



# THE LAW SOCIETY OF SOUTH AUSTRALIA

THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

## Use of Copyright Materials by Lawyers

This document has been prepared for the Law Society of South Australia by NDA Law Pty Ltd for the purpose of providing general advice to legal practitioners in South Australia on the use of copyright material within a legal practice.

It was adopted by the Council of the Law Society on 3 August 2015.

Even within the legal community, incorrect assumptions about the extent to which lawyers may use copyright material, and when the exceptions in the *Copyright Act 1968 (Cth)* (the Act) might apply, are common.

This guide is intended to provide clarity to practitioners on where the dangers may lie, and how to overcome some of the risks.

This guide is not intended to constitute personal legal advice. Practitioners must obtain their own independent legal advice before relying upon any of the recommendations in this guide.

### 1. Executive Summary

Whilst few lawyers would intentionally infringe copyright, infringements do occur in everyday legal practice. For example, very few presentations are made without the use of some kind of imagery, and interesting or topical articles are often copied, scanned or otherwise reproduced and sent on to clients or other lawyers within firms.

Whilst there are some limited 'Fair Dealing' exceptions to copyright infringement, these are narrow in scope.

One solution is to obtain a licence from the Copyright Agency. This provides a large library of content and the ability to use it in a variety of circumstances. The licence is not however a panacea. Practitioners should be wary of the strict limits placed on the communication of content, the limitations of the Copyright Agency library (see 2.9.4, below) and the limited indemnity offered.

The other option is to limit the use of material, for example using only material in the public domain or which you created. This means:

- sending links to articles, or listings of page numbers, rather than sending copies of the articles themselves;
- creating content yourself; and
- using public domain imagery (for example from stock photograph libraries) instead of proprietary content.

If specific content is required you may also be able to negotiate directly with the copyright owner, but often ascertaining their identity can be challenging.

## **2. Copyright law and legal practice**

### **2.1. Copyright Agency**

This guide comes about because of a campaign by Copyright Agency Ltd to encourage and incentivise the proper use of copyright materials in various sectors and industries, one of which is the legal profession.

Copyright Agency (the trading name of Copyright Agency Ltd) is a company limited by guarantee and a not-for-profit rights organisation which licenses the use of text and images in their library of content in return for fair payment to writers, visual artists, and publishers.

Copyright Agency collects and distributes copyright fees and royalties on behalf of its members. It is appointed by the federal government as the statutory collection agency for certain rights under the Act (managing collection and distribution of payment for educational and government use of copyright works, as well as the resale royalty scheme for artists (under which artists may receive royalties on certain resales of their artistic works)).

Copyright Agency has instituted a campaign directed to (amongst others) law firms and other professional service firms to educate and enforce proper and appropriately licensed use of text and images. (You can see more about Copyright Agency at their website, [www.copyright.com.au](http://www.copyright.com.au).)

### **2.2. Common Uses of Copyright Material in a Legal Practice**

Legal practice inevitably involves the use of a variety of copyright materials. These uses will include the following –

- photocopying or scanning of case reports, magazine articles or journal articles
- including excerpts from judgments or cases in advice letters, briefs, letters to third parties, submissions, etc.

- using third party material in presentations, on a website, or in correspondence or other communications, and
- emailing of articles or attachments to clients (whether with or without accompanying text or other material).

### **2.3. Copyright – what it protects**

Copyright automatically protects certain categories of works and other materials, including -

- literary works;
- artistic works;
- cinematograph films (including the soundtrack); and
- sound recordings.

All the above terms and concepts are widely defined and interpreted, either in the case law, or the definitional provisions of the Act.

#### **2.3.1. Literary Works**

These include books, novels, poems, magazine or journal articles, case reports, reports, media releases, screenplays, social media posts, computer software, programs and code, compilations of works, etc, in whatever language, code or notation, and irrespective of literary merit.

#### **2.3.2. Artistic Works**

These are very broadly defined to include paintings, drawings, photographs, cartoons, architectural and building plans, buildings or other structures, maps, illustrations, charts, etc.

#### **2.3.3. Cinematograph Films**

‘Cinematograph films’ include the visual images comprising the film, as well as the soundtrack, in whatever form, whether DVD, video cassette, USB stick, or a stored or streamed digital or online version, and including YouTube clips, Snapchat clips, Instagram posts, and similar.

