

Code of Practice

June 2015

This information sheet is for guidance only. It is not legal advice.

1. Background

The *Resale Royalty for Visual Artists Act 2009* (the Act) came into force on 9 June 2010. The Act sets out a scheme for reporting of information about resales of artworks, and payment of a 5% royalty to visual artists on certain resales (the Scheme).

The Australian government has appointed Copyright Agency to administer the Scheme.

The Act imposes legal obligations on art market professionals, who include auction houses, dealers, commercial galleries and others involved in the business of dealing in artworks.

2. Resale royalty website

Copyright Agency has established a resale royalty website, www.resaleroyalty.org.au, which allows art market professionals to provide information about resales online, after setting up a secure login. Resales can be reported using an online form, or by uploading a document such as a spreadsheet.

3. Art market advisory panel

In May 2010, Copyright Agency formed an Art Market Advisory Panel to advise on business practices in the art market, and how Copyright Agency can develop its systems and practices to take those business practices into account.

4. Purpose of this Code

The purpose of this Code of Practice is to set out how Copyright Agency and art market professionals will deal with key aspects of the Scheme. It has been developed with input from the Art Market Advisory Panel.

The Code is intended to be read in conjunction with other guides to, and information about, the Scheme available on the resale royalty website.

5. Compliance with other legal obligations

Copyright Agency and art market professionals acknowledge that in addition to their respective obligations under the Act, their practices in relation to the Scheme may be affected by obligations under other laws, including obligations relating to:

- privacy (such as the National Privacy Principles under the *Privacy Act 1988* (Cth));
- misleading and deceptive conduct (such as under the *Competition and Consumer Act 2010* (Cth) and State fair trading legislation);
- taxation;
- copyright and other forms of intellectual property;
- confidentiality and trade secrets; and
- cultural heritage.

6. Guidance and information about the scheme

Copyright Agency will provide information and guidance to art market professionals about the application of the Scheme to their business practices, through information sheets, FAQs, information sessions and responses to telephone and written enquiries.

7. Meaning of 'artwork'

The Act defines 'artwork' as:

an original work of visual art that is either:

(a) created by the artist or artists; or

(b) produced under the authority of the artist or artists.

Copyright Agency takes the view that items that have a predominantly utilitarian function, such as furniture, tableware and musical instruments, are not works of visual art for the purposes of the Scheme.

8. Sufficient information for non-qualifying resales

For all commercial resales after 8 June 2010, the Act requires the provision of sufficient information to enable Copyright Agency to determine whether a royalty is payable. Copyright Agency takes the view that if:

- the sale price (including GST) is less than \$1,000; or
- the artist died more than 70 years before year the work was resold; or
- the artist is not an Australian citizen or permanent resident or a national or citizen of a prescribed reciprocating country; or
- the seller acquired work before 8 June 2010,

then information in relation to any one of those matters is sufficient to meet the reporting requirements of the legislation.

Copyright Agency nevertheless encourages voluntary reporting of additional information, as this may assist it to determine whether a royalty is payable on a future resale of the work, and/or to identify the right holder.

9. Items sold for less than \$1,000

It is no longer necessary to report resales of artworks for less than \$1,000.

10. Reporting sales for \$1,000 or more in alternative formats

For the first six months of the Scheme's operation, Copyright Agency will accept information about resales for \$1,000 or more in formats other than Copyright Agency's online form or downloadable

template. During that period, Copyright Agency will work with art market professionals to establish processes to enable them to report using Copyright Agency's online form or template.

11. Presumption that royalty is payable

If the information provided by the art market professional indicates that:

- the resale date was after 8 June 2010;
- the sale price (including GST) was \$1,000 or more;
- the seller acquired work after 8 June 2010; and
- the item resold is an 'artwork'

but the art market professional is unable to provide information about:

- whether the artist is a citizen or permanent resident of Australia or a national or citizen of a prescribed reciprocating country; and/or
- whether the artist is alive, or died fewer than 70 years before the year the work was resold;

the art market professional can indicate that they do not have that information by using the term 'unknown' in the relevant part of the report.

