

December 5, 2012

Maria A. Pallante, Esq.  
U.S. Copyright Office  
101 Independence Avenue, S.E.  
Washington, DC 20559-6000

RE: Resale Royalty Right – Docket No. 2012-10

Dear Ms. Pallante:

The Association of Art Museum Directors (AAMD) submits these comments in response to the U.S. Copyright Office's Notice of Inquiry, 77 Fed. Reg. 58,175 (Sept. 19, 2012), regarding art resale royalty rights.

The AAMD appreciates this opportunity to comment on the question of art resale royalties given their potential impact on artists, the creation of works of art in the United States, and the mission of this nation's museums of art. Museums have an interest in ensuring that all living artists – whether at the beginning of their careers or already well-established – are fairly compensated and rewarded for their artistic endeavors. Artists and museums share an important relationship that is crucial to ensuring the public's continued access to and enrichment from works of art.

### **THE ASSOCIATION OF ART MUSEUM DIRECTORS**

Established in 1916, the AAMD is an association whose membership consists of more than 200 directors of art museums in the United States, Canada, and Mexico. The purpose of the AAMD is to support its members in increasing the contribution of art museums to society. The AAMD accomplishes this mission by establishing and maintaining the highest standards of professional practice, serving as a forum for the exchange of information and ideas, acting as an advocate for its member art museums, and being a leader in shaping public discourse about the arts community and the role of art in society.

### **COMMENTS REGARDING A RESALE ROYALTY RIGHT**

Art museums have long been at the forefront of assisting the creative and economic success of living artists. This happens in a number of ways and is independent of any resale royalty.

#### **Contribution of Museums to Living Artists**

- Visual artists benefit greatly when museums acquire and add their works to museum collections. Especially for young or emerging artists who may not be as well known to the public or art collectors, a museum acquisition gives immediate validation and reputational enhancement – both of which often translate into financial success that in the long run likely exceeds any resale royalty an artist would receive.

- In addition to purchasing art, museums often commission works by living artists. Commissions validate artists' creative efforts, enhance their reputations, expose their newer (and less established) works to the public, and encourage further sales by the artist to collectors and galleries.
- Art museums, of course, exhibit art. When such exhibitions take the form of solo or group shows, the artist is the center of attention. Retrospectives of a living artist's work can be instrumental in establishing his or her reputation and standing in the art world. All these can translate into significant economic benefits to an artist in the sale of the artist's works.
- Art museums publish (either through in-house publications or third party publishers) scholarly research and studies of works, including those of living artists. Such publications often place the work of the artist in the continuum of contemporary art. Through such publications, an artist's reputation may be enhanced and further sales of the artist's work often occur.

#### Effect of a Resale Royalty on Living Artists

Museums believe in fostering artists' careers and ensuring that artists can make a living from their creative efforts. There is a fair amount of empirical evidence, however, that resale royalty systems ultimately do little to help living artists.

For example, a 2010 report commissioned by the European Art Market Coalition concluded that, of the resale royalties distributed in continental Europe, 74% went to artists' heirs, 20% went to collection agencies, and 6% went to living artists.<sup>1</sup> This study is cause for concern that, however well-intentioned a resale royalty may be, as a practical matter such a royalty regime will not assist living artists or encourage the creation and dissemination to the public of new works of art.<sup>2</sup>

#### **COMMENTS REGARDING THE EQUITY FOR VISUAL ARTISTS ACT OF 2011 (EVAA)**

The AAMD understands the EVAA calls for a resale royalty payment of seven percent on works of visual art sold at auction for more than \$10,000, with the royalty to be paid to a visual artists'

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<sup>1</sup> See Daniel Grant, 'Droit de Suite' Debate Heats Up, ARTnews, Jan. 11, 2012, <http://www.artnews.com/2012/01/11/droit-de-suite-debate-heats-up/>.

<sup>2</sup> This may be the view of many artists as well. In 2006 David Hockney said with regard to the resale royalty enacted in the United Kingdom: "The arrival of this levy will do little or nothing for the vast majority of British artists. It will undoubtedly envelop the market, on which we as artists depend, in red tape, and it will discourage art dealers from buying particularly the work of emerging artists." See Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, N.Y. Times, Nov. 1, 2011, <http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-andebay.html?pagewanted=all>.

collecting society. The EVAA would also require the collecting society to distribute half the net royalty to the artist or her/his successor as copyright owner, and to deposit the other half into an escrow account to fund purchases by nonprofit art museums of certain works of art.

