



## Resale royalty rights: possible models for Australia

A decision on a resale royalty right for Australian artists is expected by the end of 2005 or in early 2006.<sup>1</sup> A resale royalty would return to artists a percentage of the sale price whenever original works of art are resold. The right typically lasts for the term of copyright, that is, the artist's lifetime and 70 years thereafter. The right has long been recognised in French law (*droit de suite*) and is an optional provision of the [Berne Convention for the Protection of Literary and Artistic Works](#),<sup>2</sup> to which Australia is a party.

### Background

In 2004, the Department of Communications, Information Technology and the Arts issued a [Discussion Paper](#)<sup>3</sup> and sought submissions on whether Australia should introduce a resale royalty right for its artists. The DCITA Discussion Paper follows more than a decade of reports and recommendations: the Copyright Council's 1988 report, *Droit de Suite: The Art Resale Royalty and its Implications for Australia*; Terri Janke's 1998 report, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights*; and two significant reports detailing the low incomes of many Australian visual artists, David Throsby and Virginia Hollister's [Don't Give Up Your Day Job: an economic study of professional artists in Australia](#) (11 November 2003) and the [Myer Inquiry into the Contemporary Visual Arts and Craft Sector](#) (2002).

This Research Note briefly canvasses the [submissions](#) which variously supported and rejected the alleged benefits of the right. It also draws on European experiences, including the forthcoming introduction of the right in the United Kingdom following the [European Council Directive](#) (2001/84/EC) that all member states introduce the right by 1 January 2006 for living artists, and by 1 January 2012 for the benefit of heirs and estates of artists who have died within the previous 70 years. The Note considers the UK draft model, along with the German scheme (in operation since 1965) as possible models for implementation in Australia.<sup>4</sup> It explores whether the right should benefit the original artist or be used to support the broader community of artists.

### Justifications for a resale royalty right

Submissions in response to the DCITA Discussion Paper reveal that arts-based organisations generally support the right with most viewing it as an extended form of copyright that would compensate visual artists for the fact that their art is not easily or often reproduced in the same way as music or writing. That distinction means that their work cannot be distributed in the same way and their options for income are fewer. Other possible justifications outlined in the DCITA Discussion Paper included the symbolic recognition afforded artists and the incentive to keep practising their art.

### Indigenous artists

Record sales of indigenous artwork have provided much of the impetus for introduction of a resale royalty. Sales now exceed \$10 million a year. 'All of which', as one commentator observes, 'is good for the indigenous art market, if not, in the absence of a resale royalty, for the artists who painted the works.'<sup>5</sup> In their submissions, major Australian public galleries and government arts departments were generally very supportive of a resale royalty as a means to address perceived inequities arising from and compounded by the resale of indigenous art for large sums without benefit to the artists.

### Effect on the art market

Auction houses and some private gallery owners (although not all, as the Watters Gallery, for example, has long included a resale royalty in contracts) oppose the right because it would increase costs. In line with this thinking, a newspaper editorial noted that "[a]nything that increases the cost of transactions dampens the market..."<sup>6</sup> In reply, proponents argue that neither the GST nor the buyer's premium of between 8 and 20 per cent affected the market and indeed, since the introduction of both, art sales have reached record highs.

### Who benefits?

One of the most contentious issues is that a resale royalty will likely benefit established artists more than artists in general, a point that even supporters of the right accept. Its effect on less established artists is unclear. According to some, it may be detrimental because it will lower the first sale price.<sup>7</sup> Others disagree, or argue that there is insufficient analysis of the effects of a resale royalty.<sup>8</sup> The results of economic modelling on the effect of the royalty in Australia vary. An [Access Economics report](#) for Viscopy, Australasia's visual arts copyright collecting agency, contends that the DCITA Discussion Paper's analysis is 'unhelpful and, potentially, quite misleading.'<sup>9</sup>

It is important to many that the royalty deliver real financial benefits to the visual arts community and not just a few already successful individuals. This raises the question of whether it is possible to achieve a balance between rewarding individual artists and helping the broader community of artists.