#### **2.3.4. Sound Recordings**

This includes audio works of any description, such as sound files, music recordings, podcasts, or any other captured audio.

In addition to all the above, there is separate protection for dramatic works, and a number of other miscellaneous works.

## 2.4. Use of Copyright Materials

In general terms, you will require copyright permission if –

- you use ‘original’ material which is protected by copyright (see 2.5);
- the part which you use of the original is a ‘substantial’ part (see 2.6);
- the copyright is still in force and has not expired (see 2.7);
- you are not the copyright owner, and you do not have a licence from the copyright owner (see 2.8 and 2.9), and
- your use of the material is not covered by an exception or defence as provided for in the Act or elsewhere (see 2.9).

## 2.5. What is ‘use’ of copyright material?

Copyright ownership confers a bundle of exclusive legal rights, including the following

- reproduction (ie. copying)
- communication (ie. making copies available online)
- publishing (ie. the first act of making copies available to the public or members of the public)

(Other rights are included, but are not relevant for these purposes.)

In practical terms, the reproduction right includes a right to photocopy, copy by hand, type up a copy, scan or OCR, etc.

The communication right also includes the right to post material to websites, upload it, or email or fax it to the public (or members of the public).

The case law establishes that ‘public’ here means other than in a personal, domestic or household context. So sending out an item to a handful of clients or to a colleague in an adjoining office is still ‘to the public’.

You ‘use’ copyright material if you exercise one of the exclusive rights in relation to that work or material. Reproduction or communication of material, if done without the copyright owner's licence or consent, may infringe copyright.

## 2.6. Substantial Part

To infringe copyright, you must use the *whole* item or a *substantial part* of it.

What is a substantial part? The special meaning of ‘substantial’ in this context is *qualitatively* substantial, not *quantitatively* substantial. A substantial part may be an *important, distinctive or essential* part of a particular work or other subject matter, even though it is not quantitatively so.

Thus a one-page executive summary of a 200-page report most likely constitutes a substantial part of that report, even though quantitatively it is less than 0.5% of the report. (However the amount taken is also relevant in assessing substantiality.)

A well-known recent example is the use of the flute 'riff' section in the 'Men at Work' song '*Down Under*', which was held to reproduce a substantial part of the traditional song '*Kookaburra*'.

There is no general standard percentage proportion of a work or number of words, that can be used without infringing copyright. There is no such thing as a '10% exception'. (Although 10% of a work may be permissible for the purposes of assessing the defence of 'fair dealing for research or study', see 2.9.2 below.)

## **2.7. Copyright Term**

Copyright lasts a long time, generally for 70 years after the death of the author, artist, or other creator. Hence most of the material under consideration for the purposes of this guide will still be 'in copyright'.

Some old materials may not have been published (ie. made available to the public) until recently; these may still also be still in copyright even though the author has been dead longer than 70 years. In such cases, the copyright will generally last for 70 years after the date of first publication to the public.

## **2.8. Who owns the copyright?**

In order to obtain a licence from the copyright owner, you must first identify who that is.

Normally, the owner is the individual(s) responsible for the creation of the work or other subject matter.

This is not always a straightforward test to apply. For example, the owner of copyright in a media release is the person who wrote it. But if the release is extensively 'tweaked' or reworked by a journalist or editor before it is published (or re-published), then the owner of copyright in the news story as so published may be the journalist or editor (or ultimately, the proprietor of the publication in which the work appears).

To make matters more complicated, the published news story may still reproduce a substantial part of the original media release, and so would infringe copyright in it unless licensed.

The second principle is that generally speaking copyright in materials created by employees will be owned by their employer (unless there is some contrary agreement).

But the position is the reverse for contractors or consultants (unless there is express agreement to the contrary). This can be a trap for those dealing in this area.

Copyright may also be expressly assigned by an agreement or other document, as can 'future copyright' ie. copyright in material yet to be created.

The owner may appoint an *exclusive licensee* over copyright material. In this case, the exclusive licensee has the right to enforce copyright in the material, and to take action directly against infringers.

This is not the position with mere licensees (ie. non-exclusive licensees). They have no right to control or enforce copyright in material.

In the case of Copyright Agency, it is appointed as the *agent* of its member authors and publishers to manage (and if appropriate, to enforce) copyright in the relevant materials.

## **2.9. Exceptions to copyright Infringement**

The main exceptions are -

- Licence from the copyright owner
- Fair dealing
- Library exception

### **2.9.1. Licences / Consents**

A licence may be *express* (written or oral). It may also be *implied*.

