

Remuneration Models For Artists And Creative Industries
Submission to the Standing Committee On Canadian Heritage
by



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About SODRAC/SOCAN

SOCAN administers the public performance and communication rights of authors, composers and music publishers and, pursuant to the acquisition of the Société du droit de reproduction des auteurs compositeurs et éditeurs au Canada (SODRAC), we now also administer the mechanical reproduction rights of authors, composers and music publishers as well as the various rights of creators in the field of visual arts and crafts.

Created in 1997, our visual arts and crafts department represents Canadian creators and rights holders and, through over forty agreements, most of them reciprocal, with affiliated societies, we also represent the works of over 40,000 foreign creators. Over the last 10 years, we have distributed nearly \$4 million to those creators. We are partners with the world's most important collective organizations and we are notably members of the International Council of Creators of Graphic, Plastic and Photographic Arts (CIAGP).

SOCAN believes that creators deserve to be fairly compensated for the exploitation of their hard work and continues to do everything it can to make sure that they are, both in the field of music and visual arts and crafts.

Introduction

We wanted to contribute to the parliamentary review of the Copyright Act to testify on behalf of the creators of artistic works, as we do on every occasion¹. As we transact on a daily basis with thousands of these creators, with the users of their works and intermediaries in the field, we have been able to identify several potential ways of adapting the Act so that it can better meet the needs of creators and users in the new digital and global paradigm.

The first finding, when it comes to creators, is the increasing difficulty they face in getting paid fairly for the use of their works. The issue here is ensuring that we can rely on a copyright law that is favourable to the creators at the very heart of an entire industry and of our very identity.

In its latest report on global collections², the International Confederation of Societies of Authors and Composers (CISAC) reports that visual arts had the highest yearly increase among all repertoires and a 67.5% increase since 2013, thanks to private copying and the resale right, among other factors, two models of remuneration that we are discussing here, with that of the right of exhibition.

The resale right alone generates around 20% of this revenue, i.e. collections of 43 million euros in 2017, approximately 65 million Canadian dollars. These royalties are growing on a global scale. In addition, private copying for visual works accounted for about 8% of collections in this sector in 2017, compared with 12% for print reproduction, while collection of exhibition rights is still marginal.

1- As an example, we invite you to consult [the brief we submitted \(in French\)](#) on the occasion of the revision of the Copyright Act in 2009, in which we address, in particular, private copying (p.3), the resale right (p.5) and exhibition of artistic works (p.6)

2- « [Global Collections Report \[2018\]](#) », CISAC, p. 22-23.

Creators and the Art Market

The resale right was created in France almost one hundred years ago and now exists in over 90 countries. It allows artists and their successors to receive a small percentage of the purchase price when their works are resold by an auction house or art gallery. This is a bona fide copyright—not a mere tax—that allows creators to follow up on their works’ economic life, and reap the dividends of their constant work of creation and promotion in parallel.

As in most areas of culture, the digital revolution has allowed some creators of artistic works to enjoy more visibility and sometimes increased notoriety, yet the causality between increased notoriety and increased remuneration is not a given, in Canada, notably because of the absence of a resale right.

Yet the art market has never thrived as much as it does today: if we look at all of the world’s 6,300 auction houses in 2017, works of art were sold for never-before-seen prices, and the main art markets indicate a growth trend that is clearly steady³. The Top 5 global markets—China, the United States, the United Kingdom, France and Germany—have all experienced tremendous sales growth during the year’s second half. It must be noted that the resale right is implemented in over half of the Top 20 countries with the highest resale volumes in 2017, and Canada is ranked 14th⁴.

Several studies⁵ have shown that the resale right has no negative impact of the price of artworks or the competitiveness of markets. In the United Kingdom, a study commissioned by the Intellectual Property Office⁶ has dispelled any doubts concerning the negative impacts of the resale right on the British market by demonstrating that the market has continued to grow after the implementation of the resale right in 2006.

Our affiliate society DACS has published a positive assessment of the first decade⁷ of the resale right in the U.K., a period during which the equivalent of 95 million\$CAD in resale right royalties were distributed to over 4,300 artists and estates. One of DACS’ findings of note is that in 2014, the resale right royalties paid out represented a mere 0.1% of the market’s total value.

The resale right was incorporated to the Berne Convention for the Protection of Literary and Artistic Works in 1948, which Canada has ratified, but it is subject to reciprocity and it is optional. In order to achieve a balance between countries where the resale right exists and those where it doesn’t, the International Confederation of Societies of Authors and Composers (CISAC)—which upholds the rights and interests of creators everywhere in the world—has spearheaded a campaign for the universal adoption of the resale right by promoting a new treaty that would make its adoption mandatory.

The Resale Right in Canada

Despite being central to the demands of artists and all the representative organizations during the 2012 review of the Copyright Act of Canada, the government decided to forego the adoption of provisions that, we will

3- The Art Market in 2017, Annual Review – « [The art market enters a new phase](#) », Artprice, March 2018

4- « The art market enters a new phase », op.cit.

