268.** That is, it is not an infringement of reproduction of the 2D artistic work if it is a step along the way to making the articles of manufacture.

6. Conclude if there has been copyright infringement or not with a corresponding design.

PART 2: CASE LAW SUMMARY

Copyright

- *Donoghue v Allied Newspapers* [1938] Ch 106
 - Plaintiff was the original source of the ideas/information, but had not created the expression himself, journalist used interviews to write articles that were published
 - No copyright for plaintiff
- *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 88 IPR 11
 - The selected newspaper headline was not substantial enough for copyright to subsist
 - Court did not rule exclude possibility of copyright protection for individual headline
- *Zeccola v Universal City Studios Inc* (1982) 67 FLR 22
 - Respondent claimed that producer of Great White had infringed copyright of Jaws
 - Plot in general will not give rise to copyright protection, but in this case, the combination of the principle situations, singular events and basic characters was sufficient to constitute an original work susceptible of copyright protection
 - On viewing of the two films, it was decided that there was an inescapable inference of copying
- *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2008) 172 FCR 580
 - T-shirt print layouts are drawings, and therefore artistic works protected by s 32
- *Roland Corporation v Lorenzo & Sons Pty Ltd* (1991) 33 FCR 111
 - While a single letter will not attract copyright, a device that consists of such may be protected
 - Trade marks can attract copyright protection even if they are registered
- *Galaxy v Sega* (1997) 75 FCR 8
 - The definition of a cinematograph film is based around the idea of “moving pictures”
 - The moving images in a computer-generated video game were held to be a film
- *Nationwide News Pty Ltd v Copyright Agency*
 - Published edition copyright protects the presentation embodied in the edition
 - Choice of layout is important in attracting an audience, and therefore requires a great deal of skill