

Response to the Consultation on the Proposed Regulations implementing the Directive on the Resale Right for the benefit of the Author of an Original Work of Art

This new right is due come into force from 1 January 2006

Introduction

1. In February 2005, the Patent Office and the Department of Trade and Industry published a consultation document inviting views on the proposed details of the implementation of Directive 2001/84/EC, introducing artists' resale right (commonly known as *droit de suite*) in the UK. This document reports on the responses received and sets out the Government's conclusions in the light of those responses.

2. A total of 140 responses were received from a wide variety of sources, including individuals, companies, professional and trade bodies, and other representative organisations. Some respondents chose to respond to all of the proposals, whereas others picked out one or more proposals of particular interest to them.

3. On 6 April 2005 the House of Commons Culture, Media and Sport Committee published its report into the Market for Art. This included a number of recommendations relating to the implementation of artists' resale right. Their report has also been considered when making our final decisions.

4. The responses raised a large number of issues, ranging from more general concerns to detailed points on the drafting of the Statutory Instrument. It is not possible for this summary to cover all of the many points which were made, and it therefore concentrates on the main issues which emerged and the Government's conclusions on these. However, careful consideration has been given to all comments that were received.

5. The introduction of resale right in the UK has been a controversial issue and the proposed changes to the draft Statutory Instrument are consistent with the Government's position that the risk of damage to the UK's art market must be minimised whilst implementing the Directive in a way which takes account of the needs of artists. A number of requirements within the Directive itself, namely the sliding scale of royalties and the cap on any one royalty payment, will provide significant protection to the UK art market.

6. It should be borne in mind that the Directive concerns matters on which there are strongly diverging views and interests, and that it is rarely, if ever, possible to find solutions which will satisfy everyone completely. The Government has sought to achieve fair and appropriate balances between the different interests on matters where the Directive leaves flexibility to member States, but otherwise is legally obliged to comply with the requirements of the Directive.

Summary

7. In summary, we have decided that resale royalties will be payable on sales of qualifying works where the sale price is €1,000 or more, with a sliding scale of rates starting at a 4% rate on the lowest band of the sale price. There will be an exemption for works purchased directly from the author and resold within three years for €10,000 or less. Sales of works by deceased authors will not attract resale royalty before 2010. Resale right will be subject to compulsory collective management with joint and several liability between the seller and an art market professional.

Summary of Responses and Conclusions

Article 1

Should resale right apply to works bought by galleries directly from the author and resold within 3 years and for €10, 000 or less?

8. The consultation document proposed that such sales should not attract resale royalties. The majority of respondents who commented on this proposal were in favour of it being retained. This will allow galleries to purchase works from new artists knowing that they will not have to pay any further to the artist if it is resold relatively quickly and for not more than €10,000. This should be sufficient to encourage galleries to continue to support new talent whilst providing protection for artists should their works increase considerably in value.

9. Resale royalties will not be payable on works purchased directly from the author and resold within three years and for €10,000 or less

Who should be liable to pay royalties?

10. Although this issue was not specifically raised in the consultation document a number of respondents commented on the proposal to make any art market professional involved in the sale jointly and severally liable for payment of the royalty. Several art dealers felt that this was unfair and that liability should remain solely with the seller. Alternatively a number of organisations representing artists felt that only by retaining this requirement could we achieve a high level of compliance at reasonable cost.

11. Many sellers are private individuals who use an art market professional to advise them, either by employing an agent, or using the services of an auction house or gallery, and may not be aware of the need to pay a royalty. If liability were to rest solely with the seller, collection of royalties would be extremely complicated as individuals and collecting societies would have to request information from the art market professional to enable them to track down the seller and demand payment. This would add considerably to the administrative costs of collecting royalties and would make collection extremely difficult and time consuming. Additionally, the request may be made some considerable time after the sale was completed, by which time it is possible that the seller has changed address, thereby further complicating the process.

12. On balance, we have decided to retain joint and several liability as this will result in high level of compliance and should not place an undue burden on the professional

involved, who will be able to make all sellers aware of this obligation from the outset and, if necessary, put in place agreements as to how the royalty is paid. We have amended the Regulations slightly to make only one of the professionals involved in a sale jointly liable with the seller. This is more consistent with the wording of Article 1.4 of the Directive.

13. There will be joint and several liability to pay resale royalty between an art market professional and the seller.

Article 2

Categories of works covered

14. Although this issue was not specifically raised in the consultation document we received a number of comments regarding the definition of eligible works in regulation 11. Some respondents felt that using the relevant parts of the definition of ‘work of art’ as provided in Section 4 of the Copyright, Designs and Patents Act 1988 would broaden the works which would attract royalty payments beyond what was intended by the Directive; whilst others felt that we may have restricted the definition unnecessarily. To avoid any uncertainty as to whether the UK law has the same scope as intended by the Directive we have replaced the original wording of regulation 11(1) with wording which closely follows Article 2(1) of the Directive.

