



Australian Law Reform Commission

Inquiry into:

***Traditional Rights and Freedoms:
Encroachment by Commonwealth Laws***

**Submission from the
Australian Digital Alliance**

And

The Australian Libraries Copyright Committee

The Australian Digital Alliance (ADA) and the Australian Libraries Copyright Committee (ALCC) thank the Australian Law Reform Commission (ALRC) for the opportunity to make this short submission in response to Issues Paper 46 *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws*. This submission is solely concerned with the interaction of the *Copyright Act 1968* (the Act) and the *Copyright Regulations 1969* (the Regulations) with traditional rights and freedoms.

Copyright is traditionally a civil matter. However, the scope of the property rights, protections and limitations are creatures of statute. The ADA and ALCC submit that the Act currently inappropriately inhibits free speech, shifts the burden of proof in one criminal (and a number of civil) offence(s) and contains unjustified offences of strict liability. We propose:

- **Removal of some of the existing copyright exceptions (as previously identified by the ALRC), to be replaced with a fair use exception to copyright infringement**
- **Addition of exceptions to the technological protection measures (TPM) provisions to enhance free speech, including, in particular, the inclusion of a mechanism to ensure that people with a legitimate claim to fair use of material do not risk civil, and in particular, *criminal* liability for circumvention;**
- **Protection of copyright exceptions from contractual override;**
- **Reconsideration of the shift of burden of proof in offences; and**
- **Removal of the strict liability offences**

Freedom of Speech

“Freedom of speech is a fundamental common law right. It has been described as ‘the freedom *par excellence*; for without it, no other freedom could survive’.”¹

Copyright law seeks to achieve a balance between the protection of creators and the ability of citizens to use and engage with material. Speech is not created in a vacuum: it exists as part of a culture. All speech, and all speakers, draw from previous works, from poems to reports, philosophies to memes, art to analyses.² Without the ability to engage with, reuse and incorporate existing copyright-protected material there is no real freedom of speech. Copyright, meanwhile, gives exclusive control of the use of copyright material to the rights holder, and the Act provides that they can enforce that right against any person who infringes. This creates a fundamental tension between copyright and free speech. Giving a copyright owner the right to control the use and reproduction of works necessarily constrains the speech of others. Although it has sometimes been argued that internal mechanisms within the copyright law sufficiently protect freedom of expression, there is a significant academic literature that points out the limitations in that argument.³

¹ IP at 2.1 referencing *Nationwide News v Wills* (1992) 177 CLR 1, 32 (Mason CJ); *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 67 [151] and quoting Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

² See generally Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004)

³ For discussion see R Burrell and J Stellios, ‘Copyright and Freedom of Political Communication in Australia’ in J Griffiths and U Suthersanen, eds, *Copyright and Freedom of Expression: Comparative and International Analyses*, Oxford University Press, Oxford, 2005)

Australia's copyright law contains some safeguards to protect speech. One protection is that copyright covers only the expression of ideas, not ideas themselves. However, as the academic literature points out, there are times when the two are to all intents and purposes inseparable, or when it is the expression that requires comment.

The other major protections are the fair dealing exceptions, especially those for reporting news and engaging in criticism or review. Yet there are many instances of speech that fall outside Australia's existing narrow, purpose-based exceptions. As Professor Croucher noted at the recent Free Speech Symposium:

"Freedom of speech also arose in the ALRC's recent copyright inquiry. In the final report, we recommended the enactment of a fair use exception to copyright laws. By allowing the use of other people's copyright material without permission or payment in some limited circumstances – when fair – this U.S. style exception to copyright infringement can allow people to use books, films, music and other material in the creation of new books, films, music and other works. Whether one supports the introduction of this contentious exception or not, it seems clear that overly confined or restrictive copyright laws can risk stifling free expression."⁴

A number of recent cases demonstrate how current copyright law restricts freedom of speech, including the constitutionally-protected right of political speech.⁵ Copyright considerations resulted in takedowns of a Labor party advertisement that used, and commented upon, a previous Liberal Party advertisement⁶ and a Liberal Party advertisement that used broadcast footage from ABC news reports.⁷ Although political speech *ought* to be a fairly obvious form of fair dealing and mechanisms *ought* to exist in the copyright law to allow such speech (subject always to a fairness analysis), it is difficult to fit such speech within Australia's narrow, purpose-specific fair dealing exceptions. Australian courts have denied the existence of any general public interest exception to copyright law.

