



# Blog, Podcast, Vodcast and Wiki Copyright Guide for Australia

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# Foreword

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This Guide has been developed by the Law Research Program of the ARC Centre of Excellence for Creative Industries and Innovation (CCI).

It examines copyright issues which impact upon creators and users of blogs, podcasts, vodcasts and wikis in the Australian legal environment. In doing so it provides practical examples of how these issues may arise and be resolved.

This Guide is a step towards:

- ensuring that creators and users of these platforms are fully informed about these issues; and
- providing strategies for creators and users to prevent or minimise the legal risks created by these issues.

I am thankful to Hannah, Peter, Anthony, Jessica, Kylie, Nic and Emma for the enormous amount of work they have undertaken, and to Peter Applegarth and Delia Browne for their assistance and feedback. They have all made a very worthwhile and productive contribution.

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## Introduction

Welcome to the Blog, Podcast, Vodcast and Wiki Copyright Guide for Australia. An electronic version of this Guide is available online at <http://creativecommons.org.au/blogguide>.

## Purpose of the Guide

This Guide will provide you with an overview of issues applicable to blogging, podcasting, vodcasting and wikis under Australian law. These terms are defined in Part 1 of this Guide.

## 'Creators and Users'

For the purposes of this Guide, the persons who are involved in these technologies fall into two categories:

- **'Creators'**: referring to the originators, architects and hosts of blogs, podcasts, vodcasts and wikis; and
- **'Users'**: referring to readers, listeners, viewers and contributors to blogs, podcasts, vodcasts and wikis.<sup>1</sup>

However, it is often the case that these categories overlap and that someone can be both a Creator and User through their participation in these technologies.

## 'Use'

For the purposes of this Guide, the word 'use' in relation to copyright works means any act that exercises the exclusive rights of the copyright owner under the *Copyright Act 1968* (Cth) ('*Copyright Act*').

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<sup>1</sup> Users have been referred to as having a unique relationship with new technology, 'individuals who are sometimes consumers and sometimes producers. They are substantially more engaged participants, both in defining the terms of their productive activity and in defining what they consume and how they consume it'; See Yochai Benkler, *The Wealth of Social Networks - How Social Production Transforms Markets and Freedoms*, Yale University Press 2006, 138

## How to Use This Guide

### Key Points

**Key Points** are highlighted in yellow boxes throughout the Guide. These boxes summarise important issues for quick and easy reference.

**Key Points:**

### Examples

**Examples** are highlighted in green boxes throughout the Guide. These boxes demonstrate how the law operates in real life and hypothetical scenarios that are relevant to Creators and Users of blogs, podcasts, vodcasts and wikis.

**Example:**

## This Guide Does Not Provide Legal Advice

This Guide provides general information about legal topics, but does not constitute legal advice. It is not a complete discussion of all legal issues that arise in relation to blogs, podcasts, vodcasts or wikis. This Guide is not a substitute for legal advice.

The authors and contributors make no warranties regarding the general legal information provided in this Guide and disclaim liability for damages resulting from its use to the fullest extent permitted by the applicable law.

## Australian Law Only

This Guide only addresses Australian law. Since blogs, podcasts, vodcasts and wikis operate in a global environment, legal issues arising under the law of other countries may also need to be considered.

Although we will occasionally highlight differences in the law of other jurisdictions, we recommend that you consult the following guides in relation to other jurisdictions:

- United States: See the Electronic Frontier Foundation 'Legal Guide for Bloggers' ([www.eff.org/bloggers/](http://www.eff.org/bloggers/)) and Creative Commons 'Podcasting Legal Guide' ([www.wiki.creativecommons.org/Podcasting\\_Legal\\_Guide](http://www.wiki.creativecommons.org/Podcasting_Legal_Guide)).
- Canada: See Creative Commons 'Podcasting Legal Guide' ([www.creativecommons.ca](http://www.creativecommons.ca)).

## Other Legal Issues

This guide deals only with copyright law. Creating and contributing to blogs, wikis, podcasts and vodcasts can also raise legal issues in other areas of law such as:

- defamation;
- injurious falsehood;
- privacy;
- confidential information;
- sedition; and
- trade mark law.

If you are concerned that your use might impact upon one of these areas of law, we recommend obtaining legal advice.

## Acknowledgements

This Australian Blog, Podcast, Vodcast and Wiki Copyright Guide draws on the US *Podcasting Legal Guide*<sup>2</sup> and the *Podcasting Legal Guide for Canada*.<sup>3</sup>

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<sup>2</sup> *Podcasting Legal Guide* ([http://wiki.creativecommons.org/Podcasting\\_Legal\\_Guide](http://wiki.creativecommons.org/Podcasting_Legal_Guide)) © 2006 Colette Vogeles of Vogeles & Associates, Mia Garlick of Creative Commons and the Berkman Center Clinical Program in Cyberlaw. This Guide was produced as part of the Non-Residential Fellowship Program of the Center for Internet & Society at Stanford Law School. It is available under a Creative Commons Attribution Non-Commercial ShareAlike 2.5 licence (<http://creativecommons.org/licenses/by-nc-sa/2.5/>)

<sup>3</sup> *Podcasting Legal Guide for Canada* (<http://www.creativecommons.ca/blog/wp-content/uploads/2007/06/podcastinglegalguideforcanada.html>) © 2007 Kathleen

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# Part 1

## Defining the Technology

## 1.1 Blogs

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### 1.1.1 Introduction

A blog (short for web-log) is a user-generated website where the author makes journal or news style entries that are usually stamped with the time uploaded and displayed in reverse chronological order. Most blogs also facilitate interaction by allowing readers to post comments.<sup>4</sup>

While some blogs function as personal online accessible diaries<sup>5</sup> or provide general commentary on any conceivable subject, blogging is also used in a professional and educational capacity to reach new and receptive audiences. Blogs often focus on one particular subject area and contain or provide links to images, videos and other web pages and or media. Blogs are said to be continual conversation, rather than a final product, because of the 'practice of allowing and posting comments, as well as comments to these comments'.<sup>6</sup>

### 1.1.2 Applications of Blogs

Blogs are can be used for a multitude of reasons, including:

- covering the news, first-hand reporting of world events, news commentary and inviting different viewpoints on news issues, often encompassing a wide range of views not represented by mainstream media;<sup>7</sup>
- political, literary and artistic commentary and the discussion of economic issues;
- facilitating learning through online and interactive education courses and scholarly discussion; and
- social networking.

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<sup>4</sup> See Wikipedia <http://en.wikipedia.org/wiki/Blog>

<sup>5</sup> D. O'Brien, *Blogs and the Law: Key Issues for the Blogosphere* (2007) 12 (2) *Media and Arts Law Review* 141 at 2.

<sup>6</sup> Yochai Benkler, *The Wealth of Social Networks - How Social Production Transforms Markets and Freedoms*, Yale University Press 2006, 217

<sup>7</sup> See A Burns and J Jacobs eds. *Uses of Blogs*, 2006 Peter Lang Publishing New York at 11-17.

It has been estimated there are now over 75.2 million blogs with 120,000 new blogs created every day and 1.6 million new entries made daily.<sup>8</sup> The number of blogs has grown, thanks to sites that provide easy to use blog platforms such as wordpress.com, movabletype.org, and blogger.com. This makes it easy to set up a blog without any knowledge of html or other programming languages.

#### **Example – John Quiggin**

<http://johnquiggin.com/> is a blog that provides commentary and forum discussion on Australian and world events (primarily economic, cultural and political issues) from a socio-democratic perspective.

#### **Example – joannejacobs.net**

<http://joannejacobs.net/> is a blog concerning political and social commentary, blogging issues and other views of the host.

#### **Example – Peter Black's Freedom to Differ**

<http://www.freedomtodiffer.com/> is a blog about legal and policy issues in relation to the internet.

#### **Example – deswalsh.com**

<http://www.deswalsh.com/> is a 'blogging evangelist' blog devoted to the business aspects of blogging and blogging technologies and features.

#### **Example – duncanriley.com**

<http://www.duncanriley.com/> is a 'blogging evangelist' blog devoted to political commentary and blogosphere issues.

#### **Example – Problogger**

<http://www.problogger.net/> is a blog devoted to issues about blogging and dedicated to promoting the blogging medium.

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<sup>8</sup> According to Technorati the latest figures are: '112.8 million blogs, ... with 175,000 new blogs (that's just blogs) every day. Bloggers update their blogs regularly to the tune of over 1.6 million posts per day, or over 18 updates a second.' See <http://technorati.com/about/>.

### Example – AgoraVox

<http://www.agoravox.com/> is an example of a 'citizen journalism' blog where persons voluntarily submit information and news articles.

Directories of Australian blogs can be found at the following sites:

- Blogs.com.au (<http://www.blogs.com.au/>);
- Australianblogs.com.au (<http://www.buggerall.com.au/tags/>);
- Gnoos (<http://gnoos.com.au/>);
- The Australian Index (<http://theaustralianindex.com/>);
- The Top 100 Australian Blogs Index (<http://blogpond.com.au/top-100-australian-blogs-index/>).

### 1.1.3 Content of Blogs

A typical blog combines text, images, podcasts and vodcasts, links to other web pages, and other media related to its topic. Blogs often involve third party content, for example quotes and excerpts from other writings and reproductions of paintings or photographs.

Blogs can be run by a single individual, a group of primary commentators, or a larger number of other contributors, and may have a limitless number of readers.<sup>9</sup> For various reasons, including personality preferences and group dynamics, even in wholly open blogs the conversation will often be 'weighted' towards a particular viewpoint or specific group of commentators.

Most blogs are primarily textual but some are dedicated entirely to photos (photoblogs) and videos (vlogs).

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<sup>9</sup> Yochai Benkler, *The Wealth of Social Networks - How Social Production Transforms Markets and Freedoms*, Yale University Press 2006, 217

## **1.2 Podcasts and Vodcasts**

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### **1.2.1 Podcasts**

A podcast (a term that evolved with the advent of Apple's iPod player) is an electronic sound or music file which is distributed over the internet for listening to at the user's convenience.<sup>10</sup>

Podcasting is the technology that allows Creators to develop their own audio files for uploading over the internet. These files can then be downloaded directly to a User's iPod, MP3 player, portable digital audio device, or any computer.

Unlike traditional radio or other web-streaming, the portable, on-demand nature of podcasts allows people to be producers of music, commentary and any other type of audio material and gives Users control over when and where they can listen to this material.

### **1.2.2 Vodcasts**

A vodcast (vod stands for 'video on demand') is like a podcast, but the content is visual and audio.<sup>11</sup> Portable technology, such as the video iPod and videophones, which play vodcasts are now commonly available.

Please note that vodcasts are often referred to as podcasts, however in this Guide podcasts will only refer to audio files and vodcasts will refer to audio and visual files.

### **1.2.3 Creators of Podcasts and Vodcasts**

Amateurs and enthusiasts were the first group to embrace podcasting and vodcasting to produce a wide range of materials such as radio shows and video diaries. However, these technologies have quickly been picked up by companies and professionals, and have evolved into an extension of traditional television and radio media. For example popular broadcasters and radio shows now make their

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<sup>10</sup> See <http://en.wikipedia.org/wiki/Podcast>

<sup>11</sup> See <http://en.wikipedia.org/wiki/Vodcast>



content available as podcasts, while universities and schools use podcasts to provide students with access to classes they have missed.

#### **Example - The GlobalGeek Podcast**

<http://globalgeek.thepodcastnetwork.com/> is an Australian site which provides news on blogging, technology issues and software and product reviews through its podcasts, vodcasts, text and graphics.

#### **Example – Triple J – JTV**

<http://www.abc.net.au/triplej/default.htm> is an Australian site which provides podcasts and vodcasts of music programs and videos from the various Triple J radio programs and from the JTV television program.

#### **Example – Slate.com**

<http://slate.com/> for podcasts and <http://www.slatev.com/> for vodcasts is an online magazine commentating on news, politics and culture via podcasts, vodcasts, text and graphics.

#### **Example - Rulesfortherevolution.com**

<http://en.wikipedia.org/wiki/Vodcast> is a library of information, podcasts and vodcasts that answer general legal questions about the law surrounding podcasting and new media.<sup>12</sup>

### **1.2.4 Content of Podcasts**

Podcasts consist of actual audio files which may include spoken word, music or any other sound. These sound recordings will either showcase original creations or incorporate pre-existing sound recordings.

Podcasts often utilize third party material, such as a book used in a recorded book reading or the lyrics and musical score that underlie the actual recording of a song.

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<sup>12</sup> See <http://www.rulesfortherevolution.com/>

### **1.2.5 Content of Vodcasts**

In addition to the audio files and underlying material found in podcasts, vodcasts may also contain third party video imagery. These visual images may be filmed, animated or computer generated.

## 1.3 Wikis

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### 1.3.1 Introduction

A wiki is a fully editable website that allows a User to read and add content to that site.<sup>13</sup> The term 'wiki' is derived from the Hawaiian word for quick,<sup>14</sup> alluding to the speed and ease with which a user can quickly edit a web page. The underlying rationale of a wiki is the proliferation of knowledge through collaborative submissions.

### 1.3.2 Wiki Collaboration

A wiki allows documents to be written collaboratively by using the mark up language in a web browser. Wikis rely on server side technology that allows visitors to make instant updates to a webpage via a web interface.<sup>15</sup> While some wiki applications are open for anyone to edit, other wikis may limit access and functionality to a restricted group of users.<sup>16</sup> The technology enables a user to visit, read, reorganise and update the structure and content of the wiki.<sup>17</sup>

The most common use of a wiki is as a shared knowledge database for a physically dispersed community.<sup>18</sup> A wiki may also be used as a repository for project documentation, reporting, collaborative software

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<sup>13</sup> Naomi Augar, Ruth Raitman and Wanlei Zhou, 'Teaching and learning online with wikis' (Paper presented at the conference *Beyond the comfort zone: Proceedings of the 21st ASCILITE*, Perth, 5-8 December) 95.

<sup>14</sup> Rick Klau, 'Technology in practice: Nothing but NET: Say aloha to the wiki' (2004) 30 *American Bar Association Journal* 20; Naomi Augar, Ruth Raitman and Wanlei Zhou, 'Teaching and learning online with wikis' (Paper presented at the conference *Beyond the comfort zone: Proceedings of the 21st ASCILITE*, Perth, 5-8 December 2004) 95.

<sup>15</sup> Fernanda Viegas, Martin Wattenberg and Kushal Dave, 'Studying Cooperation and Conflict between Authors with history flow Visualisations' (Paper presented at the *CHI Conference 2004*, Vienna, 24-29<sup>th</sup> April 2004) 575, 576.

<sup>16</sup> Axel Bruns and Sal Humpheries, 'Wikis in Teaching and Assessment: The *M/Cyclopedia Project*' (Paper presented at the *International Symposium on Wikis*, San Diego, 17-18 October 2005) 4.

<sup>17</sup> Naomi Augar, Ruth Raitman and Wanlei Zhou, 'Teaching and learning online with wikis' (Paper presented at the conference *Beyond the comfort zone: Proceedings of the 21st ASCILITE*, Perth, 5-8 December) 95.

<sup>18</sup> Mark Gaved, Tom Health and Marc Eisenstadt, 'Wikis of Locality: Insights from the Open Guides' *Knowledge Media Institute – The Open University*

development, online glossaries, dictionaries, discussion groups, or as a tool to support discussion and promotion of a specific event such as a conference.<sup>19</sup> In essence, a wiki can be used in any situation that would benefit from a collaborative environment.

### **Example - Wikipedia**

<http://wikipedia.org> is the most notable example of a wiki. Wikipedia is a free online encyclopaedia that anyone can edit.<sup>20</sup> It is available in over 265 languages, with the English language version alone having over 2 million articles. It is also available in a CD version.

### **Example - Uncyclopedia**

<http://uncyclopedia.org> is a satirical wiki modelled on Wikipedia that contains humorous and satirical articles that anyone can edit.

### **Example – Wikitravel**

<http://wikitravel.org> is create a free, editable and worldwide travel guide.

## **1.3.3 Content of Wikis**

Wikis are different from blogs because each entry in a wiki is intended to be written and edited collaboratively by large numbers of people. Wikis are frequently regulated by procedures such as peer review, structured posting privileges and reputation systems. Unlike the relative conversational freedom of blogs, conversation in a wiki entry is generally 'anchored' to a particular subject. Edits must align with the subject and must accommodate each other in order to produce coherent and collective output.<sup>21</sup>

Wikis predominantly comprised of text and hyperlinks. More sophisticated applications enable the adding of other media such as

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<sup>19</sup> Silvan 'WikiTrails: Augmenting Wiki Structure for Collaborative, Interdisciplinary Learning', University of Frankfurt; A Aguiar and G David, 'WikiWiki weaving heterogenous software artefacts (Paper presented at the conference *Proceedings of the 2005 International Symposium on Wikis*, San Diego, California, October 16 2005) 67.

<sup>20</sup> See [www.wikipedia.org](http://www.wikipedia.org)

<sup>21</sup> Yochai Benkler, *The Wealth of Social Networks - How Social Production Transforms Markets and Freedoms*, Yale University Press 2006, 218

images, tables, audio, video or interactive java components.<sup>22</sup> Wiki entries may exploit third party content such as passages from other authors and artistic and photographic reproductions.

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<sup>22</sup> A java component is a piece of software that runs through a users internet browser through what is known as a 'Java Applet'.



## Part 2

# Overview of Copyright

## **2.1 Introduction to Copyright Law**

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### **2.1.1 Copyright Basics**

Copyright law gives the owner of copyright in creative material (such as books, films, music, artworks, and computer programs) the exclusive right to control certain uses of their material.

Any use of copyright protected material without the permission of the copyright owner or some other form of legal authorisation is a breach of copyright.

### **2.1.2 Commercial and Non-Commercial Applications**

As a general rule, copyright law makes no distinction between commercial and non-commercial use of copyright protected material.

Copyright law does not permit the use of copyright material in a blog, podcast, vodcast or wiki just because it is for a non-commercial reason. Unless the use falls within an exemption under the *Copyright Act* [see 3.3 and 3.4], such as fair dealing, or you have the copyright owner's permission [see 3.1], even non-commercial uses will still amount to an infringement of copyright.

### **2.1.3 Third Party Content**

Most blogs, podcasts, vodcasts and wiki pages will contain third party owned content that is protected by copyright. This content could be passages of text, drawings, photos, sound clips and video clips. Copyright issues can arise when this material is used without permission of the copyright owner.

## 2.2 Material Protected by Copyright

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### Key Points:

- Blog, podcast, vodcast and wiki Creators and Users need to be aware that the *Copyright Act* protects particular and defined types of material from unauthorised use.
- Copyright material is divided into two groups; firstly 'works' (literary works, dramatic works, artistic works and musical works) and secondly 'subject matter other than works' (sound recordings, films, broadcasts and published editions).

### 2.2.1 Categories under the Copyright Act

The *Copyright Act* divides the type of material that is protected by copyright law into two groups: 'works' and 'subject matter other than works'.

### 2.2.2 Works<sup>23</sup>

- **literary works:** literary works is a broad category that encompasses any written material. As well as works such as stories and articles this category includes tables, compilations and computer programs. This material does not have to be of a high literary standard to be protected.
- **dramatic works:** dramatic works include material that is intended to be performed or presented, for example, a screenplay for a film or a choreographed sequence for a show.
- **artistic works:** artistic works include paintings, drawings, sculptures, engravings, photographs, buildings, models of buildings and works of artistic craftsmanship.<sup>24</sup> This material will be protected irrespective of the artistic quality or merit of the work.

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<sup>23</sup> See *Copyright Act 1968* (Cth) Part III.

<sup>24</sup> *Copyright Act 1968* (Cth) s10.

- **musical works:** musical works include the composition of sound, for example a musical score. This category does not protect musical lyrics, which are protected as literary works.

### 2.2.3 Subject Matter Other than Works<sup>25</sup>

- **sound recordings:** this category protects the sounds embodied in a record. In other words, the actual recording itself is protected, not just the music contained in that recording. Sounds recorded in any form may be protected including those recorded in a podcast or vodcast file;
- **cinematographic films:** this category protects the moving pictures of a film and the associated sounds embodied in the soundtrack.<sup>26</sup> This extends to moving imagery within a computer game;
- **broadcasts:** radio and television broadcasts are protected separately from the film or sound recordings included in the broadcast. Both live and pre-recorded broadcasts are protected. Existing radio or television broadcasts that are made available for download or streaming online (eg radio podcasts and live television streaming) will be protected separately as broadcasts; however, material that is distributed exclusively over the internet (eg streamed internet radio or television) is not;
- **published editions:** published edition copyright provides separate protection for the presentation of printed material such as books and magazines. It protects the configuration of text, images and typographic layouts in these products.

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<sup>25</sup> See *Copyright Act 1968* (Cth) Part IV for copyright of 'works'.

