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Jason Okai, Esq.
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Office of Policy and International Affairs
United States Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559

RE: COMMENTS—RESALE ROYALTY RIGHT

Dear Mr. Okai,

Thank you for the opportunity to submit these comments in response to the request for comments announced in the Federal Register, Volume 77, No. 182, on September 19, 2012. The request indicated that the Copyright Office particularly wished to receive comments about the ways in which visual artists currently exploit their work and the issues that would result from the adoption of a federal resale royalty right.

In response to this request, please accept the following comments submitted on my own behalf and on behalf of Gilbert S. Edelson.

As discussed in more detail in the attached submission,, the federal resale royalty right described in the proposed *Equity for Visual Artists Act of 2011*, S.2000/H.R. 3688 ("EVAA"), ***should not be adopted***, because:

1. A resale royalty would, at best, provide limited, sporadic and unpredictable revenue to a very small group of artists – artists for whom the market has already provided.

2. The rationale that a resale royalty is necessary in order to equalize the revenue streams available to visual artists as opposed to other artists who create literary and performance art is analytically flawed.

3. The resale royalty would constitute poor public policy. While it would provide limited benefit to a small group of artists, it would:

    - Hurt the market for less successful artists;

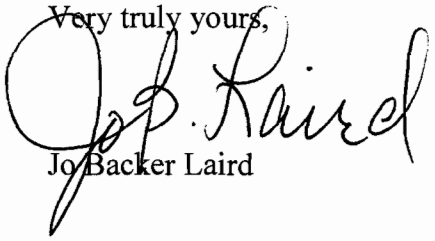
    - Interfere with the ownership rights of collectors;

- Disadvantage museums; and,
- Cede the current advantage enjoyed by the United States in the global art market.

The Copyright Office was right in 1992 when it concluded that there was insufficient justification for the imposition of a resale royalty provision in the United States. There is no reason for the Office to reach a different conclusion now.

Thank you for your consideration of the following comments. I would be happy to speak with you at your convenience to discuss these issues.

Very truly yours,



Jo Backer Laird

Jo Backer Laird is Of Counsel at Patterson Belknap Webb & Tyler LLP, where she is a member of the Art and Museum Law practice group. From November 2007 through March 2008, she served as Senior Vice President, General Counsel and Secretary of Christie's, Inc. In her current position, one of her clients is the Art Dealers Association of America. Gilbert S. Edelson is Counsel at the firm of KattenMuchinRosenman LLP and is the former Administrative Vice President and Counsel of the ADAA. The views expressed in these comments, however, are the views of the signatories only. They do not reflect the views of Patterson Belknap, KattenMuchinRosenman, the ADAA, or any other client of the Patterson Belknap or KattenMuchinRosenman.

Enclosure
cc: Gilbert S. Edelson

COMMENTS SUBMITTED IN RESPONSE TO A REQUEST FOR COMMENTS ON A PROPOSED FEDERAL RESALE ROYALTY RIGHT

SUBMITTED BY JO BACKER LAIRD, ESQ. AND GILBERT S. EDISON, ESQ.[1]

December 3, 2012

As the Supplementary Information included in the Notice of Inquiry points out, in 1992 the Copyright Office conducted "a study on the feasibility of legislation that would require purchasers 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." Resale Royalty Right, 77 Fed. Reg. 58175, 58176 (Sept. 19, 2012). The Office concluded that "there was insufficient economic and copyright justification for enacting resale royalty right or *droit de suite* legislation in the United States," citing concerns both that the royalty could reduce the price of works by artists who do not yet have a resale market, and that the royalty might "conflict with the traditional United States concept of free alienability of property." *Id.*

In the twenty years since the report was issued, nothing has happened that should change that conclusion. If anything, as discussed below, the experience in the United Kingdom would suggest that the arguments against adopting a resale royalty scheme have only increased.

