



This document is scheduled to be published in the Federal Register on 09/19/2012 and available online at <http://federalregister.gov/a/2012-23076>, and on FDsys.gov

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2012 – 10]

Resale Royalty Right

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The U.S. Copyright Office is undertaking an inquiry at the request of Congress to review how current copyright law affects and supports visual artists; and how a federal resale royalty right for visual artists would affect current and future practices of groups or individuals involved in the creation, licensing, sale, exhibition, dissemination, and preservation of works of visual art. The Office thus seeks comments from the public on the means by which visual artists exploit their works under existing law as well as the issues and obstacles that may be encountered when considering a federal resale royalty right in the United States.

DATES: Comments must be received no later than 5 p.m. Eastern Daylight Time (EDT) on [INSERT DATE 45 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: To submit comments, please visit <http://www.copyright.gov/docs/resaleroyalty>. The website interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, submitters must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: the Adobe Portable Document File (PDF) format that

contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post all comments publicly on the Office’s website exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8380 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jason Okai, Counsel, Office of Policy and International Affairs, by telephone at 202-707-9444 or by electronic mail at jokai@loc.gov.

SUPPLEMENTARY INFORMATION:

I. Background:

An artist resale royalty, or *droit de suite* as it is often called in Europe, provides artists with an opportunity to benefit from the increased value of their works over time by granting them a percentage of the proceeds from the resale of their original works of art. The royalty originated in France in the 1920s and is in general practice throughout Europe, but is not part of current United States copyright law.¹ Under the Copyright Act (the “Act”), 17 U.S.C. 101 *et seq.*, artists, like other authors, are provided a bundle of exclusive rights, including rights to reproduce, distribute and create adaptations of the works. Federal copyright law, however, does not generally grant artists or authors rights to control the subsequent use of the original work.² Rather, the first sale doctrine,

¹ Resale royalty rights are optional under applicable international treaties. *See* Berne Convention for the Protection of Literary and Artistic Works, art. 14*ter*, Jul. 24, 1971, 25 U.S.T. 1341, 8282 U.N.T.S. 221 (as amended Sep. 28 1979).

²Visual artists are granted very limited rights to prevent certain modifications to their works under the Visual Artists Rights Act (VARA), 17 U.S.C. 106A. VARA does not provide additional economic benefits.

codified in 17 U.S.C. § 109, generally permits the lawful owner of a copyrighted work to display, sell or dispose of the work without the authorization of the creator under most circumstances.

For many authors of works such as books, musical works and sound recordings, the copyright system provides substantial economic benefits and incentives through subsequent uses or performances of those works by way of licensing or contractual arrangements. For example, an author may sell rights in his or her novel to a publisher, or sell the right to create a screenplay to a writer, or sell the right to create a motion picture from that screenplay. At each point in the life cycle of that novel, numerous opportunities arise for the author to earn income from the original novel without having to write another book or restrict the number of books available for purchase in the marketplace. Indeed, a novelist and his publisher may offer millions of copies of the same book to buyers, a filmmaker may distribute millions of DVDs of his film, and a songwriter may authorize millions of downloads. In each case, every purchaser receives the same work and for the same value as the original.

By contrast, in the case of certain visual artworks, there can only be one sale at a time, and only the initial sale will inure to the benefit of the actual creator. A sculptor or painter may spend months or years creating one work of art and when that work is completed it is a unique and singular representation of the artist's intent. Unlike books, DVDs or songs, the value of the work is based on its originality and scarcity. This means that over time, it may be a collector or other downstream entity that will derive the most financial benefit.

