



C A R F A C

CANADIAN ARTISTS REPRESENTATION
LE FRONT DES ARTISTES CANADIENS

**CARFAC's Submission to the Federal Government's
Standing Committee
on Industry, Science and Technology
for the Statutory Review of the *Copyright Act***

Submitted on October 11, 2018

Introduction

Copyright is important to visual artists. The French translation of copyright, *droit d'auteur*, or the right of the author/creator, more accurately describes a visual artist's relationship to their work, because artists have rights in how their work is used, including the right to be compensated for those uses. The Exhibition Right and Reproduction Right offer visual artists with vital sources of income, but improvements could be made in how they are written in the Act. Moreover, the Canadian Copyright Act does not currently include an Artist's Resale Right, which could be a significant source of income for Canadian artists at home and abroad.

Artist's Resale Right

Visual artists are asking the federal government to include the Artist's Resale Right (ARR) in the Copyright Act. The ARR entitles visual artists to receive payment each time their work is resold publicly through an auction house or commercial gallery. Since 2011, CARFAC has recommended that 5% of all secondary sales of eligible artworks be paid back to the artist or their estate. It is a significant economic right for artists which will have no ongoing costs to the federal government.

The ARR allows visual artists to share in the ongoing profits being made from their work on secondary sales. While the market grows, Canadian artists do not get paid from sales of their work in the secondary market. Royalty payments from these subsequent sales would offer greater financial independence for artists, as they contribute to the ongoing commercial success of their work. It is common for art to increase in value over time, as the reputation of the artist grows.



The Enchanted Owl
Kenojuak Ashevak
Cape Dorset, Nunavut

Original selling price: **\$24**
Sold at auction in 2001: **\$58,650**

Kenojuak Ashevak was an artist that supported this concept, and whose work has increased dramatically over time. Her work is widely celebrated and regularly sold at auction. Her famous print, *The Enchanted Owl*, originally sold for \$24 and was later resold for over \$58,000. She missed out on almost \$3,000 in royalties just from this one sale, because we do not have an ARR in Canadian law. She is one of many artists that are missing out. CARFAC has case studies of artists across Canada whose works are regularly selling in the secondary market.

Many people profit from Ashevak's work. Since 2012, when the ARR could have been implemented, 180 of her works have sold through 13 auction houses in Canada and abroad, totaling \$696,405. More than half of her works sell for \$1,000-2,000 each, while others sell for much more. Had ARR been legislated in 2012, she and her estate would have received \$34,820 in royalties. This is minimal compared to what the seller and auction house were paid on those sales, and it does not even include sales through commercial galleries, so we're talking about a lot more money.

The ARR has a long history in other countries, and CARFAC has developed a detailed proposal for Canada based on how it is best applied elsewhere.¹ The law was first introduced in France in 1920, and at least 93 countries have it world-wide. Several studies from the European Union², the World Intellectual Property Organization³, and others have demonstrated that the ARR has not had a negative impact on the art market in the countries where it exists. In fact, the markets continue to grow. It is currently being discussed by governments in Korea, China, and the United States. It has been discussed in Canada's trade negotiations with other countries, and WIPO is considering making the international adoption of legislation a requirement under the Berne Convention.⁴

With so many countries already having this legislation, we have the benefit of being able to examine best practices of how it is applied elsewhere. Canada and Australia share a lot in common, and CARFAC bases its proposal largely on their model. In the eight years since it was introduced, more than \$6.3 Million has been paid to over 1,600 artists – half of which are living artists. Most royalties are between \$50 and \$500, and over 63% of recipients are Aboriginal or Torres Strait Islander artists, whom have received 38% of the total royalties.⁵

¹ CARFAC and RAAV, *Policy Proposition Recommendations for an Artist's Resale Right in Canada*.

