

COPYRIGHT OFFICE, LIBRARY OF CONGRESS - NOTICE OF INQUIRY RELATING TO RESALE ROYALTY RIGHT

COMMENTS BY SIMON STOKES, SOLICITOR (ENGLAND AND WALES);
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About the author

Simon Stokes is an English qualified lawyer (solicitor) and a partner in the law firm Blake Laphorn. He is also a Visiting Research Fellow at the Centre for Intellectual Property Policy and Management (CIPPM) at Bournemouth Law School, UK. He is a noted authority on UK copyright law, especially relating to the visual arts and is the author of *Art and Copyright* (2nd edition, Hart Publishing 2012) a leading text. He is also the author of the monograph *Artist's Resale Right UK Law and Practice* (2nd edition, Institute of Art and Law 2012). In his professional practice he represents artists, art dealers, auction houses, art market trade associations and art publishers on copyright and artist's resale right/droit de suite ("RRR"). He advised the UK art market on the UK implementation of RRR and provides legal assistance to the Society of London Art Dealers and their members on RRR.

He has also provided written evidence to the UK Parliament on RRR and was cited in the House of Commons (Culture Media and Sports Committee) 2005 Report "The Market for Art".¹

Simon Stokes qualified as a solicitor in 1992 and is a graduate of the University of Oxford and also of the Massachusetts Institute of Technology (Technology and Policy Program SM 1988) where he held a Fulbright Award.

NB. These comments are provided in a personal capacity and not on behalf of his firm, Bournemouth Law School or his clients. Nevertheless he believes that his comments are shared by many of those involved in the UK art market.

The relevance of the UK experience of RRR

It is submitted that the Copyright Office should in its policy and legislative deliberations look carefully at the introduction and effect of RRR in the UK. This is because:

1. there are clear similarities in our copyright systems due to the common historic origins of copyright law in our two common law jurisdictions where both countries approach authors' rights from a copyright as opposed to a continental *droit d'auteur* perspective. The UK only acquired RRR in 2006 following the 2001 EU Resale Right Directive ("2001 Directive")². Prior to that no such right had existed in UK law.
2. like the US the UK (prior to the 2001 EU Directive) had previously reviewed whether the introduction of RRR was desirable (in 1977 as part of the Whitford Committee Review of UK IP Law), and the UK had rejected it for the following reasons:
 - 2.1. it mainly benefits the estates of dead artists - opinion in the UK is against inherited wealth

¹ p.16

² Directive 2001/84/EC

- 2.2. it should apply to all sales but it is impossible to apply to private sales and if introduced it would have to be inalienable
- 2.3. there is little demand for it and it does not produce much income
- 2.4. there are practical difficulties in administering it.³

The UK Government opposed the harmonisation of RRR by the EU from the 1990s through to the adoption of the 2001 Directive.

3. along with New York the UK has traditionally been one of the most significant global art market centres.
4. there is evidence available from the UK, the EU's largest art market, of the practical effects of the introduction of RRR into UK law from 14 February 2006.

In my comments I shall include the UK experience of RRR but first there are a number of relevant "global" factual and policy issues regarding ARR that extend beyond UK law and apply generally that I wish to raise.

Global factual and policy issues

Scope of RRR worldwide

In the background to the Notice of Inquiry comments are made about the significant number of countries worldwide that have RRR. However, it should be noted that outside the EU/EEA it is unclear how many of these countries operate RRR in a meaningful, fully reciprocal way despite its existence on the statute book in those countries.

It is noteworthy that the 2001 Directive requires EU member states to provide that non EU nationals benefit from RRR in the EU "only if legislation in the country of which the author....is a national permits resale right protection in that country for authors from the member states...". In other words on the basis of reciprocity.⁴ It should be noted that the 2001 Directive required the European Commission to publish as soon as possible an indicative list of those non EU/EEA countries ("third countries") which provided reciprocity to member state nationals.⁵ As far as the author is aware the Commission has not received any evidence for any third country which demonstrates that they qualify for inclusion on the list. And it is believed to be current UK collecting society practice not to collect RRR in respect of resales of works from third country nationals presumably on the basis that the collecting societies share the view of the Commission. So in reality it appears that only the EU/EEA operate a fully functioning, reciprocal RRR system (the author is aware that Australia also operates a fully functioning RRR system but at the time of researching this area earlier in 2012 Australia did not offer reciprocity to EU artists so Australian nationals did not qualify for RRR in Europe).

The lack of reciprocal international RRR laws other than in the EU/EEA would appear to raise issues about the global reach of RRR. Unlike the reproduction right it is not a universal feature of copyright and is optional under the Berne Convention. Certainly a number of the

³ Copyright and Designs Law (Cmnd 6732) 1977: ss. 797-799; 802-803.

