



Ref: Comments to the Notice of Inquiry of the Copyright Office by Luciano Marchione in representation of SAVA.

Ciudad Autónoma de Buenos Aires, December 4th 2012

**U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000**

Dear Sir

I am writing to you as the Executive Director of SAVA, a Visual Arts Collecting Society located in Argentina.

It is of our interest to answer the Notice of Inquiry of the Copyright Office related to the Equity for Visual Artists Act of 2011 (EVAA) that is being currently analyzed in the US Congress. For Argentinean authors, the topic is extremely important, since a considerable number of their works sold abroad are auctioned in the cities of New York and Miami.

Therefore, we will answer each of the points mentioned in the Notice of Inquiry:

1. Current Copyright Law Implications

The implementation of a resale royalty and the modification of the first sale doctrine will not have a negative effect in the dissemination of works of art within the public.

The resale royalty proposed in EVAA, and resale royalty (or "*droit de suite*") in general in the countries in which the right exists, is applied only to the secondary art market. This means that the right is only applied when the owner of the works sells it, without the direct intervention of the artist.

Therefore, the resale right can only be exercised in a limited part of the market. The primary market of art, in which the artist sells the work directly, or by means of a gallery, will not be affected by this right.

2. Promoting Production of Creative Works

The adoption of a federal resale royalty regime will incentivize and protect the authors of visual artworks. Many authors sell their works at a low market price when they are beginning their careers. As they gain a reputation in the art environment, the prices of their works rise. They will not receive any participation when their work is resold in the secondary market, and many times they will continue to struggle financially.

That is why a resale right is needed. Those artists that are in a bad financial situation will receive a participation of their works that are being resold. That small participation can be an excellent stimulus that will allow the artist to create more works that will enter the market too, and benefit all the participants in the chain of value.

3. Fostering the Art Marketplace

A resale royalty right might add to the costs of those who buy and invest in artworks but they must be considered acceptable from a policy perspective. As it was said in the previous point, a resale right promotes the creation of works. Therefore, art collectors will be able to buy more works from those same authors. In this way, the possible small costs that may apply to them will be outweighed by the possible increase in profits for the access of more works by their preferred authors.

4. Scope and Applicability of a Royalty

The resale royalty right should include as many categories understood within the visual arts as possible, such as photography, video-art, and design works. The contrary could mean an unfair treatment of some art expressions, and even discrimination.

Artworks created in series must be protected too, producing limited numbers of identical works. It is strange for a work that was sold as a unique creation to be resold nowadays in copies. When artists produce limited series of an artwork, it is not common for

them for produce further copies of that work, because that could reduce their credibility, and also lower the prices of their creations.

In some cases, the work can be reproduced digitally obtaining exact copies, like in Internet Art, but most of these works have a different function in the art environment, and are not normally objet of auctions.

Finally, even if there are some artists licensing their works, they are very few of them who can negotiate this kind of contracts. Selling the work is the most normal way of art negotiation nowadays.

5. Contractual Considerations:

Even if an artist or their heirs may not wish to participate in the resale royalty right process through a collecting society, and may wish instead to pursue payment of a royalty directly from the seller; this practice should not be allowed. It could raise the cost of the collection system, making it more expensive for collectors, auction houses and collecting societies.

Also, it should not be allowed to an artist or their heirs to waive or contractually discharge his right to receive the royalty. This could motivate some collectors or art intermediaries like auction houses to apply pressure on the artist, so that they waive their right. In this case, if the artist does not waive the right, maybe we would be forced to lower the sale price of their work.

Even worse than allowing waiving the right, would be allowing transfers of it, at least while the artist is alive. The right should only be transferred to the artist's heirs or foundations.

Finally, it is also important to consider that a private contract system could be extremely difficult to enforce, and that will never have the same level of compliance as a mandatory legal system established by a statute would.

6. Types of Transactions:

The right should be applied to every resell of the work made with the intervention of an art market professional and other commercial channels, such as galleries, publicized auctions, private auctions, online or even through direct internet sales. It could be applied to private transactions, but it would be difficult to exercise the right.

The laws in California, United Kingdom, France and Australia cover a broad range of transactions involving art market professionals, including online sales, private galleries and auctions.

7. Duration of Term:

The general copyright term should be applied. When the right is applied after the author died, and it is received by its heirs, it is especially important to maintain the value of the artwork in the market. Heirs, themselves or via a Foundation, have the task to maintain the legacy of the artist. To achieve this, they have to organize exhibitions, publish catalogues, organize conferences, etc., and a resale royalty would help them covering the costs.

8. Threshold Values:

No threshold should be applied to the resale right, or it should be set low. This right normally applies only a particular group of trade operations, via qualified art market professionals and other commercial channels.

When the artwork is being resold through an art market professional, the reseller wants to obtain a profit. One of the fundamentals to implement a resale right is that the reseller obtains a profit, while the author of work does not. Whether the resell of the work produces a huge profit margin or a modest one, should not make a difference for the application of a resale right.

In addition, there are works that could be resold at low prices, like photographic works, that would be excluded from the resale right scheme. Also, young artists would see their participation in the scheme diluted if a high threshold is applied, because their works normally do not get high resell values.

Finally, it must be taken into account that if a mandatory collective system is used for collecting the resale royalty, this will keep the costs of the system low. In comparative law, the art market professional that intervenes in the resell normally has the obligation to keep the money until it is paid to a collecting society. He has to calculate the right, and pay it over a period of time, for example one month, to the collecting society.

