



Infringement: Actions, Remedies, Offences & Penalties

In this information sheet, we set out what legal actions and remedies are available for infringement of copyright, when conduct constitutes a criminal offence, and what the penalties are for copyright offences. We also discuss other dealings relating to copyright material that can give rise to civil actions or criminal offences.

The purpose of this information sheet is to give general introductory information about copyright. If you need to know how the law applies in a particular situation, please get advice from a lawyer.

We update our information sheets from time to time. Check our website at copyright.org.au to make sure this is the most recent version, and for information about our other information sheets, other publications and our seminar program.

Our other information sheets may also be relevant. They include:

- [Infringement: What Can I Do?](#) – this is useful if you think that your copyright has been infringed and you want to know what to do;
- [Moral Rights](#) – this includes information about the infringement of moral rights;
- [Performers' Rights](#) – this includes information about infringement of performers' rights; and
- [Importing Copyright Items](#) – this includes information about when you may need a copyright clearance to import items into Australia for commercial purposes and when you may be able to import without a copyright clearance.
- [Copyright Infringement & Site Blocking](#) – this provides information on the June 2015 amendments to allow copyright owners to seek an injunction against a carriage service provider to “block” access to foreign websites that have the primary purpose to infringe, or to facilitate infringement of, copyright.

Key points

- Copyright is infringed when copyright material is used without permission in one of the ways exclusively reserved to the copyright owner.
- There are some situations in which people can use copyright material without permission, either for free or on other terms.
- A copyright owner is entitled to commence a civil action in court against someone who has infringed his or her copyright, and may be entitled to various remedies.
- Some infringements of copyright (usually those that involve a commercial element) are also criminal offences, and various penalties can be imposed if someone is convicted of a copyright offence or issued with an infringement notice.

When is copyright infringed?

The Copyright Act gives copyright owners a number of exclusive rights. These rights relate to materials such as text, artistic works, musical works, computer programs, films and sound recordings, and include the right to reproduce copyright material and, for some material, to perform or screen it in public and to publish it on the internet.

Copyright is infringed if copyright material, or a “substantial part” of it, is used without permission in one of the ways exclusively reserved to the copyright owner. There are, however, some situations in which copyright material can be used without it being an infringement.

Courts determine whether a part is a “substantial part” by looking at whether it is an important, distinctive or essential part. The part does not necessarily have to be a large part to be “substantial” for the purposes of copyright law.

Copyright may also be infringed when someone:

- “authorises” someone else to infringe copyright (that is, endorses or sanctions someone else’s infringement, for example by asking or encouraging them to infringe copyright, or by providing them with the means to do so);
- imports, without permission, items containing copyright material for sale or distribution;
- deals commercially with infringing copies of copyright material;
- deals commercially with some types of items containing copyright material imported without permission; or
- permits a place of public entertainment to be used for infringing performances or screenings.

Civil actions and remedies

If copyright has been infringed, the copyright owner is entitled to commence an action in court and various remedies may be awarded. Action must be taken within 6 years of the date the infringement took place.

Action can be taken in either the Federal Court or the Federal Circuit Court. Action can also be taken in State and Territory Supreme courts, and sometimes other State courts, depending on whether or not they have the power to grant the remedies that the copyright owner seeks.

Courts may grant “interlocutory relief” and final orders. A court may also order a person who loses a case to pay another party’s legal costs. An award of costs will not, however, always cover the full amount the person who won the case has to pay their legal representatives.

Interlocutory relief

Interlocutory orders are orders that are made by a court after a case has been started but before it is finalised. Interlocutory orders are about such things as preserving the status quo, obtaining evidence, or preventing further damage to the claimant.

Ex parte orders are orders made as a result of an application made by one of the parties, generally without the knowledge of the other party or parties. In the context of copyright infringement, the most common ex parte orders are:

- *Anton Piller* orders (orders to enter premises and search and seize infringing goods and related documents); and
- *Mareva* injunctions (orders to prevent a defendant from disposing of assets to defeat a judgement).

Final orders

Final orders are granted after the case has been heard, and put the court's decision about the issues in dispute into effect. In deciding what remedies to grant where infringement takes place online, a court can take likely infringements into account as well as proved infringements if, taken together, the infringements were on a commercial scale.

