

## COPYRIGHT – PROBLEM QUESTION

Someone has copyright protection by default if their expression has been put into material form.

**Copyright** is the protection of an **expression**, not an object or idea.

- Until it is **material** and **written down**, it is not protected → it must be in **material form**.
- **Writing it down includes being written on a computer.**
- It does not need to have been published.

*Material form* (s10) → any form, whether visible or not, of storage of the work or adaptation

Copying an idea is permissible, copying an expression is not.

It does not have to be a good piece of work to automatically get copyright.

**Time length:** Life of the author + 70 years

A computer program is a literary work.

You need to have copied/ reproduced a substantial part of the work.

**STEP 1:** Before the *Copyright Act* can apply, the following criteria must be met:

**1. Is X (the person claiming the copyright) a qualified person?**

- a. Per s32(4) → A *Qualified Person* is an Australian citizen or person resident in Australia.
- b. Per s84(b) → A *Qualified Person* can also include a body corporate in the case of certain products

**2. When was publication?**

- a. Publication affects duration of copyright
- b. Per s29 → Publication is the distribution of a work to the public. This varies depending on the type of work

When is it published?		What does it include
Literary, dramatic, musical or artistic work	Deemed to have been published if, but only if, reproductions of the work or editions have been supplied (by sale or otherwise) to the public (s29(1)(a))	<b>S32:</b> books, computer games, scripts, compositions, paintings, photographs

Cinematograph film	Deemed to have been published if, but only if, copies of the film have been sold, let on hire, or offered or exposed for sale or hire to the public (s29(1)(b))	S89-92
Sound recording	Deemed to have been published if, but only if, records embodying the recording, or a part of the recording have been supplied (by sale or otherwise) to the public (s29(1)(c))	

### 3. Is it an idea or expression?

Must be an expression → written code will always be an expression

- *Nichols v Uni Pictures*: General themes are not protected but detailed expressions are
- Copyright does not protect facts or information (*IceTV Pty Ltd v Nine Network*)

### STEP 2: Have you been granted the protection of Copyright?

You get copyright **by default** → it is an opt-out system (you can do so by abandoning your rights)

- Anyone that creates a work or subject matter is susceptible to copyright protection over that materials

**NB:** Copyright does not protect facts or information (*IceTV Pty Ltd v Nine Network*)

**NB: TITLES** generally do **not** attract copyright

- Per *Francis Day*, this is because titles do not involve literary compositions and aren't **sufficiently substantial** enough to justify a claim to protection
- Further reasoning for this in *Fairfax Media* → if titles attracted copyright then bibliographies that reference titles would be in breach

Short phrases are usually also excluded → but per *Budget Eyewear Australia*, the way a concept is expressed in an advertisement intending to attract customers may involve originality attracting copyright protection

**STEP 2A:** Was the material published/ How long is your copyright granted for?

The length of the copyright protection varies depending on the type of material and whether it was published

- **NB:** Publication doesn't affect subsistence of copyright, just the duration of it

### 1. Was it published?

Per s29(1), a literary, dramatic, musical or artistic work is deemed to have been published if, but only if, reproduction of the work or editions have been supplied (whether by sale or otherwise) to the public

**Exceptions:** per s29(1)(b), cinematograph films have to be sold, let on hire, or offered or exposed for sale or hire

- Thus, if a private screening or another form of restricted distribution occurs it does not amount to publication of a film (*Bodley Head v Flegon*)

## 2. Is it in material form?

Per s22(1) → The time when something is ‘made’ is when it is reduced to **writing** or **material form**

**Material form** → is any form (visible or not) of storage of the work or adaptation, or substantial part of the work or adaptation (s10), whether or not the work/adaptation or substantial part of it, can be reproduced

**Exceptions:** makeup applied to a human face cannot amount to an artistic work as it could be removed (*Corporation of America v Harpbond*)

## 3. Is it original?

The issue is **originality** → there has to be some original thought, not just a copy written down

- It is not a high bar to meet (per *IceTV*) → minimal degree of skill & effort required
- Work must originate from the author (*University of London Press v University Tutorial Press*)

Per *IceTV* the originality required related to the expression of the thought, it doesn’t have to be in original form but it cannot be copied from another work

To decide if something is original you must look at:

1. The inter-relationship between originality and authorship
2. The relevance of skill and labour in the context of originality (not as relevant now since *IceTV*)
3. The importance of human contribution (i.e., in *Telstra v Phone Directories* where humans input data but AI creates the compilation can mean no copyright)

