

December 10, 2018

**Submission to the Standing Committee on Industry, Science and Technology
for the Statutory Review of the Copyright Act
by Professors Ariel Katz and Guy Rub**

Dear Chair and Committee members,

We, law professors who specialize in copyright law, are submitting this brief in the context of the statutory review of the Copyright Act, R.S.C., 1985, c. C-42. This brief recommends that the committee rejects any suggestions to introduce Artists' Resale Rights (ARR) into law. ARR are triggered by resale of tangible objects embodying works of art, and are not rights intangible assets, and, as such, it is questionable whether enacting such a scheme constitute legislation with respect to "copyright" or rather legislation with respect to "property and civil rights" which falls under exclusive provincial, not federal, jurisdiction. Even if the committee believes that ARR could be regarded as legislation within Parliament's legislative competence, it should reject them as inefficient, ineffective, and unfair. Both logic and the experience in other countries indicate that the main beneficiaries of such a scheme, if enacted, will be successful and rich artists, and, even more so, their heirs, as well as the collection society, or societies, that will administer it. In addition, ARR can deflate the prices in the primary art markets, which will harm most artists, channel resale activities to other countries, which will harm the Canadian art market and the Canadian economy, and entail significant administrative costs.

Artists' Resale Rights are Personal Property Rights in a Tangible Asset and not Copyright

Copyright, at its core, is a right in an intangible asset: the expressed work. Because the rights are in intangible assets, a copyright holder can control certain aspects of the work regardless of the medium in which it is expressed and regardless of who expressed it. Under the Copyright Act, in the case of a work that is in the form of a tangible object, the copyright holder only has a right "to sell or otherwise transfer ownership of the tangible object, *as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner.*"¹ After ownership in the tangible object has been transferred with the authorization of the copyright owner, she no longer has any power to control subsequent sales. "Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it."² The buyer of the tangible object, of course, owns that object

¹ Copyright Act, RSC 1985, c C-42, online: <<http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html>>, s 3(1)(j) (emphasis added).

² *Théberge v Galerie d'Art du Petit Champlain inc*, [2002] 2 SCR 336 (SCC) (available at <http://canlii.ca/t/51tn>), para 31.

but not the copyright in the work. The rights with respect to such tangible objects are thus part of personal property law and determined by the applicable provincial law.

Artists' resale rights are rights concerning those tangible objects. They do not affect the scope of the intangible copyright in the work, but rather create a right that is equivalent to a servitude in each tangible object embodying the work after it was sold and long after the copyright in which has exhausted. As such, like other encumbrances on chattels, it is a property right, under exclusive provincial jurisdiction.

Finally, as a matter of statutory interpretation, it is inconceivable that the drafter of the Constitution Act, 1867, perceived that the term "copyright," as used in section 91(23), would be interpreted so broadly to encompass this type of right in tangible copies of artworks. In fact, artists' resale rights were not part of the law in *any* country before 1920—more than fifty years after the passage of the *Constitution Act*.

Artists' Resale Rights Will Primarily Benefit the Heir of Successful and Wealthy Artists and Collection Societies

Even if the committee believes that ARR could fall within federal jurisdiction, it should reject attempts to enact such rights, as they are inefficient, ineffective, and unfair.

In its brief, the Canadian Artists Representation Copyright Collective (CARCC) claims that: "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). ARR royalties thus offer significant income potential for Canadian visual artists to make a sustainable living income"³

We find this argument misleading. Even if the committee believes that the average earning of visual artists is too low, ARR are an inappropriate tool to address that concern. In fact, they are likely to make matters worse for struggling visual artists.

The main beneficiaries from enacting ARR are typically the heirs of well-known and successful visual artists. In jurisdictions that enacted ARR, the obligation to pay resale royalties was limited to works that are resold for over a certain threshold. For example, in its brief, Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) suggests that resale rights will be limited to resales over \$1,000.⁴ Similarly, Bill C-516, which in 2013 was introduced by Scott Simms and endorsed by CARCC and CARFAC and proposed enacting an ARR scheme, limited the right to resales over \$500. Those thresholds, in themselves, already excludes most artists,

³ The Canadian Visual Artists and their Remuneration in Relation to the Revision of the Copyright Act. Submission by CARCC – Copyright Visual Arts to the Standing Committee on Canadian Heritage for the Statutory Review of the Copyright Act, November 6, 2018, online: <https://www.ourcommons.ca/Content/Committee/421/CHPC/Brief/BR10154898/br-external/CopyrightVisualArts-e.pdf>.

