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Attorney-General's Department
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BARTON ACT 2600

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Arts Law Centre of Australia Submission

Re: Copyright Enforcement Review, Issues Paper, December 2022

The Arts Law Centre of Australia (**Arts Law**) is a national community legal centre providing free or low-cost legal advice to creators residing in all Australian states and territories. Arts Law makes this submission on behalf of our broad client base and, in particular, creators and the peak or professional organisations which represent their interests. Arts Law assists thousands of Australian artists and organisations annually. Artists in the Black is a specialist program at Arts Law that provides advice and information on legal issues for Aboriginal and Torres Strait Islander artists and communities.

Arts Law would like to acknowledge the Traditional Owners of the various lands on which Arts Law works and pay our respects to Elders past and present. Please note that for the purposes of this submission, we respectfully use the term 'First Nations' to reference the Aboriginal and Torres Strait Islander people belonging to this country.

Arts Law will address below the questions raised in the 'Copyright Enforcement Review, Issues Paper, December 2022'. This submission will broadly follow the structure of that paper, and the questions addressed by each section are noted in the headings. This submission is supported in full by the National Association for the Visual Arts (NAVA).

1. Executive Summary

Copyright infringement robs creators of income. It also forces them to spend precious time and money on enforcement—resources better spent creating art, poetry, music and other works that enrich Australia's cultural landscape.

Arts Law regularly advises its clients about what they can do when their copyright is infringed. For the purpose of this submission, we also surveyed our clients about their experiences when attempting to enforce their copyright (**Arts Law Survey**).¹ The questions we used in this survey are included as an Annexure to this submission. In addition to this quantitative data, we interviewed a selection of our clients who have faced repeated

¹ Arts Law received 107 responses to its survey.

copyright infringements to better understand the drivers of that infringement and the efficacy of the enforcement options currently available. These submissions include quotes from those clients, as well as two detailed case studies documenting our clients' experiences with enforcement.

In these submissions, Arts Law wishes to bring the following points to the Government's attention:

- (1) **Rising infringement is driven by online platforms:** evidence suggests that rising copyright infringement is being driven by the way that online platforms structure their services (i.e., taking no responsibility for content). Users can reach massive audiences with little effort but are provided with almost no assistance clearing copyright. The widespread (mis)use and sharing of content online also drives increased 'offline' infringement—because of how easy it is to download, modify and re-share that content with impunity.
- (2) **Current enforcement options place an unreasonable burden on creators:** copyright infringements replicate themselves infinitely online, and the burden of monitoring these infringements is placed solely on creators, who have neither the time nor the resources to effectively do so. Industry-led takedown mechanisms vary in efficacy from platform to platform, but creators have no alternatives—the other options for escalation are largely inaccessible due to cost and complexity.
- (3) **Minimum standards are required for online platforms:** platforms profit handsomely from the user attention generated by creators, and have the resources and technological sophistication necessary to radically improve enforcement options. Arts Law supports minimum standards being imposed on online platforms (through an industry code or guiding principles) requiring proactive steps to be taken to, for example, educate users about copyright, monitor for infringements, provide simple takedown forms, impose harsher penalties for infringement, and give rights holders channels to communicate directly with infringers.
- (4) **A small claims forum for copyright infringement (and related legal areas) is needed:** the current legal system is failing creators, who are totally unable to access the courts. Even if they had the financial resources to commence proceedings (which they often don't), the cost of doing so usually dwarfs the value of the claims they are concerned about. Arts Law supports the government establishing a small claims forum for copyright infringement (and related areas), similar to the Intellectual Property Enterprise Court in the United Kingdom and the Copyright Claims Board in the United States of America. It should be designed for small claims and self-represented litigants—with low fees; flexible, informal procedures; caps on costs awards; and active case management by judges. There should be no option for infringers to opt-out of the process.

2. Nature and scale of recent copyright infringement (Q1-Q3)

Key feedback: infringement is increasing, driven by online platforms

Rising copyright infringement and its economic impact

Arts Law has observed a concerning rise in copyright infringement in recent years, primarily driven by the widespread use of social media, online marketplaces and other platforms that host user-generated content and products (together, **online platforms**). This observation is derived both from our extensive engagement with creators, arts organisations and peak bodies, as well as the raw data of legal advice queries we receive every day.

The table below illustrates the increase in our legal advice files (**Advice Files**) relating to copyright infringement between 2017 and 2020.² Given Arts Law's broad base of clients, this data is a useful microcosm for what is happening in the creative economy.

Year	How many of our Advice Files related to copyright infringement?	What percentage of our Advice Files related to copyright infringement?	What percentage of our copyright infringement Advice Files related to online infringement?
2017	123	4.9%	35%
2018	187	6.6%	43%
2019	393	9.5%	42%
2020	518	11.4%	47%

Table 1. Arts Law's legal advice files relating to copyright infringement.

We have more and more clients facing copyright infringement (518 in 2020). An increasing proportion of these infringements are happening online (47% in 2020). Where we could be getting 'front-end' legal advice queries about exciting new projects or business structures, an increasing proportion of our overall queries are about infringement (11.4% in 2020). These trends suggest that creators are being forced to spend a greater proportion of their time monitoring and managing online infringements.