5- Notably « [The Economic Implications of The Artist’s Resale Right](#) », a study presented on November 6, 2017, to the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization (WIPO)

6- « [A study into the effect on the UK art market of the introduction of the artist’s resale right](#) », Katy Graddy, Noah Horowitz, Stefan Szymanski, January 2008

7- « [Ten Years of the Artist’s Resale Right: Giving artists their fair share](#) », DACS, February 2016

never say this enough, would have given Canadian creators a participation in the wealth they create here and abroad. And although the resale right was not adopted back then, its legitimacy has been recognized widely and repeatedly.

On May 29, 2013, in the wake of presentations and support for the resale right, Liberal MP Scott Simms proposed amending the Copyright Act so that artists would receive 5% of the resale price of their works⁸. The next day, the NDP critic for Canadian Heritage, Pierre Nantel, tabled a motion⁹ to prompt the government to establish this right, “the perfect example of a measure that can stimulate creators to create and give them the means to do so.”¹⁰

Just as the reproduction right and other exclusive rights provided for by the Copyright Act, the resale right grants every artist the possibility to benefit from the exploitation of their works according to their success and the wealth they create. Adopting it in Canada is therefore a concrete step in allowing Canadian artists to earn a better living from their creative work.

According to Artprice, 98% of the world’s auction houses do business online nowadays, which is a clear sign that the market is becoming global. However, the resale right is subject to reciprocity, which means that if a Canadian artist’s work of art is resold in a country that enforces the resale right, that artist will not get a penny, since Canada has not adopted the resale right. This is something that has long affected First Nations artists, since their works of art are highly sought-after and resold around the world. Without a resale right in Canada, the income so essential for them to pursue their art, let alone their very survival, still eludes our artists, and their link with their works is broken. Mattiusi Iyaituk, a Nunavik-based artist, gave an eloquent testimony in that regard during a World Intellectual Property Organization (WIPO) conference on April 28, 2017¹¹.

Not only is the resale right an essential revenue stream that allows artists to keep creating, it also allows them to promote their work and ensure its longevity. Thus, the resale right royalties that Jean Paul Riopelle’s successors are exceptionally able to receive from France—because the artist lived there for a long time—have allowed his daughter Yseult Riopelle to carry on their legacy and promote her father’s works through the creation of a descriptive catalogue of his body of work. She began her research nearly 30 years ago, at the request of the artist himself, because he wanted her to act as an expert in finding and authenticating his creations. But if Riopelle had not lived in France, his heirs would receive nothing.

The value of artistic works, the result of creators’ work, often increases over time. Adopting the resale right therefore becomes, according to Marie-Anne Ferry-Fall, General Director of the Société des auteurs dans les arts graphiques et plastiques (ADAGP), our French affiliate society, “[...] a question of equity between the stakeholders of the value chain of the art world so that the stakeholders at the root of this value can also benefit and earn a living from it.”¹²

Collective Management to Facilitate the Implementation of the Resale Right

Collecting and distributing the resale right is a major issue in guaranteeing artists and their estate the efficient payment of their royalties. In countries where such operations have been lawfully granted to copyright

8- Bill C-516, [An Act to Amend the Copyright Act \[artist’s resale right\]](#), 1st reading

9- Motion M-445, [Artist Resale Right](#), Pierre Nantel, 41st Parliament, 1st Session

10- [Un droit de suite pour nos créateurs en arts visuels : une solution pleine de bon sens !](#)

11- [Artist’s Resale Right: SODRAC at the WIPO International Conference in Geneva](#), May 11, 2017

12- [Conférence à l’OMPI pour un droit de suite universel](#), ADAGP, May 3, 2017

collective organizations, these have ensured the fluidity, efficiency and transparency of those operations.

It is therefore crucial that this is taken into account when adopting the resale right in Canada. Elsewhere, experience has demonstrated that for professionals in the art market—who already handle the basic information regarding the collection of the resale right such as the date of the sale, the author of the work, its title, the final purchase price—the cost associated with the administration of the resale right is low, around 0.027% of the revenues of art galleries and auction houses in France. For their part, rights management organization such as SOCAN already possess the experience required to manage millions of transactions as well as the expertise to distribute those royalties to thousands of creators at home and abroad, thanks to their reciprocal agreements.¹³

As far as the government is concerned, it's only obligation regarding the implementation of the resale right in Canada is to amend the Copyright Act to include it.

Our Recommendations Regarding the Resale Right in Canada

- That the resale right inalienably benefit artists and their successors for the duration of the protection granted to works by the Copyright Act, namely the life of the author plus 50 years after the end of the calendar year of their death.
- That the resale right applies to the resale of original artistic works by the intermediation of professionals of the art market, notably auction houses and art galleries.
- That any resale transactions of at least \$1000 be subject to the resale right at a royalty rate of 5% of the works' purchase price.
- That the work's seller and the art market professional be jointly responsible for paying the resale rights.
- That artists and their successors originating from countries where the resale right exists benefit from the resale operations of their works in Canada.
- That the law provides for the mandatory collective management of the resale right.

