



TERRALEX®

CROSS-BORDER COPYRIGHT GUIDE 2018



Australia

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1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright law in Australia is the Copyright Act 1968 (Cth) (Copyright Act). Although the Copyright Act replaced and repealed four previous Copyright Acts (1912, 1933, 1935 and 1963), the previous Acts are still applied today where a work was in copyright immediately before the commencement of the current Copyright Act.

As Australia is a common law legal system, Australian copyright law also draws from a significant body of case law laid down by the courts over the years as they have interpreted and enforced copyright legislation.

2. Subsistence of copyright

2.1 What type of subject matter can be protected by copyright?

The categories of subject matter that can be covered by copyright are: literary, dramatic, musical and artistic works, sound recordings, films, broadcasts and published editions of works. They are broad categories, and can be summarised as follows:

Literary works

These are any works, other than a dramatic or musical work, which are expressed in print or writing. Tables, compilations and computer programs are also categorised as literary works.

Dramatic works

A dramatic work includes a work of dance or mime; this might be a script for a play, a dance routine that has been choreographed or a screenplay of a book for film.

Musical works

These are works consisting of music, without any words or actions that are intended to be performed with the music. There is copyright in the sound recording of a musical work but that is a separate and distinct right (see below).

The term 'musical' in the Copyright Act does not refer to any artistic or aesthetic qualities the work should possess, but rather a method of production.

Artistic works

These include graphic works, photographs or sculptures (irrespective of quality), a work of architecture (be it a building or a model for a building) or a work of artistic craftsmanship.

A graphic work is broad in scope and can be, amongst other things, a painting, drawing, diagram, map, chart, plan, engraving or etching.

A work of artistic craftsmanship must have some aesthetic appeal and be the result of the work of a skilled craftsman; for example, stained-glass windows or wrought-iron gates.

Sound recordings, films, broadcasts, published editions of works

These categories are designed to cover both recordings of sounds which are not based on underlying literary, dramatic or musical works, and recordings of literary, dramatic or musical works.

A film is a recording from which a moving image may be produced and, importantly, includes the soundtrack to the film.

Broadcasts are the electronic transmission of visual images, sounds or other information for simultaneous reception via a broadcasting service to members of the public.

2.2 What is required for works to qualify for copyright protection?

A work that falls within one of the categories above may be protected by copyright if it is original. A work is original if the author (see point 3.1 for how to decide who is the author) has created the work through his/her own skill, judgement and individual effort and has not copied from other works. Save for works of artistic craftsmanship, it is not necessary that the work is of artistic merit. It is also not necessary that the whole of a work be original.

Copyright does not protect information or ideas as such – in order to qualify for copyright protection, a work must be 'expressed in material form'. As a general rule, Australia provides copyright protection if the author is a national or resident of, or the work was first published in, Australia.

2.3 What rights does copyright grant to the rights holder?

The Copyright Act sets out the rights subsisting in copyright works which are the exclusive preserve of the rights holder (before any licences are granted or copyright is transferred to someone else). They include the right to:

- reproduce the work in a material form
- publish the work
- perform the work in public
- communicate the work to the public
- in the case of a literary work (other than a computer program) or a musical or dramatic work, enter into a commercial rental arrangement in respect of the work reproduced in a sound recording
- in the case of a computer program, enter into a commercial rental arrangement in respect of the program
- make an adaptation of the work or do any of the above in relation to the adaptation.

Creators of works also have the moral rights described in 2.4.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In Australia, the following moral rights are provided for by the Copyright Act:

- the right to be identified as the author of a copyright work
- the right to object to derogatory treatment of a copyright work
- the right not to suffer false attribution of a copyright work.

Moral rights are applicable to literary, dramatic, musical or artistic works and films. Moral rights do not apply to sound recordings, broadcasts or published editions of works.

2.5 What is the duration of copyright in protected works and other subject matter?

The duration of protection for copyright subject matter varies according to the type of work or other subject matter and the date of creation. In general, for items created on or after 1 May 1989 the duration of copyright protection is as follows:

3. Ownership

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 70 years from the end of the calendar year in which the author dies.
Where a work has a joint author/co-author, 70 years from the end of the calendar year in which the last known author dies.
Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was made or first made available to the public.
Category of work
Sound recordings and films
Duration
Copyright expires 70 years from the end of the calendar year in which the recording or film was first published.
Category of work
Broadcasts
Duration
Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made.
Category of work
Published editions of works
Duration
Copyright expires 25 years from the end of the calendar year in which the work was first published.

2.6 For how long do moral rights subsist in copyright works?

An author's moral right to be identified as the author, right against false attribution and right to object to derogatory treatment lasts for the life of the author plus 70 years.

