

From: Carol Steinberg, Esq.; Irina Tarsis, Esq.; Center for Art Law
Re: Notice of Inquiry on Resale Royalty Right (Docket No. 2012-10)
Date: December 5, 2012

This comment is in response to the Copyright Office's Notice of Inquiry regarding a issues relating to consideration of a federal resale royalty right, such as the one proposed in the Equity for Visual Artists Act. We support instituting a federal resale royalty right in the United States.

COMMENTS IN SUPPORT OF THE RESALE ROYALTY BILL

Although we find problems with some aspects of the proposed Equity for Visual Artists Act of 2011 ("EVAA"), the undersigned wholeheartedly support the concept of a resale royalty for visual artists and urge the enactment of a resale royalty bill in the U.S. We believe that the rationale for the enactment of the original resale royalty in Europe (1920), in time followed by enactment of similar laws in Australia (2010) and the United Kingdom (2011), that it is only fair that artists benefit from the increased value of their work, still applies today.

"Works of visual art" are unlike any other type of property. Case law suggests that individual states in the United States may not acknowledge the everlasting connection between an artist and her oeuvre by instituting individual resale royalty legislation, which on a state level violates the Commerce Clause of the U.S. Constitution. Still, the Constitutes vests power to promote the arts in Congress and we urge this Congress to enact a resale royalty bill in the United States. Such legislation would promote the arts by taking into account the concept that art is not like other kinds of property and the intrinsic connection between the artist and her oeuvre.

The French parliament enacted the original *droit de suite* in 1920 after hearing lengthy descriptions of how artists such as Cezanne and Gaugin lived and died in poverty, while their paintings brought enormous sums on resale. Since that time at least 60 countries have followed suit, and the European Union (EU) has issued a directive requiring the implementation of harmonized resale royalty legislation by 2006.

The United States has been conspicuously slow to join this momentum. The 1992 Copyright Office Report (the 1992 Report) did not support the enactment of the royalty; instead, it proposed alternatives, including compulsory licenses, broader display rights, and federal grants for public works of art, which never materialized over the two decades that followed. However, the 1992 Report did indicate that Congress should reconsider enacting the right if the EU were to decide to harmonize its resale royalty laws. This time has come.

Both Australia and the UK have recently enacted resale royalty legislation. Australia passed the Resale Royalty Right for Visual Artists Act in 2009 (the Act). Under the Act, artists are eligible to receive 5% of the sale price when their original works sell through a secondary market for amounts in excess of \$1,000. The Act applies to works by living artists and for 70 years after the artist's death. As in the EVAA under consideration, the Australian model covers original works of art and provides for a distribution of the royalty through a collecting society appointed by the Government for a five-year period. Artists can waive the royalty on a sale-by-sale basis. The issue of whether or not the right can be waived should be studied for a U.S. bill. In Australia,

artists supported the waiver so as not to lose sales. On the other hand, artists with less bargaining power may always be forced to waive the right.

In 2011, the United Kingdom adopted legislation similar to the proposed EVAA. There, the royalty is collected on a sliding scale depending on the final sales price. The minimal royalty assessed is 4% with a cap imposed on the ultimate amount a buyer may be required to pay, not to exceed Euros 12,500 or about \$15,000. The often-cited argument that enacting the royalty will harm the art market was also voiced in the UK. Critics of the concept of the royalty forecast the exodus of collectors and the decline if not demise of the art market. However, there has been no evidence to show that the vibrant auction and gallery scene in the UK was affected in any meaningful way as a result of adoption of their resale royalty act.

RATIONALE IN SUPPORT OF THE RESALE ROYALTY RIGHT IN GENERAL

The first reason to enact the right in the United States is that it is only fair that artists participate in the appreciation of their work. The value of the work is essentially attributable to the artist's creativity, talent, and increasing reputation. Although collectors, galleries, and auction houses assist in enhancing the value, it is the work itself, which largely creates the value. Without the work, there would be nothing to appreciate.

The second reason to enact the right is to put creators of fine art on par with other creators of copyrighted works, who may continue to earn royalties on the use of their works. J.K. Rowling, who began as an unknown, continues to earn royalties on the now invaluable Harry Potter characters and books. A similarly unknown artist who sold a painting twenty years ago, perhaps as a matter of necessity at a low price, does not have a similar opportunity to earn from the work, despite its subsequent increase in value.

The right can also provide an additional incentive for the creation of fine art. If working artists, in addition to those who sell at mega prices at auction, can see that the royalty is enforced and that the proceeds are actually distributed, its enactment would enhance the economic incentive to create, while also perpetuating "the moral right" based upon the artists' intrinsic connection to their work.

GENERAL PRINCIPLES REGARDING THE ENACTMENT OF THE RIGHT

The right under consideration should apply to various secondary market sales and not exclusively to sales through auction houses. Applying the royalty only to works at auction unfairly disadvantages artists who have not attained great financial success. The bill should target other sellers, such as museums and galleries as well as auction houses. Artists who have great talent but have not attained the success of a Warhol or Hirst should also be able to benefit from the royalty. These artists sell their work not at auction but through galleries. The famous example of Rauschenberg's "Thaw," which first sold for \$900 and resold 15 years later for \$85,000, must recur quite often (though perhaps at a lower resale price point) among lesser known artists whose work is sold in galleries.

In order to achieve the purpose of the royalty, it is very important that a system of administration and enforcement be developed, which ensures that the royalty is actually collected and disseminated to the creators of the work. The Copyright Office could collect data about administration and distribution of royalties from the sixty plus countries that long have enacted the resale royalty to find out which methods actually work and then incorporate those methods into a bill.

COMMENTS ON THE PROPOSED EVAA

Eligible Sales: The royalty should be collected not only on sales in excess of \$10,000. There are many works of art that sell significantly below this amount, even at auction, and it would be unfair to deny the resale right to the lesser-known or starting artists. The scheme as contemplated would only benefit established artists. Lesser-known artists need to be rewarded as well.

Division of Royalty: The proposed split of the royalty between the artist and a fund for nonprofit art museums to purchase visual art by living artists domiciled in the United States is a creative way to supplement dwindling budgets of the said nonprofits. However, the decision to withhold half of the royalty is arbitrary and needs to be discussed with the artist community. While some may be willing to contribute more to the fund in lieu of paying income taxes on the full royalty amount, others may not and the obligation to deposit half of collected royalty into the escrow account for unknown museums needs further research and explaining. We are further unclear about the mode of distributing the funds from the escrow account.

Administrative Expenses: Under the proposed bill, the “collecting society” would deduct up to 18% for itself to cover administrative expenses. In light of the proposed sharing of the royalty fee between artists and museums, the administrative expense, if any, should be withheld from the share owed to museums for collecting purpose and not born by artists.

Royalty Ceiling: In addition to the alarmingly high administrative expense contemplated by the bill, the bill does not impose a cap on the royalty that may be collected. The amount in question could reach into tens of thousands of dollars. We feel that there should be a cap imposed on the royalty that may be collected from any given sale.

We would like to thank the Copyright Office for inviting public comment in response to the Resale Royalty Right, and we welcome alterations to the proposed EVAA.

Signatures (Name/Date)

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December 5, 2012

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December 5, 2012