



KAY & HUGHES

31 July 2013

**Professor Jill McKeough**

Commissioner

**Australian Law Reform Commission**

GPO Box 3708

Sydney NSW 2001

by post and email: [copyright@alrc.gov.au](mailto:copyright@alrc.gov.au)

**RE: COPYRIGHT AND THE DIGITAL ECONOMY DISCUSSION PAPER**

**1. Introduction:**

Kay & Hughes is a legal practice that provides advice to clients in the arts and entertainment industries. We represent and write on behalf of a number of Australian auction houses in this matter, including Deutscher and Hackett, Mossgreen Gallery and Shapiro Auctioneers. We have also consulted with various Artists, Dealers and Buyers for their opinion in preparing this submission.

We welcome the Australian Law Reform Commission's inquiry into the operation of the *Copyright Act 1968* (Cth) (the "**Copyright Act**") to ensure this legislation remains economically and creatively efficient in the digital economy. Whilst our clients are generally open to the concept of the flexible 'fair use' exception contemplated by the recent Discussion Paper, our present submission is confined to a problem our clients have encountered regarding the impact of the existing Copyright Act on their ability to advertise and promote the sale of artworks at auction on behalf of individual vendors, particularly through print and online catalogues.

Specifically, at present, we are instructed that some art dealers and commercial galleries acting on behalf of artists are unreasonably refusing consent to publish images of artistic works in auction catalogues, or making the provision of such consent contingent upon the auctioneer's acceptance of various potentially anti-competitive terms, detailed further at Points 3 and 4 below.

This problem has been resolved in jurisdictions such as the United Kingdom and Hong Kong by the inclusion of a specific exception to copyright infringement where an artwork is reproduced "**for the purpose of advertising the sale of the artwork**". This form of specific exception, detailed further at Point 5 below, is not presently included in the Copyright Act in Australia.

In response to the proposals and questions raised in the ALRC's Discussion Paper, our clients therefore suggest that if the fair use exception proposed by the ALRC is adopted, the exploitation of the rights in an artistic work "**for the purpose of advertising the sale of the artistic work**" should be included in the list of illustrative purposes that accompanies that fair use exception (**Question 4-1**).

Alternatively, in the event that the present system of specific exceptions under the Copyright Act is retained, our clients suggest the addition of an express exception permitting the reproduction, publication and/or communication to the public of artistic works for the purpose of advertising the sale of those works.

As detailed below, the present impact of the Copyright Act on the advertisement and promotion of the sale of artistic works on the secondary market in Australia is an unrecognised source of harm to Vendors, Artists, Buyers and Auction Houses that is inconsistent with the economic and philosophical basis for copyright. The

acceptance of either form of exception proposed by our clients would allow the market to determine the true value of art and counter potentially anti-competitive behavior, which the current copyright regime is unable to ensure.

Our clients see the current ALRC inquiry as an excellent opportunity to remedy the inadvertent harm caused by the current situation, and recommend the following proposed exceptions to the ALRC in accordance with the proposals and questions detailed in the Discussion Paper.

## **2. Proposed Illustrative Purposes and Exceptions:**

As detailed above, in response to **Question 4-1** of the Discussion Paper, our clients suggest that:

- a) in the instance that the fair use exception proposed by the ALRC is adopted, the exploitation of the rights in an artistic work "*for the purpose of advertising the sale of the artistic work*" be included in the list of illustrative purposes that accompanies that fair use exception; or
- b) in the instance that the Copyright Act's existing regime of specific exceptions is retained, a specific exception to copyright infringement where an artwork is reproduced, published or communicated to the public "*for the purpose of advertising the sale of the artistic work*" be added to Division 4B of the Copyright Act.

As detailed below, these proposals accord with the principles and objectives of the ALRC Review, and could be very simply incorporated in the Copyright Act, particularly in the event that a non-exhaustive list of illustrative purposes accompanies the new fair use exception (**Proposal 4-4**).

