

Copyright and the Digital Economy

ISSUES PAPER

You are invited to provide a submission
or comment on this Issues Paper
Issues Paper 42 (IP 42) August 2012

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This Issues Paper reflects the law as at 17 August 2012
The Australian Law Reform Commission (ALRC) was established on 1 January 1975
by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian
Law Reform Commission Act 1996* (Cth).

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Questions The Inquiry

Question 1. The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law: (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services; (b) affects the introduction of new or innovative business models; (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or (d) places Australia at a competitive disadvantage internationally.

Answer. Once your copyright material reaches the internet, it spreads like a virus, you release a DVD it is difficult to prevent individuals, or organisations from copying them. The creators earnings stop when copying starts, and that's almost immediately, leaving the creator with very little for their work. Licensing points, or assignment are the only guarantee of some income. Relying on the honesty of individuals, and organisations often leaves you standing alone in the cold. People are not honest when it comes to copyright, and the corruption runs rampant thru the industry, and the courts. Lawyers duck and weave when you mention the word, so if you don't know the copyright law(they don't) you don't have a show in claiming your personal property. There are too many if's or but's in the copyright law, having exceptions only complicates the right to ownership, so if you want access or copies just pay the fee, without exception. We have some of the most sort after copyright material in the world, we are at a disadvantage not having adequate protection against copying of our personal works. Collection agencies have proven not to be reliable, and in fact not very honest. Direct licensing is the only sure method, and a government registration office. If you wish to use copyright material, pay the fee. Direct licensing also gives the right for the owner of copyright works, to receive the amount of the fee, the owner wishes.

Filmmakers have to pay fees to rightsholders to make the film, why should there be exceptions on fees for filmmakers, as returns for the exploitation of there work. Remove exceptions, and if agreeable to the owner of copyright works, exceptions that are required can be written into a contract or application written to the owner specifically for those exceptions.

Guiding principles for reform

Question 2. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

Answer. If you think the public domain, and corporations are honest in following rules in accordance to the law, you are dreaming! Remove exceptions, and you remove copyright infringements, and take control of the release. Having exceptions like "I didn't know your honour" have got to go, how easy is that to say and escape copyright infringement. Assignment and licensing agreements have to remain in writing, until a proven method without foreseeable flaws are found. Exceptions, other than in written contract, should not be legally binding. In the case of a filmmaker creating moving images, with a soundtrack, of a live performance, the filmmaker, remains to be the sole owner, and rightsholder of the film. Written consent, to film with performers, of a live performance are not required. It would be clearly evident if the filming was unauthorised, by the content and nature of the images. Any suggestion the performers or musicians have ownership of a film, because of the absence of written authorisation must be removed. What if performers refuse to agree to written permission?. This exception contradicts the rights of the filmmaker, and only creates further confusion, and conflict between the two entities. With respect to the performers moral right, if the film is going to be released commercially for economic release, permission and moral release, are obtained. Essentially, any exceptions or films for commercial sale, are obtained

under agreement with the performer. It is clear, performers do not automatically own or have rights to a film of a live performance, or its soundtrack. Adding this exception, would only cause severe complications to ownership. It is clear, a sound recording is not a "soundtrack" s23, s24(copyright act 1968), and should remain so. A film production at a live performance, remains to be autonomous to the performance, and is not to be confused, (and should be made clear) with an audio-visual which is a final release version of a film, not a film in the making. My argument of this can be read in Hill v Lang (federal court).

Additionally, in the case of a photographer who retains copyright ownership in their works, for a fee, the client can own copies of the photographs, not the copyright. The cinematographer retains the same copyright ownership in their works, and being freelance or independent producer, are the maker, of the film as well, s22(a)(b)(copyright act 1968), retaining copyright ownership in the final version of the film. Remove any exception for employers, or producers as employers, as they are clearly required to obtain license or assignment under employment agreement or contract in writing, and request a waiver or transfer of copyright ownership under current law. Without this form of agreement the copyright ownership, and economic rights, remains with original creator of the work. s22, s32, s35, s98(1)(2)(copyright act 1968)

s204(copyright act 1968) duly should be placed in s10 "artistic works", "photograph", with amendments to clearly state copyright ownership of the cinematographer, and recognise the cinematographer having authorship of the film. Since the introduction of the copyright act 1968, cinematographers have relied on the term "artistic craftsmanship" to hold their place in artistic works, as the previous reference of their work as "photographs" or "chronophotographs" were removed from the copyright act. The cinematographer has the right of integrity, which gives the cinematographer, being technically, and artistically the author, authority to continue creating, thru the making, and thru to the final version of the film. This right should be respected, and because often it is not, advice is given to include rights of integrity in written contract.

