

Establishing the Resale Right in Canada

Submitted to the Standing Committee on Industry, Science and Technology
as part of the statutory review provided for in the Copyright Act

By



Creators and the Art Market
The Resale Right in Canada
Collective Management to Facilitate the Implementation of the Resale Right
Our Recommendations Regarding the Resale Right in Canada

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About SODRAC/SOCAN

SOCAN administers the public performance and communication rights of authors, composers and music publishers and, pursuant to the acquisition of the Société du droit de reproduction des auteurs compositeurs et éditeurs au Canada (SODRAC), we now also administer the mechanical reproduction rights of authors, composers and music publishers as well as the various rights of creators in the field of visual arts and crafts.

Created in 1997, our visual arts and crafts department represents Canadian creators and rights holders and, through reciprocal agreements with over forty affiliated societies, we also represent the works of over 40,000 foreign creators. Over the last 10 years, we have distributed nearly \$4 million to those creators. We are partners with the world's most important collective organizations and we are notably members of the International Council of Creators of Graphic, Plastic and Photographic Arts (CIAGP).

SOCAN believes that creators deserve to be fairly compensated for the exploitation of their hard work and continues to do everything it can to make sure that they are, both in the field of music and visual arts and crafts.

Introduction

We wanted to participate in the statutory review of the Copyright Act to present on behalf of the creators of artistic works since we deal with thousands of creators on a daily basis, as well as with the users of said works and other stakeholders in the field, which has allowed us to identify several possible ways to adapt the Act in order for it to better meet the needs of those creators and users in today's new digital and global paradigm.

The first finding, when it comes to creators, is the increasing difficulty they face in getting paid fairly for the use of their works. The issue here is ensuring that we can rely on a copyright law that is favourable to the creators at the very heart of an entire industry and of our very identity.

Contact

Geneviève Côté, LL.L.
Chief Quebec Affairs and Visual Arts Officer
Genevieve.Cote@socan.com

www.socan.com

«Ask the buyer of a work of art if they would like part of the money they are paying to go to the artist they admire. They will say, 'Of course!' Yet, when my works of art are resold, I don't get a penny. I'm like a mine that's being exploited, whose riches are being extracted. We cherish the diamond, richly pay the diamond dealer... I'd like a portion of the riches I create.»

Zilon, multidisciplinary artist

Creators and the Art Market

The resale right was created in France almost one hundred years ago and now exists in over 90 countries. It allows artists and their successors to receive a small percentage of the purchase price when their works are resold by an auction house or art gallery. This is a bona fide copyright—not a mere tax—that allows creators to follow up on their works' economic life, and reap the dividends of their constant work of creation and promotion in parallel.

As in most areas of culture, the digital revolution has allowed some creators of artistic works to enjoy more visibility and sometimes increased notoriety, yet the causality between increased notoriety and increased remuneration is not a given, in Canada, notably because of the absence of a resale right.

Yet the art market has never thrived as much as it does today: if we look at all of the world's 6,300 auction houses in 2017, works of art were sold for never-before-seen prices, and the main art markets indicate a growth trend that is clearly steady¹. The Top 5 global markets—China, the United States, the United Kingdom, France and Germany—have all experienced tremendous sales growth during the year's second half. It must be noted that the resale right is implemented in over half of the Top 20 countries with the highest resale volumes in 2017, and Canada is ranked 14th.²

Several studies³ have shown that the resale right has no negative impact of the price of artworks or the competitiveness of markets. In the United Kingdom, a study commissioned by the Intellectual Property Office⁴ has dispelled any doubts concerning the negative impacts of the resale right on the British market by demonstrating that the market has continued to grow after the implementation of the resale right in 2006.

Our affiliate society DACS has published a positive assessment of the first decade⁵ of the resale right in the U.K., a period during which the equivalent of 95 million\$CAD in resale right royalties were distributed to over 4,300 artists and estates. One of DACS' findings of note is that in 2014, the resale right royalties paid out represented a mere 0.1% of the market's total value.

1- The Art Market in 2017, Annual Review – « [The art market enters a new phase](#) », Artprice, March 2018

2- « The art market enters a new phase », op.cit.

3- Notably « [The Economic Implications of The Artist's Resale Right](#) », a study presented on November 6, 2017, to the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization (WIPO)

4- « [A study into the effect on the UK art market of the introduction of the artist's resale right](#) », Katy Graddy, Noah Horowitz, Stefan Szymanski, January 2008

5- « [Ten Years of the Artist's Resale Right: Giving artists their fair share](#) », DACS, February 2016

The resale right was incorporated to the Berne Convention for the Protection of Literary and Artistic Works in 1948, which Canada has ratified, but it is subject to reciprocity and it is optional. In order to achieve a balance between countries where the resale right exists and those where it doesn't, the International Confederation of Societies of Authors and Composers (CISAC)—which upholds the rights and interests of creators everywhere in the world—has spearheaded a campaign for the universal adoption of the resale right by promoting a new treaty that would make its adoption mandatory.⁶

The Resale Right in Canada

Despite being central to the demands of artists and all the representative organizations during the 2012 judicial review of the Copyright Act of Canada, the government decided to forego the adoption of provisions that, we will never say this enough, would have given Canadian creators a participation in the wealth they create here and abroad. And although the resale right was not adopted back then, its legitimacy has been recognized widely and repeatedly.

