Putting Your Film or Photo Online

This information sheet outlines the legal issues artists or arts organisations should consider when planning to put films and photos online.

When it comes to putting films and photos online, film makers and photographers have a range of options. Video and photo hosting sites including YouTube, Facebook, Vimeo and Flickr all make it easy for artists to upload their work and receive feedback from the site's community as well as from the general public. Putting a film or photo online is a great way of attracting critical attention in the work.

There are, however, many legal issues which film makers and photographers must take into account before they decide to put their film or photo online. Many of these issues are outlined by the "Terms and Conditions" of the various hosting sites. What many photographers and filmmakers don't appreciate is that those terms and conditions are usually part of a binding contract between the site operator and the person uploading the content. They can dramatically affect your rights in relation to issues such as copyright, licencing, and privacy. In addition, once your work is online, not only does it have a worldwide audience but the likelihood that someone somewhere in the world will reproduce or use it in a way that you don't want also increases exponentially. You need to understand those risks.

Foreign jurisdictions

It is important to note from the onset that many media hosting sites, particularly sites such as Facebook, Youtube, Flickr and Vimeo, are based overseas (often the United States) and are therefore subject to that country's laws, not Australian law.

This information sheet gives an overview of the legal provisions governing such hosting sites, but is concerned primarily with advice under Australian law. For sites located outside of Australia, film makers and photographers may need to seek specialist legal advice to find out how the laws of those jurisdictions will affect their decision to put their work online – particularly where the artist is concerned about whether the content of their film or photo may be prohibited under a foreign law.

In addition, once uploaded to a hosting site, a film or photo can potentially be viewed by people from all over the world, beyond the jurisdiction of the hosting site. It may be that some film or photo content cannot lawfully be shown in other countries' jurisdictions, and this may affect the capacity of the site to promote your work.

Terms and Conditions of hosting sites

Video and photo hosting sites are owned and operated by private companies which, as mentioned above, are often located in foreign jurisdictions. In order to upload media to a hosting site, an artist will generally enter into a contract with the site by creating a user account and agreeing to the site's Terms and Conditions (also called Terms of Use or User Agreement). These Terms and Conditions will set out the conditions under which the user can use the site.

Film makers and photographers should ensure they carefully read the Terms and Conditions of the hosting site. They should also be aware that the Terms and Conditions are subject to change and can be revised by the site's operator without notice. The main legal requirements artists are likely to come across are summarised below. However, artists should also check the individual Terms and Conditions of the particular hosting site they wish to utilise, as different sites impose different provisions.

Copyright

Originality

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Video and photo hosting sites will usually require an artist to ensure his/her film or photo is their own work and not in breach of copyright. A breach of copyright will occur if the artist has copied the whole, or a substantial part of, another work (for example, another film, photo, television program, game play capture or sound recording) which is protected by copyright.

My film isn't completely original. Does that matter?

Under Australian law, media artists will not breach copyright if the work they have copied is out of copyright or falls under one of the exceptions listed in the Copyright Act (Cth). For example, media artists will not be liable if their use of the copyrighted material can be characterised as 'fair dealing.' The fair dealing exceptions allow copyrighted works to be used in satire or parody, research or study and in criticism or review.

Media artists should, however, be aware that the exceptions to copyright infringement may be different under the laws of other countries. For example, many hosting sites are located in the U.S. Under U.S. law, the 'fair use' exception applies which, although similar in concept, operates differently to the 'fair dealing' provisions under Australian law. Content which might be considered 'fair use' in the U.S. might **not** be considered 'fair dealing' in Australia.

If material is identified as infringing copyright by the website or the copyright owner, it may well be deleted from the site without warning. Film makers should note that "mash up" films, which use a combination of pre-existing material with new or other pre-existing material, can be particularly problematic with respect to copyright. Again, the particular Terms and Conditions governing the site and the laws of the relevant jurisdiction should be referred to.

For more information, see Arts Law's information sheet on *Copyright*, available for free online.

What if I don't hold all of the rights to the film or photo?

Under Australian law, you must hold all copyright rights in a film or photo in order to publish it online. If not, you must obtain a **Release** or other written authority from the party or parties having copyright, granting you the right to publish the work online. This may include copyright in a soundtrack accompanying a film.

