



[www.queenslandlawhandbook.org.au](http://www.queenslandlawhandbook.org.au)

The *Queensland Law Handbook* is a comprehensive plain-English legal resource designed to help you deal with your legal problems.

**caxton**  
COMMUNITY LEGAL CENTRE

## Copyright and Moral Rights

### CHAPTER CONTENTS

- 3 Introduction
- 3 Requirements for Copyright Protection
- 4 What is Protected by Copyright?
- 8 First Ownership
- 9 Rights Held by the Copyright Owner
- 11 Duration of Copyright
- 11 Exploitation of Copyright Works
- 12 Copyright Collecting Societies
- 13 Copyright Tribunal of Australia
- 14 Infringement of Copyright
- 15 Exception to Copyright Infringement
- 20 Piracy and Copyright Enforcement
- 20 Remedies for Copyright Owners
- 20 What are Moral Rights?
- 21 The Right of Attribution
- 21 The Rights not to have Authorship Falsely Attributed
- 23 The Right of Integrity
- 25 What do Moral Rights Apply to?
- 25 Who Holds Moral Rights?

27	Excuses, Defences and Exceptions for Infringement of Moral Rights
28	Remedies for an Infringement of Moral Rights
28	Resale Royalty Rights for Visual Artists
30	Future Reforms
31	Legal Notices

## INTRODUCTION

Copyright law protects the expression of ideas or information provided they are original and reduced into what is known as 'material form'. Copyright does not protect the underlying idea or information but only the expression of the idea or information. Copyright provides the copyright owner with an alienable economic right to control reproductions and other uses of their works. As copyright is personal property, copyright can be sold (assigned) or licensed to a third party. In Australia, the *Copyright Act 1968* (Cth) (Copyright Act) sets out the rights and obligations of copyright owners and copyright users. The aim of the legislation is to balance the rights of creators with the need of the public to access and use copyright works.

Typically, moral rights are defined in opposition to copyright. Moral rights provide specific protection to authors, their reputation and, in some cases, the work itself. Moral rights are personal to the creator and serve to protect the reputation of the author. They are non-economic rights that are distinct from copyright and are often justified on similar non-economic grounds. Unlike copyright, an author's moral rights cannot be sold or licensed, however, an author may consent to infringements of their moral rights.

## REQUIREMENTS FOR COPYRIGHT PROTECTION

There is no need to register a work for copyright. Copyright protection is automatic once certain elements set out in the Copyright Act have been satisfied. Placing a copyright notice (©) on a work is not required for a work to be protected. However, its use is advisable, as the symbol usually alerts potential users that the work is protected by copyright law. To attract copyright protection, a work must:

- be original
- be reduced into 'material form'
- have some connection with Australia.

### Originality

For copyright protection to apply, a work must be original (ss 32(1)-32(2) Copyright Act). This means that the work has been produced with the author's skill and labour and it has not been copied. It does not mean that the work needs to have creative merit. The originality threshold is quite low only requiring that some skill, labour and effort was invested into the creation of the work. This low threshold was examined in the decisions of *IceTV Pty Limited v Nine Network*

*Australia Pty Limited* [2009] HCA 14 (IceTV) and *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCA 44 (Telstra).

In Telstra, the Federal Court of Australia held that copyright does not subsist in Yellow Pages and White Pages telephone directories. Justice Gordon followed the High Court of Australia's decision in IceTV and found that copyright could not subsist because the author of each of the directories had not been (and could not be) identified. In particular, the directories were created through a computer-automated system, which did not allow any independent intellectual contributions from human contributors. This decision is a significant departure from the full Federal Court's 2002 decision in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112 where it held that copyright subsisted in Telstra's directories and that the copyright had been infringed. It also clearly indicates that the process started by IceTV of bringing Australian law on copyright protection of databases into line with the United States' and the European Union's position is continuing.

## Material form

Copyright does not afford protection to ideas or information until they have been expressed in a tangible form. This is what is referred to as 'material form' (s 22 Copyright Act). This can include any form of storage (visible or invisible) from which the work can be reproduced. For example, traditional stories and songs are not protected by copyright unless they are recorded or written down.

## Connecting factors

To attract copyright, the work must be connected to Australia. This occurs when a work is:

- made by an Australian citizen
- made by a resident of a country that is also a member of the relevant international copyright treaty (Berne Convention)
- published first in Australia.

## WHAT IS PROTECTED BY COPYRIGHT?

There are two types of subject matter protected under the Copyright Act. The two broad categories are 'works' and 'subject matter other than works'. Part 3 of the Copyright Act provides copyright protection for 'works', meaning original literary, dramatic, musical and artistic works. Part 4 of the Copyright Act provides copyright protection for 'subject matter other than works', which includes sound recordings, cinematograph films, television broadcasts, sound broadcasts and published editions of works. It is important to note that for the purposes of

copyright, multimedia creations are treated as a combination of literary, musical and artistic works used in combination with sound recordings, television broadcasts and film. Each of the underlying works is afforded the same level of protection as traditional copyright works.

## Part III works

### Literary works

Literary works are defined in s 10(1) of the Copyright Act to include a table or compilation expressed in words, figures or symbols (whether or not in a visible form) and a computer program or compilation of computer programs. The following have been held to be literary works under the Copyright Act:

- novels
- lyrics
- reports
- poems
- advertisements, newspapers articles
- instruction manuals
- shopping lists
- examination papers
- bingo results
- lists of football matches
- accounting forms
- trade catalogue of motorcycle parts
- instructions on seed packets
- computer programs.

### Dramatic works

'Dramatic works' refers to works that are intended for performance. These may include:

- a choreographic show
- a screenplay or script for cinematographic film, but not a film based on the screenplay (s 10(1)).

## **Musical works**

'Musical works' are not defined in the Copyright Act. The reference to the word 'musical' refers to the method of production and not to artistic or aesthetic qualities of the work. Any combination of sounds and noises that are capable of being fixed in a form, whether by notation or recorded by compact disc, tape or stored in a computer, will be protected as a musical work regardless of its merit.

