

**COPYRIGHT AMENDMENT BILL**  
**(Government Notice 646 Government Gazette 39028)**  
27 July 2015

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**SUBMISSION**

by

**STRAUSS & CO**

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**COMMENTS FOCUSING ON CREATIVE ARTS**

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1. **INTRODUCTORY REMARKS**

1.1 **Copyright Review Commission**

A Copyright Review Commission was established in November 2010 by the Minister of Trade and Industry, Dr Rob Davies, to investigate and assess concerns and allegations regarding the operational practices of collecting societies responsible for the distribution of royalties to musicians and composers of music, and to authors and artists, and concerns about the efficiency of the collecting societies model that was in place at the time. The Copyright Review Commission (CRC) was mandated to advise and make recommendations to the Minister on a wide range of issues. The CRC was not specifically mandated to investigate the fine arts sale business.

The comprehensive report of the CRC was submitted to the Minister in 2011 but was only made public a year later, in 2012. In the report the CRC made numerous recommendations regarding adjustments to be made in the application and enforcement of existing laws, particularly the Copyright Act 98 of 1978 but also the Performers' Protection Act 11 of 1967. It was indicated at that time that the necessary legislative amendments to implement the recommendations made by the CRC would be prioritised by the Department of Trade and Industry. It must be made clear that the CRC focussed on legal issues relating to musical works and performances and the rights of the composers and of performers, and issues relating to the roles of the broadcasting industry and of collecting societies in this regard. Although the CRC did address issues regarding the reproduction and use of literary works, eg for educational purposes and for disabled persons, it did not consider and did not expressly deal with issues relating to the reproduction or the resale of works of art, nor with the issue of a continuing royalty right of authors in respect of the use of their works (including artistic works) despite the transfer of the copyright in the work. In other words, the CRC did not consider several issues provided for in the Copyright Amendment Bill, and made no recommendations in that regard.

The proposed legislative amendments contained in the Copyright Amendment Bill, 2015 go far beyond the issues addressed by the CRC and the recommendations contained in the CRC report. The Bill includes some far-reaching and potentially controversial provisions applicable to the reproduction and resale of works of art, including the introduction of a resale royalty right in respect of artistic works,

and a 'use royalty right' for authors/creators in respect of the use of certain copyright works (despite the transfer of the copyright in such works by the authors/creators); and in regard to the criminalisation of certain acts and the presumption of criminal liability of juristic persons.

### 1.2 Draft National Policy on Intellectual Property

Certain changes to the Copyright Act, 1978 have also been recommended in the draft National Policy on IP (published for public comment under Government Notice 579 in Government Gazette 36816 of 4 September 2013), predominantly relating to copyright issues in the area of software and internet usage in the context of the new opportunities and demands emanating from developments in the digital and electronic technology era. Specific reference is also made in the Policy document to the importance of the flexibilities relating to 'fair use' and 'fair dealing' that would permit a degree of copying of copyright works. Although the need for 'fair use' and 'fair dealing' exceptions was raised in the context of the educational needs of the country and not expressly in the context of the sale of art works, the principle of some degree of flexibility was promising also in regard to the use of reproductions of works of art for marketing and resale purposes.

As could be expected, some of these recommended changes have been included in the Copyright Amendment Bill. However, the IP Policy did not identify the introduction of a resale royalty right in respect of the sale of artistic works, nor a use royalty payment to the authors/creators (despite the assignment of the copyright) for the use of copyright works.

### 1.3 Roundtable Discussion on Copyright

A Roundtable Discussion on Copyright was arranged by the Department of Trade and Industry on 24 February 2015 when certain copyright-related topics were raised and discussed. The meeting was informed that a Copyright Bill was in the process of being finalised for submission to Cabinet and Parliament. The meeting was also informed that the main objective of the Bill was to implement the recommendations made by the CRC, but also to give effect to the relevant policy proposals put forward in the draft National Policy on IP. Unfortunately, however, the draft Bill was not made available to the stakeholders at that time, so that there was no opportunity to consider or debate its provisions.

At this Roundtable meeting the issue of the resale of art works was raised, and the point was made that creative artists should derive some benefit from the resale of their works of art. Comments were invited; in the comments submitted (eg by Adams & Adams) the matter of the resale of art works was dealt with in detail. At the time some auction houses and entities engaged in the art sales business in South Africa were consulted and it was pointed out that the introduction of a so-called '*Droit de suite*' or a resale royalty right could have negative consequences for art sales as a form of economic activity, and would be difficult to administer, to monitor and to enforce. Since no compelling motivation was put forward at the discussion to warrant the introduction of such a resale royalty system, it was recommended that this system should not be introduced.

As regards the need for an appropriate provision to allow the use of images of art works as part of the marketing of such art works, it was specifically proposed that the UK model for a limited exception (as set out in s. 63 of the UK Copyright, Designs and Patents Act, 1988) be introduced into the Copyright Bill then being drafted, to permit the making and use of copies of art works for purposes of the sale of the work. It was explained in the submission that the purpose of the UK exception, and thus the objective with the inclusion of such an exception in the South African copyright law, is to permit the making and use of images of art works to advertise and promote the sale of such art works, ie to make potential buyers of such art works aware of the fact that the works are to be offered for sale. This would promote the sale of art works of South African artists, particularly also of emerging South African artists whose works may not be well known.

It was thus expected that at least some of these recommended changes would be included in a Copyright Bill. In fact the Copyright Amendment Bill now does incorporate extensive provisions on the resale of artistic works and the payment of a resale royalty, but no provision is made regarding the permitted exception for the use of images of art works as part of the sales process. As will be pointed out further below, the provisions on the resale of works of art and the payment of a resale royalty as incorporated in the Copyright Amendment Bill are far-reaching and unworkable, are expected to place a constraint on the sale of art works, and may potentially be discriminatory.

No mention was made at this Roundtable meeting of the introduction of a continuing royalty right for authors/creators in respect of the use of certain copyright works, despite the transfer of the copyright. Accordingly, this controversial provision could not be considered or discussed at the meeting; nor could concerns be expressed in comments subsequently submitted.

#### 1.4 Copyright Amendment Bill

The publication of the Copyright Amendment Bill by way of Notice 646 in the Government Gazette 39028 of 27 July 2015 initiated the legislative process. In the Notice interested persons are invited to submit comments to the Director-General of the Department of Trade and Industry. As an entity active in the art auctioneering business, Strauss & Co is such an interested party and hereby submits its comments and recommendations for consideration by the Department of Trade and Industry.

## 2. BACKGROUND INFORMATION

### 2.1 Focus of this submission

This submission is made by Strauss & Co, a South African entity actively engaged over nearly a decade in the sale and auction of works of art, such as paintings and sculptures, but also of works of craftsmanship, such as silverware, jewellery and furniture. Strauss & Co is, on the basis of turnover, by far the biggest auction house in South Africa in the arts sales field. The Managing Director of Strauss & Co, Mr Stephan Welz, has spent a lifetime in the arts business and has gained exceptional experience and expertise in regard to the trends and expectations in the South African arts market. This submission is also made on behalf of several other entities involved in the same field of activity involving the promotion, sale and resale, and auctioneering of artistic works and works of craftsmanship.