What is a Release?

A film maker or photographer may be required to obtain permission in the form of Releases or other written authority from other parties who have participated in the making of the film or photo before the work can be published online.

Some releases are not necessarily required by law but are recommended – and the terms and conditions of some websites may impose a contractual obligation that you have them. An example is a release signed by the model posing for the photograph.

Other releases are required by law. If you wish to upload a film of a live performance, the performers in that film must grant permission allowing the film maker to broadcast or rebroadcast that performance.

For more information, see Arts Law's information sheet on *Performers' Rights*, available for free online.

A release may include a warranty that the other party or parties will not bring any future legal action against the filmmaker or photographer for publishing the film or photo online. Before putting a film or photo online, you are strongly advised to obtain such releases.

Licence agreements

Website terms and conditions will generally require that the user guarantees that they are the copyright owner and therefore has the right to upload the film or photo to the site. By uploading a film or photo to a hosting site, an artist grants a copyright licence to the host site to host that film or photo. The licence granted to a website to host a work is usually limited, worldwide, non-exclusive and royalty-free and confers rights to the site to use the film or photo in various ways (eg., stream it online). To

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understand the exact scope of the licence you should read the website terms and conditions.

By uploading a film or photo to a hosting site, an artist generally also grants a licence to users to view that film or photo for personal and non-commercial purposes. They may also be granting a copyright license to other users to download, copy and make derivative works using that film or photo.

These licenses will be contained in the Terms and Conditions and usually operate for as long as the film or photo is hosted by the site. However, in some cases, the licence may exist beyond removal of the work.

The licence in your content that you grant to the social media site will allow other people to use your content in ways that are consistent with that site's Terms of Service (TOS) or Terms of Use (TOU). When your content is 'reposted', 're-pinned', 're-tweeted' it may end up being used in different contexts, including a commercial context, but that use could be still be consistent with the TOS/TOU of the social media site. As well, the TOS/TOU could state that the social media site has the right to sublicense to other companies and individuals who have some commercial licensing arrangement with the social media site (e.g. a 'partnering' arrangement). However a U.S. court held that there was an infringement of copyright in photographs when a photo agency took images from photographer's Twitter feed and distributed the images for commercial publication through the photo agency's licensing arrangements: See the article by Robyn Ayres & Ruthanna Klawansky 'Photographers' rights to their photos posted on Twitter and twitpics'.

Film makers and photographers are strongly advised to check the individual Terms and Conditions of the hosting site as to the specific rights conferred by the licence agreement.

What is a Creative Commons licence?

Some video and photo hosting sites give users the option of applying a Creative Commons licence to their work. Creative Commons (CC) is a non-profit organisation which provides a set of free, generic licences which creators of intellectual property can use to distribute their work to the public digitally. It is premised on the concept that people can contribute to a shared 'commons' of creative works by effectively giving up certain rights in a copyright work and allowing others to freely use, adapt, modify and distribute this work. A Creative Commons licence is a copyright licence which allows works, including films and photos, to be shared in this way.

Film makers and photographers can apply for a licence through the Creative Commons website. Those who wish to reserve all of their rights under copyright law should not obtain this licence.

For more information and to obtain a licence, see creativecommons.org.au and Arts Law's information sheet on *Creative Commons*, available for free online.

Content restrictions

- Many hosting websites will generally have some forms of restriction concerning:
- Sexually explicit and pornographic material.
- Material which is defamatory, discriminatory or incites hatred.
- Material which exploits minors.
- Material which depicts unlawful acts, animal cruelty, or gratuitous or extreme violence.
- Material which promotes fraudulent or dubious money-making schemes.
- Material which depicts drug substance and abuse, or bomb-making.
- Material which is made as a result of the film maker engaging in predatory behaviour, stalking, threats, harassment, invasion of privacy or revelation of confidential information.

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What are moderation ratings?

Some sites have moderation ratings which act as content filters once the material is uploaded. For example, Flickr rates material as “safe”, “moderate” or “restricted” depending on the suitability of the material to general audiences. Similarly, Facebook requires that users will not develop or operate a third party application containing alcohol-related, dating or other mature content (including advertisements) without appropriate age-based restrictions.

What happens if I upload a film or photo depicting prohibited material?