### Resale royalty schemes in other countries

More than 30 countries have resale royalty schemes which vary in such matters as: what artwork is covered, the royalty rate, the minimum threshold sale price at which the royalty applies, and the calculation of the sale price (inclusive or exclusive of taxes). All these factors have an impact on who benefits from the right.

Some schemes are enforced; others, such as those in Italy and Luxembourg, are not. The collective form of resale royalty operating in operation in Norway since 1948 is arguably outside the definition of a resale royalty altogether as the royalty is not paid to the individual artist but to an artists' mutual aid fund which is used to help aged artists or to provide grants to young artists. The purchaser pays a 3 per cent tax over and above the sale price.<sup>10</sup>

A report for the Arts Council of England, [Implementing Droit De Suite \(artists' resale rights\) in England](#) (2002) ([ACE Report](#)) provides an excellent overview of the resale royalty schemes operating in Belgium, Denmark, Finland, France, and Germany as well as the scheme in California, although many of the statistics are dated.<sup>11</sup> A World Intellectual Property Organisation paper on the collective management of copyright and related rights ([WIPO Paper](#)) outlines the German, Hungarian and French collection systems, and describes the latter as a simple, 'easy and cost-effective' procedure.<sup>12</sup> The DCITA Discussion Paper provides a comparative table summarising some resale royalty schemes.<sup>13</sup>

### European Union Directive

Key provisions of the European Union's Directive that member states must implement are: inalienability, a sliding scale starting at 4 per cent for works over €3,000 to 0.25 per cent for works over €500,000, and a maximum resale royalty of €12,500 payable on any one sale. The Directive allows for some discretion with respect to such matters as:

- lowering the minimum sale threshold of €3,000 (Art.3),
- increasing the minimum royalty from 4 per cent to 5 per cent on sales in the lowest band, up to €50,000 (Art. 4.2), and
- an optional exemption for works acquired from the artist less than three years before the sale and sold for a price not exceeding €10,000 (Art. 1(3)).

### Draft Regulations in the UK

In the UK, a major art market where artwork sales currently attract a buyer's premium of 20 per cent in the major auction houses and 17.5 per cent VAT,<sup>14</sup> the debate has shifted from justification to implementation. It is estimated that the resale royalty will affect 10 per cent of art works sold if the right is applied to works by living and deceased artists, and 2 per cent if it is only applied to living artists.<sup>15</sup>

The [Artist's Resale Right Draft Regulations 2005 \(UK\)](#), currently the subject of a consultation by the UK Patent Office, do not lower the minimum sale price of €3,000 nor increase the preset 4 per cent minimum royalty, but they do include the Art.1(3) exemption because it 'should encourage buyers to invest in works by less well known artists whose potential is uncertain'.<sup>16</sup>

In accordance with Article 1(1) of the EU Directive, which stipulates that the right is inalienable, the Draft Regulations do not allow the right to be waived or transferred, unless to a charity on the death of the artist (Draft Regs 6 and 7).

At present, only one submission is publicly available, that of the [Design and Artists Copyright Society \(DACS\)](#), the UK's copyright and collecting society for artists and visual creators. DACS argues that the mandatory cap on royalty

earnings (€12,500) and the sliding scale should alleviate concern that the introduction of the right will detrimentally affect the UK art market, and should therefore satisfy the art trade. It also recommends that these provisions should be balanced 'with some artist-friendly options'<sup>17</sup> that favour newly emerging artists and that are within the scope of the Directive, namely lowering of the sale price threshold to €1,000, and increasing the royalty rate to 5 per cent for the lowest price band. A House of Commons Committee report on [The Market for Art](#)<sup>18</sup> reached the same conclusions. Arguably, a lower application threshold would benefit a larger number of artists. One estimate is that 'as many as 35% more artists in the UK would enjoy the Resale Right.'<sup>19</sup> Two UK parliamentary motions this year have achieved broad cross-party support for this approach.<sup>20</sup>

