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Visual artists need to eat, too

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A healthy copyright system to protect artistic works also encourages their creation. Moreover, the U.S. Supreme Court has stated that the compensation paid pursuant to copyright law is the primary mechanism to "stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). However, in its current form, copyright law does not protect all authors of works equally. Unlike other artists in the U.S., visual artists do not receive royalties for their works. Indeed, the U.S. Copyright Office recently released a report titled "Resale Royalties: An Updated Analysis," examining the concept of royalties for visual artists in the U.S.

One form of copyright protection is the temporary right to exclusive use of the copyrighted material. This right covers everything from the right to sell copyrighted goods to the right to create derivative works . If 1,000 copies of a book are sold, the author benefits from each sale. Twenty years later, if a renewed interest in the book leads to 5,000 more book sales, the author will further benefit from such additional sales.

The same protection does not yet exist for visual fine artists. If a painter creates a work and sells it to a collector for $2,000, that is often the last economic transaction involving the painter. If, 20 years later there is a renewed interest in the painting, and the painting is sold for $20,000, the increased value will belong to the collector. This is because although the painter still retains the right to sell prints of the painting and to produce other derivative works based upon the painting, much of the value of the painting is located in the original physical work of art. An art collector will pay a premium for the actual painting so that she may hang it on her wall. However, in our example the painter cannot presently capture the $18,000 difference in the increased value of the painting.

The European Union attempts to solve the economic disparity issue between visual artists and other authors by providing a right known as "droit de suite" (or right to follow). This right allows an author to receive a predetermined percentage of any subsequent sales of his work throughout the author's lifetime and sometimes even after the author's death. The first country to institute such a law was France. Today, the entirety of the EU has resale royalty rights that kick in anytime a piece is sold by an art dealer for at least €3,000 (or less depending on the country). Despite the fear of some that the introduction of a resale royalty right would lead to lower or reduced art business, one U.K. report found that the introduction of droit de suite did not negatively impact the U.K. art market. See Kathryn Graddy et al., "A Study into the Effect on the UK Art Market of the Introduction of the Artist's Resale Right (2008).

There are some compelling reasons that the U.S. should follow the EU's lead. The most important reason to introduce a resale royalty right is simple fairness. Even though, according to the U.S. Department of Labor, visual artists seem to be doing almost, but not quite, as well as other authors economically, they are still at a legal disadvantage under current copyright law. A second reason to introduce a resale royalty right is to protect the interests of U.S. authors abroad. The Berne Convention — an international convention governing copyright — allows, but does not require, signatory countries to include a droit de suite. The penalty for not including such a provision is that other countries can apply reciprocity instead of applying their local droit de suite laws with respect to U.S. authors. This means that many countries abroad apply the less protective U.S. rights to American authors of works, as opposed to giving American authors of works the greater protection offered by some of these countries. This has led to a significant number of U.S. authors being denied resale royalties when their works are sold internationally.

Based on the apparent success of the droit de suite provisions of the EU and other countries, the U.S. Copyright Office recommends that if a resale royalty provision is adopted by Congress, it has the following characteristics:

- Applies to sales of works of visual art by all entities engaged in the business of selling visual art
- Includes a low threshold in order to benefit as many artists as possible
- Establishes a 3 to 5 percent royalty rate for works that have increased in value
- Includes a per sale cap on royalty payments
- Applies prospectively to works acquired after the U.S. law goes into effect
- Provides for collective management of the royalty scheme by private collecting societies

Despite strong evidence that the U.S. should introduce a resale royalty, there are at least three important issues that could prove problematic. The first is the potential effect on the primary and secondary art markets by diverting sales, altering prices, and moving sales through less official channels. While the U.K. found that the implementation of a resale royalty provision did not negatively impact the art market, there is reason to believe that this is not always the case, especially if alternative venues are easily accessible for sellers of art. California passed the only resale royalty legislation in the U.S. in 1976 called the California Resale Royalty Act (CRRA). Immediately after the CRRA was passed, Sotheby's stopped holding contemporary art auctions in Los Angeles, claiming that the legislation was the reason.

The second problem is the bureaucracy needed to enforce such a system in a market that has historically lacked transparency. With the CRRA, there were constant compliance issues, in large part due to the lack of enforcement and continuous challenges to the law. Even when the sellers of the art complied with the law, there were difficulties in making sure that the resale royalties actually made it into the hands of the artists or their estates, especially if the artist was not well known. The most recent figures show that the council created by the CRRA is holding royalties for at least 98 artists due to their inability to effectively get the artists their royalties.

Finally, the biggest legal challenge is whether or not a resale royalty provision would violate the Constitution or the first sale doctrine. The first sale doctrine prohibits the holder of a copyright from controlling how you use their copyrighted product after the initial sale. Many entities, from libraries to video rental stores to second hand shops, rely on the doctrine to operate their businesses. It is the primary impediment to visual artists in realizing the gains from their works of art after the initial sale. Establishing a resale royalty limits the way in which the buyer of a work of art can use their own property.

There are strong arguments in favor of implementing a resale royalty system similar to the one used in the EU in order to protect the interests of U.S. artists both overseas and domestically, but there are several problems that must first be addressed.

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