<http://www.carfac.ca/wp-content/uploads/2015/06/Artist-Resale-Right-Proposal-Oct-2015.pdf>

² European Parliament resolution of 20 November 2012 on *the Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC) (2012/2038(INI))*. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012IP0421>

³ WIPO Standing Committee on Copyright and Related Rights Thirty-Fifth Session Geneva, November 13 to 17, 2017. *THE ECONOMIC IMPLICATIONS OF THE ARTIST'S RESALE RIGHT*.

http://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_7.pdf

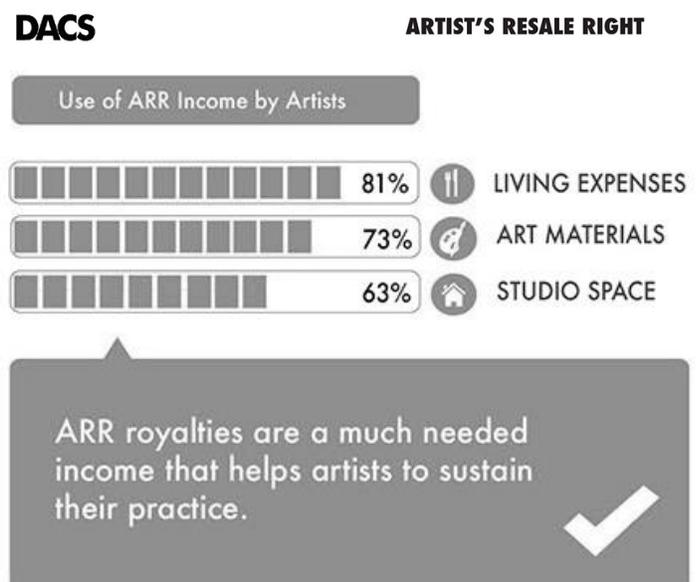
⁴ WIPO Magazine, *The artist's resale right: a fair deal for visual artists*. June 2017.

http://www.wipo.int/wipo_magazine/en/2017/03/article_0001.html

⁵ Copyright Agency, *Resale Royalties*. 17 July 2018. <https://www.resaleroyalty.org.au/>

Most artists have received one or two royalty payments, but some have received multiple payments. It is estimated that ARR payments in Australia amount to 0.5% of their domestic market.⁶

It has also done particularly well in the UK, which has had the ARR since 2006. As of 2017, nearly £65 million have been paid to 5,000 artists and estates. In 2017 alone, 1,800 beneficiaries were paid over £10 million. A recent study by DACS has shown that royalties are a much-needed income source to sustain artists in their practice, with most artists using it for living expenses, art materials, and rental of studio space.⁷



Proposed terms for Canada

Through extensive research from other international models, and consultation with Canadian artists and art market professionals, CARFAC recommends that:

- the ARR apply to secondary sales of original artworks for the lifetime of the artist, and their estates for up to 50 years after death, in accordance with the terms of the Copyright Act;
- the ARR apply to works sold for at least \$1,000, and the rate paid to artists is 5%;
- the art market agent and seller of the artwork are jointly responsible for the payment of the royalty;
- collective administration of ARR is mandatory.

We recommend that it does **not** apply: on the first transfer of ownership; if it is a private sale between individuals without an intermediary; if the work is resold for less than \$1,000; if it is sold through the secondary market in a country that does not have the ARR; or if it is made by an artist from a non-qualifying country.

⁶ WIPO Standing Committee on Copyright and Related Rights. *THE ECONOMIC IMPLICATIONS OF THE ARTIST'S RESALE RIGHT*.

⁷ DACS. *Ten Years of the Artist's Resale Right*. 2016. <https://www.dacs.org.uk/for-artists/artists-resale-right/10th-anniversary#White%20paper>

Administration and Collection of ARR

The only relationship that the federal government would have to the ARR is their role in amending the Copyright Act to include it. The ARR is a copyright royalty, not a tax. It is not collected by government, nor is it spent by government. The government has nothing to do with collecting, distributing, or monitoring the payment of royalties. The royalty is paid only on financial transactions related to work sold in the secondary market, according to specific eligibility criteria.

In most countries, the ARR is efficiently managed and paid through a copyright collecting society, for administrative and financial simplicity. It is the collective's job to contact the auction house or gallery for sales records, to determine the artist's eligibility, and to pay the artist. In the UK, most dealers and auction houses say that the paper work takes very little time and is inexpensive to report.⁸

It is recommended that CARCC, now known as Copyright Visual Arts, should handle the administration on behalf of their members and all unaffiliated artists, as they are the only collective managed **by** and **for** Canadian visual artists. They have almost 30 years of experience administering copyright, and they have more Canadian visual artist members than any other collective.