It should be noted that cinematographers that are makers of a film under s98(1)(2) from s22(a)(b)(copyright act 1968) are independent makers of the film, without contract or agreement with another person in writing. Therefore, cinematographers are producers and directors of their film.

Therefore, s98(7) is incorrect in saying that "s98(b) is a commissioned film". An amendment to remove (b) must be made to remedy confusion or (b) must be moved apart from (3), or the interpretation of "a commissioned film" be amended to remove (b).

It should be noted that the authorship of the cinematographer, in artistic works, and the maker in the final version of the film, be respected. s32, s35, s22(a)(b), s98(2)(copyright act 1968)

Caching, indexing and other internet functions

Question 3. What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?

Question 4. Should the *Copyright Act 1968* (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

Cloud computing

Question 5. Is Australian copyright law impeding the development or delivery of cloud computing services?

Question 6. Should exceptions in the *Copyright Act 1968* (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

Copying for private use

Question 7. Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

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Question 8. The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

Question 9. The time shifting exception in s 111 of the *Copyright Act 1968* (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:
(a) should it matter who makes the recording, if the recording is only for private or domestic use; and
(b) should the exception apply to content made available using the internet or internet protocol television?

Question 10. Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

Answer: Again, why have exceptions? If you pay the fee, your not impeded by the law. If it is allowed to cache and store copyright material, without paying for it, where's the crime. It opens up the world to infringement, any opening the law leaves, the people and organisations will exploit it. What's not bolted down will be taken. Having exceptions only complicates what would be infringement.

For the educator, and researcher they may only need the copyright material temporarily. In that case only allow them temporary files. If internet viewers only want temporary downloads, only allow them temporary files. If television users only want temporary recordings or files, only give them temporary recordings. If you think time and format shifting are being carried out within the law, your wrong. The public domain are not honest, and this exception has to be abolished. Copying for private use what a joke, I have never believed in this law, and never will. It is only a law for honest people, where the other 80% of the world thought "Great, legal copyright infringement", private use or commercial, it's still infringement.

With the technology today, any files or recordings intended for temporary release over broadcast or internet should have an electronic use by date, or a virus attached to dissolve or disable the copyright material, or monitor by electronic detection, at it's limited borrowed time. We are using this technology on everything else, why not for our copyright material. It is just like a library, in fact the other option is to have a series of government supervised source libraries, to monitor the access, and/ or downloads of the copyright material, for it's temporary use. Cloud computing operates in this way, but without the government providing the database, controlling the source material, I doubt it would be a secure method in monitoring copyright material.

If you choose to keep the copyright material, pay the fee. Broadcasters and libraries pay a fee, a license fee, to transmit content owners work, for the public domain to view for free. Isn't that enough, without expecting to keep or copy the owners property for free. The right to copying for private and domestic use, always remains with the creator, or author, and is intended the buyer of copies or a payer of a fee, can become owners of the copies, but not of the copyright. Cinematographers are not a charity, for films intended for commercial sale, they require a quoted fee for services, under written contract, which includes an agreement for an addition fee for assignment or license, of their copyright material. This is provided the cinematographer is working under a production company, or producer. The cinematographer working additionally as an independent producer/ director remains to be

the sole owner of copyright of the film produced, whether it be for commercial sale, or private and domestic use. The cinematographer remains to rely on sales of copies, or screening and broadcast license fees, and royalties, as income. The buyer, of course is the owner of the copy, but not the copyright. ref. Hill v Lang(federal court)

Online use for social, private or domestic purposes

Question 11. How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

Question 12. Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

Question 13. How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Answer: Those that have chosen to place their copyright material, on the internet, without the protection of being exploited, or the property being copied, appear not to be concerned with their work being infringed. They own copyright like anybody else, it is up to them, to take advantage of the economic rights, and being payed for their work. This is not an exception this a choice. If copyright material has been placed on the internet by someone else without consent, whether it be private or commercial, it is prejudicial, and therefore infringement. No exceptions.