These infringements have a serious economic impact on creators, who are already a financially vulnerable community. In 2021, the average Australian earned a salary of \$90,329,³ while, as at 2017, the average gross annual income of an Australian artist was only \$48,400 (of which, around 33% came from non-arts related sources).⁴ In that context, 10% of respondents to the Arts Law Survey estimated their losses from copyright infringement in an average month to be \$0-\$100, 15% estimated their losses as \$101-\$1,000, and 5% estimated their losses to be \$1,000-\$5,000. These are significant numbers

² We note that there was a dip in copyright infringement queries in 2021 and 2022, which we have not included in this table. These were anomalous years across all of our statistics due to the effect of the COVID-19 pandemic on creators and on cultural and commercial activity more generally.

³ Australian Bureau of Statistics, 'Average Weekly Earnings, Australia, May 2021' (Web Page, 19 August 2021) <<https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/average-weekly-earnings-australia/latest-release>>.

⁴ David Throsby and Katya Petetskaya, *Making Art Work: A Summary and Response by the Australia Council for the Arts* (Australia Council for the Arts, 2017) 9 <<https://australiacouncil.gov.au/advocacy-and-research/making-art-work/#Sources-of-income>> ('*Making Art Work*').

for a population whose average gross monthly income is approximately \$4,000.⁵ It can mean the difference between continuing a creative practice and folding away your easel.

Infringement driven by online platforms

The rise of copyright infringement on online platforms is unsurprising given the proliferation of mobile devices and digital technology. As noted above, by 2020 nearly half of Arts Law’s Advice Files relating to copyright infringement were about infringement that occurred online (see Table 1). In the Arts Law Survey, we asked respondents to select all of the places their copyright had been infringed from an extensive list of options,⁶ and the biggest culprits were Facebook (48%), Instagram (50%), and other ‘private websites’ (55%). Compare that with the 36% of respondents who experienced infringement ‘offline’. The experiences of individual artists we have spoken to mirror this trend. For example, Arts Law client Stephen Hogarth told us that:

“When it comes to my work, there has been a definite increase in copyright infringements in the last 3-4 years. Those infringements have been largely internet based.” (See Case Study #1 below).

Whether intentionally or unintentionally, online platforms have structured their services in a way that facilitates infringement. They place legal responsibility for copyright clearance on users (and limit their own liability).⁷ Their peer-to-peer, town-square model makes every user a potential ‘creator’ (and distributor).⁸ But unlike traditional creators who are often embedded in institutional structures (e.g., authors with a publisher, musicians with a label, artists with a commercial gallery), users are often untethered from the ways that copyright has been respected and cleared in the past.⁹

While this has been a blessing for independent creators wanting to reach their audience, those creators often lack the expertise and resources to enforce copyright in the same way as larger commercial entities like publishers and record labels.¹⁰ Arts Law Survey respondents were asked to select the factors that influence what they decide to do about copyright infringement, and the two leading factors were financial cost (86%) and the complexity of the process (78%). We advise creators every day who are struggling to understand what they can do when their copyright is infringed. They feel intimidated by the processes available and lack the resources to engage lawyers.

⁵ Based on a gross annual income of \$48,000: *Making Art Work* (n 4) 9.

⁶ Including Facebook, YouTube, WhatsApp, Instagram, LinkedIn, TikTok, Snapchat, Twitter, Amazon, eBay, Redbubble, Etsy, Spotify, Private website, Piracy websites or third party file sharing programs or services, Offline, or Other.

⁷ See Instagram, ‘Terms of Use’ (Web Page, 4 January 2022) <<https://help.instagram.com/581066165581870>>; Facebook, ‘Terms of Service’ (Web Page, 26 July 2022) <https://www.facebook.com/legal/terms?paipv=0&eav=AfbEenkaxs_OG0MShW7JFu0RQU60ALzXyn_Vbh-PKOQCEDO7Oa3WTb_DGe1Qkynm2U&_rdr>.

⁸ Australia Council for the Arts, *In Real Life: Mapping digital cultural engagement in the first decades of the 21st century* (Report, 17 July 2021) 4 <<https://australiacouncil.gov.au/advocacy-and-research/in-real-life/>> (‘*In Real Life*’).

⁹ *In Real Life* (n 8) 4.

¹⁰ The enforcement challenges facing individual creators are addressed in sections 3 – 6 below.

A side effect of this ‘digital revolution’ is that users have come to expect access to arts and culture at little or no cost.¹¹ Users are either ignorant or cavalier about the existence of copyright and the steps required to clear it. This lack of education was a problem identified again and again by respondents to the Arts Law Survey. For example, one respondent said:

“I believe all copyright infringement around use of imagery on social platforms is particularly grey. The platform should encourage users (especially pro ones which have a shop) to understand that they need to hold a licence to the photographs they wish to use.”