Canada and the ARR

CARFAC participated in consultations when the Copyright Act was being reviewed in 2011, and although ARR was not added when the Act changed in 2012, the committee that oversaw the review recommended that a private members' bill be presented. Several political parties have been supportive, and a private member's bill (C-516) was presented in 2013. It remains a non-partisan issue with support from MPs from all political parties.

Since we last presented ARR to Parliament, the Government of Nunavut and the community of Rankin Inlet have endorsed our proposal, and other provincial culture ministers have expressed support. We have included the ARR in several Pre-budget submissions since 2013, and in 2017 the Standing committee on Finance recommended that the *Income Tax Act* and the *Copyright Act* be amended to include ARR. It was also discussed by the Standing Senate Committee on Foreign Affairs and International Trade in February. We are now hopeful that the INDU and CHPC committees will implement it following the current review of the Copyright Act.

⁸ DACS. *Artist's Resale Right: A response to the Intellectual Property Office's Questionnaire*. May 2014. <https://www.dacs.org.uk/getattachment/Knowledge-Base/DACS-response-to-IPO-questionnaire-on-Artists-Resale-Right-May-2014.pdf.aspx>

Amendment to the Exhibition Right

Another change that we are asking for relates to the Exhibition Right. Currently, public museums and galleries are not legally required to pay exhibition royalties to artists if their work was made before June 8, 1988: the date in which the Right was enacted. At the time, it was argued that only applying the Right to works made after this date minimized the financial impact of the new law, particularly for works in museum collections.

However, this has led to discrimination against senior artists, as they are not always paid when their work is exhibited. This discrimination could be a Charter issue, as it discriminates against artists based on age. It is not intentionally or directly discriminatory, but a law which appears to be neutral can have a disproportionate negative impact, which in this case disadvantages older artists by denying them compensation for the exhibition of art created before a certain date. Even though the *Act* does not explicitly make a distinction based on age, artists creating artwork prior to that year will be older than artists creating work after 1988.

Although these artists can attempt to negotiate an exhibition fee with a museum or gallery, it is often unsuccessful as they have no legal right to those fees. Museums sometimes plan exhibitions around whether they are legally obligated to compensate artists. Meanwhile, newer works by younger artists are automatically entitled to exhibition royalties. Therefore, senior artists experience economic prejudice in comparison to their younger counterparts, and we contend that the Exhibition Right should simply apply to the term of copyright: the life of the artist and their estate for 50 years after death.

Amendment to Fair Dealing

Our third recommendation is to place some limitations on the Fair Dealing changes that were made in 2012. Each year, artworks in publications are copied for use in schools. Visual artists are supposed to be paid for those copies through collective licenses administered by Access Copyright and Copibec, but many universities are no longer renewing licenses for that use, believing they are no longer required to pay because of changes made to Fair Dealing in 2012. There is a lack of clarity over the scope of the education exception, specifically, leading to institutions unilaterally declaring what their copyright guidelines should be. The *Act* does not specifically define what is “fair”, and in the meantime, visual artists’ incomes have been eroded.

We were told that changes to Fair Dealing would not have a significant effect on artists, but the numbers say otherwise. Between 2013 and 2017, collective reprography payments to all visual artists declined by 66%, from \$3,948,763 to \$1,370,651. The average visual artist received \$49.11 in 2017. We are not asking to get rid of Fair Dealing, but we agree with Access Copyright that fair dealing exceptions should not apply when it is possible to reasonably

license work that is commercially available from a copyright collective or rightsholder. This is how it works in Scandinavia, Australia, and the UK. The change would ensure users have access to Canadian works while artists remain compensated, promoting a balance that is at the basis of copyright law.

Summary

CARFAC has three key recommendations: that the Federal Government legislate the Artist's Resale Right in the Copyright Act; that the Exhibition Right be expanded to include works made before 1988; and that limitations be placed on the Fair Dealing changes that were made in 2012.

Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) is the national voice of Canada's visual artists, working in a variety of media including painting, sculpture, photography, etc. Our core mandate is to defend the artist's right to representation and fair payment. We believe that artists, like professionals in other fields, should be paid for their work, and share equitably in profits from their work.