

TO: Ms J Fubbs, Chairperson: PC on Trade and Industry
ATTT: Mr A Hermans
Email: ahermans@parliament.gov.za
Portfolio Committee of Trade and Industry

**Submission to the Portfolio Committee of Trade and
Industry on the**

“COPYRIGHT AMENDMENT BILL [B13-2017]”

Visual Arts Network of South Africa

28 June 2017



1. Introduction

The Visual Arts Network of South Africa welcomes this opportunity to make a submission on the Copyright Amendment Bill made available for comment by the Portfolio Committee of Trade and Industry and developed by the Department of Trade and Industry (DTI). We have limited our comments largely to those areas of the document that have direct relevance for the visual arts sector, and which we have some limited competence to address based on our work in this area – this is limited primarily to sections 9A-F Artist's Resale Right (ARR).

VANSA recognises the overall objective of the Copyright Amendment Bill as first and foremost to protect and support the livelihoods of creators of artistic works, as well as for a development agenda so that these works may be well used by the South African and international populace. VANSA sees this as a commendable objective of the DTI and makes this submission with intention to support these objectives. ARR are undoubtedly a concrete strategy towards ongoing support of artists' livelihoods and if managed carefully can play a productive and valuable role for all stakeholders in the visual arts sector.

VANSA made a submission to the DTI in 2015 as is pleased to see a number of our concerns were taken into consideration and is thankful for the work done by the DTI. This includes:

- communal rights for some artworks
- reciprocity for international sales
- some steps towards clarity on rate of royalty

The further issues noted henceforth are a reinforcement of some concerns still not fully addressed, but that we feel are pivotal to the successful role of the Bill.

2. About VANSA

VANSA operates as a development agency seeking to engage with and serve the interests of the visual arts sector in South Africa. The membership, currently at over 8000 artists, that we seek to serve includes visual artists, curators, academics, arts managers, gallerists and a variety of businesses and organisations operating in the contemporary visual arts sector. We do so through considered engagement in strategic projects that seek to address one or more of the following goals:

1. Wider access to opportunities and networks for individual and organisational development
2. Improved levels of professional and ethical practice among individuals, businesses and organisations working in the visual arts
3. New ideas, new practices and new audiences for contemporary art practice in South Africa
4. New market opportunities and buyers for South African contemporary art

5. An enabling policy and regulatory environment for visual arts professionals, businesses and organisations

Our engagement with the issue of copyright relates principally to goals 2 and 5. Informed by the findings of the 2010 Human Sciences Research Council report on the visual arts sector, VANSAs initiated a process of dialogue with DALRO and public consultation on the specific issue of copyright in the visual arts in 2010. During the course of 2012, VANSAs undertook wide-ranging consultations, developed resources and convened workshops and meetings across all nine provinces aimed at raising awareness among artists and other stakeholders in the visual arts on the application of copyright law to the visual arts in South Africa. In 2013 VANSAs made a submission to the draft policy on Intellectual Property issued by DTI. ARR has been an ongoing part of VANSAs's work over the past 5 years, particularly as regards our work with DALRO.

3. A basic introduction to the Principle of Artists' Resale Rights

A right of resale, or *droit de suite* (a right to follow), is a legislative instrument under intellectual property law, which enables artists to receive a percentage of the sale price whenever artistic works are resold.

A French legal scholar, Albert Vaunois, first articulated the need for a '*droit de suite*' in connection with visual art in 1893. The French Government introduced a scheme to protect the right of resale in 1920, after controversy over artists living in poverty, while public auction houses were profiting from the resale of their artistic creations. Effectively because the value imbued in a work of fine art 'lies in its uniqueness', a fine artist is unable to exploit the benefits conferred under copyright law. A specified but related protection mechanism was therefore necessary, hence Artists' Resale Rights.

The basic premise of Artists' Resale Rights is that artists should directly benefit from the market growth and wealth production that emanates from their own work in the resale market. In order to ensure that artists are protected for the original work that they produce and that artists livelihoods are supported, Artists' Resale Rights are pivotal.

4. Summary of Key Issues

- 4.1. The principle of a developmental sliding scale and cap for the rate of the royalty.
- 4.2. The need for adequate frameworks for a collecting agency and the role that ARR can play in the overall development copyright collection in the visual arts.
- 4.3. Emphasis on ongoing review to ensure success. New legislation of this kind requires careful evaluation and potentially changes in implementation accordingly.

