

Copyright Governance

A Risk and Compliance Guide

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The **Copyright Agency** is an Australian not-for-profit organisation that represents over 40,000 members across the publishing, media, visual arts, education and surveying sectors.

We license copyright material, so companies can legally reuse content created by others, and be confident that creators are being compensated fairly for their work – thus practising Good Copyright Governance. Licensing revenue is distributed to our members, ensuring the Australian creative economy remains strong.

copyright.com.au

Introduction



Copyright governance

The values and ethical behaviour of businesses are under increased scrutiny, as shown by the recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services and the Royal Commission into Aged Care Quality and Safety. When reviewing values and ethical behaviour in an organisation, consideration should be given to copyright compliance.

An organisation's practice of good copyright governance is an important step towards building a strong internal culture of ethical behaviour and compliance. The following document sets out the regulatory framework for using works subject to copyright; provides risk modelling for assessment of copyright compliance gaps; and solutions for bridging these gaps.

Legislative framework

Copyright Act 1968 (Cth)

31 Nature of copyright in original works

- (1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:
 - (a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:
 - (i) to reproduce the work in a material form;
 - (ii) to publish the work;
 - (iii) to perform the work in public;
 - (iv) to communicate the work to the public;
 - (vi) to make an adaptation of the work;
 - (vii) to do, in relation to a work that is an adaptation of the first mentioned work, any of the acts specified in relation to the first mentioned work in subparagraphs (i) to (iv), inclusive; and
 - (b) in the case of an artistic work, to do all or any of the following acts:
 - (i) to reproduce the work in a material form;
 - (ii) to publish the work;
 - (iii) to communicate the work to the public; and

36 Infringement by doing acts comprised in the copyright

- (1) Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

Corporations Act 2001 (Cth)

Division 1 – General duties

180 Care and diligence – civil obligation only

Care and diligence – directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (a) were a director or officer of a corporation in the corporation's circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

- (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
 - (a) make the judgment in good faith for a proper purpose; and
 - (b) do not have a material personal interest in the subject matter of the judgment; and
 - (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
 - (d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence) – it does not operate in relation to duties under any other provision of this Act or under any other laws.

- (3) In this section:

Business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

Australian copyright law in context

Copyright protection under the *Copyright Act 1968 (Cth)* extends to literary, artistic, dramatic and musical works, as well as broadcasts and performances, sound recordings, survey plans, compilations such as anthologies, and published editions. Copyright does not protect ideas, concepts, styles, techniques or pure information.

Under s36 of the *Copyright Act 1968 (Cth)*, copyright infringement occurs where someone who is not the rightsholder, exercises any of the exclusive rights (contained in s31) of the copyright holder without permission or a licence. Organisations may be held vicariously liable for their employees' or contractors' copyright infringement.

Permission or a licence is not required where a fair dealing exception applies. “Fair dealing” exceptions in Australian copyright law allow the use of copyright material for a narrowly defined set of purposes:

- research or study
- criticism or review
- parody or satire
- reporting the news
- access by a person with a disability or an organisation assisting a person with a disability
- giving professional advice by a lawyer, patent attorney or trademarks attorney

In considering whether the dealing with the work is fair, the courts will look at whether an objective person would consider:

- that the use of the work is genuinely for one of the fair dealing exceptions in the act, and
- the use of the work is fair in that context

Fairness considerations

Considerations would include whether there was a negative financial impact upon the rightsholder, including whether the work was being used for commercial purposes. However, even where an organisation's use of the work did not result in a profit, it would not necessarily make the use in question fair.

In a business context, this means regular day-to-day activities, such as the below, would usually require either a copyright licence or permission from the rightsholder:

- scanning a hardcopy work into a digital format
- making a hardcopy of a work either by printing or photocopying
- forwarding media clips received from a media monitoring organisation to a PR agency
- sharing media and creative works from a PR or advertising agency
- copying and pasting an image, graph or table into a presentation or report
- copying and pasting text from a book or research paper into a report
- emailing an article to a colleague
- posting an article on an intranet, secure extranet or public website
- saving copyright works on a server or hard drive
- posting content to a social media channel.

