

Visual Arts Industry Guidelines Research Project Copyright & Moral Rights Recommendations

Visual artists and craft practitioners should regard copyright and moral rights as tools to be used to their advantage (both personal and pecuniary).

There is no right or wrong way to use a paintbrush or a potting wheel; similarly there is no right and wrong way for a craft practitioner or artist to deal with his or her copyright or moral rights. Dealing with either copyright or moral rights in one way might be appropriate in one industry or in one set of circumstances, but inappropriate in another.

Nonetheless, one *can* identify what might be described as general starting points or base lines from which artists, craftspeople and people dealing with a creator or with a craft or art work might develop ethical practice. One can also identify a number of statements which flow from these general starting points, together with a series of questions which artists, craft practitioners and people dealing with an artist or craft practitioner, or with an art or craft work which is still in copyright, might pose to themselves or to the person with whom they are dealing, in order to determine “best practice” for their particular situation. Even if an artist or craft practitioner then goes ahead with something which is not “best practice”, at least he or she should be doing so with an awareness that the way they are approaching a situation is less than optimal.

The table below sets out these general recommendations, consequent statements and relevant questions, and should be read in conjunction with the “best practice” recommendations made throughout the rest of the Visual Arts Industry Guidelines Research Project Report. It is important to note, in reading this table, that copyright and moral rights may give rights or impose obligations which are legally enforceable, and that to this extent the comments in this section may differ from comments in other sections of this report, where a failure to observe a recommendation may not have legal consequences.

<i>For artists and craft practitioners</i>	<i>People dealing with an artist/artwork or with a craft practitioner/craft work</i>	<i>“best practice” checklist</i>
Be aware of your copyright rights:	Respect copyright:	
Know what copyright is, how it works, and what uses of art or craft works involve copyright issues.	Know what copyright is, how it works, and what uses of art or craft works involve copyright issues.	Do you have relevant information relating to copyright law and relevant industry practices, on hand? For artists and craft practitioners, have you documented what you have created, and have you put the copyright notice onto your work?
Expect that people who want to use your work in a way that you control under copyright will get your permission first.	Get express permission if you want to deal with a copyright work for a purpose controlled by the copyright owner.	What assumptions are being made as to what can be done with an artwork without express permission? Are these assumptions justified, either as a result of the circumstances or as a result of an exception under the Copyright Act that allows the particular use of the art or craft work without permission? Have the parties identified, discussed and agreed on the uses to which the art or craft work will be put? ¹
Take action if your copyright is infringed.	Admit an infringement, and accede expeditiously to any reasonable demands from the copyright owner.	Have you sought advice to confirm the legal position? Is legal action necessary or desirable, or are you able to negotiate a settlement informally, either yourself or through a mediator? For an artist or craft practitioner, have you thought through what outcome(s) you want as a result of taking any action? Does any settlement include an undertaking not to infringe copyright in future?
Keep up to date with copyright issues relating to visual arts and craft in general and your field in particular.	Keep up to date with copyright issues relating to the visual arts and craft.	Have you recently checked that your knowledge is both adequate and up to date? Do you subscribe to relevant industry magazines, email alert services or other information sources? Do you belong to relevant industry organisations or professional bodies?

¹ See also below for guidelines on proper licensing standards.

<i>For artists and craft practitioners</i>	<i>People dealing with an artist/artwork or a craft practitioner/craft work</i>	<i>“best practice” checklist</i>
Respect other people’s rights and general sensitivities:	Respect other legal rights and general sensitivities	
<p>If an art or craft work you create will transgress someone else’s legal rights or tread on someone else’s sensitivities, proceed deliberately in that knowledge or re-assess your work.</p>	<p>If an art or craft work (or your intended use of an art or craft work) will transgress someone else’s legal rights or tread on someone else’s sensitivities, proceed deliberately in that knowledge or re-assess your dealing with the item.</p>	<p>Do you have relevant information on hand to help you identify when an art or craft work, or the context in which it will be used, may raise legal issues apart from copyright, such as defamation, or trade practices or passing off actions?</p> <p>Do you have relevant information on hand to help you identify when an artwork or its intended use may touch on cultural, sexual, religious or other sensitivities (including Indigenous sensitivities)?</p> <p>What are the consequences of any such transgression or of treading on the relevant sensitivity?</p> <p>Are you comfortable with those consequences in terms of your art practice or in terms of your use of a visual artwork or craft item?</p>

