



Art law – recent developments

January 2021 issue

Welcome to the latest issue of our "Art law - recent developments" newsletter in which we discuss legal issues currently affecting the global art community.

In this issue we look at:

- Data protection and 5MLD
- Digital Collections: Reflections on copyright
- What are the Generally Accepted Views of Scholars?

Data protection and 5MLD

The Fifth Money Laundering Directive (5MLD) came into force on 10 January 2020 and imposes on art market participants a new obligation to carry out a range of due diligence checks on their customers and staff.

5MLD presents particular issues in relation to data protection law. This is because 5MLD calls for the collection and retention of greater amounts of personal data, whereas EU and UK data protection law essentially aims at eliminating unnecessary or excessive personal data collection and use.

There are also specific data protection obligations in the UK legislation implementing 5MLD, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 and the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (together, the MLRs). The MLRs mandate specific steps in relation to data protection disclosures and safeguards, which art market participants must fulfil or risk falling foul of data protection law, with all the potential for fines, claims and reputational damage that this entails.

These issues have been made more problematic due to the stress that the Covid-19 pandemic has placed on data protection compliance. The pandemic may have had a significant effect on staff availability (including those staff who would monitor and enforce data protection compliance) and remote working increased distance selling may result in personal data being sent electronically for AML purposes, rendering it vulnerable to cyber attacks.

With effect from 10 January 2020, the Fifth Money Laundering Directive (5MLD) requires art market participants to carry out customer due diligence in all cases where the value of a transaction, or several linked transactions, is €10,000 or more. This will involve collecting information on individuals who are customers, officers or beneficial owners of a corporate customer, or connected to customers. In some circumstances, individual employees of an art market participant may also need to be screened. For detailed information on the requirements to carry out customer due diligence and employee checks, please see our articles on this topic from [May 2019](#) and the follow up from [January 2020](#).

Personal data and AML art market checks

Personal data is information that relates to an individual who is, or who can be, identified from it. The anti-money laundering/terrorist financing (AML) checks required under 5MLD will necessarily involve the collection of significantly greater amounts of personal data of customers and employees than was previously the case. The types of information that art dealers and auction houses may need to collect and use for these AML checks may also be more sensitive or private than the types of information traditionally collected, involving a greater need for, or expectation of, confidentiality and security. For example, instead of just names and addresses, dealers may now have to obtain and store peoples' passport details in order to verify their identity. Passport details would clearly carry a significant risk of identity theft or fraud were they to fall into the wrong hands. Where enhanced due diligence is required, even more intrusive searches will be necessary, including in relation to a potential customer's source of wealth. There would be a higher risk of financial loss or distress to the individual if this type of information were to fall into the wrong hands, and the security measures taken should be proportionate to the risk and types of personal data involved.

When AML checks are carried out, the results of those checks may also result in the creation and collection of additional personal data – for example, screening may uncover the fact that an employee has a criminal record, which information would be passed back into the care of the dealer or auction house that requested the check. Such sensitive information requires even more stringent safeguards.

The collection and handling of personal data is regulated by the General Data Protection Regulation (EU GDPR), plus, in the UK, the Data Protection Act 2018 (DPA) and, from 1 January 2021, the GDPR as it is implemented into UK law (UK GDPR). For the purposes of this article we shall refer to both the EU GDPR and the UK GDPR as the "GDPR", as there are no relevant material differences between them at this stage. The GDPR and DPA limit the ways in which organisations may collect, keep and use their clients' and employees' personal data.

The requirements of the GDPR and DPA, and the associated data protection obligations in the MLRs, may pose a challenge to art dealers and auction houses subject to the new AML obligations, since they impose restrictions and requirements around how personal data collected for AML purposes (or otherwise) may be used.

There are significant consequences for institutions with AML obligations that do not comply with data protection rules when carrying out their AML due diligence – the well-publicised maximum fines of 20 million Euros or up to 4% of total worldwide turnover for the previous year provide a strong incentive, not to mention the possible reputational damage. Data subjects are also becoming increasingly active in bringing legal claims for damages against organisations where their personal data has been misused. They do not need to prove financial loss in order to be awarded compensation – distress or unjustified "loss of control" over their personal data may be sufficient for a claim to succeed.