## **3. The Impact of the Copyright Act on the Resale of Art in Australia:**

As detailed above, the existing provisions of the Copyright Act create a number of specific and inadvertent barriers to the resale of artistic works in Australia.

Before these barriers can be clearly explained, it is perhaps best to briefly detail the manner in which art is resold at auction in Australia, and the importance of advertising such sales via catalogue. Currently, if the owner of a painting or other artistic work (the "**Owner**") wishes to sell an artistic work in Australia, one of the most common and effective ways to do so is to appoint an auction house (the "**Auction House**") to value, advertise and sell the work by auction. Whilst Auction Houses make works available for viewing at their premises prior to auction, it is usual for them to advertise the sale of such works via online and print catalogues, which detail the name, artist and year of each work, together with a brief description of the work, the professional valuation that the Auction House has ascribed to it, and its relevant lot number. Usually, the Auction House will also recommend to the Owner that the description of the work be accompanied by an image of the work, so that potential purchasers ("**Buyers**") of the work are better able to identify its availability on the market prior to auction. Ultimately, catalogues are distributed to a database of existing clients, interested parties and potential Buyers, which is maintained by the Auction House.

Whilst an Owner will hold title in the physical work they purchased, it is uncommon in Australia for an Artist to agree to the contractual assignment of copyright in a work when it is sold, and the Artist will thus usually retain copyright in the artistic work itself. Accordingly, if the Auction House and Owner agree that the catalogue should include an image of the artistic work being sold, they approach the artist who created that work (the "**Artist**") or their representative to obtain their consent to publish an image of the artistic work in the catalogue. Usually, the Artist will have delegated the power to approve such use to the art dealer (the "**Dealer**") whose gallery will exclusively represent the Artist on the primary market, and administer certain commercial decisions on behalf of the Artist.

It is at this stage of the process that the problem identified by our clients arises, as no completely coherent licensing scheme, copyright exception or industry standard applies to the provision of consent for publication of artistic works for resale in auction catalogues. Consent can therefore be withheld or provided on terms at the **absolute discretion** of the Artist (or, more realistically, their Dealer). Some Artists and Dealers expect no payment for such approval. Some Artists and Dealers expect payment for such usage. Some Artists have assigned the licensing of particular works to Viscopy, who calculate a fee according to their tariff sheet, a

process that can in itself prove unpredictable and frustrating, with a large number of works excluded from this database, even by Viscopy members. Overall, we are instructed that the expectation for Auction Houses to seek such consent is a relatively recent development in Australia, having largely emerged in the last two decades. Whilst this situation indicates a lack of coherence or consistency in the provision of licenses, it is not in itself problematic, nor does it constitute any substantial barrier to the resale of artistic works in Australia

However, more recently, our clients have raised concerns that some Dealers are exercising their power as the Agent of an Artist, and resulting ability to withhold consent for publication of artistic works in auction catalogues in a potentially anti-competitive, manipulative or restrictive manner, outside of the intentions of the Copyright Act. Before proceeding, it is fundamentally important to note that the majority of Dealers do not exercise their power or agency in the manner described below, and that even in some of the instances below, the relevant Dealer may be acting in what they understand to be the Artist's best interests (or indeed, under specific instructions from an Artist). With that qualification noted, our clients have informed us of previous examples in which Dealers have made the provision of consent to publish the image of an artistic work in an auction catalogue contingent upon:

- a) the Auction House and Owner agreeing to the inclusion of a higher estimated price range for the relevant artistic work than the Auction House's professional valuers wish to recommend;
- b) the Artist's current Dealer being credited in the catalogue, regardless of whether or not they originally sold the relevant artistic work;
- c) the Owner having purchased the work from the Artist's current Dealer (meaning that Owners who purchased works from any previous Dealer that represented the Artist will not be granted approval to publish images of their works in the instance that they wish to sell);
- d) the Auction House or Owner paying the Dealer a heavily escalated fee, beyond any payment traditionally expected in relation to such reproduction; and/or
- e) the Auction House providing the Dealer with high quality digital images of the artwork (produced at the Owner or Auction House's expense) for the Dealer's ongoing use and retention.

