

**Submission to the Department of Communications,
Information Technology and the Arts in response to
its Discussion Paper**

Proposed Resale Royalty Arrangement

**Intellectual Property Research Institute of Australia
(IPRIA)**

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1. Preface

The Intellectual Property Research Institute of Australia (IPRIA) is a national centre for multi-disciplinary research on the law, economics and management of intellectual property. It is based at the University of Melbourne, and is a joint venture of the Faculty of Law, the Faculty of Economics and Commerce, and the Melbourne Business School.

IPRIA was established in 2002 as part of the Federal Government's Innovation Statement, Backing Australia's Ability. IPRIA's research focuses on ways to improve the protection, management and exploitation of intellectual property by business, research institutions and other users of the IP system, and on supporting high quality policy development by government in areas relating to intellectual property. It seeks to use the outcomes of its research to create and contribute to public debate on key issues relating to intellectual property. Part of IPRIA's missions is to provide objective contributions to law reform efforts.

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2. Introduction

IPRIA is currently conducting a research project on resale royalties. The aims of this project are to:

- understand the existing rights enjoyed by visual artists in Australia;
- identify the main justifications for resale royalties;
- review existing literature and empirical research to determine whether resale royalties achieve their stated aims; and
- provide recommendations as to whether Australia should introduce a resale royalty right and the content of any such right.

We attach a working paper setting out the results of this research.¹ IPRIA's submissions draw heavily from the analysis in the working paper. The working paper will be available soon on IPRIA's website and will be published in a refereed academic journal later this year.

IPRIA has analysed a broad range of literature and empirical research in relation to resale royalties. As a result of this analysis, IPRIA has reached the following conclusions:

- Resale royalties will be of little benefit for the vast majority of Australian artists, instead benefiting a small group of established artists and their heirs. There is therefore no pressing need to introduce resale royalties into Australian law.
- There is little existing analysis or empirical evidence as to the potential costs or harms of resale royalties to Australian artists, the art trade and the community. IPRIA suggests that further research be undertaken into these matters.
- If this research demonstrates that the risk of adverse effects is low, the limited benefits may be sufficient to justify introduction of such a scheme.

¹ Emily Hudson and Sophie Waller, '*Droit de Suite* Down Under: Should Australia Introduce a Resale Royalties Scheme for Visual Artists' (August 2004).

3. Objectives of resale royalties

3.1 The Discussion Paper has identified the major objectives of resale royalties. We have grouped these objectives into four categories:

- (a) providing an income stream to artists, particularly Indigenous artists, thus alleviating poverty and encouraging creation;
- (b) equalising the treatment of visual artists with that given to other creators of works;
- (c) redressing the unfairness that arises when owners of art receive the full benefit of appreciation in the value of a work of art, but the artist receives no direct financial benefit; and
- (d) harmonising Australian law with international developments.

3.2 We have undertaken a review of existing research and commentary in relation to the validity of these objectives and whether resale royalties are an effective and efficient means of achieving them. We will consider each of the four objectives identified above in turn.

4. Income stream

4.1 There is substantial evidence that Australian artists have low incomes and frequently live in poverty. This is particularly so for Indigenous artists.

4.2 However, copyright law is not, and has never been, a vehicle for the equitable redistribution of wealth. The ability of a creator to derive an income stream from rights in copyright depends to a large extent on the popularity of their works. As a general statement, creators of popular works enjoy a higher capacity to derive an income from copyright than creators of less popular works.

4.3 This tendency is repeated in the operation of resale royalty schemes. Economic modelling and empirical research from countries with resale royalties demonstrate that royalties are invariably skewed towards a very small group of famous artists and their heirs. There are two reasons for this:

- (a) resale is an infrequent phenomenon, with some estimates that less than 1% of artists will ever enjoy a resale market;² and
- (b) works generally only resell once an artist has become an established ‘name’ – which often only arises posthumously.

4.4 Thus the vast majority of artists will receive no, or only a minor, pecuniary benefit from the resale royalty right. In contrast, a handful of established artists and their heirs will receive a large percentage of the royalties that accrue. This will generally occur at a stage when the artist can, due to their fame, command high prices for sales of new works, or early unsold works, such that the income from resale royalties may be ‘trivial in comparison’³ to the income from initial sales and other sources.

5. Equalising treatment

5.1 Artwork is exploited in a different way to other Part III works. Artists typically receive a lump sum from the initial sale of their work and do not receive any substantial income from dealings with copies.

5.2 However, this different treatment may not necessarily be detrimental to artists. For instance, the receipt of an immediate fixed sum from a sale may be preferable to, and of more value than, a future royalty stream of unknown quantum and duration. As the artist becomes more well known, they can command higher initial prices for sales of works. This would appear to reflect the experience of many authors and composers, who may struggle in the early part of their career, but receive a higher income as their career develops.

5.3 A number of scholars have also criticised resale royalties on the basis that they do not provide artists with rights that are analogous to writers and composers.⁴ This is because royalties accrue upon the substitution of a new owner, not the creation of a new copy or use of the work.

