



media, entertainment & arts alliance
the people who inform and entertain

Media, Entertainment & Arts Alliance

submission to the

Australian Law Reform Commission

regarding the

**Copyright and the Digital Economy
Discussion Paper**

July 2013

Media, Entertainment & Arts Alliance

The Media, Entertainment & Arts Alliance (MEAA) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, performers, artists, photographers, dancers, symphony orchestra musicians, freelance musicians and film, television and performing arts technicians.

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Executive Summary

The Media, Entertainment & Arts Alliance (MEAA) represents professionals from a wide range of creative fields, including:

- employed and freelance journalists and photographers
- performers, dancers, musicians, and film, television and performing arts technicians

Most of these professionals benefit directly or indirectly from copyright.

Performers

The Copyright Act currently provides limited direct rights for performers. Although they have the right to grant or refuse consent to the reproduction and communication of a performance, copyright has historically favoured producers, investors and authors/writers over performers. Amendments made to the Copyright Act in 2005 provided for limited copyright over sound recordings of live performance but MEAA believes these are deeply flawed because performers are invariably forced to assign their rights.

Over the years Australian performers working in the audio-visual area have negotiated residuals industrially with screen producers. Residuals represent a recognition that the works embodying performances such as films and television drama programs are repeatedly duplicated and rebroadcast and that performers, as co-creators of the those works, have a right to compensation along with existing copyright holders.

Performers do not currently benefit directly from protection of copyright and the statutory licensing schemes administered through collecting societies. They do benefit indirectly insofar as the protection of copyright and of adequate returns to producers and investors is a prerequisite for further investment and the creation of employment opportunities. An effective copyright system is needed to underpin the current residuals system, which is largely based on a percentage of distributor's income from ancillary uses such as video/DVD sales.

Negotiations for a World Intellectual Property Organisation Audio-visual Performances Treaty were finalised last year. The Australian Government has supported the treaty and is expected to ratify it and bring forward legislation in the next few years. The treaty will strengthen performers' economic and moral rights, provided that it avoids the mistakes made with the sound recording legislation and does not allow for automatic transfer of all rights.

The impact of the digital economy on performers

Digital technology has given rise to new challenges in the form of sampling, mashing up and reusing of performances, music and video aggregators/streaming services, "motion capture", all of which impact on performers' economic and moral rights.

MEAA is concerned that, rather than addressing the challenges posed by new technologies, the proposals in the discussion paper, notably the introduction of the “fair use” concept, will weaken the overall regime and undermine investment and employment creation in the screen industries. This will adversely affect performers’ livelihoods.

Journalists

The rise of digital media has forced journalists to incorporate images, video and other multimedia into their reportage. This has had an impact upon journalists industrially (in that journalists now must be a jack of all trades) but also on their dealings with copyright – their sustained access and ability to use this material is essential for the journalistic project and by extension the democratic project.

Under the Copyright Act 1968 a distinction is made between those print journalists who are employees of a newspaper, magazine or similar periodical and freelancers. Broadcast (radio and television) journalists generally do not hold the copyright in the material created for their employers except in the rare circumstance where there is an agreement in place. The employee print journalist has the right to reproduce the work for the inclusion in a book and the right to reproduce a photocopy or other hard copy facsimile. The publisher owns all other rights. Employed journalists cannot control digital uses of their work on the internet unless an agreement is in place to the contrary.

Freelance journalists are usually treated as the copyright owner unless an agreement with a publisher states otherwise. Theoretically, this should give the journalist certain control of their work however due to the weak bargaining position of freelancers most contracts diminish or remove copyright over freelancers’ work.

Employed print journalists and freelance print journalists can join the Copyright Agency and receive payments under the licences administered by the Copyright Agency for use of their work by educational institutions. They are also remunerated under government licences and voluntary business and local government licences. This is an important stream of income for journalists, particularly for freelancers.

The impact of the digital economy on journalism

Digital technology is changing the media landscape, its business models and employment structures. The changes include a decline in print subscribers, new ways of telling news and the emergence of new digital media businesses offering a niche product to a niche audience.

About 1200 journalism jobs were lost in 2012. The fragmentation of the audience due to digital technology means more job losses are certain. As this shake-out continues there seem to be four emerging trends: traditional media companies are reshaping themselves, albeit on a smaller scale; the emergence of start-ups; the development of not for profit news organisations; and the attempt by governments, corporations or non-profits to develop their own content to attract readers or viewers.

All of this indicates that digital technology is driving convergence. The lines between broadcasting and telecommunications are blurring.

With one in seven journalism jobs disappearing last year alone, journalists have either entered new careers related to the field (public affairs, public relations, media relations, etc.) or have taken the step to become freelancers.

Freelancers have had to develop new skill sets to market themselves and deliver content in the new formats. Freelancers have to pay for all their own resources, training, and superannuation while publishers pay decreasing hourly and word rates. Freelance journalists face downward pressure on pay rates and are generally forced to waive their moral rights and assign their copyright to the publisher.

In 2010 the Australian Competition and Consumer Commission decreed that in future freelance journalists would be able to bargain collectively with four major employers (Fairfax Media, News Ltd, Pacific Magazines and Bauer Media) through an agent (in this case, the MEAA). All four publishers have refused to bargain.

MEAA has also developed a new category of freelance membership, Freelance Pro, in recognition of the changing media landscape and to empower freelance journalists. MEAA has also developed a standard contract recommending copyright terms more favourable to freelance journalists and the retention of moral rights, however, most publishers will not agree to all the terms.

Proposals

Proposal 4–1 *The Copyright Act 1968 (Cth) should provide a broad, flexible exception for fair use.*

MEAA strongly supports the Australian Film/TV Bodies submission that the case for fair use has not been made by the ALRC. MEAA does not support the ALRC's proposals regarding fair use. The concept is intrinsically vague, favours those with resources to undertake prohibitively expensive litigation and has played a central role in undermining the project of journalism in the US.

Proposal 6–1 *The statutory licensing schemes in pts VA, VB and VII div 2 of the Copyright Act should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.*

MEAA strongly opposes the ALRC's proposal with respect to statutory licences. MEAA supports the retention of these licences, which provide an important revenue stream to producers and investors, in turn contributing to the financial viability of the screen industries. MEAA believes that there are solutions available to ensure that creators continue to receive equitable remuneration while educational institutions are provided with appropriate access to information.

Proposal 9–1 *The fair-use exception should be applied when determining whether private and domestic use infringes copyright. “Private and domestic use” should be an illustrative purpose in the fair-use exception.*

MEAA opposes this recommendation. MEAA suggests that while business models have been slow to develop, a number of efficient licensing models have and are emerging. These, in turn, are expanding access to copyright material for private and domestic use. With the growth of these models, private use exceptions are not required and in fact would undermine and usurp efforts to develop market solutions that satisfy consumer demand and reward and protect creators.

Proposal 10–1 *The Copyright Act should not provide for any new “transformative use” exception. The fair-use exception should be applied when determining whether a “transformative use” infringes copyright.*

MEAA strongly supports the ALRC’s decision not to propose a transformative use exception but does not support the opening up of exceptions under a fair-use regime to enable courts to construct a potential “transformative use” exception.

