

PGAV Fact Sheet

Digitising Collections - Copyright Essentials



PG Public
Galleries
AV Association
Victoria





ACKNOWLEDGEMENT OF COUNTRY

The Public Galleries Association of Victoria (PGAV) acknowledges the Wurundjeri Woi-Wurrung people of the Kulin Nation as the Traditional Owners of the lands where our office is located, and all Traditional Owners of country throughout Victoria and Australia. We recognise Aboriginal and Torres Strait Islander peoples' enduring traditions and continuing creative cultures. We pay our respect to Elders past, present and emerging.

This Fact Sheet has been developed by the Arts Law Centre of Australia.

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This Fact Sheet provides general information as a guide to best practice standards, and should not be relied on as legal advice. It is recommended galleries seek advice from a qualified lawyer on the legal issues affecting them before acting on any legal matter.

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ARTS LAW CENTRE OF AUSTRALIA

The Arts Law Centre of Australia (Arts Law) is Australia's only national community legal centre for the arts. Arts Law provides free and low-cost legal services to strengthen the capabilities and capacity of artists and arts and cultural organisations nationwide. Our services enable artists to deal with issues that can be major barriers to their artistic and financial success.

Arts Law exists to strengthen arts and culture to make a better world. Our vision is to empower artists and creative communities through the law.

PGAV

The Public Galleries Association of Victoria (PGAV) is the peak body for public galleries in Victoria. We represent over sixty galleries, including 19 regional galleries, who together reach 5.3 million visitors annually.

Our Vision

Is a vibrant, cohesive, professional network of public galleries across Victoria that deliver inspiring visual art experiences which are relevant and accessible to the whole community.

Our Mission

Is to build and strengthen the capacity of public galleries in Victoria to deliver valuable cultural, social and economic returns to their communities. To achieve this mission we act as a broker between our members, the three-tiers of government, the private and philanthropic sectors, education and research institutions, the media and the community.



Digitising Collections

OVERVIEW

Public galleries are increasingly digitising their collections and making them available online to the community for viewing and research, including on third party websites like Victorian Collections (victoriancollections.net.au) or Trove (trove.nla.gov.au).

When doing so, they must deal fairly and respectfully with the rights of artists. Some of the key issues to take into account are detailed in this fact sheet.

WHAT IS INVOLVED?

Converting a physical collection of artworks into a digital collection that is available for viewing online generally involves:

1. Creating digital or electronic copies of the artworks – this is usually done by taking high-resolution photographs or scanning.
2. Making those digital or electronic copies available online – this includes by displaying them on a website, in an archive, or on some other platform, accompanied by text.

Carrying out these steps requires permission (a “licence”) from the artist. That licence should deal fairly with copyright, moral rights, and any Indigenous Cultural and Intellectual Property (ICIP) contained in the work.

As a first step, galleries should look at the existing agreements they have with artists and/or donors to see what rights they already have, and as a result, what further rights need to be licensed by the copyright owner (which could be the artist, their estate, or another entity). For the purpose of this fact sheet, the artist is assumed to be the copyright owner.

COPYRIGHT

It is best practice to make clear in any licence that **the artist will retain copyright in their work.**

To be able to digitise an artwork and make it available online, the licence will need to provide the following rights to the gallery or museum:

- **Reproduction right** – this is the right to reproduce the work, for example, by taking a photograph of it.
- **Communication Right** – this is the right to make the work available online or transmit it electronically.

These are two of the rights that belong exclusively to an owner of copyright.

The gallery will need to discuss with the artist whether this licence is:

- **exclusive** – meaning the artist cannot licence the work to anyone else or use it themselves;
- **sole** – meaning the artist cannot licence the work to anyone else but can use it themselves;
- **non-exclusive** – meaning the artist is free to licence the work to other parties.

The artist should be compensated appropriately based on the scope of the licence they provide (i.e. more for an exclusive or sole licence than for a non-exclusive licence).