⁴ CARFAC's Submission to the Federal Government's Standing Committee on Industry, Science and Technology for the Statutory Review of the Copyright Act, October 11, 2018, online: <https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10093096/br-external/CanadianArtistsRepresentation-e.pdf>.

especially artists whose income is average or below average.⁵ Moreover, the vast majority of resale royalties' schemes worldwide, as well as CARFAC's proposal, limit the right to resales by professional: auction houses and, in some cases, galleries. Most artists whose works are resold at auction houses and even galleries are, naturally, well established and well known. Only a small group of very successful artists have their works resold by professionals, especially auction houses, for a significant sum.

The experience in other countries collaborates this simple logic. A 2008 study in the United Kingdom showed that the top 100 artists shared 80% of all royalties collected.⁶ In France, one 1999 report concluded that only about 2,000 artists benefited from the country's resale rights (called Droit de Suite) in a three years period. The top 50 of those artists received 43% of the royalties collected. The remaining 1,950 artists received less than 400 euros annually on average. Another report concluded that 70% of the royalties collected in France in 1996 were paid to the families of six or seven artists. In the same year in Germany, less than 500 artists received resale royalties. 88% of those royalties were paid to the families of deceased artists and not to the artists themselves. A similar reality exists in Denmark, where in 1996, 86% of the royalties were paid to artists' estates and only 14% to the artists themselves.⁷ A recent study that one of us conducted over two months of the art market in the United States (which is the largest in the world), suggested that if ARR would have been the law in the United States the heirs of just a single artist, Andy Warhol, would have collected more than 13% of all resale royalties.⁸

Indeed, artist resale rights are regressive in nature. They transfer money mostly to those who are already rich. The situation in Canada is likely to be similar, with most royalties distributed to a tiny group that includes the most well-known and wealthiest artists, or, more often, their heirs. Even the example that both CARCC and CARFAC use in their briefs—that of Kenojuak Ashevak—is no exception. Granted, Ashevak's *Enchanted Owl* was sold for \$24 in 1960 and resold in 2001 for close to \$60,000. But by the early 2000s, the time of the resale, Ashevak was already a wealthy woman. She continued to produce works that were sold for thousands or tens of thousands of dollars, and her wealth allowed her to support her children and grandchildren.⁹ In fact, even when it comes to *Enchanted Owl* itself, Ashevak's income was not limited to the 1960 sale price. She created additional copies of that print, and she licensed the image to the Canada Post, to be used in 1970 as a stamp. Print reproductions of *Enchanted Owl* are nowadays

⁵ That exclusion is unavoidable and is shared by all ARR schemes. As further explained below, ARR entail significant administrative costs. In order to prevent those already high costs from skyrocketing and destroying the art world ARR schemes set a resale threshold under which payment is not required. In doing so, they make ARR even more regressive because only the most successful artists whose works are sold for high prices can benefit from them. This conflict or paradox is a feature of all ARR schemes and it is unsolvable.

⁶ Katy Graddy, Noah Horowitz & Stefan Szymanski, "A study into the effect on the UK art market of the introduction of the artist's resale right" (2008) (available at <https://webarchive.nationalarchives.gov.uk/20140603122011/http://www.ipo.gov.uk/study-droitdesuite.pdf>), at 2.

⁷ Those studies are summarized at Clare McAndrew & Lorna Dallas-Conte, "Implementing Droit de Suite (artists' resale right) in England" (2002) The Art Council of England (available at http://www.academia.edu/7553610/Implementing_Droit_de_Suite_artists_resale_right_in_England), at 31-38.