A court can award a number of different types of final orders, including:

Damages

This is payment of money to compensate for the infringement. Damages are often based on the amount that the copyright owner would have been able to charge for the use of the material. Sometimes, a court may award additional damages if the infringer's conduct has been "flagrant".

An account of profits

This is payment of any profits that the infringer has made from using the work. A court cannot award both damages and an account of profits; a copyright owner must ask for one or the other.

Delivery up of the infringing articles

A court can also order the infringer to deliver (give) any infringing articles or "device" used to make the infringing articles to the copyright owner. If the infringer is not able to do this (eg., because the articles have been sold), he or she may be ordered to pay "conversion damages". These damages relate to the value of the infringing articles, but may be reduced by taking into account costs incurred by the infringer such as manufacturing costs.

An injunction

This is a court order that prohibits a party from doing something. In copyright infringement cases, an injunction will usually be an order that prohibits the infringer from continuing to infringe. In June 2015, the Copyright Act was amended to allow copyright owners to seek an injunction against an internet service provider to "block" access to foreign websites that have the primary purpose to infringe, or to facilitate infringement of, copyright.

Criminal offences involving copyright infringement

Not every infringement of copyright is a criminal offence. Generally, only infringements of copyright that involve commercial dealings or infringements that are on a commercial scale are criminal. For example, under the Copyright Act, it may be an offence to:

- cause infringement on a commercial scale, even if the infringer makes no financial gain;
- make "an article" that infringes copyright for sale or hire or to obtain a commercial advantage or profit, or to sell or otherwise deal with such an article, sometimes with the intention of obtaining a commercial advantage or profit, in specified ways;
- import "an article" that infringes copyright for trade purposes, or to obtain a commercial advantage or profit;
- distribute "an article" that infringes copyright for trade purposes, or to obtain a commercial advantage or profit, or for any other purpose that prejudicially affects the copyright owner; or
- possess an article that infringes copyright, for specified commercial purposes, including for distribution to obtain a commercial advantage or profit or in a way that prejudicially affects the copyright owner.

It may also be a criminal offence to:

- make or possess a "device" that is to be used to make infringing copies of a copyright work;
- advertise the supply of infringing copies of copyright material; or

- cause the public performance of some copyright material at “a place of public entertainment”, with the result that copyright in the material is infringed.

There are a number of categories of criminal offences that apply to copyright infringement cases. Sometimes, the matter can go to court as an indictable or summary offence. Indictable offences are the most serious, and can be tried before a jury. Whether an offence is an indictable or summary one depends on the state of mind of the alleged offender. For the third category of offences, “strict liability” offences, the state of mind of the alleged offender is irrelevant; it is enough if they do the acts that constitute the offence.

For some strict liability offences, instead of the matter going to court, a member of the Australian Federal Police, or of a State or Territory police force, can issue an infringement notice. The infringement notice scheme enables an alleged offender to avoid prosecution so long as the notice is not withdrawn, they pay the penalty and, in some cases, agree to forfeit allegedly infringing articles (and devices used to make them) to the Commonwealth.

The Federal Court and any other court that has jurisdiction (such as State and Territory magistrates or local courts, and district or county courts) can hear prosecutions of summary offences and offences of strict liability. The Federal Court cannot hear prosecutions of indictable offences. These can be heard by State and Territory district or county courts, and, possibly, Supreme Courts.

Penalties

Penalties vary, and depend on whether it is an individual or a corporation that is convicted. For some indictable offences, an individual who is guilty may be fined up to 550 penalty units or imprisoned for up to 5 years, or both. For importation of material that infringes copyright, fines of up to 650 penalty units and/or imprisonment for 5 years may be imposed on an individual. Penalties can be much higher where the infringement involves the digitalisation of copyright material from hardcopy (eg., from cassette or vinyl to MP3 or from video to MP4). An individual who is found guilty of a summary offence may be fined up to 120 penalty units or imprisoned for up to 2 years or both.

A corporation may be fined up to 5 times the amount of a maximum fine.

