

**SUBMISSION OF COMMENTS FOR  
THE EQUITY FOR VISUAL ARTISTS ACT OF 2011  
BY ARTISTS RIGHTS SOCIETY (ARS)**

Artists Rights Society (ARS) is an organization that represents the intellectual property rights, including the copyrights, of more than 50,000 visual artists worldwide. It has an American repertory, which includes Mark Rothko, Willem de Kooning, Andy Warhol, Georgia O’Keeffe, and Jacob Lawrence, to name some of the prominent members. However, the overwhelming majority of ARS’ members are lesser known artists who have nevertheless devoted their lives to this profession.

ARS also represents the repertories of all European Union countries as well as Canada, Australia, Mexico, Japan and others (a list of ARS foreign sister societies whose repertories are represented by ARS in the U.S. is attached hereto as Exhibit A). These repertories also include a number of well-known artists (i.e. Picasso, Matisse, Miro, Chagall, Kahlo), but the overwhelming majority of their adherents are not household names. The Resale Royalty, or *droit de suite*, as it is known abroad, has been of great benefit to those lesser known artists whose works obtain modest or moderate prices in the art market.

It is important to note that visual artists are the only members of the creative community in the U.S. who do not receive residual payments for their works. Composers and lyricists will collect some two billion dollars this year in royalties for their compositions, distributed by their rights societies, chiefly ASCAP and BMI. Playwrights and screenwriters get public performance royalties akin to residuals for later productions of their works. Actors in film and TV get residuals. All of these are revenues garnered by creators after their initial creative output. Alas, visual artists receive none of these and do not earn a penny in residual or resale payments. The benefits derived from the appreciation in their works accrue predominantly to collectors, auction houses, and galleries.

It has sometimes been maintained that only wealthy artists benefit from a resale royalty. In point of fact, the data gathered in the United Kingdom and France show that the royalty is of wide benefit to many working artists who are little known. The specific number of individual beneficiaries in the U.K. was 855 living artists in 2010, and 786 in 2011. In those years, the right was limited to living artists, but it has now been extended to artists' heirs, per an EU Directive, on January 1, 2012. In the first ten months of 2012, the total number of individual beneficiaries in the UK was 935.<sup>1</sup> The 2010 figures for France show 2,024 beneficiaries, and those for 2011 a total of 1,764 beneficiaries, of which 714 (40.5%) were living artists and 1,047 (59.5%) were heirs of artists.<sup>2</sup> Comparable figures for Germany were 1,022 artists in 2010 and 1,208 artists in 2011.<sup>3</sup>

Belgium followed the French institution of the *droit de suite* by adopting it in 1921, followed by Italy in 1942 and Germany in 1965. A European Union directive of 2001 (2001 / 84 / EC) mandated the adoption of the *droit de suite* by all European member states, with a deadline of 2006. The United Kingdom instituted the measure in 2006. The term of application in the EU is coterminous with that of copyright, namely life of the artist plus 70 years post-mortem.

History abounds with examples of impoverished artists whose works achieved acclaim only late in life or after their deaths. Please see the accompanying 1920 illustration by Jean-Louis Forain, (Appendix B) showing two children in tatters watching top hatted bidders vie for one of their father's works. One ragamuffin remarks to the other, "Look, one of Papa's paintings." This cartoon served as an impetus for the French adoption in 1920 of the *droit de suite*. That the resale royalty might benefit successful artists is no argument for withholding its benefits from all. The need for the royalty does not exclude artists who have even experienced a degree of success, but whose economic status remains somewhat precarious. Some pertinent artist comments follow:

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<sup>1</sup> *EC Consultation on the Implementation and Effect of the Resale Right Directive*. March 2011. Q. 7, page 16. Sales figures for 2012 supplied by Design and Artists Copyright Society (DACS).

<sup>2</sup> *Contribution a la consultation publique de la Commission europeene. En vue de l'elaboration du rapport... sur le droit de suite*. March 9, 2011, pages 4-5. French sales figures for 2012 supplied by Société des auteurs dans les arts graphiques et plastiques (ADAGP).

<sup>3</sup> German figures supplied by VG Bild-Kunst.

