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## Client Alert | Art

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Italy

### ***During the Exhibition the Gallery Will Be Closed*<sup>1</sup>. Distance selling must be in written form: the rules for gallerists**

April 2020

#### **1. The health emergency and the art market: new business models for galleries**

The extraordinary COVID-19 epidemiological emergency situation is inevitably affecting in a significant way the art market too<sup>2</sup>, posing new challenges to all operators in the sector and, in particular, to art galleries.

Indeed, in this time of social distancing, art galleries need to redesign the way in which they interact with the public and their traditional business, finding new channels for the distance sale of artworks, given that - even during the health emergency – these methods of carrying out business are expressly permitted<sup>3</sup>.

Therefore, due to the global crisis caused by the global health emergency, the digital transformation of art galleries business activities that characterized 2019 - as highlighted by Art Basel and UBS Global Art Market Report 2020 – has gained new urgency and can no longer be postponed<sup>4</sup>.

Several solutions have been developed to face the current emergency situation, mainly focused on the search for new marketing strategies and innovative ways of audience engagement and networking.

Some gallerists have set up virtual exhibition spaces, such as the Massimo De Carlo gallery with the VSpace project<sup>5</sup> or the Deodato Arte gallery<sup>6</sup>; others have opened online viewing rooms on their websites through which they can present their programs and artists to the international

<sup>1</sup> Name of a collection of essays by Camiel van Winkel that frame today's largely "post-conceptual" art, offering a fresh and revealing look at the systematics of contemporary art. Published by Valiz (Amsterdam).

<sup>2</sup> For an overview of the interventions implemented at national level in support of culture please refer to the article "[ART | During the Exhibition the Gallery Will Be Closed: the Nctm ArTeam at service of artists and gallerists](#)" by the Corporate & Commercial department.

<sup>3</sup> First, from the DPCM (Decree of the President of the Council of Ministers) of 11 March 2020 until 13 March 2020 and then from the DPCM of 10 April 2020 valid from 14 April 2020 until, for the time being, 3 May 2020. With specific reference to the performance of commercial activities at a distance and through e-commerce, please refer to the Government's [FAQ](#).

<sup>4</sup> Please refer to B. Boucher's article, [Galleries' digital transformation accelerates](#).

<sup>5</sup> Cfr. <https://www.massimodecarlo.com/vspace/login> and <https://www.exibart.com/opening/intervista-a-massimo-de-carlo-che-oggi-inaugura-vspace/>.

<sup>6</sup> Cfr. [https://www.deodato.com/deodato\\_arte\\_italy/blog/post/varese-gallery-virtual-tour/](https://www.deodato.com/deodato_arte_italy/blog/post/varese-gallery-virtual-tour/).

public, a strategy implemented by David Zwirner<sup>7</sup>, Gagosian<sup>8</sup> and the Italian galleries Continua<sup>9</sup> and Raffaella Cortese<sup>10</sup>; other galleries have launched virtual reality platforms, such as the Swiss gallery Hauser & Wirth<sup>11</sup>; while others have focused on virtual exhibition projects and storytelling of the artists they represent and works for sale on their social media profiles<sup>12</sup> or have moved their relationships and exhibition network on the web and on social networks, creating digital communities in order to give continuity to the relationships with collectors and the public<sup>13</sup>.

Business models adopted also include the use of special platforms for art e-commerce to manage online sales, such as Artsy<sup>14</sup>, Artspace and Artprice, leading platforms in the art market, or of virtual marketplaces such as Kooness or Invaluable, by means of which works offered for sale can be made virtually accessible, trading is facilitated and demand is broadened to reach new potential buyers, especially foreign ones, through the web.

However, no gallery has completely moved its commercial network online, creating real e-commerce portals. So gallerists have evolved by implementing online “shop windows” and updating their own interlocutory “style” by exploiting the web and in some cases also the increasing diffusion of social networks, all this while sticking to their historical role in the art system: the gallery as a place of cultural exchange where the privileged relationship with the artist and the collector is focused on personal knowledge, trust, mutual reliability and the frequent use of informal ways of concluding agreements, such as verbal agreements and handshakes<sup>15</sup>.

Since such types of sale are subject to the rules governing “distance” contracts, this new system requires further and different measures (including legal ones) on the part of gallerists, articulated information obligations and the stipulation of written contracts.

## 2. The requirement of the written form for distance contracts

Although the relationship with customers remains personal and is conducted via e-mail or telephone calls, the professional activity carried out *inter absentes* must be classified as an activity outside the business premises, requiring the implementation of a series of measures to protect the building of an informed consent on the part of the buyer.