<sup>26</sup> *Copyright Act 1968* (Cth) S10(1).

## 2.3 Requirements for Copyright Protection

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### Key Points:

- There is no registration system for copyright in Australia.
- Copyright protection arises automatically for material that is:
  - Original;
  - Fixed in a 'material form'; and
  - Connected with Australia.
- Material will only be protected by copyright for a set period of time.

### 2.3.1 Conditions for Automatic Copyright Protection

No registration is required for copyright protection. Copyright attaches automatically to all literary, dramatic, musical and artistic works<sup>27</sup> as well as sound recordings, films, radio and television broadcasts and published editions,<sup>28</sup> as long as they are:

- **original:** material is original if it is the result of the author's own skill, labour or judgment and was not copied from another author.<sup>29</sup> Content does not need to have artistic or literary merit to be considered original; even unimaginative material can attract copyright protection. For instance, all original text posted to a blog or a wiki either by Creators or Users, no matter how minor, will be protected as a literary work;<sup>30</sup>

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<sup>27</sup> See *Copyright Act 1968* (Cth) Part III for copyright of 'works'.

<sup>28</sup> See *Copyright Act 1968* (Cth) Part IV for subject matter other than works.

<sup>29</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

<sup>30</sup> D. O'Brien, 'Blogs and the Law: Key Issues for the Blogosphere' (2007) 12 (2) *Media and Arts Law Review* 141 at 5

- **expressed in a material form:** any creative work that has been reduced to writing, printed or is stored in an electronic format is considered to be 'expressed in some tangible embodiment or material form' and will receive copyright protection.<sup>31</sup> For example any book, film, sound recording, artwork, photograph or online content is in a material form, but a song that has not been written down or recorded is not. Even content stored temporarily (eg in the random access memory of a computer) can satisfy this requirement;<sup>32</sup> and
- **connected to Australia:** there must be a territorial connection with Australia.<sup>33</sup> In other words:
  - the material must be first published in Australia, or have been published in Australia within 30 days of its international release;<sup>34</sup> or
  - the author must be an Australian citizen or resident, or an Australian company.<sup>35</sup>

In practice, due to international treaties material created or published almost anywhere in the world will be protected in Australia [see 2.4].

### 2.3.2 Term of Protection

For copyright to apply, material must still be within its term of copyright protection.

Copyright protection is finite, and will end eventually. Once material is out of copyright it can be used in any way without needing to obtain permission. This material is said to be in the 'public domain'.

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<sup>31</sup> See the definition of 'material form' in *Copyright Act 1968* (Cth) s 10.

<sup>32</sup> A. Fitzgerald and B. Fitzgerald, *Intellectual Property in Principle*, LawBook Co. 2004 at [4.20]

<sup>33</sup> *Copyright Act 1968* (Cth) s 32(2).

<sup>34</sup> For the purposes of the *Copyright Act 1968* (Cth), a publication is treated as being 'first' published in Australia as long as it is released in Australia within 30 days of its international release (*Copyright Act 1968* (Cth) s 29(5)). As most online publications (eg podcasts, vodcasts, blogs or wikis) are arguably 'first' published simultaneously in every jurisdiction, including Australia, they will almost always be protected under Australian copyright law.

<sup>35</sup> See *Copyright Act 1968* (Cth) s32.

The works of Shakespeare, Mozart and Rembrandt, for example, are all in the public domain.<sup>36</sup>

However, it is important to note that while copyright does not last forever, it does last a very long time. Most works will be protected for many years after their original creators and publishers have died.

For more information on the length of copyright protection for different types of material see 3.2.3.

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<sup>36</sup> Note, however, that modern editions of these works may be protected by published edition copyright. While the story play or picture can be copied, facsimiles of the book or magazine in which it is contained may breach the publisher's copyright. See 2.2.3

## 2.4 Jurisdiction Issues

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### Key Points:

- When copyright infringements occur in an international environment such as the internet it can be difficult to determine where a court case should be brought and which country's (ie jurisdiction's) law should be applied.
- The general rule is that material from foreign countries will be protected in Australia and vice versa.
- Which jurisdiction's law will apply in a copyright case can depend upon whether or not the action being brought is based on civil penalties (e.g. damages or injunctions) or criminal penalties (e.g. fines and/or jail terms).
- As a general rule, in relation to both civil and criminal copyright infringement, Australian copyright law will govern the treatment of copyright material in Australia, even if the material was created or first published overseas.
- As a general rule, Australian courts will have the authority to protect Australian copyright material even when it is used overseas.

### 2.4.1 Copyright Jurisdiction Issues

Blogs, podcasts, vodcasts and wikis can transmit information and data across national borders in an instantaneous and simultaneous fashion. In the event of a legal dispute arising from such transmissions, questions arise as to:

- whether someone has the right to take legal action in a particular country or legal jurisdiction; and
- which national law will determine the dispute.

In this context, Australian Creators and Users are often uncertain whether they will be legally liable under Australian law for copyright infringement if they use or host a blog, wiki, podcast or vodcast offshore.



## 2.4.2 International Protection

Creators and Users are not at liberty to use copyright material from overseas in an infringing manner. As a result of international treaties,<sup>37</sup> copyright protection is almost always universal. In general, a person who infringes copyright in foreign material will be exposed to legal liability under Australian law, as well as potentially being liable under any applicable foreign laws. Similarly, original Australian material will be protected by copyright in most other countries.

Countries who are members of these treaties are forbidden from discriminating in their domestic copyright laws against the nationals of other member countries.<sup>38</sup> As a result, any 'advantage, favour, privilege or immunity' granted to the nationals of one country is extended to the nationals of all other treaty members.<sup>39</sup> These principles are implemented by almost every country worldwide.<sup>40</sup>

This means that material created and published overseas will almost always be protected in Australia in exactly the same way as Australian material, and vice versa. This protection is usually automatic; however to be safe a copyright notice [see 4.1.3] should be attached to the material.

Registration overseas is not necessary but may be advantageous in countries that have a registration system, such as the United States, where registration may provide advantages in litigation. For information about registration in the United States see [www.copyright.gov](http://www.copyright.gov).

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<sup>37</sup> Including the *Berne Convention for the Protection of Literary and Artistic Works* 1886; *Trade Related Aspects of Intellectual Property* (TRIPS) Agreement, the *World Intellectual Property Organisation* (WIPO) *Copyright Treaty* 1996 and the *WIPO Performances and Phonograms Treaty* 1996.

<sup>38</sup> See, for example, Articles 3 and 4 the *Trade Related Aspects of Intellectual Property* (TRIPS) Agreement and Article 3 and 5 of the *Berne Convention for the Protection of Literary and Artistic Works* 1886

<sup>39</sup> A. Fitzgerald and B Fitzgerald, *Intellectual Property in Principle*, LawBook Co. 2005 at [3.10]

<sup>40</sup> For a list of countries party to the Berne Convention see <http://www.wipo.int/treaties/en/>

### **Example – Protection of Foreign Material**

An Australian blogger reproduces on her blog Japanese cartoon figures without obtaining permission from the copyright owner, a Japanese animator. The Japanese copyright owner is protected in Australia and will be able to take legal action against the blogger using Australian copyright law.

### **Example – Foreign Protection of Australian Material**

A podcaster reproduces music in a podcast and posts it on an American website. The music is protected by copyright, which is owned by an Australian musician. The Australian copyright owner will be able to take legal action under American law to protect the music.

## **2.4.3 Criminal Jurisdiction**

Section 132AB of the *Copyright Act* specifically limits the application of the copyright criminal offences to 'acts done in Australia'.<sup>41</sup> This section overrules other laws relating to jurisdiction, including the provisions of the Australian Criminal Code.<sup>42</sup> However, the application of this provision in relation to acts that take place online is unclear, as they can often be characterised as occurring in several countries simultaneously.

### **Example – Liability under Foreign Law**

An Australian man who had uploaded \$50 million dollars worth of software, music and movies to a US based website was recently extradited to the US for alleged copyright infringement.<sup>43</sup>

<sup>41</sup> [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1968133/s132ab.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s132ab.html)

<sup>42</sup> Item 14.1 of the Criminal Code extends jurisdiction for most criminal offences to include acts done in Australia, acts done on board Australian aircraft or ships, and acts whose result occurs in Australia.

<sup>43</sup> See <http://www.builder.au.com.au/news/soa/US-fights-to-extradite-Internet-pirate-/0,339028227,339129864,00.htm>

The Australian court held that even though the man's actions occurred in Australia, 'given its continuing character, [the conduct] can properly be said to have occurred in the United States and this includes [the accused's] own conduct, notwithstanding his actual physical presence in New South Wales'.<sup>44</sup> Therefore the court held that the appropriate place of jurisdiction was the US.

The accused received a US jail sentence of 10 years for these infringements.

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<sup>44</sup> *Griffiths v United States of America* [2005] FCAFC 34 (10 March 2005) at [97]

## 2.5 Who is the Copyright Owner?

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### Key Points:

- The general rule is that the first owner of copyright of a literary, dramatic, musical or artistic work will be the author.
- For films and sound recordings, the general rule is that the first owner of copyright will be the 'maker'. For commercially produced material, this will usually be the production or record company.
- These rules are subject to exceptions in relation to commissioned material, material produced by an employee or journalist, or material made or first published by or under the direction of the Crown.
- Most importantly, ownership of copyright can always be modified by contract or agreement. In many industries, it is standard practice for authors or makers to transfer their copyright to a publisher or production company.

### 2.5.1 Copyright Ownership

The owner of the copyright will depend on the type of the material and the circumstances of its creation. The general rules of ownership are different for literary, artistic, dramatic and musical works than they are for other copyright materials (eg films and sound recordings).

The basic rules outlined below are subject to exceptions and will always be able to be altered by written agreement (such as employment contracts or contracts assigning or transferring copyright).

For detailed information on how to locate a copyright owner, see Part 4 – 'Getting Permission'.

## 2.5.2 Works (Literary, Dramatic, Musical or Artistic Works)

For literary, dramatic, musical or artistic works, the basic rule is that the 'author' will usually be the first owner of the copyright.<sup>45</sup>

For the purposes of copyright law, the 'author' of a work is the person who actually *creates* the work. This will usually be the person who first gives the work physical form. For example, a person who writes down an article or song or the person who draws a picture will be the author. However, this may not be the case where the person who first gives the work physical form is not also the person from whom the expression originates. For example, the person who dictates a letter or gives a speech will be the owner of copyright, not the person who transcribes the material.<sup>46</sup>

In relation to photographs, the 'author' is the person who takes the photograph.<sup>47</sup>

## 2.5.3 Other Subject Matter

For material that is not a literary, dramatic, musical or artistic work, the copyright ownership rules vary depending on the type of material.

Copyright ownership of these types of products tends to be complex, as the products will almost always include more than one copyright item. For example, a sound recording will often include music, lyrics or a script, all of which will have their own copyright and copyright owner separate from those of the sound recording itself. For more discussion of multi-layered copyright, see 2.7.

## Sound Recordings and Podcasts

The general rule in relation to a sound recording is that the 'maker' will be the first owner of copyright.<sup>48</sup> This is the person who, when the original recording was made, owned the master recording.<sup>49</sup>

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<sup>45</sup> *Copyright Act 1968* (Cth) s 35.

<sup>46</sup> *Donoghue v Allied Newspapers Ltd* [1937] 3 All ER 503.

<sup>47</sup> *Copyright Act 1968* (Cth) s 10(1). Note that this was not always the rule. For more information, see the Australian Copyright Council's Information Sheet G11: Photographers and copyright (January 2006) available at <http://www.copyright.org.au/G011.pdf>

<sup>48</sup> *Copyright Act 1968* (Cth) s 97.

In practice, record companies usually own copyright in commercially produced sound recordings rather than the people who have had creative input into the recording.<sup>50</sup> In relation to sound recordings that are not produced commercially, such as many podcasts, copyright will usually be owned by the maker of the original recording.

Where the recording is of a live performance, any audio performers (ie people who contribute to the sounds in the recording, whether they are musical or otherwise)<sup>51</sup> will also be 'makers' and will usually jointly own copyright in the material with the person who made the recording, unless there is an agreement which specifies otherwise.<sup>52</sup> Note that the performer's permission is also required to make a recording, so bootlegged recordings of concerts (for example) may not be legal [see 2.10.9].

## Films and Vodcasts

The general rule in relation to a film is that the 'maker' will be the first owner of copyright in the film.<sup>53</sup> This is the person who undertook the arrangements necessary for the making of the film.<sup>54</sup>

For a commercially produced film, the maker will usually be the producer or production company.<sup>55</sup> In relation to vodcasts, it is more likely that the individual vodcast will have made all the arrangements, and so will own the copyright.

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<sup>49</sup> See *Copyright Act 1968* (Cth) s 97.

<sup>50</sup> See Oak Law Project Report No. 1 *Creating a Legal Framework for Copyright Management of Open Access within the Australian Academic and Research Sector*, August 2006 at [2.38]

<sup>51</sup> *Copyright Act 1968* (Cth) s 10(1).

<sup>52</sup> The economic rights for performers in sound recordings became effective from 1 January 2005. Section 22(3A) of the Act provides that the performer and the owner of any sound recording of the performance own the copyright jointly, subject to any agreement to the contrary. Commissioned sound recordings for which the performer is paid a fee, or those made under an employment contract, are owned by the commissioner or employer (section 97(3)).

<sup>53</sup> *Copyright Act 1968* (Cth) s 98.

<sup>54</sup> *Copyright Act 1968* (Cth) s 22(4)(b).

<sup>55</sup> See *Copyright Act 1968* (Cth) s 98.

The principal director of a film is also counted as a 'maker' of the film, but only for limited purposes.<sup>56</sup> The director holds moral rights in the film [see 2.10.2] and will receive royalties under certain statutory licensing schemes set out in the Act.<sup>57</sup> However, unless they are also 'the person by whom the arrangements necessary for the making of the film were undertaken', they will not generally be the copyright owner.

## **Broadcasts**

If you are using a film or sound recording that you obtained from a broadcast, you will also usually need the permission of the owner of copyright in the broadcast. The general rule is that this will be the person or company who provides the broadcast service (eg the television or radio broadcaster).<sup>58</sup>

## **Published Editions**

If you are using a facsimile of a book or other printed work, you will also need permission from the owner of copyright in the layout of the document (ie the 'published edition'). This will be the publisher of the work.<sup>59</sup>

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<sup>56</sup> *Copyright Act 1968* (Cth) s 98(4).

<sup>57</sup> *Copyright Act 1968* (Cth) s 98(6).

<sup>58</sup> *Copyright Act 1968* (Cth) s 22(5).

<sup>59</sup> *Copyright Act 1968* (Cth) s 100.

## 2.6 Five Exceptions to Ownership

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### Key Points:

- The general rules for determining who owns copyright can be overruled by a contract transferring copyright to another person.
- Where material is produced by an employee in the course of their employment, the employer will usually own copyright.
- Where material is produced by a journalist employed by a newspaper or magazine, the newspaper or magazine will own copyright for some purposes.
- Where a film or sound recording is commissioned, the commissioning party will generally own the copyright. For photographs commissioned for private and domestic purposes, or portraits or engravings, the commissioning party will own copyright but will need the creator's permission for some uses.
- For material produced by or under the direction of, or first published by, the government, copyright will usually be owned by the Crown.

### 2.6.1 Contract

Ownership in copyright can always be transferred by contract, provided that the assignment is in writing and signed by both the assignee and the assignor. This will often happen, for example, when a person signs a recording or publishing deal with a large company.

If the author or maker has signed a document, or made an agreement that says someone else will own copyright in their material, then the ownership of copyright will be determined by that agreement.

Copyright owners can also license their rights to others (ie give them permission to use the material in certain ways). A licence will not change who is the copyright owner of the material; however, it may give the licensee exclusive rights over the material, or the right to give permission for others to use the material.



## **2.6.2 Copyright Material Produced in the Course of Employment**

Copyright material will usually be owned by the employer if it is produced:

- under a contract of employment; and
- within the course of employment.<sup>60</sup>

### **The Course of Employment**

For the employer to own the copyright, the employee must be acting 'in the course of employment', meaning that the material must be produced as part of their 'normal' employment duties.<sup>61</sup> What amounts to the normal duties of an employee will depend on all the circumstances of the case. Factors that are likely to be considered include the contract of employment, the amount of control exercised by the employer, whether the material was created during work hours, and whether it was created on work premises or using the employer's equipment.<sup>62</sup>

### **Employment Contracts and Policies**

Some employers and employees may have an agreement in place that allows the employees to retain copyright ownership in some material produced in the course of employment. This will usually be in the employee's contract of employment, or in the relevant policies of larger organisations such as universities.

Blog users and creators should make sure they are aware of any policies on blogging in the terms and conditions of their contract of employment. Breach of these terms can sometimes lead to termination of employment.<sup>63</sup>

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<sup>60</sup> See *Copyright Act 1968* (Cth) s 35(6). See also *Beloff v Pressdram Ltd* in relation to the distinction between a 'contract of service' and a 'contract for services'.

<sup>61</sup> See, for example, *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* (1952) RPC 10

<sup>62</sup> See, for example, *Oceanroutes (Australia) Pty Ltd v M C Lamond* [1984] AIPC 90-134

<sup>63</sup> D. O'Brien, *Blogs and the Law: Key Issues for the Blogosphere* (2007) 12 (2) *Media and Arts Law Review* 141 at 18

## **Freelancers, Consultants and Contractors**

a freelancer or a person employed as a consultant or a contractor, as opposed to an employee, usually retains copyright in the material they produce. However, their copyright in that material can be transferred or assigned to the person hiring them by an agreement.<sup>64</sup>

This means, for example, that if a blogger hires a web designer to design their blog or website, this person will usually own copyright in the skin and layout of the site unless there is an agreement otherwise. The blogger will, however, still own copyright in any content they post or have posted to the site.

### **2.6.3 Journalists**

The *Copyright Act* stipulates special rules in relation to who owns copyright in material created by a print journalist. These rules do not apply to television or radio journalists.

#### **Employed Journalists**

As a general guide, an employed print journalist (whether a writer or a photographer) will be the owner of copyright in their literary material for the purposes of:

- publishing the material in a book; or
- photocopying the article, excluding reproduction of the newspaper, magazine or periodical by the proprietor.<sup>65</sup>

Their employer will be the owner of copyright for any other purpose.<sup>66</sup> This means the newspaper or magazine controls the right to reproduce the material in any other way, including in the newspaper, as part of a broadcast or online publications.

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<sup>64</sup> See *Oceanroutes (Australia) Pty Ltd v Lamond* (1984) AIPC 90-134.

<sup>65</sup> See *Copyright Act 1968* (Cth) s 35(4).

<sup>66</sup> See *Copyright Act 1968* (Cth) s 35(4).

## Freelance Journalists

Freelance journalists (who are not employees) will usually retain copyright ownership in their material, subject to any transfer or assignment provisions in a written agreement.

### 2.6.4 Commissioned Material

Special rules apply for commissioned works in relation to the following categories of material:

- **photographs, paintings, drawings and portraits:** copyright in photographs commissioned for private and domestic purposes (eg wedding photos), or commissioned portraits or engravings, will generally be owned by the commissioning party. However, if the commissioning party wishes to use the material for anything other than domestic purposes (eg publishing it commercially), the photographer or artist may have the right to prevent it;<sup>67</sup>
- **sound recordings and films:** copyright is usually owned by the commissioning party, unless there is a separate arrangement for the transfer or assignment of copyright as part of the commissioning or funding agreement;<sup>68</sup>
- **other works:** the standard rules of copyright apply, and copyright will usually vest in the author or maker.

### 2.6.5 Crown Ownership – Material Made or First Published by the Government

Copyright material made or first published by or under the direction or control of the Federal or a State Government will generally be owned by that government.<sup>69</sup> For research commissioned or funded by the Government, the research agreement will usually state who owns the copyright.

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<sup>67</sup> See *Copyright Act 1968* (Cth), s35(5).

<sup>68</sup> See *Copyright Act 1968* (Cth), ss97, 98.

<sup>69</sup> See *Copyright Act 1968* (Cth), Part VII. For further information see Oak Law Project Report No. 1, p31.

## 2.7 Layers of Copyright

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### Key Points:

- A single product can include several different items that are protected by copyright. Each copyright item will be protected individually.
- This occurs most commonly in relation to sound recordings, films and broadcasts, which will usually include other copyright materials, such as scripts, music, lyrics and artworks.
- Copyright will protect these materials individually, as well as the sound recording, film or broadcast as a whole.
- Each layer of copyright material may be owned by a different person;
- Permission must be obtained to utilise each and every layer of copyright material before reproducing it in a blog, podcast, vodcast or wiki.

### 2.7.1 Underlying Rights

When you use any copyright material in a blog, podcast, vodcast or wiki you must always consider whether it contains other copyright material. Where a number of copyright objects are combined into a single product, each of those objects will have their own copyright protection. This is separate from the protection that the final product receives.