*“I am one of those artists who have always thought it was unfair to profit from artists when the work went much higher than the collectors paid for it. On a personal note, I have nothing to leave my son but my work when I die. Much of it has been sold at bargain rates; most of it my best work. Thinking about it, oddly enough, I feel left out of my own story... why should only the present owner turn a profit, while the artist is left with nothing? In other businesses, e.g. publishing, the author gets a percentage of sales besides an initial down-payment. I’ve worked to do my art, I won’t last forever, I’m 86, but the paintings will go on a lot longer than I will. It is very important for me to be able to know that I have taken care of my son who suffers from disability. This resale royalty thing is not only about money, it is about love, and being able to give. It is about legacy. In the end, it is the best kind of generosity.”* **Rosalind Drexler**

*“This royalty act is long overdue, while it has come up several times in the past, it has always been shot down. Resale on art as it now stands is severely unfair to visual artists. Much of my work which was made in the late sixties and early seventies sold for several hundred dollars of which I received half, and now sell in the many thousands. It is only fair that like writers, artists should partake in that resale price.”* **Dorothea Rockburne** (age 81)

It must be emphasized that beneficiaries of the *droit de suite* in countries possessing the right, must hail from a nation which accords the right to foreign nationals on a reciprocal basis. As the U.S. does not afford this right to foreign artists, let alone to its own citizens, American artists are precluded from obtaining resale royalties abroad. Thus, the very significant sale of U.S. works overseas produces no revenue for their American creators.

A bill calling for the adoption of the resale royalty was introduced in Congress in the early 90s by Senator Edward Kennedy and Congressman Robert Kastenmeier, with the result that formal hearings were held by the Copyright Office in 1991 and 1992, under the direction of William Patry, then Assistant Register of the Copyright Office. Mr. Patry left his position a short time before the Copyright Office’s recommendation had to be filed. His replacement, who had a very short time to acquaint himself with the dossier, produced a somewhat ambiguous document. While it refrained from recommending the adoption of the Resale Royalty at that time, it went on

to state: “*The international community is now focusing on improving artists’ rights, including the possibility of harmonization of droit de suite, within the European Community. Should the European Community harmonize existing droit de suite laws, Congress may want to take another look at the resale royalty, particularly if the community decides to extend the royalty to all member states.*” It has been 11 years since the European Community adopted a harmonized *droit de suite* rule for all member states.

There has never been a national resale royalty law in the U.S. and, consequently, artists have never benefited from a federally mandated right. One state, however, California, has instituted *droit de suite*, but no matter how well-meaning the California Act, it has been relatively easy to circumvent and compliance with it is relatively rare. Under the California Resale Royalty Act, a seller or his/her agent is obligated to locate the artist and pay a 5% royalty on sales of fine art (defined as an original painting, sculpture, drawing, or work of glass that is not permanently attached to real property), provided the value of the sale is more than \$1,000 and exceeds the previous sale price of the same work.

Interestingly, if the artist cannot be found after the sale, the seller must deposit the 5% royalty in escrow with the California Arts Council, which holds the sum for seven years. If the artist does not come forward or cannot be located within that time, the money reverts to the Council for use in acquiring fine art pursuant to California’s *Art in Public Buildings* program. The objective is for young artists or living artists to benefit from these monies, as does the public from the public works that result. The Equity for Visual Artists Act, presently before Congress, has a similar ancillary aim of subsidizing the purchase of works from living American artists by U.S. museums.

On May 17, 2012, the Federal District Court of California (Ninth Circuit) appeared to have invalidated the California Resale Royalty Act on the grounds that it purports “to regulate transactions that take place wholly outside of California” and therefore violates the Commerce Clause of the United States Constitution which holds that only the Federal government is empowered to regulate commerce between the States.<sup>4</sup> Although we believe the Court erred in

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<sup>4</sup> Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d 1117 (C.D. Cal., May 17, 2012).

its reasoning, it serves to point up the need for a Federal law, which would obtain in all the States and which the bill before Congress is designed to accomplish. On June 6, 2012, Judge Michael W. Fitzgerald, in reviewing a petition of the Plaintiffs, held that the court's "order is not a binding precedent on other district courts either within or outside the Ninth Circuit."<sup>5</sup> Therefore, for all intents and purposes, the California Resale Royalty Act is still in effect but it is clearly endangered. The perilous situation in California (where the rule has been flouted, and continues under judicial review) reinforces the need for a Federal Resale Royalty Act, applicable in all the States.

Finally, the fear that the Artist Resale Royalty Right would somehow impair or diminish auction sales is belied by experience in the U.K. There, the concern was that the market would flee to the U.S., Switzerland, or China, where there is no resale royalty. Far from falling, art market sales in the U.K have increased appreciably since adoption. The reader is referred to an article in the Huffington Post, which appeared on September 25, 2012, ([http://www.huffingtonpost.com/daniel-grant/uks-artist-resale-royalty\\_b\\_1881430.html](http://www.huffingtonpost.com/daniel-grant/uks-artist-resale-royalty_b_1881430.html)). It is titled "U.K.'s Artist Resale Royalty Law Didn't Damage the Art Market (Despite All the Claims)." The article begins "Wasn't the sky supposed to fall... and wasn't it supposed to have a 'corrosive effect' on the British Art Market." To the contrary, sales have reached record levels in the U.K. and exceed those that occurred before the adoption of the law, nor has the market fled elsewhere. The migration of the market abroad used to be a standard argument of the measure's opponents in the U.S., with the U.K. cited as the likely refuge for U.S. sellers. With the adoption of the right in the U.K., this fear, assuming it ever had validity, has been totally obviated.