Consent may also be withheld arbitrarily to prevent sales at auction that indirectly compete with other sales by that Artist, particularly in the instance that the Artist's Dealer is exhibiting new works by the Artist at the same time as the proposed auction. Additionally, the Artist or Dealer may, for personal reasons, refuse to allow publication of certain images. Finally, one of our clients has informed us of instances in which Dealers have exploited the fact that consent must be sought by Auction Houses, and the knowledge that a particular Owner is selling the relevant painting, to contact the vendor (whose details the Dealer will often possess), offering to sell the artwork instead, rather than having it sold at auction through the Auction House.

We attach as **Annexure A** statements from various stakeholders attesting to the problems of the status quo.

In this, the inability of an Auction House to publish an image of an artistic work in a catalogue significantly impacts the available market for that work, and its potential sale price. The value of auction catalogues to the art market should not be understated; the availability of information prior to an auction is invaluable in selling artistic works and developing the reputation of Artists. Arguably, the absence of an image to accompany an artistic work in a catalogue may discourage potential Buyers from purchasing a work, particularly when contrasted against other works in the catalogue that possess accompanying images. Where an image cannot be included in a catalogue, the remaining way that a potential Buyer can, firstly, identify that the artwork is for sale and, secondly, assess that work's quality and value is by physically attending the Auction House's premises. This is markedly unsatisfactory in the modern digital economy where Buyers are often located overseas or interstate.

It is also clear that under the current Copyright Act, Auction Houses and Owners lack a viable means of circumventing such unreasonable refusals. They either succumb to the unreasonable demands of the Dealers, or print the catalogue without the image, undermining the general interest and potential market for the artistic works in question. Recognising this economic inefficiency, our clients suggest that the owner's lawful

interest in physical artworks (including their right to fully access the market for the resale of such works) and the aforementioned potentially anti-competitive barriers inadvertently created by the Copyright Act are relevant to the fairness of the copyright regime (**Proposal 4-3 (b)**).

We note, in addition, that the publication of artistic works in Auction House catalogues in no way diminishes the true value, aesthetic or economic, of the original artistic work, a point relevant to its consistency with the list of fairness factors (**Proposal 4-3 (a), (c), (d)**).

## **4. Effects on the Market for Art:**

### **4.1 Auction Houses:**

The stakeholders most regularly impacted by this situation are the Auction Houses themselves. Currently, the inadvertent repercussions of the Copyright Act threaten to force them into a situation in which they need to choose between not selling a work, infringing an Artist's copyright, or compromising their professionalism and the best interests of their client.

Together with the difficulties outlined above, since Auction Houses depend upon their ability to consistently and predictably sell artworks, the current operation of the Copyright Act is harmful to their interests. Given the loss of income in not selling an artwork at auction, Auction Houses may even decline the opportunity to sell artworks by particular artists where they know that obtaining consent for their Auction Catalogues is going to be difficult, reducing the volume of their activities.

### **4.2 Collectors:**

Whilst Auction Houses encounter this problem most frequently, it is the individual collectors and vendors that bear the real detriment under the current operation of the Copyright Act. As detailed above, art collectors (including both Owners and Buyers) are often unaware that copyright in a work vests separately from legal title in the physical work, and are therefore caught unaware when informed that they need to seek permission (and potentially pay) for publication of an image to effect the resale of their property. The Copyright Act therefore imposes a hidden cost and limitation on the market for art, which is often purchased as a financial investment.

