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## LEGAL ISSUES FOR BLOGGERS

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### What is a blog?

A blog (contraction of "web log") is an online publication, diary or newsletter posted on a website by an individual, organisation, a business or community. A blog can be a personal diary, a photoboard, a running commentary on an area of interest, advice with links to other blogs and websites, or just advertising. Some blogs are interactive and encourage comments from readers, while others are non-interactive. There are a number of arts-related blogs, artists who have their own blogs to document and share their practice, and those who use blogging to discuss and review contemporary art, film and writing.

The legal issues discussed below equally apply to webmasters. Today, any artist or arts organisation with a computer and internet access can become a webmaster or blogger.

### What legal issues can arise?

The main legal issues are:

- Copyright
- Moral Rights
- Trade marks
- Defamation
- Right of Publicity

### Copyright

When you create your own blog you are creating copyright protected material, but you may also want to use material that is owned by someone else. It is always a good idea to assume that others' work is protected by copyright until you are able to confirm otherwise.

In Australia, under the *Copyright Act 1968* (Cth), copyright protection is automatic (there is no registration system) and protects original:

- literary works (e.g. written works such as the content on your blog, computer programs, compilations, novels, screenplays, song lyrics);
- artistic works (e.g. paintings, drawings, photographs, maps and plans);
- dramatic works (e.g. choreography, screenplays, plays);
- musicals works (which are separate from the sound recording or the lyrics); and
- films, sound recordings, broadcasts and published editions.

The copyright owner has a number of exclusive rights, including the rights to reproduce and to communicate the work to the public (broadcast or place on the internet).

The general rule is that the "creator" of a literary, artistic, dramatic or musical work and the "maker" of a film, sound recording, broadcast or published edition are the copyright owners. However, exceptions to the general rule include situations where the creator is an employee, is commissioned to create the work, is a freelancer, or the work was created under the direction and control or first published by the Government.

You must also consider the duration of copyright which is generally for the lifetime of the creator plus 70 years.

There are also a number of fair dealing exceptions to copyright infringement, including fair dealing for the purpose of criticism and review, parody and satire, research and study, and reporting the news.

If you are unsure who the copyright owner is, whether the copyright period has expired, or whether fair dealing exception will apply you should seek further legal advice.

For further information see the Australian Copyright Council information sheet: [Websites: Social Networks, Blogs & User-generated Media](#).

## **How does this affect my blog?**

If you want to use copyright protected works on your blog, you must obtain the copyright owners permission if you cannot rely on a fair dealing exception. You do not necessarily need a written agreement with every contributor to your blog – verbal permission is fine – but obtaining something in writing makes the terms of the licence (permission) clear to everyone.

Do not assume that what you find on the internet can be used by you, or is freeware just because it is on the internet. You should consider how to best manage content that users may post to your blog and other user-generated content. As the publisher of a blog you can be liable for the infringement of copyright even if you are not directly responsible for posting the material to your blog.

If a person posts material to your blog you can rely upon an implied contractual right to continue to publish their material on your blog –because the user chose to post the material to your blog, a right is implied for you to publish it. However such an implied right does not cover copyright works owned by someone else, but which have been posted by the user. The implied right is also limited to publishing the material on that blog – the implied licence does not permit you to publish the material in other media.

You can attempt to manage your relationship with people who access your blog through terms of use (TOU) that grant you permission to reproduce the user generated content. For further information on how you can implement TOUs, see the Arts Law information sheet: [Website development](#).

### ***Can I use quotes on my blog?***

Short words, names, titles, slogans or phrases are generally too short to attract copyright protection. You can use quotes which are not a substantial part (defined as an essential, distinctive or important part) of the original literary work or if the literary work which the quote came from is no longer protected by copyright. When considering whether you have used a substantial part, the quality is more important than the quantity used. The fair dealing exceptions, may apply when quoting (see below).

### ***Can I copy facts and ideas?***

Copyright law only protects the material form of an idea, fact, style or technique, not the actual idea, fact, style or technique itself. So generally, you are free to report facts and discuss ideas.

### ***How does a Creative Commons licence help?***

[Creative Commons](#) is a non-profit organisation that offers a flexible range of licences for creators wanting to allow others to use their work in certain ways. Often a copyright owner will reserve all their rights, but a Creative Commons licence allows the creator to relinquish some rights and reserve others.