An author's right to object to derogatory treatment in respect of a film lasts for the life of the author.

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the author. The main exception to the rule is where the work was made by a person in the course of his/her employment; in those circumstances, the employer is the first owner unless there is an agreement to the contrary. The author is defined as the person who creates the work. The Copyright Act provides guidance for the specific categories of subject matter where the creator is less clear:

- for sound recordings, the author is the person who made the arrangements necessary for making the sound recording
- for films, the author is the person who made the arrangements necessary for the making of the film (in the case of a commissioned film), or each director of the film (in the case of a non-commissioned film)
- for broadcasts, it is the person making the broadcast
- for published editions, it is the publisher of the publication.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where there is an assignment of part of a person's interest in the copyright.

To qualify as joint authors, it is necessary that the contributions of each author are not distinct. If they are distinct then two works subsist, each with separate copyright.

Joint owners have their own individual rights with respect to the work that can be assigned independently of the other or others, but the consent of all joint authors is required for licensing or use of the copyright work.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in Australia; it arises automatically upon creation of the work. There is no registration system.

A copyright notice may be useful to evidence ownership of copyright and the date of authorship. It creates a presumption that the named person is the author, and puts third parties on notice of the rights. It can also affect the remedies available for infringement, as damages will not

4. Infringement

generally be available unless the infringer was put on notice of the owner's copyright. However, copyright subsists without such notice and the failure to display such notice does not affect copyright in a work.

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment of copyright must be in writing, signed by or on behalf of the copyright owner. A licence of copyright can, in addition to being in writing, be agreed orally or by implication (although this is not best practice as the rights holder will not benefit from certain statutory rights as licensee, such as the right to sue third party infringers).

3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights can be waived but they cannot be assigned.

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed. There are two classes of infringement: direct infringement and indirect infringement.

4.1 What acts constitute direct infringement of copyright?

Direct infringement occurs where a person performs any of the acts comprised in the copyright (set out in 2.3 above) without the consent of the rights holder.

There is no need to show that the alleged infringer had knowledge of another's subsisting right, or intention to infringe that right. However, as noted above, having notice of the owner's rights may affect the remedies granted by the court.

4.2 What acts constitute indirect infringement of copyright?

In general terms, indirect infringement of copyright occurs where a person, with knowledge or reasonable grounds for such knowledge:

- imports for sale, distribution or hire an article which, if made in Australia, would infringe the copyright
- exhibits, distributes, sells, or lets for hire an article, the making of which infringed the copyright
- gives permission for use of a public place for a performance that infringes the copyright.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that are specifically permitted under the Copyright Act, notwithstanding the existence of copyright protection. These permitted acts (termed 'fair dealing' in Australia) are wide in variety but often relate to very specific scenarios. They include (amongst others):

Act
Temporary reproduction of work
Description
A copy that is transient or incidental which: <ul style="list-style-type: none">• is part of a technological process of making or receiving a communication; or• is incidentally made as a necessary part of a technical process of using a copy of the work (eg ISPs who use caching).

Act
Personal copies for private and domestic use
Description
There are format-shifting exceptions for the copying of books, newspapers and periodicals, photographs, videotapes and sound recordings for private use. The exceptions only apply if the owner of the original makes a copy, and the original is not an infringing copy. The format-shifting exception for films only applies to copies made from films in analogue form and does not apply to digital-to-digital copying.
There are also time-shifting exemptions for recording broadcasts to be watched or listened to at a later time.
Act
Research or study
Description
Copying may be allowed for the purpose of research or study where the amount copied is within the statutory limit or where use is 'fair dealing' having regard to factors including (among others) the purpose and character of the dealing, the effect of the dealing on the potential value of the work, and the amount copied.
Act
Criticism or review and reporting news
Description
Where the copyright work is being used for the purpose of criticism or review, whether of that copyright work or another work, or for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical, or by means of an electronic communication or film.
Act
An acknowledgement of any copyright work used in a criticism or review is required.
Description
Where the news is reported in a film or communicated electronically, no acknowledgment is required.
Act
Judicial proceedings or professional advice
Description
Where the copyright work is being used for the purpose of professional advice by a legal practitioner, patent attorney or trade mark attorney, or for use in a judicial proceeding or report of a judicial proceeding.

Act
Parody or satire
Description
Where the copyright work is being used for the purpose of parody or satire.
It should be noted that parodied or satirised work does not excuse defamatory remarks or the moral right to object to the unreasonably derogatory treatment of a work.