So what are the key data protection responsibilities that dealers and auction houses need to bear in mind when conducting AML checks?



GDPR and DPA data protection requirements

Firstly, there are general requirements applicable to all personal data, which will be even more relevant now that greater amounts of it will rest in the hands of those subject to 5MLD. Some of the key requirements mean that art market participants must:

1. ensure that they have **grounds** to process the personal data that they are collecting, keeping and obtaining in the process of carrying out their due diligence and checks on individuals. For the regular personal data that is necessary for AML checks then the ground is likely to be that its processing is necessary for compliance with a legal obligation. For more sensitive information – such as criminal convictions data or data on ethnic origin – additional grounds must apply, for example, that the use of this data is necessary for the purpose of preventing unlawful acts or making an AML report;
2. provide, in their policies and procedures, for individuals to exercise their **rights** and give information about the scope of these rights – it

- should be made clear that individuals' rights cannot override a conflicting legal obligation, so a person cannot exercise their right to have their data deleted if there is an overriding legal obligation to give that information in a suspicious activity report;
3. make sure that their **contracts** with service providers cover certain prescribed areas as mandated by the GDPR, for example providing that the participant has a right to object to the appointment of a sub-contractor by the service provider;
 4. provide for safeguards where transferring any personal data **abroad**, or making it available to persons overseas. If the recipient is in the EEA or a country deemed to be "adequate" (such as Japan or Switzerland) then no further safeguards will be needed. However, if the recipient is in a non-adequate country, then a safeguard such as entering into standard contractual clauses (SCCs) with the recipient will be required. As a result of the decision in *Data Protection Commissioner v Facebook Ireland Limited & Maximillian Schrems*, when relying on safeguards such as SCCs, it is also important to assess whether the recipient country can protect the personal data to a standard that is essentially equivalent to the protection given under EU law. For detailed information on this decision, in particular in relation to transfers of personal data to the United States, please see our article on this topic from [July 2020](#);
 5. provide appropriate transparency **information** to data subjects about what is being done with their data, for example making sure that their privacy notice refers to the fact that their data will be used to make checks required by law and may be passed to law enforcement. Privacy notices should be drawn to individuals' attention at the time that they give their information to the art market participant;
 6. keep all personal data **secure** using "technical and organisational measures" that are appropriate to the context and risk. This includes ensuring that internal access to due diligence documents is limited to those staff members who need them for their role, as well as the more obvious measures to secure information against loss or cyber attack, particularly in relation to higher risk and more sensitive or private information. One simple security measure that could be considered is encrypting personal data both when it is in use and at rest. However it is important to note that the GDPR does not mandate specific security

measures – these will be context and risk-specific in each case; and

7. comply with the requirement to **store** the personal data collected for the purpose of AML checks for no longer than necessary to fulfil that purpose. Where there is a legally-prescribed storage period (for example, the MLR prescription that the results of certain searches must be kept for five years), then this provides sufficient legal grounds to do so. However, if and when there is no legal requirement to keep personal data collected for AML purposes (or otherwise), such as once those five years have elapsed, then art market participants must consider whether it is still necessary to retain it for the purposes for which it was collected. If not, it must be securely deleted. There is often reluctance to delete historical records, but records of past business may usually be retained, if there still is a good business reason to keep them. Those in the art market should note that the longer they keep personal data, the greater the risk of a data breach or of accidental loss or misuse, so regular deletion of papers that are no longer needed should be seen as part of good housekeeping and risk mitigation.



MLRs data protection requirements

Secondly, the MLRs impose specific data protection requirements on art dealers and auction houses, above and beyond the standard GDPR/DPA obligations outlined above.

