



copyright office reopens the debate over federal resale rights for visual artists

MSK Client Alert

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Twenty years ago, the U.S. Copyright Office issued a study recommending against changing U.S. Copyright Law to establish a federal right for visual artists to receive resale royalties from U.S. sales of original works. Since that time, resale royalty rights are found in increasing numbers of foreign countries, allowing artists such as painters to recoup a royalty when, for example, their canvases are resold by auction houses after the artist's first sale of the work. Congress now has asked the Office to take another look at amending U.S. law to allow some version of a resale royalty for certain works of the visual arts. On September 19, 2012, the Copyright Office issued a Notice of Inquiry seeking public comment on the issue and giving auction houses, galleries, museums, art collectors, and artists themselves reason to consider whether draft legislation currently making its way through Congress or something like it could receive the Copyright Office stamp of approval. To respond to the notice, members of the public should submit by December 5 comments "on the means by which visual artists exploit their works under existing law as well as the issues and obstacles that may be encountered when considering a federal resale royalty right in the United States."¹

The resale right, known as *droit de suite* ("right to follow") in Europe, gives visual artists a right to benefit from the appreciation in value of their works over time by granting a percentage of the proceeds from the resale of their original works of art, for example, through an auction house or an art market professional. U.S. copyright law has traditionally taken a very different approach to this subject through the first-sale doctrine, which generally permits the lawful owner of a copyrighted work to sell or display that copy without the authorization of or additional payment to the original creator. But the resale right has gained some traction in relevant jurisdictions in recent years. In an important jurisdiction for art sales, this year the United Kingdom completed its implementation of the 2001 European Union Directive, requiring Member States to provide a resale

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royalty right. California adopted the California Resale Royalty Act in 1976, but as recently as May 2012 that law was overturned by a Federal District Court on grounds that the law violated the Commerce Clause of the U.S. Constitution. If affirmed on appeal the case could leave the door open for federal law to fill this new void. In 2011, a bill was introduced in the U.S. Congress that incorporates elements from these examples and goes a step further by naming nonprofit art museums as possible added beneficiaries of a federal resale royalty collection system.

When the Copyright Office examined this issue in 1992, it recommended not adopting a French-type model of a resale royalty for visual artists. Its reasoning included that a resale royalty right could diminish prices in primary markets, causing harm to artists who lack a viable resale market, and that the concept conflicted with the deeply rooted U.S. concept of free alienability of property – as embodied in the first-sale doctrine of our copyright law. But the 1992 study did not conclude that a resale right should never be considered in U.S. law; rather it said, on balance, it did not recommend it. But the Office suggested that Congress might reconsider the issue if the European Community were to extend royalty rights to all of its Member States – which is what did occur.

The European Union issued a Directive in 2001 under which the majority of EU Member States have now adopted some form of resale right – including the United Kingdom, which at the time of the Directive accounted for 56% of Europe's art market.² According to the Directive, resales of works of visual art involving an art market professional are subject to a royalty to be determined by each Member State, but to be capped at €12,500. The United Kingdom launched its implementation of the Directive in 2006 with the Artist's Resale Right (ARR).³ Under the ARR, no commissions are payable on sales beneath €1,000. Royalties are set on a sliding scale from 4% for the portion of the sale price (net of tax) up to €50,000 and incrementally up to 0.25% for the portion of the sale price exceeding €500,000. As of January 1, 2012, the ARR now has fully implemented the European Directive by covering the art of deceased artists, a move expected to have broadened the law's scope to 40% of the entire market.⁴

The California Resale Royalty Act (CRRRA), enacted in 1976, has a much longer history in practice with the resale royalty right. The CRRRA requires a 5% resale royalty to be paid to the work's artist or artist agent, or if one of these cannot be found, to the California Arts Council. The royalty applies to fine art (and, like the EVAA, excludes photography) sold at a price exceeding \$1,000 where the seller is not making the sale at a loss. The duration of the right terminates twenty years following the artist's death.

If the recent decision of the Central District of California in Estate of Graham v. Sotheby's, Inc.,⁵ overturning the CRRRA on constitutional grounds, stands up on appeal, there could be a new groundswell of support for a federal resale right among those who have come to rely on CRRRA royalties.

In December 2011, Senator Herb Kohl (D-WI) sponsored legislation to provide a federal resale royalty right, under the Equity for Visual Artists Act of 2011 (EVAA), which was then referred to Committee. The bill would require a 7% royalty to be paid on any visual art resale price of at least \$10,000 at auction. While the royalty percentage is much higher than what is collected in the UK, the scope of the EVAA is more limited with respect to, for example, covered works and the entities required to pay the royalty. The proceeds of the royalty would be divided in equal parts between the artist of the work, on one hand, and a fund for nonprofit U.S. art museums to make American art purchases, on the other. Failure to pay the royalty would constitute copyright infringement, subject to



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statutory damages.

Senator Herb Kohl (D-WI) and Representative Jerrold Nadler (D-NY) requested that the Copyright Office look into the possibility of a federal resale royalty provision in a letter dated May 17, 2012, the same day the District Court decision in Estate of Graham was issued. In its September 19, 2012, Federal Register Notice and Request for Comment, the Copyright Office explained that it "seeks comments from interested parties on how visual artists exploit their works under existing law, including any limitations due to the nature of visual art, and the effect, if any, a resale royalty right would have on the promotion, dissemination and sale of works of visual art." The Office also lists more than sixty countries that now offer a resale right in some form and seeks comments on the experience of interested parties in these other jurisdictions.

If you have questions about how this issue may affect you, contact Amanda Wilson Denton at awd@msk.com.

1. Notice of Inquiry, Resale Royalty Right, 77 Fed. Reg. 58175 (Sep. 19, 2012). The original comment period was extended from November 5 to December 5. Extension of Comment Period: Resale Royalty Right, 77 Fed. Reg. 63342 (Oct. 16, 2012).
2. As reported in The European Art Market in 2002: A Survey, published by The European Fine Art Foundation, March 7, 2002, Helvoirt (The Netherlands) (available at http://www.kusin.com/publications_2.htm).
3. Statutory Instrument 2006 No. 346 (available at <http://www.opsi.gov.uk/si/si2006/20060346.htm>).
4. Katy Graddy, Noah Horowitz and Stefan Szymanski, Intellectual Property Institute: A study into the effect on the UK art market of the introduction of the artist's resale right, at pages 19-20 (2008).
5. 860 F.Supp.2d 1117 (C.D. Cal., 2012).