Furthermore, without the protection of a flexible exception such as fair use, many uses of copyright material which add cultural and entertainment value to society remain on an uncertain legal footing. In a society where copyright consumers are increasingly moving away from mere passive consumption and towards 'produsage',⁸ memes, mashups and other playful uses of copyright material are an ever-present and important part of our cultural identity. Many such uses are essentially harmless: they do not compete with, and in fact may grow, the market for the original goods. But while the scope of the parody and satire exception remains unclear in the absence of case law on the point, and without the protection of fair use, the artistic freedom of individuals to experiment with, poke fun at, and transform, copyright works is limited.

Moving to a system of fair use would give Australians the flexibility to consider the purpose and importance of the use to freedom of speech. The balancing framework, where the purpose of the use is

⁴R Croucher R *ALRC Inquiry into Freedoms from Free Speech 2014 Symposium Papers* Australian Human Rights Commission (2014) available at <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/free-speech-2014-symposium-papers>

⁵ The right is of course not recognised as a positive right but only a restraint on the legislative powers of the Commonwealth see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

⁶ J Ireland, 'Liberal complaints see Labor parody ad removed from YouTube', *Sydney Morning Herald*, 7 August 2013.

⁷ R Willingham, 'Liberal ad pulled from YouTube over copyright breach', *The Age*, 6 February 2014.

⁸ A Bruns, 'Blogs, Wikipedia, Second Life and Beyond: From Production to Produsage' (2008)

weighed in conjunction with the nature of the use and the interests of the copyright holder, also provides a system that can be protective of both speech and creator's rights. What might be a fair use for the purposes of political speech might not be for artistic commentary. Similarly, it may not be a fair use if materials are used in a way that harms the rights holder when the speech could have been accomplished in a less harmful fashion.

Another restriction on freedom of speech is the imposition of criminal liability for removing TPMs. The relevant provisions⁹ make it an offence to break the digital locks on content, even if the person has a legitimate right to use the content. There are a limited number of exceptions to these provisions¹⁰ but these do not include the fair dealing provisions which are Australia's key mechanism for protecting free speech in the context of copyright law. In practice this means that if you, for example, wished to use footage of a political speech for the purposes of reporting the news, but that footage was protected by a TPM, you could not do so, even if the fair dealing exception would cover the actual use of the material.

As companies and individuals increasingly use digital locks or contractual provisions to override copyright exceptions, we increasingly face situations where speech may be legal but impossible.

Question 2–2 Which Commonwealth laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?

For the reasons outlined above the ADA and ALCC submit that the current copyright exceptions unjustifiably interfere with freedom of speech and should be repealed and replaced in the fashion recommended by the ALRC in the *Copyright and the Digital Economy* report.¹¹

We further submit that the current exceptions to the TPM provisions unjustifiably interfere with freedom of speech.

As such, we propose:

- **Removal of some of the existing copyright exceptions (as previously identified by the ALRC) to be replaced with a fair use exception to copyright infringement**
- **Addition of exceptions to the technological protection measures (TPM) provisions to enhance free speech, including, in particular, the inclusion of a mechanism to ensure that people with a legitimate claim to fair use of material do not risk civil, and in particular, *criminal* liability for circumvention**
- **Protection of copyright exceptions from contractual override**

⁹ See generally Division V Subdivision E *Copyright Act 1968*, in particular s132APC (Circumventing an access control technological protections measure). There are additionally civil actions available to rights holders, see generally Division 2A, Subdivision A *Copyright Act 1968* in particular s116AN

¹⁰ Some exceptions are contained in the criminal offence provision (132APC) and Schedule 10A of the *Copyright Regulations 1969* sets out the other exceptions.