In particular, the MLRs state that personal data that is obtained by dealers or auction houses for AML purposes may only be processed to prevent money laundering or terrorist financing, unless another law permits this or the affected individual has consented. So a dealer cannot use information obtained in order to carry out AML checks on a person, or as a result of such checks, to then profile that person, for example. So a dealer whose searches had uncovered the fact that a client has Italian connections cannot

then use this information to mark them as potentially being interested in Italian art. AML checks and information should be kept separate from a business' other activities.

The MLRs also require that, before establishing a business relationship or entering into an occasional transaction with a new customer, dealers and auction houses must provide the customer with a statement that any personal data received from the customer will be processed only as set out above – i.e. for AML purposes, as permitted by another law or as consented to by the customer. This statement is in addition to the normal transparency information that is required under the GDPR as set out in point 5 above. The statement would be likely to appear in the same place as the rest of the GDPR's transparency information, which is normally a dealer or auction house's privacy notice.

The timing requirement to give this statement before a business relationship is established (and the need to give the general GDPR transparency information at the time personal data is obtained) means that it is particularly important that dealers and auction houses ensure that privacy information is given early on in interactions with a potential new customer. It will be crucial to do so before any transaction is carried out - i.e., before any work is handed over to the customer.

The reliance regime in the MLRs may also have data protection implications. Put simply, this is where an art market participant ("**Receiving Participant**") may rely on the AML checks carried out by another regulated participant in the EU with whom it is working ("**Disclosing Participant**"), rather than the Receiving Participant carrying out its own checks. The Disclosing Participant must agree to provide the Receiving Participant with the customer's AML results upon request. Sharing the results of AML checks in this way would necessarily involve sharing personal data, which would carry an element of risk for the Disclosing Participant. The Disclosing Participant would therefore be likely to request some assurances from the Receiving Participant: for example, that it will only use the data for AML purposes, that it will keep it securely and delete it once no longer needed. These data protection risks may make market participants reluctant to use the reliance regime, although the risks are not insurmountable with an appropriate data sharing agreement.

There are straightforward ways of making the 5MLD and data protection regimes work side by side. However, it is true to say that the increased amounts, and riskier types, of personal data that art dealers and auction houses will have to handle under 5MLD will make it more important than ever for them to focus on complying with their data protection responsibilities.

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Digital Collections: Reflections on copyright

Over recent years, there has been a huge growth in digital collections of artwork held by galleries and museums, much of which has been made available online. During 2020, as the majority of society in countries around the world has been locked down in some way or another due to the Covid-19 pandemic, there has been a noticeable increase of online access to a wide range of the visual arts.

The technology has been around for some time, and digital collections held by various bodies have been growing steadily, but the pandemic has forced galleries and museums to adapt – like many other industries – and to shift to an "online first" approach to allow those stuck at home to remain connected to culture.

However, digital collections and the sharing of artworks online give rise to important questions of copyright ownership and potential infringement.



Not a new phenomenon

Prints, copies and casts of artworks have long since been used by collectors, galleries and museums to supplement their collections. Indeed, casts have been taken of classical artworks and ancient archaeology since at least the 1400's to allow the works to be shared more widely, whether for altruistic or perhaps more selfish reasons. Later, during the 1800's casts and reliefs were made of well-known European works to allow Victorian Londoners a chance to see the wonders of the Renaissance without needing to go on a Grand Tour. But, more recently, and helped by technological advances such as higher resolution digital photography, 3D cameras, virtual reality and generally faster internet speeds, digital collections are becoming more and more established.

For graphic artworks, these collections fall broadly into two camps. First, galleries and museums are frequently uploading large quantities of archive material to the internet to be viewed at the public's leisure or to be licensed commercially. Second, galleries and exhibitions are turning to virtual reality to provide greater access to works more generally.

These digital collections raise key questions with respect to copyright, including whether the collections/exhibitions can be owned and commercialised, and to what extent they might infringe the rights of the original artists.

Copyright in copies of artwork: Can copyright subsist in the collection/exhibition?

Whether copyright can subsist in an archival version of an artwork is potentially highly important to a museum or gallery. For example, they may wish to commercialise the images by licensing them. In order to do so fully, it helps for there to be an enforceable intellectual property right subsisting in them.