Copyright law and good corporate governance

Under s180 of the *Corporations Act 2001 (Cth)*, directors and other officers of an organisation have a responsibility to discharge their duties with a degree of care and diligence – which includes the duty to examine and comply with all laws, codes and practices which affect their organisation. This would include an organisation's obligations under the *Copyright Act 1968 (Cth)*. Alongside the statutory requirements, copyright and practising good copyright governance sits firmly within an organisation's corporate social responsibility.

The Australian Government's Corporations and Markets Advisory Committee examined the extent to which Australian companies should adopt corporate social responsibility. The report concluded that corporate social responsibility can be an important means for companies to manage non-financial risks and maximise their long-term financial value:

“... a well-managed company will generally see it as being in its own commercial interests, in terms of enhancing corporate value or opportunity, or managing risks to its business, to assess and, where appropriate, respond to the impact of its activities on the environmental and social context in which it operates. Companies that fail to do so appropriately may jeopardise their commercial future.¹”

Copyright governance should be assessed as part of an organisation's adherence to corporate social responsibility as there is an economic and social impact upon content creators, if they are continually not remunerated for the use of their works by organisations. This continual non-payment impacts upon the economy by driving down the reasonably expected return on investment for creators. Recent Australia Council research showed that, on average, 35 percent of content creators/rightsholders in Australia relied upon royalties and advances from their works as a source of income.²

Core copyright industries (including press, literature, music, art and broadcast) contributed approximately \$122.8 billion to the Australian economy in 2016 and employed over 1 million people.³ The impact of continual non-payment of royalty or licensing fees on this industry will see a decline in the types and quality of content being created as revenue streams are eroded.

¹ CAMAC, Corporations and Markets Advisory Committee 2006, *The Social Responsibility of Companies*, December, Sydney.p78

² *Making Art Work: An economic study of professional artists in Australia* Chapter 10, Income and Expenditure © David Throsby and Katya Petetskaya, 2017 p105–106.

³ PwC 2017, *The Economic Contribution of Australia's Copyright Industries*, 2002 - 2016 p4.

Copyright works



Use in a business context

The notion that copyright works are only used within marketing and communications departments is a myth.

Copyright works are easily accessed by any employee who requires information that cannot be derived purely from an enterprise’s own created works. Copyright protection is generally afforded to all literary works as well as photographs, illustrations and survey plans.

Role functions frequently using copyright works	
Primary content consumers	Copyright works
Executives	• forwarding news and opinion pieces to colleagues • content saved to desktop, tablets, phones and servers
Sales/relationship management	• forwarding content such as media monitoring clips, news stories, digital newsletters, white papers and research to colleagues, customers and stakeholders • saved content reused in presentations, reports and other formats • content saved to desktop, tablets, phones and servers
Marketing/communications	• usage of text and images for the development and update of print material and digital channels • circulating content such as media monitoring clips and news stories • content saved to desktop, tablets, phones and servers
Researchers	• usage of text and images for referencing • copy and share content in presentations, reports and handouts • content saved to desktop, tablets, phones and servers
Library/information services	• sharing beyond the services terms and conditions of use • digital storage
HR/learning and development	• usage of copyright works in training and development • content saved to desktop, tablets, phones and servers
Operations	• usage of databases, website content, manuals, newsletters, journals, white papers, manuals, proprietary company content e.g. content made available from corporate and smaller businesses etc. • content saved to desktop, tablets, phones and servers

Subscriptions, terms and conditions of use

Many enterprises will engage with copyright-protected works via subscriptions to services. But these subscriptions' terms of use are limited. These services may include:

- direct subscriptions to a publisher's website and/or publications
- subscriptions to a content aggregator or database
- agreements with a media monitoring organisation or a media analytics service.

The terms and conditions of use for these services will generally be restricted to a nominated number of internal users and may additionally provide rights for limited copying or sharing of content within an organisation. Generally, these subscriptions will not provide blanket copyright coverage, and will generally not allow for content to be shared with third parties outside of an organisation.