## **Artistic works**

'Artistic works' are extensively defined in s 10(1) to include:

- paintings
- sculptures
- engravings
- drawings
- buildings and models of buildings
- photographs
- diagrams
- maps
- etchings
- lithographs
- woodcuts
- charts and plans
- prints
- casts
- models
- design drawings
- industrial photographs.

## **Part IV works**

### **Cinematograph films**

'Cinematograph films' are defined in s 10(1) as '... an aggregate of the visual images embodied in an article or thing ... shown as a moving picture'.

Cinematograph films include:

- videotapes

- feature films
- commercials
- television programs
- video clips
- musical scores and sounds accompanying images in cinematograph films
- visual images and sounds in interactive multimedia video games.

### **Sound recordings**

'Sound recordings' are defined in s 10(1) as '... a collection of sounds captured in a record, including disc, tape, or other devices in which sounds are embodied'. This is a very broad definition and includes:

- compact disc
- digital audio tape (DAT)
- vinyl disc
- reel to reel
- tape
- audio cassette.

It is the actual capture of the sounds on the original record that is protected; 'sound alike' recordings will not be considered to be an infringement of sound recording copyright. However, a 'sound alike' recording may infringe other copyright in other aspect of the work such as the music or the lyrics (as literary works).

### **Sound and television broadcasts**

'Television broadcast' is defined to mean visual images broadcast by way of television, together with any sounds broadcast for reception along with those images (s 10(1) Copyright Act). 'Sound broadcast' means sounds broadcast other than as part of a television broadcast.

### **Published editions**

A published edition of a literary, dramatic, musical or artistic work refers to the typographical arrangement that is the layout and formatting of the printed page as published. Published edition copyright recognises the labour, skill and effort that is invested in the layout of published works. Published edition copyright is distinct from copyright in the material that is being typeset. This means, for example, that a newspaper article may consist both of copyright in the literary

work and also published edition copyright in the way that the article is set out and organised. Copyright only subsists in a published edition of a work if the edition does not reproduce a previous edition of that work (s 92 Copyright Act).

## **FIRST OWNERSHIP**

The general rule is that the person who creates a work under Part III is the first owner of copyright (s 35(2) Copyright Act). It is important to note that this general rule does not apply to employees (particularly employees of newspapers, magazines and periodicals), nor to commissioned photographers, portraitists, film makers, engravers and sound recordists (s 35(4-6)). It is equally important to note that each of these exceptions to the general rule of ownership can be excluded or modified by agreement (s 35(3)).

### **Employees**

An employer is the first owner of copyright when a work is produced by an individual who is employed on a contract of service, and the work is created in the course of employment as part of normal duties (s 35(6) Copyright Act). This general rule may be modified or varied by agreement between an employee and employer (s 35(3)). Such an agreement can be made expressly or can be implied from the conduct or arrangements that exist between the employer and employee.

### **Employees of newspapers, magazines and periodicals**

In the case of employees of newspapers, magazines and periodicals, copyright is divided between the author and publisher (s 35(4)). When works of literary, dramatic or artistic nature are produced by an author employed by newspapers, magazines and periodicals, the copyright is owned by the author for the purposes of:

- reproducing the works in a book
- reproducing the works in hard copy facsimile of an issue of the newspaper, magazine or periodical (s 35(4)(a-c)).

However, the owner of the magazine or newspaper retains ownership in all other instances (s 35(4)(d)).

### **Commissioned photographs, portraits, films, engravings and sound recordings**

When a work is commissioned, the copyright usually remains with the author, rather than the commissioner. In some cases, the copyright is transferred by agreement. There are special exceptions including commissioned:

- sound recordings and films, where copyright belongs to the commissioner of the work (ss 97(3), 98(3) Copyright Act) unless otherwise agreed
- photographs for private and domestic purposes, paintings, engravings and drawings belong to the commissioner of the work unless otherwise agreed.

Domestic purpose includes portraits and photos taken of weddings, families or children (s 35(7)). However, where the work is commissioned for this purpose and the purpose for which the work is to be used is made known to the photographer, they may prevent that work being used for any other purpose (s 35(5)). For example, if a person commissions a photographer to take photos at a wedding, the copyright belongs to the person who commissioned the work but the photographer may prevent that person from publishing the work in a publicly sold book.

Commissioned photographs for any other purpose belong to the photographer. In the case of Part IV 'other subject matter', copyright ownership is, as a general rule, designated to the producer or manufacturer.

Subject to any agreement to the contrary, the owners of the copyright in a sound recording (not a visual recording) of a live performance are both the recording company/producer of the sound recording and the performer(s) who contributed the sounds to the performance. Exceptions to these rights exist in circumstances where performers were performing under the terms of a contract of employment; the sound recording was commissioned; or an agreement has been entered into by the performer varying the rights.

For sound recordings made before 1 January 2005 the performer(s) and producer own the sound recording in equal shares (50% each), but rights of performers in those pre-existing recordings are limited.

## **RIGHTS HELD BY THE COPYRIGHT OWNER**

Copyright owners have the right to:

- reproduce the work in a material form
- publish the work
- perform the work in public
- communicate the work to the public
- make an adaptation of the work
- do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified above in relation to the first-mentioned work (s 31(1)).

## Right to reproduce

The right of reproduction is the fundamental right of a copyright owner to reproduce or make copies of the work (ss 31(1)(a)(i), 31(1)(b)(i), pt 4 div 2 Copyright Act). While 'reproduction' is not defined in the Copyright Act, it includes the means by which copying takes place. For example, typing, photocopying, scanning a document into a computer and hand copying would all be considered to be reproduction. Reproduction also includes the making of a sound recording or film of a literary, dramatic or musical work (s 21(1)). In the case of an artistic work, the reproduction of a two-dimensional work into three-dimensional and vice versa is also a reproduction for the purposes of the law (s 21(3)).

