

5 FEB 2007

FILE No:

DOC 207/9913

MARS/PRISM:

Visual Arts
Copyright Collecting
Agency

viscopy

2nd February, 2007

John Laughlin
Acting Director
Transport and Prices Oversight Branch
Australian Competition and
Consumer Commission
GPO Box 520
Melbourne, VIC 3001

Dear Mr. Laughlin

**RE: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)
DRAFT DOCUMENT "COPYRIGHT LICENSING AND COLLECTING SOCIETIES:
A GUIDE FOR COPYRIGHT LICENSEES" - VISCOPY SUBMISSION**

1. Many thanks for giving Viscopy the opportunity to provide a submission concerning the above document.
2. As the draft Guide is more familiar with the music market than with the market for visual art reprography, a background brief has been included at Attachment A. Further information can be found on our website www.viscopy.com.

Purpose of the Draft Guide

3. Viscopy welcomes the draft Guide, as it will educate Licensees about the *Copyright Act 1968*, including their obligations and the desired balance between creators and Licensees.
4. In the market for visual art reprography, there has been a great need to educate Licensees, and Viscopy has not had the funds to undertake this important task.

General Comments

5. It could be clarified whether the Guide is purely for the benefit of Licensees, or intended to be the guidelines to which the Copyright Tribunal can have regard in any proceedings.
6. As each domestic collecting society operates in unique market circumstances, with different art forms, representing diverse sets of rights, it may not always be helpful for Licensees if the Guide is focused on a single, generic, theoretical market.
 - Examination of issues of competition should feature a variety of examples from different markets and collecting societies. This is because the Licensing experience in the music industry would be very different to the Licensing experience in film and television, publications or the visual arts.
7. Statutory collecting societies have different operational mechanisms than voluntary collecting societies. Not all collecting societies are the same, or are necessarily monopolistic.

Comments on Specific Chapters

Chapter 2

P8 Viscopy agrees with the Copyright Council that the exceptions listed should include those made in the *Copyright Amendment Act 2006*.

P9 While Viscopy often directs generic queries from Licensees and the public to the Australian Copyright Council website, collecting societies also spend a great deal of time answering copyright queries.

Chapter 3

P10 Viscopy would suggest a revision of p10, para 5. It currently reads like economic theory, and could refer to specifics.

Viscopy's aim is to generate royalty income for members, long term. This gives us a greater responsibility than to purely act as a corporate entity, driven by market forces in our own market interest. Viscopy is not the most profitable business opportunity in the visual arts sector. It is, however, a proven way to generate licensing royalties for visual artist members.

P11 The correct website address for Viscopy, p11, is www.viscopy.com

P14 The Guide could perhaps note that in the five years of the Code's operation, the Australian Government has not developed a mandatory Code. During this period at collecting societies, a significant amount of staff hours have been spent servicing the Code, together with internal training and complaints processes.

Chapter 4

P17 The Guide could note that there are examples of jurisdictions where more than one collecting society has been declared for a right, or where societies compete. It does not follow that declared societies are necessarily monopolies.

P18 Viscopy is a voluntary collecting society that does not own the rights of our members, nor do we have an assignment of these rights. Our voluntary membership agreements enable us to exclusively license the works of our members, but give them the ability to withdraw from any license they do not wish to partake in.

- Viscopy must contact the artist member regarding any license with moral rights implications, or commercial advertising.
- Members can request in their membership agreements to be contacted if a particular type of licensing event could involve the members artworks, giving them the ability to refuse to take part.
- Our license also allows members to license their own material for a fee, particularly when they can generate a greater return than the Viscopy minimum rate for a License.
- Where members wish to waive their fee they must inform Viscopy in writing.

- Indigenous artists often do not wish sacred works to feature in commercial advertising.

P18 The Guide could note that in some markets, such as the visual arts, the Licensees can have a great deal of market power and have more financial resources than the collecting society. This is because in some markets there is no equivalent of a copyright owner who is not an individual creator.