The Office recognizes that buyers of artworks, including collectors, galleries and auction houses, frequently purchase artworks as investments. These persons may act as important catalysts over time, helping to increase the value of certain artworks through exhibitions and additional sales, or by supporting the careers of artists through payment or promotion. The question thus becomes one of perceived fairness under the law. Should these agents and investors benefit exclusively, or should they be compelled to provide some additional compensation to the artists who made the buyers' profits possible? Indeed, California purportedly developed its state law on resale royalties in part as a result of the indignation felt by many within the artistic community when Robert Rauschenberg's 1958 painting "Thaw," which was originally sold for \$900, was resold at auction fifteen years later for \$85,000 without compensation to the artist.³ According to some sources, certain fine art can appreciate by more than 10% in value per year.⁴

To be clear, any artist may by contract attempt to negotiate a partial interest in his work with a buyer, thereby reserving for him or herself a financial interest in its future value. However, this is by no means a common practice for transactions of fine art, even for accomplished artists, and it seems unlikely for one who is just starting out. There are also some accommodations available to visual artists in the broader marketplace. For example, some artists may exploit their works in other ways, such as through reproductions or the creation of derivative works. For some, this may be lucrative; however, for others the very nature of their visual art may limit the ability to create such

³ See Patricia Cohen, *Artists File Lawsuits Seeking Royalties*, New York Times, Nov. 1, 2011, available at <http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html?pagewanted=all>.

⁴ See Joshua Rogers, *How to Outsmart the Billionaires Who'll Bid \$80 Million for "The Scream,"* Forbes, Apr. 4, 2012, available at <http://www.forbes.com/sites/joshuarogers/2012/04/04/how-to-outsmart-the-billionaires-wholl-bid-80-million-for-the-scream/>.

derivative markets. In general, although visual art may be reproduced or adapted in the form of prints, postcards, miniature models of sculptures or even refrigerator magnets, the income realized from the sales of these items is not likely to approach the income that the original artwork will bring if it increases in value and is sold and resold at auction, in private galleries or through private sales.

A. Previous Inquiry

In 1991, Congress requested the Copyright Office to conduct a study on the feasibility of legislation that would require purchasers of works of art, subsequent to the initial sale of the work, to pay the artist or the artist's heirs a percentage of the sale price. Published in December 1992, the Copyright Office report concluded that there was insufficient economic and copyright policy justification for enacting resale royalty right or *droit de suite* legislation in the United States.⁵ The Office expressed concern that implementing a resale royalty right might be harmful to visual artists who lack a viable resale market because primary market prices might decline as a result of factoring in the future royalty. The Office further explained that imposing a federal resale royalty on sales transactions may conflict with the traditional United States concept of free alienability of property. The Office proposed alternatives to a resale royalty right, including compulsory licenses, broader display rights, rental rights and federal grants for public works of art. The Office also identified eight areas to be considered if legislation were to be proposed: oversight, types of sales, threshold amount, term, foreign authors, alienability, types of works and retroactivity. Congress did not enact legislation creating a resale royalty right at the federal level and there has been no formal congressional

⁵See United States Copyright Office, *Droit De Suite: The Artist's Resale Royalty 2* (1992) ("Report"), available at http://www.copyright.gov/history/droit_de_suite.pdf.

deliberation on this topic since the 1992 report. In its report, the Copyright Office also suggested that Congress may wish to review the issue if the European Community extended royalty rights to all of its Member States.

B. International Developments

Since the Office published its study in 1992, the legal landscape in foreign jurisdictions with respect to resale royalty treatment has changed. In 1992, thirty-six countries had resale royalty legislation; today, that number has increased to more than sixty.⁶ In 2001, the European Union adopted a Directive generally requiring Member States to implement harmonized resale royalty legislation by 2006.⁷ The Directive requires Member States to establish a royalty for all resales involving an art market professional, including auctions, private dealers and galleries. Member States have some flexibility to determine what threshold resale price would trigger the royalty below €3,000 (euros), and to provide for compulsory or optional collective management of the royalty. The Directive caps the royalty at €12,500, regardless of the resale price. As a result of the Directive, *droit de suite* is now a component of national laws across the European community. The United Kingdom, which is one of the largest art markets in the world, implemented its resale royalty legislation in 2006. Artists also receive resale royalties in many countries outside of the European Union, including Algeria, Australia, Bolivia, Brazil, Bulgaria, Burkina Faso, Chile, Congo, Columbia, Costa Rica, Croatia,

⁶See *id.* at 8; see also The Artist's Resale Right Regulations, 2006 S.I. 346 (U.K.), at art. 2, schedule 2; *Liste de Pays Dont le Ressortissants Beneficiant du Droit de Suite a Juin 2007* ("List of Countries") [List of Countries whose Citizens Benefit from the Resale Royalty Right as of June 2007], Societe des Auteurs dans les Arts Graphiques et Plastiques, [available at http://www.adagp.fr/ENG/Liste_pays_droit_de_suite.pdf](http://www.adagp.fr/ENG/Liste_pays_droit_de_suite.pdf).