⁸ Christopher J. Sprigman & Guy A. Rub, "Resale Royalties Would Hurt Emerging Artists" (2018) Artsy (available at <https://www.artsy.net/article/artsy-editorial-resale-royalties-hurt-emerging-artists>).

⁹ See <https://www.theglobeandmail.com/arts/art-is-my-job-and-my-love/article1168077>.

being sold online, and royalties are presumably paid to the owner of the copyright in the work.¹⁰ Kenojuak Ashevak was indeed one of Canada's greatest artists and possibly the most famous Inuit artist in the world, but her case does not show that the current law is flawed or that resale rights are needed. Rather, her case demonstrates an important general point: even when artists do not benefit directly from the increase in the value of tangible objects embodying their artwork, the increase in value increases the demand for reproductions of that work and for their other works and thus benefits them indirectly.¹¹

Artists' Resale Right Will Harm the Art World, and the Canadian Economy

Artists' resale rights are not just ineffective in addressing visual artists' low income. They are harmful. They will likely harm artists, especially the weaker ones, the art world, and the Canadian economy.

First, ARR can reduce prices in the primary market for artworks, which is the main source of income for most visual artists. The reason is that some primary market buyers' willingness to pay will be reduced knowing that future resales will be subject to resale royalties.¹²

Second, ARR typically channel some resale activity to other jurisdictions, where the payment of resale royalties is not required. ARR are arguably one of the reasons that the global center of the art market moved from Paris to London and New-York during the 20th century. The passage of ARR in the U.K., which was forced upon the country by a European Union directive, might similarly have attributed to the dominance of art markets outside of the EU.¹³ Granted, many resellers will not consider it worthwhile to conduct a sale in another country just to avoid paying resale royalties, but some will, especially considering that the largest art market in the world, the one in the United States, is so close.

Resale activity creates positive externalities (spillovers) to others. It supports not just the buyer and seller but the art industry itself. For example, some galleries who earn income from reselling artworks reinvest those funds in buying art in the primary market, including from struggling artists. In addition, resale activity, like any economic actions, supports other sectors of the economy, which complements such an activity. Shifting it to other countries is thus undesirable.

Third, the administration of the ARR is expensive. It typically requires management by collection societies, which charge 10%-20% of the royalties distributed as a fee. In other words, that money is supporting non-artistic administrative work. In that way, ARR transfer funds out of the art world. In addition, resellers and their agents (e.g., galleries), must bear their own

¹⁰ E.g., <https://shop.ago.ca/74057/Kenojuak-Ashevak%3A-The-Enchanted-Owl-11%22-x-14%22>.

¹¹ See also, John Henry Merryman, "The Wrath of Robert Rauschenberg" (1992) 41 AM. J. COMP. L. 103, at 111 (addressing a famous incident in which Robert Rauschenberg complained that he did not receive a share of the sale at a profit of his early work by the dealer Robert Scull by explaining that "Rauschenberg got no part of the price paid ... but it would be wrong to suppose that he did not share in the profits of the Scull sale. On the contrary, the sale added enormous value to Rauschenberg's other works . . . the Scull sale made Rauschenberg a millionaire.").

¹² Guy A. Rub, "The Unconvincing Case for Resale Royalties" (2014), 124 Yale Law Journal Forum 1 (available at https://www.yalelawjournal.org/pdf/Rub_Final_4.27.14_4rcwvqv.pdf), at 6-7.

¹³ Clare McAndrew, Why Brexit Is a Golden Opportunity for the U.K. Art Market (2018) Artsy (available at <https://www.artsy.net/article/artsy-editorial-brexit-golden-opportunity-uk-art-market>).

administrative costs when complying with ARR laws. ARR schemes that apply to sales outside of the large auction houses, and especially those who apply to all resales, as was proposed by C-516, are especially harmful in that respect.

Indeed, we are not surprised that collection societies promote resale royalty schemes. We can imagine it being good for their businesses. Similarly, we understand why some successful artists, or their heir, support resale rights. It will make those rich individuals even richer. But all others, including those who care about the art world at large, should oppose such an initiative.

We recommend that the committee rejects any suggestions to add Artists' Resale Rights (ARR) to the Copyright Act.

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