Commenting on the use of music, another respondent said:

“Such platforms allow music to be easily added, and there is limited education with brands/digital marketing people (who are often quite young and in their first jobs); because the platform functionality allows it, they assume they are allowed to use the music and it's not clear that it's a sync use.”

Similarly, Arts Law client Morgana Creely told us:

“There needs to be a broader education campaign. People don't understand that they might be ripping off a small independent artist working in their living room (they only think of big labels).”

Arts Law has advised hundreds of artists in the past year alone who have had work misappropriated and/or commercialised on online platforms without their permission. We have consistently raised concerns about these trends with the government (for more detail, see, for example, [Arts Law's 19 August 2021 submission to the ACCC on its Digital Platform Services Inquiry](#)). Many of these copyright infringements also include potential infringements of our clients' moral rights—where, for example, their work has been altered before it is posted, or warped while being printed on merchandise.

None of this analysis is to say that offline infringement is not a problem for creators. In 2020, over half of Arts Law's Advice Files about copyright infringement still related to offline infringement (see Table 1 above). As noted by the Australia Council for the Arts, the way people consume culture is a hybrid of digital and analog.¹² Most infringements involve *both* online and offline elements. For example, infringers often source images online (from an artist's website or social media account) and then reproduce those images on other websites as well as on printed materials and merchandise (which, in turn, may get re-listed or re-posted on online platforms for sale or display). In this way, online platforms make both forms of infringement more prevalent.

¹¹ *In Real Life* (n 8) 4.

¹² *In Real Life* (n 8) 4.

Case Study #1 – Stephen Hogarth faces repeated copyright infringements online and offline

Stephen Hogarth is an Indigenous visual artist in Queensland who has experienced ongoing copyright violations. His artwork has been used by others without permission on online selling sites such as Amazon, Etsy, Canva, AliExpress, Wish, Facebook and eBay and directly through the other party's own website.

Arts Law has advised Stephen on several occasions about submitting takedown notices to social media and other platforms, sending letters of demand, and using statutory notice and takedown procedures.

For example, in 2021 alone Stephen faced the following infringement situations:

- His artistic work had been used on a flyer to promote an event on social media without his permission. He contacted the event promotor to remove the image and they did not reply. Arts Law advised him to send a further letter based on Art Laws' template letters of demand for copyright infringement and breach of moral rights which are available on our website.
- His artwork was being reproduced as a tattoo and on craft ribbons sold on an online trading site. He sent cease and desist letters to both parties, again using Art Laws' template letters. Arts Law reviewed and settled the letters before they were sent and assisted in further letters between Stephen and the other person.

We were pleased to hear that some online trading sites agreed to remove the infringing merchandise from sale and from social media. But Stephen has had difficulties with larger platforms like Amazon and Facebook because of the time-consuming follow-up steps required by them and their ability to hide behind the safe-harbour scheme. Stephen said, "*some platforms like Etsy have good complaints procedures, but other platforms like Amazon make you jump through hoop-after-hoop to get obviously infringing content removed.*"

Stephen has also had difficulties with manufacturers based overseas. One manufacturer based in China did not respond to his letter and he had limited options to do anything further about them.

Arts Law strives to achieve positive outcomes for clients like Stephen by providing legal support when they are faced with infringements.

3. Effectiveness of industry led mechanisms (Q4-Q7)

Key feedback: a promising but inconsistent tool that places too much burden on creators

The first step: direct engagement

Direct engagement is a common tool used by creators to enforce their copyright. As a first step, our clients usually reach out informally to infringers to seek removal of the infringing content or to negotiate a licence. 83% of Arts Law Survey respondents took this step when faced with infringement of their copyright. It is a simple and low-cost option that can be very effective, especially when the infringer did not understand that they were infringing. It addresses the specific instance of infringement, but also educates the infringer about respecting copyright in the future.

A smaller subset of our clients opt to send a more formal letter of demand / cease and desist letter to the infringer (33% of Arts Law Survey respondents). Taking this step usually requires some advice or assistance from a lawyer, especially given the risk of groundless threats liability.¹³ In Arts Law's experience, creators are cautious about taking this step and tend not to abuse it. There can be significant reputational risks in doing so, especially when the infringing party is a larger corporate entity with some kind of standing in the industry.¹⁴

A common barrier to direct engagement is the anonymity of infringers on online platforms. In many cases, it is almost impossible for our clients to identify who has posted infringing content. This is because online platforms do not always have systematic identity verification procedures. If our clients cannot identify the infringer, they cannot informally engage that infringer, send a letter of demand or easily commence legal proceedings. This severely curtails their options, forcing them to use statutory notice and takedown procedures, or seek website blocking orders (addressed in more detail in sections 3 and 4 below).

If a creator can get through to the infringer, the risk with all forms of direct engagement is that the creator's requests will just be ignored or rejected out of hand. Direct engagement is often only effective if there is a threat of escalation. For small scale infringements, infringers know that creators cannot afford to commence legal proceedings—so they can be safely ignored. If the courts are made more accessible for small claims (see section 6 below), the threat of escalation will become more tangible for infringers, and there may be an improvement in the effectiveness of direct engagement.