⁷Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale for the Benefit of the Author of an Original Work of Art, art 1, 2001 O.J. (L 272) 32-36.

Ecuador, Guatemala, Guinea, Honduras, Iraq, Ivory Coast, Laos, Madagascar, Mali, Mexico, Monaco, Morocco, Nicaragua, Paraguay, Panama, Peru, Philippines, Romania, Russian Federation, Senegal, Serbia and Montenegro, Tunisia, Turkey, Uruguay and Venezuela.⁸

C. State Law

To date, the only resale royalty legislation in the United States has been at the state level in California, where it has operated with mixed success. The California Resale Royalty Act was enacted in 1976 and imposes several conditions prior to payment of the royalty: the artist must be a U.S. citizen or a California resident of at least two years; the seller must reside in California or the sale executed in California; the artwork must be “fine art,” (*i.e.*, an original sculpture, painting, drawing, or work in glass); and the work must be sold for more money than was paid for it and for at least \$1,000.⁹ The seller or seller’s agent is required to pay the 5% royalty directly to the artist or the artist agent. If the latter cannot be found, the seller or seller’s agent must pay the royalty to the California Arts Council, which continues the search for the beneficiary artist. The California Arts Council does not charge an administrative fee for this service.

Notably, after thirty-five years on the books, a federal district in California recently declared the California Resale Royalty Act unconstitutional under the Commerce Clause. The court concluded that the state statute impinged on the federal government’s authority to control commerce among the states because it regulated sales occurring

⁸See *Liste de Pays Dont le Ressortissants Beneficiant du Droit de Suite a Juin 2007* [List of Countries whose Citizens Benefit from the Resale Royalty Right as of June 2007], Societe des Auteurs dans les Arts Graphiques et Plastiques, [available at http://www.adagp.fr/ENG/Liste_pays_droit_de_suite.pdf](http://www.adagp.fr/ENG/Liste_pays_droit_de_suite.pdf).

⁹ CAL. CIV. CODE § 986 (West 2012).

wholly outside of California.¹⁰ An appeal is pending in the United States Court of Appeals for the Ninth Circuit.

D. Proposed Legislation

On December 15, 2011, Senator Kohl of Wisconsin and Representative Nadler of New York introduced bills in the 112th Congress titled, *Equity for Visual Artists Act of 2011* (EVAA), S.2000 and H.R. 3688 respectively. The EVAA requires a resale royalty right, under certain circumstances, to be collected from the seller. The proposed royalty would be triggered when a work of visual art is sold at auction for at least \$10,000 by someone other than the authoring artist. Following the sale, the entity receiving the proceeds pays a royalty of 7% to a qualifying visual artists' collecting society. The collecting society is required to distribute 50% of the net royalty to the artists or successor as copyright owner and place the other 50% of net royalty into an escrow account to support U.S. nonprofit museums in their future purchases of visual art created by living artists domiciled in the United States. Failure to remit the royalty to the collecting society is copyright infringement subject to statutory damages. The EVAA also directs the Register of Copyrights to issue regulations governing the designation and oversight of visual artists' collecting societies.

In a letter dated May 17, 2012, Senator Kohl and Representative Nadler requested that the Copyright Office "assess how existing law affects and supports visual artists, and how a federal resale royalty provision would affect copyright law, visual artists and those involved in the sale of art work."

¹⁰ See *Estate of Graham v. Sotheby's Inc.*, 11-CV-08604, 2012 WL 1765445 at *1-2 (C.D. Cal. May 17, 2012).

The Office therefore seeks comments from interested parties on how visual artists exploit their works under existing law, including any limitations due to the nature of visual art, and the effect, if any, a resale royalty right would have on the promotion, dissemination and sale of works of visual art.