The legislation that was recently introduced in Congress very clearly demonstrates the fact that a resale royalty would benefit only a very small group of artists for whom the market has already provided. In and of itself, that might not be a bad thing. But the benefit would come at the expense of emerging artists whose market would contract, collectors whose property rights would be unfairly restricted, and the American art market in general, which would lose an advantage in global art commerce.

A Rationale Unfulfilled

When it was first created in France in the 1920s, the underlying rationale of the *drôit de suite* was to protect artists unable to support themselves from the sale of their art. It was a rationale based in equity and in the somewhat romantic vision of an artist living and dying in

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poverty while others profited from the appreciation in the value of his art. As described in a 1968 article by Monroe E. Price:

> "At its core is a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece. . . . The purchaser is a canny investor who travels about artists' hovels trying to pick up bargains which he will later turn into large amounts of cash. Thirty years later the artist is still without funds and his children are in rags; meanwhile his paintings, now the subject of a Museum of Modern Art retrospective . . . fetch small fortunes at Park-Bernet and Christie's. . . . The *droit de suite* is *La Boheme* and *Lust for Life* reduced to statutory form."

Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 Yale L.J. 1333, 1335 (1968).[2] While the argument for protecting and supporting impoverished artists is compelling, the *droit de suite* has proved to be a fundamentally flawed way to do it. The central feature of a resale royalty is that it requires a *resale* of a work of art. In other words, it only applies to secondary market transactions, and only a tiny fraction of artists -- sometimes estimated at as few as 3% -- ever make it to the secondary market. As such, the bulk of royalties paid out under existing schemes are paid to the estates of the artists whose work is resold most frequently and at the highest prices, such as Picasso and Matisse.

A New Rationale

It is not surprising, then, that the rationale proffered for resale royalty legislation in the United States has shifted. The "starving artist" is nowhere in sight. Instead, the royalty is justified as a means of rectifying an alleged inequity between artists who create unique physical works of art and those who author books, screenplays, and musical compositions. The latter receive royalties each time a copy of a book is sold, a movie is shown, or a musical recording is broadcast. It is therefore argued that the former is short-changed if he or she does not receive a share of the proceeds each time the unique object is sold.

The argument posits apples against oranges. Or, in more precise copyright terms, licenses against sales.

The author of any copyrightable work has a set of statutory rights in that work. He or she has the right to copy the work, distribute it, display it, and create derivative works, as well as the right to prevent others from doing each of these things. The author of any copyrightable work can generate revenue by licensing any of these rights. The author of a novel, for example, can license to a publisher the right to copy and distribute it, to a magazine the right to print excerpts from it, and to a movie company the right to make it into a film and show it in theaters.

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[2] This rationale continues to be tendered by some advocates of resale royalty schemes. As recently as 2009, when a resale royalty bill was introduced in the New York State Assembly, it was formally advocated as a means of protecting "rights of artists who fall at the very bottom of the economic spectrum. . . . This will permit artists to benefit fractionally from the appreciation of the value of their works." N.Y. Assemb. A04971, 2009-10 Reg. Sess. (N.Y. 2009).

Similarly, a painter can license the right to make copies of his or her work to be used in books, magazines, videos, movies, television productions, posters, note cards, and post-cards. The right to make derivative works can be (and is) licensed, for example, to be used for jewelry, fashion, and housewares.

Each of the rights described above is separate from the right of ownership of the physical object that embodies the work. A writer who sells the original manuscript of his novel has no further statutory right to control or profit from the re-sale of that manuscript. An artist who sells his painting has no further statutory right to control or profit from its re-sale.

The proposed re-sale royalty, then, is not designed to make equivalent the rights of visual and other artists. They are already equivalent. It is designed to provide a new revenue stream for visual artists that is outside the ambit of copyright law.[3] The question is whether this kind of a royalty would constitute sound public policy.

