

The Resale Right

This is a good opportunity to help the resale right make a worldwide breakthrough before its 100th birthday in 2020! In addition to the European Union, which fully harmonised its resale right in early 2012, the United States and China are also about to introduce a resale right. This would mean it would apply to over 90% of art transactions worldwide. Switzerland then would not want to sit on the sidelines anymore either in that case. Learn more in this section about what is at issue with the resale right and why it is so important for visual artists.

- › **The Resale Right - What is it?**
- › **Resale Right in Germany**
- › **Resale Right in the European Union**
- › **The Resale Right in the United States, China, and Switzerland**
- › **The Resale Right - Criticism Unfounded!**

What is it?

Copyright should actually be linked to the utilisation of works. A few cents of compensation would be transferred to the author every time a person reads a book, watches a movie, or views a painting. On closer inspection, however, such a system would require total surveillance, and legislators were well advised to link licensing requirements to the communication rather than utilisation of a work.

This means that those who communicate copyrighted works to an audience have to pay royalties. Traditionally, this happens whenever a work is performed (opera, theatre, concert, cinema), reproduced and distributed (books, CDs, DVDs), or electronically transmitted (radio, television, Internet). The common feature in all of these instances is that the original, i.e. the first copy of a work, plays no commercial role.

That is not the case in the visual arts. In this field, everything revolves around the original; this is the only object of value. A poster of the Mona Lisa in your living room is not worth much, whereas the original in the Louvre is priceless. This fixation on originals means that artists normally only receive remuneration for their works one time - when they sell them. The owners of works and intermediaries, i.e. the art trade and auctioneers, are the only ones who profit from subsequent increases in value. This fact represents a disadvantage for visual artists in comparison to authors of other categories of works such as book authors or composers, as the latter receive royalties for all of the abovementioned performances, reproductions, broadcasts, and filmings (at least that is the way it should be).

This is where the resale right comes in. It "follows" a work when it changes owners and guarantees the artist a small share in the sales price. The more often a work changes owners, the more popular it will become and the more it will increase in value from sale to sale. This share for artists is fair, since increases in value are fundamentally based on the reputation that they painstakingly develop throughout their creative lives. It should not be denied though that the art trade can also make a significant contribution to an artist's reputation. The art trade, however, already benefits from the margin, i.e. the difference between the purchase and sale price.

The resale right is a French invention. It was a topic of intense discussion as early as the late 19th century and became effective in 1920. The immediate motivation was the sale of a painting titled *The Angelus* by Jean-Francois Millet, which was sold for a considerable price while the artist's family was living in bitter poverty. A deeper reason for the resale right was to support the widows and families of artists who had died in World War I.

Belgium was the next to introduce a resale right in 1921 followed by Italy in 1942, Germany in 1965, and Spain in 1987 to name just a few examples. Today, around 70 countries have incorporated a resale right into their copyright laws. The resale right is also regulated by the Berne Convention for the Protection of Literary and Artistic Works. Almost all countries have acceded to this convention, which contains fundamental rules for copyright and provides for its basic worldwide harmonisation. However, the Contracting States are not obligated to incorporate the resale right into their national legislation. For this reason, the right is applied only to the sale of works by artists who live in a country with a resale right and sales that take place in such countries (principle of reciprocity).

[back](#)

Resale Right in Germany

In Germany, the resale right is covered by Art. 26 of the German Copyright Act.

It takes effect when a work of visual art or photographic work is resold with the involvement of an art dealer or auctioneer within a period of up to 70 years after the death of the artist. Works of architecture and applied art are not covered, nor are transactions among private individuals.

Other preconditions: Minimum sales proceeds of Euro 400, the transaction takes place in Germany and the artist is German or a citizen of a country that also recognizes a resale right (If a work of a US American is sold in Germany, no royalties for the resale right are payable because the USA has not yet introduced a resale right in its legislation).

