

UNITED STATES COPYRIGHT OFFICE

NOTICE OF INQUIRY
CONCERNING
THE RESALE ROYALTY RIGHT

77 Fed. Reg. 58175 (September 19, 2012)

WRITTEN COMMENTS OF
VAGA

We are pleased to submit these comments on behalf of VAGA and its member rights holders in response to the Notice of Inquiry referenced above.

VAGA represents the voices of over 7000 visual artists, artists' estates and rights holders worldwide. The majority of our membership is comprised of fine artists and their heirs and thus a resale royalty is of paramount interest to them.

INTRODUCTION

Artists see few advantages in our copyright law, which encourages reproduction and multiple uses of a work. Unlike say, writing and music, whose creators benefit from successive exploitations of their works through the reproduction and sale of large quantities of each individual work, fine art's value is derived from its singularity, its scarcity, and the reputation of its creator. Other creators may see significant economic rewards from one work (a hit song, a best-selling book), and usually when it is first brought to the public, but the value in any individual work by an artist is more related to the *cumulative* reputation established through a large body of work created over a number of years. Yet the artist (or his family) usually does not benefit directly from the increasing value of his work. Those rewards go to the art market: collectors, dealers, galleries and auction houses.

If we believe that art is important to our society and want to legitimately fulfill the mandate in our Constitution *to promote the progress of science and useful arts*, we must find ways to redress the economic imbalance between artists and other creators by amending our laws to foster an equitable stream of income for artists. This in turn, will encourage

talented youth to choose a career in art. A resale royalty right can be at least a partial remedy to this problem.

The current resale right bill before Congress titled, *Equity for Visual Artists Act of 2011* (EVAA), S.2000 and H.R. 3688 was partly initiated by the efforts of VAGA. In its drafting, we encouraged its authors and sponsors in Congress, Senator Kohl of Wisconsin and Representative Nadler of New York to address the many concerns relating to the practical, effective and fair implementation of a resale royalty law. We have learned a great deal from the experiences of the 50+ countries that have implemented the resale royalty, in particular England, whose art market is most similar to the US. This has allowed for the drafting of a bill that attempts to resolve the problems experienced in other regimes.

EVAA address the problem that artists (or their families and rights holders), and the institutions that support them, have in receiving appropriate and equitable payment for their efforts, with the ultimate goal of encouraging creation of more and better art. EVAA also attempts to reduce the complexity seen in other resale rights schemes, which have often encouraged bureaucracy and higher costs for all parties involved.

In responding to the discussion points detailed in the Copyright Office's notice in the Federal Register, we will review the issues from both theoretical and practical points of view and demonstrate how EVAA addresses them.

1. *Current Copyright Law Implications*

The first sales doctrine, which prevents copyright holders from prohibiting the resale of their works, is often cited as in conflict with a resale royalty. While a resale royalty would obviously impact sellers of works of art by requiring them to pay rights holders, the right would not *prevent* the further sale or distribution of the work. Furthermore, Congress has already seen fit to allow exceptions to the first sale doctrine in the case of both sound recordings and computer software, recognizing the essential need for rights holders to be able to exploit markets that are important to their business. And, unlike EVAA, these two classes of rights holders have an exclusive rental right, not simply the right to received remuneration.

2. *Promoting Production of Creative Works*

In February 2011, DACS, a copyright collective that has administered the resale royalty in England since 2006, conducted a survey in which 68% of the artists stated that their royalties were a “very significant” or “quite

significant” incentive for them.¹ This is despite the fact that as a result of real or perceived conflicting interests between artists and the art trade, resale rights statutes have mostly ended up with payout structures offering relatively small amounts to artists. The EVAA attempts to rectify this problem through a higher rate and one without a cap, but through a structure that does not penalize the art trade in any significant manner

Young talented artists who believe that they could make a living from their work also recognize that it could take many years to persuade collectors and art dealer of the same. Most cannot afford to delay fair remuneration for their work and thus they may redirect their efforts toward a different career. A resale royalty right, like copyright, can not only encourage creators to choose art as a career path, it can motivate artists to produce more and better work to establish a reputation that will lead to more sales and more resale royalties.

If our society truly believes in the importance of visual art, and recognizes that the current rights model does not fairly compensate artists in a manner similar to other creators; and if our goal is to have more and better artists contributing to the cultural landscape, then a new right should be sufficiently robust and remunerative as to provide real incentives for creation.

