Artist resale royalties: the debate resumes

By Louisa Gommans

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Corporate and commercial lawyers may be interested in the heated debate that has resumed in recent months about whether or not artists should receive royalties from second and subsequent resales of their artworks in the secondary market.

The topic was deliberated in 2007, with a discussion paper prepared by the Ministry for Culture and Heritage. However since then there has been no movement to enact legislation to make artist resale royalties a reality.

Depot Artspace, a community based arts centre in Auckland, has awoken the debate with an exhibition entitled "Pre-Loved Re-Loved" which ran throughout February. The exhibition promised that for all sales of over $1,000 the artist would receive 5%, and an accompanying publication championed the adoption of an artist resale royalty scheme.

Overseas experience

Artist resale royalties, also known as "droit de suite" and "artist resale rights", were first introduced in France in 1920. They arose out of necessity when countless artists were living in poverty while dealers sold their works for often hefty prices.

Since then, the idea that artists should continue to see some financial benefit when their artworks resell has spread to more than 50 countries around the world.

In 2001 the European Union issued a directive requiring all member states to implement artist resale royalty legislation into domestic law by 2006. The United Kingdom has had an Artist Resale Right scheme in place since then, which operates a sliding scale of the percentage received by the artist relative to the sale price of the artwork. Australia enacted the controversial Resale Royalty Rights Act in 2010. This scheme applies to living artists and continues for 70 years after their death, though only for artworks which sell for more than $1,000. Although currently under review, approximately AU$2,000,000 in royalties have been collected since the scheme's inception.

Royalty legislation

The 2007 Ministry for Culture and Heritage discussion paper proposed the creation of an inalienable right of the artist to 5% royalties on all resales.

This was seen as increasingly worth considering given the steady growth of New Zealand's secondary art market. It was suggested that resale royalties would apply to all intermediary sellers operating in the art market, regardless of whether the artist had retained copyright in the artwork.

The discussion paper proposed that a natural fit for the royalty legislation would be within the Copyright Act 1994. The ministry's website records that of 200 submissions received from interested parties, most favoured an artist resale right.

As the Depot Artspace literature describes, artists' resale royalties are popular among many visual artists. The royalties would offer additional income throughout an artist's life and in many situations would continue to generate income for the estates of deceased artists.

Supporters point to the fact that a number of others forms of copyright work involve retained ownership rights that generate royalties for a number of years, but that visual artists seldom enjoy the same benefits.

However, opponents have identified the potential administrative nightmare that would come from introducing a resale royalty scheme in New Zealand.

In Australia royalties are collected by the Copyright Agency unless otherwise specified by the artist. Large auctions houses, including Christies London, have expressed concern about the effect of the scheme on art sales, especially in relation to high value artworks.

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Some have suggested that it might drive art purchasers to countries where the market is not encumbered by resale royalty legislation. Others have felt an impact on their profit margins by choosing to absorb the royalty costs rather than pass them on to purchasers.

Some artists have even voiced concern that a resale royalty scheme stands to benefit artists who are already successful rather than emerging artists, identifying that a large number of artists produce artworks which do not reach the secondary art market.

What is clear is that there is no straightforward divide between the supporters and opponents of artist resale royalties.

Implications for lawyers

A legislative change introducing artist resale royalties in New Zealand will be of particular interest to lawyers practising in the commercial and corporate sectors, and is likely to create new areas of work.

A resale royalty scheme will have implications in terms of tax paid by both artists (or their estates) and secondary sellers. In the case of deceased artists, there will be ongoing work for the management of estates dealing with any income generated by the royalties.

Art dealers and galleries may look to amend their contracts and terms and conditions, to strengthen provisions relating to the way royalty fees are paid. With these possibilities in mind, we will watch with anticipation the progress of this debate in the coming months.

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