

My first contribution is the article I wrote late last year setting *droit de suite* into the copyright context. You might like to add it to your bibliography. My submission follows:

COPYRIGHT for Australian Art Market Report, Summer '03

It all began as a two-line entry in the Keating Government's attempt to create a cultural policy, *Creative Nation*. "The Government will aid the establishment of a collecting agency for the visual arts, and examine those provisions of the Copyright Act relevant to the visual arts". That was in October 1994, with a million dollars promised over the next four financial years. Nine years later, with more than two million dollars received in public funds, we have Viscopy, six months shy of having to stand on it own two feet on a tiny and uncertain income of \$680,000.

But there are still artists, galleries, collectors and auction houses who are hostile to the notion of paying copyright royalties for the use of images created by 'visual authors', as they are technically called. And this despite the recent Throsby and Hollister Report showing that median arts income for visual artists is just \$9,200 a year. 52% are earning less than \$10,000; just 10% are earning more than \$50,000 from their art.

Buying a painting does not give you copyright in it. That's the law. You simply can't make Christmas cards of your favourite picture without both getting the artist's permission and (probably) paying him/her for it. You could try and track the artist down, going to the gallery where you bought the work, or you could now try Viscopy to see if s/he's one of the 3410 Australian artists (and some 250,000 overseas ones belonging to 42 affiliate agencies) who've signed up. And even before Viscopy, there was the Aboriginal Artists Agency, which has been doing the same job for 250 Aboriginal artists since 1976.

Copyright is apparently more obvious in the case of a piece of music, a book or magazine article, or a film – helped by the fact that collecting agencies have been going since 1926 in the case of music's APRA. As a result, the literary agency CAL doled out \$32m. in 2002 to authors and publishers. Some of it even went to visual authors whose work was copied under statutory arrangements with educational, commercial or government bodies.

Why are visual artists at the end of the line? "They're such solitary beasts", is the conclusion of Chryssy Tintner, brand new CEO at Viscopy, herself brought up in a musical family with subsequent international work in the film and multi-media industries under her belt. "Musos and film people collaborate", she amplified, "so they're easy to unionise and agitate for. Artists see agitation as a distraction from their work – and they never have enough money to employ an agent to do it. Only indigenous artists are socially active" – which is perhaps why more than half of Viscopy's local members are indigenous and they had their own copyright agency 20 years ahead of white artists.

And AAA's founder, Anthony Wallis sees the oppression of galleries as another factor in the fate of painters, sculptors, photographers, potters, designers, etc. "They've always used their artists' work as they've wanted. And now they find it hard to have to ask permission for exhibition catalogues, on-line promotion, newspaper

ads, etc. I try and make it as easy as possible – suggesting (and getting) \$30,000 from *Mission Impossible 2* for a roomful of paintings, or taking my minimum \$75 for a Christmas card. So it was annoying recently when a Brighton University show (in Britain) paid Viscopy via a British agency and my artists only got 13 pounds per image by the time everyone had taken out their fees”.

Viscopy’s administration costs are 22% of royalties collected - distributing \$384,000 from \$489,000 collected. Much of that income came as a result of an agreement with the Auctioneers and Valuers Association of Australia, whose fine art members’ ever-growing profile and the rising prices they’ve achieved for art re-sales has undoubtedly contributed to both the hunger of artists to get ‘a piece of the action’ and to the rather bitter sense that Viscopy is all about money-grabbing rather than higher moral motives.

Viscopy’s Tintner doesn’t deny it. “We are a royalty collecting agency, operating to a global standards with only 3 full-time staff. We’re not legal or moral advocates. And my job is to generate more streams of income. Our strategy was to start at the top (with the auctioneers) and move on down to galleries, who are just starting to sign up”.

Many galleries, of course, operate only in the primary market as agents for their showing artists who will invariably waive copyright for any effort to sell their work. But this isn’t an era of life-long loyalties. So should artists sign up with Viscopy anyway? Niagara Galleries’ Bill Nuttall is probably typical in neither encouraging it nor discouraging. “If they’re frequently reproduced, it’s worth joining; unreproduced artists are only too happy to get their work before the public”. Nuttall may also be all-too typical in believing there’s a fee for his artists to join Viscopy; there isn’t. And his view that he would no longer hold a show of secondary market art where he had to pay to advertise it or do a catalogue is pretty reflective of the current mood too. “Vendors would be bloody reluctant to pay”.

