



19 August 2021

Australian Competition and Consumer Commission (ACCC)

Sent by email to: [digitalmonitoring@acc.gov.au](mailto:digitalmonitoring@acc.gov.au)

## **ARTS LAW SUBMISSION RESPONSE TO JULY 2021 ISSUES PAPER ‘DIGITAL PLATFORM SERVICES INQUIRY – MARCH 2022 REPORT ON GENERAL ONLINE RETAIL MARKETPLACES’**

### **Introduction and response to key issues**

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The Arts Law Centre of Australia (‘Arts Law’) is the national community legal centre providing free or low-cost legal advice to artistic creators residing in all Australian states and territories. Arts Law makes this submission on behalf of our broad client base and in particular, creators involved in the visual arts and craft markets and peak or professional organisations which represent the interests of the above clients. Arts Law is in a unique position, having advised many artists who sell their work on online retail marketplaces (hereafter **online marketplaces**) or who have experienced copyright infringement or consumer law issues with the conduct of sellers on online marketplaces. A large percentage of concerns relayed to Arts Law around online marketplaces have affected Aboriginal or Torres Strait Islander artists, however these issues are not isolated to this group of artists.

Arts Law understands the ACCC is seeking general information and views on whether consumers are presented with sufficient information to inform their purchasing decisions, and whether there are processes in place to exclude or remove products that may be misleading and what mechanisms in place for consumers to report products to marketplaces and seek (and receive) redress.<sup>1</sup> In particular, Arts Law seeks to respond to the following key concerns highlighted in the Issues Paper:

- (b) Relationships between general online retail marketplaces and third-party sellers and;
- (c) Relationships between general online retail marketplaces and consumers.<sup>2</sup>

Arts Law assists thousands of Australian artists and organisations on an annual basis, many who have encountered legal problems relating to the use of their artwork or culture in an online marketplace. The main issues relate to two forms of infringement which have a carryover effect on consumers who are seeking to purchase authentic products; one being copyright infringement and other, broadly could be referred to as cultural infringement.

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<sup>1</sup> Digital platform services inquiry - March 2022 report - Issues paper (pp 14-15).

<sup>2</sup> Digital platform services inquiry - March 2022 report - Issues paper (pp 12-15).

The challenges in addressing these issues on online marketplaces are as follows:

- (1) Each online marketplace platform has its own individual user terms and conditions, along with policies that govern the platform. Depending on the platform's take down policies, the platform may decide that there has not been a breach of the terms and conditions (for example, by reason of no established fault-at-law like a determination of a court which is often guided by laws in a foreign jurisdiction).
- (2) Infringers or infringing product often appears across several different vendor sites and having the work taken down from one of these does not solve the whole problem for our clients who often feel they are playing 'whack-a-mole' to address infringements which continually 'pop up' on new vendor pages of online marketplaces.
- (3) The anonymity afforded to vendors on online marketplaces mean that where there is an infringement of copyright or cultural property, identifying who is engaging in that conduct is often almost impossible creating a perfect environment for the infringer to continue their infringing consequence free.
- (4) Indigenous Cultural and Intellectual Property (ICIP) is inadequately protected under our current legal system. The vulnerability of ICIP has been exacerbated through the ease with which it can be exploited through online marketplaces. Consumers often believe they are purchasing authentic Indigenous products and online marketplaces do not have strong policies prohibiting users/vendors from listing, selling, or promoting materials, products or services which use Indigenous Cultural and Intellectual Property in an unauthorised way.

### **Copyright Infringement on online marketplaces**

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Arts Law has assisted numerous clients who have experienced instances of copyright infringement on online marketplaces which indicates consumers are being deceived into assuming such listings are for a genuine, authentic product or that it has been licensed legitimately to the online vendor by the rights holder or creator.

Matters which have come to Arts Law's attention, include instances where artists have searched their name or brand via a search engine and been directed to a listing on an online marketplace which reproduced their artwork without permission, or referred to their brand in the detail description. In these circumstances, consumers are led to wrongly assume that the artwork is authentic, or that the vendor is supplying the product in association with the artist.

In these cases, Arts Law's clients have followed the online marketplace's intellectual property complaints process and been informed by the online marketplaces that in their view there was no 'copyright violation'. This finding by the online marketplace has often been contrary to Arts Law's view that a copyright infringement has occurred. Further, online marketplaces often require proof of a trade mark with no consideration of the 'misleading and deceptive conduct' or 'passing off' actions under Australia's consumer laws.

#### **Arts Law Case study – online infringement on an online marketplace**

Arts Law was contacted by an artist who reverse image searched her artwork and became aware that it an identical duplicate of the artistic work was being made available by a seller for sale as a print. The artist went through the online marketplace's intellectual property complaints process, who took action to take down the listing. The next day, the artist conducted a search and was dismayed to see that the same reproduced artwork was being offered for sale under a new seller account on the online marketplace. The artist informed us that this was a weekly occurrence and that each time she was made aware of it, she had to go through the time-consuming complaints process. It was a very disheartening and frustrating experience for this artist to have to continually lodge a complaint where it was so easy for the seller to simply create a new account to sell the infringing copies of the artistic works. Arts Law published [this case study in 2019](#) to highlight this issue. This is a typical scenario where rights are infringed – unfortunately, in situations like this one, finding out who listed the infringing content without verifiable vendor details being available means that the copyright holders only option is to use the platform to have the material taken down. Their options for pursuing the infringement further are significantly limited and not without huge resource expenditure.