⁴ Article 7(1)

⁵ Article 7(2)

USA's major trading partners including China and Japan do not have the right. Nor does Switzerland - a major art centre.

Rationale for RRR

RRR is often justified for inclusion in copyright law on the grounds that artists unlike say composers or literary authors do not benefit from the subsequent exploitation of their works. Yet in today's highly digital visual world artists are able to fully participate in exploiting the reproduction and communication to the public rights in their works, as well as merchandising opportunities. In the UK the collecting society DACS among others promotes the exploitation of such rights by artists. The author is aware of a number of UK artists with well-established commercial licensing policies in respect of copyright in their works and their brand as artists. So it is submitted this argument either now lacks force or is certainly not as strong as it might once have been.

Also whilst it is argued artists should share in the appreciation in value of their works artists take none of the risks in developing the market for their works. So in the EU RRR is payable even if the art dealer makes a loss on a sale. And a work can be bought and sold a number of times not necessarily at much of a profit margin yet RRR is fully payable on each resale. It is little wonder that many in the UK art market view it as an unfair tax on transactions.

Another argument advanced for RRR is that by rewarding artists it encourages artistic creation by younger, living artists - a classic incentives argument. However studies of the art market (in particular auction house data) generally indicate that the main beneficiaries of RRR are the estates of dead artists and generally the larger estates (e.g. Dali, Picasso, Matisse and so on).⁶ Accordingly such incentives arguments appear weak.

Anomalous/sui generis nature of RRR

It can be debated what sort of legal right RRR is. Whilst it is considered part of copyright law (and in the EU the right applies for the full copyright term), in the EU the 2001 Directive makes the right inalienable nor can it be waived so it is not a freely transferable intangible property right (like the reproduction right) - in the UK for example it cannot be assigned or mortgaged/charged.⁷ In addition the 2001 Directive does not provide any jurisdictional test to help assess where RRR applies - RRR arises upon a resale of a work of art - there is no clear test as to how RRR would apply on an international resale where the parties (and possibly the work of art itself) are each in different territories. This is in distinction to the reproduction right where there are well developed rules here.

There are also difficult issues in defining what art works qualify for RRR particularly when you move away from traditional art forms to new media and also craft and design works.

Accordingly the anomalous nature of the right makes it difficult and costly to apply in practice. And this is in addition to some of the practical problems of collecting RRR in the UK noted below.

Negative Economic Impact of RRR on the art market

There have been a significant number of academic studies of the effect of RRR on art markets, including whether trade would be diverted from an RRR enforcing state to a non

⁶ See for example Kusin and Company, *The Modern and Contemporary Art Market* (The European Fine Art Foundation, Helvoirt, The Netherlands 2005).

⁷ Regulation 7, Artist's Resale Right Regulations 2006

RRR enforcing state, or whether the existence of RRR might depress the initial sale price of a work or act as a disincentive for dealers to promote the work of artists. It is fair to say that in the main studies by economists are heavily critical of the right - it interferes with the market, provides negligible revenue, is costly to administer, and is poorly accepted by the market.⁸

The UK Experience

Background

As noted earlier prior to 14 February 2006 RRR was not part of UK law. Under the freedom given by the Directive the UK chose to implement the right as follows:

- Threshold for RRR to apply set at EUR 1000
- Sellers of art works and the art market professional involved jointly and severally liable to pay RRR
- The right can only be collected by a Collecting Society (currently there are two major societies)
- RRR only applied to deceased artists' works from 1 January 2012

Experience of the right

In the UK the art market is almost entirely against RRR. It is seen as an unfair tax on transactions, especially given that where dealers buy works at auction to then sell to their clients RRR is paid twice by dealers: at auction (where auction houses typically impose RRR on the purchaser (i.e. dealer) as payer) and then subsequently when the work is resold by the dealer to their client. The royalty is also a significant issue for those involved in the lower value end of the market selling limited edition prints (where RRR does apply) and lower value works at or just above the EUR 1,000 threshold where the royalty is a significant cost in relation to the value of the work in businesses where margins are often tight. It is also art market practice for dealers to often quickly buy and sell (often to other dealers and often in reality part of the same linked transaction). RRR is payable on the value of each sale regardless of whether there is a profit or loss.

