



## SUBMISSION OF COMMENTS FOR THE EQUITY FOR VISUAL ARTISTS ACT OF 2011 BY SPA – SOCIEDADE PORTUGUESA DE AUTORES

SPA is a limited liability cooperative, established in 1925 to manage Authors' Rights, in accordance with national (Code on Copyright and Neighbouring Rights, approved by Decree-Law no. 63/85 of 14 March 1985, as amended by Laws no. 45/85 of September 17, and 114/91 of September 3, and by Decree-Laws no. 332/97 and 334/97 of November 27, and by Laws no. 50/2004 of August 24, 24/2006 of June 30 and 16/2008 of April 1) and international legislation (Berne Convention of 1886 and Universal Convention of 1952, reviewed in 1971).

Nowadays, SPA's business covers all creative areas, although it was primarily focused on writers, musicians and playwrights at the time when it was established. Several years passed before the visual arts began to flourish in SPA.

Our society has been representing the most important creators for decades, and it has always been sensitive to the emergence of new technologies that can encourage new forms of artistic expression.

Being a multidisciplinary society, SPA manages all kinds of rights, including the Resale Right, since it represents, among others, authors of fine arts, photography, illustration, design, architecture, applied art and other visual works as well.

SPA's main goal is to defend the authors' rights and ensure they receive the fair share of royalties and remuneration they are entitled to.

Hereunder, it may be found SPA's view on the importance of the U.S.A. Copyright Act, providing a resale right comparable to 14ter Berne Convention.

### SOME RECOMMENDATIONS FROM EUROPEAN EXPERIENCES

One percentage of between 3-5% from the resale price should be applied to the entire price achieved, not on the margin of profit.

An application threshold should not be above USD 1 000 because it would otherwise exclude many living artists and works which achieve regularly lower price levels such as photography.

Collective management is the only efficient way with a low administrative impact on the art market and easy cross border exchange thanks to an existing international network.

Key is a enforceable information right that enables the artists and rights holders to follow affected sales and claim the revenues due.

## THE BENEFIT FOR AUTHORS, ESTATES AND HEIRS

The resale right provides artists with revenues due to the economic success of their works, provides additional income which enables artists to invest in materials and to launch new art projects. Heirs and estates are maintaining archives of works which are valuable sources for researchers and are investing in legal procedures against forgeries of original works. These activities are costly and not funded by any public financial sources.

## NO DETRIMENTAL EFFECTS ON THE ART MARKET

The 2011 report by the European Commission<sup>1</sup> on the implementation of the resale right in particular with a view on the concerns that art market professionals had expressed during the legislative process. It was feared that shares of the markets would be shifted to third countries. Such effect could not be registered by the Commission's observations. In UK and in France petitions were signed by a total of close to 5000 artists, estates and heirs which emphasized the importance of the right. About 500 submissions to the Commission's consultation were sent, many by individual authors.

The Commission's report concluded that no detrimental effect of the introduction and harmonization of the right on the European art market could be observed. In countries without resale right the market did not grow faster than in countries belonging to the EU.

The development continued in 2011 where UK, France and Germany benefitted from important growth of the market while the share of art market turnover in the US and in Switzerland decreased.

- The UK art market represented a 19,4% share of the global market with a 24% increase in sales (USD 2.24 billion in 2011 vs. USD 1.81 billion in 2010)
- France's share was 4,5% with an increase of 9% in sales (USD 521 million vs. USD 478 million in 2010)
- The German market share reached 1.8% with an impressive increase of sales of 23%.<sup>2</sup>

The Commission concludes that there is "no pattern" that the art market would react in a specific way on the introduction of the right.

The art market in general recovered very quickly from the world-wide financial crisis: the contemporary art sector results fell dramatically in value and volume. In 2010 already a level

1 [http://ec.europa.eu/internal\\_market/copyright/resale-right/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/resale-right/index_en.htm)

2 "The international art market 2011: Observations on the Art Trade over 25 Years", by Clare McAndrew for TEFAF, [www.tefaf.com](http://www.tefaf.com)

above the results in 2006 was reached. 2011 was a record year reaching results above 2009.<sup>3</sup> This development confirms that the market follows its own special rules. Some of the success should be returned to the authors.