The focus of this submission will therefore be on the potential impact of the Copyright Amendment Bill, 2015 on the business of the promotion, sale and auctioneering of all artistic works as defined and as currently contemplated in the Copyright Act 98 of 1978. In particular the submission will assess whether, and the extent to which, certain provisions in the Copyright Amendment Bill will encourage and indeed facilitate the promotion, sale and auction of artistic works, including craft works; in other words, whether the Bill will in practice have the effect of providing recognition and benefits to South African creative artists, or whether it will in practice have the contrary effect of depriving South African creative artists of potential benefits, by causing prejudice to, and diminishing or indeed destroying, the market for the sale and resale of artistic works in South Africa. Should the marketing of art works be restricted, this would impact not only on famous and well-known artists, but more significantly would deprive emerging artists not only of a potential source of income but, more importantly, of the opportunity of becoming well known as artists and for their creations to gain value and become sought after. This argument will be illustrated by statistical information referred to in more detail in paragraphs 4.1 and 4.2 further below.

In the comments set out below on specific provisions in the Copyright Amendment Bill, two main points will be made:

(i) Resale royalty right to be reconsidered

The current provisions of the Copyright Bill to introduce into the Copyright Act a resale royalty right in respect of works of art (new sections 7A – 7E to be inserted into the Copyright Act) cannot be supported; unless the legal model for resale royalty rights can be reconsidered and improved to make it a feasible and more acceptable system (eg by shortening the period during which the resale royalty will be payable to the lifetime of the author/creator, and by introducing a sliding scale for the royalty so that a higher percentage rate will apply to lower priced works and a lower percentage rate to higher priced works), these provisions should be removed from the Bill. In the first place, it is submitted that the resale royalty model as currently contemplated lacks clarity and entails many contradictions and errors (as will be pointed out below); and in the second place, it is expected that the introduction of this system will impact negatively on art sales in South Africa and will particularly cause prejudice to the potential sales of works by emerging artists of South Africa.

(ii) Resale advertising to be permitted

Specific provision is to be made in the Bill to introduce into the Copyright Act an appropriate exception in respect of the making and use of images or copies of works of art purely for purposes of advertising and promoting the sale of such works of art. It is submitted that an exception that would permit images of works of art to be used for making potential buyers aware that such works are to be offered for sale, will impact positively on and will promote the sales of art works also of emerging artists of South Africa, whose works may otherwise not become well known or sought after.

### 3. **GENERAL COMMENTS**

#### 3.1 **Limited time for submissions**

The Copyright Bill is a lengthy document (52 pages) containing many novel (and some potentially contentious and controversial) provisions. The Bill aims to introduce many novel concepts and principles into the current Copyright Act, 1978. The limited time period initially stipulated in the Government Notice (ie 30 calendar days) for the submission of comments would not have been sufficient to allow a thorough study of the Bill, particularly in the context of the CRC Report and the draft National Policy on IP, and the compilation of well-considered comments. For these reasons the granting of an extension of the period for submitting comments is appreciated. However, even with the extension granted, the time allowed is not sufficient for the Bill to be thoroughly considered and comprehensive comments drafted.

Furthermore, although public consultation sessions of a general nature have been held, the Bill with its specific proposed amendments was not available for consideration prior to these sessions and thus for debate at these sessions; the precise nature of the proposed amendments only became known to the public when the Bill was published on 27 July 2015. Therefore, once the Bill is tabled in Parliament to be considered by the Portfolio Committee on Trade and Industry, it would be essential for this part of the process to provide for a further opportunity for contentious issues in the Bill to be addressed, by way of participation in a public hearing session, so that further comments and recommendations can be submitted.

#### 3.2 **General quality of the Bill**

It is submitted, with respect, that the Bill in its current form is not of the required legal standard and level of accuracy to be submitted to Parliament. The Bill is intended to introduce far-reaching statutory changes and new provisions into the principal Act, the Copyright Act 98 of 1978; for the sake of legal certainty these changes and provisions must be clearly and accurately formulated. The principal Act is an Act of long standing; although the Act has become outdated in certain respects, eg by lacking the appropriate provisions to cater for the developments in the electronic and digital environment, the legality of its current provisions is generally accepted. The definitive and substantive provisions of the Act are generally in line with international requirements, and the provisions have been considered and interpreted by our Courts over many years. Therefore, a Bill that would update and modernise the existing Act, and would introduce provisions to cater for the requirements of the modern era, would be welcomed, provided the proposed changes are clearly and accurately formulated and their implementation would be feasible in practice.

The current Amendment Bill, however, contains many errors and, more importantly, in many instances the provisions and general formulations are out of line with or indeed contrary to the provisions and formulations of the principal Act and seek to introduce ill-considered rules and principles. Furthermore, the Bill contains provisions that (perhaps erroneously) seek to amend the Copyright Act but which may have been intended to amend a different Act, namely the Performers' Protection Act 11 of 1967.

#### **Recommendation 1**

It is strongly recommended that the Copyright Amendment Bill should be thoroughly reviewed, corrected and improved before being submitted to Parliament.

#### 4. COMMENTS ON PROVISIONS OF SPECIFIC RELEVANCE

##### 4.1 Resale of art works: resale royalty right

###### (a) Market environment for the resale of art works

It is submitted that the market for the resale and auction of works of art has become a significant area of economic activity in South Africa. It is recognised that works of art, whether in the form of two-dimensional paintings or three-dimensional sculptures, or whether photographs or works of craftsmanship, such as silverware, jewellery and items of furniture, are no longer merely collectable items – these works have become tradable commodities. This means that the artist who created the work of art, or the party who initially acquired the work of art, eg by buying it from the artist, may be interested in selling or reselling the work, and more than one subsequent sale transactions may indeed take place. The escalating levels of the resale of artistic works constitute a significant component of the copyright-related economic activity in South Africa, and may indeed be viewed as boosting the country's economic growth in that sector.

The active art market also encourages artistic creators in all genres of artistic products, and particularly also emerging South African artists, to increase their creativity and their production of saleable products. In order to generate income from the sale of their works, all of these artists rely heavily on a vibrant and active arts market that will advertise and promote the sale of their artistic works. The introduction of provisions into the Copyright Act, such as the resale royalty levies, which are intended to boost the position of artists but which are expected in practice to place a damper on the market of artistic products, will be counter-productive.

It is important, therefore, that the legal system should not be so drastically changed as to place an unnecessary restriction on this market and the related economic and creative activity. It is submitted that the introduction into South Africa's Copyright Act of a resale royalty right as contemplated by the new sections 7A – 7E to be enacted by the Copyright Amendment Bill, will in fact constitute a restriction that could inhibit and discourage not only the sales of art works but possibly also the creation of art works: if buyers will be discouraged from buying such works (because of the additional royalty levy), creators will have a less vibrant market for their works. This may have the negative result that artists may be discouraged and may no longer be motivated to create works of art.

On the other hand, it is recognised that creative artists should be given the recognition that they deserve, and should also reap financial benefits from the sales of their creative products. A resale royalty system structured to provide a financial benefit to young and emerging South African artists would achieve the benefit of rewarding and encouraging such artists. This means that the resale royalty should be levied on art works sold at the lower end of the market. The current model of a resale royalty levy as proposed by the Amendment Bill to be introduced into the legal system should therefore be reconsidered and redesigned, to provide for a royalty model tailor-made for the South African circumstances, to allow for appropriate benefits to flow to the artists without placing a damper on the arts market.

In this regard reference is made to the tailor-made model implemented in the EU, where a sliding scale is applied on the basis of the sale price paid for a work of art (see the memorandum attached as Annexure II).

