

Copyright infringement – an overview

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Under the Copyright Act 1994, a copyright owner must establish four elements in order to succeed in an infringement action. These are:

- There is a work in which copyright can subsist;
- Copyright does subsist in the work;
- The party seeking to enforce copyright in fact owns the copyright in the work; and
- Copyright in the work has been infringed.

Copyright infringement

Copyright may be infringed by any person who does something that only the copyright owner (or its licensee) has the exclusive right to do.

This includes making copies of the copyright work, offering or distributing copies to the public, importing copies, possessing copies and making of an adaptation of the copyright work.

Infringement of copyright falls under one of two headings – primary infringement or secondary infringement. Secondary infringement differs primarily from primary infringement because it requires the defendant to have *knowledge* that his or her acts infringe a plaintiff's copyright works. Knowledge is not a requirement of primary infringement.

To establish primary infringement of copyright under the Act, three elements must be proved:

- A substantial part of the copyright work must be present in the alleged infringing copy;
- There must be objective similarity between the copyright work and the alleged infringing copy. Whether there is objective similarity is largely a matter of impression for the Court; and
- There must be some causal connection between the original work and the alleged infringing copy in the sense that it is clear that the alleged copy came from, or is substantially based on, the copyright work.

Substantial part

One of the indicators of infringement is the degree of similarity between the copyright work and the alleged infringing work.

- Infringement of a copyright work does not necessarily require that there be a copy of the entire work. It is sufficient that a substantial part of the copyright work has been taken;
- There is no definition of what is meant by a "substantial part". Infringement is often determined by the *quality* of what is taken rather than the quantity, and must be judged on a case by case basis. Some judges have asked whether the "essence" of the copyright work has been taken;

- The Court's assessment will usually focus on the similarities, not the differences; and
- In making the assessment, the Court will also examine the degree of originality in the copyright work.

In a recent case before the Supreme Court the Court commented "*that the greater the originality, the wider the scope of the protection which copyright affords and vice versa.*"

Objective similarity

Even if the alleged copy takes a substantial part of the copyright work, it is still necessary that the copy looks objectively similar to the original in order to establish that copyright in the work has been infringed.

Whether there is objective similarity is largely a matter of impression for the Court. As one Judge phrased it, "*a copy is a copy if it looks like a copy*".

When determining whether there is sufficient objective similarity the Court's assessment will also focus on the similarities between the works.

Causal connection

In order to succeed in a copyright infringement action, the copyright owner must also prove that there has been unlawful use, either directly or indirectly, of its copyright works.

In other words, the starting point for the defendant's work must have been that of the plaintiff.

It is not necessary to show that the defendant has copied directly from the plaintiff's work. What must be shown, however, is that either directly or indirectly the alleged defendant has,

in making his or her copies, appropriated the labours of the plaintiff.

That copying has taken place is for the plaintiff to establish and prove as a matter of fact. The beginning of the necessary proof normally lies in the establishment of similarity combined with proof of access to the plaintiff's productions.

Defences to copyright infringement

It is possible to defend a claim of infringement. Some of the more common defences include:

- Copyright is not valid and subsisting in the work and therefore the plaintiff does not meet two of the criteria needed to establish copyright infringement.
- There is no infringement. For example, the copyright work and alleged infringing work are not objectively similar, the defendant has copied the work but has not taken a substantial part or there is no causal connection (ie the defendant didn't copy); and
- The act complained of is permitted under the Copyright Act 1994. Examples of acts set out in the Act which may be permitted subject to certain conditions are:
 - o Incidental copying of a sound recording, a film or communication work;
 - o Fair dealing (or reasonable use) of a work for the purposes of criticism, review and news reporting or for the purposes of research or private study;
 - o Transient or incidental reproduction of a work; and
 - o Performing, playing, or showing a work in the course of the activities of an educational establishment.

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