Resale royalty right for visual artists

This information sheet provides an overview of the Resale Royalty Rights scheme for visual artists.

What is the “Resale Royalty Right”?

From 9 June 2010, a 5% royalty will be payable to visual artists on certain commercial sales of their work. This entitlement is created by the *Resale Royalty Right for Visual Artists Act* 2009 **(the Act)**. A copy of the Act is available on the Commonwealth Department of the Environment, Water, Heritage and the Arts website.

What type of artwork attracts the resale royalty?

The royalty applies to original works of visual art whether created by a single artist or as a collaboration between artists including paintings, photographs, prints, sculptures, tapestries, artists’ books, video artworks, textile artworks such as batiks and weavings, drawings, engravings, fine art jewellery, glassware, carvings, ceramics, and digital and multimedia artworks.

It does **not** apply to mass produced items (such as posters or souvenirs), buildings, architectural plans, circuit layouts or manuscripts.

It does **not** apply to artworks if the artist has been dead for more than 70 years.

On which sales is the royalty paid?

The royalty will be payable if the sale:

a. occurs after 8 June 2010 **(the Commencement Date);**

b. is a “commercial resale”;

c. is the second transfer of ownership after the Commencement Date; and

d. is for a sale price of at least $1000 (the threshold as at November 2010) including GST.

What is a “commercial resale”?

A commercial resale is a sale:

a. for money (not a gift or donation or exchange for goods or services);

b. which is not the first transfer of ownership (for example, the first transfer might be the original sale by the artist to the first purchaser or the artist’s gift of his or her work to a friend or relative or the acquisition of an artwork through inheritance from the artist’s estate); and

c. which involves an art market professional.

Who are “art market professionals”?

An art market professional means:

a. an auctioneer;

b. the owner or operator of an art gallery;

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c. the owner or operator of a museum;

d. an art dealer; or

e. a person otherwise involved in the business of dealing in artworks.

For example, if an artwork is sold privately by one collector to another, no art market professional is involved and the sale is not a commercial resale. A sale on eBay or another online auction site may or may not be a commercial resale depending whether or not an art market professional participates.

What does the second transfer of ownership mean?

For artworks created **after** the Commencement Date, the royalty will be payable on the first commercial resale which occurs. For example, a work completed in July 2010 and sold by the artist through a dealer to a collector (the first transfer of ownership) is then "resold" at auction in December 2010. The sale at auction is a commercial resale (involving an art market professional) and is the second transfer of ownership after 8 June 2010. The artist is entitled to receive a resale royalty on the auction sale. However, if instead of selling it at auction, the first buyer donated the artwork to a museum or gifted it to his daughter in December 2010, that would not be a commercial resale and so no royalty would be payable even though it is the second transfer of ownership since the Commencement Date.

For artworks created **before** the Commencement Date, the royalty will not be payable on a commercial resale after 8 June 2010 if it is also the first transfer of ownership to occur after the Commencement Date. For example, a work completed in July 2000 and sold by the artist to a collector in 2008 is "resold" at auction in December 2010. The sale at auction is a commercial resale (involving an art market professional) but is only the first transfer of ownership after 8 June 2010 and the artist is not entitled to a resale royalty. The next commercial resale will attract the royalty.

Who is entitled to receive the resale royalty?

The royalty is paid to the artist or, if the artist has passed away, the artist's beneficiaries (either under the artist's will or according to the laws of intestacy). This is so even if the copyright in the artwork is not held by the artist.

The residency test

The artist must satisfy a residency test at the time of the relevant commercial resale. The residency test will be satisfied if the artist is:

a. an Australian citizen or permanent resident; or

b. a citizen of a country which also has resale royalty legislation and has a reciprocal arrangement with Australia.

If the artist has passed away, the artist's beneficiaries are entitled to the royalty if:

a. the artist satisfied the residency test immediately prior to his or her death;

b. the beneficiary satisfies the residency test; and

c. the beneficiary satisfies the "succession test" in that the beneficiary is entitled to receive the royalty either:

i. under a will or through the laws of intestacy; or

ii. as a consequence of the winding up of a charity, charitable institution or community body and is itself a body formed for the same purposes as the body which was wound up.