Further, in the instance that consent to publish an image of a work for the purpose of resale is refused (or the request abandoned due to consent being made contingent upon the acceptance of onerous conditions), potential Buyers are deprived of visual information about the artworks available at auction, and Owners are unable to advertise the sale of their property in the manner they reasonably desire. This clearly threatens a situation in which potential Buyers are unable to purchase artworks that they otherwise would if they had full information. This is clearly at odds with the importance placed on dissemination in copyright policy (**Principle 3**).

For the aforementioned reasons, Owners of artworks by particular Artists can also face unexpected difficulty when selling their artworks, limiting their ability to liquidate these assets. Our clients contend that this situation represents a potential interference with the right of individuals to deal with their physical property as they reasonably see fit. In addition, this problem feeds back to Buyers who are deterred from purchasing such artworks out of fear that they will be unable to ultimately sell them. As a result, Owners are less likely to achieve a successful sale (or the full value of the relevant artwork). If such practice became too widespread, these factors could clearly be associated with individuals losing faith in particular aspects of the art market, injuring Buyers, Owners, Artists, Auction Houses and Dealers alike.

### **4.3 Artists:**

In general, there is little incentive for Artists themselves to refuse consent for reproduction of their works in relation to resale. The income of Artists generally depends on the strength of sales through their Dealers on the primary market. Whilst more successful and prominent Artists may receive resale income through Australia's resale royalty regime, the secondary art market is usually viewed by the art world as more important from a reputational or publicity perspective, rather than a reliable income stream. Nor does

income received from licensing images for publication in Auction House catalogues form a substantial income stream for most Artists – the current Viscopy rates for an Auction House to reproduce an image in such a catalogue usually amount to several hundred dollars, depending on a number of factors. The interaction between Artists and the primary relevant collecting society in this matter, Viscopy, is discussed further below.

Thus, perhaps predictably, it is not the Artists who are driving the practices identified in these submissions. Rather, it appears to be driven by their Dealers, who, as the Artists' agents, are usually authorised to approve or withhold consent for the exploitation of an Artist's work, and hold significant commercial influence.

In this, as the ALRC will note, the practices complained about at points a) – f) of Point 2 above largely benefit Dealers, rather than Artists, whether by promoting the Dealer, providing it a fee (which may or may not go back to the Artist), or acting to quarantine the prices the Dealer sets for an Artist's Works on the primary market, thus protecting their gallery from lower value sales for the same Artist's work on the secondary market. Indeed, the practice of refusing consent (or attaching unreasonable conditions to the provision of consent) appears to have *harmed* certain artists, particularly as Owners and Buyers learn of the difficulties associated with the resale of particular Artists' works, substantially diminishing the primary and secondary market available to those Artists.

Additionally, by undermining sales of art on the secondary market, the practice of refusing consent for such publication undermines the resale royalty scheme, which was specifically designed to ensure that Artists would enjoy the economic benefits of resale of their work. Perhaps contributing to the practice noted in these submissions is the fact that Dealers do not receive a share of such resale royalties under the normal scheme.

In this instance, **Principles 1, 2 and 3** in the Discussion Paper appear to favour the proposals advocated by this submission. In view of this, the primary stakeholder to benefit from the status quo is not the creator of the artwork, whose interests copyright seeks to protect, or the eventual consumers of such copyright works, but agents separate from the artistic process, seeking to alter the market for artworks in potentially restrictive ways.

#### **4.4 Rights Management Organisations**

As detailed above, our clients acknowledge that other than Dealers, established rights management organisations are already collecting licence fees in relation to the publication of images of artistic works in Auction Catalogues.

In this, the primary Australian collecting society administering licence fees for the publication of images in Auction Catalogues is Viscopy, which has been managed by the Copyright Agency since July 2012. Viscopy and the Copyright Agency are authorised to licence their members' works, including in relation to publication of images in Art Catalogues, and also administer Australia's resale royalty scheme.

