

**THE ARTIST'S RESALE RIGHT: DEROGATION FOR DECEASED ARTISTS
CONSULTATION**

SUMMARY OF RESPONSES

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INTRODUCTION

At the end of June 2008 the UK Intellectual Property Office launched a consultation document “The Artist’s Resale Right: Derogation for Deceased Artists”. The document was in relation to the derogation in Directive 2001/84/EC¹ (the “Directive”) which the UK currently uses so that the artist’s resale right only applies in the UK to works by living artists. The derogation will expire on 1st January 2010 unless the UK Government seeks a further two year extension in accordance with the terms of the Directive. The consultation sought views on whether to maintain the existing derogation for a further two years until 1st January 2012 or to allow the derogation to lapse and for the works by artists who are deceased, but are still protected by copyright, to be eligible for resale right.

The consultation period ended on 29th September 2008, following a week’s extension for late responses, and approximately 400 responses were received. The responses were from: artists, successors in title to deceased artists, art dealers, gallery owners, collecting societies, organisations representing holders of other rights, legal advisers and some individuals and other organisations.

The summary which follows is intended to give a broad flavour of responses to the questions asked about the derogation. Many of the responses to the consultation, particularly those from the art trade, raised other more general issues in relation to resale right, including some calls to abolish the right and others to make the right compulsory all around the world.

¹ *Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art.*

QUESTION 1: SHOULD THE UK MAINTAIN THE DEROGATION FOR AN ADDITIONAL TWO YEARS?

Around 90% of the responses answered no to this question. This included all of the artists and artists' estates (around 330 responses), who expressed an opinion on the derogation, and two art galleries. There were approximately 35 responses from the art trade which answered yes to the question and supported extending the derogation until 2012. Many of these responses on behalf of the art trade were submitted by organisations for their members and represented the views of many businesses.

Two UK collecting societies for resale right, supported by around a dozen of their overseas counterparts, answered yes to the question, saying that the derogation should lapse. Several UK collecting societies and representatives for other rights made submissions supporting this view saying that the derogation should be allowed to lapse in order that resale right is brought into line with the other types of copyright.

The couple of responses from the legal profession supported the art trade's view, answering yes to the question and saying that the derogation should be extended. The political party and the Member of Parliament who sent in responses answered no to the question, arguing that the derogation should be allowed to lapse.

QUESTION 2: WHAT WOULD THE IMPACT BE ON THE ECONOMIC VIABILITY OF THE ART MARKET SHOULD THE DEROGATION BE ALLOWED TO LAPSE IN 2010?

There was a general concern expressed by many in the art trade that there would be an adverse effect on the UK art market if the derogation was allowed to lapse. However, many collecting societies and representatives of rights holders pointed out that the UK art market has been more successful than ever since the introduction of resale right and that it accounted for only a tiny percentage of the value of the art market and a small proportion of the overall costs connected with buying art. Several in the art trade expressed concern that the effect of resale right has been masked by the general state of the economy, arguing that the state of the art market reflects the state of the general economy, and were concerned about the effect of allowing the derogation to lapse in an economic downturn. There was a feeling that this would exacerbate problems for the art trade. Some galleries reported that prices had already dropped. On the other hand it was suggested that the art market was not affected by the state of the economy and that art may be an attractive investment in an economic downturn.

Several art galleries set out how their profits would be impacted by the derogation lapsing and that this would reduce employment within the UK art trade or even cause them to close, and therefore impact on the whole of the UK economy. This was refuted by some collecting societies who said that the art trade mainly passes on the cost of resale right to buyers and that any effect was limited by the cap of €12,500 on any one royalty payment. The positive effect of the cap on the art market was also mentioned by several responses from the art trade, in particular because deceased artists' work can be extremely valuable and so the cap may have even more of an effect in that market.

Many responses from the art trade argued that art business would go outside the EU if the derogation was allowed to lapse. Some admitted that it was difficult to assess this and one pointed out that there was little risk of diversion below €3,000. A couple of art market professionals and a collecting society set out details of the other factors

involved in choosing where to sell art, such as import tax, transit costs and the importance of local knowledge. Several responses said that resale right on the work of living artists had not meant work was diverted to other markets and that sales have increased in the UK as opposed to the US and Switzerland. There was a specific concern expressed that multiple consignments (where the consignment contains a mixture of works liable to resale right and works that are not), which currently come to the UK market, would be lost as all of the works would be subject to resale right.

Several responses from the art trade said that artists would also suffer if the derogation was allowed to lapse because dealers would be less likely to buy their work. However, responses in favour of artists often said that the art trade needed artists to make art and that resale right encourages creativity.

QUESTION 3: IN WHAT WAYS COULD THE UK'S ABILITY TO ADAPT GRADUALLY TO THE FULL INTRODUCTION OF RESALE RIGHTS BE IMPROVED BY MAINTAINING THE DEROGATION FOR TWO FURTHER YEARS?

Many of the responses from the art trade said that extending the derogation for a further two years would give more time to fully consider the impact of resale right on the UK art market and that it would be beneficial to see a copy of the Commission's report on the implementation and effect of the Directive due by 1 January 2009. However, some collecting societies suggested that the continued uncertainty was not good for the market.