## 4. Were you the author of the work?

Copyright protects the material produced by an author

- There is an assumption that the author is human and alive (see *Cummins v Bond* where the author was the person that wrote the book that had the words of people that she heard in a séance)
- *Telstra v Phone Directories* emphasises that authors must be human
- *Exception is employees (s35)*

Per *Donoghue v Allied Newspaper* → The journalist that puts pen to paper in an interview is the author of the words that the other person spoke

- In some contexts, a translator can be considered an author

## OWNERSHIP

**Co-authors/ co-owners:** A work of joint authorship is defined in s 10(1) as a work that is produced by the collaboration of two or more authors in which the contributions are not separate.

- *Kogan v Martin* establishes the elements of joint authorship: collaboration, authorial contribution, requirement that contributions not be separate or distinct.

## Ownership of Copyright

1. **General Rule (s35(2)):**
  - The author of a literary, dramatic, musical, or artistic work is the first owner of copyright.
2. **Exceptions to Ownership:**
  - Ownership can be modified by agreement (s35(3)).
  - Employers own copyright for work created under a contract of service (s35(6), *Redrock Holdings v Hinkley*).
  - News media owners hold copyright for journalists' work (s35(4)).
  - Commissioners of artistic works are owners (s35(5)).
3. **Contract of Service vs Contract for Services:**
  - Contract of service: Employee relationship, employer owns copyright.
  - Contract for services: Independent contractor owns copyright (*Beloff v Pressdram* – Integration test → control is not the indicative test, it is whether the work is an integral part of the business).
4. **Joint Authorship (s10(1), ss78-83):**
  - Contributions must not be distinct (*Fairfax Media v Bennett*).
  - No joint authorship if only ideas are contributed (*Brighton v Jones*).
  - Test of substantiality includes qualitative and quantitative factors (*Martin v Kogan*).
5. **Assigning Copyright:**
  - Copyright can be assigned as personal property (s196(1)).
  - Future copyright may also be assigned (s197).
  - Assignments must be in writing and signed (s196(3)).

## STEP 3: What rights do you have under the *Copyright Act 1968*?

What rights does it give you?	
Literary, dramatic, musical or artistic work	Copyright here is the exclusive right to (s31(1)(a)): <ul style="list-style-type: none"> <li>• Reproduce work in a material form</li> <li>• Publish the work</li> <li>• Perform the work in public</li> <li>• Communicate the work to the public</li> </ul>

	<ul style="list-style-type: none"> <li>• Make an adaptation of the work</li> </ul>
Artistic work	Copyright here is the exclusive right to (s31(1)(b)): <ul style="list-style-type: none"> <li>• Reproduce the work in a material form</li> <li>• Publish the work</li> <li>• Communicate the work to the public</li> </ul>
Sound recording & computer programs	They have the right to enter into a commercial rental arrangement (s31(1)(c))

**STEP 4: Did someone infringe on your copyright protection? Has Y used X's work without permission?**

To infringe on one's copyright protection, they must have copied their expression

- Possible methods of infringement include reproduction, publication or communication to the public without authorisation

If someone does something listed in s31 (table above) they may have infringed on your copyright → the most common is reproduction

**NB:** Intent is not important with respect to infringement (it can matter with damages though)

**Reproduction** (a form of infringement)

- Recording or filming of a literary, dramatic or musical work can be a reproduction (s21(1))
- Artistic works can be reproduced in another dimensions (s21(3))

**Direct infringement test (s36, s101):**

**1. Objective similarity**

- Test for objective similarity from *Larrikin* → there has to be an objective similarity between the two works. This is dependent on the context in which the work is alleged to have been copied.
- The burden of proof is on the plaintiff
- Zeccola* → the Great White movie infringed the copyright of the novel and screenplay of Jaws → the fact that the movie was about shark attacks was not the issue, it was the sequences, principal situations, characters
- Per Eagle Homes* → it is a question of impression and very close resemblance is not required for sufficient objective similarity

**2. Clear causal connection**

- The copyright owner bears the burden of proof
- A work that is created independently and with no awareness of the pre-existing work is protected by the **doctrine of independent creation**
- Direct copying is not required** to satisfy causal connection → if the defendant has access to the pre-existing work then indirect copying can be enough to satisfy causal connection