¹¹ Australian Law Reform Commission Report 122 *Copyright and the Digital Economy* (2104)

Burden of Proof

The Act contains several provisions that shift the burden of proof towards the defendant. There are four criminal offences, which we understand are of primary interest to this inquiry. These are all presumptions regarding the ownership and authenticity of copyright material.

The table below contains all the presumptions that shift the burden of proof in civil and criminal provisions.¹² While we understand that the Commission is looking into criminal presumptions, the civil presumptions in ss130A-C of the Act that copies are infringing copies are also highly troubling.

Copyright Presumptions in Australian Law

Provision	Criminal or Civil?	Presumption
126	Civil	Subsistence presumed if defendant does not put in issue.
126	Civil	Ownership presumed if defendant does not put in issue
126A	Civil	Labels and marks stating year/place of publication and foreign certificates presumed as stated unless contrary is proved.
126B	Civil	Labels/marks/foreign certificates stating plaintiff is the owner presumed to be as stated unless contrary established, and label/ mark/certificate can be first point in a chain of ownership.
127	Civil	Presumption of authorship if name appears as author on copies.
128	Civil	Presumption that name appearing as publisher was publisher unless contrary established.
129	Civil	Where author is dead, work is presumed original unless contrary is established and first publication is assumed as alleged by plaintiff.

¹² For a more detailed discussion on the role of presumptions in copyright see K Weatherall, *Provocations and challenges concerning enforcement and civil procedure in IP* in G Dinwoodie (ed), *Intellectual Property and General Legal Principles* (Edward Elgar 2015), 181-205

		Where work published anonymously or pseudonymously, work presumed original and first publication is assumed as alleged by plaintiff.
129A	Civil	Computer programs bearing label with © and a year/name – program is presumed original, year is presumed year of first publication and person named is presumed owner unless contrary is established.
130	Civil	Labels/marks on sound recordings lead to presumptions on maker, year and country of publication, including if (p) mark is used.
130A	Civil	In action for importation or sale of infringing copies of sound recordings: copy is presumed <u>not</u> to be a non-infringing copy unless contrary is proved.
130B	Civil	In action for importation or sale of infringing copies of computer programs: copy is presumed <u>not</u> to be a non-infringing copy unless contrary is proved
130C	Civil	In action for importation or sale of infringing copies of electronic literary or music items: copy is presumed <u>not</u> to be a non-infringing copy unless contrary is proved
131	Civil	Labels/marks on films lead to presumptions on maker, year and country of publication, including if © mark is used.
132A	Criminal	Labels or marks on copies, packaging or containers, and foreign certificates presumed to correctly state year and place of first publication and owner unless contrary is established.
132AAA	Criminal	Computer programs bearing label with © and a year/name – program is presumed original, year is presumed year of first publication and person named is presumed owner unless contrary is established
132B	Criminal	Labels/marks on sound recordings lead to presumptions on maker, year and country of publication, including if (p) mark is used.

132C	Criminal	If copies of films have name/year (with or without ©) it is presumed person is maker, and owner, and year is year of first publication unless contrary established.
195AZD	Civil – Moral Rights	Copyright presumed to subsist if defendant does not put subsistence in issue.
195AZE	Civil – Moral Rights	If copyright subsistence presumed, moral right is presumed to subsist.
195AZF	Civil – moral rights	s127 presumption of authorship applies in moral rights cases, and name purporting to be director, producer or screenwriter is presumed to be so unless contrary is established.
195AZG	Civil – moral rights	ss 128 (presumption of publisher/publication) and 129 (presumption of originality) apply in moral rights cases.
195AZGD	Civil – moral rights	Presumption of copyright subsistence in recorded performance if subsistence not put in issue.
195AZGE	Civil – moral rights	If copyright subsistence presumed in recorded performance, moral right is presumed to subsist.
195AZGF	Civil – moral rights	Name purporting to be name of performer on record of live performance is presumed to be performer unless contrary is established. Same goes for groups of performers.

