



LIBRARY OF CONGRESS

United States Copyright Office

[Docket No. 2013 – 3]

Resale Royalty Right; Public Hearing

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of public hearing.

SUMMARY: The United States Copyright Office will host a public hearing to discuss issues relating to the consideration of a federal resale royalty right in the United States. The meeting will provide a forum for interested parties to address the legal and factual questions raised in the comments received by this Office in response to its September 2012 Notice of Inquiry.¹

DATE: The public hearing will take place on April 23, 2013, from 1:00 p.m. to 5:00 p.m. The Copyright Office strongly prefers that requests for participation be submitted electronically. A participation request form is posted on the Copyright Office website at <http://www.copyright.gov/docs/resaleroyalty/>. Persons who are unable to submit a request electronically should contact Jason M. Okai, Counsel for Policy and International Affairs, at 202-707-9444.

ADDRESS: The public hearing will take place in the Copyright Office Hearing Room, LM - 408 of the Madison Building of the Library of Congress, 101 Independence Avenue SE, Washington, D.C. 20559

FOR FURTHER INFORMATION CONTACT: Karyn Temple Claggett, Associate Register of Copyrights and Director of Policy and International Affairs, by email at

¹ 77 FR 58175 (Sept. 19, 2012), available at <http://www.copyright.gov/fedreg/2012/77fr58175.pdf>.

kacl@loc.gov or by telephone at 202-707-1027; or Jason Okai, Counsel for Policy and International Affairs, by email at jokai@loc.gov or by telephone at 202-707-9444.

SUPPLEMENTARY INFORMATION:

Background: At the request of Congress, the Copyright Office is reviewing: (1) how the current copyright legal system affects and supports visual artists; and (2) 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 published a general Notice of Inquiry on September 19, 2012 seeking comments from the public. The Notice provided background on the Office’s previous review of this issue in its December 1992 report titled *Droit De Suite: The Artist’s Resale Royalty*² (the “1992 Report”) as well as recent international developments. After extending the deadline for the public to submit comments until December 5, 2012, the Office received fifty-nine comments from various interested parties. The comments raised a variety of issues, including purely legal matters as well as specific experiences and perspectives of individual artists, corporate entities, and collecting societies. All comments, along with the Notice of Inquiry, are available at <http://www.copyright.gov/docs/resaleroyalty/>. The Office now announces a public hearing to receive further input on issues raised in the comments. The agenda and the process for submitting requests to participate in or observe the public hearing is available on the Copyright Office Web site.

Subjects of Public Hearing:

² U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY* (1992), available at http://www.copyright.gov/history/droit_de_suite.pdf.

The public hearing will cover the following topics: (1) the changing legal landscape; (2) portability of the secondary art market; (3) effect on the primary art market and the incentive to create new works; (4) first sale and the free alienability of property; (5) visual artists and sales of works; (6) the Equity for Visual Artists Act; (7) effect on museums; and (8) constitutional concerns. Each of these topics is explained in more detail below.

1. *The changing legal landscape.* In its 1992 Report, the Copyright Office did not recommend adoption of a resale royalty right in U.S. law.³ That report, however, also noted that Congress might wish to reexamine whether the United States should implement a resale royalty law if the European Union harmonized its resale royalty law.⁴ In response to the September 19, 2012 Notice of Inquiry, several commenters stated that China, which has established itself as a major art market, is also considering a resale royalty right in pending domestic legislation. Many commenters also noted that even though the European Union harmonized its resale royalty law through its *Droit de Suite* Directive of 2001 (the “EU Directive”), nothing has changed substantively in the United States since the Copyright Office’s 1992 Report and there is therefore no need to consider adopting a resale royalty now.

Have there been changes in the worldwide legal landscape, art market, or business practices since the Office’s 1992 Report that support or undermine implementation of a resale royalty?

2. *Portability of the Secondary Art Market.* Some commenters expressed concern that if the United States adopts a resale royalty right, a substantial portion of the U.S. art market

³ 1992 Report at 149.

⁴ *Id.*

will shift to markets where no resale royalty exists currently. Conversely, some commenters cited figures showing that the German, United Kingdom, and French markets actually grew after the EU Directive was implemented, while in the United States and Switzerland, where there is no resale right, the markets declined.