3. *Fostering the Art Marketplace*

Will a resale royalty right add to the costs of those who buy and invest in artworks? Yes, but if so, the impact will be negligible. The art market has been affected by many environmental changes over the years, not the least of which is the commission structures of auction houses worldwide. These transactional fees, with no benefit whatsoever for the creator, far exceed the proposed resale royalty. There is no available evidence that the resale royalty has reduced sales in the countries with such legislation. This is borne out by studies and available statistics that will be detailed in submissions to this Notice of Inquiry by foreign collectives. Most important, with EVAA, the resale royalty is limited to sales at auction and by entities selling a cumulative amount of at least 25 million dollars of works per year. Hence, far fewer sellers will be impacted in the US as compared to other countries.

4. *Scope and Applicability of a Royalty*

In an era where almost anything might be considered art, one is tempted to broadly define the types of art that would be eligible for the resale royalty right. If however, a work is produced in numerous copies, the creator is

¹ DACS Artists’ Rights Survey, February 2011, p3. See www.dacs.org.uk for more information.

already exploiting for himself what he might have otherwise licensed to others. And it is the exclusive nature of copyright that allows the creator to solely reap the rewards from producing many copies. The resale royalty is more logically suited to the unique circumstances of visual artists, who can only reap the rewards of their creative efforts once, when their works are first sold. The definition of visual art in Section 101 of the Copyright Act and as defined in EVAA sufficiently covers the types and quantities of work that should be eligible for the resale royalty.

5. *Contractual Considerations*

To effectively monitor numerous transactions and distribute royalties to large numbers of people – impractical tasks for both rights holders and sellers - collecting societies have been formed worldwide as a practical solution and are now the norm for public performance, broadcast and mechanical rights, performance rights for dramatic works, reprographic rights and other related rights. In virtually every country that has enacted resale royalty legislation, rights holders must work through a collecting society to receive payments. Most countries have mandated that collecting societies specializing in the representation of visual artists' copyrights administer the resale royalty rights, as they are already adept in the collection and distribution of copyright fees and royalties and familiar with the visual arts. EVAA recognizes this important role for collective administration. In the US two such visual arts collecting societies currently exist for the purpose of administering the reproduction rights of artists. VAGA is one of these two societies. It would be a very simple matter to add administration of the resale royalty to our responsibilities as we have already been authorized by artists to administer their existing rights under the copyright law.

In the case of the California Resale Royalty there is a ready example of how ineffective a resale royalty right can be when rights holders and sellers are solely responsible for monitoring sales and collecting and distributing royalties. Individual rights holders have had great difficulty in obtaining information on sales of their works and no entity has been responsible for ensuring that sellers actually paid. Due to the confidential nature of most sales transactions, there is no data available on how much money has been distributed by sellers directly to artists since the enactment of the law, but given the difficulties described here, it is likely that the amount has been insignificant.

6. *Types of Transactions*

Unlike many economic systems, the art market is relatively opaque and, deliberately so. Sellers rely on rarity and exclusivity to create value when there is usually little of it in the raw materials of which art is comprised.

For example, sellers, especially individual collectors, galleries and private dealers, do not want buyers to know that a particular artist whose work they are selling may be going through a period when sales are few or where prices have gone down. Less information means higher prices. For this reason the only publically available data on resales of art is for those of works sold at public auction. That is why the proposed legislation is limited to auction sales, which are transparent and easily tracked. Extending the resale right to private sales would create significant complexities of administration and enforcement and a new burden on private dealers that likely would be resisted. Further, private galleries today constitute the primary means by which artists engage in the initial sale of their work and they are compensated for these sales, unlike auction resales. For the auction houses, it would be no more complicated to administer and collect the resale royalty that it currently is to compute, deduct and pocket the seller/buyer commissions they charge.

7. Duration of Term

Using the current copyright term of life plus 70 years as the basis for a resale royalty term makes implementation and administration of the right simpler, but more important, it is inherently fair. The resale royalty itself is being implemented to make up for the fact that copyright licensing is usually an insignificant source of income for most fine artists. Therefore the terms should be the same since the resale royalty, in essence, is making up for the deficiencies in the copyright law.

No less important is the need for terms to be similar across borders. Art sales are no different than the thousands of other transactions that occur between countries on a consistent basis. Societies have implemented various trade agreements and copyright treaties such as the Berne Convention in order to create fair and equitable systems for the movement of goods. The US increased its copyright term of life plus 50 to 70 years to create parity with the majority of the European Community and much of the rest of the world. American artists and rights holders now receive the full benefits and terms of these countries laws when their works are sold and reproduced there. The resale royalty term should follow the copyright term for these same reasons.