Private copying to compensate creators in the digital age

Visual works are ubiquitous in our day-to-day lives, and while the Copyright Act gives artists exclusive rights, there are several exceptions that allow the public and users to reproduce works without permission or remuneration. For example, we think of the reproduction for private purposes that allows the reproduction of works on different media such as smart phones and computers whose digital memory allows storage, or the reproduction of previously published works to integrate them into non-commercial content that is published on his Facebook or Instagram account. As the works are widely reproduced under these exceptions, it would be fair for their creators to be compensated for the use of the fruit of their work.

But there is already a system that can play this role effectively, it is private copying. Canada already has an effective mechanism for collecting and distributing these royalties, but our system is currently limited to the private reproduction of musical works on audio media such as blank CDs. However, there are several countries where private copying covers both the copy of music and that of books, films, visual works, and so on, on all types of recording media, analog and digital. In fact, the remuneration for private copying is a payment to the various creators in compensation for reproductions of their works that they should normally authorize under their exclusive rights, but which are permitted by exceptions in the law.

13- Jewell, Catherine, [The artist's resale right: a fair deal for visual artists](#), OMPI Magazine, June 2017

Private copying around the world

For example, in France, copyright legislation ensures that when purchasing a storage medium, whether it is a blank DVD or CD, a USB key, an external hard drive, a electronic tablet, a smartphone, etc., a small portion of the price paid by the consumer serves as remuneration for creators and rights holders¹⁴.

Remuneration scales are set by a specific administrative commission, following negotiations between representatives of rightholders, consumers and manufacturers and importers. For convenience, it is the manufacturers and importers of blank media that pay this fee, based on the storage capacity of media, and thus contribute to the financing of culture. The distribution between the different directories is based on statistical surveys which make it possible to establish the proportion between the categories of copied works.

Part of the remuneration for private copying is therefore the creators of visual works (paintings, photographs, sculptures, comics, etc.) and in 2017, for example, our sister company ADAGP perceived for the artists and assigns it represents almost 6 million euros, or approximately 9 million Canadian dollars. In fact, ADAGP pays us a portion of this compensation each year for our Canadian members, and in recent years, we have distributed almost \$ 40,000 to them.

Creators of visual works also benefit from private copying levies in several other countries, for example Austria, Belgium, Denmark, Finland, Germany, Greece, Hungary, Latvia, the Netherlands, the Czech Republic, Slovakia, and so on.

According to the International Confederation of Societies of Authors and Composers (CISAC), its member companies collected some 484 million euros in royalties for private copying in 2017 for the different types of works and the growth of collections of creators of visual works can be explained by, among other things, private copying levies¹⁵. However, the World Intellectual Property Organization (WIPO) indicates in a study¹⁶ that in 2015 private copying royalties amounted to about \$ 0.10 per capita in Canada, while, for example, they were \$ 4.80 per capita in France.

Our recommendation regarding private copying in Canada

- That the private copying system be extended to digital recording media and all categories of works including visual works, so that local artists are better compensated and compensated for reproductions of their works produced without authorization for private purposes or under other exceptions.

Harmonize the scope of the exhibition right

The exhibition right was introduced on June 7, 1988 in the Copyright Act, after more than twenty years of efforts to have Canadian visual artists recognize a right with a potential for remuneration that already benefited the authors of musical, literary and dramatic works.

Indeed, the presentation of artistic works covered by the exhibition right can be compared to a form of performance of musical, literary and dramatic works that was already provided for in the law. These rights

14- Website of the [Commission for the remuneration of private copying](#), French Ministry of Culture.

15- « [Global Collections Report \(2018\)](#) », CISAC, p.30.

16- « [International Survey on Private Copying Law & Practice 2016](#) », Stichting de Thuis kopie, WIPO, 2017, p. 18.

allow for example the author of a play to receive a fee when his play is presented or the author of a song to be paid when it is played on the radio.

These rights of performance apply to musical, literary and dramatic works regardless of their date of creation, therefore for the standard term of copyright protection in Canada, that is, the life of the author then until the end of the fiftieth year following that of his death. The exhibition right of visual works refers only to those created after the date of its adoption on 7 June 1988.

To be effective, this method of remuneration must therefore be corrected so that all visual artists benefit from the same potential for income and that this potential also corresponds to that which the law grants to the authors of musical, literary and dramatic works.

Currently, an important part if not all the works of experienced artists, for example René Derouin, Roland Poulin or Françoise Sullivan, are not covered by the exhibition right because they date from before its adoption. Conversely, the law systematically allows younger creators to charge royalties for the exhibition of their works. Experienced artists are therefore at a disadvantage vis-à-vis their younger peers and, in addition, vis-à-vis other creators.

The exhibition right is currently defined as follows in section 3 of the Copyright Act:

3 (1) Copyright in the work [...] includes, in addition, the exclusive right [...]:
and (g) to present to the public at an exhibition, for purposes other than sale or rental, an artistic work - other than a map or sea map, plan or graph - created after June 7, 1988.

Our recommendation regarding the exhibition right

- By eliminating from this definition the notion of an artistic work “created after 7 June 1988”, it will be ensured that the creators of visual works all enjoy the same exhibition right, comparable also to the forms of performance rights that the law grants to the authors of works of the other categories, with a fair potential of remuneration.

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