

**COPYRIGHT
VISUAL ARTS**



**DROITS D'AUTEUR
ARTS VISUELS**

**CARCC – Copyright Visual Art's
Submission to the Standing Committee on
Industry, Science and Technology
for the Statutory Review of the *Copyright Act***

Submitted: October 5th, 2018

I. INTRODUCTION

CARCC – Copyright Visual Arts was founded in 1990 to assist artists in managing their copyright. Copyright Visual Arts provides services to the members of the collective, representing nearly 1000 Canadian visual artists. These services include the negotiation of terms and the licensing of copyright use, collecting the royalties, and paying the artists. We are the only Canadian copyright collective run by visual artists, for visual artists. We have nearly 30 years of experience administering royalties for the exhibition and reproduction of visual artists' work, and we aim to be the primary copyright collective that eventually administers the Artist's Resale Right when it is legislated in Canada. We license the use of copyright for our artist members or their estates, in Canada and abroad.

Copyright Visual Arts submits that the committee should consider three aspects of the current *Copyright Act* (the Act) that have implications affecting the livelihood of visual artists in Canada. First, the negative impact of expanding the Fair Dealing exceptions to include education; second, the lack of provisions for an Artist's Resale Right (ARR); and third, the Exhibition Right's discrimination against senior artists.

2. NEGATIVE IMPLICATIONS OF EXPANDING THE FAIR DEALING EXCEPTIONS TO INCLUDE EDUCATION

The 2012 amendments to the Act introduced the education exemption under Fair Dealing. The issue, however, is that the Act does not specifically define the scope of this exemption. While legal precedents are only beginning to emerge 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.¹ 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.”²

These policies were developed without consultation with the creative industries, and the adoption of such policies have led to a decline in collective licensing between Canadian

¹ For example, see Universities Canada's Fair Dealing Guidelines: <https://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>.

² University of Toronto. (2012). Copyright Fair Dealing Guidelines. Retrieved from <https://provost.utoronto.ca/wp-content/uploads/sites/155/2018/06/Copyright-Guidelines.pdf>.

educational institutions and Access Copyright. As a result, artworks in publications are copied for use in schools, but licenses for such use are no longer being renewed under the guise of Fair Dealing. It is clear from data gathered since 2012 that implications of the education exemption have had a negative economic impact on Canadian artists. Between 2013 and 2017, payback royalties made to visual artists from Access Copyright declined from \$573,395.16 in 2013 to \$193,585.43 in 2017, amounting to a significant 66% decrease.

Copyright Visual Arts supports and understands the importance of artistic content being made available for educational purposes, but a balance between user and creator rights should be maintained, and the education exception should not apply when it is possible to license work that is commercially available from a copyright collective or rightsholder. In this sense, the Canadian model is not on par with international legal models that support this balance. Many of those models have express collective licensing schemes with the educational sector that allow collecting societies to represent and negotiate licenses on behalf of relevant rights holders of a particular category of works as a default, while maintaining the right for rights holders to opt out of such agreements.

Under the United Kingdom (UK) model, 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. The UK also introduced Extended Collective Licensing (ECL) in 2014. Under this scheme, RROs negotiate agreements on behalf of their members, *as well as non-members*, because ECL allows RROs to enter into agreements on behalf of all rights holders of the category the collecting society represents. As such, non-members will also receive individual remuneration (i.e. royalty payments) as if they were a full member of a collecting society, unless they opt-out of the agreement from the RRO. The UK has introduced a general and flexible right for collecting societies to operate extended collective licenses for many different purposes, as long as they can prove to government that they are sufficiently representative of the sector they operate in.

Copyright Visual Arts believes that licensing must be allowed to develop and flourish in the education sector to ensure that artists' livelihoods are not at stake, and that content can continue to be created.

Copyright Visual Arts recommends that the Act be amended to adopt a model for education exemptions under Fair Dealing that is similar to that in the United Kingdom.

3. MISSED OPPORTUNITY TO INTRODUCE THE ARTIST'S RESALE RIGHT IN 2012 AMENDMENTS TO THE ACT

For several years, visual artists have advocated for the ARR, which was significantly discussed during consultations for the 2012 amendments to the Act, but it was unfortunately not adopted. Copyright Visual Arts recommends that this missed opportunity not be repeated, and that the Act be amended to include an ARR where 5% of all eligible secondary sales of artwork sold for at least \$1,000 be paid to the artist, and that it be managed and paid through a copyright collecting society, for administrative simplicity.

The ARR entitles visual artists to receive payment each time their work is resold publicly through an auction house or a commercial gallery. This allows visual artists to share in the ongoing profits made from their work. It is common for art to gain economic value over time, as the reputation of the artist grows, yet Canadian artists do not currently share in those profits.

In 2010, the average earnings of a visual artist were \$24,672, approximately half of the typical Canadian worker (\$48,100), and lower than the average earnings of artists of all disciplines (\$32,770).³ ARR royalties thus offers significant income potential for Canadian visual artists to make a sustainable living income based on the value of their own work, in a way that is not reliant on public funding availability.