(b) Statistical information on art sales in South Africa

Attached to this submission as Annexure I is a memorandum prepared by Mr Stephan Welz, the Managing Director of Strauss & Co, in which he submits comments and sets out the latest trends (covering the period 2009 – 2013) in the South African arts market. The memorandum is amplified by Attachments A – F. Attachment A sets out the monetary value of art sales in South Africa during the period 2009 – 2013, and also lists the 33 South African artists whose works accounted for a large proportion of the art sales. It is pointed out that, of these 33 artists, only two are still alive.

Attached to the memorandum, as Attachment G, is an abbreviated CV of Mr Welz. From this it is evident that Mr Welz has had years of experience, not only as an arts auctioneer but also as an expert in regard to art works in general. He is regularly requested to assess the value of art works and to advise on the optimal resale options. He is well informed about the art auctioneering models and trends, and about the success of the markets in different countries.

Mr Welz mentions a 'disconcerting fact' that a large part of the sales of South African art works already takes place abroad (eg in London), and emphasises his view that, should a resale royalty be introduced in South Africa (as contemplated in the proposed new sections 7A – 7E), sellers of art works would prefer to move the sales abroad (eg to London or New York, the latter market operating without a resale royalty system). This will cause substantial decline in the economic activity in this field in South Africa.

Mr Welz also refers to some trends in regard to sales of works by emerging South African artists, and illustrates (in Attachments B – F) the decline in the sales figures since DALRO (a collecting society) in 2012 started to demand royalty payments from art auctioneering entities (such as Strauss & Co) for images of art works to be used to advertise and promote the sale of the works. He points out that, unless an exception provision (such as the UK model) to permit the use of images of art works for marketing purposes is introduced into the South African Copyright Act, the position of emerging artists will be severely prejudiced.

This aspect is dealt with in more detail in paragraph 4.2 below.

Obviously statistical information is not yet available to demonstrate the effect of a resale royalty right system on South African sales figures for art works of emerging South African artists. However, Mr Welz predicts that the introduction of a resale royalty right will result in the selling of high value paintings to be moved to overseas markets, such as to London or New York. The sales figures for lesser known art works of emerging South African artists would simply decline. This means that the introduction of a resale royalty right system will not achieve the intended objective, namely to provide financial rewards to lesser known emerging artists, and to promote the value of their works.



(c) Purpose of a resale royalty right

The legitimacy of the underlying axiom is supported, that the importance and value of the cultural heritage of a country should not be underestimated, and that the contribution made by indigenous and emerging creators of works of art should be recognised and appropriately rewarded. The underlying principle is thus also supported, namely that the creators of works of art should receive a due reward for their creative efforts and products. However, it is not clear that the system of resale royalty payments as proposed by the Amendment Bill would be the appropriate way of ensuring that artists would receive a due reward. As pointed out by Mr Welz in his memorandum, there is no doubt that the resale royalty system as proposed would favour the rich and successful.

In this context it should be taken into account that, to achieve the envisaged objective, such a system should be modelled so as to enhance (rather than restrict) the opportunity also for traditional and emerging artists to sell their creative products to art dealers and to submit their products to art auctioneers for resale to the public, so as to create access to a bigger market for such artists. An unduly restrictive resale royalty system, that imposes too high a levy on the resale of art works, would discourage and negatively impact on such market access.

A further consideration that should be taken into account is the level of complexity of the system to be introduced, ie the burden to manage the payment to the artist (or his/her heirs) of the resale royalty, particularly if the resale takes place many decades after the art work was created and the location of the artist or the heirs may not be known. The perceived onerous requirements of the model to be introduced by sections 7A – 7D will be dealt with in more detail below. If the model is too cumbersome, the benefit may in the end not reach the artist or the heirs while the collecting societies would stand to benefit. For this reason the term of duration of the resale royalty right should rather be limited.

It is recognised that the principle of a resale royalty right is referred to in the Berne Copyright Convention: Art 14*ter* deals with the so-called '*Droit de suite*' in regard to works of art and manuscripts of writers and composers, namely that authors shall enjoy an inalienable right to an interest in any sales of the works after the first sale. In terms of Art 14*ter*(2) this right can only be claimed if the legislation in the country to which the author belongs permits such a claim.

**Recommendation 2**

It is recommended that, in order to determine the international effect of such a resale royalty system as is now proposed to be introduced into the South African copyright law, it would be prudent to investigate what the position is in other countries, and what the effect was on the art markets in such countries when the resale royalty systems were introduced.

Attached to this submission as Annexure II is a summarised outline of reports and findings issued in other countries on the effect of the resale royalty right on art sales and markets.

(d) Proposed resale royalty right system

Section 6 – introduction of new s. 7A – 7E into the principal Act

[Note: The reference in the heading to the insertion of new sections 7A, 7B, 7C and 7D must be corrected; the reference to section 7E has been omitted.]

The new sections 7A – 7E will introduce into the Copyright Act a system of resale royalty rights in favour of the creator of an artistic work, and provide that the resale royalty would be applicable to the ‘commercial resale of his or her created work of art’. In order to provide some clarity on the application and ambit of the resale royalty provisions, the current definitions of and the main provisions regarding ‘artistic works’ currently contained in the Copyright Act, 1978 are set out below.

(i) In terms of s. 2(1)(c) of the Copyright Act ‘artistic works’ are recognised as a specific category of copyright works, separate and distinct from the other eight categories of copyright works, such as literary works, musical works, sound recordings, cinematograph films, etc. The ambit and effect of the copyright that vests in the owner of the copyright in an ‘artistic work’ is set out in s. 7; the bundle of exclusive rights includes the right to reproduce the artistic work in any manner or form, a provision currently interpreted to cover also the making of a photographic or similar image of the work, eg for purposes of the compilation and publication of a compendium of art. It must be noted that the exclusive rights forming part of the copyright does not prohibit the sale as such of the artistic work, eg by a party who acquired the artistic work from the author. In other words, the current Act does not contemplate any restriction on, or the payment of any royalty for, the resale of an artistic work.

Although certain exceptions are provided for in s. 15 to permit the use of an artistic work in certain circumstances, eg by way of fair dealing for the purpose of criticism and review of the work, it is not clearly stated that the use of an image of the work by way of an advertisement for the sale of the work would be permitted. As will be referred to in more detail in paragraph 4.2(a) below, it was accepted in the past that the sale by the copyright owner of a work of art gave the purchaser the right to resell the work, including an implied licence to carry out marketing activities (such as advertising using images of the work) in order to promote the resale.

- (ii) The concept of ‘artistic work’ is defined in s. 1(1) as follows:  
‘artistic work’ means, irrespective of the artistic quality thereof –
- (a) paintings, sculptures, drawings, engravings and photographs;
  - (b) works of architecture, being either buildings or models of buildings; or
  - (c) works of craftsmanship not falling within either paragraph (a) or (b).

It is evident, therefore, that the concept of ‘artistic work’ covers much more than merely paintings and drawings. It must be noted that the Copyright Act does not use nor define the phrase ‘work of art’ or ‘art work’. Although the term ‘artistic work’ is primarily used in the new sections 7A – 7E to be introduced into the Copyright Act to provide for the resale royalty levy, the undefined phrases

'work of art' and 'art work' are also used. The relevance of these undefined references is not clear: is the intention that the concept 'work of art' or 'art work' is to be interpreted as being different from, eg more limited than, the concept 'artistic work'? It is submitted that the use of these two different concepts in sections 7A and 7B creates legal uncertainty and is expected to give rise to conflicting interpretations.

