



## Copyright and Moral Rights

### CHAPTER CONTENTS

Introduction	3
What is Protected by Copyright?	3
First Ownership	5
Rights Held by the Copyright Owner	7
Duration of Copyright	8
Exploitation of Copyright Works	9
Copyright-collecting Societies	9
Copyright Tribunal of Australia	10
Infringement of Copyright	10
Exceptions to Copyright Infringement	12
Piracy and Copyright Enforcement	15
Remedies for Copyright Owners	15
What are Moral Rights	16

The Right of Attribution	16
The Right not to Have Authorship Falsely Attributed	16
The Right of Integrity	17
Who Holds Moral Rights?	19
Excuses, Defences and Exceptions for Infringement of Moral Rights	20
Remedies for an Infringement of Moral Rights	22
Resale Royalty Rights for Visual Artists	22
Legal Notices	24

## 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.

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.

In Australia, the *Copyright Act 1968* (Cth) 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.

## What is Protected by Copyright?

There are two types of subject matter protected under the *Copyright Act 1968* (Cth) (Copyright Act). The two broad categories are works and subject matter other than works. Part III (ss 31–83 Copyright Act) provides copyright protection for works, meaning original literary, dramatic, musical and artistic works. Part IV (ss 84–113 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, newspaper 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) Copyright Act).

### 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 which 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) of the Copyright Act to include:

- a painting, sculpture, drawing, engraving or photograph
- a building or a model of a building, whether of artistic quality or not
- a work of ‘artistic craftsmanship’. This term is not defined in the Act.

## Part IV works

### Cinematograph films

Cinematograph films are defined in s 10(1) of the Copyright Act 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) of the Copyright Act as ‘... a collection of sounds captured on 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
- 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 aspects of the work, such as the music or the lyrics (as literary works).

### Sound and television broadcasts

Television broadcast is defined to mean visual image broadcast by way of television, together with any sound broadcast for reception along with those images (s 10(1) Copyright Act). Sound broadcast means sound 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 are 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 of 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 recorders (ss 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 work in a book and/or in hard copy facsimile of an issue of the newspaper, magazine or periodical (ss 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. According to the Copyright Act, there are special exceptions including commissioned:

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

### 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), 85–88 Copyright Act). While reproduction is not defined in the Copyright Act, it includes the means by which copying takes place. For example typing, photocopying and 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 the 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.

## 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)).

## 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)).

Non-exclusive licences grant rights for a particular purpose and may be granted to more than one person.

## 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), 33(5) Copyright Act). In the case of other subject matter, the period of copyright protection varies:

- film and sound recordings—usually 70 years from the year of publication (ss 93–94)
- broadcasts—usually 50 years from the year of making (s 95)
- published editions—usually 25 years from the date of publication (s 96).

The calculation of the relevant period is from the end of the calendar year in which the work was recorded, broadcasted or published. 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.

## 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.

## 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. This agency is responsible for licensing photocopying by educational institutions and various other bodies. Copyright Agency Limited acts as an agent for its members and affiliated reproduction rights organisations overseas to administer and protect copyright owners' reproduction rights. The agency also conducts the business of Viscopy, the collecting society for the visual arts. It now licenses the reproductions of visual or graphic artistic works on behalf of visual artists including craft workers, photographers, sculptors, multimedia artists and designers, and it also administers the resale royalty scheme, which was established in Australia in 2010.

### Screenrights

Screenrights is the collecting society for film producers and distributors, script writers and music copyright owners. Screenrights collects royalties on behalf of producers, distributors, rights holders in scripts, music, artistic works and sound recordings and other rights holders 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 audio-visual 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 rights holders.

## **Australasian Performing Rights Association Ltd**

Australasian Performing Rights Association Ltd (APRA) licenses the broadcast, public performance and cable transmission of live and recorded musical works and accompanying lyrics. The association's members consist of composers and music publishers.

## **Australasian Mechanical Copyright Owners Society Ltd**

Australasian Mechanical Copyright Owners Society Ltd (AMCOS) (same website as APRA above) licenses certain recording of music and lyrics, and photocopying of sheet music by schools. The members of AMCOS are music publishers.

## **Phonographic Performance Company of Australia Ltd**

Phonographic Performance Company of Australia Ltd (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 tribunal can determine different amounts 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 can also declare a collecting society, the manner of paying royalty for copying musical works, recordkeeping 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 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:

- burning of music or computer software CDs, whether given away or sold (a defence is the personal copying for private or domestic purposes)
- 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 of images such as photographic or digital 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:

- 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 which is capable of circumventing or facilitating the circumvention of technological protection measures, 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.

## Liability of internet service providers

Internet service providers who authorise others to infringe copyright in relation to online material can themselves be liable for infringing copyright.

Section 115A of the Copyright Act assists copyright owners in preventing online piracy from an overseas website. This section provides that a copyright owner may apply to the Federal Court for an injunction to require service providers to take reasonable steps to disable access to an online location. The Federal Court will only grant the injunction if it is satisfied that:

- a carriage service provider provides access to an online location outside Australia
- the online location infringes, or facilitates an infringement of, the copyright and
- the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).

## Technological Protection Measures

According to the Copyright Act there are three prohibited activities:

- circumventing an access control technological protection measure
- manufacturing a circumvention device for a technological protection measure
- providing a circumvention service for a technological protection measure.

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 for example:

- inter-operability between computer programs
- encryption research
- computer security testing

- online privacy
- law enforcement and national security
- acquisitions by libraries and other related institutions (ss 116AN(2)–(9) Copyright Act).