The Chinese success appears to be related to the general growth of Chinese markets with the appearance of a growing number of rich Chinese business people and a growing interest in luxury goods such as cars, jewels and old wines.<sup>4</sup>

The European Parliament (EP) has adopted a report on the implementation and the results reported by the European Commission on 20 November 2012.<sup>5</sup> The EP took a positive view on the right's implementation and confirmed the Commission's results for instance as concerns the lack of a detrimental effect on the art market. It also "highlights the importance of giving proactive support to local artists".

The Commission is likely to revisit the matter with a new report in 2015 where the developments in the US will be of great impact.

## OBJECTIVE OF THE RESALE RIGHT

Other authors and right holders regularly benefit when their works are exploited by others and receive a share of generated profits. Due to the particularity of the art works which are created in one single or in a limited number of originals to be sold on the art market the artists primarily live on the sale of the work. In general artists sell the works at low prices and thus invest into the dissemination of the works and future success.

Once the work is sold the author will not receive any share of a rise in value of his or her work when the work is sold subsequently. The resale right is a means to redress the balance and introduce the right of the artist to take part in the economic success of his or her creations.

The right has also the side effect of providing artists with feed-back on the dissemination and success of works that have been sold. Artists regularly point out the importance for their work to receive such information, for instance the Irish icon of contemporary fine arts, Robert Ballagh, when supporting the setting-up the first Irish visual artists collecting society in 2005.

Many artists fear to be rejected by art market professionals when taking in public a favorable position on the resale right. The right needs to be inalienable to effectively reach the artist. Once the right is introduced, artists largely appreciate the additional income and the underlying recognition of their creation of value which encourages many artists to adhere the local collective management society like it recently was the case with DACS in the UK.

The side effect of the extension of repertoires of collective management societies also results in a strengthened representation of visual authors useful as concerns other usage of visual works such as reprography. Defragmentation of the visual repertoires facilitates the access of users to licenses, for example the large scale digitization projects of books by public educational and cultural institutions which face the challenge of embedded art works and images where rights are regularly not transferred to publishers.

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3 Footnote 2, page 46

4 <http://www.christies.com/about/press-center/releases/pressrelease.aspx?pressreleaseid=6030>

5 <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&procnum=INI/2012/2038>

## THE US EQUITY FOR VISUAL ARTISTS ACT OF 2011

The US initiative is an important and long-time anticipated step to improve the representation of artists of fine arts and photography not only in the US but even world-wide. It appears at a key moment after the successful implementation of the harmonized right in the EU and a proposal to add the right in the Chinese copyright law.

The EVA societies are confident that the introduction of the right in the USA will lead to a strengthening of the rights representation of visual authors in the United States which will be useful to solve other open copyright questions such as the necessary authorisations for large scale digitization of illustrated print media and reprography for educational purposes.

## RECIPROCITY BETWEEN USA, EUROPEAN UNION AND OTHER COUNTRIES AND CONTINENTS

The resale right was introduced in the Berne Convention as an optional right with the intention to rather encourage the introduction of the right than to impose it. Once the U.S.A. copyright act will provide a resale right comparable to 14ter Berne Convention and the EU law reciprocity will be achieved and, US American artists will benefit from the resale right in our country and in all the other 26 countries of the EU as well as in other countries where it is successfully implemented, mainly in Australia.

Also the European artists will benefit from the right when their works are resold on the US art market. Big names of contemporary artists and artists of the modern classic, such as Gerhard Richter and Joan Miro and Kandinsky sell at high prices at public sales in New York but also numerous artists which are less known and are grateful for the public recognition and income.

In 2005 the resale right was introduced in Australia and a well-functioning management was introduced by the Australian copyright management society COPYRIGHTAGENCY<sup>6</sup>.

The Chinese authorities have proposed a revision of the copyright act including a clause introducing the resale right in China. At present the text of the draft cause is worded at the Chines National Council. The perspective of the introduction of the right in the USA is of important influence for the developments in China.

## CONCLUSIONS

- The resale right is necessary to create equity with other authors and rights holders
- The resale right for the benefit of the author is an important source of income for living artists, estates and heirs and is an important incentive for the creation of new works and the maintenance of important research sources
- The amounts payable are low in comparison to other costs of a sale
- The right has no detrimental effect on the art market
- Reciprocity between Europe and the USA will provide artists at both ends with more income generated from their works

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<sup>6</sup> <http://www.copyright.com.au/>

- The Right will strengthen the visual authors' constituency and has the potential of facilitating the licensing of other relevant uses also for large scale uses in the digital environment

Lisbon, 4<sup>th</sup> of December 2012