



AUSTRALIAN
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COUNCIL



***Response to Issues Paper: Artists Resale
Royalty Scheme for Visual Artists –
Framework and Parameters***

May 2008

Australian Copyright Council

The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Commonwealth Government's arts funding and advisory body. The Copyright Council provides information about copyright via its website, publications and training, 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 Copyright Council have made separate responses to the Issues Paper: *Artists Resale Royalty Scheme for Visual Artists – Framework and Parameters* (the Issues Paper).

Framework

We support, in principle, all of the features of the proposed resale right scheme listed under the heading "Framework for a Resale Royalty scheme", except that the scheme should be implemented by stand-alone legislation. We also have some comments on some of the other features.

Stand-alone legislation or part of Copyright Act

We are not sure from the Issues Paper the reasons for the proposal that the resale right be introduced a stand-alone Act.

In our view, it would be preferable for the resale royalty scheme to be introduced as part of the Copyright Act rather than as stand-alone legislation.

We think that the inclusion of a resale right in the Berne Convention indicates that it is a copyright-related right. In addition, we think that there are terms used in the Copyright Act, such as "author", which could have the same meaning in the resale right provisions, and that the Copyright Tribunal should have jurisdiction in relation to certain aspects of the scheme.

One reason for the proposal for stand-alone legislation may be a concern that the royalty could be regarded as a tax under the Australian Constitution. The Constitution requires tax legislation to be separate from other legislation. If this is a reason for the proposal, we seek an opportunity to further respond to this issue.

"Acting in the course of a business of dealing in works of art"

We are assuming that dealing in works of art need not be the sole activity of the business referred to. The definition would therefore cover businesses that do not necessarily specialise in selling art, as well as the ones that do, such as specialist auction houses and commercial galleries.

We seek confirmation that the definition would cover resales by online auction websites such as EBay, Grays Online and Lawsons Online. Each of these sites sells artworks. While many of the items have low prices, some – including Aboriginal art – are sold for

amounts over \$1,000. While one cannot be sure which items are being resold, it would appear that a significant proportion of the higher-price works are being resold.

Where the online auction seller is an art professional, such as a gallery, the definition may need to allow for two seller's agents: the gallery and the online auction proprietor.

We also think the definition should cover public art galleries which sell works from their collections.

“Price obtained for sale”

We seek confirmation that the phrase “net of tax payable on sale” in the fourth bullet point refers solely to the Goods and Services Tax. We assume that it is not intended to refer to other taxes such as Capital Gains Tax. We also seek confirmation that the term “price obtained for the sale” is the sale price without the deduction of any charges such as buyer's premium, seller's premium or agent's commission.

Joint authors

It may be useful to define the person entitled to the resale royalty as the “author” of the work for copyright purposes. While the resale scheme should allow for more than one author of a work, it would be preferable for the drafting to avoid the term “joint author”, as a joint author in the Copyright Act is one who has worked collaboratively with one or more other authors, and whose contribution is inseparable from that of the other authors. For the purposes of the resale right, an artwork may have resulted from the contribution of more than one author, but the authors' contributions may be distinguishable.

Parameters

Works covered

The definition adopted needs to encompass new forms of artistic expression, such as video art, digital art and installations. We would be happy to make suggestions about possible drafting to achieve this objective.

We support the inclusion of original manuscripts in the scheme, although we acknowledge that they are not covered in EU schemes.

Threshold

In our view, there should be no minimum threshold in the legislation, but the collecting society should be able exercise a discretion, according to criteria set out in the Copyright Act, to decline to collect the royalty for resales below a maximum amount set out in the regulations. One criterion would be that the cost of collection would exceed the amount collectable.

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).

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, an intermediary or the collecting society. The Collecting Society's Code of Conduct could regulate any members' concerns about any threshold adopted.

Flat rate or sliding scale

We propose a flat rate of 5%. This approach has been adopted in a number of schemes, including the Californian scheme.

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.

The royalty rate could be one of the issues in a review of the legislation, which could take place three to five years after the scheme comes into effect.

Cap

For the same reasons we have put forward in favour of a flat rate, we oppose a cap on the royalty payable.

Collecting society

We think there should be only one collecting society, given the small size of the Australian art market. Having one society reduces the administration costs for all the artists entitled to a resale royalty, and increases the feasibility of collecting the royalty for resales at the lower end of the scale.

The legislation should require declaration of the collecting society, and should include criteria, similar to those listed in section 135P(3) and 135ZZB(3) for collecting societies under Parts VA and VB of the Copyright, that the society would need to meet in order to be declared. The legislation should also allow for revocation of a declaration, according to criteria similar to those set out in s135Q and 13ZZC.

Under the Copyright Act, declarations and revocations can be made by the Copyright Tribunal and/or by the Attorney-General. Applications for declarations and revocations in relation to government copying are made to the Copyright Tribunal, to avoid any conflict of interest on the part of the government. Under Parts VA, VB and VC, applications for declaration and revocation are made to the Attorney-General, but may be referred by the Attorney-General to the Copyright Tribunal.

We think the declaration of the society to administer the scheme when it first comes into force should be made by the Attorney-General rather than the Copyright Tribunal, because an application to the Tribunal for declaration, after the legislation comes into force, would delay implementation of the scheme. Any application to revoke a

declaration, and any application to declare any other society in the future, should be done by the Copyright Tribunal.

Liability to pay

We support the adoption of the UK approach to liability: joint and several liability for the seller, seller's agent, buyer's agent and buyer. We note the comments of the Chief Executive of the Design and Artists Copyright Society, at a seminar on the resale right on 10 April 2008, that the liability provision in the UK legislation has contributed significantly to the success of the scheme in the UK.

There is no reference in the Issues Paper to considerations arising from provisions in the Australian Constitution, but we note that the resale scheme would need to be drafted so that it is not a tax, and does not result in acquisition of property other than on just terms.

Access to information

We support an obligation by the seller, seller's agent, buyer's agent and buyer to provide information, at the collecting society's request, necessary to determine the amount of royalties owing and contact information for the person liable. Such obligations would, of course, need to be consistent with privacy principles.

We think the obligation to provide information should be tied to the period of liability to pay the royalty, and that this should be six years from the resale.

Exclusion period

We oppose an exclusion period for resales. As far as we are aware, the practice in Australia is for galleries to take works on consignment, rather than purchasing the work for later resale. We understand that this is also the practice of Indigenous art centres.

If there are galleries that are currently purchasing works for later resale to clients, in order to support emerging artists, there are other mechanisms that could be used to give financial support artists pending sale of their work, such as an advance against the future sale of the work.

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