Platform takedown procedures are variable

When direct engagement fails, Arts Law's clients rely heavily on the takedown procedures provided by online platforms and other service providers. They are generally free to use, available on the platform itself, and easy to initiate using an online form. Unfortunately, the availability and efficacy of these mechanisms varies greatly from platform to platform. For example, consider the following feedback we have received about different platforms:

- One Arts Law survey respondent noted that, "*When dealing with Facebook and Instagram there seems to be no way to talk to a person about my work being infringed.*"
- Arts Law client Stephen Hogarth noted that some platforms like Etsy had accessible procedures, while others like Amazon made it very difficult for rights holders to get to an outcome (see Case Study #1 above).
- Arts Law client Morgana Creely said, "*My biggest issue is with the Wayback Machine. They want you to jump through multiple hoops to have things taken down. It's designed to make people give up and go away. I have had to ask them to remove web pages multiple times, and send many DMCA [Digital Millennium Copyright Act 1998 (USA)] notices.*"

¹³ 26% of Arts Law Survey respondents selected 'a legal risk to me' as a factor that influenced what they decided to do about infringement. See *Copyright Act 1968* (Cth) s 202.

¹⁴ 61% of Arts Law Survey respondents factored in 'how much money and power the other party has' when deciding what to do about infringement.

While they are an invaluable tool for creators, the main shortcoming of takedown procedures is that they are ad hoc and reactive. The workload this imposes on creators is substantial as infringements tend to replicate themselves online. As soon as a creator gets one infringing post removed, an identical post often pops up at a new location. This new location could be on another online platform with completely different takedown procedures that the creator has to learn how to use. It could also be in search engine results (e.g., on Google) or web archives (e.g., on the Wayback Machine) that persist even after the original post has been removed.¹⁵ Chasing these indexed results down requires using yet another service provider's takedown procedures. There is also no guarantee that every platform will have a takedown procedure available. Our clients do not have the money to employ sophisticated monitoring mechanisms (e.g., paying a team of lawyers or subscribing to third-party automatic monitoring software). This creates a fundamental access to justice problem and promotes the permissive free-for-all environment cultivated by online platforms.

The perpetual game of whack-a-mole demanded of creators is unreasonable. Even if creators have been relatively careful about how and where they post (or licence) their content, it is very easy for them to lose control of their work on the internet (it can easily be right-clicked, downloaded, reproduced and re-uploaded: see Case Studies #1 and #2). This is especially challenging for First Nations creators because of the lack of formal protection for Indigenous Cultural and Intellectual Property (ICIP).¹⁶ They might have set up protections for ICIP such as a traditional story in their contract with a licensee, but if a third party downloads or copies work from where the licensee has used it, that First Nations artist has no legal recourse against the third party. The harm caused by this type of infringement is multiplied when the work is altered by an infringer (potentially presenting the ICIP in offensive or inappropriate ways).¹⁷

Arts Law supports the steps taken by some online platforms to use content recognition software to assist creators with monitoring infringements (but even these could be made more widely accessible).¹⁸ Platforms are better placed to bear this burden as they have the scale and technical sophistication that individual creators do not. For example, YouTube has launched (i) its 'Content ID' service that screens uploaded videos against a database of

¹⁵ This occurs when web crawlers index material found on the internet, taking a snapshot of it for the purpose of the search engine or the archive. Arts Law client Morgana Creely told us about her experience of this with Google: *"Even when I have had content taken down from a website for infringement, if it has been 'spidered' by Google, it will continue to turn up in image search results. When this happens I have had to contact Google directly to remove the search result and carefully explain that the original image on the website had been taken down for infringement."*

¹⁶ Arts Law supports the commitment in the government's National Cultural Policy to introduce stand-alone legislation to protect First Nations knowledge and cultural expressions, and suggests exploring whether it would be appropriate for the small claims forum discussed in section 6 of these submissions to deal with claims under that legislation: Commonwealth, *Revive: a place for every story, a story for every place – Australia's cultural policy for the next five years* (Policy, 9 February 2023) 32 <<https://www.arts.gov.au/sites/default/files/documents/national-culturalpolicy-8february2023.pdf>>.

¹⁷ See generally Arts Law Centre of Australia, Copyright Agency and The Indigenous Art Code, 'Responding to the Productivity Commission, Issues Paper – Aboriginal and Torres Strait Islander Visual Arts and Crafts' (Submission, 9 February 2022) <<https://www.artslaw.com.au/wp-content/uploads/2022/02/Submission-Arts-Law-Copyright-Agency-IartC-Aboriginal-and-Torres-Strait-Islander-Visual-Arts-and-Crafts.pdf>>.

¹⁸ At this stage, only 5% of Arts Law Survey respondents had used automated content recognition tools like those provided by YouTube.

audio and visual content from eligible copyright owners,¹⁹ and (ii) its 'Copyright Match Tool' that automatically scans for duplicates of a video that a creator has successfully had removed for infringement.²⁰ We note that only 19% of Arts Law Survey respondents reported experiencing copyright infringement on YouTube. While this is not an insignificant figure, it is substantially lower than the 48% on Facebook and the 50% on Instagram, neither of which provide content recognition tools to copyright owners in this way (acknowledging that there may be other factors, like medium, that play into this disparity).