Nevertheless, in the light of the predominant use of the phrase 'artistic work' in sections 7A – 7E, it must be presumed that the resale royalty levy to be introduced by sections 7A – 7E will apply to all 'artistic works' as defined, including sculptures, photographs, drawings of a technical nature such as maps and charts, works of architecture, and finally works of craftsmanship including items such as silverware, jewellery and other craft works.

(iii) Several of the terms used in the definition of 'artistic work' are further defined in s.1(1) of the Copyright Act, such as 'drawing', 'engraving', 'photograph', 'sculpture'. This complicates the interpretation of sections 7A – 7E even more.

(iv) Some other definitions and provisions of s. 1 of the principal Act also apply to 'artistic works', such as the definition of 'reproduction' in s. 1(1) which provides that, in the case of an 'artistic work' a reproduction includes a version produced by converting the work into a three-dimensional form or, if the work is already in three dimensions, by converting it into two-dimensional form. The question is: would the resale royalty right apply also to such a converted artistic work?

The proposed replacement of the definition of 'reproduction' by section 1(j) of the Bill is out of line with the current provisions of the principal Act and will cause a serious disruption of the current legal system.

(e) General problems foreseen with the proposed resale royalty model

It is submitted that the model for resale royalty rights currently proposed to be introduced by way of new sections 7A – 7E as set out in the Copyright Amendment Bill constitutes a very drastic model, entailing several unduly restrictive provisions and several repetitive provisions, such as:

- (i) that the resale royalty right will be inalienable and an assignment or waiver of the resale right is prohibited; these provisions will have the effect of restricting the freedom to contract of the owner of the copyright (s. 7A(1), 7D);
- (ii) that the royalty rate is fixed or may be prescribed by the Minister, so that it is not negotiable by the parties involved; this again limits the freedom of the parties to contract (s. 7A(2));
- (iii) that the resale royalty right will apply whether or not the artist was the first owner of the copyright, ie despite the provisions of s. 20(1)(b), 20(1)(c), 20(1)(d) of the principal Act (s. 7A(4)(a));

- (iv) that the resale royalty right will apply whether or not the artist has entered into an agreement to waive or change the resale royalty right; the provisions of s. 7A(4)(b), 7D(1) and 7D(2) are repetitive and override the artist's freedom to contract (s. 7A(4)(b); s. 7D);
- (v) that the resale royalty right will endure until 50 years after the end of the calendar year in which the artist dies, thereby far exceeding a reasonable period for the recognition to be given to the artist and his/her creativity (s. 7C(1)).

In addition to the unduly prescriptive and restrictive nature of the provisions to set up the resale royalty right system, it seems that the expected administrative burden of administering the system has not been taken into account. It is not clear from the provision which entity would be responsible for administering the collection of the royalty payments, for locating the artist/creator, and for paying over the royalty to the correct recipient. The difficulty of identifying and locating the correct recipient will be aggravated if the artist/creator is deceased, and the heirs have to be identified and located.

It is submitted that it is likely that the burden and the costs for administering the resale royalty right system will have to be carried by the auction houses; the effect of this will be devastating for the art sale business in South Africa.

Furthermore, even if one or more dedicated collecting societies will be responsible for administering the system, it is likely that these societies will be accumulating substantial amounts of unallocated funds, due to the difficulty of locating artists/creators and particularly the heirs.

It is submitted that, instead of enacting the current resale royalty right system as contemplated in the proposed sections 7A – 7E, an attempt should be made to arrange for a due consultation and consideration process in order to create a more balanced and equitable resale royalty system to achieve the desired benefits to emerging artists through the resale of their works, but without creating an environment that would force the local arts auctioneers to consider other options.

### **Recommendation 3**

It is recommended that the restrictive impact and the negative consequences that the currently proposed resale royalty rights system (proposed by sections 7A – 7E) is expected to exert on the art sales market in South Africa, and on the artists (particularly emerging artists), should be carefully considered before these provisions are enacted, and that the outcomes of similar provisions in other countries should also be taken into account.

The principle is recognised and endorsed that creative artists should get the recognition that they deserve, and that they should benefit from the sales of their creative products. However, a more balanced model to achieve this should be devised, ie a model that would set up a dispensation in terms of which the lesser known emerging creative artists will receive and enjoy appropriate benefits and their works will become better known and more valuable, without in the process

destroying an economically active and beneficial arts market sector. Such a dispensation would encourage emerging artists and would thus achieve developmental objectives.

In the memorandum forming the main part of Annexure I it is pointed out that a royalty right (unless properly structured) will undoubtedly primarily favour the well-known and successful artists and not necessarily the emerging artists; and moreover, it is expected that the local art market will be severely prejudiced also to the detriment of the emerging local artists.

(f) Specific problems anticipated with the proposed resale royalty system

The introduction into the Copyright Act of the principle of a resale royalty right, a totally novel and potentially contentious concept, without proper prior consultation is seen as controversial and indeed ill-advised. Apart from the fact that there was no opportunity for the underlying principle and objective of the system to be thoroughly considered and debated, or for the potential negative consequences of the system to be considered and taken into account, many of the features of the proposed system lack clarity: The ambit of the proposed system (ie which artistic works will be affected); the legal effect of the proposed system (ie which party will be liable for the payment of the royalty); and the way in which the system is supposed to function in practice (ie to whom the payment of the royalty is to be made) are not clear. Moreover, most of the applicable provisions set out in the proposed new sections 7A – 7E appear to entail serious flaws and are bound to elicit strong objections and conflicting views.

For instance, it is not clear which entity or agency will be responsible for the operation and the monitoring and the enforcement of the system for the payment of resale royalties in practice, and whether collecting societies will play a significant role in administering the system:

- who will determine whether the sale of a specific work will fall within the ambit of the provisions of sections 7A – 7E (eg whether the sale of architectural works such as a public building or private home, or items of craftsmanship such as silverware and jewellery, all of which are defined as ‘artistic works’, will be covered);
- who will determine whether the resale of a work is a ‘commercial resale’ as required in section 7A(1) and (2), or is some other type of transaction (ie whether s. 7A will apply);
- who will have the responsibility to determine whether the royalties are still payable (ie whether or not the applicable term of duration of the royalty right has expired);
- who will have the responsibility to ensure that payment of the royalty is made (ie the seller of the work or the purchaser);
- who will have the responsibility to determine the identity of the artist or of the joint artists (ie where the work of art is not marked with the name of the artist, or the artist is not otherwise identified);

- who will have the responsibility to determine whether the conditions set out in s. 7A(3) are complied with (ie whether the artist is a citizen or resident, whether the resale or any part of the transaction takes place in South Africa);
- who will have the responsibility to determine who will be entitled to the royalty where the artist is deceased (ie whether there was a testamentary disposition or the operation of law and who are the heirs);
- who will have the responsibility to receive the royalty payment and pay it over to the correct recipient (ie to the artist if he/she is still alive and/or to the heirs); and
- who will have the responsibility to determine what would be considered as the selling price of the work of art for purposes of calculating the royalty (eg where the work is donated, or where payment is in kind).