<sup>7</sup> Cfr. <https://www.davidzwirner.com/viewing-room>.

<sup>8</sup> Cfr. <https://gagosianviewingroom.com>.

<sup>9</sup> Cfr. <https://www.galleriacontinua.com/viewing-room/42>.

<sup>10</sup> Cfr. <https://raffaellacortese.com/viewing-room/>.

<sup>11</sup> See HWVR initiative of the Hauser and Wirth gallery described in the article by E. Kinsella, [Why Hauser & Wirth Is Investing Big in a Virtual Reality Tool That Can Plan Shows, Calculate Fair Logistics, and Even Host Residencies](#).

<sup>12</sup> Cfr. <https://www.exibart.com/progetti-e-iniziativa/il-covid-19-aguzza-le-gallerie-i-progetti-online-di-crac-noero-e-poleschi/>; <https://partners.artsy.net/resource/ncontemporary-covid-19-response/>.

<sup>13</sup> See N. Freeman’s article, *The New Bootstrapping: Faced With Closures, Galleries Are Forced to Finally Build Out Online Viewing Rooms—Often From Scratch*.

<sup>14</sup> Cfr. <https://partners.artsy.net>. See also the article [Success Story: Mark Moore Fine Art. How Mark Moore transformed his brick-and-mortar space into a thriving online gallery](#).

<sup>15</sup> See F. Poli, *Il sistema dell’arte contemporanea*, Editori Laterza, Roma-Bari, 2017, p. 57 et seq.; A. Donati, *I contratti degli artisti. Nuovi modelli di trattativa*, Giappichelli, Turin, 2012, p. 15 et seq..

Indeed, from the legal point of view, the European legislator and, subsequently, the national legislator intervened by preparing a legislation aimed at protecting primarily the buyer, who is considered the weaker party in these types of contractual relationships, especially in the case where the buyer is a consumer, i.e. a natural person who buys goods for purposes unrelated to the entrepreneurial or professional activity possibly carried out<sup>16</sup>.

As regards such cases, the matter is dealt with in detail by Legislative Decree No. 206 of 6 September 2005, containing the “Consumer Code, pursuant to Article 7 of Law No. 229 of 29 July 2003” (hereinafter, the “**Consumer Code**”) and, with regard to e-commerce, by Legislative Decree No. 70 of 9 April 2003 (referred to in Article 68 of the Consumer Code).

With specific reference to the art sector, the rules established by the Consumer Code for “distance” sales shall apply in all cases where the sale of artworks is concluded without the simultaneous physical presence of the professional-gallerist and of the buyer, or by using exclusively one or more means of distance communication (for example by using telephone and e-mail)<sup>17</sup>.

In order to mitigate the information asymmetry inherent in the professional-consumer relationship and to fill the perceptive and informative gaps deriving from the impossibility of meeting the gallerist in person, of receiving information about the work directly from the gallerist and of being reassured about the work authenticity and origin, of viewing the work personally - a circumstance that is of particular importance in the art market because of the need to verify the characteristics and the actual state of conservation of the goods - the Consumer Code imposes on professionals strict obligations as to information and form. Obligations that are in stark contrast with the usual practices of the art market which are characterized, among other things, by informality and absence of specific regulated forms for commercial transactions<sup>18</sup>.

In particular, Article 49 of the Consumer Code requires the trader who is selling movables at a distance or away from business premises to provide the consumer, before the conclusion of a contract, with a series of information concerning: *i)* the main characteristics of the goods; *ii)* the identity and address of the trader; *iii)* the price of the goods including any taxes and duties; *iv)* method of payment, delivery costs and methods; *v)* the existence of the right of withdrawal, methods and period for the return of goods and costs to be borne by the buyer<sup>19</sup>.

This information is of fundamental importance in the art market, in particular for the buyer to be able to make a fully conscious purchase: the detailed knowledge of the essential characteristics of the artwork, especially through photographic or video description, allows the

<sup>16</sup> See the definition of “consumer” in Article 3 of the Consumer Code, according to which a consumer is defined as “a natural person acting for purposes which are outside any entrepreneurial, business, artisan or professional activity carried out”.

<sup>17</sup> See the definitions of “distance contract” and “contract concluded away from business premises” in Article 45, paragraph 1, letter g) and letter h) of the Consumer Code.

