



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 Canadian Heritage
Remuneration Models for Artists and Creative Industries**

Submitted on December 4, 2018

Introduction

CARFAC (Canadian Artists' Representation / Le Front des artistes canadiens) is the national association representing Canada's visual artists, 4,000 of whom are members. Our mandate is to improve artists' working conditions. According to the 2011 National Household Survey and Labour Force Survey, there are nearly 16,000 visual artists in Canada, with average incomes of \$24,672.¹ This is nearly half of the average income of all Canadians, and with the median annual income for visual artists amounting to \$17,383, more than half of all visual artists are below the poverty line. Visual artists are the most likely of all artists to be self-employed, and they are among the most vulnerable when it comes to income precarity. Research shows that senior visual artists have median earnings of \$5,000, and that 1/3 of all artists are at a high financial risk.² Artists rarely have the luxury of retirement.

There are many ways we can improve artists' incomes: better taxation policies, access to social security programs, better funding for the arts, and more. Our brief focusses on recommendations for changes to the Copyright Act, which can directly lead to improvements in artists' incomes. 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 when their work sells here 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.

With copyright, ownership and duration of rights are more complex than they are for most other objects, such as houses or cars. When artists sell their work, they do not typically sell their copyright. They keep their intellectual property. Writers and composers get paid each time their work enters the market. The ARR similarly acknowledges that an artist is an important contributor to their work's ongoing value.

¹ Hill Strategies, *A Statistical Profile of Artists and Cultural Workers in Canada*. http://hillstrategies.com/wp-content/uploads/2018/11/artists_cw_canada2011.pdf

² Senior Artists' Research Project. *Senior Artists in Canada*. http://hillstrategies.com/wp-content/uploads/1970/01/Senior_Artists_full_report.pdf

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. Many of our most celebrated artists live in poverty and while they may still be making more art throughout their lives, everyone wants to buy that early work: the work that made them famous.

Kenojuak Ashevak was an artist that supported this proposal, 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 was recently resold on November 20, 2018 at Waddington's auction house for \$216,000. She missed out on \$10,800 in royalties just from this one sale, because we do not have an ARR in Canadian law.

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, because only auction sales details are public.

Ashevak 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. Another notable example is Joe Fafard. Over the last 30 years, at least 120 of his artworks sold at auction that could have been eligible for royalties. The total hammer price value of all those works is over \$1.5 Million, and if we had the ARR, he could have been paid almost \$80,000. The royalty payments would have ranged from \$70 to \$4,000.

According to a study by Canadian Heritage, only 3% of the secondary art market is through commercial galleries. Most galleries would not be affected by ARR because they deal mostly or exclusively with the primary market, and not all sales would be eligible for ARR payments. Auction houses account for 97% of the market, and they have been growing for decades. Heffel's profits have increased from \$1 Million in 1995 to almost \$60 Million in 2016. Over 30 years, Heffel has sold almost \$1 Million worth of work by Fafard, and 5% of that is approximately \$48,000. In 2016, they sold about \$309,000 worth of his work. He could have been paid over \$15,000 from various sources in that year alone.

ARR royalties have the potential to benefit more than just an individual artist. Fafard operates a foundry that employs ten people, so any money that he is paid benefits not just him but ten other families as well. Similarly, Annie Pootogook's Brother, Coo Pootogook has said that when her work sold, she shared profits with friends and family in need. People followed her on weekly trips to the co-op and she would share her earnings when she had them. We cannot dismiss the importance of even a \$50 royalty when it benefits many.

ARR's International Precedents

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.³ The law was first introduced in France in 1920, and at least 93 countries have legislated it world-wide. Several recent studies from the European Union⁴, the World Intellectual Property Organization (WIPO)⁵, and others have demonstrated that the ARR has not had a negative impact on the art market in other countries. In fact, the markets often 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.⁶

Opponents to ARR say it will harm the market, but they offer no proof of this. In fact, studies consistently show that the market continues to grow or remain stable after implementation of ARR. According to the 2017 study by WIPO: "In 2008 the UK Intellectual Property Office commissioned a study in which the authors showed that the UK market continued to grow after the introduction of the ARR... It is also clear that prices had risen significantly." Another study in 2011 came to the same conclusion. Most importantly, with regard to the living artists' market, average annual sales have increased in the UK since 2006, and "the number of transactions that took place in the UK did not have a noticeable impact on the living artist market..." and the British art market has continued to grow.

