

# Your website users could expose you to copyright infringement

Your website is under your control and you should ensure that all the material which you place on your website does not infringe the copyright of others. Regular auditing of your own website content is therefore advisable to avoid copyright infringement.

However, in certain industries, such as personnel, education and advertising, it is common practice for website owners to allow third party users to upload images and literary content to their websites. This process can expose website owners to copyright infringement if those users post infringing material on those websites.

Website owners are therefore strongly advised to set up website user terms under which users undertake not to upload infringing material. The terms should also include provisions which allow the website owner to immediately take down the infringing material and cease future access by the user. It is also prudent to include an indemnity provision in the user terms, requiring indemnification of the website owner by the user against infringement claims.

The question arises as to what extent user terms can protect website owners against copyright infringement claims for material uploaded by third party users. This is not an academic argument. There are a number of overseas copyright owners who instruct law firms to scour the websites of personnel, education and advertising service providers and threaten copyright infringement action based on uploaded material. Their prime target is generally the website owner rather than the individual user who has posted the infringing material.

In Australia, there are certain protections for the website owner under section 36(1)(A) of the Copyright Act (Cth). Under this provision, any assessment of the claim of copyright infringement must take into account the following criteria:

- (a) the extent (if any) of that person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned; and
- (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry code of practice.

In these circumstances, website owners may avail themselves of the above defence by ensuring that their user access terms prohibit the uploading of infringing material, by taking steps to immediately delete infringing material and by cancelling the user access of the infringer.

It is important to remember that under the Berne Convention, copyright in works and non-works can be enforced in virtually any country around the world. In view of the fact that Australian websites can generally be accessed by overseas users, website owners need to be aware of their legal position in overseas jurisdictions.

In the United States, similar copyright infringement defences to Australia are available to website owners. Under the US Digital Millennium Act, website hosts can claim a defence against copyright infringement by website users provided that the website hosts immediately take down the infringing material. The existence of infringement prohibitions in the website's user access terms can also assist the website hosts in their defence.

In Germany, the position of the website host in an infringement claim is addressed in section 10 of the German Telemedia Act. Under this provision, the website host is not liable for third party copyright violation on its website provided that it complies with reasonable compliance obligations which generally involve immediately removing the offending material from its website.

As a general principle, the website owner can take steps to defend itself against claims of copyright infringement by third party users of its website. However, each case will need to be decided on its own facts. As a consequence, strict user access terms, regular monitoring of user uploads and immediate deletion of offending materials are important elements of any defence to copyright infringement claims. Certain other defences, including "fair dealing" may sometimes be available against these claims, but such defences should not preclude the maintenance of strict user access regimes by website owners.

The protection of the intellectual property in your website should be part of a wider strategy of identifying, protecting and exploiting all the intellectual property in your business. Swaab can offer you a free IP Health Check as the first step in developing a comprehensive intellectual property program. You are welcome to give us a call at any time.



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