



**Copyright Enforcement Review Submission: Image Makers Association Australia – 6th March 2023**

**Submission to: Australian Government, Attorney-General's Department**

## **INTRODUCTION**

Image Makers Association Australia represents professional and emerging photographers in Australia through education, advocacy, celebration and connection. We work on behalf of our members to improve the business landscape for the photographic profession, building confidence in the value of photography and ensuring image making remains a viable career path into the future.

Image Makers Association Australia acknowledges and pays respect to the past, present and future traditional custodians and Elders of Country throughout Australia. We acknowledge their continuous connection to the lands, waters, culture and communities, on and within which we work.

Our members are commercial stills photographers working across portraiture, editorial, architecture, design, food, advertising, corporate, lifestyle, travel, social media content, still life, studio and more. They are commissioned to produce photography for a range of organisations including small and medium businesses, corporations, government, not for profit organisations and print and online publications. Their imagery can be seen across a wide range of media promoting a variety of products and services.

Image Makers Association Australia has filled a void of representation for commercial photographers; the organisation came about following several years during which a group of Australian photographers communicated with each other around issues to do with copyright that affected them all. In some instances, they worked together informally to enact change, leading to the eventual formation of an industry body in mid 2022. In 9 months of operation, membership has grown to over 100 individuals and continues to steadily climb with two industry members (Eizo and Specular) offering their support too.

In the short time since establishment, we have become an affiliate member of the Australian Copyright Council, the pre-eminent authority on Australian copyright law, and we are recognised in their literature as the relevant industry body for commercial photographers in Australia. We have also formed productive affiliations and partnerships with the following organisations in support of our aims to educate, advocate, celebrate and connect for the benefit of our membership:

- Arts Law
- Australian Institute of Architects
- Authentic Design Alliance
- Indesignlive/Inde.Awards
- Regional Architecture Association
- Stylecraft

Copyright and its enforcement are at the core of Image Makers Association Australia; in fact they are our primary reason for being. Concerns around copyright and licensing were noted by over 70% of our members as being one of the most pressing issues currently facing our industry as a whole. This was established out of a survey conducted of our membership in October 2022 to establish priorities for the newly formed association.

In order to produce our submission to the copyright enforcement review, we specifically surveyed commercial photographers to ensure our submission reflected the real, up to date experience of current practitioners. Along with our membership, we also reached out to a broad range of other photographers so as to ensure we reflected the experience of the industry as a whole, especially given our organisation is still relatively young. We received a total of 66 responses, the majority being from Victoria and New South Wales, with the remainder scattered across all Australian states and territories with the exception of Tasmania.

## **CURRENT COPYRIGHT INFRINGEMENT CHALLENGES**

### **QUESTIONS:**

1. What challenges have you been facing in relation to copyright infringement in recent years? Are you seeing any changes or trends (including any forms or methods of infringement that are emerging or particularly concerning, or conversely, are becoming less prevalent or concerning)?
2. Can you provide any data on the scale of current copyright infringement, or the estimated economic impact of such copyright infringement on you, your organisation or your industry more broadly?
3. Are there any particular drivers of copyright infringement that you see as noteworthy or significant? Have these drivers changed in recent years?

### **RESPONSES:**

#### ***Background, Challenges & Trends***

Commercial stills photographers tend to operate very small businesses, either consisting of a single person (the photographer) or only a very small number of employees. Copyright infringements experienced by these practitioners tend to be small in terms of their commercial value (images are often stolen or used without permission at a rate of a single image at a time), but there tends to be a lot of these infringements over the course of each year. If direct communication with an infringer doesn't produce a solution, there is not usually a viable means of taking commensurate legal action.

A summary of the challenges facing our survey respondents indicates that the trend towards a constant stream of visual material being required by business to drive growth and engagement, largely on social media platforms such as Instagram, is the primary issue. Imagery is easily accessible and there appears to be a general lack of understanding of Australian copyright law and its requirement that permission be obtained from the copyright owner before an image may be used in any way. In many cases, survey respondents also felt decisions were being deliberately made by infringers not to seek permission to use images, taking deliberate advantage of the fact that individual photographers are not equipped with the resources or time to take any kind of formal legal action.

Regular correspondence to our organisation from our members also indicates that photographer's images are often published without permission and without payment in online publications and blogs where revenue is being gathered through advertising that appears alongside editorial content.