The uncertainty of the system is exacerbated by the fact that any contravention of the resale royalty right provisions will be a criminal offence: Section 23 of the principal Act (which section currently deals with infringing acts and not with criminal offences; s. 27 deals with criminal offences) is to be amended by s. 28 of the Bill to create, in new s. 23(4)(j), criminal offences in respect of any contravention of the provisions in regard to the resale royalties. In terms of new s. 23(5) a person who is found guilty of such a contravention will be liable to imprisonment of up to 10 years and/or a fine of up to R50 000. Moreover, in terms of the new s. 27A to be introduced into the principal Act by s. 30 of the Bill, where any offence is committed by a company or a juristic person, any director, manager, secretary or other officer of the company who had any attributable negligence shall also be deemed to be guilty of the offence and subject to the same punishment.

The criminalisation of contraventions of provisions which are seriously lacking in clarity and certainty places a serious question mark over the rational basis for the proposed model of the resale royalty rights system.

What is clear is that the entire system of resale royalty rights was not properly considered. Although there may be merit in the underlying principle, the specific system as set out in new sections 7A – 7E will not be effective or indeed feasible. Although it is accepted that part of the motivation for the introduction of the system may have been to promote and empower emerging indigenous artists, an objective that is to be supported, it is expected that an additional financial burden and an additional risk of criminal liability, such as that contemplated in the proposed resale royalty system, may in practice have the opposite effect; it may in fact not serve to promote the works of emerging indigenous artists, nor increase the commercial value of such works, but may cause such works not to be purchased even if offered for sale by auction houses.

What is not clear is at what stage the conceptual proposal was put forward and the decision made for the introduction of a resale royalty right to become part of the restructuring of the copyright regime, and why the conceptual proposal and the implementation model were not put forward for public consideration and debate. The draft National Policy on IP did not recommend that such a system be introduced. It is pointed out that this issue was not also investigated, considered and/or

reported on by the Copyright Review Commission. The first time that it was referred to in broad terms was at the Copyright Roundtable Discussion in February 2015, but at that stage no further information regarding the model to be used was given. Therefore, it does not seem that an opportunity was created for consultation and/or debate on this issue.

#### **Recommendation 4**

It is recommended that, taking into account the outcomes in other countries where such a resale royalty has been introduced, the merits of the introduction into South African law of such a resale royalty right system should be thoroughly considered and debated; and should it be concluded that such a system is to be introduced, that a tailor-made model be designed that would achieve the intended objectives without causing irreparable harm to the art market in South Africa.

It is thus recommended that a more balanced model should be devised, if it is decided that resale benefits are to be provided to the creative artists, namely a model that would achieve the intended objectives but without causing irreversible prejudice to the art market in South Africa. Such a model should incorporate the following principles:

- (i) identification of categories of creative artists to be afforded special recognition and reward;
- (ii) appropriate recognition of and appropriate reward to the identified creative artists;
- (iii) recognition and assessment of the effect of the resale royalty model on the arts market;
- (iv) appropriate term of duration for the resale royalty right (eg only lifetime of the creative artist);
- (v) permissibility and legality of contractual arrangements that modify the basic statutory arrangements;
- (vi) clarity on the party responsible for the payment of the resale royalty;
- (vii) clarity on the party responsible for determination and processing of the payment.

#### **4.2 Resale of art works: marketing processes**

##### **(a) Marketing processes relevant to resale of art works**

Another issue that is of specific importance to the art sales market in South Africa relates to the copyright implications for the marketing processes that precede a public sale or auction.

In the process of reselling art works, it is generally necessary to market or advertise the sales, ie to make third parties aware of the fact that the art work is on sale and to display or illustrate the appearance of the art work. In the context of the reselling of art works, demands are often made in recent times, by parties (generally collecting societies) allegedly representing some original creators of the art works, for royalties to be paid in respect of the use of images of the art works in the course of advertising and marketing activities in regard to the resale of the art works. Such activities may entail the production of brochures and/or the placement of advertisements or promotional articles in newspapers and other publications, including in electronic media. It is generally accepted that the legal position is that a person who acquires a work of art from the author/creator acquires

ownership of that physical/material embodiment of the work, but does not acquire the underlying copyright in the work; the copyright remains the property of the author/creator.

At present there is uncertainty in South Africa whether the current owner of such a physical work of art has the right to make use of conventional marketing processes, such as the publication of images of the work of art, in order to resell the work. There is no doubt that the person who acquires the physical embodiment of the art work also acquires the right to resell the work. It can be argued that, by selling the art work and by granting the right to the purchaser to resell the work, the author/creator also grants to the purchaser an implied licence to make reproductions of the work for the purpose of advertising the resale of the work.

When dealing with copyright works, also artistic works, it must be borne in mind that the copyright vests in the creative concept – not in the material embodiment of the concept. Therefore, it is accepted as the current legal position (although not expressly stated in the Copyright Act) that the initial sale of the material embodiment of an artistic work by the creator does not entail the transfer of the copyright in the work; although the painting or sculpture is sold or donated to a third party by the author/creator, the author remains the owner of the copyright in the work. This means that the owner of the painting or the sculpture does not acquire the right to make reproductions or images or even take photographs of the work for commercial purposes (eg to sell prints or replicas of the work); this right remains with the author/creator (or the successor in title, if the copyright as such is transferred). It is not clear whether the purchasers of art works are always aware of this legal complication.

This means that, when the current owner of the art work wishes to resell the work and wishes to place an advertisement or promotional article showing an image or replica of the work in a newspaper or brochure, such owner may be accused of making an unauthorised reproduction of the art work. Although it is clear that the image or replica would not constitute a reproduction of the art work made for commercial purposes, eg intended to be displayed in the same manner as the original embodiment purchased (eg mounted against a wall or on a pedestal), the making and the use of such an image or replica is still alleged to constitute an infringement. The current owner of the art work may then be required to pay a royalty to the original artist to obtain the necessary permission to publish the image or replica as part of the advertisement and/or marketing of the work. This is generally seen as an undue and unfair restriction placed on the current owner of the art work.

The current position is being exploited by parties representing the authors/creators of art works; this also entails an element of discrimination. It is interesting to consider the discrepancy in this regard between the resale of physical embodiments of art works and the resale of physical embodiments of works of architecture. Works of architecture are, like paintings and sculptures, species of 'artistic works'. One would expect the different species of the same category of copyright works to be treated in a similar manner. Yet there is no record of estate agents having to pay a royalty fee to the architect who designed a house or a building when pictures of the house or building are published in sales brochures.



If the marketing of a work of architecture can take place without the payment of a royalty, it is not clear why the marketing of a work of art should be subject to such a royalty.

(b) Possible solution to legitimise marketing processes

This dilemma in the marketing of art works has been widely recognised and different solutions have been put forward. One such solution is to regard the making and the use of an image or replica for resale purposes as authorised by an implied licence given by the artist to the purchaser when the physical embodiment (ie the art work) was initially sold. Such an implied licence may be inferred from the general exception granted by s. 15(4) of the Copyright Act in respect of artistic works, eg by making the provisions of s. 12(1) and (4) of the Act applicable also to artistic works. However, these provisions contain certain limitations that may rule out such a licence.