Where an individual is convicted of a strict liability offence, the maximum penalty is 60 penalty units. However, where police issue an infringement notice, the maximum amount of the penalty for an individual is one-fifth of the maximum penalty for a strict liability offence (12 penalty units).

The amount of a penalty unit is set out in section 4AA of the *Crimes Act 1914*.

In some cases, the offender must have already forfeited infringing copies and illegal devices to the Commonwealth. From an offender’s point of view, some of the benefits of the infringement notice scheme include that, so long as the infringement notice is not withdrawn and the offender complies with the other requirements of the scheme, the offender is not taken to have admitted guilt, nor to have been convicted of the offence, and no prosecution can be brought in relation to it.

Where a matter goes to court, courts can order that circumvention devices, infringing copies, and devices and equipment used to infringe, be destroyed, or handed over to relevant copyright owners, or otherwise dealt with.

Again, for Acts that took place before 1 January 2007, you will need to refer to the provisions of the Copyright Act that applied before that date.

Other actions and offences

Circumventing technological protection measures

“Technological protection measures” (TPMs) are technological mechanisms used by copyright owners to prevent or inhibit either or both:

- unauthorised access to copyright content (access-control TPMs); and
- unauthorised use of copyright content (copy-control TPMs).

The Copyright Act includes sanctions against manufacturing, importing and supplying devices and providing services to circumvent copy-control TPMs. There are also sanctions against:

- circumventing an access-control TPM;
- manufacturing, importing, or supplying a device to circumvent an access-control TPM; and
- providing a service to circumvent an access-control TPM.

Sometimes a copyright owner can take court action against people who do these things, and sometimes this conduct is a criminal offence where action is taken on behalf of a State or Territory, or for the Commonwealth. The sanctions implement Australia’s obligations under the AUSFTA, which requires more extensive protection for TPMs than was provided in Australia before 1 January 2007.

There are limited circumstances in which a circumvention device may be legally manufactured, imported or supplied, or in which a circumvention service may be provided. These allow a person to circumvent an access-control TPM to get access to copyright content in certain situations. Some of these situations are set out in the Copyright Act; others are in Regulations to the Copyright Act. However, there are no provisions that allow the importation or supply of circumvention devices, or the supply of circumvention services, in relation to access-control TPMs.

Remedies and penalties relating to circumvention devices and services are mostly the same as for copyright infringement.

Unauthorised access to encoded broadcasts

The provisions relating to unauthorised access to encoded broadcasts (such as pay TV) include sanctions against:

- making an unauthorised decoder to gain unauthorised access to an encoded broadcast or making an unauthorised decoder available online to an extent prejudicial to a channel provider or anyone with an interest in the copyright in an encoded broadcast or its content;
- gaining unauthorised access to a subscription broadcast except in certain circumstances or making a decoder supplied for a subscription broadcast available online without permission for the purpose of gaining access to a subscription broadcast; and
- dealing commercially with unauthorised broadcast decoding devices, or offering or providing unauthorised broadcast decoding services.

Sometimes, the relevant channel provider, or those with an interest in the copyright in the broadcast or its content, can take action against people doing these things. Sometimes, this conduct is a criminal offence.

Remedies and penalties in relation to decoding devices and services are mostly the same as for copyright infringement.

Altering or removing electronic rights management information

Copyright owners sometimes place “electronic rights management information” (ERMI) within digital copies of their material so they can identify, and in some cases track, their material.

In some situations, copyright owners can take action against people who remove or alter ERMI from the copyright owner’s copyright material without permission if this would enable or conceal a copyright infringement. In some cases, removing or altering ERMI is a criminal offence. Copyright owners may also in some cases take action against people who distribute, import or communicate to the public copyright material from which ERMI has been removed or altered. Distributing, importing or communicating to the public this kind of material may also be a criminal offence.

Remedies and penalties for these actions and offences are mostly the same as for copyright infringement.

Site blocking injunction

In June 2015, the Copyright Act was amended to provide that a copyright owner may apply to the Federal Court for an injunction against a carriage service provider to take reasonable steps to disable access to an “online location” outside Australia that has the primary purpose to infringe, or to facilitate infringement of, copyright. Our information sheet [Copyright Infringement & Site Blocking](#) provides an overview of this legislation.