On May 29, 2013, in the wake of presentations and support for the resale right, Liberal MP Scott Simms proposed amending the Copyright Act so that artists would receive 5% of the resale price of their works⁷. The next day, the NDP critic for Canadian Heritage, Pierre Nantel, tabled a motion⁸ to prompt the government to establish this right, "the perfect example of a measure that can stimulate creators to create and give them the means to do so."⁹

Just as the reproduction right and other exclusive rights provided for by the Copyright Act, the resale right grants every artist the possibility to benefit from the exploitation of their works according to their success and the wealth they create. Adopting it in Canada is therefore a concrete step in allowing Canadian artists to earn a better living from their creative work.

According to Artprice, 98% of the world's auction houses do business online nowadays, which is a clear sign that the market is becoming global. However, the resale right is subject to reciprocity, which means that if a Canadian artist's work of art is resold in a country that enforces the resale right, that artist will not get a penny, since Canada has not adopted the resale right. This is something that has long affected First Nations artists, since their works of art are highly sought-after and resold around the world. Without a resale right in Canada, the income so essential for them to pursue their art, let alone their very survival, still eludes our artists, and their link with their works is broken. Mattiysi Iyaituk, a Nunavik-based artist, gave an eloquent testimony in that regard during a World Intellectual Property Organization (WIPO) conference on April 28, 2017¹⁰.

Not only is the resale right an essential revenue stream that allows artists to keep creating, it also allows them to promote their work and ensure its longevity. Thus, the resale right royalties that Jean Paul Riopelle's successors are exceptionally able to receive from France—because the artist lived there for a long time—have allowed his daughter Yseult Riopelle to carry on their legacy and promote her father's works through the creation of a descriptive catalogue of his body of work. She began her research nearly 30 years ago, at the request of the artist himself, because he wanted her to act as an expert in finding and authenticating his creations. But if Riopelle had not lived in France, his heirs would receive nothing.

6- CISAC has presented a Statement of Case to that committee during this review process.

7- Bill C-516, [An Act to Amend the Copyright Act \(artist's resale right\)](#), 1st reading

8- Motion M-445, [Artist Resale Right](#), Pierre Nantel, 41st Parliament, 1st Session

9- [Un droit de suite pour nos créateurs en arts visuels : une solution pleine de bon sens !](#)

10- [Artist's Resale Right: SODRAC at the WIPO International Conference in Geneva](#), May 11, 2017

The value of artistic works, the result of creators' work, often increases over time. Adopting the resale right therefore becomes, according to Marie-Anne Ferry-Fall, General Director of the Société des auteurs dans les arts graphiques et plastiques (ADAGP), our French affiliate society, "[...] a question of equity between the stakeholders of the value chain of the art world so that the stakeholders at the root of this value can also benefit and earn a living from it."¹¹

Collective Management to Facilitate the Implementation of the Resale Right

Collecting and distributing the resale right is a major issue in guaranteeing artists and their estate the efficient payment of their royalties. In countries where such operations have been lawfully granted to copyright collective organizations, these have ensured the fluidity, efficiency and transparency of those operations.

It is therefore crucial that this is taken into account when adopting the resale right in Canada. Elsewhere, experience has demonstrated that for professionals in the art market—who already handle the basic information regarding the collection of the resale right such as the date of the sale, the author of the work, its title, the final purchase price—, the cost associated with the administration of the resale right is low, around 0.027% of the revenues of art galleries and auction houses in France. For their part, rights management organization such as SOCAN already possess the experience required to manage millions of transactions as well as the expertise to distribute those royalties to thousands of creators at home and abroad, thanks to their reciprocal agreements.¹²

As far as the government is concerned, it's only obligation regarding the implementation of the resale right in Canada is to amend the Copyright Act to include it.

Our Recommendations Regarding the Resale Right in Canada

- That the resale right inalienably benefit artists and their successors for the duration of the protection granted to works by the Copyright Act, namely the life of the author plus 50 years after the end of the calendar year of their death.
- That the resale right applies to the resale of original artistic works by the intermediation of professionals of the art market, notably auction houses and art galleries.
- That any resale transactions of at least \$1000 be subject to the resale right at a royalty rate of 5% of the works' purchase price.
- That the work's seller and the art market professional be jointly responsible for paying the resale rights.
- That artists and their successors originating from countries where the resale right exists benefit from the resale operations of their works in Canada.
- That the law provides for the mandatory collective management of the resale right.

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11- [Conférence à l'OMPI pour un droit de suite universel](#), ADAGP, May 3 2017

12- Jewell, Catherine, [The artist's resale right: a fair deal for visual artists](#), OMPI Magazine, June 2017