Article 3

Should the threshold at which royalties become payable be set at €3,000?

15. We received a large number of comments on what would be an appropriate threshold at which to make resale right apply. There was a split in views with the majority of artists and their representatives requesting as low a threshold as possible and art market professionals and their representatives requesting a high threshold.

16. The lower threshold would clearly result in more sales being eligible for resale royalties and would provide payments to a greater number of artists. The additional artists who would benefit are likely to be the poorer artists, early in their career. We also received submissions from representational groups who were of the view that having a €3,000 threshold would exclude some forms of art, such as photography, entirely as these works never achieved high values.

17. A number of artists requested the higher threshold, although their reasons for supporting this were not set out. One group representing artists said that they did not believe a lower threshold would benefit artists, and that the administrative burden in collecting such royalties would outweigh the benefit to the artist in receiving the small royalty payment.

18. If a minimum threshold of €1,000 were set the royalty to be paid would be €40, any commission paid to a collecting society to recover their costs would then need to be deducted. This would result in the artist receiving at least €30 for the sale. We received detailed evidence setting out the estimated costs of administration for resale

right. These estimated that, provided collective management was made compulsory, total administration cost to business would be minimal, and considerably less than previously stated, as the majority of the administration would be carried out by the collecting society and would be covered by their commission charges.

19. We have also considered the report of the Culture, Media and Sport Committee which recommended a threshold of €1,000 and stated ‘We are not intrinsically opposed to the introduction of artist’s resale right into UK law, though we do not believe it should benefit solely the richest artists’.

20. On balance the evidence shows that resale right can be administered efficiently and that costs to business can be kept very low by adopting compulsory management. Adopting a lower threshold would support new artists and would not increase the risk of diversion of sales from the UK.

21. The threshold at which resale right will become payable will be €1,000
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Article 4

What should the royalty rate be on the lowest price band?

22. In the consultation document we proposed applying the 4% rate to the lowest price band, rather than the optional 5% allowed by the Directive. We received several comments on this issue. A number of artists and their representative favoured the higher rate, as this would increase the royalties they received, whilst art dealers favoured maintaining the 4% rate.

23. Raising the rate on the lowest price band would increase the royalties paid on a large number of works and would lower the sale price at which the maximum royalty of €2,500 would become payable. As we are concerned about the impact it may have on the art market regarding higher priced works, which may be at risk of diversion, and wish to minimise any adverse effects on the art market, we do not consider it wise to effectively lower the price of works which attract the maximum royalty.

24. The royalty rate for the lowest price band will be set at 4%
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Article 6

Should we provide optional or compulsory collective management of resale royalties?

25. We received 94 written comments on this issue. There was a split in views on this issue, with 50 respondents being in favour and 44 being against the use of compulsory collective management.

26. A number of respondents who objected to the adoption of compulsory collective management expressed the view that it would be wrong for the Government to award a single body a monopoly to manage the right; however, this would not be the case. No single agency would be permitted to manage the right to the exclusion of all others

and there would be no laws preventing agencies setting up in competition with those currently existing. It is true that the benefits would be reduced if a large number of agencies were created but a small number of agencies could co-exist without the benefits of collective management being lost.

27. Although one gallery commented that they had strong ties with the artists whose works they sold and would prefer to be able to make payments directly, many art dealers preferred compulsory collective management as this was seen as the most efficient and cost effective method of management, which would minimise their own administration costs. In particular, a number of smaller businesses were especially keen to see collective management made compulsory. It is also considered that the adoption of a compulsory collective management system would allow sellers to retain a certain degree of anonymity, as only limited details would need to be passed to a restricted group of people to allow payments to be made.

28. A small number of artists (6) said they wished to retain the freedom to choose how their rights were managed. The adoption of compulsory collective management would prevent artists managing their own rights, although they would be able to choose which collecting society managed their rights, should a number of agencies offer this service. However, the majority of artists, and their representative groups, expressed a strong preference for compulsory collective management, pointing out that they felt this would be the most efficient and reliable method of ensuring artists received their royalties.

29. It appears unlikely that many artists would choose to manage their rights themselves. It would be difficult for an individual artist to know when one of their works had been sold and although some galleries may have strong ties with artists this would seem to be the exception rather than the norm, especially regarding works which are being resold many times where any connection with the artists at the first sale is likely to be lost, as the work is likely to be resold through a different agent, possibly many years after the first sale. Therefore, far greater compliance will be achieved if the right is always managed collectively. This will also be of greater importance once the right is applied to the works of deceased artists as it will not be possible for dealers to trace heirs and less likely that they will have any ties to the galleries or auction houses.