Bad Policy

Experience in other jurisdictions tells us that a resale royalty scheme would benefit only artists who have already established their careers and markets. There is no reason to believe that a federal resale royalty in the United States would be any different. In fact, by its own terms, the currently proposed *Equity for Visual Artists Act of 2011*, S.2000/H.R. 3688 (the "EVAA"), assures that only the *most* successful artists would receive any benefit at all. As noted above, it is estimated that the work of only approximately 3% of artists ever makes it to the re-sale market. Of those, fewer still are ever offered for sale at the major auction houses that would be the only selling entities that would be covered by the bill. Of those very few, only a yet smaller subset sell at prices of $10,000 or more. To borrow from current political parlance, the proposed bill would only benefit the "one percent" of contemporary artists who are at the top of the market.

The actual benefit to even this small group of artists would be limited. Under the process proposed in the EVAA, a royalty of 7% of the resale price would be paid to an authorized collection society. The society could retain up to 18% of the that amount to cover administrative expenses. After the deduction of those expenses, the remaining amount would be split 50-50 between the artist and an escrow fund that would be run by the collection agency for the purpose of making grants to museums. The artist would, therefore, only receive 2.87% of the resale price of his or her art.

There is nothing inherently objectionable about successful artists making more money – even in small bits. Success is a good thing, and America's great artists should be well compensated for their work. But even assuming that increasing the income of established artists is a legitimate public policy goal, it is unclear that a resale royalty is the best way to achieve it.

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[3] It is not the intent or purpose of the copyright law to assure that copyright holders of different sorts of work achieve equal compensation. The author of a crime novel is more likely to be able to license his book to Hollywood than the author of a non-fiction book on the politics of epidemiology. The fact that the sorts of revenues that can be realized from different categories of copyrightable work are different is not surprising.

Income from a resale royalty is sporadic, uncontrollable and unpredictable. In his 1992 testimony before the Register of Copyrights, artist James Rosenquist eloquently made the point that even the most successful artist may have periods in his career in which his current work has less market value than his earlier work. He recounted a period in his life when his studio had burned down and he was short on funds. Collectors who came to see his new work praised it, but then purchased his earlier work at auction for large sums of money. He got nothing from those sales at a time when the money would have made a real difference in his life.

Similar stories could be told about other artists. Market preferences are fickle. Artists go in and out of fashion; works from one period of an artist's career are favored over others. But, if the goal of Congress is to assist or support artists during these periods, the resale royalty is a wholly unreliable way to do it. There is no certainty that any work by any artist will ever be resold. There is no way to predict or control when such sales will occur or what the resale price (and therefore the royalty) will be. Public support in the form of, for example, commissions, grants and loans to artists in need would constitute a more effective and focused way of accomplishing the goal of assuring and increasing artists' income.

The royalty will, in fact, hurt the very artists that the *droit de suite* has historically been meant to support. Because a federal resale royalty will provide benefits only to artists who are already able to support themselves through their art it will have no impact on the ability of young artists to pursue their craft. Indeed, it may hurt those very artists. The prices that collectors are willing to pay for the work of living artists may be dampened both by the prospect of having to pay the royalty when the work is re-sold, and the fact that payment of the royalty itself will reduce the funds available to them to support younger artists. The financial incentives for a collector to take a risk on an as-yet unproven artist will be artificially distorted, to the detriment of those artists.

The royalty will unnecessarily interfere with the property rights of collectors. Fundamental American law and policy protects an individual's property rights against unreasonable interference. *See, e.g.*, U.S. Const. amends. V, XIV; 74 Am. Jur. 2d *Torts* § 40 (2012). This principle is reflected in the distinction in the copyright law between the rights of physical ownership of an object and the intellectual property rights in the ideas that the object embodies.