Case Study #2 – Dale Oliver ('Malla') loses control of works online

Dale Oliver ('Malla') is a descendant of the Kuku Yalanji clan from Far North Queensland. A skilled contemporary visual artist for over 30 years, Dale's work has been sold and celebrated in Australia and abroad.

In 2000, the New South Wales Supreme Court found that Bulurru Australia Pty Limited (Bulurru) had infringed Dale's copyright in three designs on souvenirs. This was a tremendous success for Dale, but two decades on he is still seeing copies of the same designs available for sale on products. Recently he discovered products with his artwork on seven different internet sites.

Because of the financial and emotional cost and the time involved Dale decided not to bring further court claims. Instead, he wrote to the businesses which were selling the products with his artwork on them. With Arts Law's and his daughter's assistance, he communicated with at least seven manufacturers or websites who have used his images without permission on commercial arts and crafts objects across Australia. A process such as this is very time consuming. While some sites have links to their take down procedures, others are difficult to track down.

Take down notices were issued to those who had this process in place. Letters of demand had to be sent to the majority of the organisations. None of the organisations replied to the letters of demand. One organisation closed down its website and associated sites and companies after receiving the letter which was a good outcome. However, the risk is that they'll pop up somewhere else. Two of the organisations were auction sites, so letters were sent asking them to remove the products and to advise who the suppliers were. The response to this correspondence was poor.

The decision not to litigate was further complicated because the infringing party in most instances was based overseas and is a corporate entity with little information available about them.

There was no suggestion that Bulurru was continuing to copy his work, it was simply that the designs and souvenirs had been released into the marketplace and were still available for sale despite the court's ruling. As digital sales of artworks have become increasingly common, the ability of an artist to ensure the infringing works are withdrawn and destroyed has become more and more difficult, even impossible.

¹⁹ See YouTube Help, 'How Content ID Works' (Web Page)
<<https://support.google.com/youtube/answer/2797370?hl=en>>.

²⁰ See YouTube Help, 'Use the Copyright Match Tool' (Web Page)
<<https://support.google.com/youtube/answer/7648743?hl=en>>.

Minimum standards required

Copyright enforcement could be improved if there was more consistency across online platforms regarding copyright enforcement options and procedures. Arts Law supports:

- More prominent and upfront communication from platforms to their users about the importance of clearing copyright. This could be coupled with education campaigns undertaken by the platforms and other parties.
- Use of content recognition software to monitor for infringements, especially if this monitoring could be done across different platforms. Some flexibility would have to be built into these systems to allow for errors (e.g., a copyright owner's content being flagged as infringing because it is uploaded after an infringer's).
- Takedown forms that are simple and intuitive to use, with clear information about what evidence complainants will need to gather to complete the process.
- Harsher penalties for infringers and repeat infringers (such as account suspension or limiting access to features). Such penalties should be coupled with tighter identity verification to ensure users don't work around them (e.g., by creating new accounts using new email addresses).
- Giving copyright owners channels to contact infringers directly. In other words, not allowing users to remain anonymous and uncontactable.

Many of these recommendations could be achieved through an industry code,²¹ or a set of guiding principles like the Australian Privacy Principles.²² In 2019, the Productivity Commission recommended a 'mandatory ACMA digital platforms take down code to assist copyright enforcement' as part of its 'Digital Platforms Inquiry'.²³ This step is not without precedent overseas. In Europe, Article 17 of the *Directive on Copyright in the Digital Single Market* sets out a scheme requiring online platforms over a certain size to make 'best efforts' to (i) seek licences from copyright owners, (ii) ensure the unavailability of specific works identified by copyright owners, (iii) act expeditiously to remove infringing material when notified, and make best efforts to prevent future uploads of that material.²⁴

Arts Law supports mandatory minimum standards being enacted in some form, with appropriate exceptions for small platforms. These standards would help address the 'value gap'—between the value that online platforms extract from copyright content and the value that is actually returned to copyright owners.²⁵

²¹ An industry code would become relevant to an assessment of authorisation liability under s 101(1A) of the *Copyright Act 1968* (Cth).

²² See *Privacy Act 1988* (Cth).

²³ Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, 26 July 2019) 274 <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>>.

²⁴ *Directive on copyright and related rights in the Digital Single Market* [2019] OJ L 130/92, art 17.

²⁵ See Kathy Bowrey et al, *Australian Intellectual Property* (Oxford University Press, 3rd ed, 2021) 244.

4. Effectiveness of website blocking scheme (Q8-Q9)

Key feedback: inaccessible to ordinary creators

Arts Law’s clients rarely use the website blocking scheme. 0% of Arts Law Survey respondents selected it as a step they had taken. To obtain website blocking orders under s 115A of the *Copyright Act 1968* (Cth), creators must apply to the Federal Court of Australia for an injunction.²⁶ For an individual, the filing fee for such an application is \$1,390, which is the tip of the iceberg.²⁷ Most creators would have no capacity to draft an originating application, statement of claim, concise statement or supporting affidavit – and would need to pay a lawyer to do so unless they could secure pro bono assistance.²⁸ These are just the costs required to commence proceedings, not to mention the significant costs (financial, emotional and otherwise) of seeing a proceeding through to its conclusion.