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<sup>5</sup> CV-11-8604-MWF (C.D. Cal., June 6, 2012).

Appendix A

**Foreign Artists Rights Societies Represented by ARS in the U.S.**

ADAGP  
11, rue Berryer  
75008 Paris  
FRANCE

AGADU  
El Derecho de Autor es Uno de Los Derechos  
Humanos  
Canelones 1122  
Montevideo (11.100)  
URUGUAY

AKKA/LAA  
A.Čaka Iela 97  
Riga, LV-1011  
LATVIA

APSAV  
Agencia Peruana de Sociedades de Autores  
Visuales  
Los Frailes  
181 Urb, Santa Felicia  
La Moina  
Lima 12  
PERU  
ARTEGESTION  
Veintimilla E8-115 y Av. 6 de Diciembre  
593.2.2547 048 Quito  
ECUADOR

AUTVIS  
Rua Boa Vista, 186, 4º floor,  
Zip Code: 01014-000  
São Paulo, SP  
BRAZIL

VG BILD-KUNST  
Weberstrasse 61  
53113 Bonn  
GERMANY

BONO  
Kjeld Stubsgt. 3  
0160 Oslo  
NORWAY

BUS  
Årstaängsvägen 5 B

117 43 Stockholm  
SWEDEN  
COPY-DAN  
Copydan BilledKunst  
Bryggervangen 8  
2100 Copenhagen OE  
DENMARK

CREAIMAGEN  
Condell 520  
Providencia  
Santiago  
CHILE

DACS  
33 Great Sutton Street  
London EC1V 0DX  
ENGLAND

EAU  
Toompuiestee 7  
EE 0001 Tallinn  
ESTONIA

GESAP  
63 Kostava Street  
Tbilisi 380015  
GEORGIA

HUNGART  
1055 Budapest Falk Miksa utca 30. fsz.2.  
HUNGARY

IVARO  
Irish Visual Artists Rights Organization  
37 North Great Georges Street  
Dublin 1  
IRELAND

KUVASTO  
Director Kristel Nybondas  
Iso Roobertinkatu 3-5 A 22  
00120 Helsinki  
FINLAND

LATGA-A  
J. Basanavicius str.4/6  
2600 Vilnius

Appendix A

LITHUANIA

LITA

LITA, Society of Authors  
Mozartova 9  
P.O. Box 28  
810 01 Bratislava 11  
SLOVAK REPUBLIC

OSDEETE

Greek Collecting Society for Works of Visual  
Arts  
14 Kolletti St, Athens 10681  
GREECE

PICTORIGHT

Amstelveenseweg 88-90  
1075 XJ Amsterdam  
THE NETHERLANDS

PROLITTERIS

Schwamendingenstrasse 10  
CH-8050 Zurich  
SWITZERLAND

RUSSIAN AUTHORS' SOCIETY (RAO)

6a B.Bronnaya Str., GSP-5,  
123995 Moscow  
RUSSIA

SABAM

Rue d'Arlon 75-77  
B-1040 Bruxelles  
BELGIUM

SACK

SOCIETY OF ARTIST'S COPYRIGHT OF  
KOREA  
5F, GNC media Bldg., 352-11  
Seokyo-Dong, Mapo-Ku, Seoul  
121-838 KOREA

SAVA

Viamonte 723, 4<sup>th</sup> floor  
Office n° 18 (C1053ABO)  
Ciudad Autónoma de Buenos Aires  
ARGENTINA

SGA

Sociedade Guineense de Autores  
Pessoa Colectiva de Direito Privado  
Rua António M'Bana

N°2, 1° Andar, C.P. 545

Bissau  
REP. GUINÉ-BISSAU

SIAE

Viale della Letteratura 30  
01144 Roma  
ITALY

SODRAC

Tower B, Suite 1010  
1470 Peel  
Montreal, Quebec H3A 1T1  
CANADA

SOMAAP

SOCIEDAD MEXICANA DE AUTORES DE  
LAS ARTES PLÁSTICAS, S.G.C. DE I.P.  
Av. Mariano Escobedo # 373, 5° Piso  
Col. Chapultepec Morales, México, D.F., C.P.  
11570  
MEXICO

