

Navigating copyright infringement risks: Considerations for local governments

By Roland Miller

A growing area of concern in the modern digital landscape is that of copyright infringement, and local governments are not exempt from this risk. Use of images on websites, marketing material or the like, without the adequate rights to do so, can result in costly legal headaches through demands for payment by the copyright owner.

Why is this risk growing?

Various firms now operate as specialised digital copyright enforcement agencies. Their primary function is to monitor the internet for unauthorised image usage and pursue compensation on behalf of the copyright holder. Copyright owners, including photographers or stock image libraries, can engage these specialised 'debt recovery' agencies to locate the unlicensed and infringing material, and issue letters of demand requesting financial compensation.

These agencies are not exactly new and often do serve a legitimate purpose in the protection of intellectual property. However, with the advent of AI, the automation of detection and the commercial incentives of recovery can produce overly aggressive or mistaken demands, and in some cases, opportunistic or fraudulent claims that resemble scams.

AI is used by these agencies to continuously scan the web by way of powerful image-matching or reverse-image searching tools, that locate any images considered to have been used without the required permissions. What was once a laborious task, constrained by significant time and cost, has become simple. Unsurprisingly, this has resulted in a significant increase in the number of letters of demand issued by such agencies.

Implications for Local Governments

Images posted on local government websites, promotional material, and social media, without the appropriate licences, attributions or permissions, can cause a local government to become the target of a letter of demand for monetary compensation. For example, an image posted on a local government's website innocuously, may be flagged, often years later, for its alleged copyright infringement. Beyond direct financial exposure, a local government may also be at risk of reputational and operational consequences – dealing with these claims can be time consuming, and consideration must be had to whether the claim itself is actually legitimate.

How does an image uploaded to a local government's website actually infringe copyright?

Copyright in Australia is governed by the *Copyright Act 1968 (Cth)* (**Copyright Act**). Section 31(1) of the Copyright Act

grants a copyright owner exclusive rights to reproduce, publish and communicate their works.

Section 36(1) of the Copyright Act states that copyright in artistic work is infringed where a person, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorises as doing in Australia, any act compromising the copyright. Relevantly, the definition of 'artistic work' at section 10(1) of the Copyright Act includes photographs, and 'communicate' includes to make available online.

For example, the use of a photograph on a local government's website or social media will amount to a communication of the work to the public, an exclusive right under section 31(1)(b)(iii) of the Copyright Act – satisfying the elements of section 36(1) and amounting to an infringement upon the owner's copyright in the works.

Importantly, liability is not avoided merely because a use was accidental, that the work was not used for commercial gain, or because the local government is a public body. There is no requirement that the use of a copyrighted work was for a commercial purpose for there to be an infringement of copyright. Further, defences under the Copyright Act, including fair dealing for the purpose of research or study, criticism or review, parody or satire, and reporting news, are limited, being narrowly defined and fact-specific. The combination of this strict legislative framework alongside these dedicated debt collection agencies means that accidental improper use could be a costly mistake.

Remedies for infringement of copyright

If the use of the copyright work has infringed on the owner's rights, the owner is entitled to bring an action for infringement of copyright under section 115 of the Copyright Act. A court may award an injunction (an order to stop the copyright infringement) and either damages or an account of profits under section 115(2).

These remedies under section 115(2) are compensatory and not punitive, meaning that any damages sought would generally be the amount that will restore the copyright owner to the position that it would have been in if the infringement had not occurred. In cases involving use of a photograph, this is often the licencing fee for that photograph. In *Briner v The Happy Herb Company & Ors* [2017] FCCA 1854, a photographer was awarded \$500 in compensatory damages constituting the licence fee, being in line with the licence fee on Getty Images for an image used on a 'commercial blog' rather than the fee for an image to be used on a 'corporate and promotional site'.

Further, a court may award additional damages under section 115(4) of the Copyright Act for more severe or 'flagrant' instances of copyright infringement. Section 115(4) provides a non-exclusive guide to the matters relevant in assessing additional damages, which includes the flagrancy of the infringement, the need to deter similar infringements, the conduct of the defendant after the infringement, whether the infringement involved converting a work into a digital or electronic form, and any benefit accrued to the defendant due to the infringement. For example:

- in *Facton Ltd v Rifai Fashions Pty Ltd* [2012] FCAFC 9 at [36], Lander and Gordon JJ held that '*additional damages will be awarded when the conduct of the defendant is such that an award of punitive damages should be made to mark the court's recognition of the opprobrium attached to the defendant's conduct*'; and
- in *Fortuity Pty Ltd v Barcza* (1995) 32 IPR 517 at 533, a '*moderate amount*' of additional damages were awarded under s 115(4) due to the 'surreptitious' nature of the infringement, where the defendant (while working for the

plaintiff) secretly established her own business, using the copyright material of the plaintiff, and failed to stop despite objections and legal proceedings commencing

Recommendations / Practical Steps for Risk Mitigation

In light of the risks outlined above, we recommend that local governments proactively take steps to mitigate the chance of receiving a letter of demand from a copyright owner. Practically, this involves ensuring that all images posted online have adequate permissions for use. A comprehensive audit of material posted is advised, to ensure that all images have sufficient permissions for use. Where possible, commissioning original work or obtaining written assignment of the copyright works is preferable.

If any images are identified that do not have clear permissions for their use, prompt removal of the image is recommended. The AI programs used by these agencies can locate images that may no longer be visible on the website but remain visible within the website's publicly accessible files. It is important to ensure that any infringing image is removed in its entirety - this may require a full sweep of the local government's website to ensure that any reference to an infringing image is removed.

If a letter of demand is received, we do not recommend that payment is made or any admission of liability is given without first obtaining legal advice. Document all the evidence relevant to the matter, including where the image was obtained from, whether the local government holds a licence or permission for use over the image, and if removed, when the image was removed.

From there, checking the veracity of a claim is paramount. Often these letters resemble phishing emails, and sometimes, that may be exactly what they are. Even if the letter is legitimate, the claimed amounts often exceed (sometimes significantly) those typically awarded by a court (and may resemble a punitive damages award, rather than a compensatory one).

Do not ignore a letter but do watch out for red flags that suggests a claim may be opportunistic or fraudulent. Things to look out for include:

- any letter that is aggressive or vague;
- requirements for urgent payment with an imminent threat of litigation;
- a lack of substantive evidence, including refusal to provide verifiable ownership evidence or original file meta data;
- vague invoices or invoices payable to private bank accounts or via cryptocurrency;
- lack of corporate details or an inability to identify the claimant's relationship to the purported copyright owner;
- letters of demand that forbid written correspondence (e.g., no-reply email addresses); and
- whether the allegedly infringing image actually matches that publicly shared on the local government's website.

By remaining vigilant to the risk of potential scams or letters issued in error, and identifying and resolving potential problems early, local governments can ensure that the risks associated with accidental or inadvertent use of a copyright work are mitigated.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the



circumstances of each case. For any comments or questions on this article please contact Roland Miller (rmiller@mcleods.com.au).

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