



November 30, 2012

Submitted By Online Submission Procedure

Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559-6000

**Re: Resale Royalty Right: Initial Response to Notice of Inquiry
(Docket No. 2012-10)**

Prepared by James Lorin Silverberg, Esq.
The Intellectual Property Group, PLLC
On behalf of American Photographic Artists (APA)

Submitted by: Stephen Best
CEO American Photographic Artists
PO Box 725146
Atlanta, GA 31139

Introduction:

American Photographic Artists (APA) thanks the Register of Copyrights, Marie A. Pallante, for the opportunity to submit comments on Resale Royalty Rights for visual artists, specifically photographers.

The American Photographic Artists (<http://www.apanational.com>) is a leading national organization run by and for professional photographers. With its culture that promotes a spirit of mutual cooperation, sharing and support, the APA offers outstanding benefits, educational programs and essential business resources to help its members achieve their professional and artistic goals. Recognized for its broad industry reach, the APA continues to expand benefits for its members and works to champion the rights of photographers and image-makers worldwide.

Resale Royalty Right:

American Photographic Artists, Inc., (“APA”) endorses a revision to the Copyright Act which affords a resale royalty for “works of visual art” within the meaning of 17 U.S.C. §101¹, and which is inclusive by its terms of certain photographic works produced as individual pieces or limited edition prints.

The copyright in photographic works has long been recognized by copyright law. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). However, photographic artists, like artists in other media whose income relies on “works of visual art,” do not currently enjoy residual income from the resale of these works. As has been recognized by the many countries that have adopted a resale royalty, there is no justification for this

¹ A “work of visual art” is—

(1) A painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) A still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(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. 17 U.S.C. §101

inequity. Nor is there a rationale under, and it is indeed inconsistent with, current copyright law to reward photographic artists whose revenues are derived from a reproduction-licensing model, while depriving photographic artists of residual income because their creations are in the “works of visual art” media.

Private opt-in rights societies have a well-established role in the domestic and foreign copyright systems and have proven themselves to be effective tools in the administration of a royalty collection system. A similar collection system would serve equally well in resale royalty administration. These societies also provide commercial flexibility in establishing pricing in private sector commerce. These models also provide familiar systems, which involve nominal administration. Because participation in these rights administration societies is voluntary, individual artists retain the right to privately establish resale pricing above or below a statutorily set fee. However, as is the case in mechanical licensing, a statutory minimum fee provides a safe harbor for artists who do not belong to a rights society or who have not individually set a fee. APA does not endorse a model in which resale fees are shared with, and redistributed to, third party or other non-profit entities that are not in privity with the artist. The copyright law’s function is to protect the rights of artists and it is not to exploit their works for the benefit of third party entities that the artists do not select.

The current rights enforcement system in the Copyright Act is instrumental in rights protection and serves as an existing and familiar model for resale royalty rights enforcement. Following the Chapter 12, and Section 106(a) models, registration of copyright is not a precondition for the collection of statutory damages or attorney’s fees. Following the example of the many courts, which have assessed statutory damages, APA endorses a statutory damage baseline fee that is three times the statutory royalty rate, or the actual damages (which include any rate set by the artist individually or through the rights society).

Conclusion:

In light of the foregoing, APA endorses a resale royalty to help cure the existing inequity suffered by artists in the “works of visual art” marketplace, and endorses a legislative scheme which presents no more burden on art commerce than existing licensing models, which rely upon the private marketplace to set rates (subject to a statutory minimum) and when coupled with analogous royalty collection models and within existing remedial schemes.