Whilst the eventual acceptance of the recommendations of this submission would necessarily restrict the ability of Viscopy (or any other party) to collect copyright licence fees in the instance that a work is published in an Auction Catalogue for the purpose of resale, our clients believe that the current benefits of the scheme are significantly outweighed by the problems and inefficiencies detailed in this submission.

In this, the parties we have consulted in relation to this matter have raised the following issues:

- The current licence scheme operated by Viscopy does not operate as a blanket scheme, with certain Artists not being members of Viscopy (and therefore falling outside the scheme), and members being able to withhold and/or withdraw their works from the operation of the scheme, leaving significant gaps;
- The licence fees applied by Viscopy threaten to overlap with the collection of resale royalties under *Resale Royalty Right for Visual Arts Act 2009* (Cth), which is also administered by Viscopy and the Copyright Agency, and already provides Artists with payment in most instances that their works are sold on the secondary market;

- The licence fees applied by Viscopy appear to fit awkwardly with the actual operations and requirements of the Australian art market, with the fee being calculated on the print run of the relevant Auction Catalogue, medium and size of the image being published – there is also some suggestion that different rates may apply to different Auction Houses;
- Viscopy fees apply when a work is published in an Art Catalogue, regardless of whether the work is sold or not, creating an up-front cost to Vendors and/or Auction Houses that may or may not be recovered; and
- The widespread collection of licence fees for the publication of images of artistic works in Auction Catalogues is only a relatively recent development in Australia, having largely emerged in the last two decades.

Given the above, our clients maintain that the current operation of the Copyright Act needs to be reconsidered in line with the recommendations detailed under this submission.

#### **4.5 Australian Art Generally**

Together with the specific economic considerations raised above, a number of our clients have expressed concern regarding the social harm created by the barriers imposed by the Copyright Act on the publication of images of works in art catalogues to accompany their advertisement and sale.

In this, the Catalogues produced and distributed by Auction Houses serve an important role in documenting and tracing the history and development of art in Australia and internationally. Catalogues are often collected and retained by individuals and organisations as a record of art history, and are frequently relied upon in academic criticism, serving as records of developments and changes in the Australian commercial art market over time. Few other publications perform this role as comprehensively or consistently as Art Catalogues, and accordingly, the absence of images accompanying the sale of numerous important works leaves “gaps” in this record, diminishing their use as a historical record.

The restrictions imposed by the Copyright Act on the publication of images of artworks in Catalogues also have an inadvertent impact on the accreditation and verification of artistic works in the Australian art market. Wide dissemination and publication of the artworks available for sale on the market offered by Catalogues provides an important mechanism for Auction Houses, Dealers, Artists (and their estates), Galleries, Museums and other experts to monitor the market for fakes, stolen works and forgeries. Our clients point to prior instances in which publication of an image in a Catalogue has allowed third party experts to identify forged, stolen or incorrectly attributed works prior to sale

Preventing such sales is fundamentally important to the art market, as even minor doubts about authenticity are sufficient to deter investors from purchasing works – particularly where the work in question requests a high purchase price, or the Artist in question is deceased. For obvious reasons, this particular harm impacts all the stakeholders discussed above.

We are also instructed that Buyers often express doubt as to the authenticity of artworks for sale if a high-quality image of the work is not included in the accompanying Catalogue, incorrectly interpreting the absence of such images as an indication of a lack of confidence in the work by the Auction House.

As the ALRC will note, access to socially useful material is widely accepted as an important guiding principle in the drafting exceptions to copyright, and is especially important to an industry such as the art market, which is built upon presumptions of authenticity and lineage.

## **5. International Precedent:**

Various jurisdictions outside Australia already make specific provision in their legislation governing copyright law to avoid the problems detailed in this submission. These include the following examples.