Another and probably better solution is the provision for an express exception such as incorporated in the UK Copyright, Designs and Patents Act, 1988. The exception is subject to a clearly stated limitation. Section 63 of this Act provides as follows:

- “63.(1) It is not an infringement of copyright in an artistic work to copy it, or to issue copies to the public, for the purpose of advertising the sale of the work.*
- (2) Where a copy that would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with for any other purpose, it shall be treated as an infringing copy for purposes of that dealing, and if that dealing infringes copyright for all subsequent purposes.”*

It is submitted that the permissive provision incorporated in the UK Act provides a fair solution to the need of the owners of art works who wish to resell their works. As indicated above, the owners merely wish to resell an item of property that belongs to them so as to benefit from the increase in inherent value of the art work as such; they have no intention of making reproductions of the work and of selling those reproductions as ‘copies’ of the art work, thereby to benefit from infringing activities.

**Recommendation 5**

In order to facilitate the resale of works of art, and to make it clear that the use of images or replicas of the art work for purposes of promoting the marketing and sale of such art work will not constitute an infringement, it is recommended that an exception similar to that of s. 63 of the UK Act be incorporated in the draft Amendment Bill so as to amplify the South African Copyright Act.

**4.3 User royalty right: payment of royalty for use of copyright works**

A new s. 9A(4) is to be introduced into the principal Act by s. 9(k) of the Bill to provide that, notwithstanding the transfer of the copyright in a work (listed as such works are literary, musical and artistic works, cinematograph films, television, radio, photography, crafts works and computer programs), the author of the work shall have the right to claim a royalty fee as and when the copyright work is used.

Furthermore, in terms of the new s. 23(4) to be introduced into the principal Act by s. 28 of the Bill, more specifically s. 23(4)(b), any person who omits to pay the author of a copyright work a royalty fee as and when the work is used as contemplated in the new s. 9A(4), will be guilty of an offence and will be liable on conviction to imprisonment for up to 10 years, or to a fine of up to R50 000, or to both imprisonment and a fine.

The new subsection (4) to be inserted into s. 9A of the principal Act thus aims to introduce a new royalty payment principle; the ambit of and the circumstances for such royalty payment will be different. Generally royalties are payable to the owner of the copyright in a work (who is not necessarily the author or the creator of the work), in terms of a contract between such owner and the party authorised/licensed to distribute or otherwise exploit or use the work. In terms of the new s. 9A(4) it will now be provided that, notwithstanding the transfer of the copyright in a musical, literary or artistic work, or in a cinematograph film, or in a television or radio programme, or in a photograph or a crafts work, or in a computer program, and accordingly notwithstanding the fact that the new owner of the copyright will be receiving royalties from the user of the work, the creator of the copyright work shall also have the right to claim a royalty fee whenever the copyright work is used.

The reason for, and the intended outcome of, the provision of the proposed new s. 9A(4) is not clear at all. Section 9A as a whole is intended to deal with certain specific uses made of sound recordings, namely broadcasting, transmission in a diffusion service, and communicating to the public. The intention is to protect the interests of the copyright owner of a sound recording and the performer whose performance features on the sound recording, in the specific circumstances outlined in s. 9A, namely in the case of broadcasting, transmission in a diffusion service, or communicating (ie playing the sound recording) to the public. Section 9A does not deal with copyright works in general, nor does it address the use of copyright works in general.

It is not clear what is intended to be achieved by the new s. 9A(4): the formulation of the provision is not clear; the ambit of the provision is not clear; the reference to the 'use' of the work is not clear. A literal interpretation and application of this provision would have ridiculous outcomes:

- Even though a person acquires (pays for) an artistic work, such as a painting, and becomes the owner of the work, and even though the creator has transferred the copyright to that person or to a third party, a royalty must be paid to the creator whenever the work is used (eg the painting is displayed on a wall in the private dwelling of the owner)?
- Even though a person acquires (pays for) a literary work, such as a book, and becomes the owner of the book, and even though the author has transferred the copyright to that person or to a third party, a royalty must be paid to the author whenever the work is used (eg the book is read in the study of the owner)?
- Even though a person acquires (pays for) a work of craftsmanship (eg a piece of silverware such as a candle holder), and becomes the owner of the item of craftsmanship, and even though the creator has transferred the copyright to that person or to a third party, a royalty must be paid to the creator whenever the candle holder is used (eg to hold candles at a dinner table of the owner)?

This proposed provision simply does not make sense and cannot work in practice.

The position is exacerbated by the partial duplication of the provision of the new s. 9A(4) by the new s. 20(4) to be introduced into the principal Act by s. 23 of the Bill. The new s. 20(4) provides that, notwithstanding the transfer of the copyright in television, film, radio, photography or crafts works, and notwithstanding contractual arrangements, the creator of the copyright work and the performer has the 'moral right' to receive royalty payments when repeats of the television, film, radio, photography or 'art work' (*sic*)? are used as prescribed by the Minister.

Again it is not clear what is intended to be achieved by this provision: the meaning is not clear, the ambit is not clear, the relationship to s. 9A(4) is not clear, ie the manner in which the provision is to function in practice in parallel with the new s. 9A(4) is not clear – and moreover, the wording is not clear (ie the reference to 'art work').

The position is even further exacerbated by the new s. 39A to be introduced into the principal Act by s. 37 of the Bill. In terms of the new s. 39A any term in a contract that purports to renounce a right afforded by the Act will be unenforceable, ie will be null and void. This means that when the copyright in a work as contemplated in s. 9A(4) is transferred, or when the copyright in a work as contemplated in s. 20(4) is transferred, and the author waives the right to receive royalties in respect of the future use of the work, such waiver will be unenforceable.

It is submitted that such a provision negates the freedom to contract and will have a negative impact on trade, business and commercial activities in regard to intellectual property.

#### **Recommendation 6**

It is recommended that the proposed section 9A(4) be drastically revised and reformulated, or that it be cancelled.

It is also recommended that the proposed section 20(4) be drastically revised and reformulated, or that it be cancelled.

#### **4.4 Liability for criminal offences**

As indicated above, new s. 23(4), (5) and (6) are to be introduced into the principal Act by s. 28 of the Bill. The new s. 23(4) sets out a long list of acts that in future will constitute criminal offences, including a provision in s. 23(4)(b) that any person who omits to pay the author of a copyright work a royalty fee as and when the work is used as contemplated in the new s. 9A(4), will be guilty of an offence; and a provision in s. 23(4)(j) that any person who contravenes the provisions relating to the resale royalty rights of the artist/creator in the case of the resale of a copyright work shall be guilty of an offence. The new s. 23(6) then provides that any person who is found guilty of an offence will be liable on conviction to imprisonment for up to 10 years, or to a fine of up to R50 000, or to both imprisonment and a fine. In the case of institutions found guilty, deregistration may take place.

It is noteworthy that the list of acts set out in the proposed new s. 23(4), which will constitute criminal offences, does not include the acts of illegal copying of copyright works on a large scale, such as the piracy of literary works or art works or works of craftsmanship. This means that, even though the perpetrators can be identified, it is only possible to institute civil proceedings against such perpetrators. It would seem that large scale illegal copying and piracy would constitute more serious contraventions, at least on a par with the other contraventions listed in s. 23(4).

The Bill will introduce a further provision with potentially an even more aggravating effect, namely the new s. 27A to be inserted by s. 30 of the Bill. The new s. 27A(1) provides that, where any offence under the Act has been committed by a juristic person, every person who at the time was a director in charge of or responsible for the conduct of the business of the juristic person shall be deemed to be guilty of such offence, and shall be liable to be punished accordingly.

