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Artists' resale royalty right: what it means for the art trade

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More information

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This information sheet is for people and companies in the business of dealing in artworks, including commercial galleries, auction houses, art dealers, operators of online art auctions and people in the business of selling artworks online. It is also for bodies such as public galleries and museums that sell artworks that they have acquired through purchase, gift or bequest.

This information sheet is for guidance only. It is not legal advice.

The artists' resale royalty right

Under the *Resale Royalty Right for Visual Artists Act 2009* (the Act), artists and their beneficiaries are entitled to a 5% royalty on the resale price for certain resales of their work.

There is information about the background to the resale royalty, and a link to the Act, on the website of the Department of the Environment, Water, Heritage and the Arts at www.arts.gov.au/resale_royalty.

The government has engaged Copyright Agency Limited (CAL) to collect and distribute artists' resale royalties.

The Act imposes legal obligations on 'art market professionals', who include auctioneers, art dealers, art galleries, museums and others involved in the business of dealing in artworks.

Art market professionals are obliged to:

- provide certain information to CAL; and
- ensure, together with the buyer and seller, that royalties are paid to CAL to on-pay to artists and their beneficiaries.

Art market professionals are also indirectly affected by their clients' obligations to provide information and to ensure royalties are paid.

Background to the resale royalty right

The Act implemented an election promise in the government's 2007 arts policy. The government's reasons for the policy are:

The introduction of a resale royalty scheme will allow visual artists to share in the commercialisation of their work in the secondary art market. This will benefit visual artists who derive their main creative income from the initial sale of original works. These artists do not have the same range of opportunities as other creators such as writers and composers to earn money through licensing reproductions, public performances or broadcasting their work.

Many other countries have resale royalty legislation, including all members of the European Union.

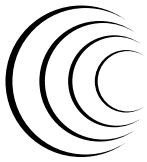
Which resales?

The obligations to provide information apply to *all* commercial resales after 8 June 2010, whether or not a royalty is payable on the resale.

What is a 'commercial resale'?

A commercial resale is a transfer of ownership that is:

- made for money;
- involves an art market professional (such as a gallery operator, auctioneer or dealer); and
- not the first transfer of ownership.



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The first transfer of ownership:

- may not have been for money (it could have been a gift or an inheritance);
- could have been before 9 June 2010; and
- could have taken place outside Australia.

For example, if a person inherited a painting on 9 June 2009 and sold it on 9 June 2010, that is a commercial resale.

On the other hand, if a person purchased a painting from a commercial gallery and sold it to a friend, as a private sale, on 9 June 2010, that is not a commercial resale.

Which commercial resales require payment of a royalty?

A royalty is payable on a commercial resale if:

- the sale price is \$1,000 or more;
- the artist is:
 - alive; or
 - has been dead for fewer than 70 years;
- the artist, or beneficiary of the artist's estate, is:
 - Australian; or
 - from another country with resale royalty legislation that is listed in the regulations to the Act;
- it is not the first transfer of ownership after 8 June 2010; and
- the sale is covered by Australian law (for example, it takes place in Australia).

The first transfer of ownership after 8 June 2010 (on which a royalty is not payable) could be the first sale by the artist, a gift, an inheritance or a resale.

The sale price includes GST, but excludes any buyer's premium or other taxes.

No countries have yet been listed in the regulations. This will occur after CAL has established reciprocal arrangements with other countries such as the UK, France and Germany. CAL will publish the countries listed in the regulations on its soon to be launched resale royalty website (www.resaleroyalty.org.au), and provide information about where to find the regulations on the government's ComLaw website.

Which artworks?

To be covered by the Act, an artwork must be:

- created by the artist; or
- produced under the authority of the artist.

The types of artworks covered include batiks, carvings, ceramics, collages, digital artworks, drawings, engravings, fine art jewellery, glassware, installations, lithographs, multimedia artworks, paintings, photographs, pictures, prints, sculptures, tapestries, video artworks and weavings.