If you want to allow others to copy from your blog, you can create your own licence or use a Creative Commons licence permitting others to copy your blog and specifying whether you consent to commercial use and modifications or require attribution.

For example, a blogger can apply an "attribution licence" to their blog enabling others to reproduce, copy, distribute and display their work provided they are credited as the author.

### ***Who will own copyright in my blog comments page?***

You won't usually own the copyright unless you are the author of the comments or copyright is assigned to you under your TOA. If someone makes comments on your blog they are probably giving you an implied licence for at least that display on the comments page, and any other incidental reproduction or associated copying. However, for clarification you could add a Creative Commons licence to your blog comments page stipulating that in posting comments they agree to license them to you.

### ***Can I provide links to another blog or website?***

Care should be taken when providing links to other blogs or websites. Providing a link on your blog does not infringe another blogger's or website owner's copyright. However, you should ensure that the blog or website that you are linking to does not infringe copyright. For example, a website owner running a MP3 website provided links to remote computer servers out of his control. These links directed users to sites enabling the downloading of MP3-format infringing copies of copyright sound recordings. The Federal Court of Australia found that both the website owner and the Internet Service Provider (ISP) were liable for authorising, facilitating and encouraging infringements of copyright.

### ***Can I use images owned by someone else on my blog?***

You can only use someone else's images on your blog if:

- the copyright duration has expired and the work is in the "public domain";
- you have the copyright owner's permission;

- using the image would be a "fair dealing" for the purpose of criticism and review, parody and satire, or reporting news AND there is sufficient acknowledgement; or
- the image is "clip art" – sometimes referred to as royalty free work, copyright-free work, shareware or freeware (e.g. Creative Commons resources such as OpenPhoto). Prior to using any of these you should read the terms and conditions, or the licensing terms which are usually found in the "click to accept" or "read me" files and ensure that you are able to use the image.

### ***Can I count on "fair use" as a defence if I use someone else's work?***

There is no defence of "fair use" in Australia. In the USA the "fair use" exception is based on the principle that the public should be entitled to use freely small portions of copyright protected work for the purposes of criticism, commentary, or parody. In Australia, the Copyright Act provides "fair dealing" exceptions for the limited purpose of research or study, criticism or review, parody or satire, and reporting news. When considering whether use of copyright material is fair dealing you need to carefully consider: the purpose and character of the use; nature of the copyrighted work; amount and substantiality of the portion; the effect on the potential market; and whether or not there is an absence of intent to plagiarise. If you are unsure whether your use of someone else's work constitutes "fair dealing", you should seek legal advice.

### ***Can collecting societies assist me?***

If the image, song or literary work you want to use on your blog does not have a Creative Commons licence attached to it which allows you to use it on your blog, collecting societies may be able to assist in arranging a licence to reproduce or use the works on your blog. For assistance with:

- **Written materials:** contact CAL ([www.copyright.com.au](http://www.copyright.com.au))
- **Musical works:**
  - if creating a cover version contact APRA-AMCOS ([www.apra-amcos.com.au](http://www.apra-amcos.com.au))
  - if using the original sound recording contact PPCA ([www.pcca.com.au](http://www.pcca.com.au))
- **Photographs and artworks:** contact VISCOPY ([www.viscopy.com](http://www.viscopy.com))

For more information see Arts Law's information sheet on [Copyright collecting societies](#).

## **Moral rights**

A creator of a work has moral rights which recognise the creator's ongoing connection with the work.

Moral rights entitle a creator to:

- the right of attribution (naming);
- the right against false attribution; and
- the right of integrity against derogatory treatment of the work in a way that prejudices the reputation or honour of the creator.

This means that should you decide to use someone else's work on your blog you not only need to obtain permission, but you should ensure that you attribute the creator correctly and make sure that you do not change the work or do anything that might be considered derogatory treatment of the work.

## Trade marks

A trade mark is a sign used in business to indicate that goods or services come from a particular trader or service provider. It can be a letter, name, signature, word, numeral, device, brand, heading, label, aspect of packaging or shape, colour and even a scent or sound. A trade mark can consist of either words or images or a combination of both. There are two types of trade marks: registered trade marks and common law trade marks.

