

U.S. COPYRIGHT OFFICE

**NOTICE OF INQUIRY
(September 13, 2012)**

RESALE ROYALTY RIGHT

NOVEMBER 28, 2012

**INITIAL COMMENTS
OF
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (ASMP)**

**SUBMITTED BY:
VICTOR S. PERLMAN
GENERAL COUNSEL AND MANAGING DIRECTOR
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.
150 NORTH SECOND STREET
PHILADELPHIA, PA 19106**

**215-451-ASMP EXT. 207
FAX: 215-451-0880
perlman@asmp.org
<http://www.asmp.org>**



INITIAL COMMENTS OF ASMP

Introduction and Background

ASMP wishes to thank the Register, Senator Kohl and Representative Nadler for this opportunity to provide comments on how a federal resale royalty provision would affect visual artists and professional photographers in particular.

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. ASMP is the oldest and largest trade association of its kind in the world and currently has approximately 7,000 members. ASMP's members are primarily commercial photographers, making images for publication in advertising, editorial, fine art and other commercial markets.

In general, ASMP believes that fundamental fairness requires some kind of royalty to the creators of visual artworks upon subsequent sales, when the artworks have reached at least a certain value. Factors such as changes in a photographer's stature and reputation and market forces often create significant increases in values between sales of a given work of visual art. Generally, at least part of those increases result from the photographer's lifetime efforts to build a career --- efforts that are not always directly compensated. As many other countries recognize, those efforts can and should be at least partly compensated by a resale royalty.

ASMP greatly appreciates the efforts of Senator Kohl and Representative Nadler in drafting and introducing the Equity for Visual Artists Act of 2011 ("EVAA") in the 112th Congress. ASMP believes, however, that the bills as drafted need improvement in one crucial area: the definition of a "work of visual art."

Currently, the definition set forth in the EVAA is "... (1) a *painting, drawing, print, sculpture, or photograph, existing either in the original embodiment or in a limited edition of 200 copies or fewer that bear the signature or other identifying mark of the author and are consecutively numbered by the author,...*" ASMP believes that defining works of visual art in such a narrow way, cobbled from the definition in the Copyright Act's token nod to moral rights, deprives a huge body of work from the economic protection sought by the EVAA. If the Copyright Office and Congress ultimately believe that there should be a federal royalty on resales of works of art such as photography, it should be applied completely and effectively,

and not as a partial solution to the problem. Incorporating such a narrow definition would only serve to eviscerate any such legislation, leaving it in place to affect only a tiny percentage of visual images and creators.

The reality in the marketplace is that originals and signed, numbered, limited edition images often fail to increase significantly in value, whereas some unsigned prints initially issued in large quantities can increase to astonishing levels. Consider, for example, advertising posters, which are often printed and circulated in vast numbers and are frequently given away without charge. Over time, some of them become rare, highly coveted collector's items, yielding auction prices thousands of times what they initially cost. Prime examples include advertising posters for the Moulin Rouge by Toulouse-Lautrec, one of which sold for approximately \$50,000. earlier this year, and movie posters for films like Metropolis, which typically sell for close to \$1,000,000., or, more recently, the 1971 poster for the James Bond film Diamonds Are Forever, which last year sold at auction for approximately \$130,000. If the Copyright Office and Congress believe that a resale royalty is appropriate for visual artworks at all, restricting the royalty to signed limited editions would be arbitrary, at best.

Specific Responses

The Notice of Inquiry sets forth a number of specific subject areas with respect to which the Copyright Office is seeking comments. The following responses address most of those issues. However, as suggested above, ASMP's primary concern with any resale royalty proposal for visual artworks is that, if one is enacted, it must not be restricted to originals and signed, numbered limited editions.

1. Current Copyright Law Implications

The Copyright Office is interested in how a resale royalty would affect the first sale doctrine. It is ASMP's view that a resale royalty would not have any more effect on the first sale doctrine than the various state and local sales taxes currently have. It would in no way restrict a buyer's (or seller's) rights under the first sale doctrine. It would merely affect the total or net purchase price (depending on whether the buyer and/or seller bore the burden of paying the royalty) for a relatively small number of sales. It should be viewed as a creator's tax --- nothing more.

2. Promoting Production of Creative Works

It is ASMP's view that any prediction as to the effect that a resale royalty might have on the production of creative works would be speculative, at best. There are arguments that could be put forth with apparent logic on either side of the equation, but ultimately they appear to be based completely on guesswork. Proponents will claim that the additional compensation will be an incentive to

increased production of creative works. Conversely, opponents will state with certainty that the increased cost will drive down demand, which will then depress prices and, in turn, drive creators out of the marketplace. ASMP believes that both arguments are colorable, but neither one has been supported by credible evidence.

3. Fostering the Art Marketplace

Again, any definitive statement on the effect of a resale royalty on the art marketplace appears to ASMP to be highly speculative. However, there does not seem to be any demonstrable reason to believe that it would have any more of an effect than state and local sales taxes. If it is possible to predict the effect of a resale royalty on the art marketplace, the answer may come down to the question of who bears the burden of paying the royalty: the buyer or the seller? Put another way, does the buyer pay the purchase price plus the resale royalty, as is typically done with state and local sales taxes; or does the buyer pay the face value of the purchase price, with the royalty being deducted and remitted through some mechanism, leaving the net proceeds for the seller? Sellers are accustomed to paying commissions to auction houses and should not be taken aback by the payment of a retail royalty from the proceeds. Intuitively, it would seem that the latter approach might be more beneficial for the art marketplace. It would allow the buyer to view the purchase price or bid as the actual price without having to factor the royalty into the bottom line cost; and it would incentivize the seller to set the sales price or reserve high enough to cover the additional cost of the royalty.