This occurs most commonly in relation to sound recordings, films and broadcasts. A sound recording, for instance, will usually contain music and lyrics, which will be protected separately from the sound recording itself.<sup>70</sup> Similarly, the script of a film will be protected separately from the film itself, as will any sound recordings in the film, and any music or lyrics in those sound recordings.

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<sup>70</sup> *Copyright Act 1968* (Cth) s 113(1).

However, it can also occur for other types of material. For example, a book or magazine may include a number of articles written by different authors, as well as illustrations in the form of photographs or other artworks. All of these items will be protected as individual works, while the book as a whole will also be protected as a published edition.

The rights for each of the separate copyright materials, known as the 'underlying rights', must all be cleared before the product can be used. This may mean you need to get permission from more than one copyright owner, or rely on more than one exception in the *Copyright Act*.

### 2.7.2 Underlying Rights in Sound Recordings, Films and Broadcasts

The list below provides examples only. Not every sound recording, film or broadcast will contain all of these underlying copyright materials. It is also possible that some sound recordings, films or broadcast will contain other materials not listed here.

Subject Matter	Underlying Rights
Sound Recordings	<ul style="list-style-type: none"> <li>• The sound recording – protected as subject matter other than works;</li> <li>• Any musical composition – protected as a musical work;</li> <li>• Any lyrics – protected as a literary work; and</li> <li>• Any script (eg in a radio play or book reading) – protected as a literary work.</li> </ul>
Films	<ul style="list-style-type: none"> <li>• The combined visual images and sounds – protected as a cinematographic film;</li> <li>• Any script – protected as a literary work;</li> <li>• Any staging – protected as a dramatic work;</li> <li>• Any animation or computer graphic material – protected as both a film and an artistic work;</li> <li>• Any artworks featured in the film – protected separately as an artistic work, even if only</li> </ul>

	<p>included in the background;</p> <ul style="list-style-type: none"> <li>• Any sets – depending on their nature, may be protected as artistic works;</li> <li>• Pre-existing sound recordings (eg music) in the film – protected as subject matter other than works;</li> <li>• In addition, any sound recordings will usually contain other material such as script, music and lyrics that will be protected separately. See 'sound recordings' above.</li> </ul>
Radio and television broadcasts	<ul style="list-style-type: none"> <li>• The broadcast – protected separately from any film or sound recording contained in the broadcast. This applies to live or pre-recorded broadcasts;</li> <li>• Film and sound recordings contained in the broadcast – protected separately as a film or sound recording;</li> <li>• In addition, any film or sound recording included in the broadcast will usually contain other material such as the artworks, script, music and lyrics. See 'films' and 'sound recordings' above.</li> </ul>

### Example – Underlying Rights in a Film Soundtrack

Using an excerpt from a film soundtrack in a blog can infringe rights held by different parties. For example, the lyricist may own rights in the lyrics, the composer may own rights in the score and the producer may own rights in the actual sound recording. In addition, if you have copied the music directly from the film and have included any other sound effects or dialogue, you may need to obtain permission to use this material separately (eg from the scriptwriter).

### Example 3 – Underlying Rights in a Live Sports Game

Creating a vodcast containing an excerpt from a live sports game that was recorded from television can infringe the reproduction, communication and public performance rights in the television broadcast, any sound recordings or films contained in the broadcast, and any script, musical works, lyrics or artworks contained in these sound recordings or films.

### **2.7.3 Permission for Underlying Rights**

This layering of rights means that blog, podcast, vodcast, and wiki Creators and Users may need permission from several different copyright owners to use a single copyright product.

In practice, it is often the case that one party (eg the producer of a film) will be able to give permission for several or all of the separate copyright objects contained in a product. However, this cannot be assumed, and the rights for all the different materials should be considered.

How to seek permission from copyright owners is discussed in detail in Part 4 of this guide.

## 2.8 Exclusive Rights of the Copyright Owner

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### Key Points:

- The copyright owner has exclusive rights to control certain uses of their material. A person who exercises any of these rights without the copyright owner's permission, or without an exemption from the *Copyright Act*, will infringe copyright.
- The exclusive rights vary according to the type of content.
- The rights most likely to apply to a blog, podcast, vodcast and wiki posting are the right of reproduction, the right of communication to the public and the public performance right. A person posting someone else's content online without the copyright owner's permission may infringe all three of these rights.

### 2.8.1 Exclusive Rights and Infringement

The copyright owner has the exclusive right to control certain uses of their material.

If a creator or a user does any of these acts without the copyright owner's permission, they will usually infringe the copyright in the material. The copyright owner is entitled to take legal action against anyone who committed the infringement, as well as anyone who approved or assisted with the infringement.

### 2.8.2 Types of Exclusive Rights

The main exclusive rights held by copyright owners are:

- **reproduction:** this is the right to make copies of the material in any format. It covers, for example, photocopying, publishing, scanning, duplicating, printing, burning to DVD and transferring between electronic devices. It also covers temporary copies, such as might be made in the Random Access Memory of a



computer, and the transferring of material from analogue to digital format. For example, posting a digital copy of a newspaper article or video in a podcast, vodcast, blog or wiki without first obtaining the permission of the copyright owner, will usually infringe copyright in the original material;

- **communication to the public:** this is the right to electronically transmit the material or make it available online. It includes, for example, posting a copy of the material on a website, broadcasting or streaming a podcast or vodcast, or even just emailing the material to a friend. It also includes making material available for other's to download via a peer-to-peer network.
- **public performance:** this covers, for example, playing a film or sound recording in a public place such as a shop, performing dramatic material or reading literary material aloud. It only applies where these acts occur in public.
- **adaptation:** this is the right to make a new work based on the original work. It covers, for example, making a movie of a book or screenplay, translating a foreign text into English or making a new arrangement of a song. This right only applies to literary, dramatic and musical works.

Not all of these rights apply to all types of copyright material. The rights granted to the creators of different types of material are set out in the following table.<sup>71</sup>

Material	Exclusive Rights
Literary, dramatic and musical work	<ul style="list-style-type: none"> <li>• Reproduce the work (including in a blog, wiki, podcast or vodcast)</li> <li>• Publish the work</li> <li>• Perform in public</li> <li>• Communicate the work to the public</li> <li>• Make an adaptation of the work</li> <li>• Control rental of a computer program</li> </ul>

<sup>71</sup> Based on figure 4.5, B. Fitzgerald and A. Fitzgerald, *Intellectual Property in Principle*, 105.

Artistic Work	<ul style="list-style-type: none"> <li>• Reproduce the work (including in a blog, wiki, podcast or vodcast)</li> <li>• Publish the work</li> <li>• Communicate the work to the public</li> </ul>
Sound Recording	<ul style="list-style-type: none"> <li>• Make a copy (including in a blog, wiki podcast or vodcast)</li> <li>• Cause the recording to be heard in public</li> <li>• Communicate the recording to the public (including making it available on a peer-to-peer network)</li> <li>• Control rental of the recording</li> </ul>
Film	<ul style="list-style-type: none"> <li>• Make a copy (including in a blog, wiki podcast or vodcast)</li> <li>• Cause the film to be seen or heard in public</li> <li>• Communicate the film to the public (including making it available on a peer-to-peer network)</li> </ul>
Broadcast	<ul style="list-style-type: none"> <li>• Record television or radio broadcast</li> <li>• Rebroadcast the broadcast</li> <li>• Communicate the broadcast to the public, including by podcast or vodcast.</li> </ul>
Published edition of a literary, dramatic or artistic work	<ul style="list-style-type: none"> <li>• Make a facsimile copy of the edition (including in a blog or wiki, podcast or vodcast)</li> </ul>

## 2.9 Copyright Infringement

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### Key Points:

- Copyright infringement occurs when all or a substantial part of copyright material is used without the copyright owner's permission (and without a statutory exemption applying).
- Whether something is a 'substantial part' of a copyright work depends on the quality, not the quantity, of the material being copied. Even very small excerpts of a work may be a substantial part.
- Infringement by authorisation occurs where a person approves, allows or sanctions the infringing actions of another person. Factors relevant in determining if an authorisation has occurred include any knowledge of the infringement or control of the alleged infringer, as well as any commercial benefit derived from the infringement.
- Indirect infringement occurs when a person makes a prohibited use of an infringing item eg by selling a pirated film or sound recording.
- People who circumvent technological protection measures such as software locks or digital rights management may face legal sanctions, even if no other copyright infringement has occurred.
- There is no rule allowing copyright material to be used just because the use is non-commercial or changes are made.

### 2.9.1 Primary Infringement

Primary copyright infringement will occur where a person:

- uses all or a 'substantial part' of the copyright material;
- in a way that is protected by copyright;

- without the copyright owner's permission.<sup>72</sup>

The only exception to this is where the use falls within an exemption in the *Copyright Act* such as a statutory exception or licence. These are discussed further at 3.3 and 3.4.

Infringement will most commonly occur when someone:

- copies the material - eg by downloading it, transferring it to a computer or portable device, burning it to a disc or printing it;
- publishes the material - eg by releasing it to the public on a website or as a book;
- adapts the material - eg by making a film of a book or poem; or
- communicates the material to the public - eg by broadcasting it, posting it online, emailing it to someone or making it available over a file sharing network.

### **2.9.2 Knowledge is Irrelevant**

A person can face liability for infringement even if they did not know that the material they were using was protected by copyright, or that their use would infringe the copyright in the material. A party's lack of knowledge may, however, be taken into account in awarding damages.

### **2.9.3 Who is responsible?**

The person liable for infringement will usually be the person who actually used the material (ie the person who copied it or uploaded it online).

However, when you are working in the online environment, it is often difficult to determine who is responsible for the infringing act, particularly in the context of wikis, file sharing networks and user-generated sites. In these cases, the owner or host of the site is likely to be pursued for authorising the infringement, on the grounds that they had the power to control or prevent it. Infringement by authorisation is discussed in detail at 2.9.11.

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<sup>72</sup> *Copyright Act 1968* (Cth) ss 36(1), 101(1).

## 2.9.4 What Constitutes a 'Substantial Part'?

Copyright will only be infringed where a substantial part of the copyright material is used. In other words, copyright law allows people to use an insubstantial part of copyright protected material.

Substantiality is assessed in terms of quality, not quantity.<sup>73</sup> How much of the original work used will be considered by the courts, but if the portion being used contains a core or distinctive part of the original material it is likely to be a substantial part even if it is only very small.<sup>74</sup> For very short material such as blog comments it may be difficult to determine substantiality.<sup>75</sup>

In practice, almost any portion of a copyright work, no matter how small, may constitute a substantial part.

The concept of 'substantial part' should also not be confused with the defined concept of 'reasonable portion', which lets you use 10% of a work or one chapter from a book for research or study [see 3.3.5].

### Example – What is a 'Substantial Part'?

A vodcaster includes some background music in part of their vodcast without obtaining permission from the copyright owner. The music in the vodcast runs for only 20 seconds while the original song runs for 5 minutes.

However these 20 seconds contain the main theme of the song and the most recognisable part. The vodcaster has reproduced a substantial part of the song and has therefore infringed copyright.<sup>76</sup>

## 2.9.5 Independent Creation

Material created independently will not infringe copyright in similar material if the similarities are purely coincidental.<sup>77</sup>

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<sup>73</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 293.

<sup>74</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* [2005] FCAFC 53

<sup>75</sup> D. O'Brien, 'Blogs and the Law: Key Issues for the Blogosphere' (2007) 12 (2) *Media and Arts Law Review* 141 at 7

<sup>76</sup> Adapted from *Hawkes and Son (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593.

However, copyright can still be infringed when material is accidentally copied. For example, in *Bright Tunes Music Corp v Harrisongs Music Ltd* the court found that George Harrison had subconsciously copied the main elements of the Chiffon's song *He's So Fine* when he was writing *My Sweet Lord*.<sup>78</sup>

Where the copying is accidental, the court may take this into account in deciding damages.

### 2.9.6 Temporary Reproductions

It is important to note that any reproduction, whether temporary or permanent may infringe copyright. This includes, for example, reproductions in the Random Access Memory of a computer or electronic device such as a DVD player.

The exception to this rule is where the temporary reproduction is made as an incidental part of the technical process of using or communicating the material.<sup>79</sup> This exception does not apply:

- where the material you are using is already infringing (eg using pirated software or playing a pirated DVD); or
- where the use or communication itself would infringe copyright (eg copies made while uploading a video without the copyright owner's permission).<sup>80</sup>

### 2.9.7 Non-commercial uses

Just because a use does not make money does not make it legal. There is no general exception that allows copyright material to be used for non-commercial purposes, and whether a use is commercial

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<sup>77</sup> See, for example, *Inform Design and Construction Pty Ltd v Boutique Homes Melbourne Pty Ltd* [2008] FCA 912

<sup>78</sup> *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F.Supp. 177 (S.D.N.Y. 1976)

<sup>79</sup> See *Copyright Act 1968* (Cth) ss 43A and 43B.

<sup>80</sup> See B. Fitzgerald et al. Oak Law Project Report No. 1 *Creating a Legal Framework for Copyright Management of Open Access within the Australian Academic and Research Sector*, August 2006 at [2.57 to 2.58]

will not be important in most court cases (although it may be considered in deciding damages).

Particularly in the US, it is common for copyright owners to sue private individuals for non-commercial uses such as posting material on a blog or sharing it on a peer-to-peer network.<sup>81</sup>

### **2.9.8 Private uses**

Similarly, there is no exception in Australia that allows people to copy or communicate material for private purposes. For example, downloading music without permission for your own private use or copying it from a friend or family member's collection will usually be an infringement of copyright, unless another exemption (such as the fair dealing exceptions [3.3]) applies.

### **2.9.9 Embedding Content**

One circumstance in which you can repost material to a blog or wiki is where the website from which that material originates has an embedding tool. In most cases the terms of use of the website will give users explicit permission to repost content to personal sites.

You should always check the terms of use of the website you are sourcing material from before you embed the material. For example, many websites will not allow material to be re-posted onto blogs that are supported by advertising.

You should also be careful about reposting material that might have been posted online without the copyright owners' permission. The person responsible for posting infringing material to a site may be liable for copyright infringement, even if they have sourced that material from another location. They may also be liable for authorising infringements by others [see 2.9.11].

Use your commonsense in deciding whether to repost material – if it contains excerpts of commercially available television, films or music, it is more likely to be infringing.

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<sup>81</sup> See 'Recording industry launches fresh wave of actions against illegal file-sharing' (17 October 2006) International Federation of the Phonographic Industry, [http://www.ifpi.org/content/section\\_news/20061017.html](http://www.ifpi.org/content/section_news/20061017.html)

### **Example - Infringement - Wikis**

Cutting and pasting copyright text, photos or multimedia material onto a wiki without permission from the copyright owner will usually infringe copyright. The nature of wikis makes them particularly susceptible to facilitating copyright infringement, particularly if wiki authors copy paragraphs or text from other work.<sup>82</sup>

### **Example – Infringement – News Articles on Blogs**

Copying an entire article from a news service and posting it to your blog will usually infringe copyright, even if you do not have advertising and you attribute and provide a link back to the original website. Summaries or short excerpts from stories may, however, be allowed under the fair dealing exception for reporting the news [see 3.3.7]. Care should also be taken when posting an entire picture, song, or film clip onto a blog page without permission from the copyright owner.

### **Example – Infringement - Embedding Content**

Streaming a home video from YouTube onto your blog, wiki or website using the YouTube embedding tool will normally be legal. This is because the YouTube Terms of Use contain a licence from the person who uploaded the content giving you permission to embed the material.

However, if the video has a popular song or excerpts from a television show or movie in it, you should check whether the material has been uploaded with the permission of the copyright owner before using it on your site.

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<sup>82</sup> P. Black, H. Delaney and B. Fitzgerald, 'Legal Issues for Wikis: The Challenge of User-Generated and Peer-produced Knowledge, Content and Culture', *eLaw Journal* Vol 14, No 1, 2007 14, No 1, 2007.



### **2.9.10 Employer Liability**

Employers may be found to be vicariously liable for any content which has been posted online by their employees, if:

- the employer had provided the employee with a corporate web space (such as a blog or wiki), but failed to exercise control over the employee's actions;<sup>83</sup> or
- the act of posting the material was authorised by the employer in the course of employment.<sup>84</sup>

Creators or Users who are also employers may want to ensure that:

- where an employee is permitted to post online (eg through the employer's blog, the employee's blog or otherwise) that the post contains a disclaimer to the effect that it is personal and is in no way authorised by or representative of the views of the employer;<sup>85</sup> and
- the employee is bound by this disclaimer procedure in the terms of their employment contract.<sup>86</sup>

### **2.9.11 Liability for Others' Infringements: Authorisation**

A person or organisation can be liable for copyright infringement where they are held to have authorised the infringement. Authorisation occurs where a person sanctions, approves or allows conduct which infringes copyright in a situation where they had the ability to control or prevent the infringement.<sup>87</sup> This might occur, for instance, where you allow others to upload infringing material to a blog or wiki that you manage.

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<sup>83</sup> D. O'Brien, 'Blogs and the Law: Key Issues for the Blogosphere' (2007) 12 (2) *Media and Arts Law Review* 141 at 159

<sup>84</sup> Ibid

<sup>85</sup> Ibid

<sup>86</sup> Judy Skatssoon, 'Blogging may get you the sack', ABC Science Online (2006) <http://www.abc.net.au/science/news/stories/s1627903.htm> at 12 October 2007

<sup>87</sup> *Copyright Act 1968* (Cth) ss 36(1), 101(1).

Where a person running a blog, website or wiki is liable for others' infringements, they may be able to avoid paying damages if they fall within one of the ISP exceptions or safe harbours set out in the *Copyright Act* [see 3.4.3].

## Guidelines for Identifying Authorised Infringement

Whether a person has authorised a copyright infringement is always considered on a case by case basis, looking at all the circumstances involved. However, there are statutory guidelines and a growing body of case law that provide some guidance as to what might be an authorisation.

The *Copyright Act* requires courts to consider the following factors in determining whether a person has authorised an infringement:<sup>88</sup>

- **control:** the extent of the person or organisation's power to prevent the infringement. For example, being able to prevent people from posting infringing material may be enough to make you liable if you do not choose to do so;
- **relationship:** what the relationship is between the person in question and the person who undertook the infringement; and
- **reasonable steps:** whether any reasonable steps were taken to prevent or mitigate the infringement, such as removing infringing material. Compliance with any relevant industry codes of practice may be relevant here. Statements prohibiting copyright infringement on the website may not be sufficient to prevent liability.<sup>89</sup>

Other factors which are also likely to be influential on any court decision include:

- **knowledge:** any knowledge of the infringement;<sup>90</sup>
- **commercial benefit:** any direct financial gain (for example, money from advertising) or an indirect benefit (for example, by

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<sup>88</sup> *Copyright Act 1968* (Cth) ss 36(1A), 101(1A).

<sup>89</sup> See *Copyright Act 1968* (Cth) ss 36(1A), 101(1A); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.

<sup>90</sup> See *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 (Wilcox J).

using infringing software posted to a corporate wiki) arising from the infringement;<sup>91</sup>

- **encouragement:** for example, any statements on the site that encourage copyright infringement, such as a 'Join the Revolution' headline.<sup>92</sup>

### Example – Non-Infringing Activities

In 1984, the US decision of *Sony v Universal*<sup>93</sup> held that a distributor of VCR recorders could not be held liable for authorising users' infringement of copyright using the VCR (eg by copying movies or television), so long as the VCR was capable of substantial non-infringing activities.

In other words, the fact that a technology or service (such as file sharing and wiki software) is capable of being used for infringing purposes does not mean the technology or service will itself necessarily be illegal.

Other factors that courts will take into account in deciding whether a technology or service is illegal are discussed in the following examples.

### Example – Knowledge of Infringement

In 2002, the first case was brought against a peer-to-peer music downloading service, Napster. The US court held that, while a computer system operator will not be held liable merely because its system is used to infringe, it will be liable if it learns of the copyright infringement and does not remove the infringing materials.

The providers of the Napster service were held guilty of contributory infringement because the facts showed that Napster had:

- knowledge of the infringing music files being shared through its system;
- a financial interest in the infringing activities; and
- the capacity to stop the infringements (eg by blocking the user's

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<sup>91</sup> See *Universal Music v Cooper* [2005] FCA 972

<sup>92</sup> See *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA

<sup>93</sup> *Sony Corporation of America Inc v. Universal City Studios* 464 U.S. 417 (1984)

access to its system) which it chose not to exercise.

### **Example – Inducing Infringement**

In 2005, the US case of *MGM v Grokster*<sup>94</sup> ruled that although the peer-to-peer software being used by Grokster was capable of non-infringing activities and hence was not illegal per se, Grokster was nevertheless liable for authorising infringements taking place on its system because it had 'induced' those infringements by promoting the service as able to infringe copyright.

