

**Statement of
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“Moral Rights, Termination Rights, Resale Royalty, and Copyright Term”

Chairman Coble, Ranking Member Nadler, and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the issue of resale royalties for visual artists. The Copyright Office published an analysis on the subject in December 2013, thereby updating our 1992 report for the first time. We concluded that certain visual artists, including painters, illustrators, sculptors, and photographers (hereinafter “visual artists” or “artists”)¹ may indeed operate at a disadvantage under the copyright law relative to other authors, and that Congress accordingly may wish to consider resale royalty legislation to address this disparity.²

I. Introduction and Overview

The issue of resale royalties is not a new one. France was the first country to enact resale royalty legislation in 1920. In simple terms, a resale royalty, or *droit de suite* as the right is known in Europe, provides visual artists the opportunity to share in the increased values of their works by granting them a percentage of the proceeds when their works are resold. Internationally, resale royalty rights are included in Article 14*ter* of the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”),³ which the United States joined in 1989.⁴ The resale royalty provision in the Berne Convention, however, is optional and reciprocal: Member States are not required to implement resale royalty laws, but if they fail to do so their citizens may not benefit from the right in countries where it is recognized.⁵

A resale royalty right is typically justified by the unique way in which some visual artists are affected by the copyright system. Although visual artists, like all authors, enjoy the same exclusive rights set forth in the Copyright Act (to distribute; reproduce; publicly perform and display their works; and prepare derivative works),⁶ as a practical reality, most artists are unable to benefit fully from exploitation of these rights.⁷ Unlike other copyrighted works such as books and music, works

¹ Our report noted that if Congress were to enact a resale royalty right, it would need to define the eligible category of works, and cited the definition “work[s] of visual art” found in the Visual Artists Rights Act of 1990. See U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* 1 n.2 (2013), available at <http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf> (“RESALE ROYALTIES”).

² *Id.* at 1.

³ Berne Convention for the Protection of Literary and Artistic Works art. 14*ter*, Sept. 9, 1886, as revised July 24, 1971 and as amended Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 3 (entered into force in the United States Mar. 1, 1989).

⁴ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.); Public Notice 1086, Berne Convention and “Berne Implementation Act of 1988,” 53 Fed. Reg. 48,748 (Dec. 2, 1988) (announcing Mar. 1, 1989 entry into force).

⁵ Berne Convention art. 14*ter* (2).

⁶ See 17 U.S.C. § 106.

⁷ See *RESALE ROYALTIES* at 10-11.

of fine art are typically valued for their originality and scarcity.⁸ Many visual artists, unlike other authors, simply do not receive meaningful compensation from reproductions or distributions of copies of their works, or from the ability to create derivative works or adaptations.⁹ A novelist and her publisher may offer millions of copies of the same book to buyers, a filmmaker may distribute millions of DVDs of a film, and a songwriter may authorize millions of downloads or streams. In each case, every purchaser receives the same work, for the same value as the original, and the author is compensated for each transaction. While some artists may successfully exploit their works through reproductions or distributions, for many others, the very nature of their visual art may limit the ability to create such markets, and the income realized from the sales of these items is not likely to approach the income that the original artwork would bring if it increases in value and is sold and later resold. This fact makes the impact of the first sale doctrine especially severe. The doctrine, which in most circumstances is an important and rational limitation on the rights of copyright owners, operates to preclude artists from sharing in the only meaningful compensation for their works—the profits from appreciation over time and downstream sales amongst collectors.¹⁰

Therefore, as a practical matter, many visual artists derive most of their compensation only from that first sale. If their work appreciates over time, under the current system, it is often third parties such as dealers, collectors, or auction houses who receive the benefit of that appreciation, rather than the artist. There are many notable examples of the inequity felt by artists from this system. France for example, began seriously to consider a resale royalty after wide circulation of a lithograph depicting impoverished children watching their father's painting being auctioned for a large sum.¹¹ Similarly, the issue of resale royalties began to receive major public attention in the United States after a well-known 1973 incident in which artist Robert Rauschenberg angrily confronted an art collector who sold Rauschenberg's painting "Thaw" for \$85,000 after having purchased it for \$900.¹² Resale royalties, many argue, would operate as other economic rights and provide visual artists with significant incentives for the creation of new works.¹³

A typical resale royalty right allows an artist to receive a certain percentage of the subsequent sales price of his or her works. For example, if an artist initially sells a work to a collector for \$100 and over time the artist's popularity increases such that the work is later resold for thousands of dollars, a resale royalty would allow the artist to recoup a small percentage (say 3%-5%) of that

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 10-11, 31-32. Under the first sale doctrine, the owner of a copyright work is generally permitted to display, sell or dispose of that work without the authorization of the creator. 17 U.S.C. § 109.