## Right to publish

The right of publication applies to literary, dramatic, musical and artistic works. It is the right to divulge a work that has not previously been made public (s 31(1)(a)(ii) Copyright Act). Therefore, it is the right of first publication rather than a general right to distribute or control sale.

## Right to communicate to the public

The right of communication to the public allows copyright owners to control how their work is electronically transmitted to the public or made available online. The right is technology neutral and covers a wide range of materials (ss 31(1)(a)(iv), 31(1)(b)(iii), 85(1)(c), 86(c) Copyright Act).

## Right to adapt

The right to adapt a work applies to literary, dramatic or musical works. Adaptation means changing the work in some way. In the case of literary works, adaptation can also mean converting the work into another medium or form. For instance, a written story may be adapted by communicating it either partly or wholly in pictures, by translating it into a different language, or by producing a dramatic version of a non-dramatic work and vice versa (s 31(1)(a)(vi) Copyright Act).

## Right to perform

The right to perform allows the copyright owners of literary, dramatic and musical works to present the work in a public location. It also applies to owners of copyright in sound recordings to allow the work to be heard in public, and owners of copyright in film to allow the work to be seen or heard in public (ss 31(a)(iii), 85(1)(b), 86(b) Copyright Act). Examples of performances include in-house movies for hotel guests and instructional videos to staff before opening hours.

## DURATION OF COPYRIGHT

The period of copyright protection depends on the type of subject matter. The term of copyright protection of a literary, dramatic, artistic and musical work is life of the author plus 70 years, or if the author dies before the work is published, performed in public, broadcast or sold in record form, 70 years from whichever of those events happens first (ss 33(2), 33(3) Copyright Act). In the case of other subject matter, the period of copyright protection varies. For example:

- film and sound recordings—usually 70 years from the year of publication (ss 93)
- broadcasts—usually 50 years from the year of making (s 95)
- published editions—usually 25 years from the date of publication (s 96).

Once copyright in a work has expired, it cannot be renewed and it is in the public domain. This means that it is open for anyone to use the material without infringing copyright.

It is important to note that Australia's term of copyright protection is now in line with that of Europe and the United States. Prior to 2005, the period of protection for literary, dramatic, musical and artistic works was life of the author plus 50 years. The period of protection was extended as a result of the *US Free Trade Agreement Implementation Act 2004* (Cth), which required that Australia extend the period of protection to bring it into line with the United States' provision on duration (i.e. the life of the author plus 70 years).

## EXPLOITATION OF COPYRIGHT WORKS

As discussed above, copyright owners may exploit their works in a number of ways. They may wish to exploit the works themselves by reproducing, publishing, performing, communicating or making adaptations of their works.

Alternatively, a copyright owner may grant permission to someone else to exploit their works. This may be done by selling (otherwise known as assigning) or licensing copyright in their works to a third party. It is recommended that any agreement for permitting copyright use should be in writing. Rights may be limited in three ways: purpose, duration and geographic area of use.

### Assignment

Copyright owners may assign their copyright to another at any time. The new owner, known as the 'assignee', can then enjoy the exclusive rights of the copyright in a work until copyright expires. Assignment of copyright must be in writing and signed (s 196(3) Copyright Act).

## Licensing

While the copyright owner is able to transfer or assign their works, in practice it is often more profitable for copyright owners to license the use of their works than to sell those works. This practice enables the continuing commercial exploitation of the work during its period of use. Licensing is merely granting permission to another to do the acts that would otherwise infringe copyright. There are two types of licences:

- exclusive licences, which must be in writing and signed, grant rights for a particular purpose and provide a guarantee that those rights will not be granted to others (s 10(1) Copyright Act)
- non-exclusive licences, which grant rights for a particular purpose and may be granted to more than one person.

## COPYRIGHT COLLECTING SOCIETIES

As many individual copyright owners are not in a position to enforce their copyright by policing the copying of their works, copyright owners often enlist copyright collecting societies to license the use of their works and collect payments on their behalf. Collecting societies are non-profit organisations and membership is optional. If a copyright owner chooses to become a member of a relevant collecting society, they assign certain rights to that particular society. In so doing, the collecting society has the authority to:

- license specific use of copyright material
- collect any fees payable for such licences from copyright users
- distribute fees (less administrative costs) to copyright owners.

There are a number of copyright collecting societies in Australia.

### Copyright Agency Limited

Copyright Agency Limited (CAL) is the collecting society for copyright owners of literary works such as publishers and writers. Since 2017, visual arts members are now also members of CAL (after VISCOPY merged with CAL). CAL is responsible for licensing photocopying by educational institutions and various other bodies. CAL acts as an agent for its members and affiliated reproduction rights organisations overseas to administer and protect copyright owners' reproduction rights.

## Screenrights

Screenrights (formerly known as Audio-Visual Copyright Society Limited) is the collecting society for film producers and distributors, script writers and music copyright owners. Screenrights collects royalties on behalf of producers, distributors, rightsholders in scripts, music, artistic works and sound recordings and other rightsholders in film and television programs. Screenrights also administers the statutory licence that allows educational institutions to copy radio, television broadcasts and, more recently, other uses of audiovisual material. It also has a licence with the Australian Government that allows Government departments to copy from television and radio, provided they pay a fee to the rightsholders.

## Australian Performing Rights Association/Australasian Mechanical Copyright Owners Society

Australian Performing Rights Association/Australasian Mechanical Copyright Owners Society (APRA/AMCOS) licenses the broadcast, public performance and cable transmission of live and recorded musical works and accompanying lyrics and licenses certain recording of music and lyrics, and photocopying of sheet music by schools. APRA/AMCOS's members consist of composers and music publishers.

## Phonographic Performance Company of Australia Ltd

Phonographic Performance Company of Australia (PPCA) licenses the broadcast and public performance of sound recordings (which are protected separately to any music and lyrics on the recording). The members of the PPCA are owners of copyright in sound recordings, principally record companies.

