

Submitted Online via <http://www.copyright.gov/docs/resaleroyalty>

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U.S. Copyright Office
101 Independence Avenue, S.E.
Washington, DC 20559-6000

Re: Notice of Inquiry on Resale Royalty Right (Docket No. 2012-10)

December 5, 2012

Dear Ms. Claggett,

I am the Assistant Director of the Kernochan Center for Law, Media and the Arts and a Lecturer in Law at Columbia University Law School. This comment is in response to the Copyright Office's Notice of Inquiry cited above, regarding a proposed resale royalty right.

As you know, the United States does not have a strong history in the area of moral rights and legislation in this area has always been controversial. There are many positive aspects to robust protection of artistic endeavors, and an increased recognition of moral rights in the U.S. would certainly be of benefit to those in the visual arts community. At the core of many other countries' laws is the resale royalty or *droit de suite*, allowing creators of visual works to be compensated when their creations are sold after the initial sale. While artists in many other fields (such as writers and television and film actors and directors) receive royalties for each copy of their work sold or distributed, those who create works of visual arts as defined in section 101 of the Copyright Act often do not. Artists may be inspired to create more works if they feel they will receive a piece of the work's appreciated future value. While I believe that these

effects are, in theory, very positive, I feel that there are many concerns and issues that must be addressed when thinking about such a proposal.

First, I would recommend that any legislation not target one venue of sales. Applying this tax only to those works sold at auction unfairly disadvantages one group and could have unintended negative effects. For instance, if the royalty is collected only through sales at auction, it is likely that more sales will be conducted through private entities. Unlike auction sales, however, private sales are largely unregulated and do not allow the general public to easily participate in the process. Auctions allow a greater segment of the population the chance to own a work of fine art, often allow the public the opportunity to view priceless pieces of art normally held in private collections; popularize artists' works thereby leading to future increases in price; and allow works to be sold at their true market value rather than at an insider price, as is so common in private deals. Furthermore, many nonprofit organizations such as museums sell solely through auction houses in order to provide the most transparency in their dealings. If legislation is passed that solely targets auction houses, it is organizations such as these that, unable to transfer their sales to the private market, will bear the burden of the royalties.

I am also concerned about the effect a resale royalty will have on art market prices. I believe buyers will begin to factor in future royalties they will be obligated to pay when they transfer their works and, thus, purchase prices will be lowered. As an analogue to this, any legislation should not apply to works purchased before the Act goes into effect as sellers would not have had the opportunity to take account of this fee, and the work's potentially decreased selling price, when initially purchasing the work. Additionally, the provisions of any proposed bill should not apply to any items sold at a loss. Doing so would provide a disincentive to

collectors to purchase new, avant-garde works lest they not rise in value, and would further penalize those collectors who are already suffering a financial loss.

Under the proposed Equity for Visual Artists Act (EVAA), any resale royalties earned would be given to the copyright owner of the work. Unfortunately, many artists assign the copyrights in their works to others for compensation. If the goal of this legislation is to compensate artists for their work and to incentivize the creation of new art, royalty payments must be granted to the artist, regardless of whether or not he owns the copyright in the work.

I believe that any legislation must consider the following issues when determining what type of royalty rate to set. First, drafters should look to current legislation in the EU, home to some of the world's largest art markets. Many of these countries have lower resale royalty rates than the proposed US legislation. Furthermore, in the EU there is a cap on the amounts to be paid and often rates vary depending on the price at sale. This assures owners of works that have greatly increased in price that they will not have an inordinate burden at the time of sale.

Any proposed legislation should also investigate the challenges that come with enforcement of such laws and there are many questions that might be worthy of investigation before a resale royalty is adopted in the United States.

- Will the cost of collecting and administering the monies pose an unfair burden on the auction houses? If a third-party collecting society needs to be established, will the costs of that outweigh the royalty payments received? Who will run the registry and who will oversee its work?
- How will income taxes related to the sale of the work be calculated? Will the seller pay tax on the entire sale price or the net price after the royalty fees are taken?

- How will artists be notified of the sales? If the law applies to sales that are held privately, who will monitor those sales? Will galleries and dealers or collectors be responsible for reporting all sales and remitting the proceeds to a collecting society? If so, who will ensure that this process is followed?
- If the EVAA as proposed is adopted, who would decide which museums received monies and what art was purchased?

Finally, I urge the Copyright Office to investigate how successful these laws are in reaching their goals. Of particular concern is the number of artists who benefit from these laws and whether or not such laws benefit only the most successful of artists. A 1999 study by Jeffrey Wu noted that “Of the 233,000 U.S. citizens who classified themselves as “painters, sculptors, craft-artists and artist-printmakers, 357 (0.15 percent) have an art resale market of greater than \$1,000 over the latest fifty-one month period and the top five sellers among these artists would have claimed more than 55% of the royalties paid over that period.”¹ While it is true that any compensation, even to a small group of successful artists, is beneficial, it would be useful to know the scope of the beneficiaries in countries that have adopted similar legislation.

Increasing and assuring the rights of a creator in the visual arts is an important endeavor; to provide the best protection, the Copyright Office should ensure that any proposed legislation is both precisely drafted and easily enforced.

¹ Jeffrey C. Wu, Art Resale Right and the Art Resale Market: A Follow-Up Study, 46 J. COPYRIGHT SOC'Y U.S.A. 531, 543-4 (1999).