



The Canadian Visual Artists and their Remuneration in Relation to the Revision of the Copyright Act.

**Submission to the Standing Committee on Canadian Heritage
for the Statutory Review of the Copyright Act**

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Introduction

CARCC – Copyright Visual Arts was founded in 1990 to assist artists in managing their copyright. Copyright Visual Arts provides services to the members of the collective, representing nearly 1000 Canadian visual artists. These services include the negotiation of terms and the licensing of copyright use, collecting the royalties, and paying the artists. We are the only Canadian copyright collective run by visual artists, for visual artists. We have nearly 30 years of experience administering royalties for the exhibition and reproduction of visual artists' work, and we aim to be the primary copyright collective that eventually administers the Artist's Resale Right when it is legislated in Canada. We license the use of copyright for our artist members or their estates, in Canada and abroad. We have representation agreements with about fifteen foreign management companies.

In this submission, Copyright Visual Arts requests that the Committee consider in priority three measures related to the revision of the Copyright Act which would have a major impact on the establishment of a sustainable remuneration system for artists in our field. Subsequently, we will briefly share with you a set of other measures to ensure the economic health of the fundamental players in our cultural industry: the Artists.

1. Three measures related to the revision of the Copyright Act

i. LIMITATIONS TO THE FAIR DEALING EXCEPTION FOR EDUCATION

The 2012 amendments to the Act introduced the education exemption under Fair Dealing. The issue, however, is that the Act does not specifically define the scope of this exemption. While legal precedents are only beginning to emerge on the interpretation of what is “fair”, many universities and other educational institutions have resorted to establishing their own Fair Dealing Guidelines that set out arbitrary and self-defined amounts they consider to be fair dealing, and claim to provide reasonable safeguards for owners of copyright-protected works.¹ For example, University of Toronto’s Fair Dealing Guidelines state that a “short excerpt from a copyright-protected work may be provided or communicated to each student enrolled in a class or course”, and “defines a short excerpt to include “an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works.”²

These policies were developed without consultation with the creative industries, and the adoption of such policies have led to a decline in collective licensing between Canadian educational institutions and Access Copyright. As a result, artworks in publications are copied for use in schools, but licenses for such use are no longer being renewed under

¹ For example, see Universities Canada’s Fair Dealing Guidelines: <https://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>.

² University of Toronto. (2012). Copyright Fair Dealing Guidelines. Retrieved from <https://provost.utoronto.ca/wp-content/uploads/sites/155/2018/06/Copyright-Guidelines.pdf>.

the guise of Fair Dealing. It is clear from data gathered since 2012 that implications of the education exemption have had a negative economic impact on Canadian artists. Between 2013 and 2017, payback royalties made to visual artists from Access Copyright declined from \$573,395.16 in 2013 to \$193,585.43 in 2017, amounting to a significant 66% decrease.

Copyright Visual Arts supports and understands the importance of artistic content being made available for educational purposes, but a balance between user and creator rights should be maintained, and the education exception should not apply when it is possible to license work that is commercially available from a copyright collective or rightsholder. In this sense, the Canadian model is not on par with international legal models that support this balance. Many of those models have express collective licensing schemes with the educational sector that allow collecting societies to represent and negotiate licenses on behalf of relevant rights holders of a particular category of works as a default, while maintaining the right for rights holders to opt out of such agreements.

Under the United Kingdom (UK) model, for example, fair dealing does not apply for copying in education when a license is offered by the rights holders or the Reproduction Rights Organization (RRO). This model encourages market-based solutions to the licensing of works, while ensuring that users have access to the widest possible variety of works for educational purposes. The UK also introduced Extended Collective Licensing (ECL) in 2014. Under this scheme, RROs negotiate agreements on behalf of their members, as well as non-members, because ECL allows RROs to enter into agreements on behalf of all rights holders of the category the collecting society represents. As such, non-members will also receive individual remuneration (i.e. royalty payments) as if they were a full member of a collecting society, unless they opt-out of the agreement from the RRO. The UK has introduced a general and flexible right for collecting societies to operate extended collective licenses for many different purposes, as long as they can prove to government that they are sufficiently representative of the sector they operate in.

Copyright Visual Arts believes that licensing must be allowed to develop and flourish in the education sector to ensure that artists' livelihoods are not at stake, and that content can continue to be created.

Copyright Visual Arts recommends that the Act be amended to adopt a model for education exemptions under Fair Dealing that is similar to that in the United Kingdom.

ii. INTRODUCTION OF THE ARTIST'S RESALE RIGHT

For several years, visual artists have advocated for the ARR, which was significantly discussed during consultations for the 2012 amendments to the Act, but it was unfortunately not adopted. Copyright Visual Arts recommends that this missed opportunity not be repeated, and that the Act be amended to include an ARR where 5% of all eligible secondary sales of artwork sold for at least \$1,000 be paid to the artist, and that it be managed and paid through a copyright collecting society, for administrative simplicity.

