Response to Discussion Paper on Proposed Resale Royalty Arrangement

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Australian Copyright Council

The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.

Some of the organisations affiliated with the Australian Copyright Council have made separate responses to the discussion paper on proposed resale royalty arrangements.

The Copyright Council has made previous submissions in favour of the introduction of a resale royalty, most recently in a joint letter with National Association for the Visual Arts, Arts Law Centre of Australia and Viscopy in February 2003 confirming our organisations' support for a resale right, and a jointly proposed model for the right in November 2003.

Proposed model for resale right

In November 2003, the Australian Copyright Council, together with the National Association for the Visual Arts, Arts Law Centre of Australia and Viscopy put forward a model for the introduction of a resale right in Australia. We continue to support that model. In this submission, we respond to a number of issues raised in the Discussion Paper, with reference to our proposed model where appropriate.

Responses to specific questions

1. Should Australia introduce a resale royalty arrangement? What are your primary reasons for your support or lack of support for such an arrangement?

We are in favour of the introduction of amendments to the Copyright Act which would grant artists a resale right.

The main rationale for our position is that there are limited benefits from the copyright system for fine artists, as their work is not disseminated in ways which generate copyright income. By contrast, writers receive royalties from book sales and composers receive royalties from the performance and broadcast of their music; they have an opportunity to receive income from their work as long as their work continues to be used. The income increases as the value of the work increases; that is, as its desirability for consumers, reflected in the level of use, increases. Artists, on the other hand, often have only one opportunity to receive income from their work: when they sell the original. They do not benefit from the future increased value of the work or future uses of it.

2. What should be the primary objectives of a resale royalty arrangement in the Australian environment?

We think the objectives of a resale right are the same as for other copyright rights: incentive for the production of new works, and reward for the value of those works to society.

3. Who do you consider should be the principal targets of a resale royalty arrangement and why?

Resale royalties are paid to artists whose works resold. Those artists may or may not be the most needy. We do not see the resale right as a substitute for funding programs or social welfare provision for needy artists, each of which have different rationales and objective to those for a resale right.

4. What kind of resale royalty arrangement would best deliver benefits to the intended beneficiaries and why?

The options put forward in the discussion paper are: a fully legislated scheme; industry self-regulation; or contract-based resale royalty.

We are in favour of amendments to the Copyright Act to introduce a fully legislated resale right scheme. As noted above, we have put forward a joint proposal for such a legislated scheme. Broadly, we propose an inalienable right giving rise to a royalty on resales in Australia, administered by a collecting society which has been declared by the Attorney-General.

It is difficult to see benefits on a similar scale being achieved from either of the alternative proposals.

The analogy given for industry self-regulation – the advertisers' code – is inapt, as it relates to controlling behaviour, not payment of money. It is difficult to envisage all sellers voluntarily paying artists a resale royalty, in the absence of a legal obligation to do so.

The possibility of a contract-based royalty already exists, but a contract is only binding on the parties to it. An artist could require the first purchaser, by contract, to pay the artist a royalty on resale, but the same obligation would not apply to the subsequent purchaser in relation to a second or subsequent resales. Each seller may possibly be able to contractually bind each subsequent seller, but the artist would have no basis on which to take legal action against a subsequent seller who failed to pay a royalty, and it is unlikely that a seller would take legal action against a subsequent seller for failing to pay the royalty to the artist.

There is also reference in the discussion paper (at page 26) to the Public Lending Right Scheme (PLR) and the Educational Lending Right Scheme (ELR). These are *not* copyright royalty schemes whereby fees are paid by users and distributed to owners. Under these schemes, money is allocated out of consolidated revenue and paid, through the Department of Communications, Information Technology and the Arts (DCITA), to Australian authors and publishers whose books are held in public libraries (for PLR) and educational institutions (for ELR). Administration costs are relatively low because there are no collection costs, the distribution costs relate to a relatively small number of Australian recipients, and there is no distribution to foreign recipients.

As noted above, our preference is for royalty-based legislated scheme. The income collected and distributed under such a scheme would be higher than that distributed under a grant–based scheme like the PLR scheme. This is partly because royalties would be collected for both Australian artists, and artists from countries in which a similar scheme operates. Given the finding in the report that nearly all works resold in Australia are Australian works, it may be that there would be net inflow of royalties into Australia. In addition, the royalties collected under a legislated scheme, which would be tied to the value of resales, may be higher than an arbitrary allocation from consolidated revenue which may in future years be diminished or stopped.

If the discussion paper is suggesting that a legislated scheme be administered by a government department or agency, we would strongly oppose such a proposal. The scheme should be administered by a collecting society whose members are actual or potential recipients of resale royalties, and which is subject to criteria which is similar to those applying to the declaration of collecting societies under Parts VA, VB and VC of the Copyright Act.

5. Are there any unique features of the Australian art market which need to be considered in designing a workable resale royalty scheme?

There are aspects of the Indigenous art market which may be unique to Australia, and which may need to be considered in connection with an Australian scheme, such as a greater likelihood that royalties will be shared amongst members of the artist's community.

Another feature of the Australian market is that, according to the Discussion Paper, most resales are of Australian works. There are a number of implications from this, including that resales are unlikely to go offshore and that most royalties will remain in Australia.

6. What are the most important principles underpinning the choice of model or the form of resale royalty arrangement? (eg. a scheme that provides royalty payments to the greatest number of living artists, or limits the impost on small business, or excludes works that decrease in value, etc)

The principle is that all artists should have a resale right that entitles them to a royalty each time one of their works is resold.