Manuscripts are excluded.

Limited editions are covered, provided each copy is authorised by the artist. These will include limited edition prints (such as etchings and linocuts), photographs and sculptures.

Mass-produced items, such as posters, are excluded.

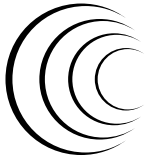
Art market professionals' obligations

Providing information

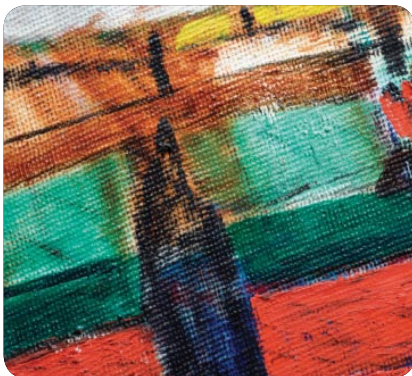
If CAL believes, on reasonable grounds, that an art market professional has been involved in a commercial resale, then the art market professional is required, by the Act, to give CAL information to help CAL work out:

- the amount of the resale royalty (if any) payable on a commercial resale; and
- who is liable to make the payment.

The art market professional must provide the information within 90 days of the request.



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Information relevant to working out the amount of the royalty (if any) includes:

- the sale price; and
- when and how the seller acquired the artwork.

Information relevant to working out who is liable could include the identity of the buyer and/or seller. CAL envisages, however, that art market professionals will usually collect royalties from buyers or sellers to on-pay to CAL, and the circumstances in which CAL would seek information about the identity of a buyer or seller would be rare.

In addition to their legal obligation to provide information in response to a request from CAL, art market professionals may also choose to provide CAL with the information that sellers are required to provide (see below under *Sellers' obligations*).

Ensuring payment

Art market professionals, such as commercial galleries, auction houses and art dealers, have a legal obligation to ensure that royalties are paid. CAL can take legal action against the seller, the buyer, the art market professional or all three to recover the royalty.

Sellers' obligations

Providing information

Sellers are obliged by the Act to give CAL certain information about commercial resales, in writing, within 90 days of the resale. That information can be given to CAL, on the seller's behalf, by the art market professional.

The information must enable CAL to work out:

- whether a royalty is payable on the resale;
- the amount of the royalty; and
- who is liable to pay the royalty.

The obligation to notify CAL of a resale applies even if:

- it is the first resale after 8 June 2010;
- the sale price is less than \$1,000;
- the artist is not Australian or from an eligible foreign country; and/or
- the artist has been dead for more than 70 years.

CAL envisages that in most cases art market professionals will pay the royalty to CAL on behalf of their clients, in which case CAL will not need information about the identity of the buyer and the seller.

Sellers also have the same obligation as art market professionals to respond, within 90 days, to a request for information from CAL.

Ensuring payment

Sellers have the same obligation as art market professionals (set out above) to ensure that the royalty is paid.

Buyers' obligations

Providing information

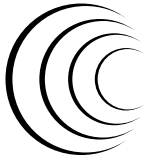
Buyers have the same obligation as art market professionals and sellers (set out above) to respond, within 90 days, to a request for information from CAL.

Ensuring payment

Buyers have the same obligation as art market professionals and sellers to ensure that the royalty is paid.

About Copyright Agency Limited (CAL)

CAL is a non-profit organisation, established in 1974, that collects and distributes copyright fees for authors, artists, photographers, publishers and others. CAL was appointed by the Attorney-General in 1990 to collect and distribute copyright fees payable by educational institutions, and by the Copyright Tribunal in 1998 to collect and distribute copyright fees for government use.



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CAL's annual report is tabled in Parliament. In addition, CAL adheres to the Collecting Societies Code of Conduct and reports annually to the Code Reviewer, a former Federal Court judge.

There is more information about CAL on its website www.copyright.com.au.