#### **Concerns around inauthentic Indigenous Art**

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Despite the Australian Government's recent 2020 response to the House of Representatives Standing Committee on Indigenous Affairs - Report on the impact of inauthentic art and craft in the style of First Nations peoples<sup>3</sup> the sale, supply and production of inauthentic Indigenous Art appears to be as active as ever on online marketplaces. Arts Law regularly advises Indigenous artist clients and Indigenous cultural practitioners who have found artwork or cultural works which are inauthentic Indigenous Art, or products embodying inauthentic Indigenous Art. Arts Law has been made aware of various instances where inauthentic art has been sold on online marketplaces and it is our view that these online marketplaces should have greater responsibility to ensure that the authenticity, authorship or provenance of these works aren't misrepresented to consumers.

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<sup>3</sup> Australian Government response to the House of Representatives Standing Committee on Indigenous Affairs—Report on the impact of inauthentic art and craft in the style of First Nations peoples <<https://www.arts.gov.au/documents/australian-government-response-house-representatives-standing-committee-indigenous-affairs-report>> 11 Sep 2020

In 2016, following representations by Indigenous community members and artists, key peak bodies, the Arts Law Centre of Australia, Indigenous Art Code and Copyright Agency began to explore how to best respond to concerns about the growing presence of inauthentic 'Aboriginal style' art and craft products and merchandise for sale across Australia. The First Nations art and souvenirs sector has increased over the last 50 years, now generating revenue in the order of \$300-500 million per year.<sup>4</sup> Sadly, it is estimated that 80% of this souvenir product is not made by Aboriginal or Torres Strait Islander people.<sup>5</sup> In response to the concerns, the 'Fake Art Harms Culture' campaign was created to address the widespread sale of works that have the 'look and feel' of being Indigenous but have no connection to Aboriginal and Torres Strait Islander communities. These are commercially produced goods, often made from non-traditional materials; and featuring inauthentic and culturally inappropriate designs. The current lack of transparency, accountability and verification present in many online marketplace transactions makes it difficult, if not impossible for consumers to identify whether Indigenous Art or souvenirs are fake or real product.

Consumers in Australia are protected from misleading and deceptive conduct by legislation. It is entirely reasonable therefore for them to assume that a piece appearing on an online marketplace, whether a high-end original work or a small souvenir, that resembles an Aboriginal or Torres Strait Islander work was, in fact, created by an Aboriginal or Torres Strait Islander artist and that it is an authentic representation of Aboriginal or Torres Strait Islander culture. The Indigenous Art Code, which is supported by the Australian Government, has played an important role in helping to establish standards and benchmarks that can increase consumer confidence, but it is voluntary, its resources are limited, and it is still evolving. Presently, consumers are at a high risk of being misinformed, paying an unreasonable price, believing their purchase financially benefits an Indigenous artist or creator when that is not necessarily the case, or they may be unaware they are collecting a culturally inauthentic or even inappropriate piece.

There are many Australian businesses of all sizes who play a role in the licensing, reproduction, distribution and sale of Indigenous art products and merchandise and who either utilise or compete directly with online marketplaces. Many companies work closely with Indigenous artists and communities, meeting the industry best practice standards and ethical benchmarks set out in the Indigenous Art Code. However, this good practice which includes fair remuneration and recognition comes at a higher cost than for the business that imports cheap, fake goods for sale. The existence of a strong and fair Indigenous visual arts sector is as reliant on distribution and sale as it is on production. Current arrangements potentially financially disadvantage those businesses that are 'doing the right thing' and therefore risk their sustainability as well as the sector more broadly.

As detailed in previous submissions made by Arts Law and reflected in other reports of previous inquiries, we recommend key reform areas that should be considered to enhance legal protection for the Aboriginal and Torres Strait Islander art market law reform in Australian

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<sup>4</sup> *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996, 32.

<sup>5</sup> *Inauthentic Aboriginal and Torres Strait Islander 'style' products purchased by Indigenous Art Code Limited and the Arts Law Centre of Australia* <<https://www.artslaw.com.au/fake-art-harms-culture/>> (June 2016).

Consumer Law, and standalone laws protecting the expression of Indigenous culture. However, Arts Law's view is there is scope within the existing legal framework for online marketplaces to tighten their terms and conditions for sellers and to streamline their intellectual property complaints processes for copyright owners. More needs to be done so that consumers have more transparency around the products they are purchasing on online platforms.

## **Conclusion**

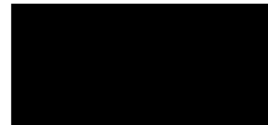
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Arts Law appreciates the opportunity to make these submissions and welcomes any further discussion. Arts Law would be very pleased to engage in further discussions around how online marketplaces can improve their practices and transparency. Please contact Arts Law by email to [artslaw@artslaw.com.au](mailto:artslaw@artslaw.com.au) or (02) 9356 2566 if you would like us to expand on any aspect of this submission, verbally or in writing.



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