

COPYRIGHT

1. Overview

Copyright is the most important intellectual property right in the context of the advertising industry. This is because copyright protects creativity. Clients are effectively paying agencies for the right to use the copyright works that they create for the client's advertising.

Copyright is regulated in Australia under the *Copyright Act 1968* (Cth). This protects creators legal right to a wide range of material (literature, art, music, sound recordings, films and broadcasts) enabling them to control use of this material in several ways.

Broadly, a person cannot do any of the following without the permission of the copyright owner, or person authorised by the copyright owner:

- Make copies of or reproduce the work
- Publish the work
- Communicate the work to the public
- Perform or play the work in public
- Broadcast the work
- Make the work available, such as publishing online
- Make an adaptation of the work.

Duration of Copyright

The length of protection in Australia is as follows:

- Copyright in a literary, dramatic, musical or artistic work expires after the life of the author plus 70 years from the end of the year in which he/she died.
- Copyright in a film expires 70 years after the end of the year in which the film is first communicated.
- Copyright in a sound recording expires 70 years from the end of the year in which it was first published.
- Copyright in a broadcast expires 50 years from the end of the year of making of the broadcast.

2. What is protected by copyright?

Copyright can protect:

- Original copyright work
- Artistic works
- Copyright in music and sound recordings
- Copyright in broadcasts
- Names and titles
- Logos
- Photographs
- Performance rights (visual and/or aural).

Protecting ideas

A work will only attract copyright protection if it is expressed in sufficient detail. Importantly, if copyright exists, it is the work itself that is protected, not the underlying idea behind it. Only the expression of the idea has copyright protection.

Automatic protection of copyright

Copyright protection in Australia is automatic, so no official registration is required. As soon as there is a record of what has been created, in any form, copyright protection may exist for that work.

3. Ownership in copyright

In the case of a literary, dramatic, musical or artistic work (including photographs), the general rule is that the person who created the work (the "author") is the first owner of the rights under copyright in that work. Regarding performances, consent is generally needed from the performers to film or record and broadcast or otherwise communicate a performance.

Generally, this rule also applies to commissioned works created by a freelancer, sub-contractor or other third party. However, where a work is created by the author in the course of employment under an employment contract, e.g. a creative in the course of employment in an advertising agency, the employer (e.g. the advertising agency) is the first owner of the rights.

This is why copyright in an advertisement typically belongs to an advertising agency, not the client. This will generally be the case even though the client has paid the agency for its services (unless the client/agency contract provides for the copyright to be assigned to the client).

Do you own the copyright if you own a copyright work?

When an advertising agency or a client commissions a person (other than an employee) or an organisation to create material, the first legal owner of any resulting copyright work is the person or organisation that created the work. The first legal owner is not the commissioner, unless it is otherwise agreed in writing.

As a result, advertising agencies must ensure they are protected since they assets are largely in its ideas and copyright works.

Transferring copyright

- The transfer of ownership may cover all or only some of the rights to which a copyright owner is entitled.
- Copyright owners may license a particular use of their work to others whilst retaining ownership themselves.

- An agreement transferring ownership of copyright is known as an assignment.
- An assignment is not effective unless it is in writing and signed by or on behalf of the copyright owner.
- Your agency's client contract may contain an assignment of copyright from the agency to the client. Similarly, work made on commission for the agency should include an assignment from the author to the agency.

Rights of copyright owners

Copyright owners generally have the right to authorise or prohibit any of the following in relation to their works:

- Copying or 'reproducing' the work in a material form
- Publishing the work
- Performing the work in public
- Communicating the work to the public by electronic transmission
- Making an adaptation of the work, such as re-enacting a piece of dance or drama for use in a television campaign.

4. Copyright Infringement

Copyright is infringed where either the whole or a substantial part of a work is used without permission.

Indirect infringement

Indirect infringement includes acts of "dealing" with unauthorised reproductions of works.

To be liable for an act of indirect infringement, the person who conducted these acts generally must know (or ought reasonably to have known) that he/she was infringing copyright.

Imposing Copyright

Where a copyright owner brings a case of copyright infringement before the courts, a full range of civil remedies are available. These include:

- Injunctions to stop that person making further infringing use of the material
- Damages for infringement
- An account of profits
- A court order to deliver infringing goods to the copyright owner

Deliberate or intentional infringement of copyright may give rise to criminal sanctions.

Copyright concessions

If use of a copyright work does not involve using a substantial part, then copyright will not be infringed. But even very small parts of a copyright work may count as a substantial part. The test for this is based on quality, not quantity.

There are various exceptions and 'fair dealing' defences to an allegation of copyright infringement. Some defences

and exceptions relevant in the advertising industry may include:

- **Incidental inclusion** - the copyright in an artistic work is not infringed by its inclusion in a film or broadcast if its inclusion is only incidental.
- **Fair Dealing** - copyright will not be infringed when used for (subject to exceptions):
 - research or study;
 - criticism or review;
 - parody or satire;
 - reporting the news; or
 - provision of legal advice.

5. Moral Rights

Moral rights are personal, non-economic rights granted automatically to the authors or creators of copyright work. They can only be held by individuals. They are independent of copyright and continue to exist even after the copyright has been sold or transferred. These rights cannot be waived, assigned or transferred.

The main moral rights are:

- the right of attribution of authorship;
- the right not to have authorship of a work falsely attributed; and
- the right of integrity of authorship and not to have the work subject to derogatory treatment, which amounts to a distortion or mutilation of it. This also applies where the treatment is prejudicial to the honour or reputation of the author, director or performer.

Moral rights are concerned with protecting the personality and reputation of authors, directors or performers.