Proposal 10–2 *The fair-use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair-use exception.*

Proposal 10–3 *If fair use is not enacted, the Copyright Act should provide for a new fair-dealing exception for quotation. This should also require the fairness factors to be considered.*

Australian law already allows for quotation. MEAA supports the Copyright Agency and Australian Film/TV Bodies’ submissions in this regard. Allowing anything more than this would significantly impact upon the legitimate rights of a copyright holder.

Proposal 12–1 *The fair-use exception should be applied when determining whether a use of an ‘orphan work’ infringes copyright.*

Proposal 12–2 *The Copyright Act should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:*

- (a) a ‘reasonably diligent search’ for the rights holder had been conducted and the rights holder had not been found; and*
- (b) as far as reasonably possible, the work was clearly attributed to the author.*

Proposal 12–3 *The Copyright Act should provide that, in determining whether a ‘reasonably diligent search’ was conducted, regard may be had to, among other things:*

- (a) how and by whom the search was conducted;*
- (b) the search technologies, databases and registers available at the time;*
and
- (c) any guidelines or industry practices about conducting diligent searches available at the time.*

MEAA is concerned the proposal has not appropriately balanced the interests of copyright holders’ (even those who have not been identified) with the interests of users.

Introduction

The Media, Entertainment & Arts Alliance (“MEAA”) welcomes the opportunity to comment on the Copyright and the Digital Economy Discussion Paper.

MEAA supports the submissions made by the Copyright Council, Screenrights and the Copyright Agency Limited. MEAA is also a signatory to the Australian Film/TV Body submission by the Australian Federation Against Copyright Theft, the Motion Picture Distributors Association of Australia, the National Association of Cinema Operators, the Australian Independent Distributors Association and the Independent Cinemas Association of Australia.

In particular, MEAA endorses the concerns detailed in the Australian Film/TV Body submission regarding the ALRC’s interpretation of the scope of the inquiry, the committee’s independence and the lack of any consideration of the economic impact of the proposals.

This submission provides additional material to the ALRC with respect to the impact that the digital economy has had on workers in creative fields and the significant role copyright plays in the working lives of performers and journalists.

Consideration of this day-to-day, on-the-ground reality is missing from the ALRC Discussion Paper.

This submission seeks to fill this gap and detail our concerns that the proposals put forward in the Discussion Paper would undermine creators’ rights and sustainable careers for artists, creators and journalists in Australia.

To this end MEAA will provide a snapshot of the current state of play with respect to performers and journalists and their relationship to the digital economy and the copyright regime and then move on to directly address the proposals in the discussion paper.

The state of play for performers and journalists

MEAA represents professionals from a wide range of creative fields, including:

- employed and freelance journalists and photographers,
- performers, dancers, musicians, and film, television and performing arts technicians.

Journalists and performers exist in a symbiotic relationship with the creative companies for which they work, operating within a complex web of legal and industrial rights.

Yet the relationship has always been characterised by an imbalance of power. The imbalance in the relationship has been exacerbated by the changes brought by the digital economy.

Copyright is for some central to this relationship, for others it is a part of the story, with copyright acting as just one stream of control and remuneration. For others still it has played a minor role.

Performers, digital technology and copyright

Historical context

The nature of performance has changed significantly over time. Performers historically were paid for their work at the time of the performance. However, over the previous century, performance as an art form was altered drastically because of the change in the way performance is delivered to audiences, with analogue and digital technologies playing a critical role in bringing about change.

The development of radio, television and cinema provided increased performance opportunities. At the same time the introduction of recording technologies meant that performers who previously performed a number of times for different radio audiences would henceforth only have to perform once. The recording took away the need for repeated performances.

At the time (in the mid-20th century) this had a considerable impact on the ability of a performer to earn a living. This in turn led to the development of what in the industry is now known as residuals. Sometimes referred to as “royalties”, “repeats” or “second usage fees”, residuals provide compensation to performers for use of a motion picture, radio or television program after its initial use. They are industrial rights in nature and were first negotiated in radio drama productions in the US and subsequently introduced into television and later feature film production.

Over the years Australian performers have fought for and won residual rights through negotiations with producers. For TV work, some repeat and other usage rights are bought up front and residuals begin when this usage is exhausted, such as when the show reaches its fourth or fifth play or goes to DVD. For film work, residuals often begin soon after the movie appears on video/DVD. Residuals, royalties, licensing and other rights are recognition that the performances are created, duplicated and rebroadcast over and over and that the creators of these commercial products have the right to compensation.

Residuals have been negotiated industrially because copyright has historically favoured producers and authors/writers over performers and other collaborators and has failed to recognise the full rights held by performers in performance.

Copyright and performers

Under the Copyright Act rights for performers centre on three areas:

1. the right to grant or refuse consent to the reproduction and communication of a performance;
2. co-ownership of copyright in a sound recording of a performance; and
3. moral rights.

The concept of performers' rights has been around since the establishment of the World Intellectual Property Organisation (WIPO). Yet singers, musicians, dancers and actors have enjoyed limited international protection for their performances recorded in audio-visual productions. The adoption in 1961 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention) was an early step. In 1996, the adoption of the WIPO Performances and Phonograms Treaty (WPPT) modernised and updated earlier standards in respect of sound performances, particularly in relation to digital uses, but left a void in the international rights' system for audio-visual performers.

Negotiations for a WIPO Audio-visual Performances Treaty were finalised last year following lengthy negotiations with respect to the transfer of rights. The adoption of the new treaty at the Diplomatic Conference on the Protection of Audio-visual Performances in Beijing strengthens the position of performers in the audio-visual industry by providing a clear international legal framework for their protection. The treaty will also contribute to safeguarding the rights of performers against the unauthorised use of their performances in audio-visual media. The treaty will enter into force once it has been ratified by 30 eligible parties, including countries or certain intergovernmental organisations.

The Beijing Treaty on Audio-visual Performances (BTAP), as it is now known, will strengthen the economic rights of film actors and other performers and will potentially provide additional revenue to performers from their work. It will potentially enable performers to share proceeds with producers for revenues generated internationally by audio-visual productions. It will also grant performers

stronger moral rights to prevent lack of attribution or distortion of their performances.

As a supporter of the treaty, Australia is expected to ratify BTAP and bring forward legislation to introduce performers copyright in the coming years.

In 2005, the Copyright Act was amended to enact the WPPT and provided performers co-ownership of copyright in sound recordings of their performances. From the performer's perspective, however, there are serious problems with the legislation.

Under the amendments, the first owners of copyright in a sound recording of a live performance, in the absence of an agreement to the contrary, are the performer and the person who owns the recording medium. This co-ownership is the key problem with the legislation.

In most other countries where performers' copyright is acknowledged and legislated, including Britain, performers are granted a standalone performers' right. Producers cannot require a performer to assign their rights to the record company as a precondition of getting the record deal. The performer may only assign these rights to a collecting society that collects and distributes royalties on their behalf.

MEAA however understands that since January 1, 2005, almost every record deal signed in Australia has required this assignment of rights. This means that what the government has given, in practical reality, the record companies have taken away – and performers are not seeing the benefit from these new rights.

Furthermore, if a performer is employed, for example as an orchestral musician or a cast member on a musical, then all performers' copyright in the sound recording is deemed to belong to the employer: Section 22(3B). If a sound recording is commissioned by a show's producer, a performer has no rights whatsoever: Section 97 (3). Rather, the person who commissioned the making of the recording becomes the owner of copyright.