Members of our association have also noted that there can be a misinformed perception that credit is an acceptable form of payment for use of photography online and in social media. Very few photographers find this to be acceptable given they seek to earn a viable living from photography. A large number of respondents to our survey however will make an exception when images are being used for the benefit of a charity or a cause that they see as being worthwhile.

The result of the problems described here is ultimately a loss of the perceived value of photography. After all, why would you pay for something you can access so easily for free? This clearly puts the sustainability of photographers' business models into question. Many Australian businesses can see the value in photography for their promotional needs, yet fewer and fewer seem prepared to pay the creators of that imagery in a way that reflects that value.

#### ***The Scale of Infringement***

83% of respondents to our survey indicated that copyright infringement is a problem within their business. They reported that the primary infringers are small-medium businesses (80% of respondents) and online publications (70% of respondents), with large corporations, print publications, government and not for profits also infringing rights albeit in slightly smaller quantities. Many of these infringements are in the form of social media content.

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Similarly, 83% of respondents indicated that copyright infringement has been getting worse in recent years. 56% indicated that the average approximate value of each copyright infringement they experience is under \$500; 33% estimated the value of individual infringements at \$500-\$1,000 and 11% at \$1,000-\$5,000. While the value of each of these individual infringements is relatively low, 90% of respondents are experiencing up to twenty of these infringements each year, with the remaining 10% experiencing significantly larger volumes of infringement. Each of these individual instances add up to a significant problem for such small businesses with legal action often considered as being too difficult or expensive in relation to each specific infringement.

### ***Economic & Professional Impacts***

When photography is legitimately commissioned or purchased, a license for the commissioning/purchasing client's use is granted with defined inclusions and exclusions and with value assigned based on the extent of the agreed use. In the scope of these agreements, the default provision is that the photographer retains ownership of copyright, as per Australian law. In our experience, it is extremely rare for copyright to be transferred to the commissioning/purchasing entity due to the higher cost involved and the fact that in most cases such transfer of copyright is simply not desired.

This means that any party wishing to utilise imagery outside of an initial licensing arrangement is required by law to seek permission from the copyright owner (the photographer) and pay a fee to reflect the value of the intended use. The licensing fees collected by photographers for such use forms part of the income stream that they rely upon. Indeed, our member survey in October 2022 indicated that most of our members receive up to 30% of their annual income from third party licensing. If there is not significant understanding around the need to seek permission and make payment before use of photographic images, along with a viable avenue for photographers to take action against those who infringe, this income is in very real danger of being significantly eroded.

The majority of respondents estimated that their time spent following up infringements was up to ten hours over the course of each year. This, however, needs to be seen in the context of there being very little practical action that individual photographers can take if an infringer is not open to direct resolution. To put this into further context, over 80% of photographers responding to our survey acknowledged that there have been cases where they became aware of infringements to their copyright and simply ignored it because the time and/or costs involved with pursuing the matter would greatly exceed any compensation.

## **THE COPYRIGHT ENFORCEMENT FRAMEWORK AND ITS EFFECTIVENESS**

### **QUESTIONS:**

4. Are the currently available industry-led mechanisms appropriate, and/or being appropriately used, to address or prevent actual or potential copyright infringement? Which mechanism(s) are most frequently and/or effectively used, and why?
5. What factors influence your decisions on what action(s), if any, to take through industry-led mechanisms in response to actual or potential copyright infringement?
6. Are the costs (including financial and time costs), benefits and risks of industry-driven mechanisms appropriately shared between different parties?
7. Are there ways in which industry participants could work together more effectively or efficiently to address or prevent copyright infringement (for example, barriers to utilisation that could be removed; new or emerging mechanisms that could be adopted)?

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**RESPONSES:**

***Industry-Led Mechanisms in Practice***

Over 80% of our survey respondents have stated that they have attempted to resolve copyright infringements themselves by communicating directly with those infringing their copyright. Only a single respondent felt this was always effective and another individual that it was never effective. 26% of respondents felt it was almost always effective, 33% sometimes effective and 20% almost never effective.