Under English law, which has been influenced to a large extent by the jurisprudence of the Court of Justice of the European Union (CJEU) over the years, the starting position is that an artistic work must be "original" for it to qualify for copyright protection. The traditional English law test set a relatively low threshold, in that the artist's "skill and labour" was the vital factor. Over the years, however, the test established by the CJEU of whether the work is the "author's own intellectual creation" – i.e. that the artist has made his/her own free and creative choices - has influenced the English approach and applies in this jurisdiction.

Applying these principles to the issue of images of existing artworks, various questions arise. Taking photographs, the key question is often whether a photograph of an already existing artwork can constitute an author's own intellectual creation. Whilst photography can clearly require the photographer to make creative decisions, for example in relation to lighting, position of the subject, shutter speed, camera angle etc., archival images – photographs of 2D artworks in particular leave little room for creativity and could be considered mere "slavish copies" which would not attract protection. Meanwhile, it may be less difficult to prove copyright subsists in relation to a photograph of a 3D object (for example a sculpture). This is because the photographer's own creative choices might be less constrained.

Moving into the realm of virtual reality, this is highly factually dependent and examples range from simple 360° views about a single point, to complex 'walkthrough' experiences. However, whilst the basis for this medium is normally a series of photographs stitched together, the end result could potentially be considered to attract copyright, depending on the circumstances.

A different type of online exhibition during this year has been walkthrough films made available online. This poses an interesting point: films do not have the same originality requirement for copyright to subsist. As such, if the underlying exhibition features predominantly out-of-copyright works, a film might be a good solution to increase the chances of creating an asset that can be commercialised fully.

Copyright in copies of old artwork?

It might be questioned how there could possibly be copyright in a reproduction of a very old artwork which is itself out of copyright. Take, for example, an archival photograph of a painting by old master. The fact that the underlying image was not, or is no longer protected by copyright, does not in itself prevent its newer reproduction attracting copyright protection itself, assuming that the "originality" test outlined above can be met. However, the issue of effectively claiming rights in what might be perceived as a work in the public domain has in the past caused some controversy given that, once copyright in artwork has expired, the theory is that the work forms part of the cultural heritage of society.

Indeed the European Commission has recently considered this point to be important enough to legislate, resulting in Article 14 of the 2019 Directive on copyright and related rights in the Digital Single Market (Directive (EU) 2019/790). In short, Article 14 provides that a reproduction of an artwork in which copyright has expired cannot attract copyright protection for itself, unless that reproduction comprises the author's own intellectual creation.

It is questionable to what extent this changes the pre-existing state of the law. As explained above, the "author's own intellectual creation" requirement already formed part of the general test for protection, although Article 14 provides a statutory basis for it in relation to reproductions of public domain works.

However, in the light of the UK leaving the European Union, the UK Government has confirmed in Parliament that it has no plans to implement the new copyright Directive. This potentially opens the door for the UK to diverge from the EU in this area,

although it is likely that to diverge drastically would require a change in the approach to the "originality" test for photographs. It remains to be seen whether an English court would feel it is no longer bound by the CJEU case law in this respect.

Can digital collections infringe the rights of others?

At the outset, in order to infringe copyright, copyright must subsist in the underlying artwork. Consideration should be made of how old the artistic work is to determine whether any copyright is still in term. Copyright in artistic works, for example, generally lasts for 70 years from the end of the calendar year in which the author (i.e. the artist) dies. Therefore, a key question, particularly in relation to older artworks, is whether copyright still remains in force.

To the extent that copyright does still subsist, whether it is infringed is a question of whether a "substantial part" has been taken. Clearly, if a painting or an artwork has been reproduced entirely as part of a digital collection then it is likely to have been copied. However, the position is more challenging in relation to partial or incidental copies.