A further limitation on the practical application of the rights is a provision in the legislation that deems the performer's permission to use the recording to have been given in certain circumstances. A performer is, for example, taken to have given permission for the use of a sound recording if his or her performance has been recorded for a particular purpose and the recording is used for that purpose in accordance with the performer's original consent.

With respect to recordings made before January 1, 2005, a performer's copyright in the sound recording has been provided retrospectively. However, the maker of the recording (and people authorised by that person) can continue to use the recording in certain ways, such as by reproducing it, without getting permission from any performer, and without having to make any payments to any performer. Also, performers do not own copyright for all purposes and are not entitled to certain remedies for infringement (including damages and account of profits). There is a

scheme for payment of compensation for acquisition of property on unjust terms, designed to overcome constitutional objections to the retrospective change in ownership of copyright in recordings of their performances. However, performers in practice rarely, if ever, see any benefit from this scheme.

All these amendments were intended to implement the WIPO Performers and Phonograms Treaty but, in MEAA's view, they do not. Article 6 of the WPPT requires Australia to grant exclusive rights to performers. The 2005 amendments, on the other hand, merely give performers a potential shared interest in limited situations.

MEAA has previously recommended that the Copyright Act be amended to ensure that the amendments made in 2005 are effective have a practical positive impact upon performers.¹

It is MEAA's view that this problem needs to be avoided in the drafting of any legislation to implement the Beijing Treaty. If the treaty is to have any positive impact upon performers' careers and livelihoods then any transfer of copyright needs to be subject to the performer retaining the economic rights – i.e. the "right to receive royalties or equitable remuneration for any use of the performance" as foreseen under the WAPT.

Digital technology and performers' rights

Digital technology has further complicated the relative powerlessness of performers to control and be rewarded for their work. Digital technology enables consumers and producers to more speedily and easily copy, manipulate and exploit audio-visual works containing performances. New technology enables the sampling, mashing up and reusing of performances for exploitation. This has already been controversial in Australia. MEAA has previously stated:

"If the performer's performance is able to be mixed or altered in a way which may be derogatory or detrimental to the performer's reputation, there will be

¹ MEAA recommends amending the Copyright Act to ensure that the performers copyright in a sound recording provides an exclusive right as occurs in all other countries except the US. The act should also provide that, as is standard practice around the world, assignability of the rights to equitable remuneration only to the appropriate collecting society.

Further, MEAA recommends amendments to the Copyright Act to ensure that performers who are employees, or performers who have been commissioned to perform a piece or performers who have recorded a performance for a particular purpose are provided with copyright in the sound recording. This would involve:

- abolition of the employer's interest in section 22(3B);
- the exclusion from section 97(3) (the commissioning provision) of the performer's copyright interest, or at least the part of the performer's copyright interest covered by statutory licenses; and
- amendments to Part IV Subdivision B (performers' rights in pre-2005 recordings) to exclude the part of the performer's copyright interest covered by statutory licenses. If there are concerns about the constitutional implications of this, then the entitlement could relate to the amount paid above the 1 per cent cap (i.e. the "new" income not contemplated at the time the recording was made).

no restrictions on the ability of others to take excerpts of the film or, indeed, take the film as a whole and adapt and alter the performer's performance.”²

Arts Law has also stated:

“The key issue for performers in the digital age is therefore protecting secondary use and knowing in advance the value of rights being assigned to producers. The audio-visual performer remains without a right of action against infringers who are not party to a contract or agreement with the performer.”

The emergence of music and video aggregators/streaming services, some of which operate via subscription, have been undermining performers’ (particularly musicians’) ability to earn income. Several prominent international musicians, such as Thom Yorke from Radiohead, have withdrawn their music from streaming services such as Spotify in protest over non-payment to musicians. The law has not caught up with this new technology.

The audio-visual industry and performance sectors are also evolving new forms of performance and these forms require new rights. “Motion capture” or “mocap” technology, where actors’ movements are digitised and applied to computer-generated characters is a burgeoning and increasingly successful area of work for actors. Films such as *Rise of the Planet of the Apes*, *Happy Feet* and *The Hobbit* all rely heavily on this form of performance. Further, there are productions that exploit the likeness of deceased performers such as Tupac Shakur³ or Jimmy Cagney and combine these with live performers to create a virtual performance. With respect to these issues Arts Law points out that:

“The current law protecting audio-visual performers does not make provisions for actors’ ‘motion rights’, that is, it does not protect the rights of the actor providing the movement. It is evident that new language will have to be introduced to existing law if the law is to contend with such developments in technology.”

Disagreements over the exploitation of material have led to a number of industrial disputes in Australia, the US and elsewhere. In the absence of appropriate copyright protections, performers are obliged to assert their rights industrially.

Copyright law needs to evolve to take into account new forms of performance and creative work. It also needs updating to include performer rights that have at last been recognised internationally and it needs improvements to the current regime covering sound recordings.

² <http://www.abc.net.au/radionational/programs/lawreport/unrepresented-litigants-who-incur-unnecessary/3451690>

³ <http://www.smh.com.au/technology/sci-tech/resurrection-rap-tupac-hologram-knocks-em-dead-at-coachella-20120417-1x4ep.html>

Without a standalone performer copyright, performers will continue to find themselves in a structurally weak bargaining position with no direct benefit from the copyright regime.

Journalists, digital technology and copyright

The work of journalism is steeped in copyright.

Journalists use copyrighted information every day. Journalists regularly quote from government, corporate, academic and research documents, and undertake interviews, all of which are copyrighted in some form. This is complicated by the fact that the rise of digital media has forced journalists to now incorporate images, video and other multimedia into their work.

This has had an impact upon journalists industrially (in that journalists now must be a “jack of all trades” – learning technical skills in addition their traditional journalism skills) but also on their dealings with copyright. Journalists’ sustained access and ability to use this material is essential for the journalistic project and, by extension, the democratic project. In Australia, the *Copyright Act 1968* provides a fair dealing exception for reporting news, which has for some time worked well and without significant problems.

Of course journalists also create copyrightable works. This, as with all forms of creative authorship, is essential to reward the work undertaken.

Under the Copyright Act 1968 a distinction is made between those print journalists who are employees of a newspaper, magazine or similar periodical and freelancers. Broadcast (radio and television) journalists generally do not hold the copyright in the material created for their employers except in the rare circumstance where there is an agreement in place.

The copyrights held by employed journalists are covered by section 35 (4). In summary these provide to the employee journalist the right to reproduce the work for the inclusion in a book and the right to reproduce a photocopy or other hard copy facsimile.⁴ The publisher owns all other rights. Employed journalists cannot control digital uses of their work on the internet unless an agreement is in place to the contrary.

Freelance journalists, on the other hand, are usually treated as the copyright owner unless an agreement with a publisher states otherwise. Theoretically, this should give the freelancer certain control of their work. However, due to the weak bargaining position of freelancers, most contracts diminish or remove these journalists’ copyright over their work.

⁴ There are differing sets of rights for those works made before May 1, 1969 and between May 1, 1969 and before July 30, 1998.

Employed print journalists and freelance print journalists can join the Copyright Agency and receive payments under the licences administered by the Copyright Agency for use of their work by educational institutions. They are also remunerated under government licences and voluntary business and local government licences. This is an important stream of income for journalists, particularly for freelancers.

