



INFORMATION SHEET

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Infringement: actions, remedies, offences and penalties

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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.

Before reading this information sheet, we recommend you read the introductory information sheets available on our website at www.copyright.org.au/introductory.

Our other information sheets, available from www.copyright.org.au, may also be relevant. They include:

- *Fair dealing, Libraries, Governments and Educational institutions* – these give information about some of the situations in which copyright material can be used without infringing copyright;
- *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.

For more information about copyright, go to www.copyright.org.au/information.

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

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.

Key points

- Generally, copyright is infringed if 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 – generally 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.

Generally, 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 pirate copies of copyright material;
- deals commercially with 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 Magistrates 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 usual ex parte orders are:

- **Anton Piller** orders (orders to enter premises and search and seize infringing goods and related documents);
- **John Doe** orders (orders against an identifiable class of people – such as T-shirt sellers - rather than named persons, which allows goods to be seized); 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. Generally, a copyright owner asks for either damages or an account of profits because a court cannot award both.

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 (for example, 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 usually 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.

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, among other things:

- cause infringement on a commercial scale, even if the person doing this 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.

The criminal offence provisions of the Copyright Act were revised with effect from 1 January 2007. The revised offences apply to conduct occurring on or after that date. For acts that occurred before 1 January 2007, previous provisions of the Copyright Act may apply.

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 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 \$93,500 or imprisoned for up to 5 years, or both. For importation of material that infringes copyright, fines of up to \$71,500 and/or imprisonment for 5 years may be imposed on an individual. Penalties can be much higher where the infringement involves the digitisation of copyright material from hardcopy (for example, from cassette to CD or from video to DVD). An individual who is found guilty of a summary offence may be fined up to \$13,200 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 \$6,600. However, where police issue an infringement notice, the maximum amount of the penalty for an individual is \$1,320. In some cases, the offender must have already forfeited infringing copies and illegal devices to the Commonwealth. 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 circumstances are much more limited now than they were pre-2007. The new provisions also 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.

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 amendments do not affect whether or not a CSP is liable for infringement; they affect the **consequences** of being liable. In this respect, the new provisions are similar to the “safe harbour” provisions for CSPs in the US.

For more information, see our information sheet *Free Trade Agreement amendments*.

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.

Common questions

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.

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 an offence to buy pirate DVDs?

No, but playing the DVD may infringe copyright.

The reproduction right is an exclusive right to reproduce a work "in material form". This was previously defined as "any form (whether visible or not) of storage from which the work ... can be reproduced".

The AUSFTA amendments introduced a new definition of "material form", which omits the requirement that the work can be reproduced from the form of storage. This means that material may be "reproduced" if it is held in a form of storage (such as RAM), even though it may not be possible to reproduce it from that form of storage. A new exception provides that there is no infringement of copyright if the reproduction is "incidentally made as part of a technical process" of using a non-infringing copy of a work. This exception is intended to allow the "normal use" of non-infringing material, for example, by playing a DVD. However, the exception does not apply to infringing material, such as on a pirate DVD. The practical effect is that, since 1 January 2005, copyright in either the material on the DVD or in the computer program that allows the DVD to operate may be infringed simply by:

- playing an infringing copy of a DVD, computer game or CD-ROM; or
- playing a DVD, computer game or CD-ROM that was imported without the copyright owner's permission, even where importing the item did not infringe copyright (for example, because it was a legitimate copy made in another country, and imported for personal use).

It is also an offence to possess an infringing copy of digital material for the purpose of selling it, hiring it or distributing it, either by way of trade or for any other purpose, to an extent that will prejudicially affect the owner of the 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 further information about copyright, and about our other publications and training program, see our website – <http://www.copyright.org.au>.

If you meet our eligibility guidelines, a Copyright Council lawyer may be able to give you free preliminary legal advice about an issue that is not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions, libraries and governments. For information about the service, see <http://www.copyright.org.au/advice> or our information sheet *Australian Copyright Council: who we are, what we do*.

Information from the Arts Law Centre of Australia may also be of interest to you: see <http://www.artslaw.com.au> or telephone (02) 9356 2566.

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Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



Australian Government



The Australian Copyright Council has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.

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