Presumptions in the context of criminal cases circumvent a key safeguard in our justice system: that the onus is on the prosecutor or plaintiff to prove the liability of the accused or defendant to the relevant standard of proof. This principle is a key protection against unjustified incursions on personal liberty. It is troubling that the reason given for the introduction of some of the presumptions was “to assist copyright owners in the litigation process”.¹³ Provisions which make criminal liability for copyright infringement easier to prove act as deterrents to the use of copyright material, conceivably leading to self-censorship of what may very well be a legal use of material in given case. The result is a net loss of creative expression.

Question 9–2 Which Commonwealth laws unjustifiably reverse or shift the burden of proof, and why are these laws unjustified?

¹³ Second reading speech for Copyright Amendment Bill 2006, Mr Ruddock MP, 19 October 2006 <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2006-10-19%2F0005%22>> referring to the presumptions that were introduced or clarified by the *Copyright Amendment Act 2006* (Cth): ss 126A, 126B, 129A, 131, 132AAA, 132B and 132C.

As detailed above there are numerous shifts in the burden proof that may result in unjustified incursions on personal liberty and suppress free speech. We propose:

- **Reconsideration of the shift of burden of proof in offences**

Strict Liability

There are a number of strict liability offences in the Act, with a significant increase in offences following the 2006 reforms when a number of commercial-scale infringement offences were added.¹⁴

To date there has been no evidence that these provisions have led to a reduction in commercial scale copyright infringement. Considering that for each offence there are also indictable and summary offence provisions, there seems limited deterrence value in leaving these offences in the Act.

Additionally, by removing the *mens rea* element from the offences, strict liability provisions could easily see people innocently committing an offence. A good example is s132AO(5) which provides:

- (5) A person commits an offence if:
- (a) the person causes:
 - (ii) images from a cinematograph film to be seen; or
 - (iii) sound from a cinematograph film to be heard; and
 - (b) the hearing or seeing occurs in public at a place of public entertainment; and
 - (c) causing the hearing or seeing infringes copyright in the recording or film.

The absence of any *mens rea* or necessity to have caused financial harm means that any person who plays a short burst of footage from their phone or laptop in a public place faces potential criminal liability. That is inappropriate given the widespread occurrence and community acceptance of such activities.

For strict liability offences in Divisions 5 there is an infringement notice scheme, set out in Part 6A of the Regulations. This scheme allows fines of over \$2000 for individuals and over \$10000 for bodies corporate to be issued on the spot. In a complex area of law, with complex questions of fact, this is an inappropriate fashion to enforce the strict liability provisions. This scheme is a further instance of shifting the onus of proof for the convenience of rights holders, as the liability for the offence is not judicially determined unless the recipient of the fine contests the matter in a Magistrates Court. The powers also appear never to have been used. As such, we recommend their removal, both for unjustifiably encroaching on traditional rights and freedoms, and also as a measure of red tape reduction.

Another concern around the strict liability offences, especially if ever coupled with actual application of an infringement notice scheme, is that they give extremely broad discretion to prosecutors and police with no Parliamentary oversight. As Weatherall has noted,

¹⁴ The relevant commercial-scale offences include ss 132A - 132AU and 248P - 248QH.

The key to understanding the regulatory potential of [the strict liability] provisions lies in appreciating their breadth. Historically, there is no quantitative threshold for criminal liability for copyright infringement: almost all offences under the *Copyright Act 1968* (Cth) apply to the making of, or dealing with, a single infringing article, provided it is made for the purposes of trade or commercial advantage. As a result, behaviour extending all the way from the obviously 'pirate' through to quite commonplace commercial acts falls within the scope of the criminal offences. For example, s 132AD of the *Copyright Act 1968* (Cth) creates three offences (one for each tier of knowledge) where a defendant:

- makes an article (which includes an electronic copy);¹⁵
- to sell it or obtain 'a commercial advantage or profit';
- where the article is an infringing copy of a work or other subject matter in which copyright subsists.