<i>For artists and craft practitioners</i>	<i>People dealing with an artist/artwork or a craft practitioner/craft work</i>	<i>“best practice” checklist</i>
You should own copyright:	The artist/craft practitioner should own/retain copyright:	
Do not assign copyright unless you have assessed that it is in your interests to do so or that it is reasonable in all the circumstances.	Do not request an assignment of copyright.	<p>Is the person who wishes to acquire copyright able to articulate why an assignment is so necessary, or why an assignment is, in the circumstances, not disadvantageous to the artist or craft practitioner?</p> <p>Will a licence (rather than an assignment) cover what the user needs or wants to do with the work?</p> <p>In what ways can any assignment be limited?</p> <p>Is the artist/craft practitioner aware of the consequences of assigning either all or part of the copyright?</p> <p>Is the assignment in return for sufficient (and separately identifiable) payment?</p> <p>Does such payment reflect the potential value of the assignment?</p> <p>Is the potential value of the copyright over the period of the assignment assessable, and if not, can the assignment to be limited by reference to the extent to which the copyright/s value can be assessed?</p>
Do not succumb to undue pressure to assign copyright.	Do not apply undue pressure for an artist/craft practitioner to assign copyright.	<p>If agreement to assign is reached, is it reached on the basis of free, informed and considered consent?</p> <p>Does the artist/craft practitioner fear he or she will lose the job or future work if he or she does not agree to assign copyright?</p> <p>Will the artist/craft practitioner be in a weaker bargaining position in future if he or she agrees to assign?</p> <p>Is the artist/craft practitioner able to articulate why assigning copyright is in this case reasonable?</p> <p>Would the artist/craft practitioner be better off refusing the job, sale or commission rather than assign copyright?</p>
Know when, under the Copyright Act, you will <i>not</i> be the first owner of copyright unless you reach an agreement to the contrary. ²	If, under the Copyright Act, you or your organisation will own copyright in material created by an artist, draw this to the attention of the artist. ³	<p>Does the artist/craft practitioner understand that the general rule about first ownership of copyright doesn't apply?</p> <p>Does the artist/craft practitioner understand the consequences of not owning copyright in this case?</p> <p>Can the commissioning party articulate what they intend to do with the work that makes copyright ownership so necessary?</p> <p>What makes it unreasonable in the circumstances to agree that the artist/craft practitioner will own copyright?</p> <p>In the absence of an agreement for the creator to own copyright, is additional payment being made, and is the artist/craft practitioner to be granted a licence to use the work in portfolios and for promotion?</p>

² This issue is relevant to material created or first published under the direction or control of State, Territory or Commonwealth governments and agencies, and to a limited range of commissioned material: portraits and engravings, and photographs commissioned for private and domestic purposes. It is also relevant to material created by employees.

<i>For artists and craft practitioners</i>	<i>People dealing with an artist/artwork or a craft practitioner/craft work</i>	<i>“best practice” checklist</i>
Do not grant a licence on terms broader than necessary:⁴	Do not request a licence on terms broader than necessary:⁵	
Assess whether the scope of the licence is commensurate with its terms and conditions, including payment.	Assess whether the scope of the licence is commensurate with its terms and conditions, including payment.	<p>Can the person requesting the licence articulate why, in all the circumstances, the terms and conditions of the licence, including payment, are reasonable or, at least, not disadvantageous to the artist/craft practitioner?</p> <p>Have the parties identified what uses are likely to result in immediate or likely future revenue streams?</p> <p>Does payment (whether by way of an up-front fee and/or royalties) reflect each of the potential revenue streams from the immediate or future use of the artwork under the licence?</p>
Get information about recommended licensing terms and conditions. ⁶	Get information about recommended licensing terms and conditions ⁷	<p>Have the parties considered how industry practices, scales of fees and licensing standards apply to their situation?</p> <p>Is the artist/craft practitioner in a position to licence the work (for example, does he or she own copyright in the work, or does the work contain any third-party material which might need separate clearance?</p>
Do not succumb to undue pressure to grant a licence in broad terms unless you have assessed it is in your interests to do so or that it is reasonable in all the circumstances.	Do not apply undue pressure to acquire a licence in overly broad terms.	<p>If agreement to a licence in broader terms than strictly necessary is reached, is it reached on the basis of the artist’s free, informed and considered consent?</p> <p>Does the artist/craft practitioner fear he or she will lose the job or future work if he or she does not agree to the licence?</p> <p>Will the artist/craft practitioner be placing him or herself in a weaker bargaining position in future if he or she agrees to a licence in overly broad terms?</p> <p>Is the artist/craft practitioner able to articulate why an overly broad grant of rights on this particular occasion is reasonable in all the circumstances?</p> <p>Would the artist/craft practitioner be better off refusing the job, licensing opportunity or commission rather than agree to the terms and conditions of the licence?</p>