Limitations on remedies available against carriage service providers

There are provisions that limit the remedies a court may award for infringement of copyright by a carriage service provider (CSP), if the CSP meets certain conditions. “Carriage service provider” has the same meaning in this context as it has in the *Telecommunications Act 1997* (Cth). In every day language, CSPs would include Internet Service Providers (ISPs). A CSP may be liable for copyright infringement in relation to something it does itself, and for “authorising” others using its facilities or services.

The provisions do not affect whether or not a CSP is liable for infringement; they affect the **consequences** of being liable. The Government is currently considering expanding the definition of CSP that applies to the Safe Harbour Scheme in the Copyright Act.

Customs provisions

As well as the remedies discussed above, copyright owners and exclusive licensees can generally notify the Australian Customs Service in writing that they object to the importation of copyright material that would have infringed their copyright if it had been made in Australia by the importer. Customs may then seize items the notice relates to if someone attempts to import them, pending court action by the copyright owner or exclusive licensee (which must occur within a specified time).

Copyright owners and exclusive licensees who notify Customs about imported material are required to give a written undertaking that the expenses of a Customs seizure will be repaid, and may sometimes be required to lodge an amount as security for these expenses.

Frequently Asked Questions (FAQs)

What are the penalties for copyright infringement?

Where copyright is infringed, the copyright owner generally has the right to bring an action against the infringer to recover damages or an account of profits. Damages is a sum of money intended to compensate the copyright owner for money lost, or spent, in respect of the

infringement. An account of profits is the profit made by the infringer through selling the infringing copies.

In some circumstances, infringement of copyright is a criminal offence, and fines and jail terms are possible penalties. The criminal provisions generally apply to commercial piracy and have been used particularly in relation to people infringing copyright in music, videos and computer software.

What can I do if my copyright has been infringed overseas or on an overseas website?

If the foreign website operates a take-down notice scheme (otherwise known as a DMCA notice), this is the best place to start. This will have your copyright material taken down from the website. If the website does not contain a take down notice scheme and is infringing your copyright, then for more serious infringements, you might consider making an application to the court to have the website blocked under the new legislation. Court processes can be expensive, so try to ensure you have legal advice and representation before you seek an injunction.

If cannot settle the matter informally, you should get advice from a lawyer. An action for infringement generally must be taken in the courts of the country in which the infringement occurred. You may, however, have rights in Australia against a person who, without your permission, imports copies of your material into Australia for sale or other commercial purposes, or who sells such copies in Australia.

For more information, see our information sheets [Infringement: What Can I Do?](#), [Importing copyright items](#) and [Copyright Infringement & Site Blocking](#).

Is an employee liable for infringement of copyright?

Yes, an employee who infringes copyright is generally liable. The employer may also be liable, under the principle of “vicarious liability”. If the employee was acting on instructions from another staff member, for example, that other person may also be liable for authorising the employee to infringe copyright.

Is it a criminal offence to copy computer software?

Under the Copyright Act, a person who infringes copyright may, in some cases, be committing a criminal offence (as well as being liable to the owner of the copyright). It is, for example, an offence to make an infringing copy of a program in order to sell it. It is also an offence to advertise the supply of an infringing program, or to have a device (such as a computer) that you know you will use to infringe copyright.

The penalties vary according to the type of infringement, the circumstances, and whether the offender is an individual or a company. Some maximum penalties are listed above under the heading “Penalties”. Also, a court has the power to order the confiscation of equipment used to make the infringing copies (such as a computer used to copy software or digital material).

Further information

For information about our other information sheets, other publications and seminar programs, see our website copyright.org.au.

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About Us

The Australian Copyright Council is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies.

We are advocates for the contribution of creators to Australia's culture and economy; the importance of copyright for the common good. We work to promote understanding of copyright law and its application, lobby for appropriate law reform and foster collaboration between content creators and consumers.

We provide easily accessible and affordable practical, user-friendly information, legal advice, education and forums on Australian copyright law for content creators and consumers.



Australian Government



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