This data shows that an industry-led mechanism, while effective in some cases and certainly an important first step, is not on its own a course of action with a reliable outcome. It speaks to the need for further avenues of action which are currently not readily accessible or affordable for commercial photographers with risks and costs involved with relying on such an industry led mechanism being borne solely by the photographer.

***New Mechanisms Are Needed***

Image Makers Association Australia is currently partnered with one industry body, The Australian Institute of Architects, to further educate their members around copyright, commissioning and publishing of architectural photography. We feel that other business groups and industry bodies could, with support from government, also assist with educating their members around the need to seek permission before utilising imagery. Where there are repeat infringers, a proposal could be put to industry organisations to consider options such as placing restrictions upon a practicing license or the suspension of an industry body membership. Image Makers Association Australia is open to consulting further and assisting with broader education in this area.

**STATUTE-BASED MECHANISMS**

**QUESTIONS:**

8. How effective and efficient is the current website blocking scheme as a way of combating copyright infringement and steering online consumers towards legitimate sources of content? For example, is the application process working well for parties, and are injunctions operating well, once granted?

9. Could the way the website blocking scheme operates be improved in any way (for example to address the use of new and emerging technologies to navigate around or through website blocks), including through changes to how the current scheme is practically implemented, or potential amendments to legislation?

(a) What impact would any such changes have on you or your organisation?

(b) Are there any potential broader or unintended consequences (for example, on other aspects of internet traffic management) that should be taken into account when considering changes that may be suggested through this consultation process?

**RESPONSES:**

***Website Blocking Scheme***

It is true that the current website blocking scheme might theoretically be an option that stills photographers could consider when attempting to combat copyright infringement. However, the complexity of the process, the financial and legal costs associated with utilising such a scheme and the potential impracticalities of the outcome would almost always be prohibitive for most of our members. As noted above, the vast majority of copyright infringements that are experienced by commercial photographers (89% of survey respondents) have a financial value of less than \$1,000 per infringement, with 56% of respondents reporting that most of their individual copyright infringements have a monetary value of less than \$500.

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Furthermore, a large proportion of the infringements experienced by our members occur either on Australian-hosted websites or on very popular social media sites such as Instagram, Facebook, LinkedIn and Twitter (70% of survey respondents have experienced copyright infringements on popular social media sites). The likelihood of success of an application to block any of these four dominant social media sites from the entire Australian populace due to the presence of copyright infringing material is so low that it would not be an avenue worth considering, especially by sole operators. As such, the website blocking scheme in its current form is largely irrelevant and impractical in relation to our industry of commercial stills photography.

## **AUTHORISATION LIABILITY AND THE SAFE HARBOUR SCHEME (AND RELATED MECHANISMS)**

### **QUESTIONS:**

10. How effectively and efficiently are the authorisation liability provisions and/or safe harbour scheme (and associated notice and take-down process) currently operating as mechanisms for addressing copyright infringement? For example:
- (a) How clear are the circumstances in which a party may be considered to have authorised another person's copyright infringement, given the courts' interpretation of the authorisation liability to date?
  - (b) How effective and efficient is the safe harbour scheme (and associated statutory notice and take-down process) in striking the right balance between combatting copyright infringement and protecting the legitimate interests of service providers?
11. Are there ways in which these provisions could be amended to improve their effectiveness or efficiency?
- (a) How would such changes affect you or your sector?
  - (b) Are there any potential broader or unintended consequences that should be taken into account when considering changes that may be suggested through this consultation process?

### **RESPONSES:**

#### ***Safe Harbour Scheme, Statutory Notice and Take-Down Procedures***

As with the website blocking scheme, generally speaking and in most instances, the formal legal processes required to initiate, oversee and successfully complete a take-down notice of this type mean that such processes are often deemed inappropriate by our members, due primarily to a disconnect between the relatively low financial value of each specific infringement and the relatively higher costs associated with obtaining the necessary legal advice to implement such a process.

That said, nine of our survey respondents have reported that they have used formal take-down notices to attempt to resolve copyright infringements. Of those nine respondents, one reported that this process has always been effective, four reported that this was almost always effective, while the remaining four reported that this was sometimes effective.

As mentioned previously and to put the experiences described above into perspective, it is also worth noting that 81% of our survey respondents (60 commercial stills photographers in total) have become aware of infringements to their copyright and have simply ignored the infringement because they feel that the time and/or costs involved with pursuing the infringement would greatly exceed any possible compensation.