For example, media monitoring organisations in Australia (including Isentia, Meltwater and Stream) are licensed by Copyright Agency to provide internal sharing rights to their customers. Any uses outside of these defined internal sharing rights, as stipulated in the Downstream Licence, requires an additional licence or permission.⁴

Where content is shared beyond the terms of use of a subscription or service agreement, alongside breaching the terms of the agreement, the organisation runs the risk of copyright infringement.

Use of content within an enterprise – opportunity for internal risk

Internal content use is often interdepartmental rather than being confined to one department or team in an organisation. Even with awareness, employees are increasingly expected to act quickly and often terms and conditions are overlooked in the interests of expediency.

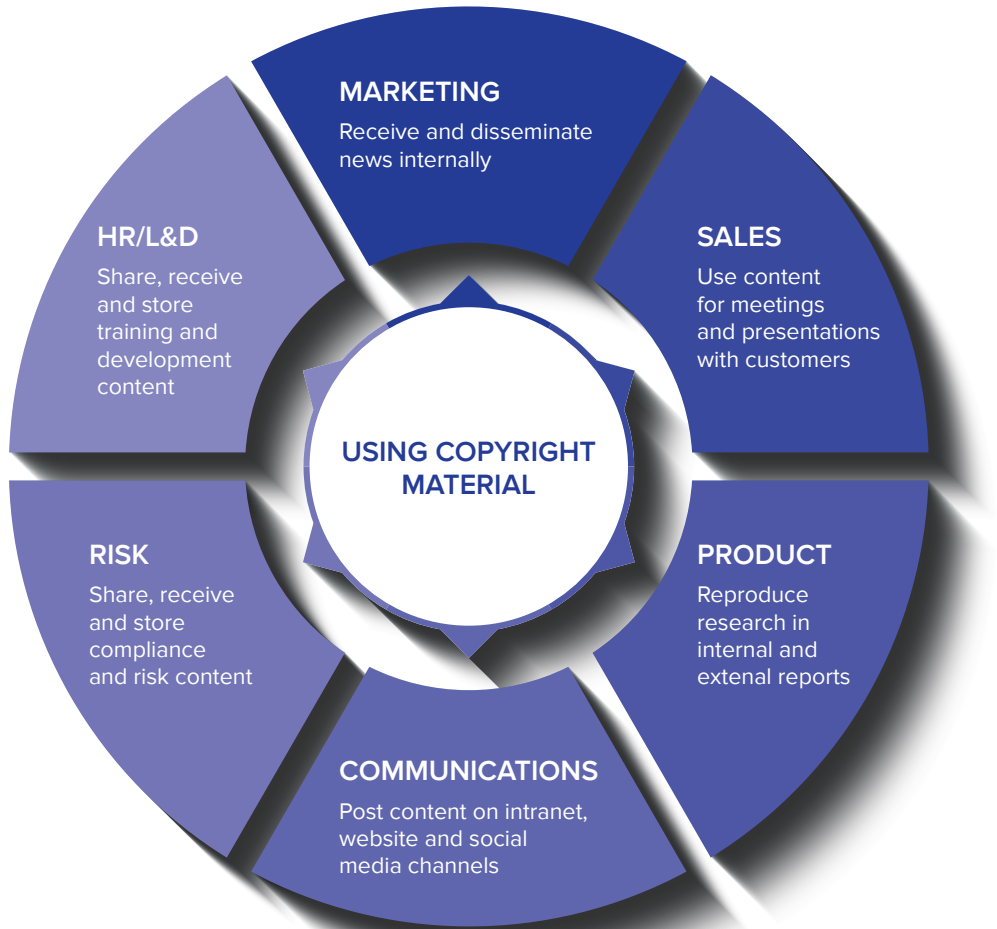
Data Storage

Digitally storing copyright works without a licence or permission on desktops, servers, storage devices, emails etc, is also a copyright risk as the copy is often created outside the terms of use and without an additional permission or licence. Any subsequent use of such copies in internal workflows could mean additional infringement takes place.

The following chart demonstrates how employees may share and reuse copyright content without awareness of copyright, or concern for the publisher/services terms and conditions.