The vast majority of the responses from the art trade set out how the introduction of resale right for the work of deceased artists would increase their administrative burden and argued that they need more time to adjust their businesses. Several of the responses provided estimates of the increase of administrative burden if the derogation were allowed to lapse. These were mainly based upon the potential increase in the number of works subject to resale right. The estimates of increase in the number of works subject to resale right included a 250% increase, a two-fold increase and a four-fold increase. Some of the art trade tried to set out how much it costs to administer resale right, again estimates varied but included £10,000 per annum, £40 per work and virtually nothing. Collecting Societies questioned the administrative burden suggesting that the cost of resale right administration was just £10 per quarter to most of art market professionals and that there were online calculators which reduced the administrative burden. It was also suggested that as the art market gets more used to resale right they will find it quicker to deal with and therefore the administrative burden will decrease.

A few of the art trade responses explained that they needed the two years to be able to train staff and to enable them to find out which works would be subject to resale right. However, some collecting societies said that they already held that information. Several of the collecting societies and rights holders' representatives, and a couple of responses from the art trade, said that neither collecting societies nor the art

market needed time to adjust and pointed out that by January 2010 resale right will have been in place for nearly four years anyway. It was also suggested that the worries that the art market have about adjusting their businesses could be addressed by communication on the applicability of resale right to deceased artists' work.

QUESTION 4: IN PARTICULAR, WHAT CHANGES COULD BE MADE DURING THE NEXT TWO YEARS TO IMPROVE THE UK ART MARKET'S ABILITY TO COPE WITH THE LAPSE OF THE DEROGATION IN 2012?

The responses in support of allowing the derogation to lapse said that no changes were needed in the two years. Collecting Societies said that their systems were already in place and that nothing additional would be gained in the two years.

The art trade set out many changes to resale right that could be undertaken in the next two years which would improve the regime. Many of the suggestions (such as compulsory registration, paying the royalty on only the increase in value of the work, calculating the royalty in sterling and making the derogation for deceased artists permanent) would require changes to EU law which would mean reopening the Directive negotiations. Other suggestions related to the UK implementation of the Directive such as increasing the threshold for resale right from €1,000 to the EU maximum of €3,000, and increasing transparency for collecting societies. The art trade and some representatives of artists also called for the UK Government to persuade the rest of the world to adopt resale right in order to reduce the affect of resale right on the EU's art trade.

There were other suggestions made which related to the administration of resale right. These included having one central and public database for resale right, requiring that collecting societies indemnify the art trade when the collecting society has failed to identify eligible artists before the sale and having just one collecting society for resale right. A few art galleries suggested that the systems were already working and no changes were needed in the two years. Collecting Societies for resale right said that many of the changes needed were already planned and that there was already a database on the Internet, although improvements to it could be made.

QUESTION 5: WHAT BENEFITS WOULD BE GAINED BY ALLOWING THE DEROGATION TO LAPSE IN 2010?

The vast majority of the responses from the art trade said that they could see no benefits whatsoever in allowing the derogation to lapse in 2010. Some admitted that it would benefit artists' estates, particularly those of famous artists who were often already wealthy, although this was disputed by many artists. The issue of the value of the resale right was raised by both artists and the art trade. The art trade said that the royalties paid out were often so small that they could not be significant to artists but many artists explained how even very small sums had made a difference to them.

Several responses from legal professionals and the art trade pointed out that the main beneficiary of allowing the derogation to lapse would be collecting societies. However both of the UK collecting societies for resale right which responded said they operated on a not for profit basis. It was suggested that there would be an increase in efficiencies for collecting societies because of the increased economy of scale and that this could be passed onto artists in the form of lower fees for administration. Also, the administrative burden per work for the art trade would decrease as more works would be subject to resale right and the art trade became more used to dealing with the right.

Several overseas collecting societies who responded said that allowing the derogation to lapse in 2010 would ensure that there was EU harmonisation in this matter, which may encourage other countries around the world to introduce resale right. Representatives of other rights holders said that allowing the derogation to lapse in 2010 would ensure that the term of resale right is brought into line with other types of copyright and show that artists are equally appreciated.

The major benefit, identified by all the artists and their successors, as well as a handful of galleries, was that artists' estates would benefit from the money provided by resale right. Some art galleries and artists' estates set out the costs that are often incurred by artists' estates in terms of storage and insurance of works as well as the

value they could add to work by providing detailed catalogues and identifying fakes. The responses from artists often contained extremely personal and sensitive explanations of their family situations explaining the hardship they and their families had endured during their lifetimes and the lack of stability due to their work. They explained how often they did not even earn the minimum wage, had no pension or holiday pay. They felt that in view of this their estates deserved reward in the form of resale right after their deaths. Or that they would like charities to benefit from resale right following their death.

A few artists explained how little they had received from art galleries and dealers when they had sold their work, partly because they were desperate to sell and partly due to the high commissions charged by the art trade. They felt that resale right helps to balance this. Many artists said that the thought of their estates benefiting from resale right would encourage them to be more creative during their lifetime. Several responses said that artists should be valued for the contribution they make to culture and the country generally.