A person who owns a trade mark in Australia may be able to stop other people using the same or a similar trade mark in Australia and obtain compensation for unauthorised use or infringement. A trade mark infringement occurs when a trade mark that is substantially identical or deceptively similar to the original or registered trade mark is used in the course of trade, in relation to the goods or services for which the trade mark is well known or registered.

For further information see the Arts Law information sheet, [Trade marks](#).

### **If I want to complain about a company – can I use their name and logo?**

You can use a company's trade mark to refer to, criticise or discuss the company. However, if you are pretending to be the company or trying to sell competing goods, you are infringing the company's trade mark.

### **Can I use the trade mark in my domain name, blog title or in the title of the blog post?**

You can use the trade mark if its use is relevant to the discussion and does not confuse the reader. You may be able to use the trade mark in the domain name provided it is clear that you are not claiming to be or speaking on behalf of the company.

For more information see Arts Law's information sheet on [Protecting your professional name](#), specifically the section on domain names.

## Defamation

While you are venting your views on your blog you should consider whether what you are writing is defamatory. Defamation is a communication to at least one person that lowers the reputation of an identifiable third person, where the communicator has no legal defence.

For more information see Arts Law's information sheet on [Defamation](#).

### **Can I be liable for material posted by others on my blog post?**

The publisher of allegedly defamatory material can be anyone who takes part in the publication or replication of such material, so you may be responsible for material posted by others on your blog and potentially liable for defamation.

As a webmaster, you too may be responsible for material posted on a website or blog carried by you even though you may have little if any control over the content of the website or blog.

## **Can I be liable for defamatory material contained on others' blogs or websites to which I provide a link to from my blog?**

It might be argued that a link to someone else's blog or website is distribution of defamatory material and, as in the above example of the webmaster, you may be liable.

## **The internet is borderless – can I be sued overseas?**

For the purpose of defamation law in Australia, the courts have found that publication of material on the internet occurs in the place where the material is downloaded and comprehended by internet users. As such, you could be liable for defamation (depending on the laws of the country) anywhere in the world where your blog is accessed.

For information on the law for bloggers in the United States see the Electronic Frontiers Foundation: [Legal Guide for Bloggers](#)

## ***Is "freedom of speech" a defence in Australia?***

There is no explicit legal protection of freedom of speech in Australia. As such, in the absence of a positive right to freedom of speech there is little protection against censorship on the part of government or other interests.

## **Right of publicity**

There is no "right of publicity" in Australia. The right of publicity exists in the USA and is a defence against the claim that you have used someone's name or likeness in a commercial manner (for advertising, to sell a product or service, or as an endorsement) without their consent, and that this has damaged their reputation or caused them injury.

If you use someone's name, image or likeness in Australia without their permission they may be able to stop the unauthorised use of their name, image or likeness by relying on the law of defamation, the *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)), and the law of passing off.

For more information see Arts Law's information sheet on [Unauthorised use of your image](#).

## **Can bloggers rely on 'shield laws' available to journalists to protect sources of information?**

In today's rapidly changing media landscape traditional definitions of 'journalist', 'journalism', 'news media' and many other kinds of media practice have been transformed. For this reason it is relevant to consider what protections, available to professional journalists may be available to bloggers.

Some state & territory statutes provide limited protection against non-disclosure of sources. These laws may be known as 'shield laws' and the protection that offer can extend from journalists to bloggers. The rationale behind such laws are that it is in the public interest that there be freedom of expression and the free flow of information critical to the maintenance of a democratic society.



Shield laws are contained in recent amendments to the Evidence Acts of the Commonwealth, the ACT, New South Wales, Victoria and Western Australia.<sup>1</sup> The Acts refer to a 'privilege against non-disclosure' meaning that in the supreme courts of each of these states as well as federal courts, judges have a discretion to protect someone from revealing their sources of information. The tests courts apply are public interest based. Courts have discretion to order that evidence of the source is revealed where they are satisfied that the public interest in disclosure outweighs the adverse effect of disclosure on any person and the public interest in freedom of communication.

In NSW and WA such protection is limited to a 'journalist' who is defined 'a person engaged in the profession or occupation of journalism'.<sup>2</sup> The Evidence Act (Vic) provides a more extensive statement of the factors relevant to engaging in the profession or occupation of journalism.<sup>3</sup> The focus on the profession or occupation of journalism supports the argument that in NSW, WA and Victoria only professional journalists can obtain the protection provided by the shield laws. At a Commonwealth level and in the ACT the privilege is extended to anyone engaged in the dissemination of news and information to the public,<sup>4</sup> i.e. anyone, including bloggers, can argue that they are a journalist.