For it is, of course the sellers at auction who are the real contributors to alleviating artist poverty - even though Deutsche Menzies’ Damian Hackett sees it as “the auction houses being singled out for copyright restriction”. He explains: “We’re absolutely in favour of Viscopy protecting unethical profiteering from the intellectual property of artists – especially on things like tea-towels, mouse-pads and Christmas cards. But why hit us, the lifeblood of the market? We’re bound to present art in its best possible light to the widest possible audience. Surely when it comes to buying and selling – injecting funds into the market – it’s reasonable to waive copyright? We certainly won’t put a Viscopy artist on our catalogue cover in the future or offer a fold-out like Tim Maguire’s in the current catalogue; they’re substantially higher rates. It just makes collecting art bloody confusing when there are all those silent partners about”.

Not that a set-rate reproduction royalty can really compare with capital gains tax, GST and the auction house’s own buyer and seller premiums all potentially taking their percentages of a top price painting. But what if *droit de suite* came in too? Such a resale right going back to the artist (or heirs, 50, even 70 years after his/her death) is proposed by both major parties in Canberra currently. Neither has worked out the

details; but all of Europe will have a tiered system from 2006 based on the resale price, whether or not the seller has actually made a capital gain.

Chryssy Tintner says the philosophical justification is that a painting has a total value over its lifespan, and the artist deserves to share in that total as it increases. Mind you, as even she admits that only the top 10% of artists will get reasonable amounts from such a scheme, she wonders whether it wouldn't be better to adopt the German idea of a fund created from *droit de suite* income being paid out to young artists as well to those whose resales have produced the money. "Whatever system comes in", she adds, "it should come to Viscopy to administer. There's every reason not to split the royalty market".

Pic Caption: Tracey Moffatt's iconic *Something More 1* - the red cheongsam girl standing in a hut doorway - was not pictured in the Deutsche Menzies November sale catalogue at the artist's insistence. Though Moffatt has signed with Viscopy, she alone has this work's copyright, and she felt that it was being overexposed to the detriment of her other work. It's a complex business!

SUBMISSION

The key to this matter will be to making the introduction of a new impost seem reasonable to the buyers and sellers in the art market. They are its twin pillars, after all. For, as I point out above, there are already a plethora of claims on the buyers' and sellers' pocket that are hard to justify unless you are a trader rather than collector. Most go to government or dealer; so an emphasis on return to the artist is already a good starting point. It must be clear, though, that the collection is being made by an agency on behalf of artists rather than just another percentage grabbed by dealer or auctioneer. Viscopy is therefore the most appropriate collecting body - it certainly should not be an arm of DOCITA

It does not help that your Discussion Paper manages to buy the silly suggestion that Aboriginal artists are being ripped off when their works re-sell for a greater mark-up than white artists' work. This is much more likely to happen because a key add-on stage in the 'industry' process has been cut out by Aboriginal community art centres. The dealer's 40/50% has not been added on. Traditional Aboriginal artists are much benefitted by this; only those sucked in by the egregious follies of Richard Bell's *Theorem* can believe otherwise.

In the name of obvious fairness, therefore, I'm going to propose that the new impost only be calculated on the increased price of a re-sold artwork. Your Paper argues that this hard to work out. Clearly you are unaware of the need to keep records of purchase price for insurance, capital gains and GST purposes. It wouldn't be hard to use that file for *droit de suite*. I'm afraid Ms Tintner, above, failed to convince me on the artist's right to have a share in the "lifetime value" of an artwork when the actual price of it has gone down! As well as playing to the seller's sense of justice, my proposal would also appear to be remarkably similar in effect to your financial models in the Discussion Paper, where the major beneficiaries under most systems are the top few percent of artists. Not only are their prices higher than the rest and the turnover of their works at auction greater in an increasingly capitalist marketplace, so are their

price increases. Clearly, under my capital gain system, the percentage of the impost will have to be higher.

The other essential justice factor, therefore, is not to pay all of the *droit de suite* to those already-comfortable artists, but to divide the money between a general fund for artist development (maybe administered by the Australia Council Visual Arts & Crafts Fund) and the price-risen individuals. And in the case of all Aboriginal artists, the communal aspect of their work should be respected so that the individual component of their *droit de suite* should go back to their community art centre and the general fund component would be shared amongst all art centres. This could have the additional benefits of assisting in the professionalisation of the art centres (an objective of the current government) and in achieving a successful payment system that is currently defeating Viscopy, who send out cheques to individual artists and find them all-too-often returned.

It is hard within my ideals of justice to see that post-mortem payments should continue for more than 50 years. It may even be better to start with 25 years and maintain the option to double it. Since America (apart from California) has no *droit de suite*, there should be no compulsion to accept the FTA's imposed 70 year copyright figure.

Thank you - Jeremy Eccles