The amount of royalty due depends on the net sales proceeds, i.e. the selling price excluding value-added tax. The artist's share starts at four per cent, gradually decreasing once sales proceeds have reached more than Euro 50,000. The royalty is capped at Euro 12,500, i.e. a single sale cannot generate a higher share for the artist, even if the work is sold for several million Euros.

Only a collecting society is entitled to request information from the art trade. In Germany, it is VG Bild-Kunst that administers the resale right.

Since 2007, royalty income has totalled been between four and five million Euros, of which about one million Euros is paid to VG Bild-Kunst from abroad for sales of its members' works that are subject to resale royalties in the country in question .

If a resale is subject to royalties, it only makes up a small portion of the sales proceeds. Nevertheless it is a major source of revenue for artists, whose income is often below average.

After the death of the artist, the resale right assumes even greater importance for the heirs. Because on the one hand the artist cannot create any new works of art, while on the other the heirs frequently bear the burden of management of the artist's legacy (storage, restoration, cataloguing, research).

[back](#)

The Resale Right Directive

The differences in the resale right in the individual states of the European Union along with the fact that some countries had no resale right at all was regarded as an obstacle to the free development of the EU Internal Market. For that reason, the EU adopted a Directive on the Resale Right (2001/84/EC) on 27 September 2001.

The individual states were granted a generous transitional period up until the end of 2005 for its implementation. On the strength of this Directive, the resale right was introduced in Austria, the Netherlands, Ireland, Malta and the United Kingdom. At the same time, these countries were granted an additional transitional arrangement until the end of 2011 allowing them to introduce the resale right for living artists only. It is only since 2012 that the resale right has been fully harmonised across the European Union, i.e. indiscriminately vesting artists and their heirs with such rights.

The Directive not only requires Member States of the European Union to introduce the resale right, but also provides a narrow corridor for shaping it. For instance, the Directive harmonises the categories of works to which the resale right applies, the sales processes involved and the royalty rates. The capping of the royalty at Euro 12,500 per transaction and the term of protection of up to 70 years after the death of the artist are also regulated in a uniform manner. The only significant point where Member States have flexibility is in fixing the minimum selling price, from which the resale right royalty will apply. The lower this threshold, the more artists will benefit from the resale right. While Germany has opted for Euro 400, in France the resale right takes effect from a selling price of Euro 750 and in Austria the threshold is even as high as Euro 3,000, which is also the maximum level stipulated by the Directive.

Dialogue with the Industry

In 2013, the European Commission organised a dialogue between art dealers and collecting societies to find solutions to problems encountered in administration of the resale right in practice. As a result, a recommendation has been presented that both sides have undertaken to implement.

For example, collecting societies will provide art dealers with electronic information about the artists entitled to the resale right. (VG Bild-Kunst has for a long time been offering such an online database.) The art trade, in turn, will give collecting societies information in an agreed format about the sale of works subject to the resale right: a system that already works fairly well in Germany.

In 2015, the European Commission will once again review the implementation of the resale right in Europe.

[back](#)

The Resale Right in the United States, China and Switzerland?

Copyright is national law. Just as with criminal law, there is no uniform copyright law that applies everywhere in the world. Nonetheless, international treaties have brought countries much closer to one another in this regard. Licensing is required, for instance, to show a film or broadcast a song in most countries of the world today. The situation with the resale right looks somewhat different. This right, which primarily ensures that visual artists receive a share of the resale value of their works, is not recognised in the United States, Switzerland, or China – all of which have substantial art markets.

In 2010, the EU accounted for 37% of the global art market while the United States made up 34% and China 23%. China's rise to become the third largest market for art is significant. As recently as 2006, its share was a mere five per cent.

Artists from the EU currently receive no remuneration when their works are sold in the US or China. By the same token, US American and Chinese artists receive nothing when their works are sold in the EU, as the resale right is only guaranteed on the basis of reciprocity. Considering the market shares, the resale right would apply to a third of all art sales worldwide without this mechanism and at least apply to all sales in the European Union.