The Draft Regulations do not establish an artists' fund, an option envisaged in the ACE Report, and as exists in Norway and Germany. However, the EU Directive and the UK Draft Regulations do provide for compulsory or optional collective management.<sup>21</sup> It is possible that an artist might come to an agreement with the collecting body to distribute a portion of the funds, for example, to artists in need. DACS estimates that, if it were the responsible collecting body, its commissions would not exceed 25 per cent for UK collections and 10 per cent for foreign collections. DACS reports that commissions charged by other collecting societies range from 10 per cent in Germany to 20 per cent in Sweden and France.<sup>22</sup>

### The German model

The ACE Report cites the German model as one that should be given serious consideration for the UK and the WIPO Paper describes the model as 'the best example of a solution to practical problems through collective management'.<sup>23</sup> The German model, which was established in 1965, already encompasses an inalienable right transferable to heirs and continuing for 70 years after the artist's death.

It has a number of distinctive features:

- gross sale price includes commission fees and taxes,
- the minimum sale threshold price is €1, and
- it applies to public and private sales (although in practice is only enforced on public sales).

These elements contribute to increasing the royalty payable or the potential pool of recipients. The German approach to collection and distribution of royalties is also directed towards ensuring total compliance and broadening the number of beneficiaries.

**1. Information rights** In 1972, the artists' collecting society, Bild-Kunst (BK), was given the legal right to request sales information of art dealers and auction houses in order to monitor sales, help enforce the right, and 'save auctioneers and dealers from being overwhelmed with individual requests'.<sup>24</sup>

**2. Blanket collecting agreement** To further improve the system, under a 1980 agreement between BK and the Association of German Art Dealers and Auctioneers, payments have been co-ordinated by an independent body, *Ausgleichsvereinigung Kunst*. They are then transferred to BK. It estimates that only 20 per cent of galleries, auction houses and dealers, and very few artists, choose to act independently because:

The lump sum system avoids the danger of individual artists being pressurised by galleries, or discriminated against when trying to obtain payment of the resale royalty.<sup>25</sup>

The result is that this agreement has helped to facilitate payments. Resale royalties have risen by 50 per cent between 1982 and 1992 and reached a high of €3.8 million in 2002.<sup>26</sup>

**3. Lump sum payment** The levy collected has two components:

- the resale royalty set at 5 per cent, and
- contributions to *Kunstler Sozialkasse* (KSK), an official, partially public-funded social-security scheme for self-employed artists that obliges art dealers, galleries and auctioneers (amongst other groups) to provide for health insurance and pension schemes for living artists.<sup>27</sup> This amount, set by the Ministry of Social Security, varies from 5 per cent to 7 per cent of the overall payments made by the art market, including galleries, to artists for the acquisition of works (that is, on first sales of works).<sup>28</sup>

Thus, a dealer will almost always be obligated to make a payment to the artist on sale of an original artwork:

... if he buys directly from a living artist, he is obliged to pay the contribution according to the social security law; if he resells a work by an artist protected by the copyright law he has to pay a remuneration for the resale right according to §26...<sup>29</sup>

These amounts are collected as a lump sum calculated every year to take account of the art market conditions and social security needs, and based on annual turnover.<sup>30</sup>

The levy is collected as a lump sum from sellers who pay a standardised percentage of their annual net sales of art created after 1900. The lump sum is calculated as a percentage of the volume of sales ranging between 0.8% and 1.3% for galleries and 1.3% to 3% for auction houses...

The sum is easy to calculate and declare as it forms part of the normal tax declarations that every auctioneer has to provide to the tax authorities.<sup>31</sup>

According to BK, the EU Directive's mandatory provision for a sliding scale 'can easily be incorporated in the existing lump sum system'.