In the context of making copies of artwork available online, something that is particularly relevant to galleries exhibiting newer artworks is the fact that copyright can be infringed by the communication of the work to the public. This includes the making of the artwork available online to a public that was not taken into account by the artist at the time it was made available to the infringer. In other words, the right given by an artist to hang an artwork in a gallery does not necessarily give the gallery the right to include the artwork online as part of a digital collection and make it available online to the world. Therefore, the risks of infringement are increased in relation to newer artworks that are still subject to copyright protection.



Points to consider:

- Galleries/museums should ensure that all requisite licences are in place in relation to artworks the subject of copyright protection before making them available in digital collections.
- Consider making a film (as there is no requirement for originality) if you wish to protect the exhibition through copyright.
- If it is important to control future use of works made available online, add technical restrictions on the download or copying of materials from digital collections and consider watermarks. Also ensure that website terms and conditions contractually restrict copying or download of the images.

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What are the Generally Accepted Views of Scholars



"Buyer Beware" is the order of the day when it comes to buying art, especially at auction. As regular attendees at auctions will be aware, the auction houses' conditions of sale often make clear that the artwork is sold "as is" with all faults and imperfections and errors of description. Even though the auction house will be responsible for putting together the description of the artwork in the sale catalogue, they will expressly set out that they make no representations or warranties with respect to the physical condition, size, quality, rarity, genuineness, authenticity, importance, provenance, exhibitions, literature or historical relevance of the Property... the list goes on.

That said, the auction houses do offer up an olive branch of comfort to their buyers in the form of a limited warranty of authenticity. It is called different names by different auction houses: Bonhams say "Forgery Warranty", Phillips say "Authorship Warranty", Christie's say "Authenticity Warranty", Sotheby's say "Authenticity Guarantee".

The gist of these limited warranties is that if the relevant warranted information (usually the attribution of the artwork) is shown to be wrong (either because the artwork is found to be misattributed or a counterfeit) then, subject to

certain stringent conditions, the auction house will unwind the sale. The stringent conditions often are (i) the warranty is limited to 5 years from the date of sale, (ii) the buyer can return good title to the artwork, and (iii) the artwork is in the same state as it was sold. Such conditions make sense, as ultimately if the limited warranty is exercised the auction house will seek to reverse the sale such that the seller will be returned the artwork and the buyer will be refunded (easier said than done of course).

However, even if these stringent conditions are met, a buyer is not home and dry as there is still a potential get out of jail clause for the auction houses (who will presumably not want to lose their commission and go through the rigmarole of trying to reverse the sale).

The "Generally Accepted Views of Scholars and Experts"

Most auction houses limit their already limited warranty of authenticity if their catalogue description corresponded with the generally accepted opinion of scholars and experts at the date of sale, or fairly indicated there was a conflict of opinion among scholars and experts.

This exclusion is of course easy to apply in extreme situations, for example if it transpired that Claude Monet's *Meules* (sold in May 2019 for \$110.7m) was actually misattributed there would be no difficulty in saying that at the time of the sale it accorded with the generally accepted opinion of scholars and experts.

Unfortunately (or fortunately, depending on your involvement in the art market), attributions are rarely a subject of such clarity and notoriety. Indeed, the need for the clause arises from the fact that it is common for the state of knowledge and scholarship to develop and artworks which were previously thought to be authentic are deemed to be inauthentic (for example "*Head with Horns*" which was purchased by the Getty Museum in 2002 and believed to be by Paul Gauguin had its attribution status demoted to "unknown" last year as a result of research) and works which are thought to be inauthentic are rehabilitated as authentic (for example the *Salvator Mundi* by Leonardo da Vinci). Understandably, the auction house does not want to be liable for a change in the opinions of scholars.

But what does the "*generally accepted views of scholars and experts*" actually mean? How many scholars are required to make a generally accepted view? Is there a difference between scholars and experts? Do they have to state their views publically? Does the scholar need to see the art in person? Does the scholar need to see scientific analysis on the art before their view should be considered relevant? What if there is only one leading scholar for that artist?