The ARR entitles visual artists to receive payment each time their work is resold publicly through an auction house or a commercial gallery. This allows visual artists to share in the ongoing profits made from their work. It is common for

art to gain economic value over time, as the reputation of the artist grows, yet Canadian artists do not currently share in those profits.

In 2010, the average earnings of a visual artist were \$24,672, approximately half of the typical Canadian worker (\$48,100), and lower than the average earnings of artists of all disciplines (\$32,770).³ ARR royalties thus offers significant income potential for Canadian visual artists to make a sustainable living income based on the value of their own work, in a way that is not reliant on public funding availability.

The ARR was introduced in France in 1920, and now exists in at least 93 other countries worldwide, including all members of the European Union, with the US, China, and Korea considering its adoption. The fact that Canada does not recognize the ARR is seen as a trade barrier for Canada in the international art market and there is a clear movement to make ARR mandatory internationally. The World Intellectual Property Organization (WIPO) is considering making international adoption of legislation a requirement.

Until its introduction in Canadian law, according to the principle of reciprocity established between the member countries of the Berne Convention, Canadian artists will not be able to receive royalty royalties if their works are resold in the countries where it exists.

The ARR has benefited many artists internationally. In the UK for example, the Design and Artists Copyright Society (DACS) has distributed over £65 million to more than 5,000 artists and artists' estates, and in 2017 alone, DACS distributed £10 million to 1,800 artists.⁴ Thousands of Canadian artists could similarly have a competitive advantage when it comes to generating income for themselves through their arts practice, with less reliance on other sources of income, including other projects or forms of employment.

Furthermore, while all Canadian visual artists have the potential to benefit from an ARR, Indigenous artists may have the most to gain. The visual art market is a particularly significant economic driver in Nunavut, where works by Inuit artists are exploited by commercial resale markets at dramatic increases in value, and artists are losing out on profits being made on their work. A notable example is the case of Inuit artist Kenojuak Ashevak, who sold her piece *Enchanted Owl* in 1960 for \$24. In 2001, it was resold at an auction for \$58,650, and Ashevak received nothing from the resale of her work.⁵ Looking to international examples in this realm, the ARR has had a tremendous impact on Indigenous artists in Australia. The Copyright Agency reports that the scheme has generated more than \$6.3 million for more than 1,600 artists since its adoption in 2010. Notably, over 64% of the artists receiving royalties are Aboriginal or Torres Strait Islander artists; and of the 50 artists who have received most money under the scheme, 22 are Aboriginal or Torres Strait Islander.⁶

Additionally, the ARR will also increase income security for Canada's senior artists. Research shows that senior visual artists (over 65) have median arts earnings of about \$5,000, which is the lowest of any artistic discipline, and that 32%

³ Hill Strategies. October 2014. "A Statistical Profile of Artists and Cultural Workers in Canada Based on the 2011 National Household Survey and the Labour Force Survey". *Statistical Insights on the Arts* 12:2. (Canada Council for the Arts, Department of Canadian Heritage, and Ontario Arts Council).

⁴ DACS. "Annual Review 2017." Retrieved from https://www.dacs.org.uk/DACSO/media/DACSImages/news_events/DACS-Annual-Review-2017.pdf.

⁵ CARFAC. August 2017. "CARFAC/RAAV 2018 Pre-budget Submission." Retrieved from <http://www.carfac.ca/news/2017/08/23/carfacraav-2018-pre-budget-submission/>.

⁶ Copyright Agency. July 2018. "Resale Royalty." Retrieved from <https://www.resaleroyalty.org.au/Default.aspx>.

of elder artists are at a high financial risk.⁷ Even established, Governor General Award winning, artists find it difficult, if not impossible, to make a living from their art. Research from countries where ARR has been adopted shows that much of the royalties collected go to senior artists, providing them with greater financial independence.

Advocacy and support for an ARR in Canada have been strong despite its missed opportunity for adoption in the Act in 2012. A bill was presented by Scott Simms in 2013, which unfortunately did not pass before the election. However, MPs and senators from all parties have expressed support for it.

ARR administration

An important question often comes up when we consider the introduction of the ARR in the Canadian legislation on Copyright: "But how will this new right be administered? ". It is proposed that the administration of the ARR in Canada be handled through mandatory collective management, and that reporting enforcement measures be put in place. In many countries where the ARR is in place, it is required by law that an artist collects the ARR through a copyright collecting society, and that Art Market Professionals (AMPs), such as commercial art galleries or auction houses, report on all sales through that society. The facilitation of the program through collective management would allow for cost efficiency and effectiveness in the process. It is easier to maintain a registered database of artists and art market professionals if such a system is in place, and it is more efficient for dealers to report sales and turnover to collecting societies rather than individual artists.