## **USE OF THE LEGAL SYSTEM AND LAW ENFORCEMENT IN RELATION TO COPYRIGHT INFRINGEMENT**

### **QUESTIONS:**

12. What factors influence your decisions on what action(s), if any, to take through the legal system and/or law enforcement in relation to suspected or alleged copyright infringement?

(a) For example, have you found mechanisms such as mediation, alternative dispute resolution and other non-court remedies to be preferable as ways to resolve disputes?

13. Are the various avenues available through the legal system and law enforcement to address copyright infringement suitable and effective? For example:

(a) Have you sought to engage with the courts or law enforcement in relation to suspected or alleged copyright infringements? If so, please provide (if possible) any data or examples in relation to your experiences.

(c) Are the current civil and criminal remedies under the Copyright Act appropriate?

(d) What barriers (if any) do you face in engaging with the legal system? Could any models introduced in other international jurisdictions to streamline consideration of copyright matters be potentially relevant in an Australian context?

(e) Were you previously aware of the ABF's Notice of Objection border enforcement application process?

14. Are there any ways in which the current system could be improved? How would such changes affect you or your sector?

### **RESPONSES:**

#### ***Experiences with the Current Legal System***

As mentioned, most individual instances of copyright infringement that are experienced by commercial stills photographers have a relatively small financial value, and most owners of copyright in still photography are sole operators. As noted previously, the vast majority of copyright infringements (89% of survey respondents) have a financial value of less than \$1,000 per infringement, and 56% of respondents report that most of their individual copyright infringements have a commercial value of less than \$500. This imbalance between the monetary value of each individual infringement and the high costs of legal representation means that many copyright infringements are either ignored or they are pursued using direct 'industry-driven' methods outside of the formal legal system. As a result, our survey has indicated that only a small sub-set of our survey respondents have pursued formal, statute-based legal responses to copyright infringement.

Of those surveyed, seven photographers reported that if a copyright infringer has refused to either take down material or enter into a paid licensing agreement with them, they have then subsequently engaged in formal legal proceedings to attempt to resolve infringements to their copyright. Three of those photographers resolved their matter using mediation, three used alternative dispute resolution processes, while only one has pursued formal court action. Those who pursued mediation reported that the resultant outcome was 'sometimes effective', those who pursued alternative dispute resolution reported that the resultant outcome was either 'almost always effective' or 'always effective'. The one photographer who reported that they had pursued formal court action noted that the outcome was 'always effective'.

On then asking those seven photographers who had pursued such legal proceedings whether the time and monetary costs relating to pursuing these matters would deter them from taking such action again, four photographers noted that they would not likely take such action again, while the remaining three photographers said that they would again pursue such action in the future. The one photographer who had pursued formal court action responded that they would not likely take such action again, due to time and monetary costs being prohibitive.

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One specific example of the impractical nature of the legal system for photographers comes from one of our members:

*"Three of my images were used without my permission in a full page printed advertisement in a local magazine with a readership of 25,000. I issued a licensing fee for their use of all three images as well as a copyright infringement notice ... When they laughed this off I sought legal advice, at an initial cost of \$1,600 to me. When they again laughed at the legal letter of demand my legal advice stated that in order to escalate this we would have to go to The Federal Court as this was a copyright matter and not handled in any lesser courts. Approximate costs were forecast to be in a range of \$40,000 - 60,000, with no guarantee of winning."*

### **Small Claims Process Proposal**

We asked our survey respondents whether they would support the Australian Government implementing a small claims process to reduce the barriers to copyright litigation. 100% of respondents answered that they would support such a process. Of those surveyed, 59% indicated support for a process that is similar to the United States Copyright Claims Board and Small Claims Process, 14% indicated support for a similar system to the United Kingdom Intellectual Property Enterprise Court, while the remaining 27% of respondents indicated that they were unsure of supporting either of these particular international precedents for a small claims process.

### **Suggested Improvements**

The problem of copyright infringement is not going away. The rapid proliferation and uptake of the internet and social media has been driving an increased and insatiable demand for photographic imagery. As a result, copyright infringement through theft of photographic intellectual property remains prevalent and widespread. In order to combat this ongoing and increasing problem, solutions and improvements could be placed into one of two categories: the first category would relate to punitive enforcement measures *after* infringements occur, and the second category would relate to minimising and mitigating copyright problems *before* infringements occur through communication and education.