## **COPYRIGHT TRIBUNAL OF AUSTRALIA**

The Copyright Tribunal of Australia has jurisdiction to determine the rate of payment and other conditions of statutory licences and other licences administered by copyright collecting societies. The Copyright Tribunal has the jurisdiction to enable different amounts to be determined in relation to different classes of materials copied, as well as in relation to different institutions or different classes of students of an institution. It also has the power to declare a collecting society, the manner of paying royalty for copying musical works, record-keeping and inspection of records under statutory licences and alternative dispute resolution. The Copyright Tribunal can also make the Australian Competition and Consumer Commission a party to proceedings before the Copyright Tribunal where appropriate.

## INFRINGEMENT OF COPYRIGHT

Anyone who exercises any of the copyright owner's rights without express permission infringes the copyright in their work. It is not only those who make the unauthorised copies or authorise someone else to make copies of works who are in breach of copyright, but also those who sell unauthorised versions of works. Some examples of infringing acts are the unauthorised:

- copyright of music or computer software, whether given away or sold. A new defence for personal copying for private or domestic purposes was introduced in 2006 (see Exceptions to Infringement below)
- interpreting and performing of a play (originated in a script)
- purchasing of a restricted number of licences from a computer software developer and then distributing copies of the software. This often happens in organisations where a limited number of licences are purchased and then many more copies are distributed to employees
- distributing photographic or digital images from an artwork
- photocopying of books from a library.

Infringement of copyright is determined by qualitative rather than quantitative measures. In other words, the amount of copying is not as relevant as whether or not the essence of a work has been copied. In some cases, even a small amount of copying may amount to an infringement of copyright. Infringement also extends to other activities that are done without the copyright owner's permission such as:

- importation of copyright works into Australia for sale, hire, distribution or exhibition
- sale, rental or exhibition of works
- permission of public entertainment venue to be used for the public performance of a literary, dramatic or musical work
- importation of a device that is capable of circumventing or facilitating the circumvention of technological protection measures (TPMs) designed to prevent or inhibit the infringement of copyright in a work or other subject matter
- removal or alteration of any electronic rights management information that is attached to copies of a work or other subject matter in which copyright subsists.

An expanded scheme of TPMs implements Australia's obligations under the *US Free Trade Agreement Implementation Act 2004* (Cth). There are three prohibited activities:

- circumventing an access control TPM
- manufacturing a circumvention device for a TPM
- providing a circumvention service for a TPM.

There are both civil and criminal liabilities for these activities. There are some limited circumstances where a circumvention device can be legally manufactured, supplied or used (ss 116AN(2)-116AN(9) Copyright Act). These include:

- interoperability between computer programs
- encryption research
- computer security testing
- online privacy
- law enforcement and national security
- acquisitions by libraries and other related institutions.

Some exceptions are set out in the *Copyright Regulations 2017* (Cth).

## **EXCEPTION TO COPYRIGHT INFRINGEMENT**

The Copyright Act has more than 90 exceptions. While the most well-known exceptions are the 'fair dealing' exceptions (discussed below), there are many other specific exceptions. These include the following acts (ss 43-44):

- temporary reproductions that are made in the course of communication
- backing up computer programs
- copying for the purposes of judicial proceedings and professional legal advice;
- inclusion of works in collections for use by places of education
- importation of non-infringing books and sound recordings.

Some other exceptions to infringements are (ss pt 3 div 4-6):

- the recitation or reading in public or in a broadcast. However, the extract must be from a published work, be of a reasonable length and sufficient acknowledgement of the work must be made
- the performance of works at a person's home (i.e. where a person lives or sleeps)
- some reproductions for the purpose of broadcasting

- sound broadcasts by people who hold print-disability radio licences
- copying of works in archives or libraries for particular purposes
- the manufacture of a record of the work. This exception is subject to certain conditions, including the payment of an agreed royalty (between the copyright owner and the manufacturer) to the copyright owner. In the event that there is no agreement in force, an amount equal to 6.25% of the retail selling price of the record will be applied.

In addition, there are exceptions to infringements of copyright in artistic works (pt 3 div 7 Copyright Act). These include:

- the inclusion in a film or broadcast of sculptures and works of artistic craftsmanship that are permanently in a public space
- painting, drawing, engraving or photographing sculptures and works of artistic craftsmanship situated permanently in public places
- incidental filming or broadcasting of artistic works.

## Private-use exceptions for copyright users

### Time shifting

The first private-use exception enables consumers to tape a broadcast of a radio or television program for private and domestic use, to watch or listen at a more convenient time. This is known as ‘time shifting’ (s 111). ‘Private and domestic use’ is defined in s 10(1) of the Copyright Act to mean private and domestic use on or off domestic premises. The recording may be lent to a family member or household, so long as it is used for that person’s private and domestic use. If a copy is sold, let for hire, offered for sale or hire, or distributed for trade or other purposes, then the recording becomes an infringing copy, both in respect of its making and subsequent dealing.

### Format shifting

The second private use exception allows a person who has purchased a legitimate copy of some categories of copyright material to make a copy in a different format for their private and domestic use. This is known as ‘format shifting’. A common example of the now permitted format shifting is where individuals wish to store their personal music collection recorded on CDs, audio tapes or vinyl records in the memory of MP3 players or personal computers. Under the format shifting provisions, it is permissible to copy without infringing copyright:

- the content of a book, newspaper or periodical that one owns into another format (s 43C)

- a photograph from hardcopy into electronic format, or from electronic format into hardcopy form (s 47J)
- a sound recording from CD, tape, record, or digital download to any other format (s 109A)
- a film from video to electronic format (s 110AA).

### **Fair dealing**

Fair dealing is a defence provided for in the Copyright Act, which allows the use of copyright materials for certain limited purposes. The fair dealing defence applies when the work is used for the purposes of (ss 40–42):

- research or study
- criticism or review
- parody or satire
- reporting the news
- legal advice and judicial proceedings.

There are mirror provisions for Part IV Subject Matter other than works in ss 103A–103C of the Copyright Act.