Where industry-led mechanisms have failed or are unavailable, the website blocking scheme provides one of the few ways for copyright owners to combat infringement that is committed by overseas entities. To make it more accessible to ordinary creators, Arts Law recommends making it possible to seek website blocking orders at a small claims tribunal for copyright infringement (addressed further in section 6 below).

5. Authorisation liability and safe harbour scheme (Q10-Q11)

Key feedback: statutory notice and takedown scheme useful, but practical limitations

The scope of authorisation liability

The scope of authorisation liability has a direct effect on the copyright enforcement procedures that online platforms set up.²⁹ While Arts Law’s clients are generally unable to bring legal proceedings against large online platforms, the benefit of larger rights holders doing so is the subsequent improvement to those platform’s copyright enforcement procedures.

Arts Law supports expanded authorisation liability for online platforms. In *Pokémon Co International v Redbubble Ltd*, the online platform Redbubble was found liable for authorisation of copyright infringement in part because of its close involvement and control of the process by which a user created bespoke merchandise and had that order made by third party fulfillers.³⁰ However, the court only ordered nominal damages of \$1 and refused to grant an injunction.³¹ This level of exposure to liability is insufficient to motivate online platforms to drastically improve their procedures (and address the problems identified in

²⁶ The Federal Circuit and Family Court of Australia, which has lower fees and is designed to be more accessible for lay claimants, does not hear applications under s 115A.

²⁷ As at the date of this submission: see *Federal Court and Federal Circuit and Family Court Regulations 2012*, Sch 1, Item 101.

²⁸ See *Federal Court Rules 2011*, r 8.05; *Central Practice Note: National Court Framework and Case Management* (CPN-1) [6].

²⁹ In *Pokémon Co International v Redbubble Ltd* (2017) 351 ALR 676, at [63], Pagone J commented on the importance of Redbubble having an IP Policy as a ‘reasonable step’ taken to prevent infringement.

³⁰ *Pokémon Co International v Redbubble Ltd* (n 26) [58].

³¹ At [71]-[72], [76]-[77].

section 3 above). It is unclear if such liability would even extend to online platforms that were not as closely involved as Redbubble with the fulfillment of orders.

Authorisation liability is influenced by the existence of an industry code (see section 3 above). If an industry code were introduced, that code would form part of the analysis of whether an online platform took 'reasonable steps' to prevent infringement under s 101(1A) of the *Copyright Act 1968* (Cth). Arts Law's view is that minimum standards need to be backed by a real threat of authorisation liability and/or penalties for non-compliance.

Safe harbour scheme and associated notice and takedown scheme

The statutory notice and takedown scheme provided for in exchange for safe harbour protections is, in theory, a useful tool for copyright owners. It is low cost, and the standard form provided by Schedule 2 of the *Copyright Regulations 2017* (Cth) gives creators a clear way to initiate the takedown process with an internet service provider. However, only 9% of Arts Law Survey respondents used this scheme. In our experience, some clients find it difficult to identify the internet service provider hosting a website using WHOIS searches, even after legal advice.

Additionally, many infringements occur on websites that are hosted overseas, or websites that use pass-through security services like Cloudflare (which turn up in WHOIS searches even though Cloudflare is not the internet service provider hosting the website).³² This can lead to a dead end for creators trying to enforce their copyright (because, as discussed above in section 4, applying to the Federal Court for website blocking orders is not accessible for them). Arts Law Client Stephen Hogarth commented that:

"I have had no success using the statutory notice and takedown procedure. The platforms are often hosted by Cloudflare, who sends a standard reply email and doesn't take any action."

Overall, the statutory notice and takedown scheme is currently slower and less effective than some of the takedown procedures created by online platforms. However, it could be improved if it were made more accessible and user-friendly. For example, websites could be required to display and link to the internet service provider hosting their website (or at least to an online form through which creators could submit a takedown notice to the internet service provider). There may, of course, be cybersecurity concerns for websites that need to be considered and balanced. Arts Law is not well placed to comment on the nature of those concerns.

³² For example, Cloudflare's standard response to takedown notices under the *Digital Millennium Copyright Act 1998* (USA) says: "Cloudflare offers network service solutions including pass-through security services, a content distribution network (CDN) and registrar services. Due to the pass-through nature of our services, our IP addresses appear in WHOIS and DNS records for websites using Cloudflare. Cloudflare is not a website hosting provider, and we cannot remove material from the Internet that is hosted by others."

6. Use of legal system and law enforcement (Q12-Q14)

Key feedback: simple, low-cost alternative to current court process is required

Legal system is inaccessible to most creators

Copyright enforcement works through a system of threatened escalation (direct engagement, then letters of demand, and then court proceedings). It is only when the final step in that ladder (commencing court proceedings) is accessible to creators that the earlier steps are truly effective. As noted above, the main factors that influence our clients when deciding what to do about infringement are financial cost and the complexity of the process.

