



Art Dealers Association
of Canada Association des
marchands d'art
du Canada

Statutory Review of the Copyright Act

Submission of the Art Dealers Association of Canada (ADAC)
to the Standing Committee on Industry, Science and
Technology

October 15, 2018



Introduction

The Art Dealers Association of Canada (ADAC) is a national not-for-profit organization founded in 1966. Our Association is the largest representation of major private commercial galleries in Canada, and our dealers represent the country's leading artists and deal in works of all periods and media. The ADAC maintains a high standard of connoisseurship and adherence to ethical practice within the profession. Members are selected for their knowledge and scholarship in their respective fields of expertise.

The ADAC's goal is to promote and support the visual arts and Canadian art market through advocacy and public outreach, and undertakes vital programming and professional development initiatives aimed at building a national and international profile for Canadian commercial galleries. Our members are small and medium sized enterprises that sell original fine art on both the primary and secondary (resale) market. While some deal in artwork by international artists, the majority trade exclusively in Canadian works.

Canadian art dealers are at the heart of growth, promotion and commerce within the visual arts. Far from being mere retailers, they work closely with their artists, private clients, corporations and public institutions to develop the careers of the artists they represent and raise the profile of important work that contributes to our identity and economy.

The Art Dealers Association of Canada is grateful to be given the opportunity by the Standing Committee on Industry, Science and Technology to provide comments during the Statutory Review of the Canadian Copyright Act. We submit this brief with regard to what we believe would be detrimental effects on the art market should Artist Resale Rights (ARR) be added to the Copyright Act.

Artist Resale Rights, also known as Droit de Suite, are rights that would allow for visual artists to receive a percentage of the revenue from the resale of their works. Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) and Regroupement des artistes en arts visuels du Québec (RAAV) have undertaken intensive lobbying in support of ARR, and in 2013, Liberal MP Scott Simms introduced a private member's bill (Bill C-516) to amend the Copyright Act to include ARR.

While ADAC believes that improving the financial situation of artists is a laudable goal, it disagrees with the introduction of the ARR in Canada for the following reasons:

1. It does not benefit those in greatest need
2. Undue pressure on the Canadian art market and small business
3. Cost of implementation and administration
4. It is not a copyright issue

1. Artist Resale Rights do not benefit those in greatest need

The average income of Canadian artists is well below the average for Canada's working population, and there are a growing number of artists trying to practice their profession and make a living out of their art in a small market. ADAC refutes the argument that the resale right is the best way to support artists in need. The secondary market typically favours established artists with successful careers. A study published in the UK in 2008 (prior to the extension of ARR to artists' estates), entitled *The Impact of Artist Resale Rights* (Toby Froschauer), found that 0.02% of artists, shared 80% of the revenues. Similar data has come out of Australia, a more comparable market to Canada. Implemented in 2010, Australia's Artist's Resale Royalty was seen to be the answer to helping Australia's indigenous artists. The result was instead a decline in sales of indigenous



artwork in the year following the implementation of ARR. Furthermore 60% of the total value of ARR went to non-indigenous artists and their estates.¹

The implementation of ARR may also have an effect on lesser-known and emerging artists selling in the primary market. There is considerable financial risk involved when supporting an artist who may not have an assured resale value. For collectors and art dealers alike, the safer option is the established artist, in order to avoid incurring a potential loss on the original purchase price.

The primary and secondary market are inextricably linked. A healthy and transparent secondary market with strong sales for living artists increases their prices and improves their market overall.

2. Undue pressure on the Canadian Art Market and Small Business

By comparison to global figures, the Canadian art market is small and highly specialized. Recent estimates by Statistics Canada put the number of private galleries and dealers operating in Canada at 1,389 in 2016, with total revenues of about \$1.3 billion in 2015. The concentration of these dealers is in Ontario, Quebec, British Columbia and Alberta, but they represent artists from all over the country including the Arctic. Annual revenues for these SMEs range from \$30,000 - \$5,000,000, with the estimated average annual revenue \$314,400.00. This revenue directly supports Canadian artists and creators. In addition, numerous support industries are also impacted by the success of the art market, such as art shippers, installers, contractors, catalogue publishers and employees of the gallery and cultural tourism industries to name only a few. The Canadian art market contributes to the diversification of the economy.

Compare this to the United States, the global leader in the art market. In 2016, the US market share totaled 16 billion (TEFAF Art Market Report 2017). In July of this year, a California court struck down the state's 1977 Resale Royalties Act as incompatible with Federal Copyright Law.² With this art market powerhouse as our closest neighbour there is a real concern among Canadian dealers that sales will move across the border should ARR be implemented in Canada.

The implementation of Artist Resale Rights will be especially hard on small businesses, with high overheads, small profits and minimal support. As it has been presented, ARR is applied to the sale price, and does not consider the profit margin (if any) made by the seller, whether the work has been sold at a loss, or any adjustment for inflation. It is noteworthy to consider too, that when sellers do make a profit in excess of \$1,000, it is subject to capital gains tax.

While sales of Harris and Kenjuak make headlines, they are not the full story. Rather than hindering the young and fragile Canadian art market by implementing a punitive levy, supporting growth and commerce in the art economy has greater and far-reaching benefits for all involved.

3. Cost of implementation and administration

Canadian proponents of ARR often note that there will be no cost to the government for its implementation. As of 2013, the Australian Government allocated a total of \$2.2 million to the Resale Royalty Scheme that was established three years earlier. \$1.5 million of this was provided to Copyright Agency (the collecting agency that distributes royalties to artists) over three years from 2009-10 to support the costs of establishing, implementing and administering the Scheme. A further

¹ <https://www.art-antiques-design.com/art/519-artist-s-resale-royalty-in-australia-strong-evidence-of-a-catastrophic-decline-in-both-sales-and-prices>

² <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/07/06/16-56234.pdf>



\$0.70 million over two years was allocated from 2012-13 for the continuation of the Scheme and its Review.³

Collecting agencies deduct an administration fee from the royalty paid by sellers. In Australia this is 10% of the royalty - the proposal by CARFAC is 15%. The galleries selling the works must absorb the administrative costs associated with compiling data, reporting and collecting and administering the payment. Some estimates from UK galleries suggest an average of 30-40 GBP per transaction, and this does not include setup costs. In addition, the galleries and auction houses are responsible for errors and timely reporting and payment, and incur penalties if they fail to do so. If it is recognized that there are costs associated with the distribution of royalties by the agency, the impact of costs and associated risk of penalty for the gallery owner must be considered, too.

4. ARR is not a copyright issue

Visual artists are already well protected for matters of copyright under the existing Act, which contains stipulations for reproduction of works for commercial or other purposes. The Artist Resale Right is erroneously compared to the royalties for musicians or writers, but the resale of an artwork has nothing in common with the pay-per-use of a recording or publication. For example, while a musician is paid a royalty for each performance or broadcast, an architect is not remunerated on the resale of a home. The resale of a unique artwork is not a transfer of copyright, but a transfer of ownership.

Recommendations

The ADAC urges the Committee that the Artist Resale Right not be added into the Copyright Act without extensive consultation with all stakeholders, including collectors, art dealers, auction houses and other art market professionals that interact in the market. It also recommends that research on the effects of ARR in countries that have already adopted it be conducted, namely Australia that has many parallels with the Canadian, before considering implementation.

³ See Review Discussion Paper at <http://arts.gov.au/visual-arts/resale-royalty-scheme/review> . Submission from stakeholders can also be viewed here.