<sup>18</sup> These practices are confirmed by the virtuous initiative of *Responsible Art Market - RAM*, which aims to raise awareness of the risks associated with commercial transactions concluded in the art market, providing practical guidelines for responsible operations in the art market (cfr. <http://responsibleartmarket.org>).

<sup>19</sup> In the event of contracts concluded at a distance or away from business premises, the right of withdrawal recognized to the consumer by Article 52 of the Consumer Code shall apply, according to which the consumer has a period of fourteen days from receipt of the purchased goods, or one year if the trader has not properly fulfilled the information obligation, to withdraw from the contract with effect *ex tunc*, without giving any reason, and to return the goods purchased.

recreation at a distance of an experience of direct contact with the work itself, which is a decisive step in the process of acquiring an artwork.

Said specific information obligation is also central to the issue of the guarantees required of the seller.

Indeed, the context of the distance sale of an artwork with a consumer is subject to the same legal guarantee of conformity provided for by Articles 128 *et seq.* of the Consumer Code for any type of contract entered into with a consumer.

So, the gallerist is required by law to deliver “*goods in conformity with the contract*”, that is, goods having the qualities and characteristics expressly agreed and corresponding to the description made by the seller, as indicated<sup>20</sup>.

The more precise, clearer and more complete is the description of the artwork provided by the gallerist during the negotiations and the formation of the distance contract - also through the transmission of paper, video and photographic documentation to the buyer - the less the possibility of the gallerist being held liable to the buyer for lack of conformity of the work sold under the contract<sup>21</sup>.

The stringent and extensive pre-contractual information obligations outlined so far are imposed on professionals exclusively when carrying out distance selling transactions and, therefore, with reference to the art sector, said obligations require gallerists to structure and organize distance selling by providing suitable means for the - clear, comprehensible and complete - transmission of the above information, and to formalize the relationships with buyers.

Indeed, according to the express provisions of law, the above information must be confirmed in writing or on a durable medium upon conclusion of the contract, to form an integral part thereof, and shall not be amended unless expressly agreed also by the buyer (Articles 50 and 51 of the Consumer Code).

**So, the handshake between the gallerist and the collector is replaced by the conclusion of a written agreement**, whereby relations between said parties are formalized in order to facilitate distance negotiations and to conclude the sale of an artwork in a transparent, informed and responsible manner.

Moreover, in the art market, the delivery of the information documents and of copy of the written agreement to the buyer-consumer is accompanied by the delivery of the documentation certifying the authenticity or at least the probable attribution and origin of the work being sold, which, as is well known, pursuant to Article 64 of the Code of Cultural Heritage (Legislative Decree No. 42 of 22 January 2004) is an obligation for anyone engaged in the sale to the public and/or exhibition for trading of painting, sculpture and graphics works or of objects of antiquity or of historical or archaeological interest<sup>22</sup>.

<sup>20</sup> See G. De Cristofaro, *La tutela degli acquirenti di opere d'arte contemporanea non autentiche tra codice civile, codice del consumo e codice dei beni culturali*, in AA.VV., *L'opera d'arte nel mercato. Principi e regole*, Giappichelli, Turin, 2019, p. 85 *et seq.*

<sup>21</sup> In the event of lack of conformity of the goods at the time of purchase, the legal guarantee of conformity shall apply, according to which the seller is liable to the consumer, who, with no charge, is entitled to request the restoration of the goods (in the form of repair or replacement) or, alternatively, the reduction of the price and termination of the contract, with refund of the amount paid upon return of the goods purchased (Article 130 of the Consumer Code).

<sup>22</sup> On the rule in question, please refer to A. Donati, *Autentiche, archivi e cataloghi: gerarchie tra diritto e mercato*, in AA.VV., *L'archivio d'artista. Tra dimensione privata e interesse pubblico*, 2013, pp. 4 *ff.* (see <http://www.opencare.it/it/155/>); and to A. Donati, *Autenticità, "authenticité", "authenticity" dell'opera d'arte. Diritto, mercato, prassi virtuose*, in Riv. dir. civ., 2015, pp. 987 *ff.*

It is appropriate to specify that the regulation of relationships with buyers - by recording of transactions in a secure and verifiable manner and segregation and storage of information relating to the work sold and the buyer - also ensures the galleries compliance with the new anti-money laundering legislation, which imposes (also) on such art market operators to adopt a series of devices and preventive procedures, including the appropriate verification of customers, in order to mitigate and manage the risks of money laundering and terrorist financing and of incurring liabilities<sup>23</sup> and to avoid reputational damage. So, by complying with the abovementioned information obligations art galleries gain a double advantage.