Copyright Agency will presume, however, in accordance with section 24 of the Act, that there is a right holder entitled to a royalty, and that a royalty is therefore payable.

Copyright Agency will review that presumption if the art market professional can provide evidence that it is unlikely that there is a right holder entitled to a royalty, for example because:

- the age of the work indicates that the artist died more than 70 years before the year the work was resold; or
- the work can be identified as from a country that does not have a resale royalty scheme.

12. Verification of information provided by art market professional

If an art market professional provides Copyright Agency with information that:

- the sale price (including GST) was \$1,000 or more; and
- the item resold is an 'artwork';

but the art market professional reasonably believes, and has notified Copyright Agency, that:

- the seller acquired the work before 9 June 2010;
- the artist does not meet the residency test in the Act; and/or
- the artist died more than 70 years ago

and thus a royalty is not payable, Copyright Agency will use its best endeavours to notify the art market professional within 28 days if Copyright Agency reasonably believes that a royalty is, in fact, payable.

13. Determination of royalty

A seller or art market professional who provides sufficient information about a resale via the resale royalty website will receive an instant indication of whether or not a royalty is payable.

In other cases, Copyright Agency will use its best endeavours to confirm, within 28 days, whether or not a royalty is payable.

14. Provision of information to Copyright Agency by art market professional as agent for seller

Because art market professionals are jointly liable to pay any royalties that are due, it is in their interest to ensure that Copyright Agency receives the information it needs to determine whether or not a royalty is payable.

If an art market professional provides information to Copyright Agency about a resale as agent for a seller, the art market professional will use its best endeavours to ensure that that information:

- is sufficient for Copyright Agency to determine whether or not the royalty is payable; or
- is all that is available to the seller and the art market professional that is relevant to

determining whether or not a royalty is payable; and

- is not inaccurate or misleading.

Best endeavours include a seller's written:

- warranty that they have provided the art market professional with all information available to the seller that is relevant to determining whether or not a royalty is payable;
- undertaking to indemnify the art market professional for any loss incurred by the art market professional as a result of the seller providing information which is inaccurate, incomplete or misleading; and
- acknowledgement that if the information provided by the seller is inaccurate, incomplete or misleading, the art market professional will provide Copyright Agency with the seller's contact details so that Copyright Agency may request information from the seller and/or may seek payment of the royalty from the seller.

15. Information about sellers and buyers

Provided the art market professional:

- provides to Copyright Agency the information available to it, and the information available to its client, relevant to determining whether a royalty is payable on a resale; and
- if a royalty is payable, pays that royalty in accordance with the requirements of the Act;

Copyright Agency will not request information about the sellers or buyers involved in the resale.

16. Incomplete, inaccurate or misleading information provided to Copyright Agency

Copyright Agency will seek the seller's contact details from the art market professional and will seek payment of the royalty from the seller if it:

- makes a determination that a royalty is not payable, based on information, provided to Copyright Agency by an art market professional as agent for a seller, that is misleading or inaccurate; and

- subsequently makes a revised determination that a royalty is payable based on accurate information it has acquired.

Art market professionals acknowledge that, in these circumstances, Copyright Agency may in some cases seek to recover the royalty from the art market professional if recovery from the seller is impracticable.

17. Money paid to Copyright Agency in anticipation of payment of a royalty

Copyright Agency will hold any moneys paid to it in anticipation of payment of a royalty in trust pending determination of whether or not a royalty is payable. If Copyright Agency determines that a royalty is not payable, Copyright Agency will refund the money paid in advance, as soon as practicable, to the person or persons who paid it.

18. Information to buyers and sellers about the Scheme

Art market professionals will use their best endeavours to ensure that sellers and buyers are aware, before a resale, of obligations under the Act, including by referring them to Copyright Agency's information resources.