Furthermore, s. 27A(2) provides that, where an offence under the Act has been committed by a juristic person and it is proved that the offence was committed 'with the consent of, or collusion with, or is attributable to any negligence' on the part of a director, manager, secretary or other officer of the company, such person shall also be deemed to be guilty of such offence and liable to be punished accordingly. It is expected that this provision may have far-reaching and probably unforeseen consequences in practice.

It is recognised that criminal sanctions would in many cases be necessary in order to address serious contraventions of the provisions of the Copyright Act. However, it is pointed out that the proposed s. 23(4) fails to criminalise large scale and illegal copying of copyright works, such as piracy.

It is also submitted that the criminal liability placed on juristic persons by the proposed s. 27A, and on the office bearers and other employees of juristic persons, goes too far; these provisions are too widely formulated and may indeed conflict with provisions in the Companies Act, 2008.

Finally, it is pointed out that the provisions to criminalise certain acts, currently to be introduced as the new s. 23(4) – (6), do not belong in s. 23 of the principal Act. Section 23 deals with acts of infringement and civil proceedings; s. 27 of the principal Act would be more appropriate for the provisions as contemplated in the new s. 23(4) – (6).

#### **Recommendation 7**

It is recommended that the list of criminal offences in the proposed new s. 23(4) be reconsidered and be amplified to cover also large scale piracy and illegal copying.

It is further recommended that the criminal liability placed on juristic persons and the office bearers and employees of juristic persons by the proposed new s. 27A, be reconsidered and redefined.

It is also recommended that the criminal offences as listed in the new s. 23(4) – (6) rather be inserted into s. 27 of the principal Act.

#### 4.5 Reversion of copyright after assignment

Section 26 of the Bill proposes to introduce into the principal Act the principle of the reversion of assigned rights, by the substitution in s. 22 of the Act of subsection (3). Section 22(3) currently provides for the assignment of copyright to be enforceable only if effected by way of a written assignment document; a proviso will now be added that such assignment shall be valid only for a period of 25 years from the date of such assignment. This means that, after a period of 25 years the copyright will revert to the assignor (who will normally be the author of the work).

Such a reversionary right was provided for in s. 5(2) of the British Copyright Act of 1911, and was introduced into South Africa by the Patents, Designs, Trade Marks and Copyright Act 9 of 1916, which made the British Copyright Act, 1911 applicable in South Africa. However, the reversionary provision was omitted from the first South African Copyright Act 63 of 1965 and also from the current Copyright Act 98 of 1978. Such a reversionary right will have far-reaching effects in the business environment, in that parties who deal with assignees of copyright will have to bear in mind that, after 25 years, the copyright will revert to the original owner and the assignee will no longer have any proprietary rights.

In the case of the fine arts industry, where older art works (including items of silverware and jewellery) are often more valuable, and where the copyright in respect of such works may have been assigned, it is expected that the reversionary right will create substantial uncertainty and will impact negatively on the sales of art works or the manufacturing of silverware and jewellery in South Africa.

#### Recommendation 8

It is recommended that the introduction of a reversion of assignment, as contemplated in the proposed amendment of s. 22(3) of the principal Act, be reconsidered and be cancelled.

### 5. COMMENTS ON PROVISIONS OF GENERAL RELEVANCE

Some comments on specific provisions to be introduced into the Copyright Act and which would be relevant to the promotion, sale and auctioneering of art works are set out below.

#### 5.1 Section 1 – amendment of s. 1 of the principal Act: Definitions

(i) **‘accessible format copy’** – this definition introduces an important new concept into the principal Act, namely to convert a work into a format that would make it accessible to a person with disability. However, if this definition is read with the definition of a **‘person with a disability’** it seems that the principle of catering for persons with disabilities is to be limited to literary works, ie to enable such persons to read printed works and books. It is submitted that persons with disabilities should also be enabled to perceive artistic works such as paintings; this is already being achieved by making copies of paintings with raised outlines that can be discerned (like Braille writing) by blind people.

#### Recommendation 9

It is recommended that the definition of **‘person with a disability’** be revised by adding the words ‘or perceive artistic works’ after the present words ‘to read printed works’; by inserting the words ‘or an artistic work’ after the present words ‘hold or manipulate a book’; and by inserting the words ‘or perceiving’ after the present word ‘reading’.

(ii) **'craft works'** – this concept is defined to include items such as works of pottery, glass work, sewing, knitting, crochet, jewellery, tapestry, wood, lace, embroidery, paper tolling, folk art, and hand-made toys. Some of these works may also be offered for sale at art auctions.

The works as listed have always been regarded as being included in the definition of **'artistic works'**, namely as **'works of craftsmanship'**. It is not clear why a further definition of **'craft works'** is required when the existing definition of **'artistic work'** in the principal Act already includes the category of **'works of craftsmanship'**. Having two separate definitions covering similar works can only give rise to interpretational problems, conflict and uncertainty. Instead of the introduction of a new and conflicting definition, the existing category of **'works of craftsmanship'** could be suitably amplified, namely by specifying the individual items to be included in the concept **'works of craftsmanship'**, eg by using wording such as 'including but not limited to works of pottery, glass, sewing, knitting, crochet, jewellery, tapestry, wood, lace, embroidery, paper tolling, folk art, and hand-made toys'.

As indicated (although in a badly formulated manner) in the new s. 11C (to be introduced into the principal Act by section 12 of the Bill) read with the new s. 9A(5) (to be introduced into the principal Act by section 9(k) of the Bill), it seems that the intention is for the resale royalty right also to be applicable to the resale of such craft works. As indicated above, such resale may take place at art auctions and the resale royalty levy may have serious negative consequences.

#### **Recommendation 10**

It is recommended that, instead of introducing a separate definition of **'craft works'** and thereby creating a possibility of conflicting interpretation, the existing category of **'works of craftsmanship'** in the definition of **'artistic works'** be suitably amplified.

(iii) **'reproduction'** – a new definition of **'reproduction'** is to be introduced to substitute the current definition of **'reproduction'** in the principal Act. However, the proposed new definition is totally out of line with the other provisions of the principal Act; in fact, the current definition of **'reproduction'** is crucial to the interpretation and application of the principal Act and cannot be replaced by the new definition as put forward in the Amendment Bill. It is suggested that the introduction of the new definition is an error; it seems that the intention may have been to replace the definition of **'reproduction'** in the Performers' Protection Act for purposes of the provisions of that Act. To replace the definition in the Copyright Act with the proposed new definition would be extremely detrimental to the principal Act.

#### **Recommendation 11**

It is recommended that the proposed insertion of the new definition of **'reproduction'** be cancelled.

(iv) **'orphan works'** – a new definition for the concept **'orphan works'** is to be introduced into the principal Act. It is not clear how this concept will relate to the concept of anonymous works already dealt with in s. 3(3) of the principal Act. Having two very similar concepts differently defined in the same Act, and with different applicable provisions, would create interpretational problems and potential conflict and uncertainty.

Furthermore, s. 3 of the principal Act is to be amended to provide that the ownership of copyright in orphan works shall vest in the State and that the term of such copyright shall be perpetual.

As regards the proposed provision that the ownership of the copyright shall vest in the State, this could provide a workable model, although the question would arise as to the position in regard to anonymous works (in respect of which no similar provision currently exists).