### **Research or study**

It is not an infringement of copyright to copy a ‘reasonable portion’ of a work, so long it is for the purpose of research or study (ss 40(1), 40(3), 103C(1)). ‘Research and study’ are not defined in the Copyright Act but are usually given their dictionary meaning. The following factors are taken into consideration when determining this category:

- the purpose and character of the dealing
- the nature of work or other subject matter
- the effect of dealing on the potential market, value of the work or other subject matter
- the possibilities of obtaining work or other subject matter within a reasonable time and at the ordinary commercial price
- the amount and substantiality of the portion copied in relation to whole thing (ss 40(2), 103C(2)).

In the case of literary, dramatic and musical works, the Copyright Act provides further guidance as to what constitutes a fair dealing for purpose of research or study. For example, one whole work may be copied where the work is an article in a periodical (s 40(3)). In the case of literary, dramatic or musical works published

in an edition of 10 pages or more, a 'reasonable portion' is considered to be 10% of the total number of pages or one chapter, whichever is the greater (s 10(2)).

Subsection 40(5) applies to a reproduction of a work or adaptation and defines a 'reasonable portion' as:

<b>Works, adaptations and reasonable portions</b>		
Item	Work or adaptation	Amount that is reasonable portion
1	a literary, dramatic or musical work (except a computer program), or an adaptation of such a work, that is contained in a published edition of at least 10 pages	(a) 10% of the number of pages in the edition or (b) if the work or adaptation is divided into chapters—a single chapter
2	a published literary work in electronic form (except a computer program or an electronic compilation, such as a database), a published dramatic work in electronic form or an adaptation published in electronic form of such a literary or dramatic work	(a) 10% of the number of words in the work or adaptation or (b) if the work or adaptation is divided into chapters—a single chapter

## Criticism or review

When a Part III work, audiovisual material or an adaptation of a work is copied without permission, it will not be an infringement if the purpose of the copying is for criticism or review so long as there is sufficient acknowledgement (ss 41, 103A Copyright Act).

## Parody or satire

A fair dealing may be made of a literary, dramatic, musical or artistic work for the purpose of parody and satire (ss 41A, 103AA Copyright Act). The government stated in its Revised Explanatory Memorandum for the Copyright Amendment Bill 2006 (Cth) that it is '... appropriate to require that a use for the purpose of parody and satire should be 'fair'. Parody, by its nature, is likely to involve holding up a creator or performer to scorn or ridicule. Satire does not involve such direct comment on the original material but, is using material for a general point, should also not be unfair in its effects for the copyright owner'.

## Reporting of news

It is not an infringement of copyright in a work, audiovisual material or an adaptation of a work if the purpose of the copying is for the reporting of news in a newspaper, periodical, magazine or in a broadcast or film (ss 42(1), 103B(1) Copyright Act). However, the source must be given sufficient acknowledgement. Additional protection is also given to music that has been copied incidentally in the course of reporting the news by broadcast or film (s 42(2)). However, this does not extend to music that is added to a soundtrack that does not form part of the news report.

## Legal advice and judicial proceedings

The use of a work for the purpose of giving professional legal advice or in the course of a judicial proceeding is not an infringement of copyright (ss 43, 104 Copyright Act).

## Additional exceptions

A number of specific exceptions allow:

- non-commercial uses by libraries or archives (s 200AB(2))
- non-commercial uses by educational institutions for educational instruction (s 200AB(3))
- uses for or by a person with a disability (s 113E).

The use must not be made for the purposes of obtaining a commercial advantage or profit.

In addition, these exceptions introduced the three-step test into Australian legislation, which means the use must satisfy the following conditions:

- It is a special case.
- It does not conflict with the normal exploitation of the work.
- It does not unreasonably prejudice the legitimate interests of the owner of the copyright or a person licensed by the owner of the copyright.

It is difficult to say with any certainty which uses will fall within these exceptions. This is likely to cause uncertainty for users as to whether their use is excepted.

## Libraries, archives, collecting institutions and educational institution amendments

There are provisions allowing certain activities relating to the collections of key cultural institutions (e.g. the making of preservation copies) where material is of historical or cultural significance to Australia (s 49–51 Copyright Act).

The definition of 'library' includes 'a library all or part of whose collection is accessible to members of the public directly or through interlibrary loans' (s 49(9)). This means that a library that is conducted for profit, such as those in a law firm or an engineering firm, can now rely upon the library copying provisions in ss 49 and 50 of the Copyright Act.

Educational institutions are also able to engage in new activities after passage of the Copyright Amendment Act. These activities allow, for example, the proxy caching of websites, subject to certain conditions; copying and communication of free-to-air broadcasts made available online (e.g. podcasts); and communication of material so it can be seen and heard by a class (e.g. a film shown via re-articulated system) (ss 200–200AAA).

## **PIRACY AND COPYRIGHT ENFORCEMENT**

The *Copyright Amendment Act 2017* (Cth) also introduced provisions relating to piracy and enforcement. There are new offences that relate to 'substantial infringement on a commercial scale'; strict liability (or on the spot fines for many offences; the ability to take likely infringements as well as proved infringements into account when dealing with online infringements on a commercial scale; and increased penalties for criminal infringement where there has been digitisation of analogue materials.

## **REMEDIES FOR COPYRIGHT OWNERS**

There are a number of remedies available for a copyright owner whose work or subject matter has been infringed. These include (pt 5 div 2 Copyright Act):

- injunctions, which stop the breach continuing or occurring
- damages, which are financial compensation for the infringement
- account of profits, which means that payment of the profit made by the infringement is paid to the copyright owner.

## **WHAT ARE MORAL RIGHTS**

Moral rights are personal rights that belong to the creator or author of a work. A key feature of moral rights is that they are inalienable, which means that they remain with the author even though the copyright in a work may have been assigned to a third party. The two new moral rights introduced by the *Copyright Amendment (Moral Rights) Act 2000* (Cth) are the right of attribution (the right to be named as author of a work) and the right of integrity (the right to object to derogatory treatment of a work). The third moral right is the right not to have authorship falsely attributed. Protection for both the right of attribution and the

right of integrity applies to all works protected by copyright which existed on or after 21 December 2000, except films and any works included in films. There is no protection for films created before that date.