#### **1. Enforcement Measures:**

The data from our survey of professional stills photographers indicates that in most instances the time and monetary costs that are required to pursue copyright infringements within the formal legal system are considered to be disproportionate to the commercial value of most individual claims. Given this reality, the legal system needs to be simplified and made more nimble and approachable for individual photographers and other creative professionals. A small claims process might be more helpful than the current court-based processes, provided the experience for those using such a system can be completed promptly, with minimal, affordable fees that are commensurate to the claim at hand and without any requirement for legal representation or advice.

#### **2. Communicative Measures:**

At present, education, communication and understanding of the broad principle of copyright throughout society is generally ineffective. While there are certainly people, businesses and organisations in Australian society that do understand copyright and do pay for and properly license photographic imagery, the number who either do not understand such principles or who choose to ignore them is growing. As a commercial photographic association, our collective experience demonstrates that copyright infringement remains rife.

In order to better combat this problem, the Australian Government and its agencies should consider an increased and improved communication and education strategy around copyright as a concept and commercial reality. For stills photographers the primary 'battleground' for copyright infringement takes place on social media and in the proliferation of digital blog and editorial publishing. Our collective experience is that many commercial businesses regularly steal our copyrighted material and subsequently use that material to promote their own commercial enterprises, either as editorial content, advertorial content or direct advertising. For us, this problem is therefore less about educating people for private use of copyrighted material and is more about educating the small and medium business sector and the people within that part of the economy.

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Given that a large proportion of our photographic work exists on social media, and that many of our copyright infringements also occur within social media, it would thus make sense for the Australian Government and its agencies to establish an educative voice within those platforms and services. This could take the form of an educational advertising campaign that is run through sites such as Instagram and Facebook, using paid advertisements as well as unpaid public ‘posts’ as the methods of communication. Such a campaign could use simple graphics and clear, apt phrasing to explain and promote copyright and image licensing principles in Australia. Social media platforms provide the benefit of being able to target such communication at specific people or industries. A series of well-targeted advertising campaigns could thus target particular sectors of the economy (such as the architecture & design community, or the food & lifestyle economy, or the fashion community, or the advertising community, etc). These same posts and advertisements could also be published in such a way that individual photographers and other copyright owners can then re-post and share those informative campaign elements with their respective communities, furthering the impact of this targeted communication. Such a campaign, once established, could be rolled out repeatedly on an ongoing basis at a relatively small cost to Government.

The ambition of such an information strategy would be to better educate and inform the broader community and to subsequently reduce the volume of copyright infringements from occurring in the first place. Such an approach would in turn reduce the burden and reliance upon an expensive and out-of-scale legal system, while also helping photographers spend more time honing their craft & making new work and less time worrying about and pursuing the theft of their intellectual property.

## **CONCLUSION & THANK YOU**

We would like to point out that the business of stills photography appears not to have been mentioned within the copyright enforcement review issues paper, though it broadly fits under the umbrella term of ‘images’. Regardless, copyright and its enforcement remain live issues for those working in the area and we would like to advocate for the unique impact on photographers being adequately considered through the process of this review with similar opportunities for their voices to be heard by government in future.

While there have not been specific questions about Artificial Intelligence posed by the Australian government’s issues paper, we would like to point it out as an emerging area of concern. Photographers are seeking protection of their original content, which has potential to be mined by AI without consent of the creators/copyright owners.

Thank you for providing our association with the opportunity to provide feedback to Government on these matters that are critical to the survival of our industry. Indeed, being adequately remunerated for the value of image licenses or usage are a critical component of any photographers’ business model and something we see as being put increasingly at risk in the current environment. This ultimately amounts to image theft by businesses who are themselves using our work for commercial gain. Issues around copyright and its enforcement are absolutely core business for Image Makers Association Australia and our key reason for existing. We are very concerned about the issues being faced by our members and would welcome the opportunity to discuss further any of the data or ideas that have been put forward in this response; we can be contacted on [info@imagemakersassociation.com.au](mailto:info@imagemakersassociation.com.au)

We look forward to seeing the education and administration of copyright law continue to evolve and better support the day-to-day realities of working professional photographers.



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