The current options for enforcement provided by the legal system are totally inaccessible to most creators due to both cost and complexity. Filing proceedings in the Federal Court of Australia is almost impossible for our clients without retaining lawyers.³³ It involves substantial fees, drafting complex legal documents, and advocating in court (see above in section 4). According to a 2016 Productivity Commission report, few intellectual property cases were brought in the Federal Circuit and Family Court due to a lack of judges with relevant expertise and similar formality and expense compared to the Federal Court.³⁴ While that court now has a National Intellectual Property List which can hear and determine less complex copyright matters, its formal litigation processes and fees mean that it remains inaccessible to most of our clients. The Copyright Tribunal in Australia does not hear copyright infringement matters.

Only a very small proportion of our clients can secure pro bono assistance, which is at the discretion of legal practitioners and firms. In our experience, legal practitioners and firms are reluctant to take on pro bono matters that require initiating court proceedings because of the significant and uncertain financial costs, and the length of the process. Without this assistance, our clients are unable to access justice in many cases. 61% of Arts Law Survey respondents thought that the current legal system could be improved (38% were unsure and only 1% said it could not be improved).

The need for a small claims procedure for copyright infringement

Arts Law supports creating a forum to hear small intellectual property claims—similar to the Intellectual Property Enterprise Court (IPEC) established in 2013 in the United Kingdom and the Copyright Claims Board (CCB) established in 2022 in the United States of America. Those forums have shown some success in assisting creators to enforce their rights.

IPEC has a ‘small claims’ track to provide access to justice for copyright owners that would otherwise find the court system overwhelming.³⁵ It hears the most straightforward intellectual property cases, where less than £10,000 is claimed. Its focus is mainly on claims relating to copyright, designs, passing off and trademarks. The hearings in the small claims track are

³³ 0% of Arts Law Survey respondents selected ‘gone to court to sue for copyright infringement’ as a step they had taken.

³⁴ Productivity Commission, *Intellectual Property Arrangements* (Productivity Commission Inquiry Report, No. 78, 23 September 2016) 573 <<https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>>.

³⁵ See generally HM Courts & Tribunals Service, *Guide to the Intellectual Property Enterprise Court small claims track* (Guide, 10 July 2014) <<https://www.gov.uk/government/publications/intellectual-property-enterprise-court-a-guide-to-small-claims>>.

short and informal, expert evidence is not permitted without permission from the court, the parties are frequently unrepresented and the loser seldom has to pay the winner's costs.

The small claims track is often used by professionals such as photographers seeking to enforce their copyright.³⁶ In 2015, an independent academic review was conducted which evaluated the success of the IPEC between 2010-2013. The report generally considered IPEC successful and stated:³⁷

the cumulative effect of the IPEC reforms 2010-2013 has been highly significant – in addition to an increase in the numbers of filed cases at the IPEC, the creation of the streamlined IPEC MT [multi-track] and SCT [small claims track] for litigating disputes has led to an overall increase in the amount of IP disputes that occur more generally... In other words, now that IP holders have the ability to utilize the IPEC – a litigation forum that caps costs and damages and makes use of active case management – IP holders are more confident about entering into disputes with potential infringers, where previously they would have not felt confident enough to do so.

The CCB is comparatively much newer, so there is less data available on its efficacy. However, its structure is instructive. It limits statutory rewards to \$15,000 per work and damages to \$30,000 per proceeding, streamlines resolution, allows virtual appearance, facilitates determination by impartial and expert members called Copyright Claims Officers, promotes self-representation, and does not allow depositions, expert witnesses or forcing third parties to provide testimony or evidence.³⁸ These limit the cost and complexity of proceedings, making them more accessible to creators. The main flaw of the CCB is that parties can opt-out of its processes (forcing creators to use ordinary court procedures if an infringer opts out).

Drawing from the IPEC and CCB, Arts Law supports investigating whether a bespoke forum could be created in Australia. Such a forum should have at least the following features to address some of the problems discussed in this submission:

- Low fees – to encourage applicants to bring claims even when they are of low value.
- Encourage self-representation – through simple court forms and instructional materials, active case management by judges, no expert evidence, no requirement for extensive pre-hearing preparation, limited costs orders, and determinations on the papers (where possible) or after short hearings.

³⁶ Sir Colin Birrs (judge appointed to IPEC in 2010) delivered a lecture on the establishment of IPEC and its feasibility in Australia on 24 September 2015 at University of Melbourne. Sir Birrs discussed that photographers were often seen in the small claims track in IPEC: see The University of Melbourne, 'To boldly reform IP dispute resolution: Experience in the Intellectual Property Enterprise Court' (YouTube Video, 24 September 2015) <<https://www.youtube.com/watch?v=kpC5XyWkNrM>>.