## **THE RIGHT OF ATTRITION**

The right of attribution provides that the creator of a work should be known as author of the work whenever (ss 194, 195 Copyright Act):

- a literary, dramatic or musical work is reproduced, published, performed, communicated or adapted
- an artistic work is reproduced, published, exhibited or communicated
- a film is copied, exhibited or transmitted.

The author must be identified in a clear and reasonably prominent way (s 195AA).

Some practical examples where the right of attribution would be infringed are:

- a television program uses a musical work without the composer being mentioned in the credits as author of the music or the lyrics
- a writer submits an article to a magazine for publication, some parts of the body of article are altered by the publisher, and the article is then published without reference to the writer
- an artist buys a painting by another artist and superimposes his own signature over the original artist's before selling it on.

## **THE RIGHT NOT TO HAVE AUTHORSHIP FALSELY ATTRIBUTED**

The author of a work has a right not to have authorship of the work falsely attributed to someone else (s 195AC(1) Copyright Act). What this means is that a person is under a duty to an author of a work not to insert or affix another person's name in or on the work, or in or on a reproduction of the work, in such a way as to imply falsely that the other person is the author of the work. This would probably occur where the creator falsely attributed is prominent or famed in some way, and the offender wants to gain notoriety, or there is some pecuniary benefit in falsifying authorship.

The moral rights provisions exhaustively list the acts that contravene the right (ss 195AC-195AH). In the case of a literary, dramatic or musical work, acts of false attribution of authorship would include:

- inserting or affixing (or authorising someone else to insert or affix) a person's name in or on the work, or in or on a reproduction of the work in a way that

falsely implied the person is the author/artist or an author of the work or an adaptation of a work

- dealing with a work with a person's name falsely inserted or affixed, if it is known that the person is not an author/artist of the work or the work is not an adaptation of a work of the person
- dealing with a reproduction of the work that has a person's name falsely inserted or affixed, if it is known the person is not an author/artist of the work or that the work is not an adaptation of a work of the person
- performing in public or communicating the work (or adaptation of) as being authored by a particular person when it is known that the person is not an author/artist of the work or that the work is not an adaptation of the work of the person.

In the case of an artistic work, there is an additional contravention, specifically the use of that person's name in connection with the work, or in connection with a reproduction of the work, in such a way as to imply falsely that the person is an author of the work (s 195AE Copyright Act).

In cases involving films and acts of false attribution of authorship would include (s 195AF Copyright Act):

- inserting or affixing (or authorising someone else to insert or affix) a person's name in or on the work, or in or on a reproduction of the work in a way that would falsely imply the person is the director, producer or screenwriter of the film
- dealing with a work where it is known that a person's name has been falsely inserted or affixed
- communicating the film as a director, producer or screenwriter when it is known that the person is not the director, producer or screenwriter of the film.

Provisions exist for committing acts of false attribution of authorship of altered literary, dramatic, musical or artistic work (s 195AG Copyright Act), with some limitations in cases where the alteration is insubstantial (s 195AG(2)(a)) or where it was required by law (s 195AG(2)(b)). There are also provisions for cases of altered cinematograph film (s 195AH). Some practical examples of false attributions of authorship include:

- an art dealer commissions an artist to produce a series of paintings for an exhibition. Before the series can be completed the artist becomes unwell and is unable to continue painting. The art dealer then enlists the assistance of someone who is skilled at copying painting styles and she completes the series

in time for the exhibition. The exhibition goes ahead advertising the series of works by the original artist

- a student writes a poem for assessment in a university course. The lecturer changes the title and then submits the poem to a university publication under his own name
- a journalist is commissioned to interview and write an article for a newspaper on homosexual parenting. The article is substantially rewritten by the editor of the newspaper, which fundamentally alters the writer's portrayal of the journalist's interviewees and conclusions.

## THE RIGHT OF INTEGRITY

The right of integrity is infringed if the work or film is subjected to derogatory treatment that is prejudicial to the author's honour or reputation (ss 195AI-195AL Copyright Act). Derogatory treatment is basically the material distortion, mutilation or alteration of literary, dramatic or musical work; an artistic work or building, or the exhibition of the work in a derogatory manner or place; material distortion, mutilation or alteration of a film; or the doing of anything in relation to a work or film that is prejudicial to the creator.

The right to integrity contains two elements:

- there has been a material distortion of, the mutilation of, or a material alteration to the work
- there has been a distortion or the 'doing of anything else' in relation to the work that is prejudicial to the author's honour or reputation.

The potential impact of the right of integrity is unknown, and the legislation appears to rely heavily on a number of imprecise tests. For example, the question of how the courts may interpret 'derogatory treatment' and 'prejudicial to the author's honour or reputation' is open to debate until the courts are faced with making a decision.

As the moral rights provisions are relatively new, the meaning of particular parts of sections is open to speculation.

### What is derogatory treatment?

The moral rights provisions refer to derogatory treatment as a material distortion, mutilation and/or material alteration, which seems to indicate that they protect the physical element of a work. While derogatory treatment can also include the exhibition in public of a work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs, it is not clear whether an unauthorised modification of a work in a material form that does

not 'touch' the physical is protected. An example of when this would occur may be in the case of Indigenous artists, where reproduction of art works on carpets or on tea towels may be considered highly offensive and derogatory to the creators and their communities, but the design may not be sufficiently appropriated and changed to attract the protection of these provisions.

## What is prejudicial to honour and reputation?

'Derogatory treatment' also refers to 'the doing of anything else' in relation to the work that is prejudicial to the author's honour or reputation. Again, there is no clear guidance as to how this will be interpreted by courts in Australia.

Uncertainty seems to arise as to whether a 'treatment' of an author is to be judged from an objective or subjective standpoint, that is, objectively judged by the court or subjectively asking the author's opinion. One suggestion is that the notion of reputation may be interpreted as similar to that defined in defamation law. That being the case, the question of whether the treatment of a work is considered to be prejudicial to an author's reputation would probably be judged objectively.