## **2.9.12 Liability for links and downloadable content**

A person may be seen as authorising an infringement of copyright if they:

- allow others to download a podcast or vodcast from their site without the creator's permission;
- allow others to download a podcast or vodcast from their site which includes infringing material in it; or
- link to other sites that facilitate infringements (eg by providing infringing material for download).

This applies even where the material or link has been uploaded by someone else (eg a site user).<sup>95</sup> Because the person in charge of the site ostensibly has control over what material is posted, they may be held liable for its continued reproduction, publication and distribution by others.

Providing a link will not usually amount to authorising infringement, particularly where the person behind the link had no reason to know the material being linked to was infringing. However, if your actions or the actions of your users can be seen as promoting or facilitating the infringement you are at risk of being held liable.

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<sup>94</sup> *MGM v Grokster* 545 U.S. 125 S.Ct. 2764 (2005)

<sup>95</sup> See *Universal Music v Cooper* [2005] FCA 972

### **Example – Infringement by linking**

In 2006, the Australian case of *Universal Music v Cooper*<sup>96</sup> held that the proprietor of the MP3s4free music downloading service was liable for authorising infringements when he let others post links to illegal music downloads on his website. The proprietor was held liable because he:

- had the power to prevent the infringements by not allowing the links to be posted;
- was benefiting financially from added traffic on his site due to the links (through sponsorship and advertising);
- did not take any reasonable steps to prevent the copyright infringements.<sup>97</sup>

### **2.9.13 Disclaimers and Notices**

To reduce the risk of liability for authorisation Creators should place clear, prominent notices explaining acceptable usage on their website.

However, simply providing a statement that people should not upload copyright material, or even that you are not responsible for material on the site, will not in itself absolve legal liability, particularly if a website is still structured in a way so as to facilitate copyright infringement.<sup>98</sup>

For a website to be legal, it should be designed to facilitate primarily non-infringing activities and must not be utilized solely for infringing conduct. All site operators should have a clear policy of removing infringing material that is brought to their attention by others.

For more information on steps that can be used to limit liability for material posted to your site see 3.4.3.

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<sup>96</sup> *Universal Music v Cooper* [2005] FCA 972

<sup>97</sup> See B Fitzgerald, A Fitzgerald, G Middleton, Y Lim and T Beale, *Internet and E-Commerce Law Technology, Law and Policy*, Lawbook Co, 2007 at [12.55.2]

<sup>98</sup> P. Black, H. Delaney and B. Fitzgerald, *Legal Issues for Wikis: The Challenge of User-Generated and Peer-produced Knowledge, Content and Culture*, eLaw Journal Vol. eLaw Journal Vol 14, No 1, 2007 14, No 1, 2007.

### Example – Disclaimers and Authorised Infringement

The recent high-profile case of *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*<sup>99</sup> found that the proprietors of the Kazaa peer-to-peer file sharing network were liable for authorising infringements occurring on the service. Importantly, the court found that warnings on the Kazaa website and the end user license agreement prohibiting infringing copyright were ineffective to prevent such conduct.

It was particularly relevant that:

- Kazaa were aware that their system was being utilized for sharing copyright files;
- Kazaa did not implement any technical measures to prevent or discourage infringement, such as key word and file filtering which could have curtailed the sharing of copyright files; and
- Kazaa encouraged misconduct by including exhortations such as 'Join the Revolution'.

### 2.9.14 Technological Protection Measures

Some copyright owners use technology to protect their digital material against copyright infringement. These technologies, which are commonly referred to as digital rights management (DRM) include:

- **technological protection measures (TPMs):** These are technologies that prevent people from copying, communicating and (in some cases) even accessing material. They might include, for example, copy protection locks, encryption and password protection;<sup>100</sup> and
- **electronic rights management information (ERMI):** These are technologies that describe, identify, monitor and track digital copyright material. They include, for example, digital

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<sup>99</sup> *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.

<sup>100</sup> See B Fitzgerald, A Fitzgerald, G Middleton, Y Lim and T Beale, *Internet and E-Commerce law Technology, Law and Policy*, Lawbook Co, 2007 at [4.155]

watermarking and the embedding of identification metadata and terms and conditions in digital material.<sup>101</sup>

A person who does an act to circumvent these technological controls, for example using a device that allows an encoded DVD to be copied or an encoded broadcast to be accessed, will usually be liable for copyright infringement.<sup>102</sup>

In addition, it is illegal to knowingly distribute or communicate to the public any copyright material that has had its ERMI removed.

These rules apply even where the person only makes legal uses of the material once the TPM or ERMI has been removed.

### **Example – Removing Electronic Rights Management Information**

As part of the process of adding an mp3 file to a podcast, a podcaster removes the metadata from the file. They then post a link to the podcast on a social networking blog. This is an infringement of the copyright owner's rights, as it amounts to removal of ERMI.

### **Example – Circumventing Technological Protection Measures**

A person buys a song from iTunes. The file is protected by software that stops them from making more than a certain number of copies of the file or loading it online. The person runs the file through a program that removes this software, so that they can use the music in a video they are making for a school assignment.

The act of breaking the copy protection lock is, in itself, an infringement of copyright, even though their final use of the material may be legal.

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<sup>101</sup> Ibid at [4.155-4.160]

<sup>102</sup> See *Copyright Act 1968* (Cth) ss116AK -116AQ.

### **2.9.15 Common Infringements**

Below is a list of common circumstances where people infringe copyright, often without realising it.

These cases will not always infringe copyright. In certain circumstances one of the exemptions discussed in 3.3 or 3.4 may apply (for example if they are a parody or satire). However, in most cases, these activities will be illegal under Australian law if you do not have permission from the copyright owner.

- Recording a concert on a mobile phone or camera, or posting a bootlegged recording of a concert to your blog.
- Copying a whole article from a blog or news site onto another site or blog.
- Using a photograph from an online source (eg Flickr or Google Images) to illustrate an article on a wiki or in a publication.
- Using a song in the soundtrack of a podcast.
- Creating videos using snippets of a movie or television show, even if the snippets are only news footage or the video is a fan video showing the 'best bits'.
- Recording a sports game on television and posting it on YouTube.
- Using a sample of a song in a mashup or remix.
- Copying music from your friend's iPod or CD.
- Copying a DVD onto your computer or video iPod.
- 'Scraping' (ie copying) an article from another person's blog onto your own site.



## 2.10 Rights Related to Copyright

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### Key Points:

- In addition to copyright, 'performers rights' and 'moral rights' can also exist in some material.
- In addition to the copyright owner, consent may be needed from the original creator and the performer of material before it can be utilized in a blog, podcast, vodcast or wiki.
- Creators of copyright material have personal rights known as 'moral rights', that require you to:
  - Attribute (credit) the creator of any content used;
  - Ensure that the attribution is correct; and
  - Not treat the copyright material in a 'derogatory' way.
- In addition to moral rights, performers also have rights to prevent the recording and distribution of their live performances without their permission.

### 2.10.1 Moral Rights and Performers Rights

In addition to copyright, the *Copyright Act* also provides for certain personal rights for the creators and performers of copyright material. These are called moral rights and performers' rights. They are not copyrights as such but are referred to as 'related rights'.

Like copyright, these rights arise automatically when the work is created. Unlike copyright they cannot be assigned or licensed by their owner, and will stay with the creators and performers even if they are not the copyright owners of the material. However, the owner can consent to others using their material in ways that might otherwise infringe their moral or performers rights (eg by reproducing the material without crediting them) in certain circumstances [see 2.10.6].<sup>103</sup>

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<sup>103</sup> *Copyright Act 1968 (Cth)*, s195AWA(2).

### 2.10.2 Moral Rights

Individual authors of literary, dramatic, musical and artistic works and films, as well as performers in sound recordings, have the following moral rights:

- The right to be attributed (or credited) for their material or performance;<sup>104</sup>
- The right not to have their material or performance falsely attributed;<sup>105</sup> and
- The right not to have their material or performance treated in a 'derogatory' way.<sup>106</sup>

As moral rights are 'personal' rights, they will always be retained by the creator or performer in question, even where the copyright in the material is owned by someone else.

### 2.10.3 Ownership of Moral Rights

The owner of the moral rights in a literary, dramatic, musical or artistic work is the 'author' of the work.<sup>107</sup> This is the natural person (ie not corporation or other legal entity) who created the work. If there is more than one creator, each of the contributors will have moral rights over the work.

For films, the principal director, the producer and the screenwriter will be joint 'authors'.<sup>108</sup>

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<sup>104</sup> *Copyright Act 1968* (Cth), ss 193-195AB and 195ABA-ABE.

<sup>105</sup> *Copyright Act 1968* (Cth), ss 193AC-195AH and 195AHA-AHC.

<sup>106</sup> *Copyright Act 1968* (Cth), ss 193AI-195AL and 195ALA-ALB.

<sup>107</sup> *Copyright Act 1968* (Cth) ss 193, 195AC and 195AI. The director, producer and screenwriter all separately own moral rights in relation to a film (*Copyright Act 1968* (Cth) s 189). Where there are multiple directors etc it is only the principal director, screenwriter and producer who hold moral rights (*Copyright Act 1968* (Cth) s 191).

<sup>108</sup> The director, producer and screenwriter all separately own moral rights in relation to a film (*Copyright Act 1968* (Cth) s 189). Where there are multiple directors etc it is only the principal director, screenwriter and producer who hold moral rights (*Copyright Act 1968* (Cth) s 191).

The performer/s will own moral rights in a sound recording of a live performance.<sup>109</sup> Note that the author of any literary, dramatic, musical or artistic work included in the performance will also have moral rights (eg the composer of the song being performed).

#### **2.10.4 Duration of Moral Rights**

Moral rights last until copyright expires in the work (ie usually the life of the author plus 70 years). The exceptions to this are the rights of integrity in a film and in a recorded performance, which only last until their owner's death.<sup>110</sup>

#### **2.10.5 Observing Moral Rights**

Creators' moral rights can be observed by following the guidelines set out below whenever using third-party content in a blog, podcast, vodcast or wiki.

If there is any doubt as to whether a particular use will infringe moral rights, consent from the creator should be obtained.

#### **Clear Attribution**

Blog, podcast, vodcast or wiki Creators should always attribute posted material to the individual who created it.

In some cases the creator may have identified how they wish to be attributed.<sup>111</sup> If not, a 'clear and reasonably prominent' form of identification should be used so that any person seeing or hearing the copyright material would be aware of the creator's name.<sup>112</sup>

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<sup>109</sup> *Copyright Act 1968* (Cth) ss 195ABA, 195AHA, 195ALA

<sup>110</sup> *Copyright Act 1968* (Cth), s 195AM and 195ANA.

<sup>111</sup> See *Copyright Act 1968* (Cth), s195(2). For example, see the instructions provided by Flickr member Qole Pejorian (aka Alan Bruce) on his profile page at <http://www.flickr.com/people/qole/?search=qole+pejorian>

<sup>112</sup> *Copyright Act 1968* (Cth), s195AA.

### **Example – Articles**

The author of an article may be attributed by writing the author's name below the headline of the article, or immediately at the end of the text in a clear font of a reasonable size. For example, 'By Sally Smith'.

### **Example – Artistic Materials**

The creator of a photograph or drawing may be attributed by writing the artist's or photographer's name immediately above or below the image. For example, 'By Sally Smith'.

### **Example – Vodcasts**

The creator/s of a vodcast (usually the principal director, the producer and the screen writer) may be attributed by listing them in the credits of the vodcast. The creator/s of any material used in the vodcast (eg a song used as background music) should be attributed in the same way.

### **Example – Podcasts**

The performers captured in a sound recording and the authors of any songs performed during the sound recording may be attributed in a podcast by listing the performer's names at the beginning or end of the song (like a radio announcement), as part of 'credits' included at the end of the podcast, or in a list next to the podcast on the webpage.

## **Correct Attribution**

Always credit the correct person as the creator of the copyright material. Do not imply falsely that any person, other than the individual creator, created the material.<sup>113</sup> Do not knowingly communicate any copyright material that has been falsely attributed.<sup>114</sup>

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<sup>113</sup> See *Copyright Act 1968* (Cth), ss 193AC-195AH.

<sup>114</sup> See *Copyright Act 1968* (Cth), ss195AC-195AF.

### **Example - Attribution**

A blogger reproduces text from another website on their blog and presents it as if it is their own original blog entry without crediting the author of text.

This infringes the author's moral right of attribution. It also potentially infringes their right against false attribution, as it implies that the blogger is the original author of the material.

### **Example – False Attribution**

Moral rights were recently relied on in an Australian case concerning a photograph published in *Woman's Day* magazine.<sup>115</sup>

A freelance photographer took a photograph of Princess Mary of Denmark posing in front of a portrait of the late Dr Victor Chang which had been painted by the artist Mr Vlasas Meskenas. The caption of the photo when it was published in *Woman's Day* said 'the Princess posed with the portrait of Dr Chang by Jiawei Shen, who is painting the Princess for the National Portrait Gallery in Canberra'.

This caption was incorrect, the painting was painted by the artist Vlasas Meskenas, not Jiawei Shen. The artist was unhappy with having his creativity attributed to someone else and instituted legal proceedings against the publisher after requests for an apology were ignored.

Despite the fact that this was an innocent mistake, the court found that both the artist's moral right of attribution and their right against false attribution had been infringed. The artist was awarded \$9,100 in damages.

## **Acknowledge Alterations**

Always acknowledge any alterations or modifications made to the original copyright material. Altering material can infringe the author's right of integrity, and acknowledgment can help to prove that your actions were reasonable. Furthermore, dealing with an altered

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<sup>115</sup> *Meskenas v ACP Publishing Pty Ltd* [2006] FMCA 1136.

reproduction of copyright material as if it is a reproduction of the unaltered material of the creator may constitute false attribution.<sup>116</sup>

### **Example – Unacknowledged Alteration**

A blogger gets permission from the author of a short story to post the story online. Going against the terms of the agreement, the blogger completely changes the ending without acknowledging the alteration. This may infringe the author's moral right of integrity, if it is held to be prejudicial to the author's honour or reputation.

### **Derogatory Treatment**

Blog, podcast, vodcast or wiki Creators and Users should not treat any copyright material in a way that constitutes 'derogatory treatment'.<sup>117</sup>

'Derogatory treatment' is doing anything to the copyright material that:

- 'results in a material distortion of, the mutilation of, or a material alteration to, the material that is prejudicial (damaging) to the author's honour or reputation';<sup>118</sup> or
- doing 'anything else' to the copyright material 'that is prejudicial to the author's honour or reputation'.<sup>119</sup>

In relation to artistic works such as photographs or images, derogatory treatment can also occur by exhibiting the material in public in a manner that is prejudicial to the author's honour or reputation.<sup>120</sup>

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<sup>116</sup> See *Copyright Act 1968* (Cth), ss195AG, 195AH.

<sup>117</sup> *Copyright Act 1968* (Cth), s195AI.

<sup>118</sup> *Copyright Act 1969* (Cth) ss195AJ

<sup>119</sup> *Copyright Act 1968* (Cth), ss 195AJ - 195AL.

<sup>120</sup> *Copyright Act 1968* (Cth), s195AK.

### **Example - Colourising Film**

A film director creates a film. The director deliberately shot in black and white for its artistic relevance. A vodcaster reproduces the film in a vodcast, but alters it so that the film is now in colour.

This may constitute 'derogatory treatment' that is damaging to the director's honour. The vodcaster has therefore infringed the director's moral right not to have their material treated in a derogatory manner. The director may have a legal right to have the vodcast removed.<sup>121</sup>

### **Example - Modifying Artwork**

The author of a wiki entry inserts reproductions of a famous painter's artwork.

The author presents the reproductions in customised borders that extend the patterns of the painting and frame the artwork. This may constitute 'derogatory treatment' that is damaging to the artist's honour and reputation.<sup>122</sup>

## **2.10.6 Obtaining Consent**

An author or performer can consent to a use that might otherwise breach their moral rights.<sup>123</sup> If for some reason you cannot, for example, attribute the author, or if you are unsure if your use is derogatory, you should obtain a consent from the author.

The consent must be in writing and must relate to a specific work and a specific act. Any consent that is too general will not be upheld by a court. There are two exceptions to this rule:

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<sup>121</sup> Based on colouring of John Huston's black and white films. Under French law it was held that his moral rights were inalienable, regardless of any contract with the film studio, and lasted beyond his death. See Cass. Civ. 1re, 1991 Bull. Civ. I 113.

<sup>122</sup> Based on German case, *Hundertwasser* BGHZ 150, 32, See Cyrill P. Rigamonti, Deconstructing Moral Rights, Harvard International Law Journal, Vol.47, No.2, 2006 at page 365.

<sup>123</sup> Copyright Act 1968 (Cth) ss 195AWA and 195AXJ

1. an employee can give their employer a general moral rights consent with respect to all the material they produce as part of their employment;<sup>124</sup> and
2. a filmmaker can give a general moral rights consent that relates to any act done with their film, as long as the consent is still limited to a specific film.<sup>125</sup>

Consent is not required if only an insubstantial part of the protected material is being used.<sup>126</sup>

### **Example – Specific Consent Required**

A musician uploads a song onto a website under a licence that gives the user a broad right to 'remix' the song but doesn't specify how or in what circumstances. A DJ downloads the song and remixes it to change the central message of the lyrics to insult the original author.

Even though the licence on the song lets the DJ change it, because it is vague it is unlikely to be specific enough to amount to a consent to allow derogatory treatment of the work. The DJ can, however, write to the musician and get their permission to release the remixed version.

## **2.10.7 Defence of Reasonableness**

Moral rights will not be infringed where a person can prove that their treatment of the work or performance was reasonable.<sup>127</sup>

In deciding whether a particular use was 'reasonable', the court will consider all the circumstances, including the nature of the work, the purpose of the treatment, and the context in which the work was being used.

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<sup>124</sup> *Copyright Act 1968* (Cth) ss 195AWA(4) and 195AXJ(4)

<sup>125</sup> *Copyright Act 1968* (Cth) ss 195AW

<sup>126</sup> *Copyright Act 1968* (Cth) ss 195AZH and 195AZP

<sup>127</sup> *Copyright Act 1968* (Cth) ss 195AR, 195AS, 195AXD and 195AXE



### **Example – Reasonable Treatment**

A blogger uses an untitled photograph from Flickr on their blog. Under the Creative Commons licence that applies to the photograph the blogger has the right to reuse photograph as long as she attributes the author [see 3.5.3].

The photographer's username on Flickr is xbox73, but their real name is not listed. The blogger includes the statement 'Untitled by xbox73' next to the photograph and provides a link to the photograph on Flickr and to the Creative Commons licence for the photo.

As the photographer's full name is not available, it is reasonable in this case to use the Flickr username instead. Therefore, the blogger has complied with the moral right of attribution and the Creative Commons licence.

In this case, it might also be a good idea to send the photographer a message that you've used the photograph. This gives them a chance to provide more detailed attribution if they like.

## **2.10.8 A Copyright Licence is Not Enough**

The economic rights conferred by copyright are separate from moral rights. If your use might infringe an author's or performer's moral rights, you must obtain consent even if you have a copyright licence to use the material.

Sometimes the copyright owner will also be the owner of moral rights, and so can provide you with all the permissions you need. But often you will need separate consents. For example, the moral rights for sound recordings are held by the performers of the recordings, not the producer (who will usually be the copyright owner).

### **Example - Moral Rights vs. Copyright Permission**

A broadcaster has a licence to broadcast a classic television show, made in the 70s. To meet modern requirements, they edit the show

to insert ads and to make it shorter, without asking the authors.

Despite the fact that the broadcaster had the necessary licences to air the programs and the editing was only minor, the broadcaster will potentially have infringed the rights of integrity held by the director and scriptwriter of the show.<sup>128</sup>

## 2.10.9 Performers Rights

In addition to the moral rights discussed above, Australian copyright law also grants performers rights over audio recordings of their live performances.

Performers have the right to prevent others from:

- Recording, including by filming, their live performances (ie making bootleg recordings);<sup>129</sup>
- Communicating to the public (eg by broadcasting or making available online) their live performances directly from the performance;<sup>130</sup>
- Reproducing, communicating or playing in public unauthorised recordings of their performances;<sup>131</sup>
- Recording an unauthorised broadcast or other communication of their performance;<sup>132</sup>
- Using any recording (even an authorised recording) of their performance in the soundtrack of a film.<sup>133</sup>

<sup>128</sup> See, for example, *Gilliam v American Broadcasting Co* 538 F.2d 14 (2d Cir. 1976).

<sup>129</sup> *Copyright Act 1968* (Cth) s 248G(1)(a)

<sup>130</sup> *Copyright Act 1968* (Cth) s 248G(1)(b). Note that this right does not extend to the right to prevent communication of authorised recordings of performances (s 248G(3)). This means that the performer's permission will not usually be needed to broadcast a commercial album (which will usually have been made with the performer's consent) – unless the performer is also a copyright owner of the recording.