Film makers and photographers who fail to suitably moderate their material or who publish prohibited material are liable to receive a warning notification. However, in some cases, material considered to breach those restrictions may be removed without warning. Some sites may be more restrictive as to content than others. In serious cases may have their site user account terminated (which can remove not only the restricted content but all the other content uploaded as well). Further penalties will depend on the particular hosting site. For example, if YouTube terminates an account then the film maker or photographer will be prohibited from creating any new accounts.

Indemnification

Many websites’ Terms and Conditions will include an indemnification clause. This means that in uploading a film or photo to a hosting site, the artist automatically indemnifies the hosting site from and against all third party actions which arise from the artist’s actions such as:

- uploading material which breaches a third party’s copyright;
- activities on the hosting site;
- violation of the Terms and Conditions of the site; or
- violation of any law or infringement of a third party right, including any intellectual property or privacy right.

If the site suffers any loss because of the artist’s actions, it will rely on the indemnity to recover damages from the artist who uploaded the content.

Infringement

I’ve found my film or photo on a hosting site. What happens if someone has uploaded my film or photo without my permission?

Hosting sites will generally have their own internal procedures to address infringements of intellectual property, including unauthorised downloads, copying or uses of a film or photo. Film makers or photographers who believe their work is being used in a way which infringes their intellectual property rights can report the infringement through the site. This may be via means of an online form, such as the Digital Millennium Copyright Act form (under U.S. law) available through Facebook, or a designated agent. Other procedures may exist such as YouTube’s Content Verification Program, designed for owners who have an ongoing need to remove infringing content.

I want to lodge an infringement notice. What do I need to supply?

Generally, film makers or photographers who wish to lodge an infringement notice will be required to supply:

- information identifying the film or photo the subject of the infringement;
- information identifying the infringing work; and
- a declaration of a good faith belief that their rights have been infringed.

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I have lodged an infringement notice but nothing has happened. What do I do?

If after a reasonable amount of time an infringement notice has still not been acknowledged, the film maker or photographer may need to contact the designated agent of the hosting site. If there is still no response, the artist may need to consider direct legal action against the site and/or the person who uploaded the infringing content. This can be very difficult if they are not in Australia.

Privacy

What does the hosting site know about me?

Hosting sites require users to provide some personal information (such as name and age) in order to set up an account. This information is collected by the hosting site and may be stored overseas. Other information collected by hosting sites might be information about users which other sources provide, or information about others which the users provide. The terms and conditions will usually state whether the hosting sites may share users' personal information with authorised service providers, business partners, direct mail partners, other businesses in the same group of companies and in other situations.

Privacy settings

It is possible for film makers and photographers to control who sees their work and which websites their film or photo is embedded in through adjusting the privacy settings of their online account. For example, this might be by only allowing a specific list of followers or friends to view their work instead the general public, or only allowing a video to be embedded in certain websites and not shared others.

Film makers and photographers are strongly advised to check the individual privacy settings of the hosting site before they upload their film or photo online.

Checklist for film makers and photographers: Putting your work online

- Read the Terms and Conditions of the hosting site carefully.
- Be clear in your understanding about the rights you are granting to the host site and to users of that site.
- If your film or photo contains material which is or may be prohibited, obtain legal advice before you upload the film or photo.
- Consider whether you need to obtain any Releases or other written approval,.
- Consider whether a Creative Commons license may be beneficial to promotion of your work, or whether you wish to reserve all rights to your film or photo.
- Know your rights and the procedures involved should your film or photo be used in a way which you have not authorised.
- Engage with the hosting site's community. This will teach you more about the requirements and expectation of you as an online user, and will further the promotion of your work.

Further information

The following hosting sites contain information, including individual Terms and Conditions, for film makers and photographers who wish to put their work online:

· Vimeo (www.vimeo.com)

· Facebook (www.facebook.com)

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· YouTube (www.youtube.com)

· Flickr (www.flickr.com)

You can find additional information about putting your film or photo online on the websites of the following organisations:

· Australian Copyright Council (www.copyright.org.au)

- Exceptions to Copyright
- Film & Copyright
- Photographers & Copyright
- Websites & Copyright
- Websites User Generated Content & Web 2.0
- YouTube & Copyright

· Screen Australia (www.screenaustralia.gov.au)

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.