However, due to the requirement to observe the principle of reciprocity, in actual practice only a portion of European sales are subject to the resale right. The artists in question must have been alive in the last 70 years and originate from an EU country or one that recognizes the resale right. Due to these restrictions, the resale right is currently applied in less than ten per cent of art sales worldwide, but this number would increase significantly if the United States, China, and Switzerland were to introduce a resale right.

The Situation in the United States

Efforts were made to introduce a resale right in the United States as early as the late 1970s and again in the late 1980s. The second initiative was launched by Senator Edward Kennedy but failed to gain traction.

Nevertheless, the US Copyright Office carried out an investigation and held various hearings in the early 1990s. The final report at that time recommended that Congress wait for the introduction of legislation in the European Union before addressing the topic again.

As is known, the European Union adopted its Resale Right Directive in 2001 stipulating that individual Member States implement it by 2006. However, it was much later that another attempt was made to introduce the resale right in the United States. A bill called the Equity for Visual Artists Act was introduced to Congress in December of 2011, and the Copyright Office was again requested to conduct an impact study on the introduction of a resale right.

This study produced a report, which was published on 13 December 2013. It contains the following recommendations among others:

- › The report first recognises that visual artists suffer from a disadvantage in that copyright law primarily deals with royalty payments required for the reproduction, distribution, and broadcast of copies of works. The law, therefore, does not cover categories of works, for which only the original has market value. In this field, copyright law fails to meet its objective of encouraging artists to produce further

works.

- › The report then states that there is a lack of evidence to support the thesis that the resale right has a negative impact on the art market.
- › The report claims that the introduction of a resale right would benefit only a small group of visual artists and recommends that Congress carefully weigh the costs and benefits of introducing such a right.

The Copyright Office recommends the following regarding the introduction of a resale right:

- › It should apply to the entire art trade (auctioneers and galleries).
- › The minimum sales price should be set as low as possible so as to benefit as many artists as possible.
- › A royalty rate between three and five per cent of the sales price should be introduced for works for which the sales price has increased.
- › A cap should be established.
- › The resale right should only apply to works created after the law takes effect.
- › The resale right should be subject to administration by a collective management organisation.
- › Remuneration should be tied to a registration requirement for works. The right should be granted to living artists only.

These recommendations can be regarded as generally positive. The recommendation that the resale right only be granted to living artists is based on the fact that the resale right was extended to heirs in the United Kingdom only in 2012 and the Copyright Office recommends an observation period. However, the proposal for the resale right to apply only to new works should be rejected.

The legal committees of both houses of the United States Congress introduced identical new resale right bills in January of 2014 with the following provisions for resale right royalties:

- › They should be set at five per cent of the resale proceeds.
- › They should apply to minimum sales prices of \$5,000 or more.
- › They should be subject to a cap of \$35,000.

The proposed laws would apply to auction houses only and not extend to galleries. There are, however, plans to conduct a study on this issue.

The recommendations of the Copyright Office to introduce further restrictions (royalty eligibility for living artists only, works created after the law takes effect, and a registration requirement for foreign works) were not reflected in the bills.

The chances are good this time that a resale right will actually be introduced in the US. VG Bild-Kunst has supported the process actively and financially since 2011 in cooperation with its sister societies in the US and Europe as well as the EVA umbrella organisation.

The Situation in China

In 2012, a process was started in China to amend copyright legislation with provisions for the introduction of a resale right.

The bill states that artists and their heirs should receive a share of the proceeds from sales of works of art and photographs at auction. The State Council would be responsible for the details (e.g. the amount of remuneration).

The draft law is currently (since late 2013) in the State Council legal committee. A second draft is expected in the first quarter of 2014. The legislative process could be completed in 2015.

CISAC will follow the legislative process and organise lobbying efforts. The organisation opened its own office in Beijing on 15 January 2014. The issue of introducing a resale right in China is very high on its agenda.

