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11 July 2013

Resale Royalty Review Team

Office for the Arts

Department of Regional Australia, Local Government, Arts and Sport

GPO Box 803

CANBERRA ACT 2601

by email: VisualArts@pmc.gov.au

Dear Resale Royalty Review Team

Copyright Agency is pleased to have an opportunity to make a submission to the post-implementation review of the Resale Royalty Right for Visual Artists Act 2009. As the collecting society appointed by the Minister for the Arts to administer the resale royalty scheme for an initial term of 5 years, we are well placed to comment on the operation of the legislation and the effectiveness of the scheme.

In our experience the scheme is working well and achieving its objectives of providing artists with recognition of their on-going rights in their art and an additional source of income. The scheme encourages greater clarity and documentation of arrangements which is of benefit for both artists and art market professionals. The information provided to artists about resales of their works enables them to make more informed decisions about sales of their works.

As at mid-May 2013, the scheme had generated over \$1.5 million in resale royalties for more than 650 artists. Over 90% of the artists who have received a royalty are living artists and over 68% of the artists who have received a royalty are Indigenous Australians. There are further statistics on the performance of the scheme on the resale royalty website at: www.resaleroyalty.org.au

Our view is that the structure of the scheme is basically sound. We think there are a small number of changes to the resale royalty legislation that would improve the functioning and viability of the scheme and we outline these below.

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Opt-out

The legislation allows a resale right holder to instruct the collecting society not to collect a royalty on a particular resale, by giving the collecting society written notice within 21 days of the publication on the resale royalty website of information about the resale.¹

There have been 105 opt-outs under this provision by 73 right holders since the commencement of the scheme. The total royalty value of these opt-outs is \$157,561 and of this amount 80% has been collected directly by the artist or their agent. A small number of right holders who have otherwise authorised Copyright Agency to collect resale royalties have chosen to opt out in resale to high value sales to avoid payment of the collecting society's administration fee.

The opt-out provision when used to avoid the collecting society fee, has the potential to undermine the financial viability of the scheme. The collecting society is authorised by the Minister to retain 10% of the royalty collected to cover administration costs. At present this administration fee does not cover the costs of running the scheme but will do so in time, if right holders do not opt out, particularly in relation to high value resales, and if competing agencies do not enter the market.

As well as affecting the financial performance of the scheme, the opt-out provision when used this way, has the potential to make compliance and administration more difficult. Some art market professionals have indicated that they have set up their systems and processes to deal with the collecting society and they wish to work with this streamlined system. It creates further administration and possible uncertainty if they have to deal with numerous parties in the payment of royalties.

We support maintenance of the opt-out provision so that artists can exercise their right not to claim. We note that 54 of the 56 artists who have not collected have done so as part of a charity auction.

For the reasons outlined above, we would like to see the opt-out provision modified to remove the option to collect directly, whilst retaining the opt-out to not claim.

Reporting responsibility

Legislative responsibility to report commercial resales to the collecting society falls on the seller only,² even though liability for payment sits jointly and severally with the seller, the buyer and any of their respective agents. The Act provides that notice can be given through an agent but if a seller fails to give a notice, there is no obligation on the seller's agent to do so in his or her place.

¹ Section 23(1)

² Section 28

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The fact that agents are not obliged to report resales has made it difficult for Copyright Agency to engage with some art market professionals and has slowed receipt of some reports. While there are mechanisms in the legislation that enable approaches to agents, it would be preferable if the reporting obligations and liability for payment were aligned so that all parties liable to pay have an obligation to report resales to the collecting society.

Inspection powers

The collecting society has no legislative power to inspect the records of sellers, buyers, art market professionals or other agents to determine the amount of any resale payable on a commercial resale or the liability for that royalty. We can require this information from these parties and, if they do not comply, we can apply to the Federal Court for a penalty against the relevant party.³ We note that the penalty provision does not empower the court to order compliance with a request for information.

In our view it would be useful to have the power to inspect records, rather than having to enforce compliance through the notice and penalty system provided. The power should extend to the right to inspect records related to information which is required to be given in a section 28 notice of commercial resale and not just the limited amount of information that can be requested under a section 29 request.

A possible model for our suggested amendment is the inspection provisions that form part of the educational statutory licence in the Copyright Act administered by Copyright Agency.⁴ We have found these provisions to be a useful tool in managing the statutory licence, though rarely used.

Conclusion

We are happy to provide any further information that the review team might find useful in relation to our suggested changes to the scheme or any other matter.

We look forward to the reviewer's report.

Yours sincerely



Jim Alexander
CEO

³ Section 29

⁴ Section 135ZY