What factors, other than implementation of a resale royalty right, affect the portability of the art market? What are the experiences in countries following the implementation of a resale royalty where one did not exist previously? For example, if China implements a resale royalty, how would this impact the worldwide market?

3. Effect on the Primary Art Market and the Incentive to Create New Works. Some commenters addressed whether a resale royalty fosters creativity for young artists, contributes to the financial sustainability of visual artists, motivates artists to produce more artistic works, and enhances an artist's reputation thereby generating more primary and secondary sales. Some comments stated that the existence of a resale royalty would not incentivize artists to create and that the royalty only would benefit a very few artists who are already professionally and financially successful.

The Office is interested in learning more about the effect of a federal resale royalty on the primary art market and whether it is an incentive for artists to create new work. Additionally, the Office would like further information on whether the payment of a resale royalty to artists' heirs foster creativity and, if so, how.

4. First Sale and the Free Alienability of Property. Some commenters suggested that a resale royalty is incompatible with the first sale doctrine set forth in 17 U.S.C. § 109. These commenters argued that a resale royalty provides an ongoing property right each time an artwork is sold (subsequent to its initial sale), prevents buyers from acquiring

unencumbered title to a work of art, and adds a layer of complexity to secondary transactions. Other commenters argued that a resale royalty does not conflict with the ability to freely transfer property because the royalty simply would require payment when a subsequent sale has been made and does not otherwise restrict the transfer or sale of a particular work of art.

In light of these comments, the Office has the following questions: To what extent, if any, are the first sale doctrine and a resale royalty right incompatible? Would a resale royalty have a detrimental effect on the initial sale of the artwork? Should the right to claim royalties on secondary sales be waivable and, if so, what effect would that have on initial sales of artwork?

5. *Visual Artists and Sales of Works.* Many commenters suggested that visual artists are at a great disadvantage in relation to creators of other copyrighted works because visual artists are not paid for the subsequent resale of their original works and do not enjoy a benefit proportional to the success of their work. Thus, these commenters cautioned that without a resale royalty, visual artists are excluded from the most significant profits that their works may generate following its creation.

Commenters opposing a resale royalty noted that copyright law does not assure that each type of work will generate similar levels of remuneration and it is not the role of copyright law to elevate one type of work over another. These commenters further claimed that any perceived inequities in the amount of remuneration for a particular category of work exists because of the characteristics of that type of work and the attendant methods of exploitation for those works.

Thus, the Office is interested in whether there is such an inequity and, if so, to what extent, if any, a resale royalty will affect it.

6. *The Equity for Visual Artists Act.* The Office received twenty-five comments that either cited to the Equality for Visual Artists Act (“EVAA”)⁵ or commented directly on the proposed legislation. The Office is interested in hearing more about what provisions should or should not appear in any resale royalty legislation and, more specifically, views on the following EVAA provisions:

a. *Transaction Types.* The current version of the EVAA applies only to live auction sales when the auction house meets certain eligibility requirements. Many comments noted that a resale royalty limited to certain live auction sales would not represent the majority of secondary art sales and would therefore fail to benefit a significant number of artists. Other commenters noted that, due to the high volume of transactions, it would simply be impractical to apply the right to additional types of sales such as online auctions, private sales, or gallery sales. The Office would like more information on the proper universe of sales to which the resale royalty should be applied.

b. *Scope.* A few comments noted that some art buyers view art as more than paintings, sculptures, or photographs and therefore any definition of art for the purposes of establishing a resale right should be broader than that in the EVAA. The Office thus would like further input regarding what types of artwork should or should not be included in any potential legislation.

c. *Collection and Distribution of Royalties.* Commenters stated that, generally, either a government agency or a designated collection society administers the resale royalty in most jurisdictions that have such a royalty law. These government agencies or

⁵ H.R. 3688, 112th Cong. (2011); S. 2000, 112th Cong. (2011).

collection societies identify qualifying sales, collect funds, deduct an administrative fee, and redistribute the monies to the artists. The collecting society scheme proposed in the EVAA would be different because the collecting society would not only collect the royalty and redistribute it to the artists, but it would also use royalty monies to fund an escrow account from which it would distribute grants to museums to purchase more art. The Office would appreciate more information on the pros and cons of such a structure.