<sup>131</sup> *Copyright Act 1968* (Cth) ss 248G(1)(b), 248G(2)(a), and 248G(2)(h)

<sup>132</sup> *Copyright Act 1968* (Cth) s 248G(1)(a)

<sup>133</sup> *Copyright Act 1968* (Cth) s 248G(2)(c)

Like moral rights, these rights are personal and will always be held by the performer. They cannot be assigned or transferred to another.

### **2.10.10 Types of Performances**

These rights apply to audio performances of all types, including musical performances, plays, readings of literary works, oral presentations, ballets and circus performances.<sup>134</sup> They do not, however, apply to sporting events, news readings, classroom presentations, or performances by members of an audience (eg heckling at a comedy gig).

### **2.10.11 Duration of Performers' Rights**

These rules apply to any performances that took place on or after 1 October 1989, and last as follows:<sup>135</sup>

- right to prevent use of an unauthorised sound recording of a performance - 50 years from the date the performance;
- right to prevent use of an unauthorised film of a performance – 20 years from the date of the performance;
- right to prevent the communication of the performance - 20 years from the date of the performance; and
- right to prevent the use of a performance in the soundtrack of a film - 20 years from the date of making the recording.

When a performer dies, the rights pass to their heirs or estate.

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<sup>134</sup> *Copyright Act 1968* (Cth) s 248A

<sup>135</sup> *Copyright Act 1968* (Cth) s 248CA

### **2.10.12 Obtaining Permission for Performers Rights**

Performer's rights are of particular importance to blog, podcast, vodcast and wiki Creators and Users who want to utilise any recording of a performer's live performance.

In order to avoid infringing performer's rights, you must seek permission from each of the performers featured in a live performance before it is recorded or communicated. This can make it extremely difficult, for example, to live-stream any performance of a large group, such as a choir.

You should take particular care when copying or communicating a recording made by others. If it was made without the performer's permission, you can be held liable for infringing the performer's rights. Use your common sense – recordings made on a mobile phone at a concert are unlikely to be legitimate.

On the other hand, if a recording has been made with the performer's consent, you will often find that the copyright owner has already obtained permission in advance for other uses you may wish to make. For example, it is common practice in the music and film industries for consent to include a performance in the soundtrack of a film to be obtained when the original recording is made. If this is the case, you do not need to seek additional permission from the performer.

It is important to note that these rights are in addition to any rights a performer may have as a copyright owner. This means that, even where you do not need to obtain the performer's permission due to their performer's rights, you may still need their permission as a copyright owner of the music or sound recording. For more information on when a performer will own copyright see 2.5.

### **2.10.13 Exceptions to Performers' Rights**

You do not need to obtain consent from the performer if:

- the recording is to be used solely for criticism and review or reporting the news;
- a communication of the performance (eg a radio broadcast) is indirectly recorded while you are making a film or sound recording for certain purposes, including private use and research or study;

- the performer has agreed to the performance being recorded for a certain purpose, and you are only using the recording for that purpose. For example, where a performer has given you permission to record their performance for inclusion in a podcast, you do not have to go back and get extra permission when it comes time to put the podcast up online.

### **Example - Unauthorised Recording of a Performance**

A blogger records a live concert on their mobile phone without obtaining permission from the performers. This is an unauthorised recording – the mere act of recording is an infringement, and the performer has legal rights to prevent it or seek compensation.

If the blogger posts the material online, this will also be an infringement of copyright, and the performer has the right to prevent the posting.

### **Example - Unauthorised Use of a Performance**

A person creates a vodcast with their own original content, but they include background music from a recording of a live performance by a classical pianist.

If the vodcaster does not obtain permission from the pianist, the pianist has legal rights to prevent the vodcast being made available online. The pianist or other copyright owner will also have a potential action against the vodcaster for any copyright infringement of the sound recording and/or the musical work itself.

## 2.11 Remedies

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### 2.11.1 Copyright/Economic Rights

If blog, podcast, vodcast or wiki content is found by a court to have infringed the exclusive rights of the copyright owner, they may be subject to one or a combination of the following remedies:

- **an injunction:** this court order either prevents an infringement occurring or stops an infringement from continuing. For example, the court may order that an infringing podcast be removed from a blog;
- **damages:** damages provide compensation to the copyright owner for the infringement. This is usually based on the amount the copyright owner would have been able to charge for the use of the material. However, if the infringer derives some additional benefit, or they misuse copyright material in a flagrant manner the court may award additional damages; or
- **account of profits:** an account of profits is an order that any profits made from the infringement must be paid to the copyright owner.

### 2.11.2 Moral Rights

If blog, podcast, vodcast or wiki content infringes the creator's moral rights, the court may order one or a combination of the following remedies against a blog, podcast, vodcast or wiki Creator or User:<sup>136</sup>

- **an injunction;**
- **damages;**
- **a public apology:** the person infringing the creator's moral rights may be ordered by the court to make a public apology for the infringement;

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<sup>136</sup> Copyright Act 1968 (Cth), s195AZA.

- **removal of infringing material:** any false attribution of authorship, or derogatory treatment of the copyright material may be ordered to be removed or reversed; or
- **declaration of infringement:** a declaration recognising that a moral right has been infringed may be ordered.

### 2.11.3 Performers' Rights

If blog, podcast, vodcast or wiki content infringes a performer's rights, the court may order one or both of the following remedies against a blog, podcast, vodcast or wiki Creator or User:<sup>137</sup>

- **an injunction;** or
- **damages.**

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<sup>137</sup> *Copyright Act 1968 (Cth)*, s248J(2).

# Part 3

## Using Copyright Material



## 3.1 The Basics

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### Key Points:

- As a general rule, you need to obtain the permission of the copyright owner before using their content in a blog, podcast, vodcast or wiki.
- If there is more than one copyright item, or more than one copyright owner, you must obtain permission from all the owners.
- The permission obtained from the copyright owner can be limited eg to certain uses, certain timeframes or certain locations.
- Even where you have copyright permission, other legal rights such as privacy and defamation may still need to be considered.

### 3.1.1 General Rule – Permission is Required

As a general rule, you will need to obtain the permission of the copyright owner before you can use their content in a blog, podcast, vodcast or wiki. This rule applies whenever a substantial part of the material is being used, no matter how small that part is [see 2.9.4], and regardless of how much the material has been altered.

The main exceptions to this rule are:

- where copyright has expired;
- where you are using an insubstantial part of the material; or
- where the *Copyright Act* does not require you to seek permission (e.g. a statutory exception or licence applies).

These exemptions and other instances where permission is not required are discussed below at 3.2.

### **3.1.2 Identifying the Copyright Owner**

Permission to use copyright material should be sought from the copyright owner.

The copyright owner in first instance will usually be the original creator of the material, such as the author of a literary work, although there are exceptions to this rule. For example, in many industries it is standard practice for the creator to assign their copyright to the publishing or production company. For more information on identifying the copyright owner see 2.5.

In most cases, contacting either the creator or the publisher of material is a good place to start if you want to find out who is the copyright owner. The process of obtaining permission is discussed in detail in Part 4.

### **3.1.3 Multiple Copyright Owners**

If there is more than one copyright owner, you must obtain permission from each separate copyright holder. This may occur, for example, if several people worked together to create the material (as is common for wikis), or if the material contains underlying works such as a script or background music. For more information about multiple layers of copyright see 2.7.

If you do think that the copyright item you want to use might contain other people's material, you should ensure that the copyright owner you are dealing with can give you permission to use all the material. The fact that they have a licence to use the material themselves does not necessarily mean they have the right to grant a licence to other people.

If the copyright owner you are dealing with does not have the right to license the material to you, you should obtain permission from other rights holders yourself.

### **3.1.4 Permission May Be Limited**

Permission to use material can be limited to certain situations and requirements. For example, permission to post an excerpt of a blog

entry may be given on the condition that it is not used for commercial gain. The licence or terms of use for the material should spell out any restrictions.

Importantly, any new permission granted by a copyright owner must not be at odds with the terms of any existing licence over that material. If the copyright owner has already entered into an agreement with another person over the material, any permission they can grant will be limited by this agreement. For example, if the copyright owner has already entered into an exclusive online publishing agreement with one website, they cannot then grant permission for another website to publish the material.

### **3.1.5 Other Rights**

You should also ensure that you do not infringe any non-copyright rights in the material. Many copyright products will be subject to other legal rights, such as trade mark rights, privacy rights, or defamation rights. These may be held by the copyright owner, or by another third party.

A copyright licence will not protect you from actions for breach of other legal rights in the material.

## 3.2 Six Instances when Permission is Not Required

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### Key Points:

- Permission to use copyright material is not required in certain cases, but these are limited.
- Permission is not required to use ideas, as opposed to the expression of those ideas.
- Generally, permission is not required to use facts by themselves. However permission may be required if the facts form part of a database or compilation of facts. Usually it will be the expression or compilation of those facts that cannot be reproduced, not the individual facts in themselves.
- Permission is not required to use material that is no longer protected by copyright. The term of copyright protection depends on the type of material.
- Permission is not required where an insubstantial part of the material is being used.
- Permission is not required where the material is being used for a 'fair dealing' under Australian copyright law (the equivalent exception in the U.S is called 'fair use').
- Permission is not required where the use falls within any of the other limited exceptions or statutory licences provided by the *Copyright Act*.
- Permission is not required to use copyright material where the use is covered by the terms of an existing licence, such as a terms of use or Creative Commons licence.

### 3.2.1 Ideas

There is no copyright in general ideas which have not been further expressed in an actual physical format, no matter how original. The law does not allow copyright in ideas because this would allow one

person to have copyright in a thought to the exclusion of all other people.

In copyright law, it is the expression of the idea that is protected – ie the sentences, notes and images etc. This expression can be stored in hardcopy (eg a book) or electronic (eg a computer disc) form, but it must be manifested in some physical (or material) way.

## **Material Form**

Examples of expressing an idea in a material form include:

- writing a book or article;
- taking a photograph;
- filming a performance with a camera;
- recording a song onto a tape;
- writing a program on a computer and saving it on a hard drive.

## **Using the Idea, not the Form**

This distinction means that mere ideas emanating from other people which have not been expressed in a physical form can be discussed in a blog, podcast, vodcast or wiki without having to first obtain permission.

It also means that, where an idea has been expressed in a material form, you can still use it as long as you do not use any of the physical expression itself. However, you must be careful not to copy the idea too closely, as you could run the risk of infringing the copyright in the expression.

For example, while you cannot copy footage from an episode of *The Simpsons* without permission, you can create your own animation about a dysfunctional American family. However, if your characters include an overweight father, a blue-haired mother and children called Lisa, Bart and Maggie, it may be infringing.

When exploiting ideas you should also consider whether your use might breach other legal rights, such as an employee's obligation to keep trade secrets confidential.

### **Example – Material Form:**

A vodcasteer thinks of an idea for a series of educational vodcasts and mentions the idea in conversation to a colleague, including details about the topics and style of the vodcasts. A few days later the vodcasteer discovers that their colleague has used this idea to create a series of educational vodcasts about exactly the same topics and in exactly the same style as was discussed.

If the vodcasteer did not express his or her idea in a 'material form' before informing that colleague, such as by writing a script, they will not have any action for copyright infringement against their colleague.

However if the vodcasteer did write down their idea in, for example, a script then they may have a course of legal action. While the vodcasteer's colleague still has not infringed copyright in the idea (which is not protected), if their product is similar enough to the script, they may have infringed the vodcasteer's copyright.

### **3.2.2 Facts**

Facts in themselves do not attract copyright protection and can be included in blogs, podcasts, vodcasts or wikis without permission.

#### **Reporting Factual Events**

Factual events reported in a newspaper can be included in blogs, podcasts, vodcasts and wikis without obtaining permission from the newspaper, provided that you do not reproduce the article itself. Using a short quote from the article may be permissible; however this would need to be in the context of an exemption, such as the fair dealing exception for reporting the news [see 3.3.7].

#### **Databases and Factual Compilations**

Reproducing or communicating individual facts from a database or a compilation of facts is in general allowed. However, copyright in the database may be infringed where facts are extracted from the database and reproduced, in the same format and expression as the database, without permission.

This is particularly the case in Australia, where databases and factual compilations may be protected by copyright simply on the basis that they required labour and expense to create.<sup>138</sup> Care must be taken to use only the information contained in the database, and not recognisable excerpts from the database itself.

In the US, databases and factual compilations need some degree of creativity in the selection, coordination and arrangement of facts, for copyright to exist. In essence this means that uses of a database that are legal in the US may not be lawful in Australia.

### **Example – Factual Databases**

Names and telephone numbers are facts which are not, in themselves, protected by copyright.

However an online telephone directory that can be searched by various filters such as name, address, postcode, and business type is a database that may be protected on the basis that its creation involved substantial labour and expense.<sup>139</sup> So while an individual name or address from the database could be reproduced without permission, a longer list or the database itself could not.

### **3.2.3 Public Domain: Content No Longer Protected by Copyright**

Permission is not required to use content that is no longer protected by copyright. This content is often referred to as being in the 'public domain'. In Australia the term of copyright protection will depend on the nature of the material, and the date of publication.

### **Text, Musical Scores and Artwork**

As a general rule, text, scripts, musical lyrics, compositions, drawings, paintings and photographs are protected by copyright for

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<sup>138</sup> See *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112; *Nine Network Australia Pty Limited v IceTV Pty Limited* [2008] FCAFC 71.

<sup>139</sup> See *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112.

70 years after the year in which the author died.<sup>140</sup> This means such material will often be protected by copyright for more than 150 years from when it was created. This rule applies even if the original author or the date they died cannot be identified.

It should be noted, however, that the 'life plus 70' rule is relatively new. Until 2005, copyright works were only protected for the life of the author plus 50 years. If the author died before 1955, the material should be in the public domain.

If the content has not been published (made available to the public) before the author dies it will be protected for 70 years after the date of the first publication.<sup>141</sup> This means that you should take particular care in using unpublished material, as it can in theory remain in copyright forever. Specific exceptions in the Act allow for the publication of unpublished material in certain circumstances.<sup>142</sup>

## **Sound, Video, Broadcasts and Published Editions**

Sound recordings and cinematographic films (moving images and accompanying sounds) are protected by copyright for 70 years from the year of first publication.<sup>143</sup>

Once again, this is the result of a 2005 extension of the copyright term, so sound recordings and films published before 1955 should be able to be used without fear of copyright infringement

Radio and television broadcasts, which may be included in podcasts or vodcasts, are protected for 50 years from the year the material was first broadcast.<sup>144</sup>

The duration of copyright in published editions of material is 25 years from the year of first publication.<sup>145</sup>

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<sup>140</sup> *Copyright Act 1968 (Cth)* s 33.

<sup>141</sup> *Copyright Act 1968 (Cth)* s 33.

<sup>142</sup> *Copyright Act 1968 (Cth)* ss 52 and 110A.

<sup>143</sup> *Copyright Act 1968 (Cth)* ss 93, 94.

<sup>144</sup> *Copyright Act 1968 (Cth)* s 95.

<sup>145</sup> *Copyright Act 1968 (Cth)* s 96.



## **Don't forget the underlying material**

It is important to note that copyright material, and in particular sound recordings, films, broadcasts and published editions, will often include other copyright works.

For instance, the music and lyrics of a song will be protected separately from the individual recording of that song, as will the script of a film and any music or artwork used in the film. These materials, which will often be covered by the longer 'life plus 70' rule, must also be out of copyright before you can use the work without permission or authorisation. For more detail on underlying copyright material, see 2.7.

### **Example – Using a Film**

A person has an old black and white film of a Noel Coward play which they want to upload to their website. The credits of the film say it was produced in 1950.

As the film was first released before 1955 it appears to be out of copyright. However, as Noel Coward did not die until 1973 the script is still protected. Any background music included in the film is also likely to be protected by copyright. The film cannot be used without the permission of Noel Coward's estate and the owners of any copyright in the musical score or lyrics.

If, however, the film is simply news footage which does not include any script, background music or other underlying material, it will have fallen out of copyright and should be able to be used.

## **Copyright Owned by the Crown**

An important exception to the above rules is material created by or at the direction of, or first published by, the State or Federal Government or its employees. The term of copyright protection for material which is owned in the first instance by the Government is 50 years from first publication.<sup>146</sup> For more information on when the Government will own copyright, see 2.6.5.

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<sup>146</sup> *Copyright Act 1968* (Cth) s 180

## **Copyright Owned by an Individual who has Died, or a Non-Operational Business**

It is important to note that copyright does not expire just because the person who owns it dies. As noted above [3.2.3], most works will remain in copyright long after their original author and copyright owner has died. Upon the death of the copyright owner, ownership passes to the copyright owner's heirs.

Similarly, if copyright was owned by a company that is no longer trading, its copyright will usually have been distributed elsewhere.

### **3.2.4 Insubstantial Parts**

It is not an infringement of copyright to use only an insubstantial part of a copyright work. This means very small portions of a piece of content may sometimes be able to be used without the copyright owner's permission.

However, there is no hard and fast rule as to what amounts to a 'substantial' part of a copyright work. The decision is made on a case-by-case basis, and depends on the quality rather than the quantity of the part you are using.

The '10 percent' rule [see 3.3.5] that you may have heard of does not affect whether an excerpt is substantial. Even a very small part, such as a few notes of a song, can be substantial if it is an important part of the creative material.

### **3.2.5 Fair Dealing**

Copyright content can be used without permission if it is for the purpose of a 'fair dealing' within the meaning of the *Copyright Act*. Note, however, that the Australian concept of fair dealing is far narrower than the US equivalent, 'fair use' (which you will often hear about in online forums).

Importantly, for a use to be a fair dealing under Australian law it must be fair and for one of the following purposes:

- research and study;<sup>147</sup>

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<sup>147</sup> *Copyright Act 1968* (Cth) s 40

- criticism and review;<sup>148</sup>
- parody and satire;<sup>149</sup>
- reporting the news;<sup>150</sup>
- providing legal advice.<sup>151</sup>

Fair dealing is discussed in more detail below at 3.3.

### **3.2.6 Other Exemptions to Copyright Infringement**

As well as the fair dealing exceptions, the *Copyright Act* provides a number of other exceptions to copyright infringement which allow material to be used without the copyright owner's permission. It also provides statutory licences which will let you legally use material, but which usually require payment. These exceptions and licences are narrow and usually only apply to specific users (such as libraries and educational institutions) or uses (such as recording a television program). In most cases, they will be of limited use to blog, podcast, vodcast and wiki Creators and Users.

Further discussion of statutory exemptions which may be relevant to blog, wiki, podcast and vodcast Users and Creators can be found at 3.4.

### **3.2.7 Content under an Existing Licence**

When a copyright owner wants to give people permission to use their copyright material, they will issue a licence. It is always legal to use material covered by a legitimate licence, as long as you comply with the conditions included in that licence.

Existing licences may take the form of:

- a copyright notice, terms of use or other custom notice attached to the webpage;
- a standardised copyright or open content licence, such as the

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<sup>148</sup> *Copyright Act 1968* (Cth) s 41

<sup>149</sup> *Copyright Act 1968* (Cth) s 41A

<sup>150</sup> *Copyright Act 1968* (Cth) s 42

<sup>151</sup> *Copyright Act 1968* (Cth) s 43

### Creative Commons licences.

More information on existing copyright licences is provided at 3.5.

Finally, you may be able to obtain a licence for your use by contacting the copyright owner. More information on obtaining permission from the copyright owner is provided in Part 4.

#### **Example - Existing Licence**

A person prints off a copy of a speech from the Prime Minister of Australia's website (<http://www.pm.gov.au>) to put on their refrigerator.

As the website includes a copyright notice which states that material on the site can be downloaded and printed (in unaltered form) for personal, non-commercial use (<http://www.pm.gov.au/copyright.cfm>) the use is allowed.

If, however, the person wanted to post the speech on their blog, they would have to seek further permission from the Commonwealth Copyright Administration (<http://www.ag.gov.au/cca>), unless another copyright exemption applied (eg reporting the news – see 3.3.7).

## 3.3 Fair Dealing

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### Key Points:

- The *Copyright Act* allows copyright material to be used for a 'fair dealing' in five specific instances – research or study; criticism or review; reporting the news; parody and satire; providing legal advice.
- The Australian concept of 'fair dealing' is narrower than the US equivalent, 'fair use'.
- Fair dealing is very flexible, but it is often hard to know if it applies until a court case has occurred

### 3.3.1 The Basic Rule

Fair dealing is a general exception that allows the use of copyright material where the use is:

- fair; and
- for particular approved purposes.

It is similar to, but more narrow than, the US concept of 'fair use', which allows a use for any purpose as long as it is 'fair' (as defined by the courts).