Normally, in countries that apply the resale right, the payment process is simple, and it does not raise the cost of the art market professional, at least not in a noticeable way. The EVAA proposed a \$10,000 threshold, which is extremely high, and that should be lowered or eliminated.

9. Payment and Enforcement:

It is necessary to establish to pay the right to a collective management organization, in a determined period of time after the resell took place. In this way, the reseller will not have the problem of having to find each artist or their heirs.

Also, the organization should be given a right to require to the art market professionals all the documentation that is necessary in order to check the information about the resell.

10. Calculating a Royalty:

The basis for calculating the resale royalty should be set based on the present sale price of the artwork. This is the only system that has really proven to be effective in comparative law. It should never be set based on the artwork appreciated value (*i.e.*, the difference between the initial sale price and present sale price), because it is extremely difficult to apply in practice.

All resale right systems that have applied the appreciated value system have failed in the past. For example, in Brazil only one time the heirs of an artist have been able to collect the right.¹

¹ João Cândido Portinari c/ Banco do Brasil S/A, Certidão de Julgamento, Recurso Especial Resp 594526 Rj 2003/0172940-5 (STJ).

11. Royalty Rate:

The royalty rate for the artists could be set around 7% or 5%. It should be noticed that EVAA would set a royalty rate of 7%, while California and Australia set a royalty of 5%. However, EVAA splits that 7% in two halves, one for artists, and one for museums. There is not a system like this in comparative law. If EVAA is approved as it is, only 3.5% of the royalty rate would be received by the artists or their heirs, which is a low one in comparative law.

On the other hand, a fixed rate is positive for the artists as well. Opposed to this is the system used by the European Directive, which introduced a sliding scale based on the amount of the transaction, from 5% for amounts up to € 50,000 to only 0.25% for transactions over € 500,000. This system reduces the economic benefits that the author may receive when their works are resold for a high value.

Also, the European Directive caps the maximum royalty at € 12,500. This cap is unreasonable, because it limits the exercise of the right even when a work is resold for millions of euros. In that case, the resale right given to the artist pales in comparison with the profits obtained by the reseller.

12. Administration of a Royalty:

The royalty payments should be collectively managed by a private collecting society. Administrative costs borne by the entity should be deducted from the final payment to the artist or their heirs. This means that the final amount paid to the artist or their heirs will be less than the amount collected, but this can be controlled establishing a cap by statute to the administrative costs.

Transparency of the collecting society should be required. This can be achieved by applying international standards, like the professional rules established by the International Confederation of Societies of Authors and Composers (CISAC). Also, an external auditor could be designated.

13. Experience in other Jurisdictions:

Uruguay successfully regulated and applied droit de suite via its Intellectual Property Law Nº 9.739, with the modifications that were introduced by the Law 17.616 of 2003.² Before this reform, droit de suite had been established using the artwork appreciated value system, which could never be applied in practice.

The new article 9 establishes that “In the event of resale of three-dimensional works of art or sculptures by public auction, in a commercial establishment or through an agent or dealer, the author, or on his death his heirs or legatees – until the work passes into the public domain – shall have the inalienable and unrenounceable right to collect three per cent of the resale price from the seller. The auctioneers, dealers or agents who are involved in the resale shall act as withholding agents of the author’s resale right in the price of the resold work and shall be required to submit the said amount to the author or the corresponding management society within thirty days following the auction or negotiation. Failure by the auctioneer, dealer or agent to fulfill this obligation shall make them jointly and severally liable for payment of the amount.”

Uruguay, unlike the European countries, doesn’t require reciprocity. This means that an author who is a national of a country that doesn’t recognize the resale royalty, will be able to collect the right in Uruguay. Collective management of the right is not mandatory, but the local society AGADU collects most of the money.

The market of Uruguay is small compared with heavyweights like New York or London, but is important in the region. There is a high amount of wealthy people from Brazil and Argentina that have summer houses in the country, and that are interested in the art market.

It should be noted that in Uruguay a resale royalty is applied when the work is in the public domain. The Article 16 of the Decree No. 154/004 of 3 May 2004, establishes that

² The translation of the Law is available at <http://www.wipo.int/wipolex/en/details.jsp?id=3978> .

“when the work passes into the public domain, this percentage shall revert to the State, which shall assign the proceeds to the Copyright Board for the performance of its duties.”³

14. Changes Since the Last Report:

It should be noted that as a consequence of the European Directive, resale royalty or droit de suite has been established throughout Europe, even in the UK. The UK market has not been affected by the introduction of the resale royalty, and has continued growing ever since. Even important galleries from USA are opening branches in the UK.⁴

In conclusion, even if EVAA can be improved, we consider that it would be an important tool to improve the welfare of visual artists. Better paid artists mean that there will be more works, and of a better quality. This can only be beneficial for the art market as a whole, and the whole community that enjoys the creations of visual artists.

Best regards,

Luciano Marchione

SAVA

³ The translation of the Decree is available at <http://www.wipo.int/wipolex/en/details.jsp?id=3979> .

⁴ Batty, David, “US art dealers make London scene a battleground”, The Observer, online version, October 7th 2012, <http://www.guardian.co.uk/artanddesign/2012/oct/07/us-art-dealers-london-scene> .