Statutory Review of the Copyright Act

Brief presented by the Contemporary Art Galleries Association (AGAC)

to the Standing Committee on Canadian Heritage

Introduction

The Contemporary Art Galleries Association (AGAC) is a non-profit association whose primary mandate is to further develop the recognition and prosperity of the contemporary art market in Canada. Today, AGAC brings together galleries in Halifax, Montreal, Quebec City, Ottawa, Toronto, Winnipeg, Edmonton, Calgary and Vancouver. The association actively contributes to the dissemination and promotion of Canadian artists via exhibitions and other major events organized in Quebec, Canada and internationally. Beyond defending the moral and economic interests of its members through a rigorous code of ethics, AGAC also fosters the public's interest in visual arts and encourages the emergence of new contemporary art collectors.

From the outset, it is important for us to point out one thing: gallery owners fully support the goal of helping increase artists' incomes, not only because gallery owners are artists' biggest defenders but also because their own income depends on the sale of artists' works. In fact, gallery owners, especially those who work in the primary market, i.e., directly with artists at the beginning of their careers, are patrons of sorts. They believe deeply in art and artists and put their money where their mouth is: they invest their personal time, energy and money to disseminate and vigorously defend the work of artists they believe in, hoping one day to be reimbursed by strong sales. It's a high-risk business: the proof of this is the number of galleries (including long-standing ones) that have closed in the last three years in Montreal, Toronto, Calgary and Vancouver. For example, five AGAC member galleries have closed their doors in Montreal in the last two years. Not because the gallery owners no longer believed in their artists or their mission, but because they could no longer survive in the market.

Unfortunately, the proposal to include an artists' resale right in the Copyright Act, while attractive at first, has major weaknesses. First, linking such royalties to copyright seems wrong. Moreover, in addition to adding—in an already complex structure—another costly and cumbersome administrative burden, introducing a resale right in Canada will have negative effects that will only further weaken an already extremely precarious market. More importantly, these royalties will not help artists who need them the most because it primarily benefits those who are already well established—and their heirs.

1 – RESALE RIGHTS ARE NOT A COPYRIGHT ISSUE

Providing for a resale right in Canadian copyright law is being proposed to correct an apparent inequity among artists from different disciplines. However, copyright ownership already applies in visual arts and in film, music and literature. Unless they have given up their rights, visual artists, like these others, can monetize their authorization to reproduce their work in books, magazines, films, posters, greeting cards, stamps, etc.

The difference lies in the consumption of the work itself. The Copyright Act applies each time a work composed by an artist is seen or listened to, or therefore widely "consumed" by the public.

However, unlike a book or CD, a visual artist's work is a unique item and cannot be offered for "public consumption" except in rare exhibitions, most often organized by museums. There is no profit here on every book or every CD sold. It is a work that makes the owner happy, such as a piece of furniture or jewellery made by a craftsman. Including a resale right in Canadian copyright law is therefore less of a way to correct an inequity than a way to provide a new source of income for established artists.

2 – NUMEROUS NEGATIVE IMPACTS ON THE MARKET

According to the bill, the tax would be collected by galleries or auction houses. With auction houses being compensated through a commission that varies between 10% and 20%, the seller will require that the new tax be deducted from this amount. As many galleries use the revenues generated by reselling works to finance the dissemination of artists at the beginning of their careers, it is understandable that the foreseeable decline in their revenues can only have a negative effect on these artists...

Another negative effect that should not be overlooked is the unfairness of a one-size-fits-all measure. The bill states that the tax would be collected on the total amount of the sale, whether there is a profit or a loss. In the event of a profit, the seller would be doubly taxed since, if the profit realized on the sale of a work of art exceeds $1,000, this profit is already taxable as a capital gain. Unfortunately, works are frequently sold at a loss on the secondary market because at the time the work is purchased no one knows how the artist’s career will evolve. In the work is sold at a loss, the buyer is also doubly penalized: he has made a bad investment and must pay a royalty to boot. The same applies to gallery owners who buy the works of their artists at the beginning of their career to encourage them to persevere, hoping that they will succeed later. If not, and the gallery owner resells the work at a loss, they will also have to pay a 5% tax: they are therefore penalized first for taking a serious risk and then again for having to pay a surtax. This discourages them from engaging in this practice, which, once again, will hurt their artists who are trying to carve out a place for themselves on the primary market.