A beneficiary may be an individual, a corporation or an unincorporated body.

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For example, the artist was an Australian citizen who passed away in Melbourne without a will. Under the laws of intestacy in Victoria, her three children are entitled to share her estate. One lives in Queensland, one has moved to Mexico and taken Mexican citizenship, and one has since passed away leaving everything to a Sydney charity. The child who has become a Mexican citizen will not be entitled to any royalty unless Australia has a reciprocal royalty arrangement with Mexico. The child living in Queensland and the Sydney charity are both entitled to claim the royalty.

Works created by more than one artist

If an artwork was created by more than one artist, the resale royalty is held by:

a. each artist who is living at the time of the commercial resale and who satisfies the residency test; and

b. the beneficiaries of any artist who satisfied the residency test at the time of death provided thatthe beneficiary satisfies:

    i. the residency test; and

    ii. the succession test.

If all of the holders of the resale royalty right are artists of the artwork, each artist is entitled to an equal share of the resale royalty on that commercial resale, unless the artists have agreed to apportion shares in the resale royalty among themselves differently.

For example, in a collaboration between a sculptor, a textile artist and a graphic artist in respect of a significant visual installation artwork largely designed and installed by the sculptor, an agreement was made that the sculptor would receive 80% of any resale royalty with the other collaborators taking 10% each. This agreement will be effective to apportion any resale royalty. However if the agreement provided that 50% of the royalty would to the company which sponsored and funded the artwork, the agreement would not be effective to change the statutory entitlement of the three artists to share the royalty equally.

In other words, other than as permitted under the succession test, an artist **cannot** sell, assign or transfer the artist's entitlement to resale royalty to any person except an artistic co-creator.

For how long will the resale royalty be paid?

The resale royalty right continues to apply to all eligible commercial resales which occur until the end of 70 years after the calendar year in which the artist dies.

If there is more than one artist of the artwork then, in relation to the proportion of the resale royalty right held by or through a particular artist, the resale royalty right continues to apply to all eligible commercial resales which occur until the end of 70 years after the calendar year in which that artist dies.

Who must pay the resale royalty?

Generally, the seller, the buyer and the art market professional involved in a commercial resale of artwork are jointly liable to pay the royalty.

How is the resale royalty collected?

The Federal government has appointed Copyright Agency Limited (**CAL**) as the collecting agency responsible for collecting the resale royalty and distributing it to artists.

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CAL's obligations under the Act include:

a. publishing information about commercial resales of artwork on its website;

b. collecting the resale royalty; and

c. distributing the resale royalty.

CAL will levy a 10% fee on the amounts collected by it to cover its costs.

In order to receive their resale royalty payments from CAL, artists should register their details with CAL.

An artist or beneficiary who does not wish CAL to collect the resale royalty in respect of a particular artwork resale must notify CAL in writing within 21 days of the publication on CAL's website of details of that resale. The artist can then choose to recover the resale royalty directly from the buyer, seller or art market professional.

Such notice needs to be given in relation to each resale of an artwork for which artists or their representatives entitled to the royalty do not want CAL to collect the royalty. A permanent direction to CAL not to collect the royalty for a particular artwork is not possible.

CAL will establish reciprocal arrangements with other countries that have resale royalty schemes, such as the UK, France and Germany. This will facilitate the collection and distribution to Australian artists of resale royalties payable on sales which occur in those countries and the payment to overseas artists of royalties payable in respect of sales of their artwork in Australia.

For more information visit the CAL website (**www.resaleroyalty.org.au**) or contact CAL by telephone 1800 066 844 or email (resale@copyright.com.au).

What obligations do art market professionals and sellers of artwork have?

Art market professionals and sellers are required by the Act to send CAL information about every commercial resale occurring after the Commencement Date.

That information must be in writing and must be provided within 90 days of the date of the commercial resale. It must include sufficient information for CAL to calculate the resale royalty payable and identify who is liable to pay it.

For further information

For further information relating to resale royalties for artists and the industry, visit the Australian Copyright Council's website here.

The **Australian Copyright Council** also publishes an information sheet entitled *Artists: Resale Royalty* (www.copyright.org.au/)

Video Resources

Arts Law's video relating to the Resale Royalty Scheme.

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