About 4000 MEAA members are members of the Copyright Agency. Over the past 20 years, the Copyright Agency has distributed close to \$8 million directly to MEAA journalist members, representing approximately 8 per cent of total payments. Most of the payments (about 80 per cent) have been for newspaper content, but there have also been payments for magazines, journals, books and online content. Some payments would also have gone indirectly to MEAA members who are not the Copyright Agency members for book content, in accordance with their publishing contracts.

Journalists are further supported indirectly by Copyright Agency licences in much the same way as performers are currently supported indirectly by the copyright regime. That is, businesses such as publishers that benefit from the licences are in part sustained by licence fees and are able to maintain their operations and continue employing journalists.

The impact of the digital economy on journalism

Digital technology is fundamentally changing the media landscape, its business models and its employment structures – much in the same way digital technology has fundamentally changed other industries. The effect of this change is similar to, and as disruptive as, the advent of broadcast media on performers' income in the middle of last century.

These technological changes have led to a fragmentation of the audience for news, information and entertainment; a dramatic slide in advertising revenue, which traditionally underpinned the investment in quality journalism; and a massive decline in print subscribers as audiences change their news habits.

The world's print newspaper markets – as a mix of advertising and circulation – are shrinking. According to data from PricewaterhouseCoopers, in 2007-2009 the US market was hammered by a massive 30 per cent decline. At that stage, Australia endured a more modest 3 per cent slump, reflecting the milder impact of the financial crisis.

But it's clear now that Australia was merely postponing a similar slide. We're living through it now. A generation of Australians are losing the habit of reading print newspapers. The graph below shows that in 1991 160 newspapers were sold for every thousand Australians. Two decades later less than 100 are sold for every thousand of us.

As print sales decline, there has nonetheless been a growth in digital audiences. However, the advertising model underpinning print has not transferred online. In this context, control over copyright has become more important for journalists.



As a consequence of the decline in print, the two leading newspaper groups, News Corp Australia and Fairfax Media, last year decided to make digital news the priority. This has meant that more than 1200 journalism jobs have been lost, predominantly at Australia’s two largest media organisations.

Digital-first has led to the creation of a new type of journalist: one that first files a breaking story for digital and continues to update it during the news cycle, often with multimedia content. The story is then rewritten for print later. The ramifications of those changes are still to work through the industry.

Digital technology has also led to developments that herald the beginning of a very different era in journalism: new ways of telling news through video and audio, and the emergence of digital-only media businesses offering a niche product to a niche audience.

As this shake-out continues there appear to be four emerging trends – all of which have implications for journalists, their journalism and copyright.

First, traditional media companies are reshaping themselves, albeit on a smaller scale. Traditional media companies have been able to use their size to be the first movers in the online space and to dominate the news on the web as they did in print or analogue broadcasting.

This has forced a fundamental rethink of how newsrooms work. It's simply not practical to require the same journalist to write for each platform with a unique story and conflicting commissioning lines. Instead of writing for a particular paper or program or even website, reporters, writers, photographers are employed to produce material into a central clearing pool from which editors of different platforms – daily papers, weekend papers, websites, apps, etc. – can draw material to shape their production needs.

The challenge for these traditional media organisations is how to size their staff numbers to a level that is affordable – at a time when the revenue model is also being savaged by the digital transformation. There are probably half as many journalists working for newspaper companies (including their online component) as worked for them seven or eight years ago.

The second trend is the emergence of start-ups. As some of the traditional players strive to balance the old and new, we're seeing some new commercial start-ups emerging that are finding new ways to monetise the traditional income sources of advertising and circulation. In Australia, we have seen online sites like New Matilda and Crikey pioneering news content online and via subscriber emails. They have been joined by site such as mUMBRELLA and The Hoopla.

A third trend is the development of not-for-profit news organisations. In Australia, Graeme Wood has funded the launch of The Global Mail and he has partnered with Britain's *The Guardian* to launch that newspaper in Australia as an online operation.

A different version of a non-profit is The Conversation, launched by Andrew Jaspán, a former editor of *The Age*. This works with academics to unlock data and information held in universities and make it journalistically available.

A fourth model is the attempt by governments, political parties, corporations or non-profits to develop their own content to attract readers or viewers. Qantas, for example, is generating its own travel journalism. The AFL employs a media team of about 100 people – half of them journalists – to prepare material for use by them and by their clubs. The NRL is also developing a media unit.

So far, these new players don't begin to employ the number of editorial staff lost from places as big as Fairfax and News Limited.

All of this indicates that digital technology is driving convergence. The lines between broadcasting and telecommunications are blurring. Traditional journalism distribution platforms such as print, radio and TV are increasingly finding that audiences come to them via social media and they may stay only briefly to follow one story before using social media to go elsewhere in pursuit of something else.

The Pew Center Project for Excellence in Journalism's report on the state of the US news media 2013 found that online news consumption had risen sharply over the

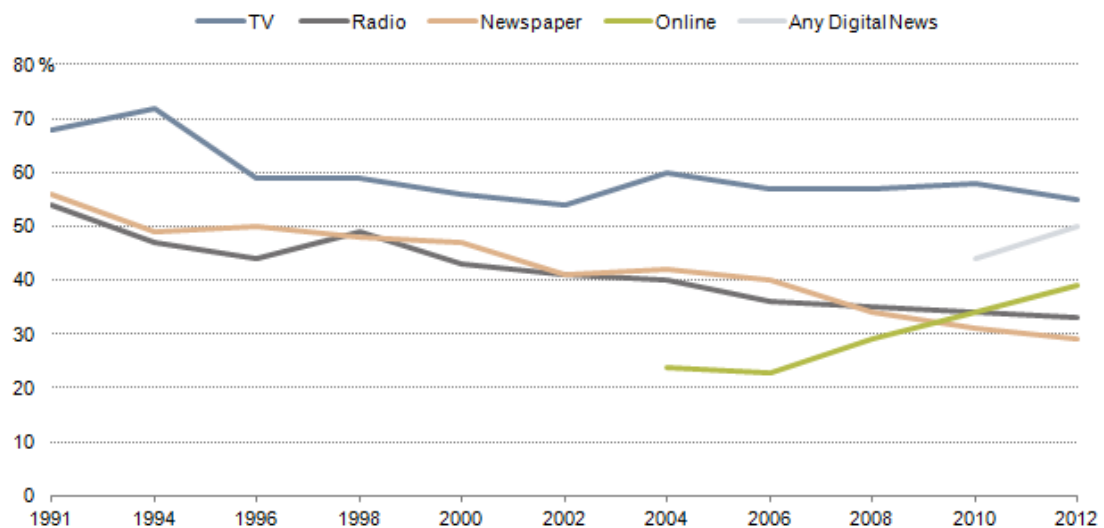
last two years, following the rapid spread of digital platforms. In fact, online was the only category of news that showed growth.

The report said:

“In 2012, about 39% of respondents got news online or from a mobile device ‘yesterday’, (the day before they participated in the survey) up from 34% in 2010, when the survey was last conducted. And when other online and digital news sources are included, the share of people who got news from one or more digital forms on an average day rises to 50%, just below the audience for television news (which combines cable, local and network), but ahead of print newspapers and radio (29% and 33%, respectively). A further breakdown shows that 19% of respondents got news from social media and 16% did so from email, while 8% said they’d listened to a podcast.”