⁴ Copyright Agency information for customers of Media Monitoring Organisations

Internal content usage example



Stakeholder and channel engagement – opportunity for external risk

Information enters organisations via multiple stakeholders including customers/clients, partners, intermediaries, franchisees, agents, suppliers, vendors and associations. This information can flow via various hardcopy and digital channels.

Example of copyright works received via external channels	
Content source	Content received
Public relations and advertising agencies	• coverage reports, media mentions, media monitoring, media analysis and competitive analysis
Industry researchers	• reports from organisations such as: Ibis World, Frost & Sullivan, Nielsen, Roy Morgan
Market research	• workshops, surveys and customer and research focus groups
Conferences	• presentations, reports, handouts and SlideShare
Sales meetings	• innovation lab forums, meetings at customer sites, meetings at external meeting rooms and conference centres
Consultancy	• consultant reports
Social media	• content accessed via links shared to social media

External content flow

Content also flows from an organisation to multiple third parties. Again, this information can flow via various hardcopy and digital channels. The chart below provides common examples of how content flows from within an organisation to third parties.

ORGANISATION				
MARKETING & COMMUNICATIONS Share research with external advertising, PR or content marketing agency Communicate relevant news content with stakeholders, reseller networks etc.	RESELLER NETWORKS Communicate relevant news content or research with clients, branches, franchise networks	FINANCE Creating reports using third party graphs	PRODUCT DEVELOPMENT Share research with third party developers Download and share relevant articles and research with third parties	SALES TEAMS Share graphs or images from third party research Print copies of research reports or articles to provide to clients

Copyright and risk



Quantifying copyright risk

The reuse of copyright works, without permission or licence from an owner of works, gives rise to both an operational risk and a reputational risk within an organisation's framework of risk management.

Compliant use of copyright works can be further defined as ethical and responsible behaviour.

The **operational risk** for an organisation centres on the potential financial damages payable for a breach of copyright. A quarter of content creators believe their copyright has been infringed; with the highest proportion of infringement reported by writers and visual artists. Where a creator has acted to stop copyright infringement or to seek compensation for unlicensed use, 60 percent of actions undertaken by Australian content creators/rightsholders have been successful.⁵

Exposure can escalate from an employee's or contractor's unwitting conduct into reputation risk. An organisation's digital footprint amplifies its risk.

Risk appetite for reusing copyright works may be common amongst organisations for the following reasons:

- perceived low chance of external exposure/**reputational risk**
- perception that copyright works are only used in marketing and advertising departments
- assumption that media monitoring services and media analytics suppliers provide blanket copyright coverage
- concerns over the role and positioning of a licence agreement in the organisation's information procurement and management framework

Organisations may believe they are adopting a low-risk position with low-risk appetite for copyright compliance, when, in fact, the risk exposure could be moderate to high. This is compounded by the belief in common copyright myths by many individuals within an organisation.

As examples of possible **operational risk** and **reputational risk**, see the following two case studies of organisations caught using copyright works without a licence. Financial remediation and public apologies were key components in settling both cases.

⁵ *Making Art Work: An economic study of professional artists in Australia* Chapter 10, Income and Expenditure © David Throsby and Katya Petetskaya, 2017 p105–106.

Case studies

Copyright Agency has settled hundreds of matters involving the unlicensed use of our members' content. The below case studies highlight the reputational and operational risk of copyright infringement in an organisation.

Case study 1 – Strathfield Council (NSW)

This recent case study on actions undertaken by an Australian local council highlights both the **operational** and **reputation risk** faced by an organisation that is not copyright compliant. An IT contractor for Strathfield Council inadvertently placed copyright works on an externally facing website without a licence or permission from the rightsholder. This was both a breach of copyright and a breach of the terms and conditions of the council's licence for the use of content supplied by a media monitoring organisation. Following discussions with the Copyright Agency, Strathfield Council agreed to pay for an annual copyright licence, and to make a payment for past use, as well as issuing a public statement of apology published in the Daily Telegraph, Sydney Morning Herald and the Inner West Courier.

