

COPYRIGHT ESSENTIALS

BASIC PRINCIPLES OF COPYRIGHT

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INTRODUCTION

This paper is written for the beginner – for those lawyers who are new to this area of the law. The format of the paper will be as follows –

- Overview of Copyright law in Australia
- What Copyright protects
- How Copyright comes into existence
- Who owns Copyright
- Infringement of Copyright
- Remedies for Infringement
- Statutory Defences to Infringement

There is of course a lot more that is involved in the law of copyright and which could be discussed. This will have to be the subject of another seminar where the target audience are not newcomers but those who already have some familiarity with the key concepts. That seminar might include what are called the ‘specialist’ areas of copyright such as copyright and libraries, copyright and educational uses, moral rights, copyright and computers, circuit layouts and so on.

The law of copyright in Australia is principally governed by the *Copyright Act 1968* (the Act) as amended as applied and interpreted by the courts. As this is a “basics” paper I will not be providing any detailed commentary on or insights into specific sections of the Act. Nor will I be analyzing specific court decisions.

OVERVIEW

The first key principle to take on board is that copyright does not protect creative ideas per se – rather it protects the form of expression of ideas. It conveys a property right to the creators and owners of the form in which ideas are expressed. The ‘form’ may be literary, artistic,

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dramatic, musical, cinematographic or in the form of a broadcast, sound recording or a published edition of a work or any combination of those.

The law is designed to protect creative expressions so that their commercial value is not robbed or appropriated by others without the owner's permission. Permission may be granted free of charge or for a fee whether that be by payment of royalties or an agreed licence fee. Failure to provide and enforce the 'copyright' might not only deprive the owners of the fruits of their creative endeavour but also deprive the community of being able to enjoy the benefits of such creative endeavour because talented individuals lose incentive to carry on or persevere with their work because it is simply not possible to make a decent living out of it.

Copyright protection is intended to achieve a balance of interest between the protection of a copyright holder and his or her reward for creative effort and the interest of the general public in having access to and the benefits of such creative endeavour.

The Copyright Act gives a qualified monopoly in favour of the copyright owner that is made subject to certain permitted uses by other persons. It is often referred to as a "bundle of rights" which cover some, but not all, of the processes associated with the exploitation or works and related subject matter. Other aspects of exploitation may be picked up and affected by other laws such as the law of patents, trademarks and trade practices law.

The "qualified" monopoly is part of the scheme which seeks to strike a proper balance between stimulating creative endeavour via economic incentives but ensuring that the protections afforded do not go too far so that it stifles public access to information or offends fair competition policy. The rights of the individual must be balanced with that of the whole community.

Copyrights need to be distinguished from corporeal rights in tangible objects such as a painting. When you buy a painting you become the owner of the painting as a physical object but not of the painter's copyright in the painting. You can sell the painting but you cannot infringe the artist's copyright by trying to duplicate or reproduce the artwork for commercial gain without his or her permission.

Another example to illustrate this concept is a book which contains a number of original ideas. The author's copyright will protect the text (form) which expresses his ideas in print or other media. It will not protect the ideas per se. Any person who obtains and reads the book and digests the ideas in it can appropriate them free of charge and make whatever use he wishes of them provided that he does not reproduce the text (written form) in which those ideas have been published without the copyright holder's permission.

This partial or qualified monopoly in the exploitation of the copyright lasts for the lifetime of the author of an original “work” plus 50 years after his or her death. In the case of “subject matter other than works” (such as sound or film recordings or TV or radio broadcasts) it will last for 50 years after its first publication or first public broadcast.

There is no requirement or protocol for registration of a copyright before the law will afford protection. However copyright holders are encouraged to use whatever means they can to notify the existence of and their claim of copyright to members of the public who might access their work. Most of you would be familiar with the standard symbol used to notify the claim of copyright.