Chapter 7

P33 Viscopy notes that the Guide states the ACCC can become a party to Tribunal proceedings where it is in "the public interest", and then defines "the public interest" purely in terms of market activity. However it is also relevant, when considering the public interest, to note that collecting societies operate in creative industries. The maintenance of the creator is also in the public interest, although harder to define in market terms.

Chapter 8

P34 The Guide argues that all collecting societies are monopolies. Collecting societies could also be seen as groups of members with an administration.

Viscopy would argue that in practice the collecting societies are already modified, engineered and restricted, through legislation and reporting mechanisms, through the Copyright Tribunal, Codes of Conduct and Review, member activity, and cultural benefits to society.

In any event, with voluntary membership agreements, a mandate of only 1/3 of Australian visual artists and the capacity for members to opt out of licensing arrangements, Viscopy is clearly not a monopoly. We compete with other collecting societies and galleries in the licensing of members works, and this negatively impacts royalty income for members.

P35 Viscopy services a number of Licensing groups including auction houses, commercial galleries, public galleries, Government, corporate sector, film and television, advertising and manufacturing. Many of these groups are more powerful and well endowed than Viscopy, which explains the low level of royalty income for our members. Enforcement is very difficult if the collecting society cannot afford to go to court, or even the Copyright Tribunal.

P35/36 Price greater than marginal cost. This argument presumes goods are substitutable and that the copyright material will be reproduced in ways that do not always occur for the visual arts. For Viscopy to License the rights of a young unknown Australian artist, as opposed to the known quantity of Picasso, requires a considerable amount of entrepreneurial activity in the market. The cost of distribution is funded by the commission withdrawn from the resulting royalty, but the cost of generating the license is most definitely not zero, or close to zero. In our market the rights themselves are goods that are distinct from the original work, which sells for a much higher amount than any reproduction ever will.

P36 To assess whether a Licensee has low or high price elasticity of demand would appear to require a License to have taken place.

Conclusion

While Viscopy welcomes the Guide, we are concerned that taking matters to the Copyright Tribunal is not an affordable avenue for all collecting societies, regardless of the merits of the case. In contrast, many of Viscopy's Licensees are well able to afford taking matters to the Tribunal.

Viscopy welcomes the opportunity to contribute further to the development of the Guide. Please do not hesitate to contact me on (04) 11 514 535, should Viscopy be of further assistance.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'For Chryssy Tintner', followed by a long horizontal line.

Chryssy Tintner MBA MFA
CEO, Viscopy

BACKGROUND BRIEF

Introduction to Viscopy Ltd, Our Membership and Operations

i. Viscopy Ltd. is a non-profit, voluntary copyright royalty collecting society for the visual arts in Australia, owned by 6678 individual professional visual creators. Viscopy represents rights for fine artists, illustrators, cartoonists, textile designers, photographers, crafts workers, sculptors and architects. Viscopy represents over 1/3 of professional visual artists in Australia, according to the definition in the *Copyright Act 1968*.

ii. Over 40% of Viscopy members are Aboriginal and Torres Strait Islander artists. This proportion is because of the high number of Indigenous visual artists in Australia. These members speak a total of 38 languages.

iii. Membership of Viscopy is voluntary, and free. Since 2003-4, Viscopy is fully funded by a commission on the royalties we collect for members.

Creation of Viscopy to Prevent a Market Failure

iv. Viscopy was established in 1995-6 with the assistance of the Commonwealth and the National Association of Visual Arts (NAVA).

v. Prior to that date there was no organisation that could license the direct use of either domestic or international visual reproductions for the territory of Australia. As a result visual artists were not able to secure payment for the use of their works. There was complete market failure in that the works were still used, but not paid for.

vi. There continues to be an imbalance of market power between the companies, Governments and cultural institutions who are Licensees, and the individual artist. However Licensees play an essential role in the functioning of the market.

vii. As a group, Australian visual artists are among the poorest of creators, earning an average of \$17,000 per annum according to the most recent research by the Australia Council. They are generally unable to afford legal actions.

viii. Over the past ten years Viscopy has had between two and six permanent staff. As a result it has been difficult for us to police infringements of our members works, and we depend upon them to report infringements. It has also been challenging to charge tariff rates for uses the market previously had for free. To date we resolve infringements through letters, and have only been able to afford one legal action, which was settled out of court.