Transformative use

Question 14. How are copyright materials being used in transformative and collaborative ways—for example, in ‘sampling’, ‘remixes’ and ‘mashups’. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

Question 15. Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

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Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

Question 17. Should a transformative use exception apply only to: (a) noncommercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Question 18. The *Copyright Act 1968* (Cth) provides authors with three ‘moral rights’: a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

Answer: Remove transformative use, remove any such exception. Anyway you look at it, it is copyright infringement. Let's be totally realistic, you give them a inch, they will take a mile, because they can. Stop it where it starts, and stop infringement, private and commercial. However small or large the required use is, pay the fee. Remixes and mash up's, should be removed as an exception, and considered under written contract agreement, with the owner of content in the copyright, with respect to the content owners moral right. I believe any use of copyright in this way is prejudicial to the author.

Libraries, archives and digitisation

Question 19. What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

Question 20. Is s 200AB of the *Copyright Act 1968* (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

Question 21. Should the *Copyright Act 1968* (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

Question 22. What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

Answer: Freedom given to libraries to copy is too broad, and too open to the public domain. Consent to copy and digitise should be confined to NFSA, National library of Australia, and issued by State libraries. After all, school and council libraries are a borrowing centre, not a copy shop! Indigenous works, have the same right to protection like anybody else. It would be prejudice otherwise. Restrictions on taking material home, may have to accompany a fee, to ensure some royalty to the copyright owner.

Orphan works

Question 23. How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

Question 24. Should the *Copyright Act 1968* (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

Answer: Orphan works usage require strict requirements, proof of at least a registered search from a government institution, having respect for the original owner, charge a fee, kept by the national film and sound archives, in a fund supporting archive maintenance costs, instead of another law being abused. If the owner is ever found, the owner can still claim those fees.

Data and text mining

Question 25. Are uses of data and text mining tools being impeded by the *Copyright Act 1968* (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?

Question 26. Should the *Copyright Act 1968* (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?

Question 27. Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

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Answer: Technology is great, as long as it doesn't infringe on privacy, and personal property. This exception should be removed, and allowing licensed and approved government organisations to monitor, and release access on behalf of applicants.

Educational institutions

Question 28. Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

Question 29. Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Question 30. Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the *Copyright Act 1968* (Cth) be

instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

Question 31. Should the exceptions in the *Copyright Act 1968* (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

Answer: Like libraries, Educational institutions are not copy shops, they borrow from the libraries. It is a fact that exceptions for Educational Institutions are abused, and therefore must be abolished. Schools would have to show the worst abuse of copyright, than anywhere else. It is fair schools pay a license fee, but I believe the license must be confined to "the use of copyright material" not copying. With NFSA, and the National library of Australia having sole consent to make monitored copies, which can be distributed to the schools, it secures payment to the content owner of copyright, and prevents illegal copies being made. Restrictions on taking material home, may have to accompany a fee, to ensure some royalty to the copyright owner.

Crown use of copyright material

Question 32. Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Question 33. How does the *Copyright Act 1968* (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

Question 34. Should there be an exception in the *Copyright Act 1968* (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

Answer: I believe all commonwealth, federal and state governments should pay fees, to copyright owners, without exception. Filmmakers have to pay taxes, it seems only fair the government provide us with an income like anybody else. Ofcourse, under agreement the Australian film and sound archives, and the national library would have consent, without the fee.

Retransmission of free-to-air broadcasts

Question 35. Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

Question 36. Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

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Question 37. Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?

Question 38. Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?

Question 39. What implications for copyright law reform arise from recommendations of the Convergence Review?

Answer: In my experience, it's hard enough getting a license fee from the broadcaster, let alone deprive the broadcaster a fee for them. As a content owner, and rightsholder, I expect permissions, for the first transmission, and every transmission after that. The broadcaster as a licensee, disserves the same permissions, whether it be television, internet, all communications, with no exceptions. As a content owner, and rightsholder I expect a license fee for every transmission or communication, whether it be broadcast television transmission, retransmission, internet, all communications, with no exceptions. If the

license allows, licensees and broadcasters should receive fees as well, that can be passed on to the content owner, and rightsholder. It is essential, broadcasters notify content owners, and rightsholders, and negotiate a fee. Any reference to broadcasters having exceptions to gaining permission via license, without a fee, must be removed. No exceptions.