30. We received responses from several European collecting societies, all of whom said that in their countries the right already exists and is managed effectively by collective management. They are able to operate efficiently, even when dealing with very small amounts of royalties.

31. Evidence provided during the consultation showed that royalties could be collected efficiently, even on very small amounts, if compulsory collective management was adopted. Figures indicated that costs to business could be as low as £10 per quarter to maintain the systems plus less than £1 per transaction, with all further costs being absorbed by the collecting society. Recently commissioned independent research⁽¹⁾ considered these figures plausible and other studies⁽²⁾ available have also concluded that compulsory collective management reduces the cost of administration.

32. We also considered the recommendation of the Select Committee which was that a system of compulsory collective administration should be adopted. The Select Committee stated that ‘this is the preferred model throughout Europe, is relatively efficient and better secures compliance’.

33. Therefore, on balance, we have decided to adopt a system of compulsory collective management.

34. A system requiring compulsory collective management will be adopted.

Article 7

Should we allow authors who are non-EU nationals but are habitually resident within the UK to enjoy resale right?

35. We received a reasonable number of comments on this issue. The majority were not in favour of extending the right to cover non-EU nationals who are habitually resident within the UK. (EEA nationals are of course to be treated the same as EU nationals.)

36. The main reason cited for not extending the right was that this would add an unnecessary complexity to the system, as it would be more difficult to determine whether an author was habitually resident than to determine nationality.

37. There were also comments relating to whether it was fair to offer such a right to nationals of third countries whose home countries do not provide such a right for either their own or EU nationals. Some organisations representing artists also commented that the principle of reciprocity may be valuable in encouraging countries which don’t have resale right to introduce it.

38. We have therefore decided not to include non-EEA nationals who are habitually resident in the UK.

39. Resale right will only be available to EEA nationals and nationals of countries offering reciprocity for EEA nationals.

Article 8

Should we use the derogation for works by deceased authors?

40. The consultation document set out our reasons for using the derogation to not apply resale right to the works of deceased artists until 2010. We have received a number of comments on this proposal. All representatives from the art trade who commented on this issue maintained that it was of great importance that we use this derogation. However, a number of representatives of artists and their heirs expressed the view that it was unfair to impose such a delay.

41. On balance we have decided to maintain this position. The market for works of deceased authors is extremely important and the introduction of resale right will be a

major change for the UK art market. It is important that we allow sufficient time for the market to make adjustments and to monitor the effect of the new regulations.

42. We will monitor the effects of resale right on the UK market and determine whether it is necessary for the UK to extend this derogation to 2012 as provided by Article 8(3).

43. Resale royalties will therefore not be payable on works of deceased authors until 2010.

Jurisdiction

44. A number of respondents expressed concerns about the manner in which we had defined a sale which would be considered to have taken place within the UK. Many representatives of the art market were concerned that the suggested drafting would require them to pay royalties on sales made entirely outside the EU, for example through a subsidiary branch or at an art fair in Switzerland.

45. We accept that the original drafting may have been too wide for our intended purpose (although it is certainly not the case that sales through a branch established outside the UK would have been covered). In particular, we accept the point that, as an intellectual property right, resale right under UK law should not extend beyond the territory of the United Kingdom. After further discussions, we have decided that there is no simple satisfactory way of defining in the Regulations which transactions should be covered. It will therefore be for the courts to decide the application of resale right in cross-border situations, having regard to the nature of the right and the purpose of the Directive.

Review mechanism

46. As resale right is an entirely new concept in UK law, and the UK has such a strong art market, we feel it is appropriate to carefully monitor its effects over the first three years following its introduction. We have already commissioned an independent study⁽³⁾ into the UK market and the likely impact of resale right. This study has been used to inform the decision making process and also to provide a baseline against which future data may be compared. We will commission further research to determine the true impact of resale right once the right has been in place for a number of years. This will provide us with information to feed into the Commission's review of the Directive, scheduled for 2009.

Artist's Resale Right – Response to Consultation Drafting points on the proposed Artist's Resale Right Regulations 2005

In the following, we note the most important changes in the drafting of the Regulations, as compared with the version of the Regulations contained in the Consultation, and indicate where changes were a response to comments made in the Consultation. (In some cases changes were made that are simple drafting improvements, or were made in response to comments from other Government departments or devolved administrations.)

Regulation 2 (interpretation)

Definition of "author": this is now given directly, rather than by cross-reference to the Copyright, Designs and Patents Act 1988.

Definition of "EEA State": the same comment applies.