Federal law already recognizes that owning fine art is in some ways different from owning other objects. The Visual Artists Rights Act, for example, restricts the rights of the owner of a work of art to destroy or mutilate it or to display it in a manner that would tend to damage the reputation of the artist. 17 U.S.C. § 106A(a) (2012). Those limitations are designed to protect the artist's creative vision and reputation, as well as the public's interest in the preservation of works of art of recognized stature. See Carter v. Helmsley-Spear, Inc., 861 F.Supp. 303, 324 (1994) ("This provision [17 U.S.C. § 106A(a)(3)(B)] is preservative in nature: Congress was concerned that the destruction of works of art represented a significant societal loss."); Edward J. Damich, The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art, 39 Cath. U.L. Rev. 945, 955 (1990) ("Moral rights derive from the fact that a work is an expression of the artist's personality. An insignificant, unappreciated work is no less an expression of the artist's personality than is a work 'of

recognized stature.' Thus, adopting a quality criterion changes the focus of the statute from moral rights to art preservation.").

By contrast, the resale royalty would restrict the owner's right to sell the object and profit from his or her investment. It would, in effect, impose a mandatory form of profit-sharing.[4]

The argument in favor of this form of profit-sharing is that it is the artist who created the work and who therefore has an ongoing right to share in the profits of its sale. The same, however, could be said of architects, contractors, jewelers, fashion designers, scientists, engineers, and (even) lawyers—i.e., anyone who has contributed to the value of any object. Indeed, even with respect to fine art, the artist is not the only person who can be credited when the value of his or her work increases. Art dealers who guide and promote the artist's career and place his pieces in private and museum collections, collectors who purchase the artist's work, display it, and permit its publication and loan to exhibitions, art critics and scholars who write about the work, and museums that add the work to their collections all have a role in enhancing the value of a work of art over time. To borrow again from political parlance, few if any artists actually succeed on their own. It really does take a village.

Museums. The EVAA purports to benefit museums through the establishment of escrow funds that would finance the purchase of American art for museum collections. The funds would be managed (and grants or purchases made) by the private entities that would be charged with collecting the royalty from the auction houses. Whether this would ultimately constitute a benefit to American museums would depend on its implementation. One's comfort level that the funds will be distributed fairly and in a way that promotes the curatorial independence of the museums is only as high as one's confidence in the collection societies themselves. Under the legislation, each collecting society is charged to work with the Office of Copyright to develop procedures and criteria for determining which museums are allotted how much money to purchase which works of art. The collection societies will then control the distribution of the funds, subject only to annual reporting requirements. The delegation of this sort of official authority to private, profit-making organizations is troubling.

Regardless of whether the escrow funds ever actually provide a benefit to museum, the EVAA's royalty itself will put them at a disadvantage. When museums deaccession art (i.e., remove it from their collections and sell it) they do so in order to purchase other art. Their goal—and their fiduciary duty—in each such sale is to obtain the highest price possible so as to provide the greatest benefit to the museum's collection. Because sales by museums are subject to public and legal scrutiny, museums have tended to sell at public auction as a fiduciary "safe haven." If, as proposed by the EVAA, the royalty would apply only to auction sales, museums would be disadvantaged. First, collectors will tend, more and more, to purchase art privately in order to avoid paying the expense of the royalty, thereby reducing competitive bidding on works sold at

[4] Critics of the resale royalty have pointed out the inequity of an artist having a right to share in a collector's profits if the value of his art goes up, without having a corresponding obligation to compensate the collector for his losses if the value of the art goes down.

auction.[5] If there are fewer bidders, auction prices will be lower, and institutions like museums who sell at auction will be hurt. Second, the proceeds paid to museums will be further reduced by the 7% royalty that attaches to the sale.[6]

