Copyright in Legal Practice

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Issues concerning copyright laws can, perhaps unexpectedly, pop up in legal practice and care needs to be taken not to fall foul of them.

This month's Riskwatch article is an adjunct to the article "*Getting to grips with governance – a post Hayne priority*" by Licensing and Compliance Manager of the Copyright Agency Lucinda Gardiner (published on page 24).

Despite the fact that this article and the Copyright Agency's article appear in this special "*Arts & Entertainment*" edition of the Bulletin, it is a mistake to think that copyright issues only affect and are only relevant to artists, authors, musicians and the like. Copyright applies to original "literary and artistic works" and the definition of such works is extremely wide, meaning that copyright issues can arise in many endeavours, including, of course, in legal practice as any original written work can be considered to be a "literary work" and thus protected by copyright.

The Council of the Law Society has recognised this and has adopted a document entitled "Use of Copyright Materials by Lawyers" which can be found on the Society's website here. The document was adopted by Council on 3 August 2015 and amended by Council on 6 August 2018 with a view to providing general advice to legal practitioners in South Australia on the use of copyright materials within a legal practice and to provide clarity to practitioners on where dangers may lie and how to overcome some of the risks.

Parts of Ms Gardiner's article deal with common myths about copyright. The sections of that article entitled "*It's fair use, so I can use it without a licence or permission*" and "*We're a law firm so we don't need a licence or permission*" are particularly important for law practices to understand. The sections of the Council adopted document headed "*Substantial Part*" (para 2.6) and "*Fair Dealing*" (para 2.9.2) are also particularly important.

In addition to the section of the Copyright Agency dealing with "common myths" I would article the myth that something is only copyrighted if it bears the symbol ©. Whilst use of the symbol © is common and indicates that the copyright holder is asserting their copyright, the absence of the symbol cannot be taken to mean that there is no subsisting copyright in any literary or artistic work.

A 2002 article in the UK Law Society Gazette contains a cautionary tale for lawyers. It refers to a case in 2002 in the Chancery Division of the High Court where three companies in the AON Group were found to have breached copyright in a document produced by Unicorn Strategies (Unicorn). The document, which dealt with extended warranties was drafted by a law firm for Unicorn for use in Unicorn's business had been licensed by Unicorn for use by another company, USP. Employees of one of the AON companies had been provided with a copy of the document whilst negotiating certain contractual matters with USP. Subsequently, the AON Company used the document as part of its own arrangements when in competition with USP to provide extended warranty services to an electrical goods retailer. Unicorn and USP sued the AON companies for breach of confidence and breach of copyright.

The AON companies argued that they had the benefit of an "implied licence" because of a "trade practice" that existed within the legal community which entitled lawyers to look at and use their colleagues' documents and precedents. The judge found that there was no such "trade practice" or "custom" in the business or legal world which allows one company or lawyer to use the copyright in a document without the prior written consent of the copyright holder or holders, in this case, Unicorn (being the entity which had paid to have it drawn up) and USP (being an entity which was a legitimate licensee). The Judge did note that individual phrases were almost impossible to copyright but the document in this case as a whole was drafted in a very distinctive and identifiable way.

Whilst in the AON/Unicorn case the Judge also commented that it was "a long shot" for USP and Unicorn to demonstrate any pecuniary loss, the possibility of being on the receiving end of proceedings for breach of copyright would be far from ideal.

A commentator on the AON/Unicorn case has said:

> *"Solicitors or their clients who are particularly concerned about this practice might even drop into their drafting deliberate mistakes, so that plagiarism can be more easily spotted. Care should be taken, however that any such deliberate mistake does not create its own set of legal problems if it ends up in a signed contract!"*
>
> Osborne Clarke *(marketinglaw.osborneclarke.com/2002/11/26/).*

From a risk management point of view, the sentiment expressed in the last sentence quoted above can only be echoed. Further, again from a risk management point of view, it is worth reiterating that slavish and unthinking adherence to precedents (even where properly licensed) should be avoided.