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The law in Australia is not yet clear on hyperlinking or framing. In Australia, it is an infringement of copyright to communicate a work to the public, including by making a work available online. In *Universal Music Australia v Cooper* [2005] FCA 972, the question was whether providing a hyperlink on a website that led to a copyright work was 'making available' that work to the public. Tamberlin J found that, given that the copyright work was not stored on Cooper's website but on a remote website, it was the remote website rather than the Cooper website that had 'made available' the copyright work.

On appeal, however, the Full Federal Court held that Mr Cooper had authorised the primary copyright infringement. There has not yet been any litigation on framing in Australia.

4.5 Is a licensee of copyright able to bring an infringement action?

Under the Copyright Act, an infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action depends on the type of licence involved.

An exclusive licence authorises the licensee to exercise rights which would otherwise be exercisable exclusively by the copyright owner. One such right is the right to bring an infringement action.

A non-exclusive licensee may also bring an infringement action but only where the licence is in writing and signed by the copyright owner and expressly grants the non-exclusive licensee the right to enforce the copyright.

5. Remedies

5.1 What remedies are available against a copyright infringer?

The Copyright Act provides the following remedies for rights holders:

- interlocutory injunctions (including search orders and freezing orders)
- delivery up of infringing articles
- seizure of infringing articles
- forfeiture of infringing articles
- a final injunction against the infringer
- to elect between either an enquiry as to damages or an account of profits arising from the infringement.

5.2 Are there any specific remedies for online copyright infringement?

An injunction can be obtained against an internet service provider which is providing access to an online location outside Australia used primarily to infringe or facilitate infringement of copyright. The ISP can be required to take reasonable steps to disable access to the online location (s115A of the Copyright Act).

There are a number of specific actions in respect of access control measures (such as a measure to limit the geographical area in which a particular work may be accessed). An action lies against a person who tries to circumvent an access control measure (s116AN of the Copyright Act) and a person who manufactures a circumvention device (s116AO) or provides a circumvention service (s116AP).

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

The Copyright Act creates a number of criminal offences in relation to copyright. Generally, criminal offences involve commercial dealings or infringements on a commercial scale.

The relevant criminal acts are:

- commercial-scale copyright infringement that has a substantial prejudicial impact on the owner of the copyright
- making an infringing copy for sale, or hire, or for commercial advantage
- selling or letting for hire an infringing copy
- offering an infringing copy for sale or hire, or for commercial advantage or profit

- exhibiting an infringing copy in public commercially
- importing a copy of a copyright work into Australia commercially
- distributing an infringing copy
- possessing an infringing copy for commerce
- making or possessing a device, intending to use it for making an infringing copy
- advertising the supply of an infringing copy
- causing a work to be performed publicly or a recording or a film to be heard or seen in public
- circumventing an access control technological protection measure for commercial advantage or profit
- manufacturing a circumvention device or providing a circumvention service for a technological protection measure
- removing or altering electronic rights protection information
- distributing, importing or communicating copies after removal or alteration of electronic rights management information
- distributing or importing electronic rights management information.

Each offence requires a level of intention, knowledge or belief on behalf of the alleged infringer, and each carries various penalties. Generally, what is required is:

- the intention to engage in the physical act
- intention, knowledge or recklessness as to the circumstance or result of the act.

The potential penalties are:

- for indictable offences – AU\$99,000 or imprisonment for not more than five years, or both
- for summary offences – AU\$21,600 or imprisonment for two years, or both
- for strict liability offences (where applicable) – AU\$10,800.

There are slightly different potential penalties for the following offences:

- importing a copy of a copyright work into Australia commercially – AU\$117,000 or imprisonment for not more than five years, or both
- advertising the supply of an infringing copy – AU\$5,400 or six months' imprisonment, or both
- circumventing an access control technological protection measure for commercial advantage or profit – AU\$10,800.

6. Enforcement

For some strict liability offences, the Australian Federal Police or the State or Territory Police can issue an infringement notice as an alternative to prosecution. In this case, an alleged offender can avoid prosecution if they pay a penalty and forfeit infringing copies and devices used to make them to the Commonwealth.

An aggravated offence is committed if in certain cases the infringing copy was made by converting a work from hard copy into a digital form. The consequence is a higher maximum fine of AU\$153,000 and/or imprisonment for not more than five years.

While fines and imprisonment are both possible sanctions for infringement of copyright, more often than not the penalties are monetary. A corporation can be fined up to five times the amount of the maximum fine.

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is six years to bring a claim for breach of copyright. Time begins to run from the time the infringing act was done.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In Australia, the general rule is that the unsuccessful party pays a proportion of the costs of the successful party. However, this is subject to the very wide discretion of the court, which can order otherwise. As a general rule, a successful party will not recover more than 60% of its costs.