WHAT COPYRIGHT PROTECTS

It only protects a “work”² or “subject matter other than works”³ in which copyright subsists under the Copyright Act. For a “work” (eg. literary or musical) the copyright comes into existence when the work is created. For “subject matter other than works”, such a sound or film recording, the copyright comes into existence when it they are ‘made’.

In the case of “original works”, copyright is the *exclusive right (in the case of a literary, dramatic or musical work)*⁴ to do all or any of the following acts –

- i. to reproduce the work in material form;
- ii. to publish the work;
- iii. to perform the work in public;
- iv. to communicate the work to the public;
- v. to make an adaptation of the work.

HOW COPYRIGHT COMES INTO EXISTENCE

To attract the statutory protection the following essential elements⁵ must be present –

1. *Originality* - The work or other subject matter must be “original” when it is created or made. Something that is substantially copied from another source and lacks its own uniqueness is unlikely to qualify as original. On the other hand no aesthetic quality is necessary in order to qualify the work as original. The work in question can be very basic such as a questionnaire, telephone book or betting form. Provided that the manner in which it is expressed in some *material form* is original it will qualify as original. It may be that separate words found in the work will not qualify as original. What makes the work

² See section 31 of the Copyright Act.

³ See Part IV Division 2 of the Act.

⁴ For “subject matter other than works” refer to Part IV division 2 of the Act.

qualify as original is the manner in which ordinary words or numbers are skillfully organised together and presented in some format (eg. a directory of some kind). This was achieved through the applied skill and effort of the creator and its commercial exploitation in the market place is therefore entitled to protection.

2. *Material Form* – To attract copyright protection a work must exist in material form. This essentially means ‘reduced to writing’ or to some form from which copying can be undertaken. S. 10 of the Copyright Act (definition section) contains the following definition of ‘material form’ – *includes any form (whether visible or not) of storage from which the work or adaptation, or a substantial part of the work or adaptation, can be reproduced.*” Hence material form can include such things as electromagnetic storage of computer programs or digital storage of a work in a computer hard disk provided that it is possible to make copies from what is electronically stored.
3. *Qualified Persons* – S.32 of the Act limits copyright protection to those persons who were “qualified” at the time the work was made. A ‘qualified person’ is defined as an Australian citizen, an Australian protected person or a person resident in Australia. Works created by citizens of other countries may be ‘protected’ if that citizen is a resident of the country of origin and that country of origin and Australia are parties to the same international treaty arrangements such as the *Berne Convention, the Universal Copyright Convention or the General Agreement on Tariffs and Trade (GATT)*.

WHO OWNS COPYRIGHT?

This is governed by s.35 of the Act which states – *Subject to this section, the author of a literary, dramatic, musical or artistic work is the owner of any copyright subsisting in the work by virtue of this Part.*

For “works” the copyright resides with the author. For “subject matter other than works” such as films, sound recordings etc the copyright resides with the maker of that recording (usually the manufacturer or producer).

Section 35(4) deals specifically with the situation where the work is made by the author under the terms of his or her employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service and is made for the purpose of inclusion in a newspaper, magazine or similar periodical. The protection will not extend to the reproduction of that work by the employer for a purpose connected with the publication of the newspaper, magazine or similar periodical. For that purpose the employer is the owner of the copyright.

⁵ Often referred to as the “connecting factors” which are found in s.32 of the Act.

There can also be joint-ownership of copyright. A work or other subject matter might arise from some collaboration in circumstances where the work of one is not distinct from the work of the other. Where there are two or more authors, in the absence of any agreement to the contrary each author will hold an interest in the work as tenants-in-common with the other and share an indivisible share in the whole of the work created.

INFRINGEMENT

The law of infringement is governed by Part III Division 2 of the Act with respect to “works” and Part IV Division 6 with respect to “subject matter other than works”. Section 36 provides –

*Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright.*⁶

Infringement will also arise if any of the copyrights are exercised in relation to a ‘substantial part of the work’.⁷ What amounts to a ‘substantial part’ is a question of quality rather than quantity and depends on the nature of the work itself. For example, in a long literary work, the quotation of a small passage may still be considered to be substantial if it is an important or essential part of that work. Similarly, the reproduction of just 30 seconds of a six minute song may be held to be an infringement of the copyright in the sound recording if that half minute contained an essential and well known phrase or melody in that song.

