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Electronic Submission
http://www.copyright.gov/docs/resaleroyalty/comments/

Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000
ATTN: Jason Okai, Counsel, Office of Policy and International Affairs

Artist Resale Royalty Notice of Inquiry
[Docket No. 2012–10]

Dear Sirs:

The American Free Trade Association (AFTA) is pleased to submit these comments to the Copyright Office in response to the Notice of Inquiry described in the Federal *Register* of September 19, 2012 (Vol. 77, No. 182).

Background

AFTA is a not-for-profit trade association of independent American importers, distributors, retailers and wholesalers, dedicated to preservation of the parallel market to assure competitive pricing and distribution of genuine and legitimate brand-name goods for American consumers. AFTA has been an active advocate of parallel market interests for over twenty years. It has appeared as *amicus curiae* in the two leading Supreme Court cases affirming the legality of parallel market trade under the federal trademark, customs and copyright acts (the 1985 *Kmart* case and the 1998 *Quality King* case) and in numerous lower court decisions. In addition, for several decades, AFTA has led the charge against counterfeiters and has actively participated in crafting legislation and rulemaking focused on eradicating all forms of this illicit trade. AFTA's involvement in emerging legislation and agency rule making has been critical to ensuring the continued availability of genuine, competitive, brand name merchandise, even in the midst of aggressive activity meant to punish and deter counterfeiters

and/or to further expand the exclusive rights and remedies available through existing U.S. intellectual property rights, laws and regulations.

Comments and Discussion

AFTA believes that all artists should be appropriately compensated for their creative contributions to our society, so long as existing limitations to exclusive intellectual property rights are maintained. Recognizing the importance of those limitations, the Notice of Inquiry specifically references the First Sale Doctrine at 17 U.S.C. 109(a) as perhaps the predominant obstacle to implementing a federal resale royalty regime. As noted in the *Federal Register* notice: *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.*

The first sale doctrine, respectfully, does more than merely satisfy the public's interest in widespread dissemination of copyrighted works. The first sale doctrine promotes innovation, ensures a competitive marketplace, preserves cultural contributions, and permits product pricing reflecting unfettered resale rights. In the event a federal artist resale royalty is implemented, the domestic marketplace could be severely affected as each product sale would effectively be a single incident --- akin to a license. There would be no promise of recoupment from investment via downstream resale or distribution. Future sales could be stagnant as product owners would likely be unwilling or unable to go through the research necessary to determine copyright ownership and appropriate contact methods and downstream purchasers would likely bear the economic brunt of a required artist royalty. Moreover, the flow of commerce would necessarily slow considerably as the ability to spontaneously sell or resell artwork could be impaired, if not precluded entirely. The first sale doctrine must continue to serve as an affirmative right of property owners to freely dispose of copyrighted works lawfully acquired and in connection with which the rights holder has, in fact, already been satisfactorily rewarded.

Of most import, however, is the need to recognize that U.S. copyright protection is not just afforded to fine art. Copyright protection is available for artwork as mundane as product labels, product packaging, container notices, coupons, instruction booklets and other materials applied to or used by rights holders to sell, market or distribute consumer goods and similar articles which, as manufactured, may themselves be intrinsically uncopyrightable. Under certain circumstances, it is not uncommon for manufacturers to copyright such tags or labels not to provide any type of "reward" to, for example, the contracted graphic artist, but solely to restrict marketplace competition and control product distribution/pricing to the detriment of American consumers.

Fortunately, Senators Kohl's and Nadler's pending legislation seeking to implement an artist resale royalty program appears to contemplate application only in connection with "visual art" as defined in Section 101 of the U.S. Copyright Act. That definition specifically excludes

"….(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title." It is critical that any type of artist resale program specifically include disincentives for meritless litigation insisting that royalties are due or otherwise owed due to the resale of any copyrighted work other than a "work of visual art" as currently defined in U.S. copyright law.

Finally, it is important to bear in mind that U.S. copyright law is intended to foster creation and innovation; it is not guaranteed to make every artist a millionaire nor is it intended to regulate market conditions. "To promote the Progress of Science and useful Arts" was the first stated purpose of U.S. copyright. The U.S. Constitution ratified in 1788 proposed to do that "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. Notably, there was no concept of property "ownership" as a guiding principle of U.S. copyright protection nor is there any thought to unlimited rewards and profit. The primary purpose of copyright law is not so much to protect the economic interests of the authors/creators, as it is to promote the progress of science and the useful arts—that is—knowledge and innovation.

AFTA believes strongly that existing limitations to the exclusive rights afforded to U.S. copyright owners are critically necessary to support a thriving, competitive and innovative marketplace. AFTA would not oppose an artist resale royalty program so long as it can be administered without compromising the benefits provided to U.S. consumers and small businesses as a result of the first sale doctrine, and so long as such a program is specifically and explicitly inapplicable to copyrighted works utilized by rights holders to accompany, promote, sell, market or otherwise distribute consumer articles (such as product packaging, containers, labeling, coupons, instruction booklets, etc.).

Should there be any questions or doubts about AFTA's position or comments, please feel free to contact the undersigned or AFTA's General Counsel, Lee Sandler, Esq. (lsandler@strtrade.com), directly at any time.

Respectfully,

Lauren V. Perez

Lauren V. Perez
Advisor, Government Affairs

cc: AFTA Board of Directors
Lee Sandler, Esq.