



## 4 – COPYRIGHT

### 4.1 Overview Defining copyright

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

As well as providing the legal platform for the economic relationship between clients and agencies, copyright is also important because most of the lawsuits initiated against clients and agencies by disgruntled third parties involve allegations of copyright infringement. These are often the result of alleged plagiarism by agencies of copyright works such as films, TV programmes, photographs, music or even other advertisements.

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

In particular, 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 e.g. online or;
- Make an adaptation of the work.

#### Duration of Copyright

The term of protection or duration of copyright varies depending on the type of copyright work.

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.

#### The Purpose of Copyright

The purpose of copyright is to allow creators to gain economic rewards for their efforts. It also encourages future creativity and the development of new material.

Copyright material is usually the result not just of creative skill and judgment but also of significant labour and/or investment. Without copyright protection it would be very easy for others to exploit material without paying the creator.

Most uses of copyright material, therefore, require permission from the copyright owner. There are some exceptions to this, which we will look at a little later.

#### Combining other forms of intellectual property protection and copyright

There are a number of other forms of intellectual property protection that agencies should be aware of, including trade marks and design protection.

It is important that agencies and designers are aware of the existence of design rights, which can be used alongside copyright to enhance their protection. Design law in Australia is governed by the *Designs Act 2003* (Cth), which provides for registration of designs. Designs must be registered in order for the protections to apply. Design registration gives the owner a monopoly on his product design i.e. the right to stop others from making, commercially using or selling a product to which the design has been applied without his permission.

A registered design refers to the overall appearance of the product resulting from one or more visual features of the product. Visual features include the configuration, pattern and ornamentation of the product. So, the shape of a trendy new phone or the get-up of a new bottle the market can be protected by design law.

To qualify for registration, the design must be new and distinctive. A registered design lasts up to a maximum of 10 years, with an initial 5 year period and the possibility of another 5 years on application by the owner.

### 4.2 What is protected by copyright?

#### Original copyright work

An original copyright work is one that is the result of independent intellectual effort of the author. It will not be classed as original if it has been copied something that already exists. Before giving a work protection, the court will check to see that the work was produced by the application of the author's skill and labour, as an original expression of the creative freedom of the author.

As copyright protects the expression of an idea, rather than the idea itself, it only exists if the work has been fixed or recorded in a permanent form. For example, in a case involving a claim for copyright in Adam Ant's face paint, it was decided that there was insufficient permanence in the face paint, so it could not be protected by copyright.

### **Artistic works**

An "artistic work" in copyright has a wide scope. Under Section 10(1) of the *Copyright Act 1968* (Cth), the definition of artistic work includes paintings, sculptures, drawings, engravings or photographs, whether they are of artistic quality or not. It also extends to buildings or models of buildings and works of artistic craftsmanship, such as one-off pieces of furniture or other three dimensional works of art.

It is important to note that copyright law does not protect an artist's style or technique, as such. It is the particular work that is protected, not a style, method or technique used to create that work, even though these may be particularly associated with a creator.

In the Federal Court case *Cummins v Vella* [2002] FCAFC 218, the alleged infringer admitted that he painted in the same style (including choice of colours and subject matter) and used the same technique as the applicant, whose works he was well acquainted with. The Court held that copying style, technique, colours and subject matter was not sufficient to constitute copyright infringement, drawing the distinction between legitimate use of another's style, concept and technique and the illegitimate copying of form and expression.

### **Copyright in music and sound recordings**

Some facts:

- When a musical work is recorded, there will usually be more than one copyright owner with a right in that recording;
- The copyright owners of the music and the lyrics comprising a musical work will often be different people;
- The sound recording of a musical work will be a separate copyright work, distinct from the copyright in the music and lyrics; and
- Performers' rights may also exist in the recorded music.

Music is an important element in broadcast advertising.

### **Copyrights in broadcasts**

Copyright can also subsist in either a terrestrial or a satellite broadcast. A broadcast may be encrypted or not and can be delivered by wireless means or by cable.

Broadcast rights exist independently of any underlying copyright in the material being broadcast, such as films, music and literary material. Television advertisements are treated as discrete television broadcasts.

### **Names and titles**

It is generally accepted in Australia that there is no copyright in a name, title, slogan, phrase or headline as they are not sufficiently substantial to amount to literary works. One therefore must consider registration as a trade mark, the common law action of passing-off and/or consumer protection laws to protect brand features such as these. However, copyright protection may be available if such features are considered to be sufficiently substantial and original.

### **Logos**

Logos may be protected by copyright, as artistic works. Many trade marks are also copyright works.

It is possible for copyright protection to subsist where a logo consists only of a name or group of letters if they are arranged in an original way so as to give some form of "artistic" impression, but there will be no copyright protection if the artistic work is not original.

Copyright may be used to prevent someone from making a copy of a logo. For example, if a comparative advertisement uses a competitor's logo without consent, then it may infringe the competitor's copyright.

### **Photographs**

As a general rule all photographs are protected by copyright from direct reproduction (e.g. photocopying or being printed in an ad), the requisite originality deriving from the author's choice of subject matter, angle, lighting etc. Agencies should thus be cautious if adapting the style or technique of existing photos or artworks to ensure that the resulting work is clearly a different expression of such styles or techniques.