¹¹ See Carole M. Vickers, *The Applicability of the Droit de Suite in the United States*, 3 B.C. INT'L & COMP. L. REV. 433, 438 n.16 (1980).

¹² See Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, N.Y. TIMES, Nov. 1, 2011, http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html?pagewanted=all&_r=0.

¹³ See RESALE ROYALTIES at 37-38.

resale price. Accordingly, if a work originally sells for \$100 and is later resold for \$10,000 then the artist might receive \$300 to \$500 at the time of the resale under such a system.

Since its inception in France in 1920, many countries have followed suit. Some thirty countries have adopted the right in the past twenty years.¹⁴ At this time, more than seventy countries have some form of resale royalties, including the United Kingdom, France, and Germany.¹⁵ At least two other major economies, Canada and China, are also seriously considering adoption of a resale royalty.¹⁶ This international trend is significant for the United States in light of the Berne reciprocity issue noted above. Because our law does not provide for a resale royalty right, American visual artists are often prevented from recouping any royalties generated when their works are resold in countries that do have the right.¹⁷

II. History and Prior Studies

In the United States, the issue of a resale royalty has been the subject of periodic interest. Through the years, several federal bills have been introduced, including legislation sponsored by Representative Waxman in 1978 and by Senator Kennedy and then-Representative Markey in the 1980s.¹⁸ The Kennedy-Markey bill also provided limited moral rights of attribution and integrity to visual artists. A version of that legislation eventually was enacted as the Visual Artists Rights Act of 1990 (“VARA”),¹⁹ but the resale royalty language was removed prior to the bill’s passage.

¹⁴ See *id.* at 8, 17.

¹⁵ See *id.*, Appendix E.

¹⁶ See *id.* at 19-20.

¹⁷ See, e.g., Copyright Agency/Viscopy, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 5 (Dec. 2012) (Australian rights management organizations stating that, between 2007 and 2011, works by forty-seven American artists generated sales of \$2,606,343 at Australian auctions); Design and Artists Copyright Society, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 6 (Nov. 2012) (“The introduction of a resale royalty in the U.S. will have a mutually beneficial impact for both British and American artists when the Right is reciprocated. American artists and their heirs will benefit from royalties arising from the significant market in American art in the UK, and vice versa.”); European Grouping of Societies of Authors and Composers, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 2 (Dec. 5, 2012) (“[B]y the recognition of the resale right, the artists in the US will benefit from the resale of their works in other countries thanks to the reciprocity principle.”); European Visual Artists, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 5 (Dec. 2, 2012) (“US American artists will benefit from the resale right in all 27 countries of the EU as well as in other countries where it is successfully implemented . . .”). These and other comments submitted in response to the Office’s request are available at <http://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/>.

¹⁸ See Visual Artists’ Residual Rights Act of 1978, H.R. 11403, 95th Cong. (1978); Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986); Visual Artists Rights Act of 1987, H.R. 3221, S. 1619, 100th Cong. (1987).

¹⁹ Visual Artists Rights Act of 1990, tit. VI of Judicial Improvements Act of 1990, Pub. L. No. 101-650.

To date, the only law that has passed in the United States has been at the state level in California. The California Resale Royalties Act (“CRRA”), adopted by the California legislature in 1976, provides for a 5% royalty for works of fine art that are resold at a gain for at least \$1,000 where the seller resides in California or the sale takes place in California.²⁰ The seller or seller’s agent is required to pay the royalty directly to the artist, and if the artist cannot be found within ninety days, the seller must pay the royalty to the California Arts Council.²¹ The Arts Council must continue the search for the artist for seven years, at which time, if the artist has not been located, the royalty is transferred to the Council to be used in acquiring fine art for public buildings.²² In 2012, a California federal district court held the CRRA unconstitutional under the dormant Commerce Clause on the ground that it had the practical effect of controlling commerce occurring wholly outside California.²³ The case is currently on appeal.²⁴