Statutory licences in the digital environment

Question 40. What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

Question 41. How can the *Copyright Act 1968* (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

Question 42. Should the *Copyright Act 1968* (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

Question 43. Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

Question 44. Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

Answer: The concept of statutory licensing systems sound acceptable, and are very animal farm, but no it's not a satisfactory system. There is no personal control of your fees or royalties, and I don't like being told what the value of my copyright is. If your not happy with what I charge go somewhere else, simple! Direct licensing between the owner, and the user is the only acceptable method. Abolish statuary licensing, there is no fair remuneration.

Fair dealing exceptions

Question 45. The *Copyright Act 1968* (Cth) provides fair dealing exceptions for the purposes of:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news; and
- (e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

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Question 46. How could the fair dealing exceptions be usefully simplified?

Question 47. Should the *Copyright Act 1968* (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

Answer: The only fair dealing when it comes to copyright, is with a written agreement and a license fee. No other fair dealing is possible, and this exception must be abolished. Do the legal's pay the fee.

Other free-use exceptions

Question 48. What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

Question 49. Should any specific exceptions be removed from the *Copyright Act 1968* (Cth)?

Question 50. Should any other specific exceptions be introduced to the *Copyright Act 1968* (Cth)?

Question 51. How can the free-use exceptions in the *Copyright Act 1968* (Cth) be simplified and better structured?

Answer: It is clear in my opinion, all free use exceptions be removed, and dealt with under written contract. Then they become exceptions to the law, and easily enforceable as offences, should conflict arise between owners and users.

Broadcasters exceptions should be removed, and brought into line with general copyright usage points of law. They are not immune to direct licensing.

*In the matter concerning filming of live performances, it is agreed, the filmmaker is the producer, and owner of the film, of the performance. As the film production is autonomous to the live performance, unlike a pre-contracted performance in the making of a feature film. It is wrong to suggest, performers automatically receive ownership, and economic rights to the film, if written consents are not obtained from the performers, by the filmmaker. What if the performers refuse to agreement, in writing? This is an exception obviously suggested by performers and musicians, and must be removed from any consideration, to avoid Major conflict. Written authorisation is not required when spontaneous, or non-commercial filming takes place, it remains in the realm of "private and domestic" or "corporate", unless required for commercial or economic use at a later date. Should this be the case, performers do have there moral rights, under performer protection, and as a code of conduct, the filmmaker seeks written permission, from the performers, for the release of the performance in the film. To change this to any other exception, would cause considerable conflict, and force unnecessary court proceedings. An example of this is found in my current proceedings; **Hill v Lang**(federal court).*

Proposed amendments: Interpretations s10

artistic work means: (a) insert; " cinematograph film "

author: insert; "In relation to cinematograph film, means: the cinematographer, the person who created the images, and the soundtrack of the cinematograph film works. "

insert; " cinematograph film works means: the original works of the cinematographer. "

insert; "director of photography means: the principle creative person responsible for the artistic and technical aspects of the film. "

s98(7) commissioned film: omit; " and (b) "

photograph: omit; "of a" ...or, insert; " a work produced by" ... a process similar, omit; "other than", insert; " having corresponding meaning as in "photographic" and "cinematographic film works", then insert; "an article or thing in which visual images forming part of a cinemagraph film have been embodied." omit; " and includes a product of xerography, and photographic has corresponding meaning," insert; " includes products of xerography and photo-lithograph. "

s195AX, omit; " it is not", insert "it is"

The photograph amendment has been carried forward from s204 of the act, and reads as follows;

s204 Interpretations

(1) In this part, the expression photograph has, in lieu of the meaning given to that expression by section 10, the meaning given by the next succeeding subsection;

"photograph" includes photo-lithograph and a work produced by a process similar to photography.

"Cinematography" is a process of artistic work, and craftsmanship is a technical skill of cinematography.

A "cinematographer" without assignment or written agreement is producer and director of their own individual work, therefore author and copyright owner of that work. A waiver of such rights must be in writing.

The government recognise cinematographers as creators. Reference under the provisions of s35 belong to all creators, including cinematographers. Cinematographers as creators in their works, and makers of cinematograph film, are the filmmaker.

Fair use

Question 52. Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

Question 53. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

Answer: There is no such thing as fair use, without a fee. Try to explain fair use, for free, to a car hire company, and without a license!! I do not think so. Abolish fair use, remove any such exception. The only fair use, is when you have payed for it.

Contracting out

Question 54. Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

Answer: Essentially yes.

Question 55. Should the *Copyright Act 1968* (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

Answer: No