II. Discussion:

There are a variety of factors to consider when examining how visual art is treated under the Copyright Act and whether a federal a resale royalty right would foster the goals of the copyright system. Among the issues are:

Current Copyright Law Implications: The first sale doctrine (17 U.S.C. § 109) is a fundamental tenet of U.S. law. It helps to maintain the copyright system's balance between incentives for authors and the public's interest in widespread dissemination of copyrighted works. How a federal resale royalty right would affect the first sale doctrine is therefore of paramount interest to the Office, as is the interaction with any other exceptions and limitations that support the dissemination of works of art to the public.

Promoting Production of Creative Works: Copyright law furthers the creation and/or distribution of new works and provides authors (and those who invest in the works of authors) with certain incentives and protections under the law. Therefore, whether the adoption of a federal resale royalty regime would further incentivize and protect the authors of certain visual artworks is also of paramount interest to the Office.

Fostering the Art Marketplace: The effect of a resale royalty on current or future markets is a related, important question, though that is not to say that the law must or should protect all existing business models. Is it possible, however, that a resale royalty right might add to the costs of those who buy and invest in artworks and, if so, are such

costs acceptable from a policy perspective? In this regard, the art market should be broadly defined, including emerging artists, heirs, investors and collectors.

Scope and Applicability of a Royalty: A threshold question is what categories of works should be covered under a resale royalty right. For example, the California resale royalty provision governs works of “fine art,” while the European Directive covers all “original works of art.” The EVAA would cover works of “visual art” as defined in Section 101 of the U.S. Copyright Act. The Office is aware that some artists today work in series, producing limited numbers of identical works and some works that may have been sold as unique creations in the past are now sold in copies including, for example, so-called Internet Art. Moreover, some artists, though certainly not most, are moving from a business model where works are sold to one where access is licensed. Such issues may inform the appropriate scope of fine art, original art or the like.

Contractual Considerations: For any number of reasons, an artist or his or her heirs may not wish to participate in the resale royalty right process through a collecting society, and may wish instead to pursue payment of a royalty directly from the seller; or an artist or his or her heirs may wish to waive or contractually discharge his or her right to receive the royalty. For example, an artist may wish to waive the right to receive the royalty in return for a higher initial sale price rather than wait the years or decades for a work to sell at auction, or an artist may wish to contract privately with the initial seller to provide for a payment of a percentage of any future sales, although the enforceability of this type of contractual term has been questioned. In each instance, however, it is the artist setting their individual terms of sale and determining individual contractual obligations with each initial seller, not a statute. Alternatively, an artist may prefer to

receive a lesser royalty in return for a third party to administer and distribute payments due. Perspective on the issue of how to address the contractual issues associated with a resale royalty right, including whether the right should be transferable or waivable, is helpful to the Office in exploring the practical effect of a resale royalty.

Types of Transactions: Art is bought and sold through myriad channels and venues. Many artists are affiliated with galleries that buy, consign, sell and even resell works to private or corporate clients. Other transactions occur in well publicized auctions, private auctions, online or even through direct internet sales. The laws in California, United Kingdom, France and Australia appear to cover a broad range of transactions involving art market professionals, including those through online sales, private galleries and auctions. Given the variety of ways in which works of art are sold or transferred in the U.S. and across borders, a significant factor for the Office to consider is to what extent a resale royalty should apply or be managed in the numerous commercial channels, or whether the resale royalty should apply to some types of transactions and not others.

Duration of Term: One of the rationales for having a copyright term extending post mortem of the author is to provide income and benefits to the heirs of the artist or author. This rationale may not apply in the same way to a federal resale royalty. Many countries, however, simply follow their general copyright term (such as life of the author plus seventy years), while the California state law uses a term of life of the author plus twenty years. Thus, consideration should be given to the appropriate duration of such a right and how the specific duration or term of a right would support the goals of the copyright system.