There is also a question as to how the courts may interpret the word 'honour'. If one assumes that honour is how a person views themselves, prejudice to honour may contain stronger subjective elements.

Some examples of this may include:

- a composer's song is used in a documentary as the title song to promote overtly racist and political material, which was not the composer's intention
- an artist sells her paintings to a collector. When she visits the house of the collector she finds that the background has been changed on each painting to coordinate with the collector's furniture
- a novel is adapted into a movie. However, pivotal aspects of the novel are excluded and less important aspects of the book are exaggerated, changing the entire tone of the original work
- an artist is asked by a gallery to hold an exhibition of his work. With permission, the gallery produces a catalogue that shows various illustrations of his work. After the exhibition, the photographs of his artwork are removed from catalogues and turned into badges that are then sold to the public. The artist states that such a treatment of his work trivialises the nature of the work and he would never have given permission for the catalogue had he known what it would eventually be used for

- a sculpture is donated to a museum. The museum curators decide that the sculpture should be spray painted and modified to make it more accessible for children's play
- an artist buys a portrait of a well-known politician and then cuts it up into pieces, reassembling it in a different order in a parody about mental health and politics
- a department store commissions a sculpture that does not fit in the main foyer, so they remove the top third of the work.

## **WHAT DO MORAL RIGHTS APPLY TO?**

Moral rights apply to any work that is protected by copyright law. A 'work' for the purposes of the legislation includes the following:

- artistic works such as paintings, drawings, architecture, sculpture, craft, photographs, maps and plan
- dramatic works such as ballets, plays, screenplays and mime
- musical works such as song lyrics
- literary works such as poetry, prose, novels (both fiction and non fiction)
- screenplays, song lyrics, musical notation and journal articles, letters, and reports. It also includes tables or compilations which have been expressed in words, figures or symbols
- computer programs
- cinematograph films such as documentaries, feature films, television programs and commercials, music videos and movies.

## **WHO HOLDS MORAL RIGHTS?**

Moral rights are held by the individual creators of literary, dramatic, musical and artistic works and makers of films (s 190 Copyright Act). Examples include the:

- painter of a painting
- writer of a screenplay
- composer of a musical work
- architect of a building
- writer of a novel
- choreographer of a ballet.

In the case of films, the following people are entitled to take legal action with respect to moral rights (s 191):

- principal director
- principal producer (provided the producer is a natural person and not a company)
- principal screenwriter.

## Performers' moral rights

The (World Intellectual Property Organisation) *WIPO Performances and Phonograms Treaty*, to which Australia acceded to, provides for moral rights of performers in the sound recording of a live performance. Performers are entitled to moral rights similar to authors. In particular, performers have the right:

- of attribution of performership (the right to be identified as the performer);
- not to have performership falsely attributed; and
- of integrity of performership (the right not to have the performance subjected to derogatory treatment).

A performer's right of attribution of performership and the right not to have performership falsely attributed in respect of a recorded performance continues in force until copyright ceases to subsist in the recorded performance (ss 195ANA(1), 195ANA(2) Copyright Act). A performer's right of integrity of performership in respect of a recorded performance continues in force until the performer dies (s 195ANA(3)).

## Transfer of moral rights

Moral rights belong to the creator and remain with the author even if copyright has been transferred to someone else. This means that moral rights are not assignable. Moral rights are therefore different to 'economic rights' such as copyright, which gives an owner a right to reproduce the work, or where the owner can assign or license the use or reproduction of a work. It means that even if creators assign all their economic rights in a work, they would retain the moral rights.

## Duration of moral rights

The duration of the right of attribution continues for as long as copyright – that is, the life of the author plus 70 years for works, and 70 years from first publication. For works other than films, the right of integrity continues as long as copyright (ss 195AM–195AN Copyright Act).

## EXCUSES, DEFENCES AND EXCEPTIONS FOR INFRINGEMENT OF MORAL RIGHTS

The legislation does provide for some defences or excuses for infringement of moral rights. These include situations where:

- the person's action, or omission, was 'reasonable'
- the creator consented in writing to the person's action or omission
- a special exception to infringement applied.

### Reasonableness

A defence to an alleged infringement of the rights of attribution or integrity is that the act or omission was reasonable in all the circumstances. The Copyright Act provides guidance to courts by listing the matters to be considered when determining whether the act or omission was reasonable (ss 195AR and 195AS). These include:

- the nature of the work
- the purpose, manner and context for and in which the work is used
- any practice in the industry in which the work is used that is relevant to the work or the use of the work
- any practice contained in a voluntary code of practice in the industry in which the work is used that is relevant to the work or the use of the work
- any difficulty or expense that would have been incurred as a result of identifying the author, whether the work was made in the course of the author's employment, or under a contract by the author for the performance of services for another person
- views of other authors and their views on the alleged infringement.

### Consent provisions

A key limitation of the moral rights regime is that authors are able to consent to their moral rights being infringed (ss 195AW–195AWA Copyright Act). That is, it is possible for authors to agree not to take legal action if their moral rights are infringed. The Copyright Act requires that a creator specifies, in writing, the acts or omissions, or specifies classes or types of acts or omissions to which the consent relates. Consent has to be a genuine consent, and will have no effect if procured through duress or false and misleading statements (s 195AWB).

## Special exceptions to infringement

There are special exceptions to infringement in the moral rights provisions including (s 195AT Copyright Act):

- destroying a moveable artistic work is not an infringement if the person who destroyed the work gave the author, or a person representing the author, a reasonable opportunity to remove the work from the place where it was situated
- relocation, demolition or destruction of a building is not an infringement of the author's right of integrity if the owner of the building, after making reasonable inquiries, cannot discover the identity and location of the author or a person representing the author, or has complied with written notice requirements in the Act stating the owner's intention to carry out the change, relocation, demolition or destruction
- restoring or preserving a work in good faith is not, by that act alone, an infringement.