The Situation in Switzerland

In Switzerland, the introduction of a resale right was intensely discussed in 1992 as part of the country's new copyright codification process, but the idea was ultimately rejected due to fears of negative consequences for the domestic art market. An elaborate lobby campaign by the art trade later prevented the resale right from becoming effective in 2007 when the country's copyright law was amended.

However, not even Switzerland can escape international developments, even if it does seem quite appealing to form a legal "island" of advantage for the domestic industry.

Early in December of 2013, visarte, the association of Switzerland's visual artists, called for an action programme to introduce the resale right. Our sister society ProLitteris will also be actively involved in the campaign in 2014.

Criticism Unfounded!

The art trade (galleries, auction houses, art dealers) perceives the resale right as a financial burden. In countries such as Germany with a longstanding awareness of the resale right, pragmatic solutions have been developed, which have contributed to its broad acceptance.

The arguments against the resale right are the same around the world.

Argument 1: The art trade is migrating to countries without the resale right.

This argument is constantly advanced against the resale right by the art trade.

A number of studies have examined the impact of introducing the resale right on local art markets. The most recent such effort was an EU Commission report released in December of 2011. However, none of these efforts have managed to establish a migration trend. The reason is that the resale right represents only one of many cost factors and is a minor one at that. More weight is placed on the general tax system in the country of transaction, and local VAT taxes play an especially important role. General VAT rates vary between 15 and 25 per cent in the EU alone.

However, the art trade is not motivated strictly by financial considerations. It is much more important to dealers to have a location where they can cross paths with the best-resourced buyers. Certain locations often crystallise as markets for certain types of artwork, and these are the places where one can find the best expertise, the largest selection, and highest level of trust.

Argument 2: The administrative burden outweighs the benefit.

The administrative burden on artists is minimal. Collecting societies monitor the market, handle resale right claims, and forward royalties to artists. The best condition for collective management of the resale right is a legal requirement for claims to be administered by collecting societies. Under this arrangement, payments can be made to the appropriate societies for all sales subject to the resale right, and the societies also bear responsibility for passing on royalties to non-members.

Nonetheless, the market has also developed simple information and accounting systems where there is no requirement to work through collecting societies. The Resale Right Artist Search on the VG Bild-Kunst website makes it easy to find information regarding the artists, for whom the collecting society handles claims.

Galleries that work directly with artists do not have to pay resale royalties as a general rule, as they typically handle first sales settled with the artists themselves. Galleries are, however, required to make contributions to the German Artist Social Fund for payments made to artists.

Argument 3: Living artists benefit the least from the resale right.

It is true that the works of younger artists are resold less often than those of older, better-known or deceased artists. However, such criticism misses the mark, insofar as it is desired that heirs of artists should receive royalties as do the heirs of pianists and book authors when the works of their parents or grandparents are used.

Moreover, the number of living artists who benefit from the resale right is highly dependent on the threshold value, at which it takes effect. This threshold is relatively low in Germany (400 Euros resale price), which is the reason why approximately one half of the royalties distributed by VG Bild-Kunst go to living artists and half go to heirs.

Argument 4: Increase in value, not the purchase price, is the real key factor for resale right royalties.

This claim is understandable in theory, as the resale right is meant to allow artists to participate in the increase in value of their works. However, such an approach would be nearly impossible to implement in practice in light of the fact that verifying increases in value would be dependent on purchase price disclosure. The art trade massively opposed such disclosure when the resale right was introduced. If the resale right were linked to actual increase in value, the percentage would have to be much higher and the outcome would still be the same.

In the British art market, for instance, claims are made about the existence of a so-called "cascade effect," but there is no evidence to support this assertion. If this "cascade effect" is understood to mean that each new sale of an item should trigger royalties when it is resold multiple times in short succession, this is the logical impact of the resale right on each sales transaction as envisioned by legislators.

On the other hand, if it is based on the concept that buyers and sellers reach agreements on royalties that are not entirely consistent with the law (e.g. the seller is to pay the resale right royalty), then the market will impede such an effect.