A final potential perverse effect of the proposed measure is the relocation of resold works far from of Canadian galleries and auction houses. These resales will easily migrate to sales between individuals (thus avoiding the tax) or to markets where the tax does not apply: The United States or China, the two major markets for Canadian art. We therefore predict a loss of revenue for galleries—and therefore for unestablished artists as explained above—but also for the government if sales are made outside the control of galleries, the only entities authorized to collect sales tax.

The truth is that introducing a resale right will weaken an already precarious market and penalize the vast majority of artists, because collectors will take fewer risks and pass young artists over, choosing instead to invest in a very small group of risk-free, already known artists.

3. MISSING THE TARGET

Studies published in France, the United Kingdom and Australia, among others, show that the resale right, which normally aims to improve the situation of visual artists, misses its target altogether since the measure ultimately benefits well-established artists and their heirs only.

The idea that works of art are frequently resold at a profit is a romantic notion that has very little connection with reality, let alone the reality of the Canadian art market.

Very few works are returned to the market, let alone sold at a profit. Less than 5% of works are resold, despite some popular rhetoric about art as an investment. Most of the artists making up this 1% receive only between $50 and $100 on average per year. Most royalties go to the “recognized masters,” the handful of key artists who make headlines with the prices their works get.

In France, seven artists (or their heirs!) share 70% of all royalties. In the United Kingdom, 80% of all royalties go to just 10 artists. It is therefore a measure that benefits the wealthy, even more the rich and dead ones.

The vast majority of visual artists struggle to make their place in the primary market: either they eke out a living hoping to make a name for themselves one day, or they have a job that allows them to support themselves but at the same time prevents them from fully concentrating on their art. Implementing a resale right in Canada will not improve their situation. It will do quite the opposite.

RECOMMENDATIONS

AGAC strongly hopes that the government will put in place measures that will improve the socio-economic conditions of Canadian artists. They deserve to be better recognized and to earn a decent living.

However, we believe that, to reach all artists, the solution lies in measures that stimulate the market for buyers.

i. For example, rather than taxing collectors when they resell works they have already acquired, why not encourage them to buy more primary market works, through tax credits, for example?
ii. Why not offer this type of tax credit to any buyer of a Canadian work of art over $1,000?
iii. Why not tax the capital gain on the sale of a work of art if the profit is immediately reinvested in the Canadian art market (as was the case in the United States with the 1031 Like-Kind exchange.)
iv. Why not take inspiration from the United Kingdom and its Own Art programme, a program that incents people to acquire works by living artists? Such a program reflects a real commitment to improving artists' pay with tangible and regular benefits. Among other initiatives, it provides interest-free loans for 10 months to facilitate the acquisition of works of art.

AGAC believes that the resale right does not fall under copyright law. However, the issue of resale rights warrants discussion, if only because it leads government to examine the plight of visual artists.

We would like various professionals in the art market—collectors and auction houses, for example, —to also be invited to appear before the committee. In addition, we recommend that a comprehensive study be conducted on the impact of resale rights in countries that have adopted it, in particular Australia, whose market is very similar to Canada's. Lastly, we invite the committee to consider promoting measures that would encourage the acquisition of works of art, which would benefit all artists.

We are all committed to improving the well-being of visual artists, so that they can further contribute to the expression of our Canadian identity, which is maybe even more important today. It is in how we do this that our opinions differ. Yet it is by sharing our visions that we find winning solutions.