It should be noted that the aforesaid provisions are imperative, hence any agreement aimed at derogating therefrom which is more unfavourable to the consumer shall be considered invalid for protection purposes pursuant to Article 66-ter of the Consumer Code and shall also result in the application of heavy administrative pecuniary sanctions imposed by the Antitrust Authority and the Sanctions Office of the Chambers of Commerce<sup>24</sup>.

### 3. Online reproduction of images of the works

The use of distance selling channels determines, among other things, the need to reproduce (possibly on the web or in a catalogue) the images of the works for sale.

In order to provide potential buyers with more correct and timely information on the characteristics of the works and their state of conservation, it is essential to describe the works also through their photographic representation.

Given that, according to the provisions of Article 13 of Law No. 633 of 22 April 1941 (hereinafter, the "**Copyright Law**") the reproduction right is an exclusive right of the author of the work, the authorization of the owner of the right is always required for the lawful use of the image of the work in exhibition or auction catalogues, since the photographic reproduction of an artwork in a catalogue is a form of exploitation of said work.

However, said operation, carried out for the mere purpose of describing works that cannot be viewed and examined in person and thus of facilitating their distance selling, does not fall within the exceptions provided for in Article 70, paragraph 1-bis, of the Copyright Law<sup>25</sup>.

<sup>23</sup> The transposition of the Fifth Anti-Money Laundering Directive (Directive (EU)2018/43) by Legislative Decree No. 125 of 4 October 2019 has included among the entities obliged to implement AML/CFT prevention systems also art market operators, and in particular galleries and auction houses, that is, as mentioned by said law, "*b) entities engaged in the trading of antique goods, entities engaged in the trade of artworks or acting as intermediaries in the trade of said works, including when this activity is carried out by art galleries or auction houses referred to in Article 115 of the Consolidated Text of Laws on Public Security (TULPS) if the value of the transaction, even if split, or of related transactions, is equal to or greater than 10,000 Euro; c) entities holding or trading artworks or acting as intermediaries in trading them, when such activity is carried out within free ports and the value of the transaction, even if split, or of related transactions is equal to or greater than 10,000 Euro*".

<sup>24</sup> Said administrative sanctions are imposed - pursuant to Article 12 of the Consumer Code - by the competent authority pursuant to Law No. 689 of 24 November 1981.

<sup>25</sup> Pursuant to Article 70, paragraph 1-bis, of the Copyright Law "*The free publication through the Internet, free of charge, of low-resolution or degraded images and music, is permitted for teaching or scientific purposes and only if such use is not for profit. The limits to the teaching or scientific use referred to in this paragraph have been defined by decree of the Minister of Cultural Heritage and Activities, after consultation with the Minister of Education and the Minister of University and Research, after hearing the opinion of the competent parliamentary committees*".

On the basis of the principle of the exhaustion of the author's exclusive right to the economic exploitation of his/her intellectual work, authoritative Italian legal doctrine<sup>26</sup> - also in the light of the provisions of Article 68-*bis* of the Copyright Law that allows acts of temporary and transient reproduction, of no economic significance and carried out for the sole purpose of allowing a legitimate use of the work itself - has supported the possibility for the owner of an artwork (or his/her agent) to carry out temporary acts of reproduction for the sole purpose of reselling the purchased work without necessarily having to obtain permission from the author or owner of the reproduction right.

Looking at extraterritorial rights, the above assumptions do not appear to be admissible under French law, where, pursuant to Article L. 122-5 of the *Code de la propriété intellectuelle*, there is only one exception to the rule of prior authorization of the owner of the reproduction right, namely in the case of, full or partial, reproductions of graphic or sculptural artworks to be included in the catalogues of a court sale taking place in France and made available to the public before the sale for the sole purpose of describing the works. Therefore, catalogues published by private auction houses are excluded from this exception<sup>27</sup>.

On the contrary, according to the United Kingdom law, pursuant to Section 63 of the Copyright Design and Patent Act 1988, the reproduction of an artwork for the purpose of advertising the sale of the work it is not an infringement of copyright<sup>28</sup>.