### **5.1 United Kingdom:**

Section 63 of the *Copyright, Designs and Patents Act 1988* (UK) provides a specific exception in relation to the advertisement of sale of artistic works, being that:

- 1) *It is not an infringement of copyright in an artistic work to copy it, or issue copies to the public, for the purpose of advertising the sale of the work.*
- 2) *Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with for any other purpose, it shall be treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright for all subsequent purposes.*

*For this purpose, "dealt with" means sold or let for hire, offered or exposed for sale or hire, exhibited in public, distributed or communicated to the public.*

This legislation provides the strongest international precedent for the proposals advocated in these submissions.

### **5.2 Hong Kong:**

Hong Kong's *Chapter 528 Copyright Ordinance* (s 72) reproduces the s 63 exception present in the in the UK legislation.

### **5.3 Switzerland:**

As in the above common law jurisdictions, Switzerland provides an exception to copyright infringement for reproduction in catalogues of artworks held in public galleries (s 26 of the *Swiss Copyright Act 1992*). This exception was interpreted in *Pro Litteris v Town of Geneva* (BGE 127 III 26) as generally applicable to all artworks in a museum, denying the plaintiff any right to royalties from a catalogue.

## **6. Electronic Distribution:**

In view of the Commission's concern with the impact of technologies on the existing copyright framework, we note that express coverage of electronic catalogues, and the right for Auction Houses to communicate such works to the public would be advisable. In this, Auction Houses often employ digital technology to create broader public appeal around artworks beyond their regular consumer base, particularly where they wish to access interstate and international markets.

## **7. Conclusion:**

We therefore recommend for the ALRC's consideration the proposals detailed at Point 2 above.

Whilst these proposals target an extremely specific and relatively unknown problem, it is an issue that remains a major concern for the Australian art industry, and the ability of the ALRC to remedy this issue through the inclusion of a simple, narrow, clear description of such usage on any list of illustrative purposes accompanying a new fair use exception would remove a significant and unnecessary barrier to the efficiency of the Australian art market, without harming the legitimate interests of Artists, Dealers, Auction Houses, Buyers or Owners.

In this, the use of images of artistic works to advertise the resale of artworks on the secondary market is, our clients would submit, exactly the kind of non-competing, good-faith, legitimate use of copyright that statutory exceptions (including fair use) are designed to protect.

Moreover, our clients submit that it is necessary for this purpose to be specifically included on any list of illustrative purposes supporting a flexible "fair use" exception, as there is clear evidence that the Copyright Act is currently creating unnecessary inefficiencies in the Australian art market, and such use clearly does not fall under any of the purposes currently proposed by the ALRC (**Proposal 4-4**). Whilst it is arguable that such use would usually fall under the protection of the kind of general fair use exception currently proposed by the ALRC, the uncertainty created by the existing situation is sufficient to warrant immediate, clear resolution of whether such exploitation should form a legitimate exception to copyright in Australia, as it does in various other jurisdictions.

From the information included above, we believe that a clear argument exists to support the amendment of Australia's copyright regime to include such an exception, and that if the ALRC embraced this opportunity to clarify the Copyright Act and make provision for such usage, the Australian art world – our clients included – would be grateful.

We eagerly anticipate the release of the ALRC's Final Report and are happy to answer any questions that you may have in response to these submissions.

Yours Faithfully,



**Ben Kay**  
**Partner**



**Kate Hughes**  
**Partner**

**Kay & Hughes**  
**Art and Entertainment Lawyers**



**ANNEXURE A: STATEMENTS**

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30 July 2013

Professor Jill McKeough  
Commissioner  
Australian Law Reform Commission  
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Sydney NSW 2001

Dear Commissioner,

I write as Executive Director of Deutscher and Hackett, a major fine art and aboriginal art auction house operating in Sydney and Melbourne. I have over 20 years experience in fine art galleries and auctions, being Head of Australian and International Art for Phillips de Pury and Luxembourg from 2001-2002 and National Director of Deutscher-Menzies from 2002-2006.

