



The Internet Association



Computer & Communications Industry Association

1972-2012: 40 YEARS OF TECH ADVOCACY

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**Re: Federal Resale Royalty Right Notice of Inquiry, Copyright Office Docket No. 2012-10**

The Internet Association (“The IA”) is a newly formed trade association that represents the interests of leading U.S. Internet companies and their global community of users. The IA seeks to protect a free and innovative Internet by educating regulators and legislators about protecting Internet freedom, fostering innovation and economic growth, and empowering Internet users. The Internet is one of the greatest engines of innovation and economic growth. We engage on a wide range of policy issues such as copyright policy to ensure that this revolutionary platform continues to serve as an important channel for international trade and commerce.

The Computer & Communications Industry Association (“CCIA”) represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services – companies that collectively generate more than \$250 billion in annual revenues.

Collectively, we refer throughout to The IA and CCIA as “the Associations.”

As the Copyright Office (“Office”) revisits the idea of a federal resale royalty right, The Associations welcomes the opportunity to comment on how adopting this right in the U.S. would affect copyright policy and secondary markets.

In 1992, the Office first considered this issue by examining the historical development of resale royalties known as *droit de suite*.<sup>1</sup> At the time, the Office surveyed a small number of nations (including France, Belgium, Germany, Uruguay, Czechoslovakia, and Italy) that recognized *droit de suite*.<sup>2</sup> The Office did not recommend the adoption of a federal resale royalty for two main reasons: (1) adoption of this type of right would conflict with the free alienability of property concept and (2) the lack of sufficient empirical evidence showing that the federal resale royalty right has a positive impact on the visual arts market.<sup>3</sup>

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<sup>1</sup> U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY* (1992) [hereinafter

<sup>2</sup> *Id* at 10-46.

<sup>3</sup> *Id* at xv.

The Associations support visual artists' right to receive fair compensation for their works and believe that the Internet can empower artists to reach their audiences directly and discover new, innovative ways to realize the value of their works. At the same time, the Office's 1992 report was well reasoned and no intervening circumstances justify a different conclusion today. Indeed, creating a federal resale royalty right would run counter to existing copyright principles, such as the first sale doctrine codified in section 109 of the Copyright Act. It would also exacerbate existing unresolved problems with copyright law, such as the lawful exploitation of so-called "orphan works." In view of these concerns and the continued lack of clear empirical data demonstrating the likely impact of a federal resale royalty right on the domestic market for visual works, it would be improvident to institute a resale royalty at this time.

### A Federal Resale Royalty Right Would Conflict With the First Sale Doctrine

Enacting a federal resale royalty right would significantly erode the first sale doctrine. The U.S. Copyright Act aims to achieve a balance between allowing creators to reap the financial benefits of their copyrighted works and permitting society to gain access to these works. Since 1908, the first sale doctrine concept has served as a bedrock principle in promoting the wide dissemination of copyrighted works to the public.<sup>4</sup> Its legislative history shows that lawmakers did not intend for copyright owners to exercise control over works once they entered into the stream of commerce.<sup>5</sup>

The first sale doctrine has allowed secondary markets to flourish. Those markets provide consumers with ready access to affordable goods and provide economic incentives for valuable goods unwanted by their initial owners to remain in the stream of commerce. Those incentives facilitate the creation, display, distribution and reproduction of works, furthering core purposes of the Copyright Act.

In *Kirtsaeng v. Wiley*,<sup>6</sup> the Supreme Court is considering whether the first sale doctrine applies to works made abroad and then imported into the United States. This limitation on the first-sale doctrine would stifle the growth of secondary markets by exempting foreign consumer goods.<sup>7</sup> Consumers in the secondary market would have to first identify each copyrighted work before determining its manufacturing origin.<sup>8</sup> This would result in higher transactional costs, "higher costs for consumers, increased unemployment, and risk for small business."<sup>9</sup>

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<sup>4</sup> *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908) (stating that "The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.").

<sup>5</sup> H.R. Rep. No. 60-2222 at 19 (1909). ("[I]t would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale").

<sup>6</sup> *Kirtsaeng v. John Wiley & Sons, Inc.*, (Dkt. No. 11-697, OT 2012)

<sup>7</sup> Brief *Amici Curiae* of eBay et al. in Support of Petitioner at 16, filed in *Kirtsaeng v. John Wiley & Sons, Inc.*, *supra* (July 9, 2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 17.

The ability to sell or trade online would also be at risk. In the third quarter of 2012, retail e-commerce in the United States totaled \$57 billion,<sup>10</sup> an increase of 3.7 percent increase from the second quarter of 2012. By comparison, total retail sales increased by only 1.4 percent.<sup>11</sup> The Internet is a critical driver in today's global economy and is important to the growth of e-commerce. The first sale doctrine should allow for the continued growth of this sector.

The Office's 2001 DMCA Section 104 Report considered a digital first sale doctrine. At the time, the Office chose not to extend the first sale doctrine to digital goods because it found no evidence demonstrating a need for this extension.<sup>12</sup> In the past decade, Internet technologies and digital commerce have advanced significantly. Therefore, the Associations request that the Office reconsider extending the first sale doctrine to the digital world. An inquiry that considers only measures to constrain the first sale doctrine overlooks the substantial benefits that may flow from the doctrine's extension to new areas.

Moreover, as the Office observes in its Notice of Inquiry, a resale royalty may exacerbate the so-called "orphan works" problem where the owner of a work cannot identify or locate the rights holder: "One may envision a situation in which the artists or his or her heirs are unable to be located. The seller may not know how or have the means to locate the artists or heirs, and may be under obligation to pay the royalty indefinitely."<sup>13</sup> Ironically, the current orphan works problem makes resale one of the few actions an owner can take with respect to a work whose author is unknown without risk of litigation. A resale royalty would take even that off the table. The Copyright Office issued a new notice of inquiry on the issue of Orphan Works and Mass Digitization on October 22, 2012. The Associations respectfully suggest that until the issue of orphan works is resolved, the consideration of a resale royalty is premature.