While the AAMD supports the work of artists and encourages the creation of all forms of art, the AAMD has concerns about the EVAA.

First, the EVAA does not appear to advance the purposes of the U.S. copyright law to promote the creation and dissemination of works of art.

The nation has had a thriving artistic community for generations without a federal resale royalty right, and it is difficult to see how the EVAA would encourage artists to create more art than is already being created. The EVAA would in large part benefit artists' heirs and collection societies that do not create art, by mandating royalties to be paid for decades after the artist's death. The EVAA also would not assist the vast majority of living artists; it would exclude works of art sold for less than \$10,000 and apply to works sold through the large auction houses, which usually only sell the works of established artists.

Second, the bill may in fact have harmful consequences for artists, the museums that exhibit their artwork, and ultimately the public.

The AAMD is concerned that the royalty, contrary to its intended purpose, may actually undermine the economic position of many living artists, especially artists at the start of their careers. As a matter of economics, if a buyer knows that he or she has to pay a share of any profits from later sales, then the buyer is likely to pay less in the initial transaction – and at that point of sale in an artist's career, the buyer usually has much more negotiating power over price. This translates into downward pressure on the prices at which artists sell their works. While a few artists will receive resale royalties in the future, most artists will not make up the difference because they will not receive any royalty. This is especially true under the EVAA, which excludes a large number of living artists from its benefits.

Art museums may suffer as well. Museums acquire works of art in a number of different ways – through gift or bequest; by direct purchasing of works from artists, collectors, or galleries; or through art auctions. With regard to auctions, a museum itself may bid for works at auction, which offers transparency – letting museums gauge the economic value of similar works and thereby plan future acquisitions carefully using their limited resources. The EVAA, by imposing a royalty on works of art sold at auction, would encourage closed-door, private sales at the expense of public auctions, potentially depriving museums of vital information about the availability and pricing of works of art.

Third, the AAMD has serious concerns about the escrow fund that has been proposed as part of the EVAA. In particular:

- *Conflicts of interest.* There are conflicts inherent in appointing a collecting society as the arbiter of grants to museums. Those societies (some of which are for profit

corporations) are created, *inter alia*, to collect license fees for their artist members. There are at times legitimate issues about when a fee is due or whether the use is “fair use” by a museum. To have a for profit corporation become the arbiter of distributions to museums to purchase art the sale of which will generate a license fee is a construct that is fraught with potential conflicts of interest.

- *Lack of precedent and experience.* Collecting societies have no experience in making grants to museums to purchase works of art. Furthermore, the EVAA would require a whole new bureaucracy and system of regulations which has no precedent in existing law. The AAMD believes that such rulemaking (and the inevitable amendments to the regulations) will be time-consuming and burdensome given the numerous issues to be decided, the potential for differing positions by collecting societies and museums, and the limited resources that museums have at their disposal to engage in a rulemaking.<sup>3</sup>
- *Potential reduction in other arts funding.* Public arts funding is regularly debated in Congress, and the AAMD is concerned that establishment of an escrow fund may be used as an argument to reduce other federal arts funding, for example to the National Endowment for the Arts, the National Endowment for the Humanities and the Institute of Museum and Library Services all of which benefit museum initiatives that benefit the public.

While the escrow fund appears well-intentioned, the problems inherent in any such fund will remain regardless of what efforts Congress or the Copyright Office may undertake to craft a solution.

Many of the reservations that the AAMD has regarding the EVAA apply equally to the California Resale Royalty Act.<sup>4</sup>

## **CONCLUSION**

The nation’s art museums have long supported and will continue to support artists through purchases, commissions, exhibitions, research, and publication of the artists’ work. We will continue to foster a creative dialogue among artists, museums, and the public.

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<sup>3</sup> Indeed, the Copyright Office’s expenses incurred in establishing such regulations would be deducted from the escrow funds, and it is likely that a significant portion of the royalty pool will be consumed to fund the rulemaking. See Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. § 6 (2011).

<sup>4</sup> The California Resale Royalty Act, which places the burden on the seller to pay a resale royalty to the artist, seems to have been of limited value since it is generally not well understood and cumbersome to implement; there are also serious questions that have been raised about its constitutionality.

The AAMD believes that a great deal more thought and study needs to take place regarding resale royalties, particularly in light of the serious examinations underway in the EU and Australia.

Sincerely,

A handwritten signature in black ink that reads "Kimerly Rorschach". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kimerly Rorschach  
Illsley Ball Nordstrom Director, Seattle Art Museum  
AAMD President