SUBMISSION OF COMMENTS FOR
THE EQUITY FOR VISUAL ARTISTS ACT OF 2011
BY ARTISTS RIGHTS SOCIETY (ARS)

Artists Rights Society (ARS) is an organization that represents the intellectual property rights, including the copyrights, of more than 50,000 visual artists worldwide. It has an American repertory, which includes Mark Rothko, Willem de Kooning, Andy Warhol, Georgia O’Keeffe, and Jacob Lawrence, to name some of the prominent members. However, the overwhelming majority of ARS’ members are lesser known artists who have nevertheless devoted their lives to this profession.

ARS also represents the repertories of all European Union countries as well as Canada, Australia, Mexico, Japan and others (a list of ARS foreign sister societies whose repertories are represented by ARS in the U.S. is attached hereto as Exhibit A). These repertories also include a number of well-known artists (i.e. Picasso, Matisse, Miro, Chagall, Kahlo), but the overwhelming majority of their adherents are not household names. The Resale Royalty, or droit de suite, as it is known abroad, has been of great benefit to those lesser known artists whose works obtain modest or moderate prices in the art market.

It is important to note that visual artists are the only members of the creative community in the U.S. who do not receive residual payments for their works. Composers and lyricists will collect some two billion dollars this year in royalties for their compositions, distributed by their rights societies, chiefly ASCAP and BMI. Playwrights and screenwriters get public performance royalties akin to residuals for later productions of their works. Actors in film and TV get residuals. All of these are revenues garnered by creators after their initial creative output. Alas, visual artists receive none of these and do not earn a penny in residual or resale payments. The benefits derived from the appreciation in their works accrue predominantly to collectors, auction houses, and galleries.
It has sometimes been maintained that only wealthy artists benefit from a resale royalty. In point of fact, the data gathered in the United Kingdom and France show that the royalty is of wide benefit to many working artists who are little known. The specific number of individual beneficiaries in the U.K. was 855 living artists in 2010, and 786 in 2011. In those years, the right was limited to living artists, but it has now been extended to artists’ heirs, per an EU Directive, on January 1, 2012. In the first ten months of 2012, the total number of individual beneficiaries in the UK was 935.¹ The 2010 figures for France show 2,024 beneficiaries, and those for 2011 a total of 1,764 beneficiaries, of which 714 (40.5%) were living artists and 1,047 (59.5%) were heirs of artists.² Comparable figures for Germany were 1,022 artists in 2010 and 1,208 artists in 2011.³

Belgium followed the French institution of the droit de suite by adopting it in 1921, followed by Italy in 1942 and Germany in 1965. A European Union directive of 2001 (2001 / 84 / EC) mandated the adoption of the droit de suite by all European member states, with a deadline of 2006. The United Kingdom instituted the measure in 2006. The term of application in the EU is coterminous with that of copyright, namely life of the artist plus 70 years post-mortem.

History abounds with examples of impoverished artists whose works achieved acclaim only late in life or after their deaths. Please see the accompanying 1920 illustration by Jean-Louis Forain, (Appendix B) showing two children in tatters watching top hatted bidders vie for one of their father’s works. One ragamuffin remarks to the other, “Look, one of Papa’s paintings.” This cartoon served as an impetus for the French adoption in 1920 of the droit de suite. That the resale royalty might benefit successful artists is no argument for withholding its benefits from all. The need for the royalty does not exclude artists who have even experienced a degree of success, but whose economic status remains somewhat precarious. Some pertinent artist comments follow:

³ German figures supplied by VG Bild-Kunst.
“I am one of those artists who have always thought it was unfair to profit from artists when the work went much higher than the collectors paid for it. On a personal note, I have nothing to leave my son but my work when I die. Much of it has been sold at bargain rates; most of it my best work. Thinking about it, oddly enough, I feel left out of my own story... why should only the present owner turn a profit, while the artist is left with nothing? In other businesses, e.g. publishing, the author gets a percentage of sales besides an initial down-payment. I've worked to do my art, I won't last forever, I'm 86, but the paintings will go on a lot longer than I will. It is very important for me to be able to know that I have taken care of my son who suffers from disability. This resale royalty thing is not only about money, it is about love, and being able to give. It is about legacy. In the end, it is the best kind of generosity.” Rosalind Drexler

“This royalty act is long overdue, while it has come up several times in the past, it has always been shot down. Resale on art as it now stands is severely unfair to visual artists. Much of my work which was made in the late sixties and early seventies sold for several hundred dollars of which I received half, and now sell in the many thousands. It is only fair that like writers, artists should partake in that resale price.” Dorothea Rockburne (age 81)

It must be emphasized that beneficiaries of the droit de suite in countries possessing the right, must hail from a nation which accords the right to foreign nationals on a reciprocal basis. As the U.S. does not afford this right to foreign artists, let alone to its own citizens, American artists are precluded from obtaining resale royalties abroad. Thus, the very significant sale of U.S. works overseas produces no revenue for their American creators.