Case study 2 – Australian Hotels Association (NSW)

This recent case of an association highlights the reputational and financial risk faced by organisations that are not copyright compliant. The association had posted newspaper articles to their website without permission or a licence from the relevant publishers. This was both a breach of copyright and a breach of the terms of their agreement with their media monitoring organisation. Following conversations with the Copyright Agency, Australian Hotels Association (NSW) obtained an ongoing annual copyright licence, made payment towards their past unlicensed use of content and published an apology in The Australian, Sydney Morning Herald and The Daily Telegraph.

Risk modelling

With most organisations' employees having access to printers, email, computers, internet, photocopiers and social media, the risk of copyright infringement is high.

Research⁶ has shown that copyright infringement by employees is likely to be frequent given that:

- 90% of employees share information within the organisation several times a week
- 59% of employees share information externally with clients several times a week
- 88% of employees send attachments via email
- 43% of employees cut and paste content from the source and embed it in an email
- On average, information is forwarded 12 times per week to 14 people each time.

Using the above research, the copyright risk can be modelled in scenarios for multiple groups, brands, offices and locations who use copyright protected material.

- 500 staff forwarding published information 12 times per week = **6,000 communications**
- 6,000 communications to 14 people = **84,000 communications**

By using pay-per-use licensing rates for Australian newspaper content⁷ we can quantify the **operational risk** in certain scenarios using this research:

- **1 staff member forwarding 1** Sydney Morning Herald article to 14 external recipients via email each week = **\$201 in unpaid licence fees** owed to rightsholders per week
- **1 staff member forwarding 12** separate Sydney Morning Herald articles to 14 external recipients via email each week = **\$2,412 in unpaid licence fees** owed to rightsholders per week
- **6,000 staff members each forwarding 12** separate Sydney Morning Herald articles to 14 external recipients via email each week = **\$14,472,000 in unpaid licence fees** owed to rightsholders per week

⁶ Kate Lewis & Jim Hydock. 2014. "The Copyright Pandemic Continues: What's a Content Provider to Do?" June 17, 2014. Outsell Inc.

⁷ [RightsPortal](#)

Good copyright governance



Achieving good copyright governance

Simple steps can help ensure your organisation is hitting a benchmark for copyright compliance and fairly supporting Australian content creators.

Understand the risk

- Conduct regular audits of information policies and controls to understand how third party content is used within an organisation. This includes:
 - assessing how different types of content flows into an organisation
 - reviewing how content is used and archived internally across all departments, and
 - understanding how content is shared with third parties.
- Review, or implement, organisation-wide copyright policies to ensure they reflect current content use and business practises.

Follow best practice

- Are systems or processes in place to ensure legislative and regulatory obligations are met?
- Is someone in your organisation responsible for managing copyright and obtaining relevant permissions where necessary?
- Does everyone in your organisation know when and where to obtain permissions?

Look into an umbrella licensing solution

Copyright tends to be a complex topic and common myths and misconceptions can leave considerable compliance gaps, putting your organisation at risk of being brought into a copyright dispute.

A Copyright Agency copyright licence sits behind the scenes, like a safety net, enabling employees to carry out their day-to-day use and reuse of copyright works without having to seek permission from content creators individually – thus enabling faster workflows and a compliant culture. Key benefits include:



Time efficiency

Enjoy a fast and unencumbered flow of information and focus on your core activity



Ease of use

No need to negotiate licence fees with individual copyright owners



Peace of mind

Real compliance to protect your reputation and avoid potential litigation expenses



Collaboration

Share material internally, email articles to clients, and publish news content on your website or social media⁸



Value

A tailored fee based on the number of employees and the specific rights your organisation needs

⁸ Terms, conditions, limits and exclusions apply. Refer to the licence agreement for full terms and conditions.

Summary



Copyright risk is manageable

Organisations cite in their governance statements their employees' commitment to operating within the regulatory and legislative environments that concern their businesses.

This must include the obligation, as set out in Australia's *Corporations Act 2001 (Cth)*, to evaluate codes of conduct against employee practices.

When employees are required to use information from a range of copyright sources, with little time to assess permission or licensing criteria for reuse, a corporate copyright licence is an easy way to provide enterprise-wide compliance.

A Copyright Agency copyright licence fosters a culture of trust and respect, as it exemplifies an organisation's willingness to provide fair compensation to the creators of the material it relies on.



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