Digital Grows Again as a Source for News

Percentage of Respondents Who Got News “Yesterday” From Each Platform



Source: Pew Research Center

PEW RESEARCH CENTER

2013 STATE OF THE NEWS MEDIA

The upheaval triggered by digital has had a direct impact upon the working lives of journalists, the sustainability of their careers and the income they can earn from their creative work. With one in seven journalism jobs disappearing, many journalists who have been made redundant by traditional media groups have either entered new careers related to the field (public affairs, public relations, media relations etc.) or have taken the step to continue working albeit as ‘permanent’ freelancers.

There are positives and negatives arising from the increase in freelance journalism. Freelancers have had to retrain as they are expected to develop new skill sets in

order to market themselves and deliver content in the new formats that media outlets require – such as accompanying video or podcast.

Freelancers have to pay for all their own resources, their training, even their retirement savings into superannuation while publishers impose ever decreasing hourly and word rates.

On the surface freelancers have greater control over their copyright and can theoretically benefit more directly from the current copyright regime. However, freelancers work in an industrial and economic context that sees them in a weak bargaining position.

MEAA recently surveyed its freelance members about the challenges they face when dealing with these employers. Given their weak bargaining power in a shrinking but oversupplied market, freelance journalists say they are confronting downward pressure on pay rates and are increasingly being forced to waive their moral rights and assign their copyright to the publisher.

MEAA has recently sighted contracts that allow the freelancer to retain copyright but restrains them from publishing their work in a list of 12 major online and traditional publishers.

Until recently it was impossible for freelance journalists to bargain collectively because they were categorised under the Trade Practices Act. However in a 2010 ruling the Australian Competition and Consumer Commission decreed that in future freelance journalists would be able to bargain collectively with four major employers (Fairfax Media, News Ltd, Pacific Magazines and Bauer Media) through an agent (in this case, the MEAA). All four publishers have refused to bargain around freelance rates meaning freelance journalists have no effective control over their income or copyright.

MEAA has also developed a new category of freelance membership known as Freelance Pro. This has been established to recognise the changing media landscape and to empower freelance journalists. The membership involves professional indemnity and public liability insurance, and increased contract advice. MEAA has also developed a standard contract for freelance journalists. In it, MEAA has recommended copyright terms more favourable to freelance journalists and the retention of moral rights.⁵ It is a sad reality that due to their greater bargaining

⁵ **3. Copyright**

3.1 Exclusive licence

3.1.1 On submission of a Work under clause 2.3, the Contributor grants to the Publisher an exclusive option to publish the Work for the period from the date of submission to the date of acceptance as set out in the Work Description.

3.1.2 If the Work has not been accepted for publication by the acceptance date, and the Publisher and the Contributor have not agreed otherwise, the exclusive option granted in clause 3.1.1 will lapse and the Contributor may deal with the Work as he or she sees fit.

3.2 Assignment or licence on publication

From the date of acceptance of the Work for Publication, the Contributor grants to the Publisher the licence described in the Work Description.

power, most publishers will not agree to all the terms. However, the document at least sets out the starting point for best practice.

Freelancers, lacking genuine bargaining power, subjected to downward pressure on pay rates, compelled to sign away their rights or else not be engaged, and having additional burdens imposed on them (such as demands for insurance coverage and restraints on trade) are confronted with a situation where their ability to earn a living from their creative work is becoming increasingly difficult.

Copyright and images

Publishers and journalists (both freelance and employed) have at times found themselves tripped up by the complexities of copyright in the digital age.

Dr Fiona Martin in *Life in the Clickstream II – The Future of Journalism December 2010* detailed several issues that have arisen relating in particular to the use of images in the age of the internet. Dr Martin described two instances:

“[In 2010] Twitpic user and software executive Joe Neale successfully went into battle with Sky News in London, when it used his image of a crime scene without his permission and without correct attribution or payment. Some weeks and emails to Sky later, when Joe was still trying to get paid for use of the image, he ran a Twitter campaign among his 20,000 plus followers, which included messages like ‘Newscorp use your photos without permission but have plans to charge for reading their content’. Sky News then agreed to pay.

“In a long ongoing ongoing court case AFP and photographer Daniel Morel were trying to settle whether Morel ‘provided a nonexclusive license to use his photographs when he posted them on a social networking and blogging website known as Twitter without any limitation on the use, copying or distribution of the photographs’. AFP is alleging what many media workers have assumed – that users sanction free republishing of their work if they post it on social media sites.”

Dr Martin continues:

“But this goes against basic copyright provisions. As a rule of thumb, every content-sharing service has terms of service which acknowledge the creator’s copyright and then claim additional licensing rights for the service to any work posted there. Socially shared images aren’t in the ‘public domain’ unless

3.3 Licence to the Contributor

Where the Contributor has granted an assignment or an exclusive licence of the copyright in the Work to the Publisher, the Publisher grants the Contributor a royalty free non-exclusive licence of the copyright in the Work for use by the Contributor in promoting his or her services, including in portfolios and on websites.

3.4 Moral rights

Nothing in this agreement constitutes a consent by the Contributor in relation to any acts contrary to the Contributor’s moral rights, unless expressly set out in the Work Description.

the copyright has expired or been relinquished – as you sometimes find on Wikimedia Commons images. Even then there may be moral rights covering the way the image is used. Realistically you can't know how social media creators want their work used unless you ask them. That's a sensible ethical approach to ensure you know:

- *how they want to be attributed*
- *whether they want to be paid for their work*
- *how they want it to be captioned and whether they want a caption link back to the original work*
- *how the image should be interpreted, whether it's out of date or wrongly labelled*
- *whether it's subject to a legal dispute."*

Journalists and photographers, working in an increasingly complex digital, multimedia world, need ensure other people's rights and livelihoods are protected while also protecting their own.

Seeking the rights to reuse published content can be fraught with difficulties and frustrations. But if digital technology is the cause of the problem it can also be the solution. Licensing schemes provide a simple easy to use, system that will only improve in time as digitalised data collection systems are put in place. The Copyright Agency's Rights Portal for example provides an improved solution to users.

Response to proposals

4. Fair Use

Proposal 4–1 The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.

The ALRC's proposes the repeal of existing statutory exceptions to copyright infringements and their replacement by a broader "fair-use exception".

This would take the form of an express statement within the Copyright Act that fair use does not infringe copyright, with the fairness of the use in question to be determined by reference to a non-exhaustive list of "fairness factors" and "illustrative purposes", together with relevant case law.

If implemented, the proposed system would resemble the more deregulated US system, where litigation is often necessary to determine whether the use of copyrighted materials was sound.

The ALRC has stated that the current regime discourages innovation. MEAA believes the opposite to be the case. With broader exceptions to copyright infringement comes the prospect of litigation to resolve whether use and reproduction of materials is fair across a much extended range of “illustrative purposes”, the rights of content producers will be increasingly ignored and their right to benefit from the use of their work will be reduced.

In the context of MEAA members, the loss of what are already modest limitations on copyright use will provide further disincentive to remain in or enter the creative industries, which are in the midst of substantial change, including workforce reductions. The consequences in terms of a reduction in the overall pool of journalistic and artistic materials and the quality and diversity of those materials should be apparent.

MEAA strongly supports the Australian Film/TV Bodies submission that the case for increased fair use has not been made by the ALRC. To this end MEAA does not support the ALRC’s proposals regarding fair use.

MEAA has three key concerns with the introduction of fair use.