The process will be simplified, thanks to Copyright Visual Arts' new digital platform, which is scheduled to be launched in March 2019. This transactional platform will enable the online management of various types of licenses for the use of artistic works, and it ensures that ARR collection will be managed efficiently and transparently. AMPs will be able to register online, enter a sales report in a simple form which calculates the fee to be paid to the artists, and processes the payment. This online transaction will be done in minutes for each work sold. Artists will also be invited to register online with Copyright Visual Arts. The royalties collected on their behalf will then be remitted by cheque or direct deposit into their bank account. A small administrative fee will be retained by the collective society, as is done in other countries.

To ensure transparency, each transaction will be recorded in the seller's account and in the personal account of the artist. The seller and the artist can then consult their respective private account by connecting to the platform.

This way of doing things appears to us the simplest and most transparent because it makes the most of the capacities offered by digital tools. Copyright Visual Arts aims to keep itself at the cutting edge of digital technologies available to benefit both users of artistic works, including secondary market sellers, and the rightsholders.

Copyright Visual Arts therefore recommends including the Artist's Resale Right in the Copyright Act as it was proposed by Mr Scott Simms' bill in 2013.

⁷ Hill Strategies. February 2010. "At Risk Senior Artists." (Senior Artist Research Project) at 2.

iii. DISCRIMINATION AGAINST SENIOR ARTISTS IN THE COPYRIGHT ACT

The Act includes an Exhibition Right that allows artists to require payment for the exhibition of their works if the purpose of the exhibition is not the sale or hire of the works exhibited. However, public museums and galleries are currently not legally required to pay fees to artists if their work was made before June 8, 1988, the date in which the right was enacted. Although it was argued that this minimizes the financial impact that the Exhibition Right could have, particularly for works in museum collections, the date limitation in this provision has in fact led to discrimination against senior artists and the estates of deceased artists. Some museums choose to pay artists for earlier works, but without a legal guarantee, senior artists are not always paid when their work is exhibited. There are arguments that this discrimination could be a Charter issue.

Copyright Visual Arts recommends that the 1988 date be dropped, and the Exhibition Right be extended to include all works subject to copyright. This recommendation was put forward for amendment to the Act in 2012, but it was not implemented. We stand by this recommendation.

2- Supplementary Measures to Improve the Remuneration of Artists

When we speak about a better system of remuneration for artists in order to improve their socio economic conditions, there are diverse proposals to be made.

We will not discuss them today because they somewhat go beyond the scope of the Committee's work as we understand it but we think it is worthwhile to mention them to demonstrate that there is still much work to do beyond bringing the necessary aforementioned adjustments to the Copyright act.

Copyright Visual Arts and its partners, CARFAC and RAAV, will be happy to discuss them with representatives of the Department of Canadian Heritage in another forum.

2.1 Inclusion of Artistic Works in a Renewed Private Copy Regime

Copyright Visual Arts considers that the private copying regime should be renewed and that it should include all types of works, and among them artistic works. The trade in digital copying tools has had a major impact on all cultural industries without the creators really benefiting from it. Their works are copied at will without their users contributing to the vitality of artistic creation in Canada. Like France among others, it is essential for Canada to modernize its private copying regime to ensure that a minimum royalty is charged on the sale of any digital copying device, from smart phones to tablets, computers to TV program recorders, USB keys to external memory drives.

2.2 Extension of the Duration of Copyright up to 70 Years after the Death of an Artist.

As in many countries around the world, we think that the Committee should extend the term of protection of artistic works to 70 years.

2.3 Establishment of a Pan-Canadian Collective Bargaining System

Copyright Visual Arts considers important that the Status of the Artist Act applies to any organization or institutions receiving federal government funding in order to allow the collective bargaining of scale agreements that promote better compensation for Canadian creators through the establishment of mandatory minimum royalties for the use of their works.

2.4 Withdrawal of GST on Sales of Original Canadian Works in the Primary Market

2.5 Establishment of a Tax Credit on Copyright Royalties comparable to that of Quebec

2.6 Establishment of a National 1% Policy for the Commission of Public Art Works inspired by that of Québec

2.7 Establishment of a Supplementary Pension Plan for Artists

Conclusion

An appropriate system of remuneration for Canadian visual artists can only be achieved by observing the entire artistic practice and the various ways of deriving a decent income. The proposed additions or corrections to the Copyright Act will make a strong contribution to this, as will the related measures that are important to mention for further discussion.

In closing, we ask that the CHPC committee work in concerted effort with the INDU committee to make the following changes to the Copyright Act:

- 1) That the Act be amended to adopt a model for education exemptions under Fair Dealing that is similar to that in other countries, such as the United Kingdom;
- 2) That the Act be amended to include the Artist's Resale Right;
- 3) That the Act be amended so that the Exhibition Right be extended to include all works subject to the term of copyright, including works made before June 7, 1988.

We also ask that the committee consider additional proposals which would improve the socio-economic conditions of visual artists.