5. Our principle concerns with the current document are as follows:

Key areas need clarification and formal structuring to ensure they bring benefit to those who need it. VANSA proposes the form of ARR devised and provided for in both British and Australian Legislation be used as a functional model. A number of key issues need to be provided for, including:

5.1. The amendments require clarification of monies: rate, threshold and cap of royalties.

- a) Compliance with the Bill and penalties for non-compliance.
- b) Threshold price range for sales of work. The 5% royalty is strongly welcomed and will go a long way to supporting emerging artists and artists who need the financial support. International practice indicates that a threshold ensures poorer and emerging artists benefit most, strengthening the impact of ARR. This also ensures that sales numbers are not affected in the secondary market. A sliding scale for which the higher the sale price of the artwork, the lower the overall royalty rate, stands as international best practice.
- c) A maximum royalty cap. In order to emphasise the ARR commitment to the support of artists' livelihoods a royalty cap is to be expected. A cap serves as standard international practice to ensure funds are directed at those who need it most.
- d) Origin of cost. Clarification is needed on whether the point of resale has the entitlement to pass on costs to the buyer.

In order to ensure ARR serve as a workable form for Collection Agencies, buyers, points of sale, and especially for artists, a more detailed infrastructure will need to be legislated.

5.2. Copyright Collection Agency

The Bill is currently unclear as to the role of Collection Agencies as regards ARR, an issue that will be pivotal to the success of ARR. Both the original bill and the amendments point to concerns over the roles and collectivity of Collection Agencies and Societies, indicating the need for clarity and legislative frameworks for functioning.

The Visual Arts is notorious for not having a strong royalties collection culture, with few artists signing on as members of Collection Agencies. The need for a stronger impetus for membership is clear and ARR can potentially play a strong role in this. Should ARR be indicated in the bill as mandatory to be collected through a collection agency, this would serve to encourage more meaningful volumes of payments through collection agencies, encouraging professionalisation of the artists through motivating membership. This professionalisation is key to the betterment of artists' careers.

The current scale of the visual arts economy does not justify a separation of collection agencies for different rights. A single collection agency, mandated to collect both copyright and ARR would strengthen the overall rights management of the visual arts as a whole.

The use of a single collection agency mandated to manage all rights associated with visual arts would also ensure a leaner process for artists and points of sale, enabling less administrative burden on all parties. The Australian model of competitive bidding for single management of visual artists' rights may be an adequate way to manage this process. Monitoring would need to be conducted to evaluate whether a single collection agency is the best option.

5.6. Review

International learning points to a need for ongoing review of the effectiveness of the infrastructure of ARR in order to ensure changes are made to best benefit all stakeholders. VANSAs believes this is a key point for the introduction of an entirely new legislative framework.

6. Addressing Criticisms of ARR

ARR rights remain a point of contention, particularly for certain point of resale companies who see ARR as an administrative burden and an obstacle to sales. Repeated international research points to the need for clear and manageable administrative frameworks, with clear operational models for Collection Agencies in order to minimise the administrative burden on points of sale. International research also unanimously points to significant impact for artists, with little to no impact on sales figures, amounts or buying trends. The following addresses in more detail some of the concerns; research has been collated from Australian, UK and Canadian resale rights research.

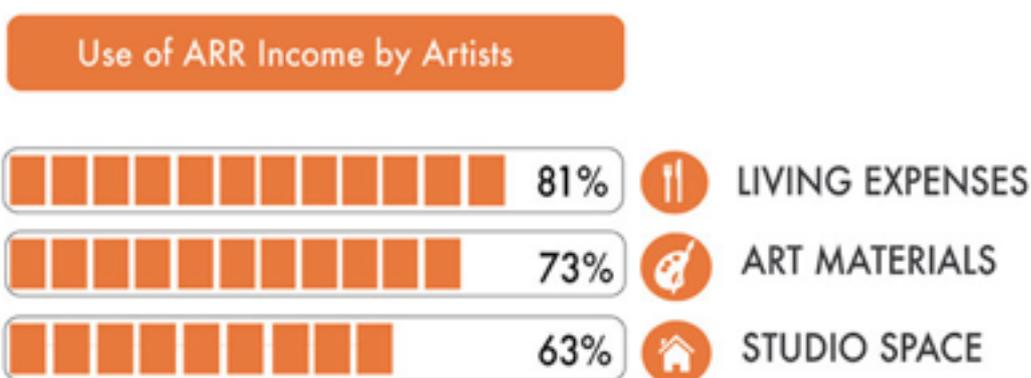
6.1. Incorrect Criticism 1: "Resale Right affects the market for sales of works"

Resounding research has indicated increased market sales after the implementation of artist resale rights, indicating that ARR has little effect on buyers' appetite for artworks. There is currently no evidence to point to direct impact of ARR on sales.