As you might expect, there is a considerable amount of caselaw dealing with the issue of infringement. The key principles of copyright infringement are contained in the well known and oft cited decision of Jacobs J of the UK High Court of Justice in the case of *Ibcos Computers Ltd & Anor –v- Barclays Mercantile Highland Finance Ltd & Ors*.⁸ It contains an excellent exposition of the law and is frequently cited in Australian courts.

The claim for copyright infringement requires a 4-stage test :

1. What are the work or works in which the plaintiff claims copyright?
2. Is each such work original?
3. Was there copying from that work?

⁶ The “acts comprised in the copyright” are those set out in s.31 and their counterparts in Part IV of the Act.

⁷ See s.14(1). Acts done in relation to a substantial part of the work or other subject matter are deemed to have been done in relation to the whole of the work or other subject matter.

4. If there was copying, has a substantial part of that work been reproduced?

The test appears quite straightforward. The difficulty lies in matching up the evidence to each element of the test. This can be a very complex and expensive task – for instance where the alleged infringement is copying certain bits of a software program.

In *Ibcos Computers, Jacobs J* dealt with the issue of 'copying' in this way –

For infringement there must be copying. Whether there was or not is a question of fact. To prove copying the plaintiff can normally do no more than point to bits of his work and the defendant's work which are the same and prove an opportunity of access to his work. If the resemblance is sufficiently great then the court will draw an inference of copying. It may then be possible for the defendant to rebut the inference – to explain the similarities in some other way.....The concept of sufficient similarities shifting the onus onto the defendant to prove non-copying is well recognised in copyright law."

There can also be infringement by "authorisation". This is caught up in the words of s.36 (1) cited above. Copyright is infringed if a third party is found to have authorised another to engage in conduct that infringes copyright. The leading Australian case in this area of the law is *University of New South Wales v Moorehouse and Robinson (Publishers) Pty Ltd.*⁹ It is essential to show some connection between the authoriser and the infringing person. It is also necessary to show that the person authorising the infringement was in fact in a position to prevent the infringing conduct.¹⁰

This aspect of the law of infringement has become very topical in recent times since the advent of the digital age. The ability to breach copyright has increased dramatically with the proliferation of personal computers all having the ability to connect to the internet and all the electronic works able to be accessed via the internet. Unlawful copying and dissemination of digital works to thousands of recipients can occur in a matter of seconds.

Because of the difficulty of catching the end –users who infringe copyright (i.e the users of the PCs) copyright owners have focused their attention on an easier target – the Internet Service Provider (ISP). They have sought to use "authorisation" as the key principle upon which to attach liability for infringements to the ISP.

⁸ (1994) 29 IPR 25.

⁹ (1975) 133 CLR 1.

¹⁰ See Section 36 (1A) of the Act which was introduced recently via digital agenda amendments to the Act.

The Government recently introduced a whole lot of amendments to the Act to update copyright law to make it more functional and versatile in the digital information and communication age we now live in. This will be covered by one of the other presenters at this seminar who is presenting a paper on the *Digital Agenda Act*.

Copyright protection for computer software is of fairly recent origin.¹¹ This part of the law has been further updated by amendments to the Copyright Act in 1984. Today "computer programs" are expressly included in the class of literary works protected by the Act.

REMEDIES FOR INFRINGEMENT

Part V of the Act provides civil remedies for infringements of copyright. S.115 deals generally with actions for infringement, and s.116 makes available an action for conversion or detention in respect of infringing copies or plates. The Act also gives to the copyright owner in certain published works power to have printed copies declared as prohibited imports. There is also a civil remedy for groundless threats of legal proceedings.

