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Review of the remuneration models for artists and creative industries

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Submission to the Standing Committee on Canadian Heritage

Introduction

CISAC, the International Confederation of Societies of Authors and Composers, was informed that the Standing Committee on Canadian Heritage has started the process of reviewing the remuneration models for Artists and Creative Industries and has invited the interested stakeholders to submit short briefs expressing their views. With this paper, CISAC wishes to contribute to the process by providing the point of view of the global community of visual artists.

We do hope that the above information will assist in adopting the most appropriate strategy towards the recognition of the rights of visual artists, both national and foreigners.

About the Resale Right

The artist's Resale Right, also referred to as *droit de suite*, guarantees creators the ability to earn a fair share from the resale of their works. It is a royalty paid to visual artists when their works are resold by an auction house or gallery, above a certain price.

The royalty is a small percentage of the resale price. The rate varies from country to country and normally depends on the sale price of the work.

The artist's Resale Right ensures that the artist and his/her family receive compensation each time a work is resold. This makes it possible for the artist to retain a share in their work as it increases in value. Without Resale Right, the artist receives no compensation after the initial sale, while auction houses, art dealers and private collectors' cash in on the growing value of the work, which is attributed to the artist's reputation.

The first Resale Right law was enacted in France in 1920. The need for the right became clear when a collector made a significant amount of money from the sale of Jean-François Millet's painting "The Angelus," while the artist's family was living in extreme poverty.

The Resale Right is the only way for visual artists to maintain an equitable share in the value of their works after the initial sale. Artists, especially early on in their career, usually sell their works at a low price to collectors or dealers, who put them aside and place them back on the market again once the author's reputation is well established. With the Resale Right in place, the artist receives a small percentage of the resale price of each public resale. Without the Resale Right, auction houses and galleries get to keep all of the money from the sale, and the artist receives nothing. This unfair and unjustified system completely ignores the artist's role in raising the value of his or her own works.

Ultimately, it is the artist's growing reputation that determines the value of their work; therefore, it is only just and equitable that the artist and his family benefit from the work's appreciation.

Even with the Resale Right in place, the lion's share of the resale price still goes to the seller. Nonetheless, the money received by artists, while usually representing an insignificant sum to the sellers, is an incredibly important source of income for artists.

Many artists earn less than their country's median income. Unlike other creators such as composers or writers, the amounts visual artists receive for reproduction or representation of their works are generally marginal. Thus, the amount received from the resale of their works is a vital part of their income. After an artist's death, the need for resale income remains crucial as families and heirs inherit not only the rights to the work but also the burden of managing an artist's estate, including the costs of storage, conservation, cataloguing, research and restoration.

Furthermore, as the Resale Right requires accountability on the part of auction houses, dealers and galleries, it helps artists maintain the connection with their works and have an accurate view of their value.

International framework – The reciprocity issue

The right is recognized under international copyright law. It is included in article 14ter of the Berne Convention, which remains the principle blueprint for global authors' rights. It is not compulsory, however, and is instead presented as a reciprocal right. This means that for an artist to receive the resale royalty, the right must be enacted both in his/her home country as well as the country where the work was sold.

Because the Resale Right is considered a reciprocal right in the Berne Convention (meaning that an artist can only receive the resale royalty if legislation is in place in both his/her home country as well as the country where the sale occurred), it is of the highest importance to ensure that the Resale Right is implemented in as many territories as possible¹.

A Directive of the European Union passed in 2001 required all EU countries to implement the Resale Right. This was a major step forward towards the global recognition of the right, which now exists in more than 80 countries worldwide. In many other countries, possible implementation of the Resale Right is under discussion. However, due to the reciprocal nature of the right in the Berne Convention, the absence of the right in countries representing major art markets like the United States, China, Canada and Japan prevents visual artists worldwide from fully benefiting from the right.

Impact on the art market

Many academic studies, including a comprehensive report issued by the European Commission in December 2011², have shown that there is no evidence that the Resale Right has an economic impact on art market prices or sales volumes. Rather, global implementation of the Resale Right would foster creativity and guarantee that all artists, without discrimination, receive a fair share in the economic success of their works.

This point has been proven time and again, most recently at the UN's World Intellectual Property Organisation (WIPO) where a study dedicated to this topic was presented during an international conference on April 28, 2017³. The study, which examines the case of United Kingdom, shows that introducing the Resale Right has no impact on art market prices or sales volumes.

Prior to partial implementation in the UK in 2006, London art market professionals who were against the right argued that sellers would abandon London for territories that did not have the right (the two key markets identified were Switzerland and the US). And yet, the UK market outgrew both the US and the Swiss markets substantially during 2007-2008, at a rate of 10.8% growth compared to -18.8% and -13% respectively⁴.

Further, in a December 2013 report, the US Copyright Office reviewed its position on the Resale Right, noting the long list of countries which have already implemented it and observing that no negative impact has resulted from implementation of the right in countries outside the US⁵.

Potential Benefits for indigenous artists

While all Canadian visual artists have the potential to benefit from the implementation of the Resale Right, the fragile community of Indigenous artists may derive the maximum profit from it. Looking to international

¹ For example, because Canada, does not currently have the Resale Right in place, artists from the EU or Australia or other countries that do have the Resale Right cannot obtain royalties from resales in Canada. Likewise, Canadian artists cannot collect resale royalties even when their works are resold in countries that do have the Resale Right in place.