CAL's obligations

CAL's obligations under the Act include:

- publishing information about commercial resales on its website;
- collecting royalties on behalf of right holders;
- ensuring that royalties are paid by those liable to pay;
- identifying and locating right holders entitled to resale royalties; and
- paying royalties to right holders.

CAL recognises that, for a range of reasons, it will be easier to establish reporting and payment mechanisms with some art market professionals than with others. But CAL has obligations to all artists to ensure they receive the royalties due to them, and will actively seek to recover those royalties from reluctant as well as cooperative art market professionals.

As a condition of its appointment as the collecting society for the resale royalty scheme, CAL is required to report to the government on its administration of the resale royalty scheme. It will also report annually to the Code Reviewer on its adherence to the Collecting Societies Code of Conduct.

In addition, CAL is committed to transparency regarding its operations, and will provide information to those interested in the operation of the scheme on its main website (www.copyright.com.au), its soon to be launched resale royalty website (www.resaleroyalty.org.au), and on request.

CAL is establishing an Art Trade Resale Royalty Advisory Panel, comprising art market professionals, to advise CAL about how to implement the Act in accordance with current practices.

Some FAQs

Can an art market professional find out in advance whether the royalty is payable?

Provided CAL has, or can get, the information necessary to determine whether a royalty will be payable, CAL will help art market professionals work out, in advance of a resale, whether a royalty will be payable.

Is the royalty payable on a 'cancelled' sale?

In some cases, a purchaser is the successful bidder at an auction but does not follow through with payment, and the work is returned to the vendor or relisted by the auction house. In this case, there has been no transfer of ownership (because the transfer is subject to receipt of payment), so the royalty is not payable.

If a purchaser agrees to buy a work, but negotiates to pay in 30 days time, when is the royalty payable?

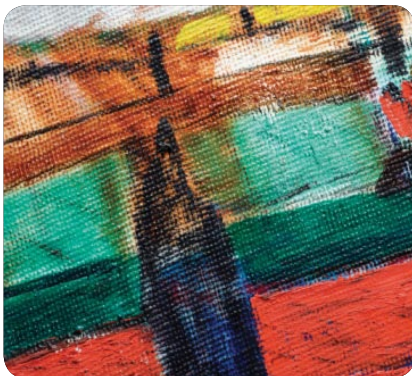
The royalty is payable as soon as ownership is transferred. This will be determined by the terms of sale, and when the purchaser gets title to the work (before or on payment for the work).

If a gallery pays an artist an advance against a future sale, is the sale of the work by the gallery a commercial resale?

If the artist still owns the painting when the gallery sells the painting, no. The sale by the gallery will transfer ownership of the painting from the artist to the purchaser, and will not be subject to payment of the royalty. Whether or not the artist retains ownership of the work will depend on the terms on which the advance is given.

What is a gallery's legal obligation to ensure that sellers provide accurate information about the sales history for an artwork?

Galleries are legally obliged, together with the buyer and the seller, to ensure that the royalty is paid on a resale if the artist is entitled to it.



More information

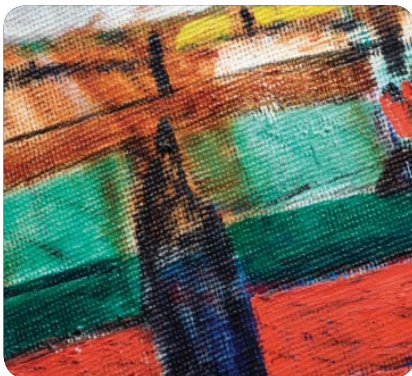
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A seller is obliged to notify CAL of *any* commercial resale, whether or not a royalty is payable, and to provide sufficient information to enable CAL to determine whether a royalty is, in fact, payable. This will include information that the seller will necessarily know, such as the sale price and when and how the seller acquired the artwork. It could also include information the seller may know, such as the artist's nationality and date of death.

Sellers who fail to meet their notification obligations – for example, fail to inform CAL about where and when they acquired the artwork – are subject to certain financial penalties that can be enforced by CAL.

