

## “COMMON USE” IS NO EXCUSE

By Leanne Montibeler, Solicitor

One of the most commonly held beliefs in the advertising and marketing space is that one can freely use any image sourced on the Internet on the basis that these images are “in the public domain” or “in common use”. So... are they? What are the actual rules? Are there exceptions for online materials or is that just wishful thinking?

It has always been the case in Australia that an image is protected under copyright laws from the moment it is created. There is no registration system for copyright protection in Australia like there is in the USA and it is not necessary to include a copyright notice or symbol (“©”) to stake a claim for copyright, however it is generally prudent to do so. Importantly, the fact that a work has been published online and is available in the “public domain” or is apparently “commonly used” does not mean that the owner has relinquished their copyright or their ability to dictate how their works are used commercially. In other words, just because an image is easy to find and locate on publicly available sources like online does not mean that the material is not owned and protected by copyright.

Owners of copyright in images have the exclusive right to reproduce, publish and communicate the image to the public, just like the owners of other copyrights. They may choose to licence the use of the image to others upon contractual conditions and in exchange for a fee, or even to provide their works online for free, but this remains at their discretion.

It is confusing for the best of us because modern technology allows for images to be easily copied and transferred which makes this type of copyright infringement increasingly prevalent in our online era, especially on social media. However, technology is also increasingly available for photographers and artists to search for and detect where copyright infringement of their works has occurred and demand removal or a licence fee for use.

In some cases, where those demands fail, a photographer may go further and take the issue to court, as one photographer did in a recent case before the Federal Circuit Court of Australia.

In *Taylor v Sevin* [2014] FCCA 445, the applicant, an American photographer living in Hawaii, ran a business of producing, selling and licensing stock photos. He discovered via searches of his images on the Internet that the respondent, an Australian travel agent, had published his work on her website without a licence and in breach of his copyright. Since the breach occurred in Australia, the applicant was able to instigate proceedings in the Australian court.

The Court was satisfied that the travel agent had infringed the photographer's copyright by using the work without making any inquiry as to the ownership or authorship of the copyright or being “*in all probability, in reckless disregard of it*”.

The Court acknowledged that a breach of this nature was “*at the lowest end of the scale*” because of how simple it is to copy and publish images online and because Internet users may operate under the “common use” misconception and may not be aware of the need to obtain a licence. In saying this however, the Court stressed the need to make it clear that conduct of this kind will not be tolerated. The Court stated: “*This case will be important because, through it, it will be made clear that this conduct cannot continue*”.

In assessing the damages to be awarded to the photographer, the Court took notice of the travel agent's uncooperative behaviour in the proceedings and emphasised the need to deter similar copyright infringements of this nature by stating: “*The court does believe that there is a need to deter a similar infringement of copyright, either by the respondent, or by any other potential respondents. Breaches of copyright in this manner are common...and the courts must do what they can to assist copyright owners to maintain their property, and prevent the unlawful use of it*”.

The travel agent was liable to pay damages under the *Copyright Act* 1968 (Cth), which the Court determined to be \$12,500 (plus interest), as well as payment to the photographer of the usual licence fee for use of the photo in the sum of \$1,850 (plus interest) and legal costs. The Court also awarded an injunction to prevent the travel agent from continuing to publish the work. The damages may have been lower if the travel agent had made some reasonable effort to track down the copyright owner. Their disregard of the copyright owner's rights was clearly taken into account by the Court.

This case is important as although this kind of copyright infringement is a common problem for photographers, it is the first instance in Australia where this conduct has been brought before a court. It serves as an important reminder to ensure you have an appropriate licence or consent when you use images that you source online, and just because something is publicly available does not mean it is "in the public domain" in a copyright sense.

### Contact us

If you would like further information on copyright or licensing of images, please contact one of our experts below. We can provide tailored legal and practical advice to assist you with reviewing or clearing advertising material.

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