

# Intellectual Property

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## 1. Copyright

Copyright law concerns establishing and protecting the rights and privileges that the creator of an original literary, dramatic, musical or artistic work has in respect of that work. In general terms, if a person has produced a creative work, such as a book, piece of music or a computer program then that person has certain rights regarding the copying of that work and the use of that work in commercial circumstances. Copyright exists as soon as a work is created; there is no need to register the work to attract copyright protection. Copyright generally subsists for 70 years from the end of the calendar year in which the author of the work dies.

Copyright law makes a fundamental distinction made between 'ideas' and 'expressions'. The law does not protect ideas; it only protects the material expression of ideas. Thus, for example, a musician may have an idea about a love song. He does not hold copyright over that idea. But if he writes down the words and music of the song – the material expression of that idea – then he does have copyright in the written music and words of that song.

In order to attract copyright, a work must be 'original'. The work must originate in a specific author's skill and labour. However, there is no threshold of novelty or creativity applied to copyright. Copyright can subsist in a number of different types of 'work'. These include literary works, dramatic works, musical works, artistic works, cinematographic films, sound recordings, sound and television broadcasts as well as legal adaptations of literary, dramatic or musical works and computer programs.

Copyright entitles the owner of the copyright to certain exclusive rights with regard to the work they create. These include the exclusive right to commercial exploitation of the work, to reproduce material from the work or make a copy of the work, to make an adaptation of the work, to publish the work, to perform the work in public, to re-broadcast or re-transmit television and sound broadcasts and to commercial rental.

Copyright is owned by the person who creates the relevant work. However, when an employee creates a work under an employment contract in the course of his or her employment and as part of his or her duties, the employer owns the copyright in the work. Where the employer is the publisher of a newspaper, copyright is split between the publisher and the author. In commissioned work, such as photos by a commercial photographer, the copyright generally belongs to the author (i.e. the photographer or photographic studio) and not to the person who commissioned the work. Joint ownership of copyright may arise where two or more people collaborate in making a work. Copyright can also be assigned or transferred by the copyright owner to a third party by appropriate documentation.

## 2. Trade Marks

A trade mark is a symbol used by a company or organisation to distinguish its own goods and services from those of other companies or organisations. A trade mark may consist of a word, phrase, letter, number, sound, smell, shape, logo, picture, aspect of packaging or a combination of these. Some of the most well known trademarks belong to companies like Coca Cola, Shell, McDonalds and British Petroleum (BP).

Trade marks exist as soon they are deployed; there is no need to register them. However, it is advisable to register a trade mark to pre-empt future controversies. In Australia, trade marks are registered with IP Australia. It is generally difficult to register a geographical name or a common surname as a trade mark, or a trade mark that conflicts with earlier trade marks. When registering a trade mark, an examiner may find that it conflicts with an earlier trade mark if the new trade mark:

1. is substantially identical or deceptively similar to the trade mark which is the subject of the application;
2. covers goods or services which are similar or closely related to those covered by the application; and/or
3. has an earlier date than the application.

In addition, some words may be prohibited by law.

If a trade mark is accepted for registration, it is published in the *Official Journal of Trade Marks*. For a period of three months from this time, other people may declare opposition to the registration of the trade mark. If this opposition is unsuccessful or if no opposition is filed, the trade mark is registered when the relevant application fee is paid. IP Australia then issues a Certificate of Registration and records the details of the trade mark in the Register of Trade Marks. The trade mark will then be registered from the date it was filed for application, not from the date it was examined or accepted. A trade mark can generally only be amended before it has been published in the trade marks database.

## 3. Licences

Copyright is considered to be the intellectual property of the author of a work. Trade marks are another form of intellectual property. Other forms of intellectual property includes inventions, original designs or other practical applications of an idea such as know how, trade secrets, confidential information, patents, circuit layout rights and plant breeders' rights.

The owner of intellectual property may deal with this property like any other proprietary right. In commercial undertakings, intellectual property is often the subject of a licence to a third party to use or exploit the intellectual property, usually in return for a royalty or commission. As such, a licence is specific property transaction. The licensor – usually the owner of the intellectual property – gives a licence to the licensee to make certain uses of the intellectual property. Generally a licence will give permission to the licensee to

reproduce or otherwise use the intellectual property in a commercial context. A licence of intellectual property is not permanent; the licensor will usually retain all relevant rights in the intellectual property after an agreed period of time.

Licences of intellectual property may be 'exclusive' or 'non-exclusive'. A licence is exclusive when the licensor grants exclusive usage of all rights in the intellectual property. Exclusive licences must be written and signed on behalf of the intellectual property owner. A non-exclusive licence arises where a licensor has given certain rights in respect to intellectual property but also retains the right to use the intellectual property themselves and/or to also grant licences to other parties. In some cases, a licence to use certain intellectual property may be implied from circumstances.

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