Threshold Values: Not every artist's works sell for tens of thousands or even millions of dollars. Many works may be resold by collectors for hundreds or thousands of dollars at local auctions, charity events, or perhaps even some larger sales events. Any such resulting royalty from these smaller payments may be outweighed by the costs incurred by making the payment. Also, if an artwork is sold at a charity event, the proceeds are not realized by the seller, but by the charity. Under a traditional rubric, it appears that the charity would be responsible for payment of the royalty, which lessens the amount it may redirect toward its charitable efforts. The Office would find it helpful to explore the issue of whether a minimum amount of money realized from a sale must be attained in order for the requirement of a royalty payment to be made, and if so, what standards would be appropriate. For example, the California resale royalty applies to sales of \$1,000 or more, while the European directive sets a maximum threshold of €3,000. The EVAA would impose a \$10,000 threshold on transactions subject to the royalty. It would be helpful to receive information about these varying approaches and how the different thresholds may support the goals behind the royalty.

Payment and Enforcement: It is possible that under a resale royalty scheme, the artist and the subsequent seller may have no contractual relationship and therefore the only obligation on the payer of the royalty would likely be statutory. Therefore, any statute would likely include provisions to enforce the payment of the royalty and remedies to both the artist and the collective management organization should such an organization be utilized. One may also envision a situation in which the artists or his or her heirs are unable to be located. The seller may not know how or have the means to locate the artist or heirs, and may be under obligation to pay the royalty indefinitely.

Calculating a Royalty: The basis for calculating a resale royalty could be set in different ways, for example, based on the present sale price of the art work, or its appreciated value (*i.e.*, the difference between the initial sale price and present sale price). Each formula for calculating a royalty rate could have different consequences for the artist and seller and would need to be considered as part of the royalty mechanisms in place.

Royalty Rate: The amount of the royalty could affect the market and artists in different ways and should be assessed, including reviewing the experience of other jurisdictions. The EVAA would set a royalty rate of 7%, while California and Australia set a royalty of 5%. The European Directive adopts a sliding scale based on the amount of the transaction, from 5% for transactions involving sales of €50,000 to a royalty of only 0.25% for transactions over €500,000. The European Directive also caps the maximum royalty at €12,500. The Office seeks information about what factors should be considered in setting an appropriate royalty rate and how the royalty rate might affect artists and the art market.

Administration of a Royalty: Additionally, if the royalty payments are collectively managed, administrative costs born by the collecting society are usually deducted from the final payment to the artist rather than added to the cost of the royalty paid by the seller. The final amount paid to the artist or his or her heirs will undoubtedly be less than the amount collected and may not be fully known until payment is made. In addition, a certain level of transparency in such a collecting society would be required in order to provide the artists and his or her heirs with a sufficiently clear accounting of payments in relation to the administrative costs associated with operating as the

collecting society. It would be helpful to understand whether collective management of royalty payments should be proposed, and if so, what type of entity should be authorized (*e.g.*, government or private) and what standards should apply.

Experience in other Jurisdictions: As noted above, a resale royalty currently applies under state law in California, as well as in many European and Latin American countries. These jurisdictions have taken different approaches to the issues identified above (*i.e.*, transactions covered, thresholds, royalty rates and administration). It would be helpful for the Copyright Office to receive information on the practical experience of those jurisdictions, any obstacles that may have been encountered, and data on the effect of the right on those markets.

Changes Since the Last Report: The Copyright Office last reviewed the resale royalty in 1992. It is therefore interested in any information addressing whether there have been significant policy or economic changes that should be considered when assessing the current feasibility of a resale royalty.

Alternatives to a Resale Royalty: As the Copyright Office acknowledged in its 1992 report, there may be alternatives to a resale royalty that would further the goals of promoting creativity and the public dissemination of visual art.

IV. Subject of Inquiry and Conclusion

The Office hereby seeks comment from the public on factual and policy matters addressed above, including the potential effect of a resale royalty on visual artists, current copyright law and practical implications for commerce. If there are any pertinent issues not discussed above, the Office encourages interested parties to raise those matters in their comments. The Office may also publish a further Notice of Inquiry posing specific

questions and possibly exploring additional alternatives following the receipt of comments in response to this Notice.

Dated: September 13, 2012

Karyn Temple Claggett,
Senior Counsel for Policy and
International Affairs.

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[FR Doc. 2012-23076 Filed 09/18/2012 at 8:45 am; Publication Date: 09/19/2012]