There is also no evidence that the market has moved to other countries that do not have ARR. The royalties are usually too modest to remove incentives to relocate in order to avoid paying it. The cost of exporting an artwork is invariably higher than the royalty. For example, a work sold for \$5,000 would generate a royalty of \$250, at the proposed rate of 5%. The cost of packing, insuring, and shipping an artwork to a country without the ARR, not to mention the hassle involved and fees that you can face for exporting work, would likely outweigh the benefit of avoiding the royalty, particularly if the work does not sell and the work has to return to Canada. Art will always be sold where it's likely to get the best price. We see no real threat of the art market moving abroad, as the Canadian art market has specialized expertise, and buyers are more likely to purchase Canadian work in Canada.

As of 2018, the United States remains the largest art market worldwide, followed by China, then the UK. Switzerland is an important example to illustrate that collectors are unlikely to sell elsewhere to avoid the ARR, as they are the only European country that does not have

³ 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>

⁴ 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>

⁵ 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

⁶ 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

it. They rank 20th in the global market, with several countries that have ARR legislation placed ahead of them: UK, France, Germany, Italy, Belgium, Austria, Holland, Sweden, and Poland. Sellers in those countries are not going to Switzerland to avoid paying, and in most cases, it would be far easier to export there than it would be for a Canadian seller to take the sale to the US.

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. It has 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

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 AUD 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.⁸ 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.⁹

Proposed terms for Canada

The royalty is paid only on financial transactions related to work sold in the secondary market, according to specific eligibility criteria. 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;

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>

⁸ Copyright Agency, *Resale Royalties*. 17 July 2018. <https://www.resaleroyalty.org.au/>

⁹ WIPO Standing Committee on Copyright and Related Rights. *THE ECONOMIC IMPLICATIONS OF THE ARTIST'S RESALE RIGHT*.

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.

Administration and Collection of ARR

The only relationship that the federal government would have to the ARR is by 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 would not be involved in collecting, distributing, or monitoring the payment of royalties. We are asking for the legal right to collect the royalty, because without a legal requirement to pay, it will not be respected.

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.¹⁰ Copyright collectives are building best practices in how to collect royalties, and how to get non-compliant AMPs to pay. We recommend that strict penalties be imposed in Canadian legislation, in addition to our collectives building effective administration processes.

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 changes were made 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.

¹⁰ 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>

CARFAC recommends that the Artist's Resale Right be added to the Copyright Act. We recommend the terms presented in Bill C-516 in 2013, with one amendment: that the minimum eligibility threshold be increased from \$500 to \$1,000. We believe this change would be more administratively efficient and more beneficial to the Canadian art market.

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. When it was first implemented, 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 naturally 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.

CARFAC recommends that Part I, 3 (1) be amended as follows:

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work ~~created after June 7, 1988~~, other than a map, chart or plan,

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.

The 2012 amendments to the Act introduced the education exemption under Fair Dealing, and the Act does not specifically define the scope of this exemption. While legal precedents are emerging on the interpretation of what is “fair”, many universities and other educational institutions have resorted to establishing their own Fair Dealing Guidelines that set out arbitrary and self-defined amounts they consider to be fair dealing, and claim to provide reasonable safeguards for owners of copyright-protected works.¹¹ For example, University of Toronto’s Fair Dealing Guidelines state that a “short excerpt from a copyright-protected work may be provided or communicated to each student enrolled in a class or course”, and “defines a short excerpt to include “an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works.”¹²

The lack of clarity over the scope of the education exception leads 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.

It does not have to be this way. In the UK, for example, fair dealing does not apply for copying in education when a license is offered by the rights holders or the Reproduction Rights Organization (RRO). This model encourages market-based solutions to the licensing of works, while ensuring that users have access to the widest possible variety of works for educational purposes. Overall, this model benefits both users and creators, with users having access to a broad repertoire of copyrighted material, and creators being fairly compensated for that use.

We are not asking to get rid of Fair Dealing, but we agree with Access Copyright and others 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 consistent with how it works in other countries, and 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.

¹¹ For example, see Universities Canada’s Fair Dealing Guidelines: <https://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>.

¹² University of Toronto. (2012). Copyright Fair Dealing Guidelines. Retrieved from <https://provost.utoronto.ca/wp-content/uploads/sites/155/2018/06/Copyright-Guidelines.pdf>.

CARFAC recommends that the Act be amended to adopt a model for education exemptions under Fair Dealing, as is done in other countries. We recommend the following addition to subsection 29.01 of the Act:

29.01 The exemption from copyright infringement for research, private study, or education provided by Section 29 does not apply to educational institutions, or a person acting under the authority of one, if the work or other subject-matter is commercially available within the meaning of the definition of commercially available in section 2 including in the case of paragraph (b) of that definition, by a collective society or other person for the dealing.

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.