However, the general rule relating to costs and the amount of costs that can be recovered will be influenced by the making of an offer of settlement and the timing of that offer.

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

Action for copyright infringement is generally brought either in the Federal Court of Australia or the Federal Circuit Court. Actions can also be brought in the State and Territory Courts, if the amount of damages sought is within the limit that the court can award and there is a connection with the state or territory.

6.2 Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure by the Australian Customs Service of infringing copies being imported into Australia. A copyright owner must lodge a Notice of Objection with the Chief Executive Officer of Customs, which then authorises a Customs officer to seize copies of allegedly infringing copyright material. Customs may decide not to seize the copies unless the copyright holder gives a written undertaking to repay to the Commonwealth the expenses of seizing the copies.

Criminal proceedings

Criminal proceedings, although rare, can be brought on the grounds described in 5.3 above, and pursued through the criminal courts. Infringing activity may be reported to the State or Territory Police, or may be referred directly to the Australian Federal Police. Generally, the Australian Federal Police investigate copyright infringements and the Commonwealth Director of Public Prosecutions prosecutes offences under the Copyright Act.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? What do they do?

The Commonwealth Attorney-General's Department is responsible for the development of Australian copyright policy as well as monitoring and communicating Australia's stance on international copyright issues.

The Australian Copyright Council is an independent, not-for-profit organisation that represents the interests of many copyright owners and advocates for the importance of copyright. It provides an online legal advice service, lobbies for law reform and publishes educational material on specific copyright matters.

The Copyright Tribunal is an independent tribunal established by the Copyright Act. The Tribunal deals with statutory licences (or statutory exclusions from

infringement), the administration of licence schemes, and commercial licensing disputes between collecting societies and users of copyright material. It does not deal with criminal ‘piracy’ of copyright works.

There is no agency specifically tasked with enforcement of copyright. The Australian Federal Police will target criminal activity (see 5.3) but it is up to the rights holders or the rights management agencies to identify infringement of their rights and seek civil remedies under the Copyright Act, with the additional option of bringing criminal infringements to the attention of the authorities.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

As a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collecting societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent. The key Australian collecting societies in each sector are as follows:

Agency
Aboriginal Artists Agency Limited
Who it represents
Aboriginal and Torres Strait Islander artists
Agency
Australasian Mechanical Copyright Owners’ Society
Who it represents
Musicians and music publishers
Agency
Australian Performing Rights Association
Who it represents
Musicians, composers, music publishers
Agency
Australian Screen Directors Authorship Collecting Society Ltd
Who it represents
Directors

Agency
Australian Writers’ Guild Authorship Collecting Society Ltd
Who it represents
Scriptwriters
Agency
Christian Copyright Licensing International
Who it represents
Christian music-writers and filmmakers
Agency
Copyright Agency Limited
Who it represents
Authors, journalists, illustrators, visual artists, photographers, and newspaper, magazine and book publishers
Agency
LicenSing
Who it represents
Christian music publishers
Agency
Phonographic Performance Company of Australia
Who it represents
Musicians and record companies
Agency
Screenrights
Who it represents
Artists, film producers and distributors, scriptwriters, music copyright owners
Agency
Word of Life International
Who it represents
Christian music-writers and publishers

6.5 Are copyright levies payable? By whom, and in what circumstances?

Copyright levies are not payable in Australia.

7. Copyright reform

7.1 What do you consider to be the top two recent copyright developments?

First cases brought under section 115A Copyright Act 1968 (Cth)

In June 2015, the Copyright Amendment (Online Infringement Act) 2015 introduced amendments to the Copyright Act which permit a copyright owner to apply for an injunction requiring an ISP to block access to an overseas online location (or website) where that online location “has the primary purpose of infringing copyright or facilitating the infringement of copyright” (also known as the ‘site-blocking legislation’).

Section 115A gives the Federal Court of Australia the power to order an injunction to require a carriage service provider (CSP) to take reasonable steps to disable access to the online location. In determining whether to grant the injunction, the Court will take into account the following:

- the flagrancy of the infringement or the facilitation of the infringement
- whether disabling access to the online location is a proportionate response to the circumstances
- whether it is in the public interest to disable access to the online location.