Regulation 3 (artist's resale right)

The provisions (previously regulation 3(6)) covering the case where the artist is not the first owner of the work were criticised by several consultees. Since they appear to have given rise to misunderstanding, they have now been omitted. They are in any event unnecessary, as it already follows from regulation 3(1) that a resale must follow an initial transfer of ownership by the author.

One consultee suggested that a "first transfer" by the artist should include the case of physical transfer e.g. from the artist's studio. Such an interpretation of Article 1.1 of the Directive seems clearly untenable; but the fact that it was put forward suggests that it is necessary to retain the wording "transfer *of ownership*" in regulation 3(1).

Regulation 4 (works covered) ⁽⁴⁾

In response to strong views expressed by several consultees, the definition of "work" now follows much more closely the wording in Article 2.1 of the Directive. Although this arguably results in a reduction in legal certainty, it at least ensures that we do not "gold plate" our implementation by covering a wider range of works than those envisaged by the Directive. However, it should be noted that the definition is not an exhaustive one, and accordingly that the sale e.g. of original pieces of jewellery and furniture is not necessarily excluded from the scope of resale right.

Regulation 5 ⁽⁵⁾

The definition of "joint authorship" no longer follows the definition in section 10 of the **Copyright, Designs and Patents Act 1988**. The latter definition is appropriate for joint ownership of copyright. However, two or more authors may have distinct copyrights in the same physical work that is resold. In that case also, it is appropriate for the authors to be treated as joint authors who each hold part only of a single resale right.

Regulation 7 (assignment etc.), and regulation 8 (waiver etc.) ⁽⁶⁾

The drafting has been simplified. For instance (as suggested by one consultee) it does not seem necessary to exclude both assignments and agreements to assign. Although another consultee suggested that it was necessary to deal expressly with agreements to assign, in order to prevent equitable assignments, the better view appears to be that an unassignable right cannot be assigned in equity either.

Contrary to one suggestion made, the expression "inalienable" has not been used, as it seemed better to spell out the consequences in UK law of the principle that the resale right is inalienable. The Directive, in various places, characterises resale right as one

which is "inalienable", "unassignable" and "cannot be waived", and the relationship between those three overlapping concepts is not immediately transparent.

The definition of "qualifying body" (i.e. charity) has been improved, in particular to cater for the position under Scots law.

Regulation 10 (nationality etc.) ⁽⁷⁾

Express provision is made for the case where resale right vests in a trustee in bankruptcy. One consultee suggested that resale right might be excluded, as a "compassionate allowance", from the estate of a bankrupt artist. However, it seems preferable to allow resale right to vest in the trustee in bankruptcy, in order that debts already incurred by the artist may be paid on that artist's behalf. That does not appear to be inconsistent with the principle that resale right should be retained for the benefit of the artist.

Regulation 11 (trusts) ⁽⁸⁾

Fuller provision is made enabling resale right to be held on trust and transferred to and from a trustee.

Regulation 12 ("resale") ⁽⁹⁾

No attempt is any longer made to define the territorial scope of the transactions covered by resale right.

Regulation 13 ("liability") ⁽¹⁰⁾

As a result of a closer analysis of Article 4.1 of the Directive, at most one art-market professional has now been made jointly and severally liable with the seller.

Regulation 14 (collective management) ⁽¹¹⁾

This now makes collective management compulsory.

Regulation 15 (right to information) ⁽¹²⁾

In response to comments by several consultees, the time-limit for a response to a request for information has been extended to 90 days.

Regulation 16 (transitional provisions) ⁽¹³⁾

The drafting has been clarified.

The reference to the predecessors of successor States has been omitted as unnecessary, since it is considered that such a reference will in any event be implied.

Regulation 17 (sales before 1st January 2006) ⁽¹⁴⁾

For the sake of transparency, the provisions regarding the sale of works of deceased artists have now been brought together in a separate regulation.

Schedule 2

The list of third countries has now been included, based on a provisional list drawn up informally by the Commission. This may need to be amended in due course when the Commission publishes its "indicative list" under Article 7.2.

¹ Scoping Study: Artist's Resale Right (IP Institute, Dr Kathryn Graddy and Professor Stefan Szymanski)

² See also Study of the Potential Impact of Droit de Suite on the UK Art Market (Gerard Leeuwenburgh, MSc)

³ Scoping Study: Artist's Resale Right (IP Institute, Dr Kathryn Graddy and Professor Stefan Szymanski)

⁴ Previously regulation 11.

⁵ Previously regulation 4.

⁶ Previously regulations 6 and 7.

⁷ Previously regulation 9.

⁸ Previously regulation 9(5)(a).

⁹ Previously regulation 10.

¹⁰ Previously regulation 12.

¹¹ Previously regulation 9.

¹² Previously regulation 9(5)(a).

¹³ Previously regulation 10.

¹⁴ Previously regulation 12.