Although a federal resale royalty right has never been adopted, Congress first requested that the Copyright Office study the issue formally when it enacted VARA in 1990. VARA’s Section 608(b) directed the Office to conduct a study on the feasibility of future resale royalty legislation. In response, the Office published a report in 1992 recommending against adoption of the right at that time.²⁵ Among other factors, the Office expressed concern that such a right might be detrimental to artists who might never enjoy a viable resale market, because purchasers’ inclination to factor in future resale royalties could drive down prices for artwork in the primary market.²⁶ The Office also noted concerns that a resale royalty could adversely affect the secondary art market by diverting sales away from the United States.²⁷ And, the Office highlighted tension between a resale royalty right and the first sale doctrine, which generally permits a person who holds lawful title to a copy of a work to freely dispose of that copy.²⁸ The Office stated, however, that, “[s]hould the European Community harmonize existing *droit de suite* laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its Member

²⁰ CAL. CIV. CODE § 986(a), (b)(2), (b)(4).

²¹ *Id.* § 986(a)(2).

²² *Id.* § 986(a)(5).

²³ *Estate of Graham v. Sotheby’s Inc.*, 860 F. Supp. 2d 1117, 1125 (C.D. Cal. 2012).

²⁴ *Estate of Graham v. Sotheby’s, Inc.*, No. 12-56077 (9th Cir. filed June 8, 2012).

²⁵ U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY* (1992), available at http://www.copyright.gov/history/droit_de_suite.pdf (“1992 REPORT”).

²⁶ *Id.* at 133.

²⁷ *Id.* at 147-48.

²⁸ *Id.* at 148; see 17 U.S.C. § 109.

States.”²⁹

III. Current Study and Recent Developments

In 2001 the European Union did in fact extend resale royalties to all EU Member States by adopting a Directive to harmonize resale royalty laws across Europe.³⁰ The Directive required all EU Member States to implement resale royalty legislation by 2006.³¹ Under the Directive, EU Member States are required to establish a royalty for art sales involving “art market professionals” that occur after the first transfer of the work by the author.³²

In the aftermath of the EU Directive, resale royalties have again become the subject of serious consideration in the United States, and in 2011 Representative Nadler and Senator Kohl introduced the Equity for Visual Artists Act of 2011.³³ The following year, Representative Nadler and Senator Kohl asked the Copyright Office to follow up on its earlier pledge by re-examining the issue through an updated analysis.³⁴

The Office’s current study began in 2012 with a Federal Register notice seeking written comments from interested parties. In response, we received nearly sixty comments from a broad range of stakeholders both in the United States and abroad. We also held a public roundtable in which members of the public were able to discuss the issues and express their views.³⁵

The Office issued an updated analysis in December 2013, concluding that visual artists may indeed operate at a disadvantage under the copyright law relative to other authors, and that Congress accordingly may wish to consider resale royalty legislation to address the disparity.³⁶ We observed that over thirty countries have adopted resale royalty laws since the Office’s 1992 report, bringing the total number of countries recognizing the right to more than seventy.³⁷ The Office also cited

²⁹ 1992 REPORT at 149.

³⁰ Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32-36, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=180301.

³¹ *Id.* art. 12(1).

³² *Id.* art. 1(2).

³³ H.R. 3688, S. 2000, 112th Cong. (2011).

³⁴ Letter from Sen. Herb Kohl and Rep. Jerrold Nadler to Maria A. Pallante, Register of Copyrights (May 17, 2012) (reprinted in RESALE ROYALTIES).

³⁵ See U.S. Copyright Office, Transcript of Resale Royalty Public Roundtable (Apr. 23, 2013), <http://www.copyright.gov/docs/resaleroyalty/transcripts/0423LOC.pdf>.

³⁶ RESALE ROYALTIES, *supra* note 1.