Change From Public Funded to Self Sufficient Collecting Society

ix. Viscopy operations were funded by the Commonwealth Government until 2003-4.

x. In 2005-6 Viscopy royalty income was a total of \$1.2 million. This was the highest ever for Viscopy and resulted in a profit for the company without public support for the first time, of \$23,000.

xi. For the past three financial years the only public funding we have received has been a grant to fund our Indigenous Copyright Education program. This is because, given the large number of Indigenous artists in remote areas, it is beyond us to fund the travel and linguistic requirements of that program.

Membership Agreements and Rights Represented

xii. Viscopy members elect, in voluntary membership agreements, which of two sets of rights they wish to be represented:

- a) Primary rights are represented for 60% of Viscopy membership, and include royalties resulting from the direct licensing of images. Viscopy provides direct licensing services for Licensees, including: auction houses, cultural institutions, commercial galleries, film makers, public art galleries, libraries, manufacturers, publishers and other users of direct licensing image services, such as retail; and
- b) Statutory rights refer to Government and Educational use and these royalties can be received on behalf of 96% Viscopy members. The remaining 4% are represented by other collecting societies for statutory rights only.

xiii. While Viscopy members can receive statutory royalties, they are collected by the two collecting societies declared for these rights under the *Copyright Act 1968*, the Copyright Agency Limited (CAL) and Screenrights. Viscopy members receive royalty income from both these collecting societies. In addition CAL has visual artist members and there has been a certain level of competition between Viscopy and CAL, for members.

xiv. Provision for carve outs or exclusions from rights representation is made at the back of our standard membership agreement. Generally this is used when member artists wish to exclude a gallery who represents their original works for sale, as the artist benefits financially from the reproductions used in promotion. This section can be used for any exclusion desired by the artist member.

xv. It is essential these types of exclusions are sent in writing to Viscopy, by the artist member, so that the particular use can be excluded from general Licensing.

xvi. The Viscopy tariff has lower rates for non-commercial use and non-profit use.

xvii. It is of course up to the artist if they wish to waive their royalties, so long as they inform us. In our experience this rarely happens, as visual artists need even small streams of income very badly.

Services to Members

xviii. Viscopy campaigns for legislative provisions in relation to copyright and reprography, for the resulting benefits to creators and copyright owners.

xix. In addition to managing the rights of our members, Viscopy provides services for them including advocacy, Indigenous services, educational services, information, non-legal advice, infringement services and moral rights services.

xx. Where legal advice is required for members, our officers and legal advisor Virginia Morrison work with the Arts Law Centre of Australia, the Australian Copyright Council and pro bono lawyers, to ensure members have representation.

Services to Licensees

xxi. Viscopy provides licensing services for our Licensees which include auction houses, commercial galleries, film makers, public art galleries, manufacturers, Government, the corporate sector, publishers and other users of the direct licensing of artworks, such as retail.

Accountability

xxii. Viscopy is a non-profit company that operates under the Australian Corporations Law. In addition we are covered by our Constitution, which is available online, and accountable to members. We also adhere to a voluntary *Code of Conduct for Collecting Societies*, a review of which is carried out annually by Justice Burchett, QC. Reporting to this review is extremely time consuming for a small organisation, but we see it as a valuable investment in the continuous improvement of our services to both members and Licensees.

xxiii. Viscopy is a voluntary collecting society. We are not declared for particular legislated rights, although this may change in the future.

xxiv. We do not report to the Attorney-General officially, although in practice we have a close working relationship, and we see him several times a year. As an example we would provide him with all annual reports and newsletters, although we are not required to do so.