In February 2016, the first applications for injunctions under the new legislation were made in the Federal Court by Village Roadshow (seeking to block access to streaming site SolarMovie) and Foxtel (seeking to block torrent websites The Pirate Bay, Torrentz, TorrentHunt and IsoHunt) in order to have these streaming and torrent websites blocked by ISPs. The cases were heard together. At issue was whether an injunction should be granted requiring carriage service providers to take reasonable steps to disable access to online locations outside Australia that infringed or facilitated the infringement of copyright. In accordance with s115A, the Court granted injunctive relief, requiring the respondent CSPs to take reasonable steps to disable access to the infringing sites and to redirect users to landing pages which outlined the reasons for the blocked access.

The Court has emphasised that section 115A provides for a ‘no fault’ remedy against carriage service providers. The entitlement of an applicant for relief under the section does not depend upon establishing that a carriage service provider has infringed copyright either by its own acts or by authorising the acts of another person.

In April 2016, Universal Music Australia, Warner Music Australia, Sony Music Entertainment Australia and Albert Music, together with collection agency APRA AMCOS, also brought an action in the Federal Court, successfully seeking

injunctive relief requiring a number of ISPs to disable access to the KickassTorrents website. In the more recent decision of *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435, the Federal Court of Australia found in favour of the applicant, which took action against 30 respondent CSPs, ordering them to disable internet user access by way of implementing a Domain Name System Blocking (DNS Blocking) to the KAT website.

On 18 August 2017, Foxtel Management Pty Limited and Roadshow Films successfully sought injunctive relief pursuant to s115A of the Copyright Act 1968 (Cth), having the effect of disabling access to 49 online locations that allegedly infringe, or facilitate the infringement of, the respective copyrights. The Court made the requested orders, requiring the carriage service providers to take reasonable steps to disable access to the infringing sites, including Putlocker, WatchFree, PrimeWire and Movie4K.

At issue in both proceedings was determining who should appropriately bear the costs of implementing the DNS Blocking mechanisms, as the Copyright Act is silent on this point. In both cases, the Court found that the applicants should pay the respondents’ compliance costs for the blocking orders, on the basis that the applicants receive a commercial benefit under s115A of the Copyright Act.

Copyright Amendment (Disability Access and Other Measures) Act 2017 (Cth)

On 15 June 2017, the Federal Parliament passed the Copyright Amendment (Disability Access and Other Measures) Act 2017 (Cth). The provisions are expected to take effect in December 2017. The Act makes a number of amendments to the Copyright Act specifically relating to the use of copyright material by persons with a disability and anyone assisting them, as well as organisations assisting persons with a disability.

Relevantly, the Act introduces a new fair dealing exception under s113E for access to copyright material by persons with a disability. The fair dealing exception will permit, for instance, enlarging text and graphics, and making changes to the format of materials. The Act also consolidates and streamlines the necessary exceptions allowing libraries and archives to make copies of copyright material for preservation purposes.

7.2 What do you consider will be the top copyright development in the next year?

Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements

On 29 April 2016, the Productivity Commission, an independent federal government agency, released its Draft Report on Intellectual Property Arrangements (Report), which set out its findings and recommendations as to “whether current arrangements provide an appropriate balance between access to ideas and products, and encouraging innovation, investment and the production of creative works”. In its Draft Report, the Productivity Commission recommended a number of significant changes to Australian copyright law, including:

- the replacement of the current fair dealing exceptions under the Copyright Act with a broad, US-style fair use exception
- the repeal of parallel import restrictions for copyright-protected books
- the repeal of section 51(3) of the Competition and Consumer Act 2010 (Cth), which exempts licensing or assignment of intellectual property from certain competition law prohibitions
- the expansion of the safe-harbour scheme to cover a broader set of online service providers
- changes to the Federal Circuit Court to improve dispute resolution processes for lower-value intellectual property disputes, especially those involving small and medium-sized enterprises.

A final Report was published in December 2016 and, in August 2017, the Australian Government released its Response to the Report which, whilst broadly supportive, indicated that the Australian Government will exercise caution in its implementation of the Commission’s recommendations.

Specifically, in the Response:

- in response to the first change recommended above, the Government stated that it will publicly consult on more flexible copyright options in early 2018, in order to allow adequate time to properly consider the complexities of the recommended changes
- in response to the second recommended change above, the Government supported in principle the repeal of parallel import restrictions for copyright-protected books, and will “consult with the book industry to develop a reform pathway that is in the public interest”

- in response to the third recommended change above, the Government supported the repeal of section 51(3) of the Competition and Consumer Act 2010 (Cth), stating that “there is no fundamental conflict between IP rights and competition policy”
- in response to the fourth recommended change above, the Government supported in principle the expansion of the safe-harbour scheme to cover a broader set of online service providers and, acknowledging the limitations of the current scheme, will be undertaking additional consultation on the safe-harbour scheme before considering amending legislation.

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