8. Threshold Values

By subjecting the resale royalty to minimum sales of \$10,000 made at auction, and to entities with a minimum of 25 million in sales per year, EVAA easily resolves expressed concerns about administrative costs outweighing the value of the payment. It is difficult to objectively know what threshold level would be considered an inappropriate burden to large auction entities, but it is acknowledged that perhaps the number could be

lower in order to meet what would be the clearly admirable goal of bringing the resale royalty right to those artists who need it most.

9. *Payment and Enforcement*

As artists do not have contractual relationship with auctioneers; there needs to be a mechanism available for enforcing the payment of royalties and remedies. EVAA proposes the application of the remedies currently available for copyright infringement under our existing statute. This however, is not sufficient for most individual artists, who do not have the resources to pursue costly copyright litigation. By requiring the collective management of the resale royalty, artists are represented by a larger entity that would have the capability of representing their legal interests to large art sellers.

The use of copyright collectives would also solve the problems associated with artists and rights holders who cannot be located. The royalties would be held for a period of time by a collective, perhaps six years (as is done in England), during which time a comprehensive search is commenced. If the artist or beneficiary is not located during this period, as detailed in EVAA the royalties would be deposited into an escrow account established to pay royalties to non-profit museums for the purpose of buying art from living artists.

10. *Calculating a Royalty*

In determining the method for calculating the royalty, a balance must be found between what is fair and what is practical. Basing the royalty on the increase in the value of a work between sales would require onerous record keeping vulnerable to error and possible manipulation. The method currently used in the European Union is based on the sales price at auction. This is the method advocated in EVAA.

11. *Royalty Rate*

EVAA sets the royalty rate at 7% and without a cap. This rate and structure is more generous than typically seen in other countries and thus should have a greater motivating effect on artists. It also takes into account that half the money will go to museums, which must use it to purchase art from living American artists. This also serves the purpose of motivating talented young artists to pursue an art making career.

12. *Administration of a Royalty*

Royalty administration is most effectively carried out by collecting societies, as detailed in Section 5 above. EVAA sets the administration

rate at a maximum of 18%, which would appropriately cover the expenses of implementing and then administering the resale royalty scheme. It is envisioned that over time, increased efficiencies by the collectives will reduce their administrative costs, and coupled with competitive market forces, will result in lower administrative rates.

In order to protect the interests of artists, EVAA details that the Copyright Office will establish a formal process for authorizing entities as collecting societies setting minimum standards for size, experience, payment and vetting structures for museums, accounting, and transparency.

13. Experience in Other Jurisdictions

The California Resale Act has been an ineffective tool to bring resale royalties to artists. No state agency was appointed and no collecting society entered the market to police the art trade and collect royalties for artists. Because the law covered all sales, private and public, and there was no mechanism in the law to effectively compel sellers to comply with the statute, relatively little money was distributed to artists.

The experiences in foreign jurisdictions are detailed in the submissions to this Notice of Inquiry by foreign collecting societies.

14. Changes Since the Last Report

The most important change since the last Copyright Office report in 1992 is the number of countries, over 50 now, that have implemented the resale royalty. This international recognition of the importance of the resale right is more formally outlined in the Berne Convention, of which the US is a signatory. The European Community has also developed a series of protocols in order to harmonize the resale right in member countries.

15. Alternatives to a Resale Royalty

We do not believe that there are any effective alternatives to the resale royalty but do advocate other steps to help creators take better advantage of the current copyright statute.

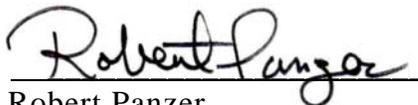
A. Eliminate for visual artists the requirement to have registered their copyrights with the Copyright Office prior to infringement in order to take full advantage of the copyright law's remedies. Visual artists are typically self-employed and produce hundreds to many thousands of works in a lifetime. It is impractical and costly for them to fulfill the registration requirements.

B. Institute a small claims mechanism for visual artists. With the advent

of the internet, visual artists have little if any control over their works, which are easily reproduced on the web. Under the current system, the extraordinary time and costs associated with pursuing even one infringement far exceeds any possible economic reward from either a settlement or successful law suit

C. Rewrite the DMCA. The nature of the internet combined with the failure of ISPs to monitor and control the millions of infringements that occur on the web is threatening the core of our copyright system. It is unlikely that cheap technological advances will occur in the near future to allow any reasonable control of what appears on the web. The DMCA should be amended to place greater responsibility on the web's gatekeepers.

Dated: December 1, 2012

By: 
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