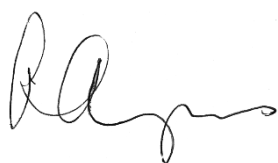
³⁷ Christian Helmers, Yassine Lefouili and Luke McDonagh, *Evaluation of the Reforms of the Intellectual Property Enterprise Court 2010-2013* (Report, 22 June 2015) 36 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447710/Evaluation_of_the_Reforms_of_the_Intellectual_Property_Enterprise_Court_2010-2013.pdf>.

³⁸ See generally Copyright Claims Board, United States Copyright Office, *Copyright Claims Board Handbook* (Handbook, 16 June 2022) <<https://ccb.gov/handbook/>>.

- Streamlined resolution – resolution should be as quick and efficient as possible to prevent ongoing harm from infringement, and ongoing personal cost to applicants.
- Thresholds for claim size and complexity – jurisdiction should be limited to claims under a certain value (to limit case numbers appropriately). There should also be pre-filing assistance to help applicants determine whether their claim is too complex for the forum (Arts Law appreciates that more complex claims are not suited to a streamlined, informal and truncated procedure).
- No opt-out – infringers should not be able to opt-out of the process, which would undercut the benefits of having such a forum.

7. Conclusion

Arts Law appreciates the opportunity to make these submissions and welcomes any further discussion and consultation. Please contact Arts Law by email to artslaw@artslaw.com.au or (02) 9356 2566 if you would like us to expand on any aspect of this submission, verbally or in writing.

A handwritten signature in black ink, appearing to read "Robyn Ayres".

Robyn Ayres
CEO, Arts Law

A handwritten signature in black ink, appearing to read "Aditya Vasudevan".

Aditya Vasudevan
Solicitor, Arts Law

APPENDIX – ARTS LAW SURVEY QUESTIONS

1. Have others used your creative work without your permission?
 - a. Yes
 - b. No

2. When others have used your creative work online without your permission, where has it been used? (Tick all that apply)
 - a. Facebook
 - b. YouTube
 - c. WhatsApp
 - d. Instagram
 - e. LinkedIn
 - f. TikTok
 - g. Snapchat
 - h. Twitter
 - i. Amazon
 - j. Ebay
 - k. Redbubble
 - l. Etsy
 - m. Spotify
 - n. Private website
 - o. Piracy websites or third-party file sharing programs or services
 - p. Offline (e.g., in print or on merchandise)
 - q. Other (please specify)

3. What have you done when others used your work without permission? (Tick all that apply)
 - a. Directly reached out to the other person/organisation (e.g., spoke with them or wrote to them in an email or letter)
 - b. Sent a formal letter of demand to the other person (explaining your rights and what you would like them to do in response)
 - c. Used a notice and takedown procedure offered by a digital platform (e.g., filing a complaint on Instagram, Spotify, YouTube, etc)
 - d. Used automated content recognition tools (e.g., YouTube Copyright Match Tool or other software)
 - e. Applied to the Federal Court to have the website blocked (i.e., through the 'site blocking scheme')
 - f. Sent take-down notice to your internet service provider (a legal process sometimes called the 'safe harbour scheme')
 - g. Used alternative dispute resolution mechanisms, like mediation
 - h. Gone to court to sue for copyright infringement
 - i. Engaged with the Australian Border Force to prevent importation
 - j. Done nothing

4. For each of the options that you ticked Yes above please rate how effective you thought they were. If you did not try an option you can leave it blank. 1 = Completely ineffective (eg. they are still using my work without permission) 2 = Somewhat

ineffective (eg. they stopped using my work without permission but have not agreed to any of my demands.) 3 = Somewhat effective (eg. they stopped using my work without permission but have only agreed to some of my demands.) 4 = Very effective (eg. they stopped using my work without permission and agreed to most or all of my demands.)

5. When deciding what to do about copyright infringement, what factors would affect your decision? (Tick as many as apply)
 - a. Financial cost (e.g., Can I afford the legal fees?)
 - b. Time cost (e.g., Do I have time to write letters?)
 - c. Complexity of the process (e.g., Do I understand what to do next?)
 - d. How much money and power the other party has (e.g., Are they a big corporation?)
 - e. The location of the other party (e.g., Are they overseas?)
 - f. The outcomes available (e.g., Court I get paid or be properly credited?)
 - g. Access to help (e.g., Are there legal services I can use?)
 - h. A legal risk to me (e.g., Could I get in legal trouble?)
 - i. Other (please specify)

6. Do you think the current legal system that applies to copyright infringement could be improved?
 - a. Unsure
 - b. No
 - c. Yes

7. How much would you estimate to be your losses from copyright infringement in an average month?
 - a. \$0
 - b. \$1-\$100
 - c. \$101-\$1,000
 - d. \$1,000-\$5,000
 - e. \$5,000-\$10,000
 - f. More than \$10,000

8. How much time would you estimate you spend on dealing with copyright infringement in an average month?
 - a. Less than an hour
 - b. 1-5 hours
 - c. 6-10 hours
 - d. 10-20 hours
 - e. More than 20 hours

9. What barriers (if any) do you face engaging with the legal system?

10. Do you have any other comments about copyright infringement that you would like to share?