#### The Benefits of a Resale Royalty Right for Artists and Its Potential Impact on the Art Market Are Unclear

The Office's 1992 study noted that there was a lack of empirical evidence to reliably predict the effect of a federal resale royalty right on participants in the art market. The Office determined that "any conclusions ... [made] about the number of artists who would benefit from the resale royalty would be based on anecdotal evidence and limited sample size."<sup>14</sup> Based on this lack of economic evidence, the Office chose not to enact a resale royalty right. The Office noted that at the state level, California's Resale Royalty Act has operated with "mixed success."<sup>15</sup>

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<sup>10</sup> Press Release, U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales 3<sup>rd</sup> Quarter 2012* (Nov. 16, 2012) at [http://www.census.gov/retail/mrts/www/data/pdf/ec\\_current.pdf](http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> See U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (2001).

<sup>13</sup> See Copyright Office Notice of Inquiry, *Resale Royalty Right*, 77 Fed. Reg. 182, 178 (2012) [hereinafter "NOTICE"].

<sup>14</sup> REPORT at 145.

<sup>15</sup> NOTICE at 177.

In 1992, The Copyright Office report pointed out that European policy choices regarding a resale royalty should be evaluated through the lens of an economic analysis.<sup>16</sup> A recommendation should not merely consider the fact that European policymakers have adopted a resale royalty, but instead focus on the economic consequences of that choice. In the past 20 years, more than sixty countries have adopted resale royalty legislation, including the United Kingdom, one of the largest art markets in the world.<sup>17</sup> However, the impact of the *droit de suite* on the UK art market and its benefit to visual artists is far from clear. A 2010 economic study of *droit de suite*'s impact on the UK market indicates that the resale royalty right's impact is still relatively inconclusive.<sup>18</sup> There, the authors analyzed the difference in price growth and sales growth across various countries from 1993 to 2007.<sup>19</sup> The study found that *droit de suite* did not have a negative impact on the UK art auction market.<sup>20</sup> However, the authors suggested that the price growth in the UK market could be attributed to the UK simply being a popular market in comparison to other markets during that time period.<sup>21</sup> It also suggested that without *droit de suite*, the UK could have seen an even higher increase in paintings sold and even greater price growth.<sup>22</sup>

In a previous 'natural experiment' where the European Commission created a new IP right while the United States did not, the additional protection provided no benefit to European stakeholders. In 1996, the European Union adopted *sui generis* protection for the investment in the assembly of facts in databases. The stated objective was to increase the European global market share of this industry relative to the United States, which does not provide a similar form of protection, consistent with *Feist v. Rural Telephone*.<sup>23</sup> In 2005, the European Commission performed a study on the effectiveness of the Directive, post-enactment. The study found that since the adoption of the Directive, the European share of the global database market had actually decreased, leading to the Commission's conclusion that the Directive did not have a positive impact on database creation.<sup>24</sup>

Although international harmonization of copyright law is often a laudable goal, harmonization for its sake alone can often produce unintended consequences that outweigh any likely benefits. Accordingly, the mere increase in the number of countries that have adopted the *droit de suite*, without more, should not persuade the United States to follow suit.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Chanont Banterghansa and Kathryn Graddy, *The Impact of the Droit de Suite in the UK: An Empirical Analysis*, JOURNAL OF CULTURAL ECONOMICS, Vol. 35, Issue 2, 81-100 (2011), available at <http://people.brandeis.edu/~kgraddy/published%20papers/BanternghansaGraddyJCE2011.pdf>.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* at 33.

<sup>22</sup> *Id.*

<sup>23</sup> *Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340 (1991).

<sup>24</sup> See DG Internal Market and Services Working Paper, "First evaluation of Directive 96/9/EC on the legal protection of databases," Dec. 12, 2005, available at [http://ec.europa.eu/internal\\_market/copyright/docs/databases/evaluation\\_report\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf) (indicating lack of economic benefits attributable to creation of *sui generis* right in databases).

## Formalities Should Accompany Any Resale Royalty Obligations

Although a resale royalty should not be pursued in the first instance, the Copyright Office should recommend that if the proposal is to be pursued, resale royalty obligations should not be imposed without the institution of formalities. The well-documented problems associated with extraordinarily long copyright terms have created substantial administrative problems associated with copyrights, including orphaned works. These problems should not be extended to physical assets owned by third parties.

Requiring formalities of marking and registration upon imposing a resale royalty obligation would partially mitigate the high administrative and transactional costs that can be anticipated here. While the Berne Convention generally prohibits formalities, Article 14*ter*(2) regarding *droit de suite* indicates that the right may only be claimed “to the extent permitted by the country where this protection is claimed”, with “procedure for collection” being determined by national legislation. Thus, while a blanket requirement of formalities as to the copyright might be argued to violate Berne Article 5(2), requiring formalities in order to exercise the entitlement to a resale royalty should not.

### Conclusion

The IA and CCIA appreciate the opportunity to provide comments on whether the Office should adopt a federal resale royalty right. The Associations agree that artists should participate in the market on an equal footing and enjoy fair compensation for the value of their works. At the same time, the Office’s conclusion that a federal resale royalty right “does not appear to be the best way to level the playing field” is as true today as it was in 1992.<sup>25</sup> We encourage the Office to consider extending the first sale doctrine to the digital environment, an extension that could benefit all participants in primary and secondary markets for copyrighted works.

Respectfully Submitted,

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<sup>25</sup> REPORT at 132.