

# Intellectual Property Remedies

Intellectual property rights are private rights, which means that it is the responsibility of the holder of these rights to enforce them. In other words, there is no intellectual property ‘police’ that will initiate legal proceedings on your behalf. If infringement of your intellectual property rights occurs, you could pursue several strategies. These include alternative dispute resolution procedures such as mediation and arbitration and lawsuits filed in the court system.

There are three different types of orders that courts may grant as remedies for intellectual property infringement. These are interim injunctions, interlocutory injunctions, and final orders. The types of orders that fall within each of these categories are summarised below.

## 1. Interim injunctions

An interim injunction is a temporary court order of limited duration, usually sought on an urgent basis, and without notice to the alleged infringer. Interim injunctions are sought when action is needed very quickly to preserve rights or assets. If granted, an interim injunction may be limited to a few days or hours, and the court will review and either extend or allow the order to lapse after the alleged infringer has the opportunity to present his or her argument. If the injunction is extended after hearing arguments from the alleged infringer, it will be replaced with an interlocutory order.

## 2. Interlocutory orders

Interlocutory orders are temporary court orders that are made after an infringement case has been filed but before it has been finalised. These types of orders generally are made on notice. They may be aimed at preserving the rights of a party, obtaining evidence, or preventing further damage to the intellectual property owner. To obtain an interlocutory injunction, it is necessary to establish the following conditions:

- There is a serious question to be tried.
- There is a matter of urgency.
- Damages will not adequately repair the harm.
- The balance of convenience favours granting the injunction. This means that the intellectual property owner would suffer greater damage if the conduct were to continue than the damage that the alleged infringer would suffer if he or she were ordered to stop the conduct.
- The intellectual property owner gives a promise to the court to pay any damages that the alleged infringer suffers because of the injunction if, at the end of the trial, infringement is not proven.

Interlocutory (and interim) orders include:

**Interlocutory injunction** is an order to prevent (or to require) specified conduct for the purpose of maintaining the status quo or preserving the subject matter of the litigation until the trial is over.

**Anton Piller order** is an order to enter a premise to search and seize allegedly infringing goods and related documents or evidence. The primary purpose of an Anton Piller order is to prevent the destruction of relevant evidence.

**John Doe order** is a representative order against an identifiable class of defendants rather than named persons that allows allegedly infringing goods to be seized. John Doe orders are useful when the exact identity of an alleged infringer is not known to the intellectual property owner.

**Mareva Injunction** is an order to prevent a defendant from disposing of their assets to defeat a judgment. Mareva injunctions are also known as freezing orders or asset protection orders.

## 3. Final orders

Final orders are granted after the case has been heard. These orders give effect to the court’s decision about the issues in dispute. Final orders may include the following:

**Damages:** Orders for damages require the infringer to pay money to the intellectual property owner to compensate for the infringement. Damages are often calculated based on the amount of money that the intellectual property owner has lost because of the infringement. If an infringer’s conduct has been ‘flagrant’, a court may, in some circumstances, award extraordinary damages.

**Account of profits:** Where the infringer has sold or benefited financially from the infringing goods, the court may order that they pay the intellectual property owner a sum equivalent to the profits they made from using the owner's intellectual property. Under certain intellectual property legislation, damages are not available where the infringing party was unaware that he or she was infringing. In such situations, the intellectual property owner is limited to obtaining an account of profits. Where damages and account of profits are both available as infringement remedies, the intellectual property owner must choose one or the other. If the infringer operates more efficiently or has a lower cost structure than the owner, it may make sense for the owner to choose account of profits as the best remedy.

**Delivery up:** In certain cases, a court may order the infringer to deliver any infringing articles or devices used to make the infringing articles. In delivery up, the owner is entitled to have the infringing goods rather than to have them destroyed. If the goods have been sold, a court may order the infringer to pay conversion damages, calculated based on the value of the goods that have been sold.

**Final injunction:** If infringement is proven, a permanent injunction will be put in place to prevent the infringer from undertaking any further infringing conduct. The infringer will not be able to continue his or her conduct without a licence to do so from the intellectual property owner.

**Interest:** If the remedies ordered include damages or account of profits, the court will also order interest to be paid, typically set at a rate much higher than current interest rates. Interest will accrue from the date of infringement to the date of judgment, and from the date of judgment to the date of payment.

**Costs:** Ordinarily, the successful party to an infringement lawsuit is entitled to have the legal

costs that they have incurred in relation to the proceedings to be reimbursed, in addition to any damages, profits, or interest that also may be awarded. However, the successful party will not receive 100% of the legal costs that he or she has paid. On average, 50-60% of actual costs are reimbursed. This is because some intellectual property laws make concessions for when an infringement has occurred but and the infringing party is 'innocent', that is, he or she had no reasonable grounds for suspecting that his or her conduct was infringing. If this defence is allowed, the intellectual property owner will be entitled to an injunction and costs, but may not be entitled to damages or profits.

**Penalties:** In Australia, several intellectual property statutes allow courts to impose penalties on infringers, the amount of which will vary depending on whether the infringer is a corporation or individual. For example, under the Copyright Act 1968, an individual who is found guilty of infringement may be fined up to 550-650 penalty units, imprisoned for up to 5 years, or both. A corporation may be fined up to 5 times the amount of the maximum fine for individuals.

## Remedies for moral rights infringement

A creator who brings a successful claim for infringement of moral rights is entitled to the following remedies.

- Financial compensation (damages).
- An order to prevent or stop a particular activity (an injunction).
- A declaration that a moral right of the creator has been infringed.
- An order that the defendant make a public apology for the infringement.
- An order that any false attribution or authorship, or derogatory treatment of the work be reversed or removed.

This fact sheet is only for information purposes, and to assist you in understanding your legal rights and obligations in a general sense. It is not tailored to any particular fact, situation or specific requirements, and must not be relied on as legal advice.

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