The ARR was introduced in France in 1920, and now exists in at least 93 other countries worldwide, including all members of the European Union, with the US, China, and Korea considering its adoption. The fact that Canada does not recognize the ARR is seen as a trade barrier for Canada in the international art market and there is a clear movement to make ARR mandatory internationally. The World Intellectual Property Organization (WIPO) is considering making international adoption of legislation a requirement. Most recently, in October 2017, the International Council of Creators of Graphic, Plastic, and Photographic Arts (CIAGP) held a meeting in New York City, where its members passed the following motion to be endorsed by the International Confederation of Societies of Authors and Composers (CISAC):

CIAGP recommends that CISAC sends a letter to Canada's Minister of Innovation, Mr. Navdeep Bains, and to the Minister of Canadian Heritage, Ms. Melanie Joly, urging Canada to adopt the Artist's Resale Right, a measure of fairness essential to the livelihood of visual artists, and to support the adoption of a universal treaty on the

³ Hill Strategies. October 2014. "A Statistical Profile of Artists and Cultural Workers in Canada Based on the 2011 National Household Survey and the Labour Force Survey". *Statistical Insights on the Arts* 12:2. (Canada Council for the Arts, Department of Canadian Heritage, and Ontario Arts Council).

Artist's Resale Right, currently studied at WIPO's Standing Committee on Copyright and Related Rights.

The ARR has benefited many artists internationally. In the UK for example, the Design and Artists Copyright Society (DACS) has distributed over £65 million to more than 5,000 artists and artists' estates, and in 2017 alone, DACS distributed £10 million to 1,800 artists.⁴ Thousands of Canadian artists could similarly have a competitive advantage when it comes to generating income for themselves through their arts practice, with less reliance on other sources of income, including other projects or forms of employment.

Furthermore, while all Canadian visual artists have the potential to benefit from an ARR, Indigenous artists may have the most to gain. The visual art market is a particularly significant economic driver in Nunavut, where works by Inuit artists are exploited by commercial resale markets at dramatic increases in value, and artists are losing out on profits being made on their work. A notable example is the case of Inuit artist Kenojuak Ashevak, who sold her piece *Enchanted Owl* in 1960 for \$24. In 2001, it was resold at an auction for \$58,650, and Ashevak received nothing from the resale of her work.⁵ Looking to international examples in this realm, the ARR has had a tremendous impact on Indigenous artists in Australia. The Copyright Agency reports that the scheme has generated more than \$6.3 million for more than 1,600 artists since its adoption in 2010. Notably, over 64% of the artists receiving royalties are Aboriginal or Torres Strait Islander artists; and of the 50 artists who have received most money under the scheme, 22 are Aboriginal or Torres Strait Islander.⁶

Additionally, the ARR will also increase income security for Canada's senior artists. Research shows that senior visual artists (over 65) have median arts earnings of about \$5,000, which is the lowest of any artistic discipline, and that 32% of elder artists are at a high financial risk.⁷ Even established, Governor General Award winning, artists find it difficult, if not impossible, to make a living from their art. Research from countries where ARR has been adopted shows that much of the royalties collected go to senior artists, providing them with greater financial independence.

Advocacy and support for an ARR in Canada have been strong despite its missed opportunity for adoption in the Act in 2012. A bill was presented by Scott Simms in 2013, which unfortunately did not pass before the election. However, MPs and senators from all parties have expressed support for it.

⁴ DACS. "Annual Review 2017." Retrieved from https://www.dacs.org.uk/DACSO/media/DACSIImages/news_events/DACS-Annual-Review-2017.pdf.

⁵ CARFAC. August 2017. "CARFAC/RAAV 2018 Pre-budget Submission." Retrieved from <http://www.carfac.ca/news/2017/08/23/carfacraav-2018-pre-budget-submission/>.

⁶ Copyright Agency. July 2018. "Resale Royalty." Retrieved from <https://www.resaleroyalty.org.au/Default.aspx>.

⁷ Hill Strategies. February 2010. "At Risk Senior Artists." (Senior Artist Research Project) at 2.

Copyright Visual Arts thus recommends that the ARR be reconsidered under current review of the Act.

4. THE EXHIBITION RIGHT'S DISCRIMINATION AGAINST SENIOR ARTISTS

The Act includes an Exhibition Right that allows artists to require payment for the exhibition of their works if the purpose of the exhibition is not the sale or hire of the works exhibited. However, public museums and galleries are currently not legally required to pay fees to artists if their work was made before June 8, 1988, the date in which the right was enacted. Although it was argued that this minimizes the financial impact that the Exhibition Right could have, particularly for works in museum collections, the date limitation in this provision has in fact led to discrimination against senior artists and the estates of deceased artists. Some museums choose to pay artists for earlier works, but without a legal guarantee, senior artists are not always paid when their work is exhibited. There are arguments that this discrimination could be a Charter issue.

Copyright Visual Arts recommends that the 1988 date be dropped, and the Exhibition Right be extended to include all works subject to copyright – that is, life of the artists plus 50 years. This recommendation was put forward for amendment to the Act in 2012, but it was not implemented. We stand by this recommendation.