**4. Individual and general distribution** The levy, or lump sum, is distributed after deductions are made for administration expenses and two separate funds:

- the *Sozialwerk* scheme for 'artists in need' who do not qualify for an official KSK pension, and
- the *Kulturwerk* scheme which fosters and supports contemporary fine art through, for example, competitions.

Living artists receive 80 per cent of the net contribution after 10 per cent is deducted for each of these funds. Artists' estates and heirs receive 90 per cent with only 10 per cent deducted for *Kulturwerk*.<sup>32</sup> Of the resale royalty collected, by far the larger proportion is paid to heirs and only a small amount to living artists.<sup>33</sup>

The German scheme focuses on both the rights of the artist and on support for the arts by providing financial support to new artists. Germany is the EU's third largest art market, behind the UK and France. The ACE Report described the German scheme as 'the most efficient', and was impressed that the scheme was able to monitor auction sales as well as collect lump-sum royalties at less cost than

France or Belgium. It considered that the model 'should be fully examined for its benefits to both artists and agents, and its feasibility for implementation in the UK'.<sup>34</sup> The UK Draft Regulations do provide for central collection by one or more collecting agencies but only for distribution to individual artists.

### An Australian model

Australia is not limited by the terms of the EU Directive and can adopt a model that combines the best of the schemes operating in other jurisdictions.

#### Australian concerns

In the Australian context, a resale royalty raises similar issues as those in foreign jurisdictions. These are whether resale royalties should be directed towards those artists whose works are sold, in keeping with the principle that the right is a form of copyright owned by the artists, or whether they should be spread among many artists. The DCITA Discussion Paper notes that the advantage of the latter approach is that it addresses concerns that a resale royalty is otherwise 'a relatively untargeted mechanism for providing income support'.<sup>35</sup> Even the German scheme, which primarily benefits heirs, supports many artists through the distribution of *Socialwerk* and *Kulturwerk* funds.

Weighted against this advantage, however, are concerns that a compulsory fund appears more like a tax than a property right benefiting the individual creator.<sup>36</sup> Similar criticisms have been levelled against the Australian Indigenous Art Trade Association's fund which was presented as an alternative to a resale royalty in its [submission](#).<sup>37</sup> This fund uses proceeds from the sale of art works by Indigenous artists to support health and welfare initiatives in Indigenous communities; the money is not returned to individual artists.<sup>38</sup>

A more moderate approach like that which is now being considered in the UK, would be to lower the sale threshold price so as to broaden the base of possible recipients. Although the general view is that this will raise the cost of collecting the royalty, the German model suggests that it is possible to keep costs to a minimum even if the threshold price is very low.

A practical matter is how the royalty should be collected. Certainly, collection by a central agency (perhaps *Viscopy*) appears to be the most effective means of enforcing payment of the royalty. This would help ensure that artists who should benefit, will benefit. If there is support for a general fund, collecting agencies are obviously best placed to support young artists and artists in need and could provide a logical central point from which programs could be administered.

#### Reciprocity

Given the international moves towards implementing resale royalty rights, the absence of such a scheme in Australia runs the risk of disadvantaging Australian artists. Typically, and as is consistent with the *Berne Convention*, the sale of an Australian work will attract a resale royalty in a country only if a reciprocal right exists in Australia for artists of that country. While the lack of reciprocity may not be an issue at this time, because Australian works are generally sold in Australia, the increasing popularity of Indigenous works for overseas buyers may alter this picture. As has been observed elsewhere:

It is therefore possible that harmonisation may be of benefit in the future. One issue that would need to be considered is the extent to which Australian legislation would need to mirror that of overseas countries in order to experience the benefits of harmonisation.<sup>39</sup>

Australia is in the enviable position of being able to study the implementation process now taking place in Europe and choose an approach best suited to Australia's needs.