Sellers can provide the information to CAL via an agent, such as a gallery.

CAL will conduct independent research to check that sellers are notifying CAL of commercial resales, and that the information they provide is accurate and complete. Where appropriate, CAL will take legal action against sellers who fail to notify CAL of commercial resales, or provide inaccurate or incomplete information. An art market professional is required to provide CAL with a seller's contact details if that is necessary for CAL to determine whether or not a royalty is payable on a resale.

CAL will seek to enforce the payment of royalties that it believes, on reasonable grounds are payable.

CAL will work with art market professionals to prepare information sheets and other material for sellers and buyers about their obligations.

How much will CAL deduct from the resale royalties?

CAL's administrative fee will be 10% of the royalties collected.

Can the resale royalty apply to works in which copyright has expired?

In some cases, yes. The resale royalty lasts for the artist's lifetime plus 70 years. This is also the period of copyright protection for most artworks, but not for all.

For example, copyright in all photographs taken before 1955 has expired, but the sale of a limited edition of a photograph taken before 1955 could be subject to payment of the resale royalty if the photographer has been dead for fewer than 70 years. To give another example, copyright in a painting whose artist died in 1954 has expired, but resale royalties will be payable on the painting until 2024.

Is GST payable on the 5% royalty?

CAL's view is that GST may not be payable on resale royalties. CAL will clarify this before commencement of this scheme, and update this information sheet.

Do the obligations to provide information apply to resales under \$1,000?

Yes. Sellers are obliged to notify CAL of all commercial resales. The notification must provide sufficient information to enable CAL to work out whether the resale is payable (which includes the sale price).

In response to a request from CAL, sellers, buyers and art market professionals are obliged to provide information relevant to determining whether a royalty is payable (and that includes the sales price).

Is the royalty paid by the seller or the buyer?

The seller, the buyer and the art market professional are jointly liable to pay the royalty. This means that CAL can recover the royalty from one or more of them. CAL anticipates that in practice the royalty will be paid to CAL by the art market professional, and recovered from the buyer or the seller.

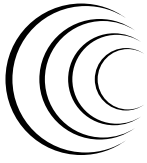
Is the royalty payable on the hammer price or on the hammer price plus GST?

The royalty is payable on the hammer price plus GST. The Act defines the 'sale price' on which the royalty is payable to include GST, but exclude any buyer's premium or other tax.

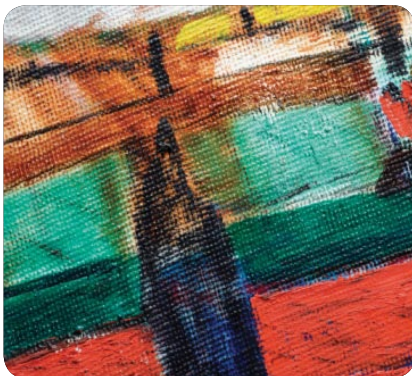
For example, if the hammer price is \$950 and GST is payable on the sale, a royalty is payable (provided all other conditions are met) because the hammer price plus GST is more than \$1,000.

Would the resale of a piece of jewellery be subject to the resale royalty?

Not if it had been mass-produced. On the other hand, a piece of jewellery made by an artist could be subject to payment of the royalty, as could a piece of jewellery made by someone else but under the artist's authority.



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Is there a database of artists for whom we should charge the resale royalty?

CAL has a database of artists whose works are likely to generate resale royalties, and will be adding to that as it receives information from artists who register for royalties and from other sources. The database will assist CAL to determine whether or not the royalty is payable, but additional information will often be required.

Whether or not the royalty is payable depends on a number of factors including the artists' nationality and, if the artist is dead, when they died. These factors may change over time.

For example, beneficiaries of an Australian artist who died in 1941 will be eligible to receive resale royalties in 2010 and 2011, but the entitlement will expire at the end of 2011. On the other hand, a French artist would not be entitled to any royalties on resales occurring before France is listed in the regulations to the Act, but may be entitled to royalties on resales that occur after that.