It is important to note that these provisions have yet to be tested for bloggers and other information sites. What will matter is not the channel through which something is being delivered to the public but what information is being delivered. A New Zealand Court has considered whether a blogger is a journalist in the context of the disclosure of sources of information and held that the blogger was a 'journalist' and the blog a 'news medium' as it disseminated new and recent stories of public interest.<sup>5</sup>

There is a further exemption contained in s. 7B(4) of the *Privacy Act* (Cth). This exemption means that journalists and media organisations are not prevented by the Privacy Act from disclosing personal information held by companies and government agencies. This exemption applies where media organisations are publicly committed to observing standards that deal with either their own written standards or to adhere to standards set by a body representing a class of media organisations. Given that unlike other forms of news media, bloggers tend to self-regulate means that they fall outside the scope of this protection. However it should be noted that the media industry codes provide limitations on how journalists and media organisations should report personal information and otherwise report matters that impact on the privacy of individuals.

## Other questions

### Should I have a disclaimer on my blog?

Having a disclaimer on your website to deny responsibility for any misconduct (copyright infringement, defamation, etc) will not provide absolute protection from others taking legal action against you. However, it is always a good idea to have a disclaimer on your site because the whole of your conduct in any given situation will be taken into consideration. The disclaimer may also have the effect of breaking the chain of causation between your conduct and the loss suffered by the party alleging your misconduct.

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<sup>1</sup> s. 126H *Evidence Act 1995* (Cth); s. 126K *Evidence Act 1995* (NSW); s. 126K *Evidence Act 2008* (Vic); s. 126K *Evidence Act 2011* (ACT); s. 20I *Evidence Act 1906* (WA).

<sup>2</sup> s. 126J *Evidence Act 1995* (NSW); s. 20G *Evidence Act 1906* (WA).

<sup>3</sup> s. 126J *Evidence Act 2008* (Vic).

<sup>4</sup> s. 126G *Evidence Act 1995* (Cth); s. 126J *Evidence Act 2011* (ACT).

<sup>5</sup> *Slater v Blomfield* [2014] NZHC 2221 (12 September 2014) considered the definition of a journalist in s 68(1) of the Evidence Act 2006 (NZ) and the publications on the Whale Oil website.

## Why has my blog been removed from the internet?

If your blog contains material that is likely to be disturbing or harmful to persons under 18 years or contains non-violent sexually explicit material involving consenting adults, your webmaster, Internet Content Host (ICH) or Internet Service Provider (ISP) may be issued with a take-down notice requiring them by law to delete your blog from their server.

Similarly, a blogger can be prosecuted under Australian law for making available material that is deemed objectionable or unsuitable for minors. These provisions vary among the States and Territories and you should seek legal advice.

If your blog exists through a blogging service such as Blogger, WordPress, LiveJournal, etc., your blog operates under that service's Terms and Conditions or Terms of Use. Violation of these terms may result in the blogging service shutting down your blog and/or account. Each blogging service has their own set of Terms and you should take care to read them before signing up for an account.

## What should I do if I get a cease and desist letter?

If you are using unauthorised material on your site you should remove it immediately while you investigate and seek legal advice. Continuing to use the material after you have been notified may aggravate the claim and increase the chance that you will need to pay damages.

## Can I publicise the cease and desist letter on my blog?

The cease and desist letter is protected under copyright law and should not be published on your blog without the author's consent. That is, unless you can justify your publication of the letter as being a 'fair dealing' as criticism or review, parody or satire, and reporting news. For more information see Arts Law's information sheet on [Copyright](#).

## Further Information

The [Australian Copyright Council](#) provides legal advice on copyright and has a number of useful publications. Its information sheets may be accessed free:

- [Assigning & Licensing Rights](#)
- [Exceptions to Copyright](#)
- [Fair Dealing: What Can I Use Without Permission](#)
- [Parodies, Satire & Jokes](#)
- [Quotes & Extracts](#)
- [Websites & Copyright](#)
- [Websites: Social Networks, Blogs & User-generated Media](#)

## Need more help?

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

Also visit the [Arts Law website](#) ([www.artslaw.com.au](http://www.artslaw.com.au)) for more articles and information sheets



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