1. Attorney-General Phillip Ruddock at the Australian Copyright Council's *Copyright Law & Practice Symposium*, 17–18 November 2005.
2. 9 September 1886, Article 14<sup>ter</sup>, Paris Revisions 1971.
3. Department of Communications, Information Technology and the Arts, *Proposed Resale Royalty Arrangement*, Discussion Paper (2004) [http://www.dcita.gov.au/\\_data/assets/pdf\\_file/12024/Proposed\\_Resale\\_Royalty\\_Arrangement\\_Discussion\\_Paper.pdf](http://www.dcita.gov.au/_data/assets/pdf_file/12024/Proposed_Resale_Royalty_Arrangement_Discussion_Paper.pdf)
4. Art. 26 of the Authors Rights Law 1965, modified in 1972: see C. McAndrew and L. Dallas Conte, *Implementing Droit De Suite (artists' resale rights) in England* (The Arts Council of England, 2002) p. 28, <http://www.artscouncil.org.uk/documents/publications/325.pdf>
5. K. Strickland, *Playing Possum, The Australian*, 28 July 2005, p. 14.
6. Editorial, *The Australian*, 29 August 2005.
7. See V. Ginsburgh, *The Economic Consequence of the Droit de suite in the Economic Union* (European Center for Advance Research in Economics and Statistics, Université Libre de Bruxelles, March 2005) <http://www.ecare.ulb.ac.be/ecare/people/members/ginsburgh/papers/134.droit%20de%20suite.pdf>; R. Kirstein & D. Schmidtchen, *Do Artists Benefit from Resale Royalties? An Economic Analysis of the New EU Directive* (Center for the Study of Law and Economics, Universität des Saarlandes, 2002) [http://www.uni-saarland.de/fak1/fr12/csle/publications/2000-07\\_dsd4.pdf](http://www.uni-saarland.de/fak1/fr12/csle/publications/2000-07_dsd4.pdf).
8. See *Proposed Resale Royalty Arrangement*, Submission of the Intellectual Property Research Institute of Australia (August 2004) [http://www.dcita.gov.au/\\_data/assets/pdf\\_file/15171/Intellectual\\_Property\\_Research\\_Institute\\_of\\_Australia.pdf](http://www.dcita.gov.au/_data/assets/pdf_file/15171/Intellectual_Property_Research_Institute_of_Australia.pdf)
9. Report by Access Economics for Viscopy Ltd, *Evaluating the Impact of an Australian Resale Royalty on Eligible Visual Artists* (October 2004) pp. 4, 10, [http://www.dcita.gov.au/\\_data/assets/pdf\\_file/16026/Viscopy\\_Access\\_Economics.pdf](http://www.dcita.gov.au/_data/assets/pdf_file/16026/Viscopy_Access_Economics.pdf)
10. H. Lydiate, *The Way Forward*, *Artquest* (1979), <http://www.artquest.org.uk/artlaw/studios/thewayforward.htm> accessed on 8 December 2005.
11. ACE Report, op. cit.
12. *WIPO International Forum on "Intellectual Property and Traditional Knowledge: Our Identity, Our Future"*, Introduction to Collective Management of Copyright and Related Rights (WIPO/ITPK/MCT/02/INF.6, November 2001), pp. 18–21, [http://www.wipo.int/arab/en/meetings/2002/muscat\\_forum\\_ip/pdf/iptk\\_mct02\\_i6.pdf](http://www.wipo.int/arab/en/meetings/2002/muscat_forum_ip/pdf/iptk_mct02_i6.pdf) accessed on 8 December 2005.
13. DCITA Discussion Paper, op. cit., pp. 40–42.
14. House of Commons, Culture, Media and Sport Committee, *The Market for Art*, Sixth Report of Session 2004–05 (6 April 2005) pp. 16–17, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmcmds/414/414.pdf> accessed on 8 December 2005.
15. Patricia Hewitt MP, House of Commons *Hansard Written Answers* for 9 March 2005, <http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmhansrd/cm050309/text/50309w07.htm> accessed on 8 December 2005.
16. UK Patent Office, Consultation, *The Directive – options and proposals*, <http://www.patent.gov.uk/about/consultations/resalerights/directive.htm> accessed on 8 December 2005.