³⁷ *Id.* at 8.

studies indicating that the adverse market harms that had been predicted to result from such laws had not materialized in countries that had enacted resale royalty legislation.³⁸

At the same time, the Office did not conclude that a resale royalty right is necessarily the only or best option to address the position of visual artists. We acknowledged the fact that some studies still suggest that the bulk of resale royalty payments go to a small number of already well-established artists and that there is some question as to whether a resale royalty is the most effective means of incentivizing artist creativity.³⁹ The Office also found that any prediction about such a law's likely effect is complicated by a general lack of reliable empirical information about the operation of the art market worldwide.⁴⁰ The Office accordingly recommended additional deliberation to determine whether the benefits of a resale royalty law would outweigh its costs (*e.g.*, administration and enforcement).⁴¹ To further assist Congress's consideration of the issue, the Office highlighted various provisions that it believes should be included in any resale royalty legislation to ensure that it benefits the greatest number of artists while minimizing any disruption in the art market.⁴²

In February 2014, Representative Nadler and Senators Baldwin and Markey introduced an updated resale royalty bill, the American Royalties Too Act of 2014.⁴³ The legislation would establish a resale royalty for visual artworks sold at auction by a person other than the author for \$5,000 or more.⁴⁴ The royalty amount would be the lesser of 5% of the sale price or \$35,000, plus cost-of-living adjustments.⁴⁵ Royalties would be distributed by visual artists' collecting societies, which would be governed by regulations issued by the Copyright Office.⁴⁶ We were pleased that the bill adopted a number of the Office's recommendations, including a relatively low price threshold, a royalty rate that is consistent with international practice, a cap on the royalties available from each sale, collective management by private organizations with government oversight, and a request for further study by the Copyright Office.

Since we issued our report, several countries have initiated or continued studies on the impact of a resale royalty in their respective markets. In February 2014, stakeholders in Europe issued a document entitled "Key Principles and Recommendations on the management of the Author Resale

³⁸ *Id.* at 2.

³⁹ *Id.* at 68-69.

⁴⁰ *Id.* at 26-31.

⁴¹ *Id.* at 31.

⁴² *Id.* at 73-81.

⁴³ H.R. 4103, S. 2045, 113th Cong. (2014).

⁴⁴ *Id.* § 3.

⁴⁵ *Id.*

⁴⁶ *Id.* §§ 3, 5.

Right” under the auspices of the EU Commissioner for Internal Market and Services, providing guidelines to improve administration and transparency in the operation of the resale right in Europe.⁴⁷ The United Kingdom is currently conducting an online survey to gather information about how the resale right is working in the United Kingdom and is seeking public comments, with a report expected September 2014.⁴⁸

IV. Conclusion

The issue of resale royalties is at its core an issue of fundamental fairness. Should visual artists be able to receive some compensation from the substantial increases in the value of their works over time, to help ensure a fair return in works that are uniquely produced? Indeed, Congress has emphasized the concept of fair return as an appropriate consideration in copyright policy. For example, the current termination provisions, also being discussed today, are specifically designed to allow all authors an opportunity to share in the economic success of their works by terminating and renegotiating previous transfers of their exclusive rights under copyright law, for example, to publishers or producers.⁴⁹ These provisions do little for visual artists, however, because their primary (if not singular) return comes not from licensing copies to publishers but from selling the original, physical work once.

As I have discussed, there is a compelling international trend that makes U.S. review of the resale royalty right timely and important. Nonetheless, both the formulation and application remain complex questions. The true benefits of a resale royalty are difficult to accurately quantify and there are administrative and logistical concerns that would need to be carefully considered to develop a fully functioning system in the United States. For these reasons, in our analysis, we also proposed alternative or supplementary options Congress may wish to consider as a way to support and sustain visual artists, such as the encouragement, or even oversight, of voluntary initiatives and best practices among participants in the visual art market, broader public display rights for visual artists, rental rights, and increased federal grants for the arts.⁵⁰

Thank you for inviting me to testify today. We at the Copyright Office look forward to assisting the Subcommittee as it continues to consider this issue and the overall process of copyright review.

⁴⁷ See *Resale Right*, EUROPEAN COMMISSION, http://ec.europa.eu/internal_market/copyright/resale-right/index_en.htm.

⁴⁸ See *Artist’s Resale Right*, U.K. INTELLECTUAL PROPERTY OFFICE, <http://www.ipo.gov.uk/types/copy/c-other/c-arr.htm>.

⁴⁹ 17 U.S.C. §§ 203, 304(c), (d).

⁵⁰ RESALE ROYALTIES at 70-73.