I would like to draw to the Commission's attention the problems faced by the secondary art market as a result of the existing copyright regime in relation to art auction catalogues, since it continues to create substantial impediments to the sale of artworks at auction. In particular, the obligation to obtain consents from owners of copyright (or their agents) to publish images of artworks in catalogues impacts auction houses by causing significant loss of income, unpredictable and unjustifiable costs and the disclosure of confidential commercial information all of which can cause the inability to sell otherwise sought-after artworks.

I would also point out that these issues are all due to the fact that the copyright law, in its current form, does not allow for the owners of original works of art to reproduce those works for the purpose of adequately marketing those original works for their sale. Although seemingly unintentional, the wording of the law does not make any distinction between those who wish to profit from sale of reproductions and those who wish to reproduce an image to assist the sale of the original object. This type of use is allowed in other jurisdictions around the world included within "fair dealing".

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# deutscherandhackett

The first issue I would like to raise is the onerous conditions often placed on Deutscher and Hackett by artists' agents as pre-requisites to including a photographic reproduction of artworks in our catalogues.

Importantly, these demands include, but are not limited to, demands to increase the estimated price range for an artwork in excess of the range advised and negotiated with the vendor by our professional valuers. This demand, reinforced by the threat of withholding copyright, places us in an untenable position: by complying, we may substantially decrease the chance that we will successfully sell our vendor's property by deterring potential buyers; cause costs to be incurred to ourselves and our vendors; and compromise our reputation by failing to successfully deliver our service. By refusing the demand of the copyright holder (or usually their agent) we substantially decrease the likelihood of sale by depriving our clientele of visual information.

Auction estimates are incredibly important to sellers and buyers: even where the reserve price maybe much lower than the published estimates, buyers quite reasonably assume that the estimates are indicative of the expected price of the artwork and are very often deterred from even considering to bid, where this has been artificially elevated. When explaining this point to an art dealer who demanded such an increase in return for copyright clearance, his answer was, "Good. I'd rather see the painting pass-in (unsold) with a high estimate than sold at a low estimate."

In some circumstances, given the significant costs associated with presenting a work for auction, the practice has caused us to decline to handle the sale of some artworks at all, where a consent is withheld. Indeed, Deutscher and Hackett will not handle artworks by a number of artists where consents are consistently refused or subject to unreasonable conditions, no doubt decreasing the general interest in the works of those artists and causing them financial harm. Some of our clients, even those who have historically purchased new works by specific artists from each primary exhibition will no longer purchase artworks by those artists where this issue has made those artworks virtually incapable of being sold at auction.

Secondly, the status quo is open to other forms of abuse by those agents who act to directly undermine our business. In many cases, the artist's agents are the dealers who conducted the initial sale of the artwork, and, from time to time, circumstances have arisen where, after being contacted to obtain a consent, that dealer has identified the seller of the artwork using their own records and contacted them directly with an offer to sell the work instead of through the auction house. In many cases, vendors wish to remain absolutely anonymous for any number of reasons. This may include, but is not limited to, *not* wishing the original dealer to be aware that they are selling a work. To be required to seek copyright approval from an agent and required to provide details of the specific artwork and the estimate range, provides that dealer with sensitive and private commercial information which they should not be entitled to demand. This misuse of the copyright law gives these dealers an unfair advantage over other (secondary market) dealers and auction houses and does not necessarily align with the best interests of the artists they are supposed to represent.

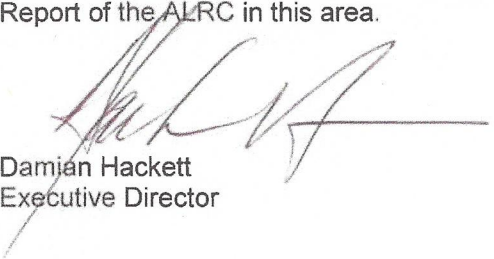
Thirdly, copyright collecting organisations such as Viscopy and the Copyright Agency Limited (CAL) have created a number of separate issues beyond those already faced by the auction house. There is presently a list of works by specific artists which absolutely no licence will be granted, as well as a list of artists from whom Viscopy or CAL must seek pre-approval **before** images appear in our catalogue, creating unpredictable delays. Although somewhat simplified now, the licence fees demanded by these collecting societies have been non-standard, with a value system varying by print run and print dimensions. As an indicative figure, for a \$2000 item in a catalogue, a fee of at least \$100 can be required, which is particularly onerous given our high costs of sale and limited profit margins.