19. Transfer of title from seller to art market professional

Copyright Agency encourages art market professionals to confirm, in writing, whether or not their arrangement with an artist or other seller involves a transfer of title to the art market professional at any point.

For galleries that do not currently have written agreements with artists, sample agreements between artists and galleries, which specify that title to artworks does not pass to the gallery, are available for purchase from the Arts Law Centre of Australia.

Copyright Agency acknowledges that, in the absence of a written agreement between an art market professional and a seller, the following factors indicate that an art market professional is acting as a seller's agent and title passes directly from the seller to the purchaser:

- the gallery's invoice to the buyer indicates that it is acting as the seller's agent;

- the gallery does not treat the purchase price as income in its financial reporting;
- the gallery informs the artist of the purchase price;
- the gallery invoices the artist for its commission; and
- the seller treats the purchase price as income, and the gallery's commission as an expense, in their financial reporting.

Copyright Agency may be entitled, under the Act, to request information about whether an arrangement between an art market professional and a seller resulted in a transfer of title.

20. Exchanged artworks

If an art market professional sells an artwork to a buyer, and subsequently allows the buyer to exchange that artwork for another, Copyright Agency will regard the provision of the second work to the buyer as a commercial resale unless the seller is the artist.

21. Inclusions in sale price

If an art market professional invoices a buyer separately for reimbursement of costs incurred such as stretching and framing, and the invoiced amount does not exceed the costs incurred by the art market professional, Copyright Agency will treat those items as excluded from the sale price for the purposes of the Scheme.

22. Privacy and confidentiality

The Act prohibits Copyright Agency from using any of the information it receives from art market professionals pursuant to the Act for any purpose other than administering the scheme in accordance with the Act, unless it has the consent of the person to whom the information relates.

Copyright Agency also adheres to a privacy policy, which complies with the National Privacy Principles under the Privacy Act 1988.

The information is stored in secure systems and is only accessible to those with authority to view it. Apart from the art market professional who provides the information, information will be viewed by authorised Copyright Agency staff for the purposes of administering the scheme – for example, to conduct research on previous sales of an artwork, or to identify a right holder.

23. Copyright Agency's service charter

Copyright Agency's service charter includes specific commitments in relation to its administration of the resale royalty scheme.

These are:

- Notice of an artwork's commercial resale will be published on Copyright Agency's resale royalty website (www.resaleroyalty.org.au) within three business days of receiving formal notification of the resale.
- Copyright Agency will advise those liable that a resale royalty is payable no later than 60 days after receiving formal notification of the resale.
- Copyright Agency will use its best endeavours to collect a royalty as soon as practicable after determining that the royalty is payable.
- Right holders will be paid the resale royalty no more than 30 days after Copyright Agency has collected the royalty.

The charter's general commitments are also applicable to the Scheme. These include commitments to respond to phone enquiries within one working day, and all other correspondence within seven days.

Copyright Agency's service charter is available from its website, www.copyright.com.au.

24. Collecting societies' Code of Conduct

Copyright Agency adheres to the Collecting Societies' Code of Conduct, and reports annually to the Code Reviewer.

The objectives of this Code are:

- (a) to promote awareness of and access to information about copyright and the role and function of Collecting Societies in administering copyright on behalf of Members;
- (b) to promote confidence in Collecting Societies and the effective administration of copyright in Australia;
- (c) to set out the standards of service that Members and Licensees can expect from Collecting Societies; and

(d) to ensure that Members and Licensees have access to efficient, fair and low cost procedures for the handling of complaints and the resolution of disputes involving Collecting Societies.

Matters covered in the Code include governance and accountability, education and awareness, and complaints and disputes.

The Code, and the Code Reviewer's annual reports on Copyright Agency's adherence to the Code, are available from Copyright Agency's website.

Copyright Agency will extend to art market professionals relevant commitments in the Code to licensees, and to resale royalty right holders relevant commitments to its members.

25. Complaints and disputes

There are information sheets about Copyright Agency's complaints handling procedure and its dispute resolution procedure on its website.