d. *Duration.* Many commenters favor keeping the term of the resale royalty right consistent with the term of copyright because such a term could easily be tracked and calculated and also allows for the royalty payments to an artist's heirs. The Office would like to learn more about how to calculate a justifiable term for a resale royalty right.

e. *Threshold Value.* The EVAA establishes that a resale royalty would only be paid on artwork sales of \$10,000 or more. Some comments noted that a \$10,000 threshold amount would exclude many types of works, *e.g.*, photographs and prints, but also many artists whose work is resold in the secondary market for less than \$10,000. Other comments suggested that too low of a threshold would result in a situation where the cost of administering some royalty payments would be higher than the cost of administering the payments. The Office is thus interested in learning more about whether there should be a minimum threshold before a resale royalty is owed and, if so, what that threshold should be.

f. *Payment.* Based on a review of the comments, determining which entity should be responsible for payment of the royalty following the resale of a work is somewhat controversial. Jurisdictions that have a resale royalty differ on which party is responsible for paying the royalty. The EVAA provides that the party responsible for remitting the

royalty to the collecting society would be the party responsible for receiving the “money or other consideration” from the sale. The Office would like further information on which party should be responsible for paying any resale royalty to the author.

g. Royalty Rate. Some comments noted that the EVAA’s proposed 7% royalty would be one of the highest rates in the world. Many of the comments suggested a 5% royalty with or without a limit on total remuneration as the most consistent with worldwide practice. The Office would like more information on what a reasonable royalty rate could be and how to determine what is reasonable.

7. Effect on Museums. Under the EVAA, museums are eligible to receive grants for purchasing art based on a portion of the resale royalty paid to the author. One comment noted that the EVAA may inadvertently undermine the ways in which museums acquire and deaccession works as well as limit museums’ access to certain pricing information related to works of art. The Office is interested in learning more about the impact of these grants on museums’ purchasing behavior.

8. Constitutional Concerns. Two companies submitted comments highlighting constitutional concerns over federal resale royalties. The Office is interested in hearing from parties wishing to elaborate on the arguments summarized below.

a. Retroactivity and Due Process. One comment expressed concerns that if a resale royalty would apply retroactively to purchases already concluded it would benefit artists at the expense of buyers and collectors that already purchased the artwork without the requirement to pay a royalty on the secondary sale. In addition, the comment stated that while application of a royalty to new works may be permissible under the Copyright Clause of the U.S. Constitution, its retroactive application raises due process concerns.

Thus, the Office would like to hear more regarding whether retroactive legislation would be barred by the Due Process Clause of the U.S. Constitution.

b. *Takings*. One comment noted that applying a resale royalty to pre-existing works may implicate the Takings Clause of the U.S. Constitution through a limitation on the free alienation of property and the transfer of the royalty payment from one individual to another. The Office would like to learn more about whether pre-existing works would implicate the Takings Clause.

c. *Prohibition Against Bills of Attainder*. One comment noted that a federal resale royalty law such as the proposed EVAA may raise issues under the constitutional prohibition on bills of attainder because it specifies particular types of auctioneers that must pay the royalty. For example, the EVAA proposes that the royalty shall apply if the sale takes place in a public auction house that has annual sales in the previous year of over \$25 million - excluding online and private sales. The Office is thus interested in more information on the relationship between the EVAA's limitations and the constitutional prohibition on bills of attainder.

REQUESTS TO PARTICIPATE: Requests to participate should be submitted online at <http://www.copyright.gov/docs/resaleroyalty/>. The requestor should also indicate, in order of preference, the sessions in which the requestor wishes to participate. Depending upon the level of interest, the Copyright Office may not be able to seat every participant in every session he or she requests, so it is helpful to know which topics are most important to each participant. In addition, please note that while an organization may bring multiple representatives, only one person per organization may participate in a particular session. A different person from the same organization may, of course,

participate in another session. Requestors who already have submitted a comment in response to the Office's September 19, 2012 Notice of Inquiry, or who will be representing an organization that has submitted a comment, are asked to identify their comments on the request form. Requestors who have not submitted comments should include a brief summary of their views on the topics they wish to discuss directly on the request form. Nonparticipants who wish to attend and observe the discussion should note that seating is limited and, for nonparticipants, will be available on a first come, first served basis.

Dated: March 25, 2013

Karyn A. Temple- Claggett
Associate Register of Copyrights and
Director of Policy and International Affairs

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