The first is the complexity, uncertainty and vagueness intrinsic to the open concept of fair use. The interpretation of “fairness” will always be a lottery and will inevitably be dependent upon the views of a judicial officer.

The ALRC Discussion Paper points to a number of elements that will provide greater certainty including “guidelines developed by peak bodies, industry protocols and internal procedures and documentation” as well as “an industry code.” While MEAA supports such industry-based agreements, codes and memoranda of understanding in a multitude of industrial arenas, in many circumstances government legislation and regulation provide much greater certainty for all concerned. Where there is a lack of clarity, there will always be outliers working to undermine industrial agreements and chip away at their effectiveness.

The second concern is that “fair use” is a concept that principally benefits individuals or organisations with market power and/or considerable wealth. This of course is no problem for major media corporations. It is a problem for sole-operating freelance journalists and photographers as well as small to medium businesses. There is no equality in bargaining power in these transactions and the prospect of achieving equal footing is dim to say the least.

The British Copyright Council commissioned a report on the costs of fair use versus the costs of fair dealing. This report quotes the American Intellectual Property Law Association, which estimates that the average cost to defend a copyright case is just under \$1 million.⁶

⁶ [Cited at page 42 in an article by Giuseppina D’Agostino entitled “Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use – published in *Comparative Research in Law & Political Economy* 2007 (Vol: 03 No. 04)].

The high cost is due to the uncertainty inherent in the concept of fair use, which is complex and open to broad interpretation by the judiciary and thereafter subject to further litigation.

Professor Lawrence Lessig observes in his book *Remix* that the fair-use principle acts against the interests of the small-scale infringer, just as it acts against the interests of the small-scale creator because of the expense of “defending a claim of ‘fair use’ ”:

“Fair use is a critically important safety valve within copyright law. But it remains, perhaps necessarily, an extraordinarily complicated balancing act, and a totally inappropriate burden for most amateur creators.”⁷

...
“When copyright law is meant to regulate Sony and your 15-year-old, a system that imagines that a gaggle of lawyers will review every use is criminally inadequate. If the law is going to regulate your kid, it must do so in a way your kid can understand... ‘Fair use’ could do its work better if [US] Congress followed in part the practice of European copyright systems. Specifically, Congress could specify certain uses that were beyond the scope of copyright law.”⁸

The concept of fair dealing is at least better-defined, in accordance with the first leg of the three-step test – “certain *special cases*” – and provides greater certainty in the long run.

The third concern is that fair use in the US has played a central role in undermining the project of journalism and has supported those entities that have unduly exploited the creative labour of journalists.

Journalism is largely dependent upon an environment that is profitable and sustainable and in which people are willing to pay. And this is where the force of the digital revolution clashes with the business models that sustain journalism. As Steven Waldon states:

“One of the most famous phrases of the internet era is ‘information wants to be free’. There is some truth to that. People want to distribute and receive information for free. But what that leaves out is reality that in some cases the information will not come to the fore without the work of professional reporters. And while information may want to be free, labour wants to be paid.”⁹

Fair use has allowed companies that have made no contribution whatsoever to journalistic endeavour to siphon off unearned advertising income.

⁷ p255

⁸ p267

⁹ Steven Waldman “The Information Needs of Communities”, [US] Federal Communications Commission, June 2011.

The US fair-use system has assisted in the success of companies such as Google and Facebook, to the detriment to journalism's predominant business model. Advertising revenue that once flowed to the newspaper or the radio or the TV, now flows to the internet entity where the reader finds the story. Yet in the great majority of cases that internet site didn't commission the story and doesn't pay the wages of the reporter who wrote it.

News aggregation services now derive huge profits by simply summarising articles and providing links to the originating article or photo, even though they paid nobody to write or take it. These entities simply scoop up material in the hope of digital sales. Google at least provides a link to the creator's website and tends to provide very brief extracts and thumbnail sized images on its listings.

News reporting itself, the means by which citizens get to make informed decisions in a democracy, is now under threat. Advocates for the new media environment regularly promote the view that new web-based 'citizen journalists' or professionals will emerge to take over. There is no doubt that there has been an upswing in this phenomenon.

However, the US Federal Communications Commission¹⁰ reported that 95 per cent of the stories carried on these websites were based on original reporting by the so-called traditional media. It then cites Michele McLellan of the University of Missouri journalism school:

"The tired idea that born-on-the-web news sites will replace traditional media is wrong-headed, and it's past time that academic research and news reports reflect that."

Far from facilitating innovation, fair use merely allows the unfettered recycling of the original content of other creators with no compensation, thereby undermining the economic basis of the initial content creation.

To illustrate these concerns, MEAA directs the ALRC to the following anecdote from member Chris Tangey, owner and manager of Alice Springs Film and Television:

"I shot a rare 'fire tornado' last year [2013] and hold the sole copyright on that vision. Immediately following the event I had to become a virtual international copyright lawyer overnight, which is a pretty big ask for a bloke from the bush.

"It gained global attention including from ex US vice-president Al Gore. Mr Gore's PA contacted me first after he had seen it and requested a licensing deal for five years; I felt strongly that the event could not be justified in a global warming context so refused. A month later another Al Gore group, the Climate Reality Project, asked again to license it and again I refused. I heard

¹⁰ <http://www.fcc.gov/document/information-needs-communities>

some time later from a reliable US media source that Mr Gore had then intended to 'bypass' permission under the US copyright 'fair use' clause UNTIL he was given legal advice that it wouldn't be possible as my vision was first published in Australia under Australian law.

"Currently I consider this my retirement fund; I am gaining steady, regular sales of it to BBC, Weather Channel, Japanese game shows, Ripley's Believe it or Not, ad infinitum. Even news channels, museums around the world, stage shows etc., have all had to ask permission of me EVERY time."

"I fear that if fair use is introduced in Australia the vision will become virtually worthless as various media organisations around the world, commercial, hybrid commercial/non-commercial etc. will use it willy-nilly. Even though they know they may be in the wrong on occasion, they will also know that a little guy in Alice Springs would not have a hope in hell of covering the legal expenses required to take them on."

Finally MEAA would like to emphasise that the model proposed does not include a key factor that the ALRC recommended, which is "the possibility of obtaining the work, adaptation audio-visual item or authorised recording of the performance within a reasonable time at an ordinary price". This would at least demonstrate some recognition of the rights of copyright creators and owners.

6. Statutory Licences

Proposal 6–1 The statutory licensing schemes in pts VA, VB and VII div 2 of the Copyright Act should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

MEAA strongly rejects the ALRC's proposal with respect to statutory licences. MEAA supports the retention of these licences and believes that there are solutions available to ensure that creators continue to receive equitable remuneration while educational institutions are provided with appropriate access to information.

Performers and most crew members do not directly benefit from the Part VA Statutory Licence regime administered by Screenrights. The direct beneficiaries are producers, writers, composers and music publishing companies. Performers and crew, however, do have a significant interest in ensuring that producers are equitably remunerated by the Educational Copying of Broadcast Statutory Licence. Screenrights distributed \$29.03 million in 2011/12. While in the grand scheme of the industry it is not the largest revenue stream it is not insignificant. Taking this out of an industry that is already heavily subsidised by government could have a devastating impact.

This income stream will only increase in importance in the years to come as income streams further fracture and fragment. It is in the interests of performers and crew for the film and television industry to remain sustainable and viable. The statutory licence is critical to ensuring that the industry remains healthy.