Any licence from the artist to the gallery should be limited in purpose. This means the licence should only allow the gallery to “reproduce” and “communicate” the work for a specific, named purpose. This could be on a particular platform or website such as the gallery’s website and/or for the purpose of a particular exhibition. If the work is to be available without charge (for example, in an online collection which is free to access), the licence should be explicitly “non-commercial”.

It is likely for digital collections that the licence will need to be perpetual. It is ordinarily best practice for a licence to be limited in time – only for the duration that it is strictly required for the activities planned (for example, an exhibition of 6 months). But given that digital collections are likely to be held and used indefinitely, it is all the more important that the licence is limited in purpose.



If the gallery intends to provide the digital work to third party archives or platforms (like Victorian Collections), its licence from the artist will need to include **the right to sub-licence to third parties**. This means the right to authorise a third party to “reproduce” or “communicate” the work. Where possible, the right to sub-licence should be limited (for example, to a particular platform or archive). When including a right to sub-licence, galleries should generally commit their “best endeavours” to ensuring that any third party to whom the work is sub-licensed will comply with the terms of the original licence between the gallery and the artist.

Some third party terms and conditions (like those of Victorian Collections) may refer to work uploaded under “**Creative Commons**” licences. Creative Commons are a set of free, generic licences for intellectual property creators to distribute their work to the public. All of these licences are non-revocable and last for the duration of copyright. They all grant the licensee reproduction, performance and communication rights in all media and all formats, and require attribution of the artist. However, the licences vary in their other terms (such as whether use can be commercial or not).

It is important for galleries to read the terms and conditions of any third party website very carefully before sharing their online collection items. Galleries need to ensure those terms and conditions are consistent with the rights attached to any work they wish to put up on the third party website. For

example, when uploading work to a third party website (like Trove), a gallery should check what rights are attached to that work and decide whether they (i) already have sufficient permissions to do so, or (ii) they need additional permissions from the artist. Even if a website allows users to upload work with ‘all rights reserved’, galleries still need to check whether they have the necessary permissions to upload work.

MORAL RIGHTS

Artists have three moral rights in their artwork:

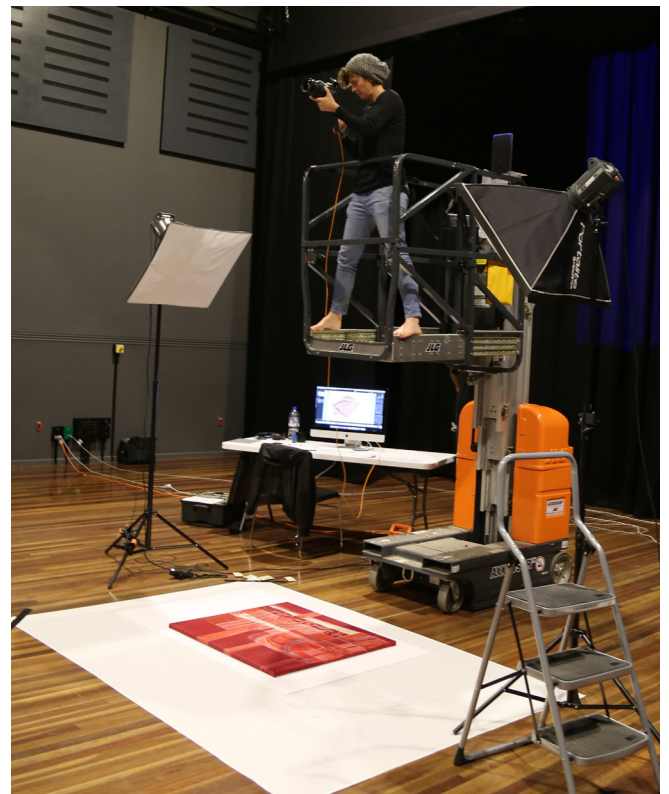
1. **To attribution** – to be credited for their work.
2. **Against false attribution** – not to have someone else credited for their work.
3. **To integrity of authorship** – to ensure their work is not subject to derogatory treatment, meaning that it is not used or altered in a way that could harm their honour or reputation.

These rights should be generally respected and covered in licence agreements.