### 3.3.2 Determining if a Dealing is Fair

For a use to be permitted under these exceptions, it must be 'fair', taking all the relevant circumstances into account.<sup>152</sup> The *Copyright Act* sets out certain factors that the courts will usually consider in deciding whether a dealing is fair. These include (but are not limited to):<sup>153</sup>

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<sup>152</sup> *TCN Channel Nine v Network Ten Pty Ltd* (2001) 50 IPR 335, [66] (Conti J).

<sup>153</sup> *Copyright Act 1968* (Cth) ss 40(2) and 103C(2).

- the purpose and character of the dealing – for example, a commercial use is less likely to be held to be fair [see 3.3.3]. Note, however, that a use will not be fair just because it is non-commercial;
- the nature of the material – for example, a higher standard is likely to apply to material that is commercially available;
- the possibility of obtaining the material within a reasonable time at an ordinary commercial price;
- the effect of the dealing on the market for, or value of, the material; and
- the portion of the material used, and how important or substantial that part was - This is judged on a case by case basis. The rule that you may have heard of that lets you copy 10 percent of a document only applies to fair dealings for the purpose of research and study [see 3.3.5]. How much is a 'reasonable' portion may also depend on the type of material you are dealing with and the purpose of the dealing.<sup>154</sup>

These factors will be weighed against each other, along with any other relevant factors. A dealing will not be considered fair unless it is for one of the prescribed purposes. More detail on how these factors apply to these purposes is discussed below.

### **3.3.3 Commercial Benefit**

Just because a dealing is non-commercial does not mean it will be 'fair'. Courts will consider whether a dealing is commercial in deciding whether it is allowed; however, it will only be one of many factors. Large-scale non-commercial uses (such as making a popular movie available on a file sharing network) are still likely to be illegal.

The fair dealing exception is less likely to operate if the blog, wiki, podcast or vodcast in which the infringing content is used contains advertising or some other commercially beneficial feature such as a 'tip jar'. Creators using money-making tools such as these may need to seek permissions and licences in respect of copyright material, instead of relying on these defences.

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<sup>154</sup> See for example, *Telstra Corporation Pty Limited v Premier Media Group Pty Limited* [2007] FCA 568, [48-50] (Allsop J).

### 3.3.4 Fair Dealing Purposes

In order for a dealing to be fair, it must be for one of the following prescribed purposes:

- research or study;<sup>155</sup>
- criticism or review;<sup>156</sup>
- parody and satire;<sup>157</sup>
- reporting the news;<sup>158</sup>
- providing professional legal advice.<sup>159</sup>

The actual person using the material must be genuinely doing so for one of these purposes. The prevailing view is that you cannot make a fair dealing on behalf of another person.<sup>160</sup>

### 3.3.5 Research or Study

#### Personal Research and Study

The meaning of research and study for copyright purposes is broad. It includes formal research conducted as part of a job or enrolled course, but is not limited to that. You can be conducting your own personal research or study in your own home. 'Research' includes any diligent and systematic enquiry or investigation into a subject in order to discover facts or principles.<sup>161</sup>

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<sup>155</sup> *Copyright Act 1968* (Cth) ss 40, 103C.

<sup>156</sup> *Copyright Act 1968* (Cth) ss 41, 103A.

<sup>157</sup> *Copyright Act 1968* (Cth) ss 41A, 103AA.

<sup>158</sup> *Copyright Act 1968* (Cth) ss 42, 103B.

<sup>159</sup> *Copyright Act 1968* (Cth) ss 43, 104.

<sup>160</sup> *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, 629 (Beaumont J) at 297. Compare this, however, to the alternative approach taken in *CCH Canadian Limited v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13.

<sup>161</sup> *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, 629 (Beaumont J).

## Beyond Personal Research and Study

This exception can only be relied on to excuse the initial dealing for the purpose of research or study, *not* any other purpose to which the reproduction is ultimately put.<sup>162</sup>

It is also not always clear whether or not this exemption would allow a person who has done research or study to then publish or communicate (eg online) the results to other persons. If the communication is for the purposes of the communicator's own research and study (eg posting a question on a forum), the exception should apply. However, if the results are only communicated for the sake of teaching or publishing final results, then the exception may not apply. It is irrelevant that the recipients of the information would be using the results for their own research and study.<sup>163</sup>

This is significant because it means that most people who present their results to others, teach the results or who upload them online may not be able to rely on this fair dealing exception to avoid copyright infringement.<sup>164</sup>

## Reasonable Portion: the 10 Percent Rule

Of all the fair dealing exceptions, the research and study exception is unique because it includes a clause which deems the use of certain amounts of material to be fair. As long as your use is for the purpose of research and study and you only use a 'reasonable portion' of the material, you do not have to worry about other factors such as whether the material was available in a reasonable time at an ordinary commercial price.

The *Copyright Act* deems a 'reasonable portion' of material to be:

- a single copy of a journal article;<sup>165</sup>

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<sup>162</sup> Ibid

<sup>163</sup> See A. Fitzgerald and B. Fitzgerald, *Intellectual Property in Principle*, Lawbook Co. 2004 at [5.135]

<sup>164</sup> See B. Fitzgerald, A. Fitzgerald, M. Perry et al, *OAK Law Project Report No 1: Creating a legal framework for copyright management of open access within the Australian academic and research sector* (August 2006), Chapter 6, available at <http://www.oaklaw.qut.edu.au/reports>.

<sup>165</sup> *Copyright Act 1968* (Cth) s 40(3)(a).



- one chapter or 10% of a book of 10 or more pages;<sup>166</sup>
- 10% of the words in material that is in electronic form.<sup>167</sup>

The reasonable portion test is in addition to the normal fair dealing exception. You can still copy more than 10 percent of a work for research and study, as long as your dealing is fair.

### **Example – Teaching**

A school teacher does her own personal research into modern music. The teacher then uses the results of her research in a podcast for a class tutorial to discuss modern music. The podcast analyses specific commercial songs and includes portions of those songs.

In this situation, while the research will be a fair dealing, the podcast will not. It may, however, be covered by the one of the special exceptions for educational institutions [see 3.4.4].

### **Example – Research and Study**

A person carries out research into the Second World War. They post the results of this research onto a wiki, including portions of copyright material used in the research.

If the person presents the results as a finished product such as a book or article, then the posting to the wiki is unlikely to be a fair dealing, as the communication is not for personal research and study. However, if the results are posted in an unfinalised form and others are invited to comment or make contributions to enhance his research, then the exception may apply.

Wikipedia, the online encyclopaedia, is a forum that might potentially fall within this exception as the information it contains is continually upgraded and amended by contributors who conduct their own research and study to produce a collective output.

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<sup>166</sup> *Copyright Act 1968* (Cth) ss 40(3)(b), s 10(2).

<sup>167</sup> *Copyright Act 1968* (Cth) ss 40(3)(b), s 10(2A).

### 3.3.6 Criticism and Review

#### Definitions of Criticism and Review

The terms 'criticism' and 'review' are defined broadly. Many different kinds of commentary – from movie review vodcasts to appropriation artworks – can benefit from this exception.

In practice, there seems to be little difference between 'criticism' and 'review' – both terms will generally cover any 'content that passes judgment as to the merits of something (for example the written or graphical expression of the material) or the underlying ideas in the material.'<sup>168</sup>

Criticism and review can be strongly expressed or humorous and does not need to be balanced.<sup>169</sup> However, it does require the material being criticised to be identified (eg by acknowledging the author and the title of the material).

#### Must be Genuine

Users should be aware that criticism and review must be genuine. This defence will not operate if the person making the criticism has another hidden motive, such as financial gain or using a competitor's copyright material in order to divert customers from the competitor.<sup>170</sup> It also won't apply if the person is making the criticism purely for reasons of personal ill will.<sup>171</sup>

#### Must be 'fair'

Although the criticism or review does not need to be balanced, the dealing itself must still be 'fair'. Courts will consider all the surrounding factors, such as the amount of material used or how the

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<sup>168</sup> Criticism is defined to mean 'the act or art of analysing and judging the quality of a literary or artistic work, the act of passing judgement as to the merits of something and a critical comment, article or essay: *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, 631 (Beaumont J). *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108 [66] (Conti J).

<sup>169</sup> Australian Copyright Council Information Sheet, *Fair Dealing* – January 2007 at <http://www.copyright.org.au/publications/infosheets.htm> on 12 October 2007

<sup>170</sup> Ibid

<sup>171</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108, [66] (Conti J); *Hubbard v Vosper* [1972] 2 B 84, 93 (Denning LJ).

use might affect the market for the product, in deciding whether a particular dealing was fair.

### **Example – Film Review**

A blogger writes a review of a film they have just seen on their blog. Next to the review, they include some screen captures of key moments of the film. Underneath the review, they provide a link to a torrent for an unauthorised copy of the film.

Because the person has undertaken a legitimate review of the film, the use of the screen captures is probably permitted as a fair dealing. However, linking to a downloadable copy of the film is not 'fair', as it involves the reproduction of the whole of the work and is likely to have a substantial detrimental effect on the market for the film.

The film producers and other copyright owners in the film will therefore have the right to take legal action against the blogger.

## **3.3.7 Reporting the News**

### **What is 'News'?**

Copyright material can be used freely if it is for the purpose of reporting the news, and sufficient acknowledgement of the source and original author is made.<sup>172</sup> What is a fair dealing in news reporting will be a question of judgment and impression, and will take into account public interest considerations.<sup>173</sup>

The following guidelines should help in deciding whether a particular use falls within the fair dealing exception for reporting the news:

- the purpose of using the copyright material must be to report or comment on the news, not to entertain. If the purpose of using the copyright material is merely to entertain, then using news excerpts will not avoid copyright infringement;<sup>174</sup>

<sup>172</sup> *Copyright Act 1968* (Cth) ss 42 and 103B.

<sup>173</sup> *Telstra Corporation Pty Limited v Premier Media Group Pty Limited* [2007] FCA 568, [48] (Allsop J).

<sup>174</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108, [66] (Conti J); *Hubbard v Vosper* [1972] 2 B 84, 93 (Denning LJ).

- news may still involve humour.<sup>175</sup> The mere fact that news coverage is entertaining does not mean that it is not news,<sup>176</sup> provided that the main purpose is to report or comment on a newsworthy event;
- the courts will consider all the surrounding material and facts in assessing the 'news' item, such as the context and tone of the material and any accompanying commentary;
- 'news' does not have to be current – it can refer to past events.<sup>177</sup>

## Using News Excerpts

This defence may arise where a blog, podcast, vodcast or wiki includes excerpts of sporting or other news articles or broadcasts online, which would otherwise infringe copyright.

There is no clear rule as to what constitutes a fair dealing in this context; however it is unlikely that the internet as a medium will be treated differently from traditional media.

As a general guide:

- you should always reference and (where possible) link to the source of any material you use;
- quoting from an article (with attribution) is allowed, but reproducing the whole article or a large portion of the article (eg several paragraphs) is not;
- any video or sound recording excerpts should be limited to less than one minute;<sup>178</sup>

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<sup>175</sup> *The Panel Appeal* (2002) 118 FCR 417, 424.

<sup>176</sup> *Nine Network Australia v Australian Broadcasting Corporation* (1999) 48 IPR 333, 340 per Hill J

<sup>177</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108

<sup>178</sup> See *Telstra Corporation Pty Limited v Premier Media Group Pty Limited* [2007] FCA 568. Telstra who owns exclusive rights to broadcast National Rugby League games on the internet and mobile phones pursued foxsports.com.au for broadcasting match reports of up to two minutes. The court refused to limit the allowed time to 45 seconds because TV networks regularly air up to two minutes of footage and there was no evidence as to why the internet should be treated differently. This judgement is being considered by the International Olympic Committee in their

- you should take particular care when reproducing photographs, especially those from commercial publications. Always try to inform or seek permission from the photographer.

However, complying with these rules will not guarantee that your use is a fair dealing, and the defence will always depend on the full circumstances.

### **Example – Using News Excerpts**

A current affairs show uses news excerpts from other television stations without first obtaining their permission. For fair dealing to apply to embedded video links, the context of the news excerpts has to be:

- either for criticism or comment;
- for parody or satire (see below); or
- the copyright material used has to be 'newsworthy'.

The excerpts also shouldn't be too long, and the original network should be attributed (eg by including their logo in the corner of the screen).<sup>179</sup>

### **Example – Online News Excerpts**

Reporting the highlights of a rugby game on a podcast, vodcast, blog and wiki is newsworthy and can be done without permission provided the dealing is fair and the news source is acknowledged.<sup>180</sup>

However, reproducing significant portions of a news article or television or radio coverage of the game will usually not be allowed.

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media-access guidelines which currently bans all use of Olympics footage by anyone but the rights holder.

<sup>179</sup> See 'The Panel Cases' referred to in B Fitzgerald, A Fitzgerald, G Middleton, Y Lim and T Beale, *Internet and E-Commerce law Technology, Law and Policy*, Lawbook Co, 2007 at [4.245 to 4.275]

<sup>180</sup> See *Telstra Corporation Pty Limited v Premier Media Group Pty Limited* [2007] FCA 568, [30].

### 3.3.8 Parody and Satire

Parody and satire is the newest of the fair dealing defences. It was introduced in 2007 to promote 'free speech and Australia's fine tradition of satire by allowing our comedians and cartoonists to use copyright material for parody or satire'.<sup>181</sup>

There have not yet been any court cases to clarify how it works. However, it is likely that the exception will cover:

- **Parody:** an imitation of another person's prior copyright work or material (e.g. film or literature) that replicates it in a humorous way so as to make fun of the material.
- **Satire:** using a copyright work to comment on or ridicule social issues<sup>182</sup> or the characteristics and actions of people. Satire need not be 'funny', however it must involve commentary.

It is still unclear how fairness will be assessed in the context of parody and satire under Australian law.<sup>183</sup> Factors that courts will consider are likely to include:<sup>184</sup>

- the amount of copyright material used – it is likely that larger portions of a copyright product will be able to be used under this exception than the other fair dealing exceptions. Parody in particular often requires the reproduction of substantial parts or all of the original material in order to make its point;<sup>185</sup>
- whether the use made of the copyright material is reasonable or appropriate;

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<sup>181</sup> The Hon. Philip Ruddock MP, Attorney General, Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p2.

<sup>182</sup> *TCN Channel Nine Pty Ltd and Others v Network Ten Pty Ltd* (2001) 184 ALR 1, 14 (Conti J at trial, referring to dictionary definitions).

<sup>183</sup> For a detailed discussion of how the parody and satire exception is likely to be interpreted under Australian law, see N. Suzor, 'Where the bloody hell does parody fit in Australian copyright law?' (2008) 13(2) *MALR* 218.

<sup>184</sup> M. Handler and D. Rolph, 'A Real Pea Souper': The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' [2003] *MULR* 15 at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MULR/2003/15.html?query=a%20real%20pea%20souper>

<sup>185</sup> S. Beattie and E. Beal, *Connect+Converge: Australian Media and Communications Law*, Oxford University Press 2007, 148.

- whether the use would have an adverse affect on the author or breach the author's moral rights of integrity in the work;
- the motives behind the parody or satire and how it is presented to the public;
- whether the author or copyright owner has been properly attributed;
- whether the satirist and the copyright owner are in commercial competition with each other.

#### **Example – [www.richardneville.com.au](http://www.richardneville.com.au)**

The social commentary of Richard Neville provides examples of both parody and satire based on third-party copyright content such as images and text.

#### **Example – Manic Times - [www.manictimes.com.au](http://www.manictimes.com.au)**

The vodcasts and commentary of Charles Firth and other contributors provide satirical comment on political and social issues again utilising some third-party copyright content.

#### **Example – Kevin Rudd and 'Tintin'**

The test for the satire and parody in Australia came close to being considered recently when a cartoonist for *The Australian* newspaper was threatened with legal action by the Belgian-based copyright owner of the Herge created Tintin character. In the lead up to the 2007 election, the cartoonist had portrayed Kevin Rudd in political satire cartoons as Tintin, along with Tintin's companion, Snowy the dog. It was argued that while the cartoons were not parodies of the Tintin character they did satirise Kevin Rudd,<sup>186</sup> and that the exception for parody and satire would therefore protect the cartoonist from any action for infringement.

The copyright owner later conceded that the cartoonist was free to portray Kevin Rudd as Tintin in his political cartoons, provided that he did not sell copies of his cartoon to the public.<sup>187</sup>

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<sup>186</sup> See Sally Jackson, 'Rudd's TinTin No No' (31 May 2007) *The Australian* <http://www.news.com.au/heraldsun/story/0,21985,21824906-661,00.html>

<sup>187</sup> See Peter Wilson, 'Leak in the clear over Tintin' (04 June 2007) *The Australian* <http://www.news.com.au/story/0,23599,21842711-2,00.html>

## 3.4 Other Exemptions to Copyright Infringement

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### Key Points:

- As well as the fair dealing exceptions, the *Copyright Act* also includes a number of other provisions that allow copyright material to be used without the copyright owner's permission in certain cases.
- These exemptions can be in the form of:
  - An exception to copyright infringement, which will usually provide free use; or
  - A statutory licence, which usually requires payment to a collecting society.<sup>188</sup>
- These exemptions as a general rule are limited and are unlikely to be of relevance to those running blogs and wikis. The most relevant are discussed below.
- For further detail, the *Copyright Act* can be viewed online at [www.austlii.edu.au](http://www.austlii.edu.au).

### 3.4.1 What is the Difference between an Exception and a Statutory Licence?

Exceptions and statutory licences are two different devices included in the *Copyright Act* to allow copyright material to be used without the need to obtain permission from the copyright owner.

In practice, exceptions and statutory licences operate very like each other. They are usually quite narrow and strict in their application, and are likely to have little relevance for those working with blogs, wikis, podcasts and vodcasts.

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<sup>188</sup> *Copyright Act 1968 (Cth)*, Pt VB.



## Exceptions

An exception usually provides an absolute defence to copyright infringement, as long as your use qualifies. Most exceptions are aimed at specific users (such as schools or libraries) or specific uses (such as backing up a computer program).

## Statutory Licences

These act like a licence, in that they give you permission to use the copyright material on certain terms, usually in return for payment. However, they are compelled under law rather than being provided by the copyright owner. They are intended to facilitate large-scale uses that it would be impractical to license directly, such as government and school copying.

Some of the more significant statutory licences include those for:

- the copying and communication of broadcasts by educational institutions and institutions assisting people with a disability;<sup>189</sup>
- the reproduction and communication of material by educational institutions and institutions assisting people with a disability;<sup>190</sup>
- the reproduction of material for the purpose of broadcasting;<sup>191</sup>
- the retransmission of free-to-air broadcasts;<sup>192</sup>
- the inclusion of a literary or dramatic work in a print disability radio broadcast;<sup>193</sup>
- the recording of a cover song;<sup>194</sup>
- use of copyright material for the services of the Crown.<sup>195</sup>

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<sup>189</sup> *Copyright Act 1968* Part VA

<sup>190</sup> *Copyright Act 1968* Part VB

<sup>191</sup> *Copyright Act 1968* ss 47, 70 and 107.

<sup>192</sup> *Copyright Act 1968* Part VC

<sup>193</sup> *Copyright Act 1968* s 47A

<sup>194</sup> *Copyright Act 1968* s 55

<sup>195</sup> *Copyright Act 1968* s 183

There are also a number of voluntary licence schemes in Australia which serve to facilitate mass licensing. These licence schemes act like statutory licences, but are not enacted by legislation. Instead, copyright owners choose to enter into them voluntarily, normally by joining a collecting society or industry organisation, such as the Australasian Performing Right Association (<http://www.apra.com.au>).

## Collecting Societies

Payments under both the statutory and voluntary licences are made to collecting societies, who then distribute the money to the relevant copyright owners. When you are using copyright material, you will often need a licence from more than one collecting society.

The main Australian collecting societies are:

- **Copyright Agency Limited** (CAL – [www.copyright.com.au](http://www.copyright.com.au)) – licenses published works, including authored works, visual art, photographic and journalistic work.
- **Screenrights** ([www.screenrights.com.au](http://www.screenrights.com.au)) – licenses films, sound recordings, broadcasts and works included in audiovisual products.
- **The Australasian Performing Right Association** (APRA – [www.apra.com.au](http://www.apra.com.au)) – licenses the public performance and communication of musical works.
- **Australasian Mechanical Copyright Owners Society** (AMCOS [www.apra-amcos.com.au](http://www.apra-amcos.com.au)) – licenses the reproduction of musical works, including production music, broadcasts, music videos and DVDs.
- **The Visual Arts Copyright Collecting Society** (VI\$COPY – [www.viscopy.com](http://www.viscopy.com)) – licenses artistic works, including paintings, photographic works, illustrations, multimedia works, graphic designs and sculptures.
- **The Phonographic Performance Company of Australia** (PPCA – [www.ppca.com.au](http://www.ppca.com.au)) – licenses the communication and public performance of sound recordings.

### 3.4.2 Device and Format Shifting

A number of exceptions in the *Copyright Act* allow the owners of copyright material to copy it into different formats for their own private and domestic use.