² Eg, Tom R Camp, ‘Art Resale Rights and the Art Resale Market: An Empirical Study’ (1980) 28 *Bulletin of the Copyright Society of the USA* 146; Jeffrey C. Wu ‘Art resales and the art resale market: a follow up study’ 46 (1999) *Journal of the Copyright Society of the USA* 531.

³ John Henry Merryman ‘The wrath of Robert Rauschenberg’ (1993) *Journal of the Copyright Society of the United States of America* 241, 255.

⁴ Eg, Stephen E Weil, ‘Resale Royalties: nobody benefits’ (1978) *ARTnews* 58, 59.

5.4 In any event, resale royalties do not change the economic position of the vast majority of artists. Given that most artists will never enjoy a resale market, and will therefore never receive any royalties, the benefit of a resale royalty right is illusory for those artists.

6. 'Unjust enrichment' of purchasers

6.1 As a financial investment, the purchase of artwork is a highly speculative enterprise. Evidence suggests that in most cases when artwork is resold, it results in no or only a minimal real profit to the seller.⁵ It is rare that resale delivers a massive return.

6.2 Currently, the risk that resale will result in a loss is entirely borne by the owner of the artwork. If a resale royalty scheme were to be truly principled, the royalty would be paid with respect to capital gain, not sale price. However, this has been argued to be too complex to be workable in practice.

6.3 It is also misleading to argue that the artist receives no benefit when a work is resold at a high price. Whilst the artist does not directly share in the profit earned by the seller, he or she may nevertheless enjoy indirect benefits. For instance, a strong secondary market may serve to raise the artist's profile, enabling him or her to demand higher prices for new or unsold works.

6.4 Finally, many factors external to the artist contribute to the appreciation in value of works of art. For instance, galleries and dealers put considerable effort into publicity and marketing. The popularity of an artist may depend upon general trends in the art world and academic commentary on their works.

7. Harmonisation with international law

7.1 Many resale royalty schemes allow resale royalties to be paid to overseas artists. This is usually predicated on there being reciprocal arrangements between the two jurisdictions.

7.2 There is not a great deal of evidence available in relation to the extent to which Australian artwork is sold overseas. It is probably fair to say that Australian artists currently enjoy the highest level of sales, at the highest

⁵ Eg, Jon Stanford, *Economic Analysis of the Droit de Suite - The Artist's Resale Royalty* (2002), <http://eprint.uq.edu.au/archive/00000433/01/DP301Jan02.pdf>.

prices, within Australia. However, as Australian artists continue to develop an international reputation, increasing numbers of works may be resold overseas. Harmonisation may therefore allow Australian artists to receive an income from those sales. As with the general trend in relation to resale royalties, this is likely to primarily benefit a small group of famous artists.

8. Conclusion

8.1 The evidence suggests that there is a considerable problem with the financial status of artists, particularly Indigenous artists. It is important that the Government addresses this issue. However, resale royalties will do little to improve economic conditions for most artists because the majority of royalties invariably flow to a small group of well-known artists and their heirs.

8.2 There are therefore two vital questions that must be considered.

8.3 The first question is whether the remaining objectives for resale royalties are strong enough to justify introduction of such a scheme. There are cogent arguments that the remaining justifications are not particularly robust because they:

- (a) misstate or overstate the impact of the differential treatment of artistic works compared with other Part III works;
- (b) ignore the benefits already enjoyed by artists with a resale market; and
- (c) are contrary to the fundamental principle that profit-sharers are risk-sharers.

8.4 The second question is whether introduction of a resale royalty scheme would have a detrimental impact on artists, the art market and the community generally. There has been little analysis on this question in Australia. Furthermore, this analysis typically considers the sale of paintings at auction. The effects of a resale royalty on the other modes of sale and other types of art are largely unknown.

8.5 One possible harm is that resale royalties will lead to a reduction in initial sale prices obtained by artists because rational dealers will take the future

resale royalty into account when determining the price they are willing to pay.⁶ Another concern is that investors will be dissuaded from investing in art. It is also possible that sellers will attempt to avoid the scheme by selling in other jurisdictions or through private sales. Further research on these questions is necessary.

- 8.6 Finally, the desirability of a resale royalty scheme may depend on the extent that it requires government funding. Overseas experience suggests that resale royalty schemes operate most efficiently when administered by a central collecting agency. These agencies generally deduct a fee representing administrative costs from the royalty paid, meaning that artists bear much of the cost of the scheme. However, extra government funding may be required, particularly during implementation of the scheme.
- 8.7 IPRIA has concluded that a resale royalty scheme will be of little benefit to the vast majority of artists. As such, IPRIA does not consider that it is necessary to introduce such a scheme into Australian law. However, if research demonstrates that a resale royalty scheme will generally be self-funding and will not cause harm to artists, the art trade or the community, the limited benefits may be sufficient to justify its introduction. In the absence of such research, IPRIA does not recommend that resale royalties be introduced into Australian law.

⁶ Eg, Roland Kirstein and Dieter Schmidtchen in their work 'Do Artists Benefit from Resale Royalties? An Economic Analysis of the New EU Directive' (2002), accessed from www.uni-saarland.de/fak1/fr12/csle/publications/2000-07_dds4.pdf