³ See previous footnote.

⁴ Or commission the creation of copyright material which includes a licence to use the commissioned material which is broader than necessary.

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⁶ Contact, for example, VISCOPY, ACMP, AIPP or AGDA (for contact details see pages ...).

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<i>For artists and craft practitioners</i>	<i>For people dealing with an artist/artwork or with a craft practitioner/craft work</i>	<i>“best practice” checklist</i>
Expect that your moral rights will be respected:	Respect the moral rights of artists and craft practitioners:	
Do not consent to uses of your work which would otherwise infringe your moral rights unless you have assessed it is in your interests to do so or that it is reasonable in all the circumstances.	Get consent to a dealing with an art or craft work which would otherwise infringe his or her moral rights.	<p>Is the person requesting the consent able to articulate either why he or she requires the consent, or why the granting of the consent would not be disadvantageous to the artist?</p> <p>Are there industry practices or standards which are relevant to the granting or withholding of a consent?</p> <p>In what ways will the consent operate against the interests of the artist?</p> <p>Is the consent really necessary for the purposes of the person requesting the consent?</p> <p>Is the consent expressed as narrowly as possible to deal with the particular reason for which the consent is sought?</p> <p>Is the artist/craft practitioner to be paid an additional sum in return for any consent?</p> <p>Is consent expressed as narrowly as possible to deal with the situation in relation to which the consent is sought?</p> <p>Would the artist/craft practitioner be better off refusing consent?</p>
Do not succumb to undue pressure to obtain a consent.	Do not apply pressure to obtain a consent to do something which otherwise would infringe an artist’s moral rights.	<p>If consent is given, is it a free, informed and considered consent?</p> <p>Does the artist/craft practitioner fear that he or she will lose the job, licensing opportunity or future work, if he or she does not give the consent?</p> <p>Will the artist/craft practitioner be placing him or herself in a weaker bargaining position in future if he or she grants the consent?</p>
Take action if your moral rights are infringed.	Admit an infringement, and accede expeditiously to any reasonable demands from the artist.	<p>Have you sought advice to confirm the legal position?</p> <p>Is legal action necessary or desirable, or are you able to negotiate a settlement informally, either yourself or through a mediator?</p> <p>For an artist/craft practitioner, have you thought through what outcome(s) you want as a result of taking any action?</p> <p>Does any settlement include an undertaking not to infringe moral rights in future?</p>

<i>For artists and craft practitioners</i>	<i>For people dealing with an artist/artwork or with a craft practitioner/craft work</i>	<i>“best practice” checklist</i>
Record any agreement in writing.	Record any agreement in writing, including any consent to an action or activity which would otherwise infringe an artist or craft practitioner’s moral rights.	Does the agreement or consent include everything that has been agreed to?
Before entering any agreement, get advice or information as to the effects of the agreement.	Give an artist the opportunity to get advice or information as to the effects of an agreement.	Have you researched what legal and industry advice and information is available in relation to your situation? ⁸ Is the agreement, licence or consent both in line with industry practice and not disadvantageous to the artist/craft practitioner? If an artist/craft practitioner, have you identified both the advantages and disadvantages of entering the agreement or granting the permission or consent? Has legal advice been obtained?

⁸ For further information see the bibliographies and contact lists, pages