The Part VA Statutory Licence has been very successful in ensuring that creators have been appropriately remunerated and has provided the education sector with extraordinary access to broadcast material.

The educational licence under Part VB of the Copyright Act administered by the Copyright Agency Limited, too, has been successful in remunerating journalists, authors and publishers and providing education sector access to written material.

Journalists are at times in a similar position to performers insofar as they benefit from the scheme indirectly as an employee of an organisation that is able to monetise its copyrighted material. Freelance or staff journalists with a copyright licence also benefit directly. Most journalists are members of the Copyright Agency, which administers the statutory licences for education and government as well as the voluntary licences for local government and business.

Members have written to MEAA to express their support for the scheme:

"I have had a few payments from CAL over the last couple of years ... nothing startling ... about 3 grand I think ... However, that's 3 grand that I wouldn't otherwise have had ... and I'm very grateful for that in this current work climate! The funds were for publications of my work that I wouldn't otherwise have known about ... !!!!!"

"Please know that my published work has sometimes attracted a payment. Knowing that my work is protected in this way is reassuring."

Both Parts VA and VB have been successful in balancing the rights of copyright owners in being equitably remunerated for their work and providing easy access to educational institutions to copyrighted material.

With rates of employed journalism in decline, the increase in freelance journalism and rise of smaller online publishing, journalists will become increasingly dependent upon alternative streams of income arising from their work. It is important that journalists are empowered to be appropriately rewarded for their work through the statutory licence scheme in order that this stream of income assists in developing sustainable careers.

One of the central issues raised by the Issues Paper with respect to education licensing is the so-called problem of "otherwise free and publicly available material on the internet". The education sector has recommended that this material should be removed from the scope of the licensing schemes and a new exception allowing

educational institutions to copy and communicate free and publicly available material on the internet for non-commercial educational purposes.

MEAA wishes to reiterate the concerns Screenrights and the Copyright Agency have raised regarding the concept of freely available audio-visual material on the internet.

The digital environment has had a range of impacts upon the media industry but one superficial one has been the increase of seemingly free content (reportage, audio-visual material) available on the web. One only has to visit smh.com.au, the Huffington Post, or YouTube to be given the impression that information is now free.

This interaction with the educational statutory licence has been dealt with previously in 2000 with the Digital Agenda Act 2000, which introduced amendments to cover content from the internet. However, there remains a view that given so much material is now available “freely” on the internet that educational institutions should not be expected to pay for the use of such material.

MEAA strongly agrees with the Copyright Agency and does not accept that:

“... merely by publishing their material on the internet, they effectively waive their rights to specify how the content may be used. There is a widespread misconception that anything that is ‘freely available’ on the internet is not covered by Copyright... While there are obvious differences in how digital content is created and disseminated compared to printed content, the principles of rights management are the same.”

The creation of reportage by employed and freelance journalists, for example, are posted onto the internet within very specific business contexts, many of which are rapidly evolving. Journalism produced for published websites or for standalone blogs can be produced as a loss-leader sample to encourage subscription. They can be produced specifically to be read in conjunction with embedded advertising and sponsored links. They can also be produced to market their wares. It is worth repeating the Copyright Agency’s discussion here:

- *Content creators who authorise the publication of their content on a website usually want people to view the content online in the context of the website.*
- *They do not necessarily want it to be used without permission or payment in other ways (eg: made available on a learning management system, emailed to students or included in a coursepack).*
- *There are a range of reasons for this, including:*
 - *advertising revenue from visits to the website,*
 - *attracting visitors to the website to view or possibly purchase products or services (eg: engage a photographer to take photographs, or apply for a licence to use the photographs).*

- *The content is a sample (eg: of a textbook) intended to encourage purchase. Statutory licences enable (but do not require) content creators to be compensated for the use of their content without permission.*
- *Content creators can choose to make their content available for educational use without payment, for example under open licences such as Creative Commons licences: educational institutions do not pay for their use of this content.*
- *The statutory licence allows the use of content from an infringing source, but ensures that the infringement is not compounded (in practice, educational institutions can find it difficult to determine whether or not the source is legitimate).*
- *For the reasons above, when the statutory licence was amended in 2000 to cover digital material, the amendments were explicitly intended to cover content from the internet.*

It is also worth repeating Screenrights discussion as well:

- *Firstly, the proposal [for a new free exception] completely misunderstands the basis upon which most copyright owners agree to make material 'freely' available online; and,*
- *Secondly, the proposal would create a free exception for the same content covered by Part VA and so would undermine Part VA of the Act.*

The misunderstanding inherent in this proposal is that the material 'freely' available on the internet is not valued by the copyright owner. The proposal presumes that the content is given away by being made available online without a direct payment. This is completely incorrect. Copyright owners like Screenrights' professional filmmaker members make material available online for very clear commercial reasons. They may choose to make it available for a fee, such as with commercial video on demand services or they may choose to license a website to stream the content for a period of time without charging the consumer directly (such as ABC iView). In the latter case, the consumer still pays for the content, either by watching associated advertising, or through brand attachment to the website and there are clear cross promotional benefits to other platforms where the content is available for a fee, such as via DVD or Blu-ray discs. In neither case is the viewing 'free' in the sense implied by this proposal from the education sector.

This misconstruction is particularly stark for Screenrights as material 'freely' available on the internet is very like material broadcast 'freely' on television. When an educational institution copies a free to air broadcast, it is required to compensate the copyright owners via the Part VA scheme that Screenrights administers. Fundamentally, Screenrights can see no difference with content made available online for free. There may very well be a debate about the value of the content and the price of the compensation, but the principle is the same.

The relevance of Screenrights' second concern is clearly apparent. Although the proposal does not seek to amend Part VA, it seeks in effect to undermine its operation by creating an uncompensated exception for essentially the same material.

Finally, Screenrights notes that educational institutions have the same right as any other part of society to view the content online and not pay a fee for that viewing. This is quite proper, as this is the use which the copyright owner has authorised, and it is compensated in the manner the copyright owner has agreed with the website publisher.

Looking at the working of the current statutory licence it is clear that there are processes in place that ensure that content that is genuinely freely available are not included in the measuring of the licence fee. According to the Copyright Agency:

in 2012, more than 50% of the digital content recorded as used by schools was identified as not used in reliance on the statutory licence (and will thus not be taken into account in assessments of past usage for future licence negotiations).

MEAA notes further that the Copyright Agency has been actively engaged with educational institutions on this issue seeking essentially a market/industry initiated solution to the issues raised by educational institutions. MEAA supports this process.

MEAA also support the Copyright Agency's recommendation with respect to any amendments including the continuing ability for journalists and other creators of copyright to choose to licence uses of their content through a rights management organisation.

MEAA would be seriously concerned if the statutory licences were removed as it would undermine creators' legitimate interest in equitable remuneration. MEAA therefore supports the Copyright Agency's supplementary submission in this regard.

9. Private and Domestic Use

Proposal 9–1 The fair-use exception should be applied when determining whether a private and domestic use infringes copyright. 'Private and domestic use' should be an illustrative purpose in the fair-use exception.

MEAA opposes this recommendation. MEAA suggests that while business models have admittedly been slow to develop, a number of efficient licensing models are emerging, which in turn are expanding access to copyright material for private and

domestic use. With the proliferation of these models, private use exceptions are not required and in fact would undermine efforts to develop market solutions that satisfy consumer demand and reward and protect creators.