## REMEDIES FOR AN INFRINGEMENT OF MORAL RIGHTS

Remedies for an infringement of moral rights are found in s 195AZA of the Copyright Act. Once a creator has been successful in their claim about an infringement of a moral right, a court can grant remedy. Remedies may include:

- damages in the form of financial compensation
- an order for a public apology for the infringement
- an injunction that effectively prevents or stops a particular type of activity
- a declaration that a moral right of the creator has been infringed by a particular person
- an order that any false attribution of authorship or derogatory treatment of the work be removed and/or reversed.

## RESALE ROYALTY RIGHTS FOR VISUAL ARTISTS

According to the *Resale Royalty Right for Visual Artists Act 2009* (Cth), the resale royalty right, which subsists for 70 years after the death of the artist, is inalienable (s 33) and unable to be waived (s 34). It is, however, able to be transferred upon death of the artist to a successor in title (s 12). The resale royalty right only applies where the holder of the right (either the artist or their successor) is an Australian

citizen, a permanent resident of Australia, or a national or citizen of a prescribed reciprocating country (s 14).

The scheme grants artists a royalty on the resale of original artworks. More specifically, royalties are received from 'resales of original works of visual art sold through the secondary art market where the seller has acquired the work after the legislation takes effect' and the work is resold for a minimum of \$1000 (s 10(1)(a)). The resale royalty scheme applies to original works of visual art, which are defined in the Act to include traditional fine arts such as paintings, sculptures, drawings and engravings, along with applied or decorative arts such as jewellery, glassware, ceramics and tapestries, installations, digital video and multimedia artworks (s 7(2)). Buildings, plans or models for buildings, circuit layouts and manuscripts are expressly excluded from the definition (s 9).

The scheme only applies to works created or acquired by the seller, on or after the date of commencement of the Act, when they are later resold through the secondary commercial art market. This protects owners of existing artworks who bought them before the scheme was introduced' (s 11). The royalty is calculated on the sale price when an artwork resold after the first transfer of ownership in the commercial market. The royalty rate payable is 5% of the sale price of the commercial resale of the artwork (s 18).

To ensure that the resale royalty scheme operates effectively, it was decided that a collecting society should be established to collect resale royalties and enforce resale royalty rights on behalf of the holder of resale royalty right (ss 22–31). The task of administering the resale royalty scheme was granted to the Copyright Agency Limited (CAL), the collecting society established to deal with the reproduction of literary works. In administering the resale royalty scheme, CAL is required to publish information about commercial resales that it is aware of on its website 'as soon as it is reasonably practicable' (s 22). If the holder of a resale royalty right does not notify CAL within 21 days post publication that they do not want the collecting society to collect royalties or enforce relevant rights (ss 23(1)–(3)), CAL is obliged to collect and distribute royalties and to enforce rights. In addition, vendors, directly or through their agents, must provide CAL with sufficient information about all commercial resales for CAL to ensure, together with the buyer and seller, that royalties are paid to CAL to on-pay artists and their beneficiaries. This information can be provided to CAL by galleries, auction houses or dealers.

As is often the case with the imposition of a new tax, the resale scheme has proved to be controversial, particularly among commercial gallery owners. In this sense, the experience in Australia is not dissimilar to the reactions that the *droit de suite* scheme provoked in the United Kingdom. While it will be some time

before we are in a position to assess the relative costs and benefits of the resale scheme, it will be interesting to see whether and, if so, to what extent it delivers any benefits to artists. It will also be interesting to see whether any of the benefits that are meant to accrue to Indigenous artists and their communities eventuate or whether, as some critics have suggested, the scheme is destined to fail because it does not take account of the particular place that Indigenous art and artists occupy within Indigenous communities.

## **FUTURE REFORMS**

In May 2024, the World Intellectual Property Organisation (WIPO) member states adopted the first WIPO Treaty to address the interface between intellectual property, genetic resources and traditional knowledge. This is the first WIPO Treaty to include provisions specifically for Indigenous people as well as local communities. Australia has signed up to the treaty and is undertaking the domestic implementation processes. The federal government and IP Australia have been consulting with a wide range of stakeholders on the development of laws for the protection of traditional knowledge and cultural expressions.

The Australian Government has committed to working with First Nations peoples to introduce stand-alone legislation to protect First Nations traditional knowledge and traditional cultural expressions including to address the harm caused by fake art, merchandise and souvenirs. This commitment is outlined in the National Cultural Policy—*Revive: a place for every story, a story for every place*

The rapid rise of artificial intelligence has exposed a number of tensions with existing regulations, particularly copyright. The Australian Federal Government has released a *Copyright and AI Transparency discussion paper*, a major policy document that sets out some options for reform and invited public feedback. There is no final position on copyright reform at the time of writing.

## LEGAL NOTICES

### Disclaimer

The Queensland Law Handbook is produced by Caxton Community Legal Centre with the assistance of volunteers with legal experience in Queensland. The Handbook is intended to give general information about the law in Queensland as at the date stated on each individual page. The content of the *Queensland Law Handbook* does not constitute legal advice, and if you have a specific legal problem, you should consult a professional legal advisor.

### External links

The *Queensland Law Handbook* provides links to a number of other websites that are not under the control of Caxton Community Legal Centre. These links have been provided for convenience only and may be subject to updates, revisions or other changes by the entities controlling or owning those sites. The inclusion of the link does not imply that Caxton Community Legal Centre endorses the content, the site owner or has any relationship with the site owner.

### Limitation of liability

To the maximum extent permitted by law, Caxton Community Legal Centre and the contributors to the *Queensland Law Handbook* are not responsible for, and do not accept any liability for, any loss, damage or injury, financial or otherwise, suffered by any person acting or relying on information contained in or omitted from the *Queensland Law Handbook*.

### Copyright

The content of this website is subject to copyright. You may use and reproduce the material published on this website provided you do not use it for a commercial purpose, the original meaning is retained and proper credit and a link to the *Queensland Law Handbook* website is provided. If the material is to be used for commercial purpose, permission from Caxton Community Legal Centre must be obtained.