A bill calling for the adoption of the resale royalty was introduced in Congress in the early 90s by Senator Edward Kennedy and Congressman Robert Kastenmeier, with the result that formal hearings were held by the Copyright Office in 1991 and 1992, under the direction of William Patry, then Assistant Register of the Copyright Office. Mr. Patry left his position a short time before the Copyright Office’s recommendation had to be filed. His replacement, who had a very short time to acquaint himself with the dossier, produced a somewhat ambiguous document. While it refrained from recommending the adoption of the Resale Royalty at that time, it went on
to state: “The international community is now focusing on improving artists’ rights, including the possibility of harmonization of droit de suite, within the European Community. Should the European Community harmonize existing droit de suite laws, Congress may want to take another look at the resale royalty, particularly if the community decides to extend the royalty to all member states.” It has been 11 years since the European Community adopted a harmonized droit de suite rule for all member states.

There has never been a national resale royalty law in the U.S. and, consequently, artists have never benefited from a federally mandated right. One state, however, California, has instituted droit de suite, but no matter how well-meaning the California Act, it has been relatively easy to circumvent and compliance with it is relatively rare. Under the California Resale Royalty Act, a seller or his/her agent is obligated to locate the artist and pay a 5% royalty on sales of fine art (defined as an original painting, sculpture, drawing, or work of glass that is not permanently attached to real property), provided the value of the sale is more than $1,000 and exceeds the previous sale price of the same work.

Interestingly, if the artist cannot be found after the sale, the seller must deposit the 5% royalty in escrow with the California Arts Council, which holds the sum for seven years. If the artist does not come forward or cannot be located within that time, the money reverts to the Council for use in acquiring fine art pursuant to California’s Art in Public Buildings program. The objective is for young artists or living artists to benefit from these monies, as does the public from the public works that result. The Equity for Visual Artists Act, presently before Congress, has a similar ancillary aim of subsidizing the purchase of works from living American artists by U.S. museums.

On May 17, 2012, the Federal District Court of California (Ninth Circuit) appeared to have invalidated the California Resale Royalty Act on the grounds that it purports “to regulate transactions that take place wholly outside of California” and therefore violates the Commerce Clause of the United States Constitution which holds that only the Federal government is empowered to regulate commerce between the States.\(^4\) Although we believe the Court erred in

its reasoning, it serves to point up the need for a Federal law, which would obtain in all the States and which the bill before Congress is designed to accomplish. On June 6, 2012, Judge Michael W. Fitzgerald, in reviewing a petition of the Plaintiffs, held that the court’s “order is not a binding precedent on other district courts either within or outside the Ninth Circuit.” Therefore, for all intents and purposes, the California Resale Royalty Act is still in effect but it is clearly endangered. The perilous situation in California (where the rule has been flouted, and continues under judicial review) reinforces the need for a Federal Resale Royalty Act, applicable in all the States.

Finally, the fear that the Artist Resale Royalty Right would somehow impair or diminish auction sales is belied by experience in the U.K. There, the concern was that the market would flee to the U.S., Switzerland, or China, where there is no resale royalty. Far from falling, art market sales in the U.K have increased appreciably since adoption. The reader is referred to an article in the Huffington Post, which appeared on September 25, 2012, (http://www.huffingtonpost.com/daniel-grant/uk-s-artist-resale-royalty_b_1881430.html). It is titled “U.K.’s Artist Resale Royalty Law Didn’t Damage the Art Market (Despite All the Claims).” The article begins “Wasn’t the sky supposed to fall… and wasn’t it supposed to have a ‘corrosive effect’ on the British Art Market.” To the contrary, sales have reached record levels in the U.K. and exceed those that occurred before the adoption of the law, nor has the market fled elsewhere. The migration of the market abroad used to be a standard argument of the measure’s opponents in the U.S., with the U.K. cited as the likely refuge for U.S. sellers. With the adoption of the right in the U.K., this fear, assuming it ever had validity, has been totally obviated.