The UK has just celebrated 10 years of ARR and their research indicates new artists are benefiting from new sales regularly

21 New artists receiving ARR royalties each month in 2015


- 6.2. Incorrect Criticism 2: “ARR benefits established artists who are already wealthy instead of artists who are otherwise struggling”
- The provision, included in the amendment bill, for resale rights to be transferred to families after the artists’ death will have significant impact on the ongoing support of families of established artists – especially as works regularly increase in value after the death of an artist. This is an important element of the support of artists, who are regularly supported by their families while still alive and both artists and their families regularly struggle with poverty in their lifetimes.
 - Artists that are less established can also benefit from the resale market, as younger or emerging artists’ works are increasingly being traded in the resale market.
 - The sliding scale and cap at a certain total proposed in this submission ensures that rather than serving as an enriching mechanism for artists already selling at high amounts, the ARR is aimed at recognising the Intellectual Property of the artist and making a contribution to their livelihoods. A 2016 report of Britain’s ten year anniversary of ARR indicates artists use royalties for living costs and to further their art:



ARR royalties are a much needed income that helps artists to sustain their practice.



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- 6.3. Incorrect Criticism 3: “Administration of ARR is complex and taxing on point of resale companies”
- ARR administration is no more complex or onerous than any other form of copyright collection. The administrative need does not override the right of the artist or the impact on the artists’ livelihood. A clear and manageable collection structure and administrative model is key to

ensuring collection is made accurately and artists receive their royalties on time. The regulations and good governance of collection agencies for ARR should apply as with all others. International research indicates that the per sale cost of royalty administration is reasonable and manageable.

- 6.4. Incorrect Criticism 4: “5% does not equate to a worthwhile income for artists in comparison to the costs of administrating the amount.” While royalties are generally quite modest amounts, the addition to the artists’ income is significant for the ongoing work of the artist and the development and strengthening of the visual arts as a whole. Again rather than serving as an enriching mechanism for artists already selling at high amounts, the ARR is aimed at recognising the Intellectual Property of the artist and making a contribution to their livelihoods. In Britain a report from 2016 after 10 years of ARR indicates that 81% of artists use the income for living expenses.



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4. Conclusion

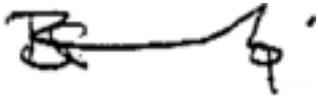
In conclusion, VANSAs is pleased at the inclusion of ARR in the overall amendment bill. VANSAs commends DTI on the inclusion and the commitment to the support of the arts.

Significant work needs to be done to improve the potential of clear and proper implementation of ARR within the amendment bill – with important details needing to be added to the document to ensure a stronger legislative protection for artists as well as support to points of resale.

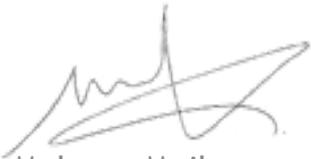
Should changes be made, in accordance with international best practice, ARR can be a workable and productive addition to South Africa’s copyright regime for artists, buyers and points of resale. Should all stakeholders be willing to come to the table to a productive and constructive support for artists Intellectual Property Rights, it will have a resounding effect on the Visual Arts Sector as a whole.

We further support the submissions of ANFASA and ANSA in ensuring the rights of producers - and particularly authors - are duly respected. We are sure that a positive and strengthening copyright regime for South Africa is possible and can benefit all.

On Behalf of the Members of the Visual Arts Network of South Africa



Bandile Gumbi
Chairperson | Visual Arts Network of South Africa



Molemo Moiloa
Director | Visual Arts Network of South Africa

p: +27 (0) 11 402 2085/6 | c: +27 (0) 72 355 4965 | f: 086 662 2074

| e: molemo@vansa.co.za

www.vansa.co.za | www.artmap.co.za

13 | Transwerke Building

Sam Hancock Street | Constitution Hill | Johannesburg | [map/directions](#)

P O Box 53457 | Troyeville 2139 | Johannesburg | South Africa

NPO nr: 055-622 | PBO nr: 930025347