These exceptions are quite complex and technical, and guidance should be sort before making use of them. However, as a general rule, they let you:

- copy a sound recording into a different format (eg by transferring music from a purchased CD to an iPod);<sup>196</sup>
- make a digital copy of a video (eg by copying it to an iPod or burning it to DVD) – note that this exception only applies to videos and does not allow you to copy DVDs (eg to your computer) or make the material available online;<sup>197</sup>
- make a digital copy of a printed book, newspaper or magazine, or vice versa (eg by scanning a chapter from a book or printing out an article from a newspaper or periodical);<sup>198</sup> or
- scan a hardcopy photograph or print out a digital photograph.<sup>199</sup>

However, it should be noted that the exceptions do not apply if:

- the original copy being reproduced is illegal (eg a pirate CD or an illegal download);
- the person making the copy is not the owner of the original material (eg copying a friend's CD);
- the original material has been sold or disposed of (eg given away to a friend); or

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<sup>196</sup> *Copyright Act 1968 s 109A*

<sup>197</sup> *Copyright Act 1968 s 110AA*

<sup>198</sup> *Copyright Act 1968 s 43C*

<sup>199</sup> *Copyright Act 1968 s 47J*

- the material is used for anything other than private and domestic purposes, such as uploading it to a blog or wiki or making it available over a file sharing network.

### **3.4.3 Internet Service Provider liability**

The *Copyright Act* includes a number of exemptions that limit the liability of online service providers for certain infringing acts. For example, there are exceptions which state that where a person merely provides facilities for making a communication, they will not be held liable for authorising infringements made by others using those facilities.<sup>200</sup> However, this does not mean Internet Service Providers (ISPs) will never be liable – where they have a close relationship with the infringer or have done something more than ‘merely’ provide facilities, they can still be held responsible by a court.

### **ISP Safe Harbours (Notice and Takedown)**

The most commonly used of the service provider exemptions are the ISP Safe Harbours.<sup>201</sup> Where a person or organisation undertaking certain online activities is found to have infringed copyright, or authorised someone else’s infringement, these safe harbours will protect them from having to pay damages, as long as they have complied with all the eligibility requirements.

### **Activities Covered by the Safe Harbours**

These safe harbours apply to online services that:<sup>202</sup>

- provide facilities for the transmission of copyright material;<sup>203</sup>

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<sup>200</sup> *Copyright Act 1968* ss 39B and 112E. Note that this exception will not apply where a service provider can be said to have done more than ‘merely’ provide facilities (eg because of their relationship with the infringer etc) - *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.

<sup>201</sup> *Copyright Act 1968* 116AA-116AJ

<sup>202</sup> Specifically, the safe harbours apply to ‘carriage service providers’ as defined in the Telecommunications Act 1997 – see *Copyright Act 1968* ss 10 and 116AA

<sup>203</sup> *Copyright Act 1968* 116AC. Note that an exception in s49B and 110B of the act also removes liability for those who merely provide facilities for the communication or reproduction of copyright material.

- automatically cache copyright material;<sup>204</sup>
- store material for others online (eg host websites or provide a place for people to post their material);<sup>205</sup> and
- provide links to websites.<sup>206</sup>

## Conditions

In order to qualify for the safe harbours, you must comply with the following conditions.<sup>207</sup> Not all of these conditions apply to all of the safe harbours. However, to be sure you are fully protected, it is a good idea to follow them all.

- **No changes:** You must not have altered or modified the infringing material in any substantive way. Technical modifications that take place as part of the transmission and storage process are allowed.
- **Copyright contact:** You must display prominently on your website a contact to whom people can report copyright infringements.
- **Remove infringing material:** You must expeditiously remove any infringing material you become aware of on your site. You are not, however, required to actively monitor material on your site.
- **Notice and takedown:** If someone notifies you of infringing material on your site, you must comply with the 'notice and takedown' scheme set out in the regulations.<sup>208</sup> This basically requires you to expeditiously remove the material. You must also inform the person who originally posted the material that it has been removed, and restore the material in response to any counter-notice from them stating that the material is not infringing.
- **Financial benefit:** You must not receive a direct financial benefit from the infringing activities. Having advertising next to infringing material, for example, would most likely count as a direct financial benefit.

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<sup>204</sup> Copyright Act 1968 116AD

<sup>205</sup> Copyright Act 1968 116AE

<sup>206</sup> Copyright Act 1968 116AF

<sup>207</sup> Copyright Act 1968 116AG-116AH

<sup>208</sup> Copyright Regulations 1969, Part 3A

- **Termination policy:** You must have a policy for termination, in appropriate circumstances, of the accounts of repeat infringers. It is best to publish this policy on your site, as proof of its existence.
- **Industry codes:** You must comply with any relevant industry codes. The Internet Industry Association (<http://www.iaa.net.au>) should be able to tell you what codes exist.

### 3.4.4 Exemptions for Educational Institutions

The *Copyright Act* permits educational institutions (including schools, kindergartens and universities, but not private tutors)<sup>209</sup> to use copyright material for educational purposes in certain circumstances.

The three main categories of exemptions for educational institutions are:

- classroom use exceptions;
- the statutory licences for educational institutions;
- the s200AB 'flexible dealings' exception.

Below is a simple explanation of each of these provisions. If you would like more detail, the National Copyright Unit of the Ministerial Council on Employment, Education, Training and Youth Affairs provides a *National Copyright Guidelines for Schools* and a number of use specific fact sheets on their 'SmartCopying' website at [www.smartcopying.edu.au](http://www.smartcopying.edu.au).

### The Classroom Use Exceptions

A number of exceptions in the *Copyright Act* allow schools to make use of copyright material in a classroom setting (including virtual classrooms). These exceptions include, for example:

- performing and communicating copyright material in the classroom;<sup>210</sup>

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<sup>209</sup> See also *Copyright Act 1968* (Cth), s10.

<sup>210</sup> *Copyright Act 1968* s28

- making one off reproductions (ie not photocopies) for educational purposes;<sup>211</sup> and
- automatic caching of copyright material by educational institutions to provide teachers and students with more efficient internet access.<sup>212</sup>

These exceptions are of use to teachers wishing to use online material such as blogs, wikis, podcasts and vodcasts in the classroom. However, it is important to note that they do not allow uses that occur outside the educational environment. This means that, while they will allow educators to use material that is available online, they are of limited use to educators wishing to, for example, post class projects or materials to publicly accessible blogs or wikis.

## **Statutory Licences for Educational Institutions**

These licences allow schools to make certain uses of copyright material without the copyright owner's permission, as long as they pay reasonable compensation to a collecting society. The collecting society then distributes this money to the relevant copyright owners.

The Australian *Copyright Act* provides two statutory licences for educational institutions. These licences relate to:

- reproduction and communication to the public of broadcasts, podcasts and vodcasts – this includes free-to-air broadcasts as well as podcasts and vodcasts of free-to-air radio and television programs. However, it does not include webcasts ie podcasts or vodcasts that did not originate as a free-to-air broadcast;<sup>213</sup> and
- reproduction and communication to the public of literary, musical, dramatic and artistic works for classroom use – this includes works that are available in electronic form, such as downloading or printing material on blogs and wikis.<sup>214</sup>

Again, these licences let educators copy or communicate existing material for educational purposes. They do not give permission for

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<sup>211</sup> *Copyright Act 1968* s200

<sup>212</sup> *Copyright Act 1968* s200AAA

<sup>213</sup> *Copyright Act 1968* Part VA

<sup>214</sup> *Copyright Act 1968* Part VB

the material to be distributed outside the classroom, or uploaded onto a public website.

## **Flexible Dealings Exception**

Section 200AB of the *Copyright Act* allows educational institutions and other bodies such as libraries to make use of copyright material in 'special cases'. This exception, which was introduced in 2007, is fairly broad and is intended to allow uses that would not be covered by existing exceptions in the Act.

In order to qualify for this exception, the use must be a 'special case' and must not:

- conflict with the normal exploitation of the work;
- unreasonably prejudice the copyright owner's interests; and
- be for commercial advantage or profit.

It is not clear yet how this section will operate in practice. It is possible that it will cover some uses of online material not previously permitted under the *Copyright Act*, such as downloading webcasts for classroom use or transferring videos to DVD format.

For more information on the exception and how it operates, see the SmartCopying 'Flexible Dealing' information sheet ([http://www.smartcopying.edu.au/docs/flexible\\_dealing\\_info\\_sheet\\_update.pdf](http://www.smartcopying.edu.au/docs/flexible_dealing_info_sheet_update.pdf))



## 3.5 Existing Licences

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### Key Points:

- Before seeking permission from the copyright owner, it is worth checking whether material is already under a licence (such as a website Terms of Use) that would permit your use.
- It is always legal to use material under a legitimate licence, as long as you obey the terms of that licence.
- An increasing amount of material is available under open content licences (such as the Creative Commons licences) which will allow the material to be used in many circumstances
- You should always use your common sense in deciding whether a licence is legitimate.

### 3.5.1 Terms of Use

Some copyright owners will attach a licence to their material that gives permission in advance for certain uses. If material is under a licence that covers your use, you may not need to get further permission from the copyright owner.

On a website, such as licence can usually be found in:

- the terms of use;
- on a separate copyright page;
- next to the material in question; or
- at the bottom of the page on which the material is located.

On a printed document such as a book or CD it will usually be located on the back cover or somewhere on the first few pages.

A licence can be a full legal document or a simple statement about how the material may be used. It will often provide limited rights to use material only on certain conditions. For example, it may allow the material to be used only for non-commercial purposes, or only if you

attribute the original copyright owner.

Your use will be permitted if it falls within the terms of the licence. However, it is very important to make sure you read the licence carefully. If you do not obey the exact terms, the licence will usually be terminated, and standard copyright law will apply.

### **Example: YouTube Terms of Use**

The YouTube Terms of Use has a provision that lets users embed other people's videos into their own personal blogs and wikis using the YouTube embedding tool.<sup>215</sup>

However, this licence does not permit you to embed the material onto your website using another tool. Your use of the material must also be for non-commercial purposes. You are permitted to embed the videos on ad-enabled blogs or websites, but only where the site is not trying to compete with YouTube and where increasing your advertising revenue is not your primary reason for posting the material.

For most Youtube material, it will also be illegal for you to download it onto your computer or burn it to disc. However, Youtube has introduced some downloadable content. Read more about it at [http://www.youtube.com/blog?entry=Mp1pWVLh3\\_Y](http://www.youtube.com/blog?entry=Mp1pWVLh3_Y)

## **3.5.2 Open Content Licences**

An increasing number of copyright owners are now choosing to use standard copyright licences available online to tell people how they can and cannot use their material. These licences, often called open content licences (OCL), give you more rights to use the material than you would have under 'all rights reserved' copyright, but still reserve some rights to the copyright owner.

A familiarity with these systems can be very helpful for finding material such as photos and music that can be legally used on blogs and wikis and in podcasts and vodcasts. Once you become familiar with the main licences and what they do and do not allow, it becomes easy to identify material that you can use for your particular purpose. Some of the licences (most notably Creative Commons) have

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<sup>215</sup> See YouTube Terms of Use clause 4(C) <http://au.youtube.com/t/terms>

technological tools that allow you to find re-usable material via search engines such as Google, Yahoo and the Firefox web browser.

There are a number of open content licences, including the GNU Free Documentation Licence<sup>216</sup> and the Art Libre<sup>217</sup> (Free Art) licence. However, the most common are the Creative Commons licences, which are discussed further below.

### **3.5.3 Creative Commons**

#### **What is Creative Commons?**

Creative Commons ([www.creativecommons.org](http://www.creativecommons.org)) is a non-profit organisation that offers a flexible copyright licensing system for creative material.

The Creative Commons system aims to facilitate the use of copyright protected material. It does so by providing a set of free licences that creators can attach to their work to give permission in advance for certain uses. This builds on the 'all rights reserved' of traditional copyright to create a voluntary 'some rights reserved' model.

Creative Commons licensed material can be used on blogs and wikis and in podcasts and vodcasts, as long as you obey the terms of the licence.

#### **The Creative Commons Licences**

The Creative Commons system is based around four standard 'licence elements' – Attribution, Non-commercial, No Derivative Works and ShareAlike.<sup>218</sup> These are combined to make the six 'core' licences.

All of these licences allow you to, at a minimum, distribute the material for non-commercial purposes. However, some go further, allowing you to remix the material, or use it commercially. They all require you to attribute the author.





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<sup>216</sup> <http://www.gnu.org/copyleft/fdl.html>





<sup>217</sup> <http://artlibre.org/licence/lal/en/>

<sup>218</sup> See <http://creativecommons.org.au/licences>

The six core Creative Commons licences are:

<b>Attribution (BY)</b>		<p>This is the most accommodating of the Creative Commons licences, in terms of what others can do with the material. It lets others share, copy, distribute, transmit, remix and adapt the material, even commercially, as long as they credit the original author.</p>
<b>Attribution Non-commercial (BY-NC)</b>		<p>Allows others to share, copy, distribute, transmit, remix and adapt the material, as long as it is for non-commercial purposes and they credit the original author.</p>
<b>Attribution Share Alike (BY-SA)</b>		<p>This licence is often compared to open source software licences such as the GNU General Public Licence.<sup>219</sup> It lets others share, copy, distribute, transmit, remix and adapt the material even for commercial purposes, as long as they credit the original author and license any derivative materials under identical terms. All new materials based on the original material will carry the same licence, so any derivatives will also allow commercial use and share alike remixing.</p>
<b>Attribution Non-commercial Share Alike (BY-NC-SA)</b>		<p>Allows others to share, copy, distribute, transmit, remix and adapt the material, as long as it is for non-commercial purposes, they credit the original author and they license any new creations under identical terms.</p>

<sup>219</sup> <http://www.gnu.org/licenses/licenses.html#GPL>

<b>Attribution No Derivative Works (BY-ND)</b>	 	<p>Allows the use of material in its current form for both commercial and non-commercial purposes, as long as it is not changed in any way or used to make derivative materials, and credit is given to the original author.</p>
<b>Attribution Non- commercial No Derivative Works (BY-NC-ND)</b>	 	<p>This is the most restrictive of the six core licences. It is often called the 'advertising' licence because it allows material to be copied and shared with others, but only in its original form, for non-commercial purposes and where credit is provided to the original author.</p>

As well as the above rights and restrictions, each of these licences also have standard clauses that, for example, retain moral rights and ban the use of the materials in a product that uses technological protection measures.

## Tools for Users

Creative Commons provides a number of tools designed to assist people to use their licences. These include:

- **the licence deeds:** Each licence is accompanied by a 'licence deed', which sets out the major terms of the licence in plain English. This is the public face of the licence and assists licensors and licensees alike to understand their legal rights and obligations. It is the first thing a person will see if they click on a Creative Commons licence button on a webpage; from there, they can access the full legal code of the licence.
- **the licence buttons:** These are graphic buttons that can be placed on a web page to indicate that material on the page is available under a Creative Commons licence. There is a button for each licence, as well as a generic 'some rights reserved' button.

- **the licence generator:** A questionnaire available through the Creative Commons website which automatically determines the most appropriate licence for your work.<sup>220</sup>
- **the licence metadata:** This metadata enables materials badged with the Creative Commons licences to be identified by a range of search engines, including Google, Yahoo and Linux web browser Mozilla Firefox.<sup>221</sup> This means you can easily search for and identify Creative Commons licensed material. For more information see <http://search.creativecommons.org>.

### Example - Creative Commons Attribution-NonCommercial-ShareAlike Licence

A musician writes and records a song and posts it to their blog. There is a statement next to the song that it is licensed under an Attribution-NonCommercial-ShareAlike (BY-NC-SA) 2.5 Licence.

Under this licence, others are free to copy, distribute and remix the song, provided that :

- the song is attributed to the original musician;
- it is not used for commercial purposes; and
- any derivative material (ie remix) is also distributed under the BY-NC-SA licence.

The song is downloaded from the blog and adopted by:

- a music student, who adds lyrics and a guitar track and posts the new song to her own blog; and
- a DJ, who uses a sample from the song in a remix which he includes in an album he is selling on his website.

The student is entitled to use the song within the terms of the licence because the student credits the original musician and provides a link to the original song on his blog, and because she publishes her new song, which is derived from the original song, under a BY-NC-SA licence.

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<sup>220</sup> See, 'Choose a license' *Creative Commons* <http://creativecommons.org/license/> at 20 December 2006. The licence generator is also available as a desktop wizard.

<sup>221</sup> See for example, 'CC Search' *Creative Commons* <http://search.creativecommons.org/> at 20 December 2006

However, despite correctly attributing the song, the DJ who included the song in a retail album is in breach of the licence, as he used it for a commercial purpose. He further breaches the licence because he doesn't release the new song under a BY-NC-SA licence. Because he has gone beyond the terms of the licence he no longer has a valid permission, and he can be sued for copyright infringement.

### **3.5.4 Recognising Legitimate Licences and Content**

It is not uncommon for individuals who do not fully understand copyright law to post material to websites under licences that they do not have the rights to provide. For example, user generated video services such as YouTube will often contain videos that incorporate infringing content.

Having a licence to use this material from the website will not protect you from copyright infringement if the person posting the material did not have the legal right to issue that licence. As is discussed at 2.9.11 above, you can be held liable simply for re-posting infringing material originally provided by another person.

It is therefore very important to always use your common sense in utilising material under an existing licence. Make sure you are confident that the person providing you with the material has the rights to do so, or that your use otherwise falls into an exception in the *Copyright Act*. If it contains commercial material, it is less likely to be legitimate.

### **3.5.5 Always Attribute**

It is important to note that under Australian law it is compulsory to attribute the original author and source of any material you are using [see Moral Rights 2.10.2].

This means that, even where the licence does not specifically require it, you should always attribute the author or you will be risking legal action. All Creative Commons licences require attribution.

# Part 4

## Getting Permission



## 4.1 Finding the Copyright Owner

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### Key Points:

- Blog, podcast, vodcast and wiki creators and users will generally need permission from the copyright owner to use third-party content.
- The *Copyright Act* does not permit copyright material to be used simply because the copyright owner cannot be located.
- When using content in a blog, podcast, vodcast or wiki several permissions from multiple copyright owners may be needed.
- How to obtain permission will depend on the type of material in question.

### 4.1.1 When do you need permission?

In most cases, you will need to get permission from the copyright owner if you want to use another person's creative material in a blog, podcast, vodcast or wiki.

The main exceptions to this rule are when the work is out of copyright, when you are using an insubstantial part of the work, or when an exemption under the *Copyright Act* applies to your use. For more details these cases and other times you do not need permission from the copyright owner, see 3.2.

### 4.1.2 Who can give permission?

As is discussed earlier [2.7] often a single product will contain a number of copyright items with different copyright owners.

Sometimes a single person or entity will be able to give you permission to use all the copyright items included in a product. For example, for a commercial film the producer or production company will often either own the copyright to all the underlying works, or will have the right to license the works as part of the film. The producer or production company should be able to tell you if this is the case.

However, more commonly the copyright in the different items will be owned by different people, and you will need to contact multiple copyright owners to get the permission you need to use the whole copyright product.

Of course, if you only want to use part of a product (eg a song from the soundtrack of a movie) you only need permission from the copyright owner/s of that part.

### **4.1.3 Owner Cannot be Located**

It is important to note that the *Copyright Act* does not permit the use of copyright material simply because the copyright owner cannot be located. If copyright material is used without permission copyright will be infringed unless an exemption applies [see 3.3 and 3.4].

### **4.1.4 No Copyright Registration System**

There is no registration system for copyright in Australia so there are no official records that can be searched to find a copyright owner. A variety of resources may need to be consulted to identify all the relevant copyright owners and clear the necessary rights.

A good starting point is to check the actual material being used or the website on which it is located for a copyright notice [See 2.17.1]. For example CDs and books usually name the copyright owner and may give contact details. On a web page this information may be at the bottom of the page, on a separate contacts or copyright page, or in the terms of use.

For other copyright material, such as films or broadcasts, the copyright owner of the work may be listed in the credits.

### **4.1.5 The Copyright Notice ©**

Many materials will include a copyright notice. This can be as simple as the © symbol with the author's name next to it, or the phrase 'all rights reserved'. Or it can be a whole paragraph or separate web page. Copyright notices on websites can often be found via a 'copyright' link at the bottom of the webpage.

A copyright notice is not a prerequisite for copyright protection. If there is no copyright notice permission still needs to be sought.

The copyright notice is a useful starting point to locate the copyright owner. Occasionally the copyright notice may also incorporate a licence giving permission for some uses [see 3.5], or the contact details of the copyright owner.

### **Example - Short Form Copyright Notice**

© Joe Blogger, 2007.