Legislation is not so clear in the United States, where the possibility is debated to extend the principle of "fair use" referred to in Article 107 of the U.S. Copyright Act of 1976 to cases of "descriptive" use of photographic reproductions of artworks in auction catalogues or gallery exhibition catalogues referred to in Article 109, letter c, of the same legislation<sup>29</sup>. Indeed, the debate is divided between those who consider it fundamental - in order not to jeopardize sales, especially at a distance - to permit such descriptive use of photographic reproductions without the prior consent of the owner of the right, and those who consider it necessary to obtain the prior consent of the owner of the right to reproduce the works, especially in the case of reproduction on covers and first pages of catalogues or for purely commercial purposes, or for advertising, marketing and promotion of auctions and exhibitions in galleries.

On the other hand, the use of the reproduction of the work for the promotion of other works, for a sale or a vernissage should be considered differently. Obviously, the issue should be studied in depth from time to time in relation to each single specific case.

#### 4. International trade

Given the international nature of the art market, in case of negotiation of cross-border distance contracts - i.e. in the context of a sales contract between a professional established in Italy and

<sup>26</sup> See L. C. Ubertazzi, *Commento all'art. 13 della legge d'autore*, in *Commentario breve alle leggi sulla proprietà intellettuale e concorrenza*, WKI – Cedam, VII Edition, p. 1543 according to which, on the basis of the principle of exhaustion, the "buyer" would be "free to make all the reproductions necessary to resell the work purchased in the meantime: and thus, for example, auction houses" could "create advertising catalogues containing the paintings offered for sale". On this point, the Author refers to A. M. Gambino, *Le trasmissioni telematiche del bene immateriale*, in *AIDA*, 1997, pp. 507-508.

<sup>27</sup> Please refer to the website of ADAGP *Société des Auteurs dans les Arts Graphiques et Plastiques* (cfr. <https://www.adagp.fr/fr/droit-auteur/droits-patrimoniaux/exceptions-au-droit-patrimoniaux>).

<sup>28</sup> Cfr. <http://www.legislation.gov.uk/ukpga/1988/48/contents>.

<sup>29</sup> Cfr. <https://www.copyright.gov/title17/>.

a consumer residing in another Member State of the European Union or in a non-European country - the gallerist, as professional, is required to operate with particular caution in compliance with the mandatory regulations imposed by the Community and international legislator to protect foreign consumers-customers. In particular, in such cases, the gallerist may specify, in the event of unilateral decision (also) of these aspects, that such choice does not prejudice the mandatory rights granted to consumers by the legislation applicable to them.

## 5. Final considerations

The countless initiatives that art galleries have put in place to deal with the complex economic and financial situation linked to COVID-19 show that, in an emergency context such as the current one, it is possible and necessary to start again from art.

So, the transformation process from traditional orality towards digital and, in general, writing could be - even beyond the current emergency context - a “winning” strategy for said players in the art market, especially in so far as they will drive their “at a distance” business towards a greater professionalisation, responsibility, transparency and security<sup>30</sup> that will allow to keep art galleries as essential places of social inclusion for the diffusion of culture<sup>31</sup>.

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*This article is for information purposes only and is not, and cannot be intended as, a professional opinion on the topics dealt with. For further information please contact your counsel or send an email to the address [arteam@nctm.it](mailto:arteam@nctm.it) or to the following counsels: [Alessandra Donati](#), [Filippo Federici](#), [Eliana Romanelli](#).*

<sup>30</sup> Please refer to E. Karmann’s article, *Mercato dell’arte e cyber-crimini: quanto siamo preparati (e al sicuro)?*, available on the website [https://www.artribune.com/professioni-e-professionisti/mercato/2020/04/cyber-crimini-musei-gallerie/?utm\\_source=Newsletter%20Artribune&utm\\_campaign=4ad273b51e-&utm\\_medium=email&utm\\_term=0\\_dc515150dd-4ad273b51e-153783413&ct=t%28%29&goal=0\\_dc515150dd-4ad273b51e-153783413](https://www.artribune.com/professioni-e-professionisti/mercato/2020/04/cyber-crimini-musei-gallerie/?utm_source=Newsletter%20Artribune&utm_campaign=4ad273b51e-&utm_medium=email&utm_term=0_dc515150dd-4ad273b51e-153783413&ct=t%28%29&goal=0_dc515150dd-4ad273b51e-153783413).

<sup>31</sup> Please refer to C. Masturzo’s article, *Il futuro delle gallerie d’arte*, available on the website <https://www.artribune.com/professioni-e-professionisti/mercato/2019/02/futuro-gallerie-arte/>, and A. Cohen’s article, *Will Online Viewing Rooms Increase Price Transparency at Galleries?*, available on the website <https://www.artsy.net/article/artsy-editorial-will-online-viewing-rooms-increase-price-transparency-galleries>.