A third alternative would be to take the kind of approach that is used for paying realty transfer taxes in many real estate sales: the parties split the cost. ASMP does not have a view as to which approach would be preferable.

4. Scope and Applicability of a Royalty

As discussed above, ASMP believes that, if there is to be a resale royalty, it should apply to all categories of visual artworks without limitation. There is no reason in logic or equity to distinguish among the manners or markets in which images are published and distributed.

5. Contractual Considerations

Simplicity and uniformity would suggest that a resale royalty and its systems for collection and distribution should not be changeable by contract. Again following the sales tax analogy, it should be applied and administered uniformly.

6. Types of Transactions

Again, if a resale royalty is in fact appropriate, there is no reason to distinguish among various markets or methods of sale. Especially in today's rapidly evolving, global and virtual marketplace, differentiating among the channels of sale would appear to be illogical at best and counter-productive at worst.

7. Duration and Term

ASMP believes that matching the duration and term of a resale royalty right to that of a copyright would be the most logical and easily understood and remembered approach. It has the virtue of consistency with a concept that most people working in the art world know and understand. It also has the rationale of continuing the sort of financial incentives for creators (whether for themselves or their heirs) that exist within the Copyright Act in order to foster creativity for the public good.

8. Threshold Values

Deciding at what point a resale royalty should be imposed is extremely challenging. There seems to be no real, practical benefit to photographers and other creators of imposing a resale royalty on every single resale at any price point. Further, doing so would create pointless burdens on the parties to resales. However, picking a specific dollar threshold seems to be a case where there is no correct answer. The decision would appear to be controlled more by visceral reactions than factual analysis. Given the increasingly global nature of the economy and the fact that several European countries provide a resale royalty with a threshold of €3,000. (the equivalent of approximately \$4000. as of the writing of these comments), ASMP suggest that a \$5,000. threshold might make sense in the U.S. Based on pure gut reaction, it feels like a Goldilocks number.

9. Payment and Enforcement

The Notice of Inquiry does not pose any specific questions on this topic, so it is difficult to know how to respond. It appears to ASMP that the appropriate approach to payment of the royalty is for the buyer or seller (or third party such as an auction house) to send it to a qualified collective management society, along with whatever information they may have concerning the identification and location of the creator and/or the creator's heirs. Where the creator and/or the creator's heirs cannot be located after a reasonably diligent search, regulations should be promulgated, or incorporated into the legislation, governing the duration of time for the collective management organization to hold the funds while attempting to contact the creator and/or heirs, the publication of notices regarding the funds, further efforts at locating the creators and heirs, and the

eventual distribution and/or use by the collective management society if no proper distributee is located after a specified period of time.

Overall, ASMP has several practical concerns with resale royalties. It is hard to imagine any kind of workable enforcement scheme. Self-policing and –reporting appear likely to be honored more in the breach than in the observance. The only kind of sale that would be amenable to third party scrutiny would be public auctions. If a resale royalty were imposed and its payment and/or administration were to be considered even a mild impediment by the buyer and/or seller, ASMP is concerned that this would drive sales away from public auctions to the private sale environment. That, in turn, would force useful pricing information under the radar, potentially impeding the operation of the fair market system, while allowing sales to take place without the royalty being collected and paid.

10. Calculating a Royalty

ASMP's view is that the resale royalty should be calculated based on the actual sale price generated by the sale in question. While basing the royalty on the appreciation in value since the previous sale is a logical and appealing approach, it begs the question of what happens when there is no pricing information readily available from the previous sale. Rather than imposing investigative burdens on the buyer and/or seller, it appears more practical simply to use the actual sale price for each resale above the specified minimum value, as it occurs.

11. Royalty Rate

Like picking a threshold value, identifying an appropriate rate or scale feels somewhat arbitrary. The two obvious and conflicting factors are keeping the royalty high enough to reward and incentivize creators, on the one hand, and keeping it low enough to prevent it from depressing sales, on the other. In the absence of any credible evidence to support or reject any particular figure, a flat rate of 5%, as currently used in Australia and in the former legislation in California, seems to be a reasonable approach.

12. Administration of a Royalty

ASMP believes that some collective management organization will have to be involved in the collection and distribution of at least some resale royalties, such as where the author and/or the author's heirs cannot readily be located. In addition, funnelling all resale royalties through such an organization would provide convenience, uniformity, and systematization to the benefit of buyers, sellers and creators. ASMP has some experience with the collective management of royalties for individual creators through its membership and participation in the Authors Coalition of America. It is ASMP's view that the Authors Coalition or some similar entity (a private, non-profit body) would be ideally suited to serve as a clearing house for resale royalties.

Conclusion

ASMP believes that a workable and enforceable federal resale royalty on works of visual art would further the goals of copyright and thereby benefit both creators and the public. However, any approach that is limited to sales only of originals and of signed, numbered limited editions draws an arbitrary and unsupportable distinction in the marketplace for works of visual art, and it should not be part of any federal resale royalty legislation.

Thank you for your time and consideration.

Respectfully submitted,

Victor S. Perlman

General Counsel and Managing Director



American Society of Media Photographers, Inc.
150 North Second Street
Philadelphia, PA 19106
215-451-ASMP Ext. 207
Fax: 215-451-0880
E-mail: <perlman@asmp.org>