

December 5, 2012

Karyn Temple Claggett
Senior Counsel for Policy and International Affairs
U.S. Copyright Office, Library of Congress
101 Independence Avenue, SE
Washington, DC 20559-6009

Re: Notice of Inquiry re Resale Royalty Right, Copyright Office Docket No. 2012-10

Dear Ms. Claggett:

eBay Inc. welcomes this opportunity to offer its views on questions raised in the September 13, 2012 Notice of Inquiry on creation of a federal resale royalty right (the “NOI”). eBay encourages the Copyright Office to promote policies that encourage robust free and open trade of legitimate visual works.

As an operator of a global marketplace and a commerce services provider, eBay enables creators, owners and vendors to reach a virtually unlimited global market for their goods, thereby contributing to the public dissemination of many works, including visual art. eBay provides a service for buyers of existing works and helps generate interest in and establish markets for new works, including those of undiscovered artists. eBay benefits consumers of visual works by fostering price competition, transparency and choice.

Marketplaces like eBay provide the greatest benefit to creators, sellers, buyers, and the larger economy when they are able to prosper in an open and free trade environment. For sound public policy reasons, eBay institutionally opposes barriers to and restrictions on free commerce and defends the free alienability of property that individuals legally acquire. Such free alienability of property is part of the fabric of the U.S. economic system and underlies the common sense understanding that Americans have about the goods they buy, the property they own and how their possessions are affected by the interests of third parties.

In the context of copyrighted works or works containing copyrighted content, this means that the benefit for all stakeholders relies upon a properly-functioning first sale doctrine, which untethers legitimate goods from latent interests once they have been legally transferred or placed into the stream of commerce.

With the understanding that alienability of goods is an essential factor of promoting a prosperous global open and free marketplace, eBay addresses its comments to two specific inquiries posed by the NOI:

- “How a federal resale right would affect the first sale doctrine.” **The short answer is that it would undermine the first sale doctrine at its core and open the door to proposals that could further constrict open markets.**
- “[W]hether there have been significant policy or economic changes [since 1992] that should be considered when assessing the current feasibility of a resale royalty.” **The short answer is no and should there be any change in the first sale doctrine it should be to strengthen it by protecting the free alienability of legitimate goods.**

The Copyright Office has recognized that a resale right runs contrary to basic U.S. principles governing alienability of property and would undermine the first sale doctrine.

The report on resale royalties published by the Copyright Office in December 1992 (“the report”) raises serious issues with the federal resale royalty right for visual artists. In that report, the Office recognized the potential conflict between a federal resale royalty right for visual artists (or *droit de suite*) and the “traditional U.S. concept of free alienability of property.” It said:

“[T]he notion of an encumbrance attaching to an object that has been freely purchased is antithetical to our tradition of free alienability of property.”¹

In discussing the basis for *droit de suite* legislation in other jurisdictions, it added:

“The United States, however, follows the more traditional view of property rights – that the purchaser of an item for a freely negotiated price is the absolute owner – and is less receptive generally to restraints on free alienability.”²

The report noted the problematic policy judgments Congress would have to make in order to enact *droit de suite* legislation, asking, among other questions, “[D]oes Congress want to eliminate, or even qualify, the First Sale doctrine, and abandon well-settled principles of free alienability in AngloAmerican property jurisprudence?”³ It added, “the resale royalty concept fits awkwardly within a free market economy.”⁴

The report concluded:

“Based on its analysis of the foreign and California experience with *droit de suite*, the administrative record, and independent research, the Copyright Office is not persuaded that sufficient economic and copyright policy justification exists to establish *droit de suite* in the United States.”⁵

eBay could not agree more with these views criticizing *droit de suite*. The Copyright Office’s views against *droit de suite* are premised on fundamental tenets of the U.S. economic system (you buy something freely and legally, you can sell it freely) – or for that matter, any true free-market system – where the value of an object is what a willing buyer will pay a willing seller at a given time. By contrast, *droit de suite* is a foreign concept born of different social and legal systems.

Because of the different U.S. economic, legal and social traditions, seeking to insert *droit de suite* into the U.S. market is likely to inflict harm on consumers, businesses, and marketplaces and services, like eBay Inc.’s that enable global free and open trade. *Droit de suite* undermines traditional US concepts of ownership and market value.

¹ United States Copyright Office, *Droit De Suite: The Artist’s Resale Royalty 2* (1992), http://www.copyright.gov/history/droit_de_suite.pdf at page xi.

² *Ibid.*, at page 130.

³ *Ibid.*, at page 134.

⁴ *Ibid.*, at page 147.

⁵ *Ibid.*, at pages xv-xvi.

The 1992 report stands the test of time. No developments in the intervening years alter the soundness of its conclusions.

Nothing has happened in the last 20 years to change the conclusions that the Copyright Office reached in 1992. There have been no fundamental shifts in the U.S. economic, legal or social systems and no new policy justifications to enact resale royalty law. Therefore, there should be no resale royalty law enacted.

On the contrary, the emergence and growth of Internet marketplaces during the last two decades have fostered an increase in artistic endeavors by providing more outlets for discovery and remuneration. The copyright law functions best if artists and other creators can find marketplaces where they can display and vend their works without restrictive barriers on trade.

During this same period, there have been efforts to erode the first sale doctrine. Unhappy with the competition enabled by these burgeoning marketplaces, some rights holders have sought to constrict first sale so as to prevent legitimate and valuable commerce, upsetting an important component of the balance of copyright law. Examples of efforts to subordinate ownership rights to latent IP rights include:

- The *Kirtsaeng v. Wiley* case, which seeks to limit the operation of the first sale doctrine with respect to foreign-made goods.
- Ongoing commercial and legal battles testing the ability of brand owners to restrict distribution and control pricing of products beyond their first sale.⁶
- An international trade policy that does not promote global first sale protections.

Importantly, these types of limitations on alienability run counter to widely-held expectations about what people can and cannot do with the property they legally acquire. Individuals expect that they own the art they purchased and don't expect limitations on resale. As such, new restrictions serve to undermine and diminish respect for and compliance with copyright requirements, having a net negative effect on intellectual property protection.

Finally, as the U.S. moves increasingly towards a digital economy there will be important first sale issues that will arise. It is important that barriers are not erected to impede future innovative e-commerce models focused on the digital economy.

eBay supports measures to promote the production of creative works and the broad dissemination of visual art. The 1992 report identified a number of alternatives to a resale royalty that might achieve those ends, without forcing Congress to make no-win policy choices or inflicting the collateral damage discussed above.

Simply put, a resale royalty right would undermine first sale protections that have been a strong underpinning of free commerce in our country. A resale royalty right runs counter to the American concept that a good purchased is a good owned and there should not be restrictions on its resale. Other

⁶ Testimony of Gilbert Lee Sandler, Counsel for the American Free Trade Association, before the House Judiciary Committee March 28, 2012: "While United States law and economic policy hold parallel market trade to be lawful and desirable, there are many trademark owners who are dedicated to the elimination of parallel market trade through legislative, regulatory, judicial and commercial practices."

means should be considered to ensure that creators of visual works are appropriately compensated rather than undermine the essential first sale protection that promotes robust open and free trade.

Best regards,

A handwritten signature in black ink, appearing to read 'Tod Cohen', with a long horizontal flourish extending to the right.

Tod Cohen
Vice President, Associate General Counsel
eBay Inc.