The royalty would cede market advantage currently held by the United States. The fact that the United States does not impose a resale royalty on sales of art has given us a competitive advantage in the global market. Anthony Browne, chairman of the British Art Market Federation ("BAMF"), an organization that represents many of the larger players in the United Kingdom's bustling art and antiques market, notes that the imposition of the EU resale royalty in the United Kingdom has caused the UK art market to lose a significant amount of business to markets that do not have such a royalty, such as the United States and China. *China Overtakes Britain to Become the World's Second Biggest Art Market*, www.artinfo.com (March 15, 2011), http://www.artinfo.com/news/story/37214/china-overtakes-britain-to-become-the-worlds-second-biggest-art-market. BAMF also notes that since the market collapse in 2008, the contemporary art markets in the United States and China have recovered at rates of 120% and 121%, respectively, as compared to a recovery of only 43% in the United Kingdom. Response by The British Art Market Federation to the European Commission's Consultation on the Implementation and Effect of the Resale Right Directive, at 8, *available at* http://www.lapada.org/public/BAMF_Response_to_EC_Consultation.pdf (last visited Nov. 12, 2012). The adoption of a resale royalty scheme in the United States would unnecessarily cede this market advantage at the expense of the artists and businesses that make up the American art market, an industry estimated to include over 71,000 businesses generating approximately 17.4 billion dollars in 2011. Clare McAndrew, The International Art Market in 2011: Observations on the Art Trade over 25 Years (2012).

What's more, the adoption of the EVAA would not only cede our market advantage, it would reverse it. The resale royalty laws in the European Union impose a royalty of 5%; the EVAA would require 7%. The royalty payable on any work of art in the EU is capped at 12,500 Euros. The royalty imposed by the EVAA will not be capped. For the American art market to remain at the center of global art commerce, it must continue to be able to attract the most important, high-value art transactions. The EVAA would make the United States a materially less attractive place to sell exactly these sorts of works.

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[5] The imposition of a resale royalty to private sales might solve this particular problem, but would cause further damage to emerging artists – the very artists that the *droit de suite* was historically meant to benefit. Galleries who work with emerging artists regularly use the proceeds of secondary market sales to subsidize their sales efforts on behalf of new and emerging artists. By diverting the funds that dealers would otherwise use to support as-yet unsuccessful artists, or that collectors might otherwise use to purchase work by those artists, the royalty would be counterproductive.

[6] Whether the auction house charges the royalty to the seller or the buyer, the amount that the museum actually receives will be reduced. A buyer at auction adjusts his bids to account for the additional amount that he will have to pay in excess of the hammer price. The proposed resale royalty will add 7% to that calculation, and will accordingly reduce the amount that the potential buyer is willing to bid.

Conclusion

In his 1968 article, Monroe E. Price described the "theology" of the *droit de suite*. The use of the term "theology" was apt. It connotes an article of faith that persists in the face of contrary evidence or argument.

The resale royalty has never accomplished its historically proffered and deeply romantic rationale. It has not and does not provide support to "starving artists" exploited by a rapacious market. At best, it provides limited, sporadic and unpredictable revenue to a very few artists for whom the market has already provided—artists whose work sells in the secondary market.

As such, proponents of a federal resale royalty have created a refurbished rationale; the royalty is no longer designed to support struggling artists, but is meant to "equalize" the revenue streams available to visual artists as opposed to artists who create literary and performance art. It is not a rationale that withstands analytical scrutiny.

Nor is it sound public policy. The proposed resale royalty, while providing limited support even to the very few artists who would benefit, would hurt less successful artists, interfere with the ownership rights of collectors, disadvantage museums, and cede the current advantage enjoyed by the United States in the global art market.[7]

The Copyright Office was right in 1992 when it concluded that there was insufficient justification for the imposition of a resale royalty provision in the United States. There is no reason for the Office to reach a different conclusion now.

[7] One cannot help but note that the EVAA was drafted with the participation of the Visual Artists Rights Coalition. The legislation states that in order to act as a collection agency under the Act, an organization has to have had prior experience licensing the copyrights of artists in the United States or has to have been authorized by at least 10,000 artists to license their copyrights, either directly or through reciprocal agreements with foreign collecting societies. The Sunlight Foundation Reporting Group identifies the Artists Rights Society and VAGA (two American entities that provide copyright services to artists), and the ADAGP and EVA (two European collecting societies) as organizations that are affiliated with the Visual Artists Rights Coalition. Each of these organizations would be eligible to act as collecting societies under the legislation that their lobbying group helped to draft.