# deutscherandhackett

Nonetheless, artists and their representatives often charge substantially more than Viscopy or CAL would for the use of images, in many cases with seemingly no relation to the value of the underlying picture. In some cases, Deutscher and Hackett has been unable to sell artworks where the costs of the licence fees are too burdensome on sellers.

Importantly, the licence fees demanded by artists, their representatives and copyright collecting agencies are in addition to resale royalties that now add further costs to art market participants and dampen interest in secondary art markets. However, for all of the issues surrounding the resale royalty, there is less ability for artists and agents to misuse these rights to impede, restrict or restrain the trade of individuals' property as is currently occurring with the copyright.

For these reasons, I support the recommendations made in this submission and await the Final Report of the ALRC in this area.



Damian Hackett  
Executive Director

# SHAPIRO

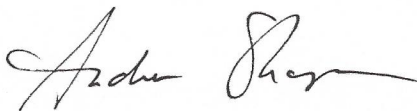
## **The need for manageable and reasonable fees for the reproduction of images on the secondary art market in Australia**

Shapiro Auctioneers fully understand the importance of protecting the artist's copyright. The current copyright laws/Government bodies (Viscopy) and commercial galleries that hold copyright for reproduction of artworks not only hinders the possibility of sales on the secondary market but are actually affecting the sales of artworks on the primary market as well.

These separate bodies and galleries show blatant inconsistencies in both pricing and licensing agreements. Auction houses are paying different fees to publish images and in some cases not paying at all. Artworks sold under \$5000 are incurring the same copyright fee as artworks sold over \$100,000.

Commercial galleries are using copyright approval to leverage higher estimates. Thus they are restricting auction houses from offering artworks on the secondary market at fair market value. In fact this is an attempt to manipulate the market.

We believe a closer examination of the US and UK art market would benefit this government body as it is important we allow free trade to occur for commercial operators in the secondary market.



Andrew Shapiro  
Managing Director  
Shapiro Auctioneers and Valuers

**From:** Mossgreen Gallery  
**Subject: Re: Copyright Submission**  
**Date:** 26 July 2013 12:53:22 PM AEST  
**To:** Ben Kay  
**Cc:** Kate Hughes

**Statement on the need for manageable and reasonable use of images for the re-sale of artworks in Australia**

As both an auctioneer and an art dealer that represents living artists, I am in a unique position to understand the importance of protecting artist's copyright and also to understand the effect that unreasonable copyright restrictions has on living artist's, when artwork is re-sold at auction in what is termed the secondary market.

The auction market in Australia is very under-developed and sadly there is not a very strong re-sale market for artist's work for many living artists who are successful in the primary market ( The gallery market)

This is largely because there are no contemporary art auctions held in this country where collectors can both sell and buy and where commercial operators can build a strong re-sale market.

This has led to some art-dealers trying to compensate for this by using copyright restrictions to leverage higher estimates, so that their artists work is not sold or offered at prices below that which they consider is in line with their gallery prices.

But in effect what happens is this leads to many works going unsold and the perception that the market for the artist is not good at auction, so the whole process becomes counter-productive, both to the vendor and of course to the artist.

It is important that we allow free trade to occur for commercial operators in the secondary market and it is also important that price-fixing is not allowed to occur, as this is both against the law of the land, but also it is ultimately against the best interests of artist's and everyone that collects, promotes and trades in art.

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