Clearly, this provision applies to the obvious: the person who makes counterfeit copies of Hollywood DVDs en masse and sets out to sell them at the market. But the provision is also sufficiently broad to apply to a business whose employee makes a single unlicensed electronic copy, say of a computer program, for use in the course of business (this being use 'to obtain a commercial advantage'). It might also apply where, for example, a business was selling a book which unintentionally included too large a proportion of someone else's copyright material or which inadvertently used a copyright-infringing photograph on the cover.....

The provisions confer considerable discretion on the executive branch, in the form of enforcement agencies and prosecution agencies, without parliamentary oversight. By passing the *Copyright Amendment Act*, Parliament gave the executive branch, including the police, *carte blanche*, and an incredibly flexible and broad set of tools, to determine all future copyright criminal enforcement matters. Prosecution policy, and the drafting and updating of enforcement guidelines, are matters for the executive branch: both can change without parliamentary oversight.¹⁶

Finally, the Act contains some outdated recordkeeping and inspection strict liability offences. Of particular concern is s203E(10) which makes it an offence for the person in charge of a library or archive to divulge **any** information acquired in the course of an inspection.

Question 12–2 Which Commonwealth laws unjustifiably impose strict or absolute liability for a criminal offence, and why are these laws unjustified?

The current strict liability provisions in the Act are and ineffective and disproportionate part of the enforcement regime for copyright infringement. Considering their potential for misuse and their wide applicability they unjustifiably encroach on traditional rights and freedoms and should be repealed.

The relevant provisions are set out in the table below.

¹⁵ *Copyright Act 1968* (Cth) s 132AA.

¹⁶ Kimberlee Weatherall, 'Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms' (2007) 31 *Melbourne University Law Review* 967, 1004-1008.

Provision	Offence of strict liability
S47A	Record not retained, print disability radio licence
S132AD(5)	Making an infringing copy in preparation for, or in course of selling, letting or obtaining commercial advantage or profit.
S132AE(5)	Selling or hiring infringing article by way of trade
S132AF(7)	Offering infringing copies for sale or hire
S132AG(5)	Exhibiting infringing copy in public commercially
S132AH(5)	Commercial importation of infringing copy
S132AI(5)	Distribution of infringing copy for trade or commercial advantage
S132AJ(5)	Possession of infringing copy for commerce
S132AL(8)	Making a device for making an infringing copy
S132AO(5)	Causing a cinematographic film to be seen in a place of public entertainment
S132AQ(5)	Removing or altering electronic rights management information
132AR(5)	Distributing, importing or copying copies after removal or alteration of electronic rights management
S132AS(5)	Distributing or importing electronic rights management information
S133B/s248SA	Not technically an offences of strict liability, but allows for the infringement notices for offences of strict liability
S203A(1)	Not keeping records, libraries and archives
S203D(1)	Not keeping records in chronological order
S203E(6)	Not providing inspector of a library or archive 'all reasonable facilities and assistance'
S203E(10)	Divulging information from an inspection

S248PB(5)	Making an unauthorized indirect recording of a performance
S248PF(5)	Copying unauthorized recording
S248PG(5)	Unauthorised copying of exempt recording
S248PH(5)	Unauthorised copying of authorised sound recording for preparation for use in a soundtrack
S248PI(5)	Selling, hiring or exposing for sale or hire unauthorised recording
S248PJ(7)	Distributing unauthorised recording
S248PK(5)	Commercial possession or import of unauthorised recording
S248PL(5)	Exhibiting unauthorised recording in public by way of trade
S248PM(5)	Importing unauthorised recording for exhibition by way of trade
S248QC(5)	Copying unauthorised sound recording
S248QD(5)	Selling, hiring or exposing for sale or hire unauthorised sound recording
S248QE(5)	Distributing unauthorised sound recording in the course of trade
S248QF(5)	Commercial possession or import of unauthorised sound recording
S248QG(5)	Exhibiting unauthorized sound recording in public by way of trade
S248QH(5)	Importing infringing copy by way of trade

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