² *Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC) from the Commission to the European Parliament, The Council and the European Economic and Social Committee*; December 14, 2011.

³ *The economic implications of the artist's Resale Right*, Professor Joëlle Farchy and Professor Kathryn Graddy, WIPO, 2017.

⁴ *The International Art Market 2007-2009: Trends in the art trade during global recession*, Dr Clare Mc Andrew, 2010.

⁵ *Resale royalties: an update analysis*, Office of the Register of Copyrights, Unites States Copyright Office, 2013.

examples in this sense, the Resale Right has had a remarkable impact on Indigenous artists in Australia. The Farchy-Graddy WIPO study⁶ reported estimations from NAVA (the National Association of Visual Arts) according to which over the 5-year period between the study dates of 2010 and 2015, indigenous artists received approximately 1.4 million dollars. NAVA reported that approximately 65 per cent of the visual artists who benefited from the Resale Right were Aboriginal and that they received 38 per cent of the total royalties collected in the country.

Administration of the artists' Resale Right

In most countries, the Resale Right is efficiently managed and paid through a collective management organisation (CMO, also known as authors' society) for administrative and financial simplicity. In many countries, this is even required by law.

CMOs managing visual artists' rights send periodically "resale report requests" to local auction houses, dealers and galleries across the territory they represent. The various sellers fill out the reports and return them to the CMO, which then calculates the resale royalty share due for each resale and bills the seller. Once payment is received, the money is distributed to the artists. In countries with compulsory collective management, the CMO distributes not only to its members but also its non-members. In such countries, the local CMO searches for the artist or heir in order to carry out the distribution. CMOs provide numerous online tools such as registration for artists, searchable artist databases, royalty calculators and online sale reporting.

In countries where the Resale Right has become incorporated into the daily working environment of art professionals, many companies have automated the process and send monies and reports directly to the collective societies without prompting. A study carried out by DACS (Design and Artists Copyright Society) in the UK following implementation of the Artist's Resale Right, showed that 60% of art market professionals said their own administration of the resale right took less than five minutes and cost them less than £10 per quarter⁷.

Testimonials from artists and beneficiaries

Julio Carrasco Bretón - MEXICO

"In my view, the Resale Right not only secures artists a fair share in the success of their works but also enables them not to cut the umbilical cord with their creations by not losing track of them on their first resale. The Resale Right affords artists the possibility, in the same way as other authors, of receiving fair remuneration that is proportional to the price of their works and of following the fortunes of their works, but sadly only in some countries. Artists worldwide should be able to enjoy this right, without discrimination."

Hervé Di Rosa - FRANCE

"Art is universal; artists delight the peoples of the five continents; the rights protecting them and the Resale Right in particular should be recognized in every country of the world."

Ousmane Sow – SENEGAL

"Artists do not live on thin air. And because they enrich the world with their art, they should be protected. So it is fair that those who trade in their works pay them a share of what they earn. That is the purpose of the resale right: to share all forms of enrichment."

Frank Stella - USA

"Visual artists are the only members of the creative community in the United States who do not receive residual payments for their works. Composers, lyricists, actors, playwrights, screenwriters, all deservedly receive royalties for the later productions, performances, or sales of their works. Unfortunately, visual artists

⁶ *The economic implications of the artist's Resale Right*, Professor Joëlle Farchy and Professor Kathryn Graddy, WIPO, 2017.

⁷ *The Artist's Resale Right in the UK: Submission to the post implementation review by the UK Intellectual Property Office by the Design and Artists Copyright Society*, February 2008.

in the US do not earn a penny in residual or resale payments. The benefits derived from the appreciation in the later sale of their works accrue entirely to collectors, auction houses, and galleries. The adoption of the droit de suite in my country is therefore long overdue.”

Recommendations

In conclusion, CISAC recommends that the Standing Committee on Canadian Heritage considers the inclusion of the artists’ resale right among the remuneration models for artists and creative industries.

We remain at your disposal for any question or clarification you may have on the above-mentioned considerations.

About CISAC

CISAC, the International Confederation of Societies of Authors and Composers, would like to thank the US Copyright Office for the opportunity to express its position on the desirability of introducing an extended collective licensing regime for certain mass digitisation use of visual art works.

CISAC is a not-for-profit, non-governmental organisation, composed of 230 authors’ societies from more than 120 countries. Through its membership, CISAC represents some 4 million creators. These creators are drawn from a wide variety of artistic fields, including music, drama and literature, visual arts and audiovisual.

In the field of visual art, our members represent the interests of authors of fine art, painters, sculptors, video artists, illustrators, photographers, designers, architects and other visual authors. The tasks they usually carry out for the benefit of their members are diverse:

- Providing licenses for the reproduction and communication to the public of their members’ works, thus providing legal certainty to users;
- Collecting and distributing royalties for the rights managed under mandatory collective management;
- Collecting and distributing the artist’s Resale Right;
- Defending its members’ rights against any infringement;
- Protecting and developing authors’ rights at a national and international level;
- Promoting cultural activities and assistance in favour of the creators’ community.