SPA

Av. Duque de Loule, 31  
1069 Lisboa Codex  
PORTUGAL

SPDA

Duplex Giza Tower 2/12 (#301)  
201204 Ginza, Chuo, Tokyo 104-0061  
JAPAN

VBK

Tivoligasse 67/8  
A-1120 Wien  
AUSTRIA

VEGAP

GRAN VIA, 16 - 5° Dcha.  
28013 Madrid  
SPAIN

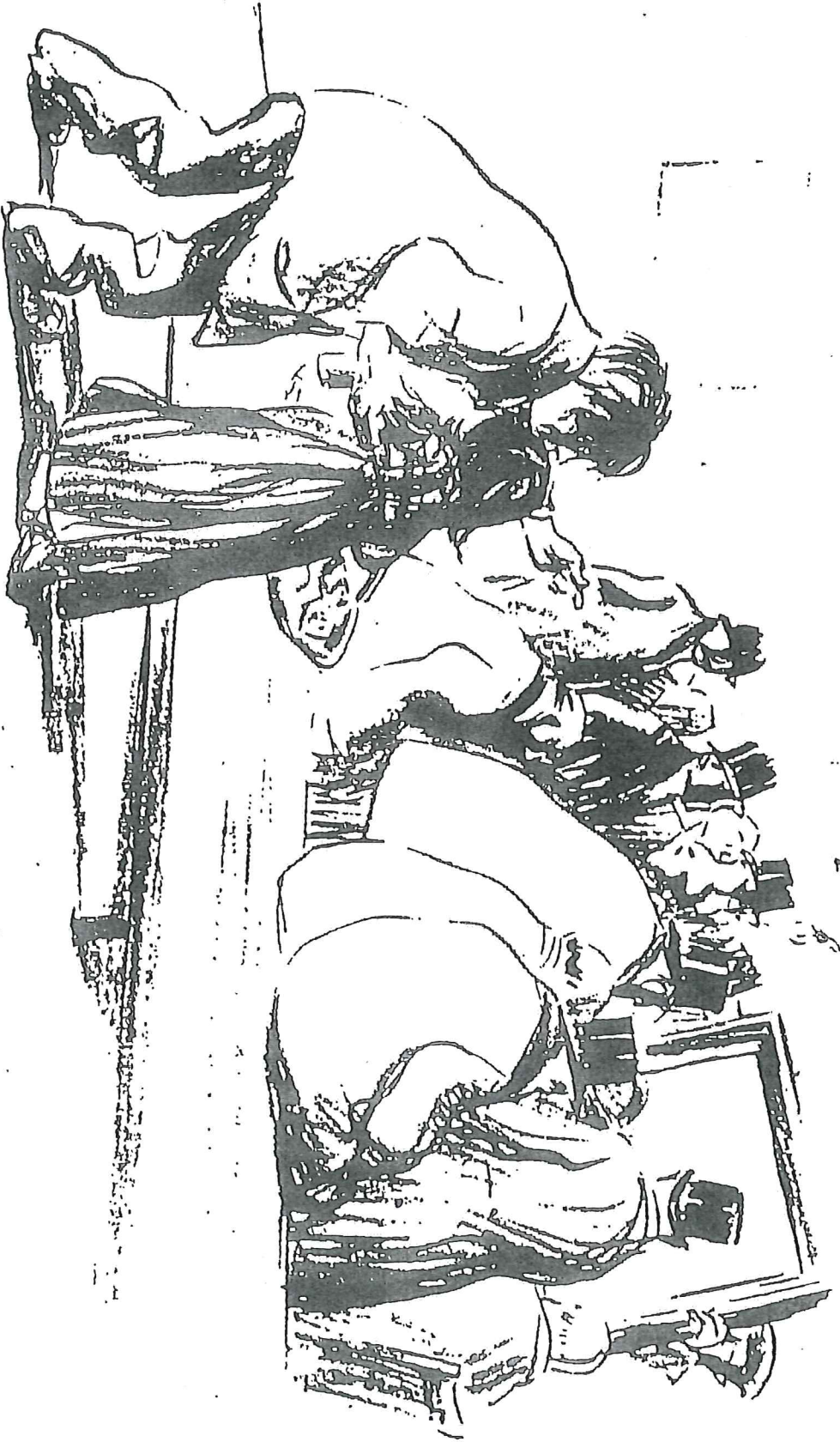
VISARTA

71117 str. N. Iorga nr. 21, Bucuresti  
ROMANIA

VISCOPY

1 Blackfriars Street  
Chippendale NSW 2008  
AUSTRALIA

A l'Hôtel des Ventes  
(At the Auction Office)



— Un Tableau de papa !

Copyright by SPADEN

Ce dessin de Forain a provoqué le mouvement d'opinion qui s'est trouvé à l'origine de la loi  
du 20 juin 1920 créant le « droit de suite » en France.

(This FORAIN's drawing originated the movement that was going to initiate the June 20, 1920 Law creating the "Droit de Suite" in France.)