The specific remedies available to the copyright owner are –

- a. an injunction : s.115(2);
- b. damages : s.115(2);
- c. additional damages : s.115 (4);
- d. an account of profits: s.115 (2);
- e. damages for conversion or detention in respect of infringing copies and plates used for making them: s.116 (1);
- f. delivery up of infringing copies or plates – s.116(1).

"Additional Damages" can be awarded in the following circumstances –

- an infringement is established;
- the court is satisfied that it is proper to do so, having regard to –
 - the flagrancy of the infringement;
 - whether the infringement involved the conversion of a work or other subject matter from hardcopy or analog form into a digital or other electronic machine-readable form; and
 - any benefit shown to have accrued to the defendant by reason of the infringement; and
 - all other relevant matters.

¹¹ One of the landmark Australian cases is *Computer Edge Pty Ltd v Apple Computer Incorporated* (1983) 50 ALR 581; (1984) 21 IPR (Full FC) and 161 CLR 171 (High Court).

The recent 'digital agenda' amendments to the Act has seen Part V expanded by the inclusion of Division 2A – "Actions in relation to circumvention devices and electronic rights management information". No doubt this will be covered in one of the other paper being delivered at this seminar which is focusing specifically on the digital agenda amendments.

Who can sue for infringement of copyright?

1. The legal owner of the copyright;
2. Any owner of the copyright by assignment;
3. An exclusive licensee;
4. An equitable owner of the copyright (but this is limited to interlocutory relief).

Who can be sued for infringement?

- i. The person who commits the tortious act of infringement or any joint tortfeasor;
- ii. The person who commits the act of conversion of infringing copies;
- iii. Any person who 'authorises' an infringing act;
- iv. Any person who procures the commission of an infringing act;
- v. Where the primary infringer is a company, a director or officer of a company may be personally liable according to the principles of company law which impose personal liability on directors for the torts of the company depending on the degree of their involvement.¹²

STATUTORY DEFENCES TO COPYRIGHT INFRINGEMENT

There are a number of statutory defences contained in the Act¹³ but the two most prevalent and litigated ones are –

- i. Fair Dealing; and
- ii. The copying of works for the purposes of "educational use".

The exact nature and extent of each defence is subject to the provisions of the Act. As you might expect there has been a great deal of caselaw attempting to define the ambit of each defence. It is all about attempting to strike the right balance between copyright owner's rights and users' interests. With advances in digital technologies this is becoming quite a complex task.

¹² The question of the nature and extent of the involvement of a director (to attract liability) has not been agreed to by the courts. It remains a controversial area.

¹³ See Part III Division 3, 4 and 7 for "works" and Part IV Division 6 for "other subject matter".

The Government's policy, as reflected in amendments to the Act, is to allow libraries and educational institutions reasonable access to copyright material for the benefit of the general community but in such a way that the economic rights of copyright owners is not unreasonably prejudiced. Hence exceptions to the bundle of "exclusive rights" given to the copyright owner are strictly qualified with a view to achieving that balance.

The Fair dealing provisions in the Act are included in Division 3 of Part III which is titled "Acts not constituting infringements of copyright in works". The Fair Dealing sections relating to "works" are sections 40,41 and 42. They apply to three kinds of "dealings" –

- s. 40 – Fair dealing for purposes of research or study;
- s.41 – Fair dealing for purpose of criticism or review;
- s.42 – Fair dealing for purpose of reporting news.

Section 40 sets out various matters which it requires to be taken into account in determining whether a "dealing" with material protected by copyright is a "fair dealing" for purposes of research or study –

- a. the purpose and character of the dealing;
- b. the nature or the work or adaptation;
- c. the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- d. the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- e. in a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole of the work or adaptation.

CONCLUSION

As I stated at the outset – this is very much a "basics" paper for the law of copyright. Copyright is a huge area of the law and touches upon a very large number of activities. There are a number of specific areas and topics in copyright law that would each warrant its own separate seminar paper to do it justice.

The purpose of this paper was simply to give you an overview of some of the main features of copyright law and some of the key underlying principles.