### **Example - Long Form Copyright Notice**

This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the *Copyright Act*, no part of it may in any form or by any means (electronic, mechanical, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publishers.<sup>222</sup>

### **Example - Online Copyright Notice**

The Queensland University of Technology's copyright notice provides:<sup>223</sup>

Apart from fair dealing as permitted under the copyright law of your country, and as necessary for the operation of the program, no part of this program nor the information contained in it may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, reprographic or otherwise, without the prior permission of the Queensland University of Technology. (see [www.qut.edu.au](http://www.qut.edu.au)).

### **Example – Copyright Notice Incorporating Licence**

The Prime Minister's website provides this copyright notice:<sup>224</sup>

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<sup>222</sup> Google Book Search: Ethics and Political Practice: Perspectives on Legislative Ethics at <http://books.google.com> on 12 October 2007

<sup>223</sup> See <http://www.qut.edu.au/general/copyright.jsp>

<sup>224</sup> <http://www.pm.gov.au/copyright.cfm> © Commonwealth of Australia, reproduced by permission.

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Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration  
Attorney General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

or posted at <http://www.ag.gov.au/cca>.

## 4.2 The Permission

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### Key Points:

- A copyright permission should always be in writing and clearly indicate who is agreeing and what they are agreeing to.
- Make sure your agreement covers everything you want to do with the material, and applies to all the underlying copyright items.
- At a minimum, you should always obtain permission to reproduce and communicate the material for the purpose of your project.
- If you want to attach a copyright licence to the material, make sure you have permission to do this too.
- You may also need to obtain moral rights permission.
- Always consider whether your use may impact on other legal rights such as privacy or defamation.

### 4.2.1 Formalities

You should always ensure that any permission you get from the copyright owner is in writing, and that you have a clear indication of their agreement (eg a signature). If you are transferring the copyright (eg from the original author to the new copyright owner) this is a legal requirement. But even if you are only obtaining a limited permission or licence it is still a good idea.

If you have reached a verbal agreement with the copyright owner, follow up by sending a letter or email setting out the permission, and asking them to confirm their agreement. Make sure the permission makes it clear who is agreeing, and what they are agreeing to.

Other than being in writing, the permission does not have to be a formal legal document to be valid. A simple agreement between two parties will still be upheld by a court, as long as it is clear what the agreement allows and that both parties have accepted it. However, if

your agreement is complex or involves commercial use, it is a good idea to get a lawyer's advice.

### **4.2.2 Different Approaches to Getting Permission**

When asking permission to use copyright material, you must make sure that you ask for all the rights you need to use the material.

A good way to do this is to spell out exactly how you plan to use the material (eg 'I would like permission to post the photograph to my blog to illustrate an article on X'). However, if you make the permission too specific you will need to go back to ask permission for future uses (eg if you then decide to post the article to other forums).

Another approach is to ask for a licence to use specific copyright rights (eg 'I request a world-wide, non-exclusive licence to reproduce and communicate the work to the public for the duration of copyright'). This makes the permission more flexible for future uses. However, it also makes it harder to ensure that you have all the rights you need.

Either approach, or a combination of the two, is valid, as long as it is clear that the permission covers your use.

### **4.2.3 Your Treatment of the Material**

It is often a good idea to tell the person you are seeking permission from how you intend to display the material. For example, you might want to say how you will provide attribution, what resolution you will use for any images, whether there are advertisements on the page.

This reassures the owner and gives them a chance to add any extra details they require (eg attribution of their funding body).

### **4.2.4 What Rights Do You Need?**

The two rights that you will always need when you are using material in a blog, wiki, podcast or vodcast are:

- the right to reproduce the material; and

- the right to communicate the material to the public.

In addition, you may need other rights, such as the right to publicly perform, adapt or publish the material, depending on the type of material and how you are using it. For more information on these rights and how they work see 2.8.

#### **4.2.5 Don't Forget the Underlying Material**

Always ensure you have permission for all the copyright works included in the product you wish to use. Remember that a single product can often contain a number of different copyright works (eg the script, illustrations, the soundtrack, the musical arrangement). This is particularly the case for film and sound recordings. You need permission for any of these elements you intend to use.

For more information on multi-layered copyright see 2.7.

#### **4.2.6 Licensing the Material**

If you intend to attach a copyright licence to the material, or let others use it, you will need to ensure that you have the right to license the material to others. For example, if you plan to include a song in the soundtrack of a vodcast, which you then intend to let others download and remix, you must include this information in your agreement.

#### **4.2.7 Moral Rights**

Do not forget that as well as obtaining copyright permissions, you must also honour any moral rights in the material by correctly attributing the author and not treating the work in a way that is prejudicial to the author's honour. If you do not intend to do so, you will usually need to obtain consent from the original creator. For more information on moral rights, see 2.10.2.

### **4.2.8 Other Laws?**

Finally, always give thought to whether your use might infringe other legal rights besides copyright. For example, if you are using a photograph of a person in an advertisement, you may need a model release from that person.

A copyright licence will not protect you from liability for breach of other areas of law such as privacy, trademark or patent infringement, or defamation. If you think that your use might impact upon these or other rights, you should obtain legal advice.



## 4.3 Text and Written Material

### 4.3.1 Commercially Published Material

Permissions will usually be needed from the following people:

<p>The publisher or the person identified in the copyright notice on the imprint page</p>	<p>Although the publisher will not always own copyright in the book itself, they will often be able to provide you with permission to use material included in the book. If they can not, they should be able to provide further direction to the appropriate copyright owners.</p> <p>The publisher's contact details will usually be provided on the material itself (eg on the imprint page of a printed book). Other sources of information about publishers include:</p> <ul style="list-style-type: none"><li>• The <b>Copyright Agency Limited</b> (CAL - <a href="http://www.copyright.com.au">http://www.copyright.com.au</a>) a copyright collecting society that licenses the reproduction of material from books. CAL may be able to provide the publisher's contact details, or to license the material to you themselves.</li><li>• A comprehensive directory of Australian and foreign publishers and their contact details is published by the <b>Australian Publishers Association</b> (APA). This can be purchased online at <a href="http://www.publishers.asn.au">www.publishers.asn.au</a>.</li><li>• The <b>Australian Libraries Gateway</b> website provides a directory of online publishers and their contact details at <a href="http://www.nla.gov.au/libraries/resource/bookpub.html">www.nla.gov.au/libraries/resource/bookpub.html</a>.</li></ul>
<p>The author or authors</p>	<p>If the publisher or <b>CAL</b> cannot give permission you may have to approach the author/s yourself. If the author does not provide copyright permissions for the work, they should be able to tell you who does.</p> <p>Many authors now maintain their own websites, which will often have contact information. The <b>Australian Society of Authors</b> (ASA -</p>

	<p><a href="http://www.asauthors.org">http://www.asauthors.org</a>) provides a comprehensive list of links to Australian authors' websites.</p> <p>Another useful resource is the <b>Australian Writers' Guild</b> (AWG - <a href="http://www.awg.com.au">www.awg.com.au</a>). They have a writer's directory of all members and their contact information.</p>
The owner of copyright in any illustrations	<p>The following industry bodies can provide you with permission to reproduce illustrations included in books, assist with locating illustrators:</p> <ul style="list-style-type: none"> <li>• <b>CAL</b> (<a href="http://www.copyright.com.au">http://www.copyright.com.au</a>);</li> <li>• <b>Viscopy</b> is a visual arts collecting society who license (for a fee) artistic materials from Australia and overseas (<a href="http://www.viscopy.com">www.viscopy.com</a>).</li> </ul>
The owner of copyright in any other material included in the book, such as musical scores.	<p>If the publisher or author is unable to provide you with the required permissions or information, you should try contacting the relevant industry organisations for the type of material in question listed at other points in this chapter (eg <b>APRA/AMCOS</b>).</p>
The owner of copyright in the published edition (usually the publisher)	<p>This will be required if you are planning on photocopying or scanning the book itself. The publisher will usually own this copyright, or should be able to point you towards the relevant copyright owner.</p> <p><b>Copyright Express</b> (<a href="http://express.copyright.com.au/">http://express.copyright.com.au/</a>) is a service provided by <b>CAL</b> which offers an easy way to request permission (for a fee) to digitally copy from a hard copy original.</p>

### 4.3.2 Text on a Website

For permission to use text from a website look for any copyright notice or licence on the site setting out how the material can be used [3.5]. This can often be found at the bottom of the page, or by

following a 'Copyright' or 'Terms and Conditions' link. If the terms of use are not clear or do not provide the permission you need, the webmaster of the website or the author of the material should be contacted.

### **4.3.3 Material Published in Magazines and Newspapers**

Copyright in material published in magazines and newspapers is usually split between the employer (the newspaper) and the employee (the journalist). This is discussed above at 2.6.4.

The publisher should be able to assist with contacting the relevant person/s for permission. Information about contacting journalists (and media photographers) may be available from **Media Entertainment and Arts Alliance** (MEAA) at <http://www.alliance.org.au>.

### **4.3.4 Unpublished Material**

To obtain permission to use unpublished material, the author or their employee should be contacted. See discussion of contacting authors above.

### **4.3.5 Other Sources of Information**

Some libraries provide services to assist with obtaining copyright permissions, particularly for copyright material in their collections.

### **4.3.6 Sources of Text/Written Content**

- Project Gutenberg (<http://www.gutenberg.org/>) provides access to over 100,000 public domain works.
- The Public Library of Science (<http://www.plos.org/>) is a large resource of scientific papers licensed under Creative Commons licences.
- Many blogs are licensed under a Creative Commons licence. It's always worth checking the copyright terms.

## 4.4 Music and Sound Recordings

### 4.4.1 Commercially Recorded Music

Permissions will usually be needed from the following people:

<p>The person who owns the copyright in the sound recording (usually the record company)</p>	<p>Although the record company will not always own copyright in all the material included in the recording, they will often be able to provide you with a single permission to use the recording as a whole. If they can not, they should be able to provide further direction to the appropriate copyright owners.</p> <p>The record company's contact details will usually be provided on the material itself (eg on back of the CD).</p> <p>Other sources of information about music publishers include:</p> <ul style="list-style-type: none"><li>• the <b>Phonographic Performance Company of Australia</b> (PPCA - <a href="http://www.pcca.com.au">www.pcca.com.au</a>) which licenses copyright in sound recordings</li><li>• the <b>Australian Record Industry Association</b> (ARIA - <a href="http://www.aria.com.au">www.aria.com.au</a>) should also be able to assist with finding a record company and/or any licences needed to upload the sound recording online.</li><li>• the <b>Australasian Performing Right Association</b> (APRA) and the <b>Australasian Mechanical Copyright Owners Society</b> (AMCOS) at <a href="http://www.apra.com.au">www.apra.com.au</a>. <b>APRA/AMCOS</b> (which operate as one organisation) include many music publishers in their members.</li></ul>
<p>The person who owns the copyright in the music (usually the composer)</p>	<p>A good place to start in locating the composer is to contact <b>APRA/AMCOS</b>. They provide licences for many different uses (including online) of musical works on behalf of their composer members. They represent both</p>

	<p>Australian and (through agreements with similar organisations) international composers.</p> <p>Alternatively you may be able to locate the composer's agent, or contact the composer directly, through their website or Myspace page.</p>
The person who owns copyright in the lyrics	<b>APRA/AMCOS</b> should also be able to assist with locating the relevant person.
Any performers included in the recording	<p>This may not always be necessary, as it is standard industry practice for the publisher or producer to take an assignment of the performers' copyright in the sound recording.</p> <p>Where permission is required, the <b>Media, Entertainment and Arts Alliance</b> (MEAA - <a href="http://www.alliance.org.au">www.alliance.org.au</a>), the industry body that represents performing artists and journalists in Australia, may be able to assist you with locating the appropriate performer. Alternatively, <b>APRA/AMCOS</b> may be of assistance, or the publisher of the material.</p>

#### 4.4.2 Non-Musical Sound Recordings

For non-musical sound recordings, the rules are essentially the same as those listed above. You will need separate permission from the person who owns copyright in the sound recording itself, as well as any scriptwriter and any performers.

The producer or person who made the recording (eg the podcaster) should be able to provide you with permission, or help you with locating the relevant scriptwriter. Alternatively, the **ASA** (<http://www.asauthors.org>), **AWG** ([www.awg.com.au](http://www.awg.com.au)) or the **MEAA** ([www.alliance.org.au](http://www.alliance.org.au)) may be able to assist.

#### 4.4.3 Home-Recordings or Podcasts

For amateur or privately created recordings, such as home-recorded albums or podcasts, the same general rules apply as above.

However, in this case the person who owns copyright in the recording itself will usually be the person who made the recording. They should be able to provide you with permission to use the recording, and put you in contact with any underlying copyright owners.

Care should be taken when using home-recordings and podcasts, as they often contain infringing material.

#### **4.4.4 Radio Broadcasts**

In addition to the permissions listed above for any music or sound recordings included in the broadcast, if you wish to use material recorded from a radio broadcast you will also need permission from the person who owns the copyright in the broadcast itself.

The broadcaster will usually be the copyright owner of the broadcast, and otherwise should be able to provide assistance with locating them.

#### **4.4.5 Cover Songs**

The *Copyright Act* provides exemptions that let you perform and record cover songs, as long as you obtain the appropriate licence from **APRA/AMCOS** ([www.apra.com.au](http://www.apra.com.au)).

If you are performing the cover at a live music venue they may already have the licence you need. However, if you want to record the song or post it online you will need additional licences, which usually require the payment of a fee. APRA/AMCOS can provide you with more information on appropriate licences.

#### **4.4.6 Sources of Text/Written Content**

- ccMixer (<http://ccmixter.org/>) is a site dedicated to remixable music. All music on ccMixer is under a Creative Commons licence.
- Freesound (<http://www.freesound.org/>) is a good source of Creative Commons licensed sounds and sound effects.

## 4.5 Films

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### 4.5.1 Commercially Produced Films (eg DVDs and videos)

Permissions will usually be needed from the following people:

<p>The person who owns copyright in the film (usually the production company)</p>	<p>For a commercially produced film, the best starting point is to contact the production company. Their details can usually be found on the DVD or video box, or in the credits. Other helpful contacts are:</p> <ul style="list-style-type: none"><li>• the <b>Australian Film Commission</b> who have a list of industry contacts and directories (<a href="http://www.afc.gov.au/industrylinks/">http://www.afc.gov.au/industrylinks/</a>);</li><li>• <b>Roadshow Film Distributors</b> (<a href="http://www.village.com.au">www.village.com.au</a>), who handle most commercially produced films;</li><li>• <b>Screenrights</b> (<a href="http://www.screenrights.org">www.screenrights.org</a>) who handle licences for the use of films or TV programs by educational institutions. Screenrights also has an extensive record of rights owners which may be of help with locating a copyright owner.</li></ul>
<p>The person who owns copyright in any music or sound recordings included in the soundtrack</p>	<p>Permission will be required from copyright owners in the sound recording, the music and any lyrics (see Pre-Recorded Music, above).</p> <p>The <b>Phonographic Performance Company of Australia</b> (PPCA) (<a href="http://www.pcca.com.au">www.pcca.com.au</a>) should be contacted regarding the separate sound recordings in a soundtrack.</p>
<p>The person who owns the copyright in any</p>	<p>The producer should be able to provide you with permission, or help you with locating the relevant scriptwriter.</p>

script on which the film is based	Alternatively, the <b>Australian Society of Authors</b> ( <a href="http://www.asauthors.org">http://www.asauthors.org</a> ) or the <b>Media, Entertainment and Arts Alliance</b> ( <a href="http://www.alliance.org.au">www.alliance.org.au</a> ) may be able to assist.
The person who owns copyright in any other material included in the film, such as artworks or choreographed dances.	Again, the production company will be the best place to start for these. Alternatively, you may want to try contacting any relevant industry organisations for the type of material in question listed at other points in this chapter (eg the <b>MEAA</b> ).
Any performers included in the film	<p>This may not always be necessary, as it is standard industry practice for the producer to take an assignment of the performers' copyright in the film.</p> <p>Where permission is required, the <b>Media Entertainment Arts Alliance</b> (<a href="http://www.alliance.org.au">www.alliance.org.au</a>), the industry body that represents performing artists and journalists in Australia, may be able to assist you with locating the appropriate performer. Alternatively, <b>APRA/AMCOS</b> may be of assistance, or the publisher of the material.</p>

#### 4.5.2 Home Videos or Vodcasts

For amateur or privately created films, such as home videos or vodcasts, the same general rules apply as above.

However, in this case the person who owns copyright in the film itself will usually be the person who made the film. They should be able to provide you with permission to use the film, and put you in contact with any underlying copyright owners.

Care should be taken when using home films and vodcasts, as they often contain infringing material.



### **4.5.3 Television Broadcasts**

If you wish to use material recorded from a television broadcast on a blog or wiki or in a vodcast or podcast, you will need permission from the person who owns the copyright in the broadcast itself. This is in addition to the permissions listed above for any films, sound recordings etc included in the broadcast.

The broadcaster will usually be the copyright owner of the broadcast, and otherwise should be able to provide assistance with locating them.

## **4.6 Artwork, Photographs and Imagery**

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### **4.6.1 Internet Material**

For permission to utilize imagery downloaded from the internet, look at the website where the material was accessed for information regarding how the material can be used.

This can often be found by following 'Copyright' or 'Terms and Conditions' links. If this is not clear the webmaster of the website or the licensor should be contacted.

### **4.6.2 Artwork from a Software Package such as Clip Art**

Clip art is usually acquired under a licence which will set out how the images can be used. The licence agreement may be found within the software program itself or in a document that comes with the software package.

If it is unclear how the content can be used, the company who published the software should be able to assist. The **Business Software Association of Australia** (BSAA), who represent most software developers, may also be able to provide further direction ([www.bsaa.com.au](http://www.bsaa.com.au)).

Other helpful resources:

- Microsoft's advice on using clip art is available at <http://www.microsoft.com/about/legal/permissions/default.mspx#E4>.
- the Open ClipArt Library (<http://openclipart.org/>) and Wikimedia Commons ([http://commons.wikimedia.org/wiki/Category:Clip\\_art](http://commons.wikimedia.org/wiki/Category:Clip_art)) provide large resources of openly licensed or public domain clip art.

### 4.6.3 Imagery from Books or Magazines

**Viscopy** ([www.viscopy.com](http://www.viscopy.com)) and **CAL** (<http://www.copyright.com.au>) both have the ability to license artistic works included in printed publications.

Alternatively, the publisher should be contacted. The publisher can be identified from the imprint pages of a book or the contents pages of a magazine (usually in the form '© [year] [name]'). The **Australian Publishers Association** (<http://www.publishers.asn.au>) may also be able to help you in identifying the relevant publisher.

### 4.6.4 Animation

Before using third-party animation in a blog, vodcast or wiki, permission from the relevant copyright owner is needed. Most cartoon characters such as The Simpsons or Disney characters are licensed on behalf of the copyright owner by the merchandise body.

Some of the major merchandising organisations are: <sup>225</sup>

- **The Walt Disney Company. (Australia) Pty Ltd:** 7/650 Chapel St, South Yarra, Melbourne VIC 3141; (03) 9832 6155;
- **Warner Bros. Consumer Products:** 2 / 15-31 Pelham St, Carlton VIC 3053; (03) 9657 0333; fax: (03) 9663 8007;
- **Gaffney International Licensing Pty Ltd** (Star Trek, Teletubbies, The Wiggles, Bananas in Pyjamas, Thomas the Tank Engine, Pokemon, Care Bears and others), <http://www.gaffney.com.au>; and
- **Haven Licensing Pty Ltd** (The Simpsons, Peanuts, Sesame Street,) [www.havenlicensing.com.au](http://www.havenlicensing.com.au).

### 4.6.5 Other Sources of Information

**Viscopy** ([www.viscopy.com](http://www.viscopy.com)) is a visual arts collecting society who license (for a fee) the reproduction, publication and communication (eg online) of artistic materials (eg paintings, photographs etc) from Australia and overseas.

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## **4.7 Plays and Other Dramatic Materials**

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### **4.7.1 Published and Performed Material**

Contact the publisher, producer or the person identified as the copyright owner on the imprint page or program (usually in the form '© [year] [name]'). If they cannot give permission they should be able to direct you to the appropriate person or their representative.

If the material has been published in a written form, you may be able to obtain a licence from **Copyright Agency Limited** (CAL - <http://www.copyright.com.au>) to reproduce it or publish it online. See discussion of text at 4.3 above.

If the content involves material that has been recorded (eg on film or tape) you should follow the guidelines set out at 4.4 and 4.5 above.

### **4.7.2 Unpublished Material**

Contact the author for permission or assistance with locating the copyright owner.

### **4.7.3 Other Sources of Information**

Other useful resources include the **Australian Writers' Guild** (AWG - [www.awg.com.au](http://www.awg.com.au)), the **Australian Publishers Association** (APA - [www.publishers.asn.au](http://www.publishers.asn.au)) and the **Media Entertainment and Arts Alliance** (MEAA - <http://www.alliance.org.au>).