With it being in nearly all of the major auction houses' terms and conditions one would have thought this clause would have been litigated at some point and that there would be legal guidance in the form of a judgment setting out the precise scope of this clause. Yet this is not the case. Before 2019, as far as the author is aware, this clause had never

been tested in this country or any of the other major jurisdictions. However, in December 2019, Knowles J handed down judgment in *Sotheby's v Mark Weiss Limited and Fairlight Art Ventures LLP and Ors* and addressed the meaning of the clause.

The case involved the sale of the painting "*Portrait of a Gentleman, half length, wearing Black*" which was sold through Sotheby's by private treaty as a Frans Hals. Sotheby's sought to unwind the sale several years later pursuant to the terms of the Authenticity Guarantee. Ultimately, the question of authenticity of the painting was not an issue which the Court was required to resolve. Upon hearing the evidence, the judge left the question as to authenticity open: "*there is also room for views that the Painting is not counterfeit, and those views too would be reasonable and rational and not capricious or perverse*" However, one of the many points the Court did have to resolve was what did the "*generally accepted views of Scholars and Experts*" actually mean.

Unfortunately, for those looking for certainty and clarity they will be disappointed. Knowles J first made the general observation: "*The words "generally accepted views of scholars and experts" are to be given their ordinary meaning, in context.*" So far, so good. One would expect the judge to clarify what the "*ordinary meaning*" is so that one might be able to then answer some of the questions posed above. Sadly, this was not the case. Knowles J explained what the words do not mean but failed to actually say what they do mean: "*The words do not set a headcount or a majority, or a weighting between one scholar and another or between a scholar and an expert. On what is a question of opinion the words require that a generally accepted opinion has been reached*". In a perfect example of tautology, he concluded by accepting that "*the views [of the scholars and experts] that are material are considered views which result from the application by scholars and experts of their scholarship and expertise.*" This does not appear to further our understanding. When would a relevant scholar and expert give a view that did not apply their scholarship and expertise. Moreover, what is the difference (if any) between a scholar and an expert? The parties submitted various arguments on the point which the judge did not engage with.

Knowles J did however make two useful observations regarding the clause, albeit the first is somewhat stating the obvious:

- 1) He accepted that it can take time, after a first discovery of a work, to reach a point where there are "*generally accepted views of scholars and experts*".

- 2) Sotheby's, as a corporate entity, was not a scholar or expert and its acceptance of the views of scholars and experts does not mean they were "generally accepted".

In the end, Knowles J concluded from the evidence before him that as at June 2011 the "generally accepted views of Scholars and Experts" exception did not apply to the painting before him albeit he conceded that "in time a "generally accepted view of scholars" might have formed".

Knowles J' decision, including his interpretation and application of the "generally accepted views of scholars and experts" was appealed to the Court of Appeal this year and once again the Court had to consider the meaning of the proviso¹.

However, ultimately the Court of Appeal found "no fault" with Knowles J's construction of the proviso (albeit providing a little more substance). Whilst noting that the wording invites argument, the Court of Appeal held: "what is required is for "views" plural to have coalesced into a "generally accepted view" singular. Another way of putting it, which avoids the use of the word "view's", would be to say that the question is whether there was a consensus (ie a generally held view not requiring unanimity) among scholars and experts at the time." The words did not require a "weighting" between scholars and experts. However, when deciding whether there was a generally accepted view, it would be necessary to identify who the scholars and experts were in the field, and to survey their views in the light of their numbers, eminence and the degree of consideration that each had given to the question.

In the present instance, the Court of Appeal agreed that as a newly discovered painting the Hals did not yet have a generally accepted view.



So what general conclusions can we draw? Despite the clause having come before the Court of Appeal it will still be open to interpretation and conducting the factual exercise of who thought what, when and on what basis, will not be straightforward. It is therefore likely that the wiggle room will benefit the auction houses more than their clients; the auction houses will seek to rely on the clause to avoid having to rescind sales and will have deep pockets should further litigation be required to resolve the factual dispute about whether or not there was a "generally accepted view". This is unsurprising as the auction houses include the clause for their own benefit to provide protection against any change in scholarly opinion after a sale which can occasionally occur usually with Old Masters.

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¹ [2020] EWCA Civ 1570