In practice, this right would be limited in various ways. For example, in countries which have a resale right, the right applies only to "public" sales because of the difficulty or impossibility of monitoring private sales, rather than because private sales are not covered by the rationale for the right. Similarly, as we discuss below, some countries do not collect the royalty for resales below a certain threshold price, because the costs of collection and/or distribution would exceed the royalty collected.

We envisage that some limitations would be built into the legislation. For example, we propose that the legislation would initially apply only to resales through "public" intermediaries such as auction houses and commercial galleries. Other limitations would be a matter for the collecting society from time to time. For example, as we discuss below, we think the collecting society should have the power to not collect a resale royalty if certain factors are met, such as that the cost of collection and/or distribution would exceed the amount of the royalty.

7. What works should be covered by the arrangement and why?

We propose that the right apply to the original embodiment of an artistic work, as defined in the Copyright Act (except if it is a building, or if it forms a permanent non-removable part of a building). We propose that reproductions made by or under the direction of the artist in limited numbers (for example, numbered prints or craftworks) would be also be covered.

The works covered by the scheme would be limited to those resold through an intermediary.

We note the recommendation of the Myer Committee that the current definition of "artistic work" be reviewed. We support such a review, having particular regard to new forms of artistic expression such as installations and multimedia works which may not adequately be covered by the current definition.

8. What duration should apply and why?

Consistently with international practice, we propose that the right last for the same period as the copyright. Under the current law, this is usually the life of the artist plus 50 years. The period of protection will be extended– in most cases to life of the artist plus 70 years – assuming the US Free Trade Agreement Bill is passed.

9. Should artists be able to assign, waive or sell the resale royalty in their works, and why?

Under the Berne Convention, the EU Directive on the resale right, and international practice, the resale right is inalienable. This is largely because artists tend to be in a weaker bargaining position than their clients and dealers. In our view, a resale right in Australia should be inalienable, or there is a risk that many artists will not benefit from the right. We note that the Australia – US Free Trade Agreement expressly allows the introduction of an inalienable resale right.

Consistently with inalienability of the right, we propose that the legislation allow the collecting society to distribute only to the artist or the artist's legal personal representative.

10. Should there be a threshold level for the resale of works, and if so at what level should that be set and why?

The rationale for a threshold is that the costs of collecting and/or distributing the royalty will exceed the royalty. These costs are likely to decrease over time, particularly with advances in technology. In addition, the costs may vary according to the circumstances of the resale (eg the costs of collection from a small commercial gallery may be different to those for collection from a large auction house). For these reasons, we do not think there should be a fixed threshold.

We do think, however, that the collecting society should be empowered to decide not to collect a resale payments, having regard to factors set out in the Copyright Act, including that the amount available for collection would be less than the costs of collection and/or distribution. The legislation should set out the maximum resale price

at which this discretion could be exercised. We anticipate that this maximum amount would probably be in the range of $1000 ($50 royalty on a 5% flat rate) to $3000 ($150 royalty), but we want first to consider the findings in the forthcoming report commissioned by Viscopy from Access Economics in connection with this discussion paper.

We envisage that any thresholds adopted by the collecting society from time to time would be publicly available, including on its website. A threshold could be reviewed by the Copyright Tribunal at the instigation of a seller, a intermediary or the collecting society. The Collecting Society's Code of Conduct could regulate any members' concerns about any threshold adopted.

11. What rate of royalty should apply and why? Also, should the royalty be set as a flat rate or on a sliding scale and why?

In our joint model, we proposed a flat rate of 5%. We continue to support that proposal.

In Appendix A of the Discussion Paper, of the 25 countries listed for which a rate was given, a majority (13) had a flat rate of 5%.

A sliding scale would not seem necessary for Australia, given that the maximum amounts for resales in Australia are much lower than in Europe and that the considerations that gave rise to the sliding scale in the EU Directive do not apply here. A simple flat rate is likely to lower administrative costs, particularly for the sellers and intermediaries.

12. What type of organisation should administer any arrangement and what factors should be used to assess and ensure the performance of such a body? (eg. highest rate of return to artists, transparency of process, administrative efficiency, low costs etc.)

We propose that the resale right be administered by a collecting society which has been declared by the Attorney-General, subject to criteria set out in the Copyright Act. The criteria would be similar to those set out in Parts VA, VB and VC of the Act (applying to Copyright Agency Limited and Screenrights). These criteria include requirements aimed at safeguarding the interests of members and potential members. In addition, all collecting societies are subject to obligations under the collecting societies Code of Conduct.

As noted above, we do not support administration of a royalty scheme by a government department or agency, as it would not be possible for it to meet the criteria for declared societies.

13. If you do not support a resale royalty, do you consider that alternative support arguments are more appropriate? If so, what kind?

We regard the desirability of a resale right as an entirely separate issue from the desirability of other forms of support for artists. We support a legislated resale scheme, but also support other mechanisms to assist artists based on other rationales.

14. What do you consider is the likely impact of your preferred position on the possible groups affected and on the Australian art market?

Artists whose works are resold will benefit from a legislated resale royalty scheme. We note that other imposts, such as the buyer's premium, capital gains tax and the GST, do not appear to have had a detrimental impact on the art market. Having said that, we think there is a need to look at how intermediaries, particularly the smaller commercial galleries, may be able to streamline the administration of the resale royalty together with other imposts.

15. Do you have any other issues?

We confirm our strong support for the recommendation in the Myer report for Government funding for implementation of the resale right. To be effective, we would encourage the Commonwealth government to commit resources to a concerted education campaign to be conducted concurrently with the introduction of the resale right.

Libby Baulch
Executive Officer
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