Generally the circumstances where a licence may be implied are broader and more generous than the quite narrow circumstances under which a term will be implied into a contract.

The test of whether or not an implied licence arises is highly fact-dependent. Whether the user paid money (and how much) can be important but is not the only factor.

The doctrines of estoppel, waiver, acquiescence and laches all potentially play their part in determining whether a copyright owner may enforce their copyright.

Significantly, just because the copyright owner puts material up on the internet, this does not automatically mean that it is 'open season' on that material, or that it can be freely used, reproduced, and further communicated.

And if there are express words disclaiming or negating permission for further reproduction or use of material, that is highly relevant, and usually definitive.

### **2.9.2. Fair Dealing**

There are special exceptions to infringement in the Act. Most relevant for these purposes is if the proposed use is a 'fair dealing'.

In Australia the fair dealing must be for a particular purpose, most relevantly for –

- criticism or review;
- research or study;
- reporting news; and
- judicial proceedings, or a report of those proceedings, or the giving of professional advice by a legal practitioner.

For any of these to apply, the dealing must be 'fair'. This is to be judged by the criterion of a fair minded and honest person. Is the person using the material doing so for commercial purposes, and is the copyright owner out of pocket from that use (for example, where the person copies the whole of a work that is otherwise available for sale)?

But note that merely because the person using the material is not making a profit, this does not necessarily make it 'fair'.

#### *Research or study*

The research or study fair dealing defence relies on the research or study being that of the person involved in the use or reproduction. A user cannot use the defence if they are copying on behalf of someone else who is engaged in the research or study.

There is a presumption that the exception applies if it is for the particular purpose, and the part taken is no more than a reasonable portion of the work. 'Reasonable portion' in this case means 10% of the number of pages of a book, or 10% of the number of words in other works, or if the work is divided into chapters, a single chapter (but note the penultimate paragraph of 2.9.2 above).

#### *Criticism or review*

This defence exists because often to make a fair criticism of material, it is necessary to quote selected extracts from it. The purpose of the criticism or review must be genuine. If there are other motives, eg. to use a competitor's

materials to make a profit, the defence will not apply if or merely because there is also criticism or review of the material.

#### *Reporting news*

The fair dealing for reporting news defence requires that there is sufficient acknowledgement of the original work or other material.

Whilst 'news' may not be restricted to current events, there must be more than simply a connection with a newsworthy topic. For the defence to apply, the primary purpose of the use must be to report or comment on news.

As with the other defences, if the party who carries out the use or other reproduction is doing so for the purpose of someone else or for someone else's use for reporting or commenting on the news, this will *not* be sufficient for the defence to apply; the agency principle has no application to the fair dealing defences.

#### *Judicial proceedings, etc*

Finally, the fair dealing for the purposes of legal use does not confer a blanket exemption for lawyers! First, the dealing must still be 'fair'. Copying of an entire item which is otherwise freely available for sale is unlikely to be 'fair'. The use must also be for the purposes of court proceedings or the like, or in connection with giving legal advice. This is unlikely to extend to the lawyer's broader activities, such as marketing, or development of business from existing and potential clients.

### **2.9.3. Library exception**

The library use defences are complex and intricate. They mostly apply to public libraries or libraries not conducted for a profit, although a library is not taken to be established or conducted for profit merely because it is owned by a person carrying on business for profit. Hence a law firm library may still qualify, although some exceptions only apply to libraries accessible to members of the public (directly or via inter-library loan), and any charge must not exceed the cost of making and supplying the loaned copy.

The exceptions are copying material for a user who wants it for their research or study; copying unpublished material which is 'old' for research or study; copying for other libraries, or for preservation purposes; or for administrative purposes (for access by library staff only).

### **2.9.4. Licences from Copyright Agency**

Copyright Agency offers licences to law firms and law practices to enable them to make limited use of the extensive copyright library for which it acts as the

agent for the purpose of licensing use of such work. This licence has a number of significant limitations. Practitioners are advised to consider carefully the licence terms, noting that there are significant 'holes' in the library of materials licensed by Copyright Agency (eg. *BRW magazine*, *Australian Financial Review* may not be covered); and in particular that the indemnity offered by Copyright Agency may be subject to a cap or ceiling which may be commercially inadequate.

If you have any queries or questions about matters of copyright, please obtain specific legal advice.

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