Some exceptions are set out in the *Copyright Regulation 1969* (Cth).

## Exceptions to Copyright Infringement

In some cases, what would seem to be an act of infringement may be protected by the exceptions in the Copyright Act. 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 45–64):

- 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
- 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
- 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 (ss 65–73):

- the inclusion in a film or broadcast, 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 consumers

### 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 be watched or listened to at a more convenient time, known as time-

shifting (s 111 Copyright Act). Private and domestic use is defined in s 10(1) 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, known as format-shifting. A common example of 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 of the Copyright Act, 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) except podcasts (s 109A(1)(b))
- 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 40–43):

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

### Research or study

It is not an infringement of copyright to copy a reasonable portion of a work, so long as it is for the purpose of research or study (ss 40(1), 40(7)(b), 103C(1) Copyright Act). 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 the 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)).

## Criticism or review

When a Part III work, audio-visual 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).

## Reporting of news

It is not an infringement of copyright in a work, audio-visual 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 sufficiently acknowledged. Additional protection is 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 (s 43 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 (s 41A Copyright Act). While there has been little litigation on this defence, the government gave some guidance on the meaning of the terms, when it introduced the defence. 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.*

## Additional exceptions

Additional exceptions contained in the Copyright Act are:

- 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 where the use is for the purpose of making the work more accessible (s 200AB(4)).

The new fair dealing exceptions covered will not apply where an existing exception or statutory licence already operates (s 200AB(6)).

The use must not be made for the purposes of obtaining a commercial advantage or profit and must satisfy the following conditions of the three-step test:

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

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

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) Copyright Act). This means that a library that is conducted for profit, such as those in a law firm or an engineering firm, can rely upon the library copying provisions in ss 49 and 50 of the Copyright Act.

Educational institutions are also allowed to proxy cache websites subject to certain conditions, copy and communicate free-to-air broadcasts made available online (e.g. podcasts), and communicate material so it can be seen and heard by a class (e.g. a film shown via a re-articulated system) (ss 200–200AA).

## **Piracy and Copyright Enforcement**

The offences of piracy 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
- 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:

- 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 (ss 115–116AAA Copyright Act).

## 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 Copyright Act addresses three moral rights:

- the right of attribution (i.e. the right to be named as author of a work)
- the right of integrity (i.e. the right to object to derogatory treatment of a work)
- 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 Attribution

The right of attribution provides that the creator of a work should be known as author of the work whenever:

- 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 (ss 194–195 Copyright Act).

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

The right of attribution would be infringed in the following practical examples:

- 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 signature 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). The moral rights provisions exhaustively list the acts that contravene this right (ss 195AC–AH Copyright Act). 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 the work) 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, 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 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 (s 195AF Copyright Act).
- Provisions exist in the Copyright Act for committing acts of false attribution of authorship of altered literary, dramatic, musical or artistic work (s 195AG), 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 are listed below:
- 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 they complete 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, which is prejudicial to the author's honour or reputation (ss 195AI–AL Copyright Act). Derogatory treatment is basically:

- the material distortion, mutilation or alteration of literary, dramatic or musical work
- displaying 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 and
- a distortion or the doing of anything else in relation to the work, which is prejudicial to the author's honour or reputation.

## Derogatory treatment

The moral rights provisions refer to derogatory treatment as a material distortion, mutilation and/or material alteration, which seems to indicate that it protects 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, which 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.

## 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. Uncertainty seems to arise as to whether a treatment of an author is to be judged from an objective or subjective standpoint (i.e. objectively judged by the court or subjectively by 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 as in the following examples:

- 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 their paintings to a collector. When they visit the house of the collector they find 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 their work. With permission, the gallery produces a catalogue that shows various illustrations of their work. After the exhibition, the photographs of the artwork are removed from catalogues and turned into badges that are then sold to the public. The artist states that such a treatment of their work trivialises the nature of the work and they would never have given permission for the catalogue had they 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 plans
- 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 Copyright Act):

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

## Moral rights of performers

- 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
- 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)–(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, which give 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—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 (s 195AM(2) 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–AS). 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–AWA 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 Copyright Act).

## Special exceptions to infringement

There are special exceptions to infringement in the moral rights provisions including:

- destruction of a moveable artistic work 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 if the owner of the building, after making reasonable enquiries, cannot discover the identity and location of the author or a person representing the author, or has complied with written notice requirements in the Copyright Act stating the owner’s intention to carry out the change, relocation, demolition or destruction
- restoration or preservation of a work in good faith (s 195AT Copyright Act).

## 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, including:

- damages in the form of financial compensation
- an order for a public apology for the infringement
- an injunction, which 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

The resale royalty entitles artists to a percentage payment when a work of art that they have created is resold.

According to the *Resale Royalty Right for Visual Artists Act 2009* (Cth) (Resale Royalty Right for Visual Artist Act), the resale royalty right, which subsists for 70 years after the death of the artist (calculated from the end of calendar year in which the artist died (s 32)), 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 Resale Royalty Right for Visual Artist Act to include items 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). Buildings, plans or models for buildings, circuit layouts and manuscripts are expressly excluded from the definition (s 9).

The new scheme only applies to works created on or after the date of commencement of the Resale Royalty Right for Visual Artist Act (s 11) when they are later resold through the secondary commercial art market (s 8). 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, a collecting society was 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 Copyright Agency Ltd (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 resale 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 it does 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 transfer to artists and their beneficiaries. This information can be provided to CAL by galleries, auction houses or dealers.

## Legal Notices

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