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5 CV-11-8604-MWF (C.D. Cal., June 6, 2012).
Appendix A

Foreign Artists Rights Societies Represented by ARS in the U.S.

ADAGP 11, rue Berryer 75008 Paris FRANCE

AGADU El Derecho de Autor es Uno de Los Derechos Humanos Canelones 1122 Montevideo (11.100) URUGUAY

AKKA/LAA A.Caka Iela 97 Riga, LV-1011 LATVIA

APSAV Agencia Peruana de Sociedades de Autores Visuales Los Frailes 181 Urb, Santa Felicia La Moina Lima 12 PERU

ARTEGESTION Veintimilla E8-115 y Av. 6 de Diciembre 593.2.2547 048 Quito ECUADOR

AUTVIS Rua Boa Vista, 186, 4° floor, Zip Code: 01014-000 São Paulo, SP BRAZIL

VG BILD-KUNST Weberstrasse 61 53113 Bonn GERMANY

BONO Kjeld Stubsigt. 3 0160 Oslo NORWAY

BUS Årstaängsvägen 5 B

117 43 Stockholm SWEDEN
COPY-DAN copydan BilledKunst Bryggervangen 8 2100 Copenhagen OE DENMARK
CREAIMAGEN Condell 520 Providencia Santiago CHILE

DACS 33 Great Sutton Street London EC1V 0DX ENGLAND

EAU Toompuiestee 7 EE 0001 Tallinn ESTONIA

GESAP 63 Kostava Street Tbilisi 380015 GEORGIJA

HUNGART 1055 Budapest Falk Miksa utca 30. fsz.2. HUNGARY

IVARO Irish Visual Artists Rights Organization 37 North Great Georges Street Dublin 1 IRELAND

KUVASTO Director Kristel Nybondas Iso Roobertinkatu 3-5 A 22 00120 Helsinky FINLAND

LATGA-A J. Basanavicius str.4/6 2600 Vilnius
Appendix A

LITHUANIA

LITA
LITA, Society of Authors
Mozartova 9
P.O. Box 28
810 01 Bratislava 11
SLOVAK REPUBLIC

OSDEETE
Greek Collecting Society for Works of Visual Arts
14 Kolletti St, Athens 10681
GREECE

PICTORIGHT
Amstelveenseweg 88-90
1075 XJ Amsterdam
THE NETHERLANDS

PROLITTERIS
Schwamendingenstrasse 10
CH-8050 Zurich
SWITZERLAND

RUSSIAN AUTHORS' SOCIETY (RAO)
6a B.Bronnaya Str., GSP-5,
123995 Moscow
RUSSIA

SABAM
Rue d’Arlon 75-77
B-1040 Bruxelles
BELGIUM

SACK
SOCIETY OF ARTIST'S COPYRIGHT OF KOREA
5F, GNC media Bldg., 352-11
Seokyo-Dong, Mapo-Ku, Seoul
121-838 KOREA

SAVA
Viamonte 723, 4th floor
Office n° 18 (C1053ABO)
Ciudad Autónoma de Buenos Aires
ARGENTINA

SGA
Sociedade Guineense de Autores
Pessoa Colectiva de Direito Privado
Rua António M’Bana

Nº2, 1º Andar, C.P. 545
Bissau
REP. GUINÉ-BISSAU

SIAE
Viale della Letteratura 30
01144 Roma
ITALY

SODRAC
Tower B, Suite 1010
1470 Peel
Montreal, Quebec H3A 1T1
CANADA

SOMAAP
SOCIEDAD MEXICANA DE AUTORES DE LAS ARTES PLÁSTICAS, S.G.C. DE I.P.
Av. Mariano Escobedo # 373, 5º Piso
Col. Chapultepec Morales, México, D.F., C.P. 11570
MEXICO

SPA
Av. Duque de Loule, 31
1069 Lisboa Codex
PORTUGAL

SPDA
Duplex Giza Tower 2/12 (#301)
201204 Ginza, Chuo, Tokyo 104-0061
JAPAN

VBK
Tivoligasse 67/8
A-1120 Wien
AUSTRIA

VEGAP
GRAN VIA, 16 - 5º Dcha.
28013 Madrid
SPAIN

VISARTA
71117 str. N. Iorga nr. 21, Bucuresti
ROMANIA

VISCOPY
1 Blackfriars Street
Chippendale NSW 2008
AUSTRALIA
Cette façon de faire provoque le mouvement d'opinion qui s'est trouvé à l'origine de la loi. La peine de 1920 créant le "droit de suite" en France.

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Appendix B