In television a number of catch-up services have been developed that enable greater access to material. These have included ABC iView¹¹ (available on an exhaustive range of devices), SBS On Demand, Plus 7 and Foxtel On Demand and IQ services. In film, DVDs now come with digital copies embedded while there is an increasing number of streaming services including Quickflix and Apple iTunes.

In print, subscribers to hard copy versions are provided with full access to online versions. Business models supporting digital-only editions have been developed with some of these allowing partial access to attract subscribers and others involving full digital subscriptions for content.

For further examples, MEAA directs the ALRC to the Australian Film/TV Bodies submission.

10. Transformative Use and Quotation

Proposal 10–1 The *Copyright Act* should not provide for any new ‘transformative use’ exception. The fair-use exception should be applied when determining whether a ‘transformative use’ infringes copyright.

MEAA strongly supports the ALRC’s decision not to propose a transformative use exception but does not support the opening up of exceptions under a fair-use regime to enable courts to construct a potential “transformative use” exception.

Performers

In addition to the comments made above regarding the nature of technology and its impact upon a performers’ craft and their moral and economic rights, MEAA would like to detail two on-the-ground examples that demonstrate some of the issues performers are dealing with currently with respect to transformative use.

Firstly, transformative works have the potential to damage performers’ reputations and future earning capacity. A broad exception allowing transformative works would take away the ability for a copyright creator and/or a performer to control their own image and work.

¹¹ www.abc.net.au/iview/

Recently a viral video titled *Summer Bay Slaughter* was released on the internet and screened at the Sydney Underground Film Festival which featured scenes from the Seven Network's *Home and Away* overdubbed with offensive material.¹² While it could be argued that the video was a parody, it is also arguably not parody at all and simply malicious and exploitative. Either way the video demonstrates the ease in which a copyright owner/creator can lose control of their material through transformative uses and their moral rights be breached. It is clear that the performers in this video were not party to the production of this video. A more professionally made production could be more convincing though.

A popular transformative video could potentially undermine the ability for the performer to earn a living through an association with an unseemly video and image. The performer and copyright holder chose not to pursue any action in this case. However, quoting the AFACT submission, MEAA reiterates: "Why should [their] moral rights, or those of other copyright owners, be overridden by a mash-up?"

Introducing an exception for mash-ups or other transformative works would undermine the ability for the copyright owners and performers to control their moral and economic rights – in this circumstance, the performer's right to maintain the integrity of their work and not be subject to derogatory treatment.

The Issues Paper acknowledges that sampling or mash-up exception can be a severe undermining of an author's moral rights. While this could be put forward as an example of how these rights are impinging on new creative uses of copyrighted material, they have very real financial and reputational consequences for performers and other copyright holders.

Another recent example to illustrate this is the "transformative" website Johnny Moronic¹³ The website takes screen captures from Australian television programs and places them out of context onto a webpage that focuses largely on sex scenes and/or nudity. The screen captures are then accompanied by titillating and suggestive comments. It is set up to seem like a pornographic site. A transformative work exception would again undermine the performer's ability to maintain their right of integrity and protect their work from "material distortion of, the mutilation of, or a material alteration to, the performance that is prejudicial to the performer's reputation".¹⁴

MEAA notes that the marketplace is working hard to resolve issues with the reuse and re-editing of material. While digital technology may speed ahead and businesses lag behind, business models do emerge and legitimate access is provided. AFACT points to business models that are working.

MEAA and SPAA have negotiated clauses in the Australian Feature Film Agreement and the Australian Television Repeats and Residuals Agreement which deal with

¹² <http://www.smh.com.au/entertainment/movies/actor-verballed-into-a-foul-tirade-20120905-25dtv.html>

¹³ <http://www.johnnymoronic.com/>

¹⁴ s. 195ALB Copyright Act 1968

reuse and re-editing of material. Third parties subsequently negotiate with producers and owners of copyright to use material. Legitimate markets for mash-up material have emerged and these maintain protections for copyright owners and creators while at the same time providing access to material.

Journalists

MEAA notes that the Copyright Agency Limited has previously detailed the current Australian copyright framework enabling “transformative” uses in a number of ways.

These include:

- if the use is of part of a work, and that use is not a “substantial part”;
- the use is licensed;
- the work is used for the purposes of parody, satire, criticism (critique) or review;
- the work is used for the purposes of reporting news;
- the work is otherwise used in reliance on an exception or statutory licence (no exceptions or statutory licence prohibit the use of a work in another work: for example the educational statutory licence allows a teacher to create a new work using all or parts of other works).

MEAA strongly supports this framework and reiterates the Copyright Agency’s reasonable question as to what further uses are not permitted within the existing framework:

So the question is: to what extent are there socially beneficial ‘transformative’ uses of works that cannot be enabled by existing exceptions and/or available licensing solutions? We note that there are many people who are happy to make their content available for mash-up, for example under a Creative Commons licence. Those who want to mash up other people’s work have an available pool of content that they can use for this purpose.

Proposal 10–2 The fair-use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair-use exception.

Proposal 10–3 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.

Australian law already allows for quotation: there is no infringement of copyright for use of less than a substantial part of a work. MEAA supports the Copyright Agency and Australian Film/TV Bodies submissions in this regard. Allowing anything more than this would significantly impact upon the legitimate rights of a copyright holder.

12. Orphan Works

Proposal 12–1 The fair-use exception should be applied when determining whether a use of an ‘orphan work’ infringes copyright.

Proposal 12–2 The *Copyright Act* should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

- (a) a ‘reasonably diligent search’ for the rights holder had been conducted and the rights holder had not been found; and
- (b) as far as reasonably possible, the work was clearly attributed to the author.

Proposal 12–3 The *Copyright Act* should provide that, in determining whether a ‘reasonably diligent search’ was conducted, regard may be had to, among other things:

- (a) how and by whom the search was conducted;
- (b) the search technologies, databases and registers available at the time; and
- (c) any guidelines or industry practices about conducting diligent searches available at the time.

Despite a lack of quantifiable empirical evidence surrounding orphaned works, the anecdotal evidence suggests it can be a significant and difficult issue for those who are affected. For example orphaned works are a particular problem in film because there is an ongoing interest in using old films in new documentaries but it is common for the owner to be unidentifiable.

Any solution needs to balance the rights of creators (unidentified or otherwise) and the rights of users and if necessary acknowledge the difference between non-commercial and commercial uses. MEAA supports the principles enunciated by both the Copyright Agency and the Arts Law Centre in guiding any development of an appropriate licencing scheme including:

- assessing whether “there is no benefit to a licensee in choosing to use an orphan rather than an equally suitable identified work, merely arising from the orphaned works status”;
- providing clearly directed steps outlining what a potential licensee would need to do to attempt to identify and locate a copyright owner;
- provide for appropriate licence fees to the appropriate collecting society;
- enable the copyright owner to be paid in the even that they are found;
- if the rights holder is not identified with a set period of time that the fee be used to benefit the class of copyright holders, provided that the collecting society has also undertaken an appropriate search
- include a mechanism to compensate for moral rights infringements

- acknowledge the unique circumstances facing indigenous creators and rights holders and accommodate these within the scheme.

MEAA is therefore concerned that the proposal being put forward by the ALRC has not included these elements and not appropriately balanced the interests of copyright holders (even those who have not been identified) with the interests of users.