CAL will, however, assist art market professionals to work out, in advance of a sale, whether or not the royalty will be payable if the sale price is over the \$1,000 threshold.

How can an auction house recover the royalty from a buyer if it does not know in advance whether or not the royalty is payable?

The Act does not require anyone to provide information to CAL in advance of a sale. Auction houses may, however, choose to provide CAL with relevant information before a planned sale, so that CAL can assist them to determine, in advance, if the royalty will be payable. This will depend on CAL having the necessary information, which includes the nationality of the artist and, if the artist is dead, the date of death.

What procedure is required in the reporting of the required information to CAL?

CAL will discuss with auction houses the procedures for reporting that will best fit with auction houses' current business practices and systems. CAL anticipates that there will be a number of options for reporting, including completion of an online form and completion of a paper form.

What procedure is required in forwarding the funds to CAL and how often are we obliged to do so?

CAL will discuss with auction houses options for forwarding funds to CAL that will best fit with their current business practices and systems.

What happens if CAL cannot locate the right holder entitled to the resale royalty?

CAL has six years to find the right holder for a royalty. If CAL is unsuccessful in doing so after that period, there are three things that can happen to the money:

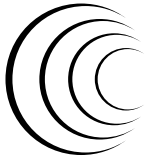
- if there are other right holders in the work who can be located, it is paid to them;
- if not, and one or more of the people who paid the royalty can be located, the money is paid to them;
- if none of the right holders nor the people who paid the money can be located, the money is retained for administration of the scheme for other artists.

In the second situation, CAL would seek information from the art market professional, at the end of the six year period, about the identity and location of the person who paid the money.

Would sales at an auction in July 2010 have to be reported to CAL?

The sales that are resales, yes. All commercial resales after 8 June 2010 should be reported, whether or not a royalty is payable.

It is unlikely that the royalty would be payable on any of the sales, because it is improbable that there would have been a prior change of ownership between 8 June 2010 and the auction.



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Will royalties be payable on foreign works

Royalties will be payable for works from countries that are, in the future, listed in the regulations to the Act if all other requirements are met. CAL has begun contacting collecting societies in other countries with resale royalty schemes. When the countries are listed, CAL will publish them on the resale royalty website, and notify art market professionals that have registered with CAL.

Even when a country is listed, the royalty will not be payable until the work has changed hands for the second time after 8 June 2010.

What to do now

If you are reselling artworks, contact CAL so we can talk to you about the options for meeting your reporting and payment obligations that will best integrate with your existing internal systems.

CAL is keen to minimise the administrative requirements for art market professionals, and to work with you to find the best solutions for implementing the Act.

From 9 June 2010, you will be able to report resales online at www.resaleroyalty.org.au.

CAL anticipates that reports of aggregated sales data that can be compiled from the data it is collecting may assist art market professionals and would like to hear from you about what reports might be useful.

More information

There will more information soon on CAL's new Resale Royalty website, www.resaleroyalty.org.au.

You can also ask us for more information by:

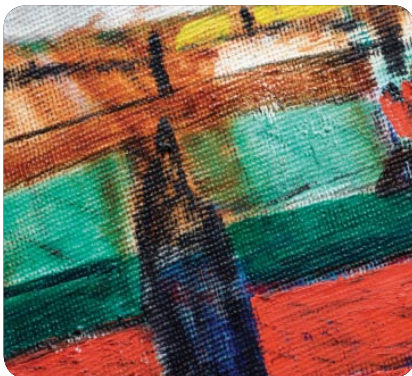
- emailing us at resale@copyright.com.au; or
- phoning 1800 066 844

Contact people at CAL in relation to the resale royalty scheme include Zoë Rodriguez and Libby Baulch.

Use of this information sheet

Check CAL's website for the terms of use for this and other CAL information sheets, and to make sure that this is the most recent version of this information sheet.

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