There is also no doubt that the UK art market has incurred and continues to incur significant costs to put in place recording and reporting mechanisms to ensure the law is complied with. For example a 2008 survey found that “the cost of administering [RRR] excluding set up expenditures averages between £23.30 and £26.50 per transaction. Taking set-up costs into account, the costs can be as high as £53.60.”⁹

As for the long term possibility that art sales in the UK (and EU more generally) will be diverted to non RRR states (e.g. New York and Switzerland) the evidence here is not definitive.¹⁰ However, studies of this area have only been carried out prior to 1 January 2012. There is no doubt that the extension of RRR to the estates of dead artists from 1 January 2012 has potentially increased probably by at least four times the amount of RRR payable in the UK (to at least £10 million per annum based just on auction house sales; dealer data is not

⁸ See e.g. discussion in Stokes, *Artist's Resale Right UK Law and Practice* (Institute of Art and Law, 2012) pp 7-9 (“Stokes”).

⁹ Froschauer, *The Impact of Artist Resale Rights on the Art Market in the United Kingdom* (Antiques Trade Gazette London 2008) p 12 (“Froschauer”).

¹⁰ See for example Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM(2011) 878 final, Brussels, 14 Dec. 2011

readily available).¹¹ So given this increase and the global nature of the art market it would not be surprising if trade were diverted from the UK in the future, if indeed there is not already an effect. This will however require further research.

In the UK there are two major collecting societies for RRR. Competition here has undoubtedly helped reduce the charges levied by collecting societies on RRR payments to cover their costs. However this does mean that the art market now faces requests for information from two collecting bodies and there also remain practical difficulties and uncertainties as to how RRR is collected when an artist or their estate has not expressly mandated a collecting society to collect. Tracing who is entitled to RRR on the death of the artist is also not necessarily straightforward. All this adds to the administrative and cost burdens on the art market.

Dealers also complain that because in the UK RRR can only be collected through a Collecting Society dealers who represent an artist or their estate are unable to collect on behalf of their artists.

Concluding Comments

RRR in the UK has been controversial and it remains unpopular with the majority of the UK art market (i.e. dealers, auction houses, art trade associations) not least for the administrative burden, costs of administration and effect on profit margins as dealers invariably pay (despite sellers also being liable). The jury is out on its long term effect on the UK art market and certainly further economic analysis is required following the full application of RRR in the UK to the estates of dead artists from 1 January 2012. There is also clear evidence that in the UK (as well as in the EU generally) prior to the extension of RRR to the estates of dead artists in 2012 a small number of better known artists took a significant proportion of RRR by value and following the application of RRR to the estates of dead artists from 2012, including such significant estates as those of Picasso, Dali and Matisse, this situation can only be expected to intensify.¹² One might reasonably say that such artists and estates are not in need of a further revenue stream through RRR given living artists and estates can still benefit from the first sale of studio works, and copyright reproduction licensing revenue. Indeed it remains the author's view that the position of less well known artists who do not command high initial first sale prices would be better served through government (local and national) support for the arts rather than by the introduction of RRR in the UK which in the main benefits established artists and their estates. This would avoid the adverse effects on the operation and functioning of the UK art market noted above and would operate more efficiently in ensuring creativity flourishes and artists at the start of their careers are supported.

In summary the UK experience of RRR is that:

- A small number of artists (and estates) take the majority of the RRR paid (one study found as high as 80% in respect of the top 10% of living artists)¹³
- Arguments about the diversion of art market trade from the UK to Switzerland and New York following the introduction of RRR into the UK are inconclusive but studies

¹¹ See discussion in Stokes p 34.

¹² See Froschauer pp 17-18.

¹³ Froschauer p 17.

are needed from 1 January 2012 when RRR in the UK applied to the estates of deceased artists for the first time.

- It has not been well received by the vast majority of the UK art market not least for its administrative cost, effect on margins (including the prevalence of linked transactions where the dealer in effect pays RRR twice on what can be considered to be the same transaction) and also that dealers cannot collect RRR for their own artists – they must do this through a collecting society.
- There remain significant legal ambiguities and difficulties in the operation of RRR not least in dealing with multiple collecting societies, lack of clarity about entitlement to collect (especially where the artist has not mandated a collecting society or the artist or their estates cannot be traced), scope of the right in areas such as multimedia, craft and design works, and a complete lack of clarity as to how RRR works in international transactions where the test for whether UK RRR applies is simply not clear.
- The value of RRR payments is currently estimated to be at least £10 million per annum based on auction house data alone so the true figure will be greater once dealer data is included. Nevertheless in light of UK government spending on the arts generally and in relation to other copyright royalties such sums are modest and as noted above the majority by value in any event ends up in the hands of a limited number of established artists or their estates.¹⁴

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2 December 2012

¹⁴ For example the budget of Arts Council England (which is a major conduit of government arts funding), although recently subject to cuts of 30%, will nevertheless by 2014 be £349 million (BBC News 20 October 2010).