### **Protecting ideas**

It is possible for some ideas to be expressed in sufficient detail to attract copyright protection. However, if that happens it is the work itself that will be protected, and not the basic idea behind it.

It is therefore the expression of an idea that has copyright protection, rather than the underlying idea itself.

Advertising agencies have to be particularly careful to use the law of confidentiality if they want legal protection for ideas being pitched to a client.

### **Automatic protection of copyright**

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

As long as the work created qualifies for copyright protection (it falls into one of the categories of material protected by copyright) then it will have copyright

protection without anything else necessary to establish this.

However, agencies should, where possible, keep detailed records of the creative process in relation to all copyright works as this will be of invaluable assistance if a dispute should later arise.

### 4.3 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.

Generally speaking, this rule also applies to commissioned works created by a freelancer, subcontractor or other third party. In these instances, the first owner is normally the creator or author of the work, not the person who pays for it to be created, although there are some exceptions, including for photographs commissioned for private or domestic purposes. 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.

Copyright in an advertisement, therefore, typically belongs to an advertising agency not the client, 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?

If you have bought or inherited a painting, you only own the painting and not the copyright in it, unless it has been specifically transferred to you.

If you buy a book of photographs looking for inspiration for a press advertisement, you have not bought the copyright in those photographs and so cannot copy a substantial part of any artistic work in that book without the permission of the copyright owner.

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 and not the commissioner, unless it is otherwise agreed in writing. As a result, for an advertising agency its assets are largely in its ideas and copyright works, which must be protected.

#### Transferring copyright

- Copyright can be bought and sold, inherited and transferred just like any other type of property;
- The transfer of ownership may cover all or only some of the rights to which a copyright owner is entitled;

- Copyright owners can choose to license a particular use of their work to others whilst retaining ownership themselves;
- An agreement transferring ownership of copyright from one person to another 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; and
- 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 things 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. This includes both broadcasting and putting copyright material on the internet e.g. a banner advertisement or on a brand owner's website; and
- Making an adaptation of the work, such as re-enacting a piece of dance or drama for use in a television campaign.

### 4.4 Copyright Infringement

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

"Substantial part" is not defined in the *Copyright Act 1968* (Cth) but has been interpreted by courts to mean a qualitatively (and not necessarily quantitatively) significant part of an original work. As such, infringement may occur when an important part of the work is used even if it is only a small part in terms of quantity. The key question is whether the part in question represents the application of a high degree of skill and labour on behalf of the author. If so, there may be a claim of copyright infringement. On the other hand, copyright infringement may not arise if an unoriginal part of the work is taken, even if it is a large part.

#### Indirect infringement

There are certain acts that will amount to 'indirect infringement' of copyright. These acts are essentially "dealing" with unauthorised reproductions of works – such as importing, possessing or distributing infringing flyers that make use of a piece of artwork for the purposes of trade, without the consent of the artist.

If someone commits an act of indirect infringement, the copyright owner may take action, but 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 protected work has been used without permission, it is said that copyright is infringed. Where a copyright owner brings a case of copyright infringement before the courts, a full range of civil remedies are available, including:

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

Deliberate or intentional infringement of copyright may give rise to additional remedies, including 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, as the test is one of quality, not quantity. There is a common misconception that making a certain number of changes or only copying a certain number of elements will make a difference – this is incorrect. However small the element reproduced, if it conveys part of the original author's intellectual creation, then it potentially infringes.

There are various exceptions and 'fair dealing' defences to an allegation of copyright infringement. Some such defences and exceptions that may be relevant in the advertising industry include:

## **Incidental inclusion**

There are some acts relating to incidental inclusion of copyright works that will not amount to an infringement. For example, the copyright in an artistic work is not infringed by its inclusion in a film or broadcast if its inclusion is only incidental. Copyright in sculptures that are located in public places will also not be infringed by painting or photographing them, or including them in a film, while a similar exception exists for buildings and models of buildings.

## **Fair Dealing**

- **for the purpose of research or study**

Using a copyright work just for non-commercial research and private study will not infringe copyright. Researching a topic and using a book of photographs in order to pitch an idea to a client is arguably for commercial gain and therefore this exception would not apply.

- **for the purpose of criticism or review or reporting the news**

This includes using part of a copyright work in order to review the work. For example, when an industry publication reproduces the best or worst advertisements of the year for the purposes of a review, it may be able to rely on this exception. Reporting the news is considered to be for the purpose of providing information, however drawing the line between 'news' and 'entertainment' can be difficult.

- **for the purpose of parody or satire**

Using a copyright work for the purposes of parody or satire will not infringe copyright, although defining these terms has been a challenge for the courts. While this defence may apply in an advertising context, it must be remembered that the use must be fair. In deciding this, the courts are likely to consider factors including how much of the work is used, the context and whether it is used for commercial purposes.

## **4.5 Moral Rights**

Moral rights are personal, non-economic rights granted automatically to the authors of literary, dramatic, musical and artistic works and also to film directors and performers. 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.

The main moral rights are:

- the right of attribution of authorship
- the right not to have authorship of a work falsely attributed;
- the right of integrity of authorship and not to have the work subject to derogatory; and
- 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.

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

In Australia, moral rights cannot be assigned, transferred or waived, although they can be waived in some foreign jurisdictions. Agencies in Australia therefore need to ensure that they have the author's express consent to do any acts that may affect the author's moral rights.