Galleries should always credit artists in a reasonably prominent manner.

Digitising an artwork may sometimes involve modifying or presenting the work in a way that could affect the artist’s moral rights. For example:

- using low-resolution photographs of a work;
- cropping the work for a web page; or
- placing a work next to online advertising.



It is important to have an open discussion with artists about the digitisation process and how their works will appear online. Galleries should try to obtain **prior written consent** for any modifications or uses that might affect the artist's moral rights.

INDIGENOUS CULTURAL INTELLECTUAL PROPERTY

ICIP refers to all of the rights that Indigenous people have, and want to have, to protect their traditional arts and culture.

When dealing with Aboriginal and Torres Strait Islander artists, galleries should commit to respecting ICIP in their licence terms and in practice. This includes:

- Complying with any restrictions on use of the work notified by the artist.
- Displaying an acknowledgement of any ICIP embodied in the work as notified by the artist (sometimes called a "notice of custodial interest").
- Not using or displaying work in a way that might be considered by an Aboriginal or Torres Strait Islander community to be derogatory, degrading, offensive or inappropriate.

It is important to include these commitments in licence agreements with artists as they are not automatically protected by Australian law.

ORPHAN WORKS

Galleries are not always able to find the copyright owners of artworks that have ended up in their hands, even after a diligent search. These artworks are known as "orphan works".

There is no exception to copyright infringement for orphan works. So, a gallery wanting to digitise (or otherwise use) an orphan work will need to think carefully about doing so because it could become liable for copyright infringement if the copyright owner turns up. Every effort should be made to locate the copyright owner and comprehensive records should be kept of those searches.

If a gallery does intend to go ahead with digitising an orphan work, it is recommended that it use a "**good faith notice**" when the work is displayed online. This is a notice that indicates it has tried to find the relevant copyright owners and invites them to come forward if they have a problem with what is being done. A good faith notice does not prevent a gallery from being sued for copyright infringement. It just demonstrates that the gallery is acting respectfully and in good faith – so that if a copyright owner does appear, they are less likely to take an aggressive approach.

Additional Resources

Arts Law Centre of Australia, Information Sheet, Copyright

<https://www.artslaw.com.au/information-sheet/copyright/>

Arts Law Centre of Australia, Information Sheet, Moral Rights

<https://www.artslaw.com.au/information-sheet/moral-rights/>

Arts Law Centre of Australia, Information Sheet, Indigenous Cultural and Intellectual Property

<https://www.artslaw.com.au/information-sheet/indigenous-cultural-and-intellectual-property-icip-aitb/>

Arts Law Centre of Australia, Information Sheet, Creative Commons

<https://www.artslaw.com.au/information-sheet/creative-commons/>

Image Credits

Cover: Photographing artwork by Ah Xian as part of the Digitisation Program at Hamilton Art Gallery. Artwork: Ah Xian, born China 1960, arrived Australia 1990. *Bust 35 China China* series 1999, porcelain in underglaze cobalt-blue. Purchased by Hamilton Gallery Trust with support from Jason Yeap OAM and Jacqueline de Kievit. Hamilton Gallery Collection. Copyright the artist. Photo: Madi Whyte.

p.1: Digitising artwork by Garry Dish as part of the Digitisation program at Bendigo Art Gallery. Artwork: Garry Bish, *Theatre of convergence*, 2005, slipcast ceramic, 435mm x 665mm x 95mm, Bendigo Art Gallery Collection, Gift of Rod Fyffe 2008. Photo by Leon Shoots.

p.2: Hamilton Art Gallery, Artwork: Howard Arkley. Howard Arkley, Australia 1951-1999, *Australian Home* 1993, acrylic on canvas. Purchased by Hamilton Gallery Trust Fund, Hamilton Gallery Collection; Digitisation Program at Ararat Gallery TAMA. Photo by MDP Photography & Video.

p.3: Latrobe Regional Gallery technician, Ellen Taylor preparing artwork for photography;

p.5: Staff at Wangaratta Art Gallery prepare work from the collection as part of the Digitisation Program.



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