17. Design and Artists Copyright Society, *Submission to the Public Consultation on the Implementation of Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art* (May 2005) p. 4, [http://sun.serving-host.com/dacs/pdfs/dacs\\_submission.pdf](http://sun.serving-host.com/dacs/pdfs/dacs_submission.pdf) accessed on 8 December 2005.
18. House of Commons Committee Report, op. cit.
19. H. Lydiate, *Artists' Resale Right*, *Artquest* (2005) <http://www.artquest.org.uk/artlaw/droitdesuite/artistresaleright.htm> accessed on 8 December 2005.
20. Early Day Motion No. 479, Artist's Resale Right Directive and Support for the Creative Community, Tabled 12 January 2005 (04–05 session), <http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=27016&SESSION=873>; and No. 106, Artists' Resale Right, Tabled 17 May 2005, <http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=28294&SESSION=875> accessed on 8 December 2005.
21. Draft Regs 7(3), 15; Directive Art. 6(2).
22. DACS Submission, op. cit., p. 9.
23. ACE Report, op. cit, p. 65; see also E. Hudson & S. Waller, *Droit de suite Down Under: should Australia introduce a resale royalties scheme for visual artists?*, *Media and Arts Law Review* (2005) March, p.21; WIPO Paper, op. cit., p. 18, para 96.
24. WIPO Report, op. cit., p. 19, para 96.
25. *ibid.*
26. S. Stern, *The Collecting Societies – How is Droit de Suite exercised?*, *E-zine*, vol. 16, iss. 4, April 2002, with reference to VG Bild-Kunst website; and Watching the spread of resale rights, *International Confederation of Societies of Authors and Composers*, <http://www.cisac.org/web/Content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=CN-2004-01-Resale-Right3> accessed on 8 December 2005.
27. ACE Report, op. cit., pp. 29–30.
28. *Collection of artists' resale royalties in Germany through VG Bild-Kunst*, [http://www.bildkunst.de/body\\_collection.html](http://www.bildkunst.de/body_collection.html) accessed on 7 November 2003.
29. *ibid.*
30. *ibid.*
31. ACE Report, op. cit., p. 29. Though BK notes a variation of between 1.8 per cent and 2.3 per cent for auctioneers.
32. *ibid.*, p. 30. See also WIPO Report, op. cit., p. 19, para 97.
33. Based on 1998 figures in ACE Report, op. cit., p. 32.
34. *ibid.*, pp. 65, 68.
35. DCITA Discussion Paper, op. cit., p. 17.
36. Rupert Myer, *Myer Inquiry into the Contemporary Visual Arts and Craft Sector* (2002), p. 169; see also S. Weil, *A Cabinet of Curiosities: Inquiries into Museums and their Prospects* (Smithsonian Institution Press, 1995) p. 235; K. Gunn, *'Dangerous ground' for resale royalties*, *Art Monthly Australia*, no. 181, July 2005, p. 34 at 36.
37. The Australian Indigenous Art Trade Association, *Submission on the Proposed Introduction of a Resale Royalty Arrangement in Australia*, [http://www.dcita.gov.au/\\_data/assets/pdf\\_file/15148/The\\_Australian\\_Indigenous\\_Art\\_Trade\\_Association.pdf](http://www.dcita.gov.au/_data/assets/pdf_file/15148/The_Australian_Indigenous_Art_Trade_Association.pdf) accessed on 8 December 2005.
38. See National Association for the Visual Arts, *Resale Royalty Submission*, [http://www.dcita.gov.au/\\_data/assets/pdf\\_file/15173/National\\_Association\\_for\\_the\\_Visual\\_Arts.pdf](http://www.dcita.gov.au/_data/assets/pdf_file/15173/National_Association_for_the_Visual_Arts.pdf), p. 4, accessed on 8 December 2005.
39. E. Hudson & S. Waller, op. cit., p. 18.

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