As regards the proposed term of duration, it is submitted that perpetual duration of copyright in the case of orphan works would have many detrimental consequences. It is also not quite clear why orphan works (where the author cannot be identified or located) should be dealt with differently from anonymous works (where the author is unknown), and in respect of which a fixed but limited term is provided for in s. 3(3) of the principal Act – a term of duration in line with other copyright works.

### **Recommendation 12**

It is recommended that the proposed provision to be inserted into s. 3(3) of the principal Act should rather be amended to replace the current subsection (3)(b), and the current subsection (3)(b) renumbered and amended to constitute subsection (3)(c), as follows:

- “3.(b) In the case of an orphan work, where the copyright vests in the state by virtue of section 20(3) and where the author or the owner of the copyright is unknown or cannot be located, or the author or the copyright owner is dead and his or her heirs cannot be located, the copyright shall subsist for fifty years from the end of the year in which the work was made available to the public or from the end of the year in which it is reasonable to presume that the author died, whichever term is the shorter.
- (c) In the event of the identity of the author becoming known before the expiration of the period referred to in paragraph (a) or (b), the term of protection of the copyright shall be calculated in accordance with the provisions of subsection (2).”

Strauss & Co  
September 2015

**COPYRIGHT AMENDMENT BILL 2015**  
**(Government Notice 646 Government Gazette 39028)**  
**27 July 2015**

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**MEMORANDUM**  
**with**  
**COMMENTS AND STATISTICAL INFORMATION**

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**1. INTRODUCTION OF A RE SALE ROYALTY**

In South African the auction houses Strauss & Co and Stephan Welz & Co are the leading auctioneers of South African art, holding approximately 85% of the South African art auction market.

Evidence from the auctions conducted by these two houses for the 2009 – 2013 period shows how some 33 artists account for a large proportion of art work sold by value and by number (see Tables 1 and 2 in Attachment A). Of these 33 artists only two are still living.

These 33 artists account for a turnover of R531,543,334 over the four year period. Of these 33 artists Irma Stern accounts for R191,994,082, or 36% of the total. The works of seven of the 33 artists are no longer subject to copyright (the period of copyright protection has expired), with their sales totalling R107,237,655. The top 30 artists account for 43% of all art works sold, and for 75% of the total market value over the 2009 – 2013 period. Works from 584 identified artists were offered at auctions over this period by the two auction houses; therefore about 550 artists, or 94%, accounted for only 25% of the turnover.

There is no doubt that a resale royalty right would undoubtedly favour the rich and successful.

A further disconcerting fact is that a large part of the auction market for South African art is held by Bonhams in London. In 2012 their sales of South African art totalled R100 million. Earlier they sold Irma Stern's *Arab Priest* for R34 million and in 2013 Tretchikoff's *Chinese Lady* for R13 million. They also until recently held the record price for a work by J.H. Pierneef at R10 million, and have over the years sold a large number of Irma Sterns totalling many millions of rands. Bonhams do not accept low value art works for auction. In terms of the proposed new section 7A(3)(c), outlining the payment of the proposed resale royalty, any transaction taking place outside of South Africa will not be subject to a resale royalty. I have no doubt that with paintings of high value, should a resale royalty be introduced in the South African law, sellers, where possible, will favour London to auction their artworks. Also, such a royalty will inevitably lead to a number of transactions taking place 'under the table', all resulting in a great loss in commission income to South Africa.



## 2. COPYRIGHT IN AN ARTISTIC WORK COPIED FOR PURPOSES OF SALE

Confusion exists in the South African art market as regards the right of the copyright owner to charge for reproductions of a work in the form of images or photographs, made for resale purposes whether in the print or digital media. It was hoped that this aspect regarding copyright would be dealt with in the Copyright Amendment Bill.

Until 2012 the question was not an issue; it was accepted that, when selling a work of art, the artist responsible for the work grants an implied licence allowing the purchaser to illustrate the work in the media when offering it for resale. In 2012 DALRO started securing mandates from artists or their heirs to administer the reproduction rights in the relevant artists' works on the understanding that the copyright holder has the right to charge for reproductions of a work for resale purposes. Auction houses in particular, with their greater public visibility, were initially targeted.

The reproduction charges may vary from R240 to R896 per illustration. While this might appear to be relatively insignificant when selling a work of several hundred thousand rand, the obverse is true for works of a low value. As could be seen from Attachment A, by far the greater number of artists' works sold could be regarded to be in a low price range, many as low as R3000 and less. Given the commission auction houses are able to charge, even a reproduction charge of R240 it is not a proposition for auction houses to handle these lower priced works.

It is an accepted fact that the successful sale of an artist's work at an auction enhances the value of other works by the artist and also the artist's reproduction which is boosted by the positive publicity. Auction catalogues, which reach a very large proportion of the art market, also grant an artist considerable exposure to a very relevant audience. The converse is that the non-inclusion in auction catalogues, auction advertisements and press reviews can prove detrimental to an artist's career. This means that images or pictures of the lower priced art works, usually by lesser known emerging artists, will generally not be advertised or published in the catalogues, because the demand for the payment of a royalty renders this a non-proposition for auction houses.

Attachments B to F reflect the current market position of five artists currently mandated to DALRO. The sales information regarding these five reflects the problems related to lower-priced artists, generally lower prices achieved and a reduced number of works sold. This can be partly attributed to a slowing economy, but the introduction of a copyright charge for the marketing exposure has undoubtedly influenced the artists' market and has diminished their reputation. All indications are that a charge for reproduction as part of the marketing process again favours the rich and successful but is to the detriment of the artist struggling for success in the art market. In fact many of the artists in this latter category are at a tipping point: they are earning very little if anything from the copyright fees and are also not selling their works.

This problem situation could be readily solved by introducing a section into the Copyright Act similar to section 63 of the UK Copyright, Designs and Patents Act, 1988 which makes a very clear exception as regards reproduction for the purpose of sale:

*'63.(1) It is not an infringement of copyright in an artistic work to copy it, or to issue copies to the public, for the purpose of advertising the sale of the work.'*

The introduction of this or a similar section into the Copyright Act would, I believe, greatly improve the market place both for auctioneers and art dealers, but more importantly, for emerging artists hoping to pursue a full time career as an artist.

Stephan Welz  
Managing Director  
Strauss & Co  
Johannesburg

**FIGURES AND TABLES**

**ATTACHMENT A**

Table 1: The South African Art Market

	Strauss & Co	Stephan Welz & Co	Total
<b>Art Work Presented for Auction:</b>			
Total Estimated Value	612,342,700	531,083,200	1,143,416,900
Number	3,751	3,802	7,533
Mean Value	163,248	139,685	151,387
Median Value	40,000	14,000	25,000
Variance	$5.21 \times 10^{11}$	$2.40 \times 10^{13}$	$1.24 \times 10^{13}$
Standard Deviation	721,948	4,902,580	3,515,133
<b>Art Work Sold at Auction:</b>			
Total Value	586,468,891	119,277,166	705,696,057
Number	2,946	2,399	5,345
Mean Value	199,140	49,699	132,053
Median Value	44,560	15,680	28,964
Variance	$7.33 \times 10^{11}$	$2.56 \times 10^{10}$	$4.21 \times 10^{11}$
Standard Deviation	856,401	160,130	648,962
<b>Note:</b> Values are in South African Rand (ZAR)			
<b>Source:</b> Strauss & Co data collection from auctions, 2009 - 2013			

Table 2: Principal South African Artists at Auction

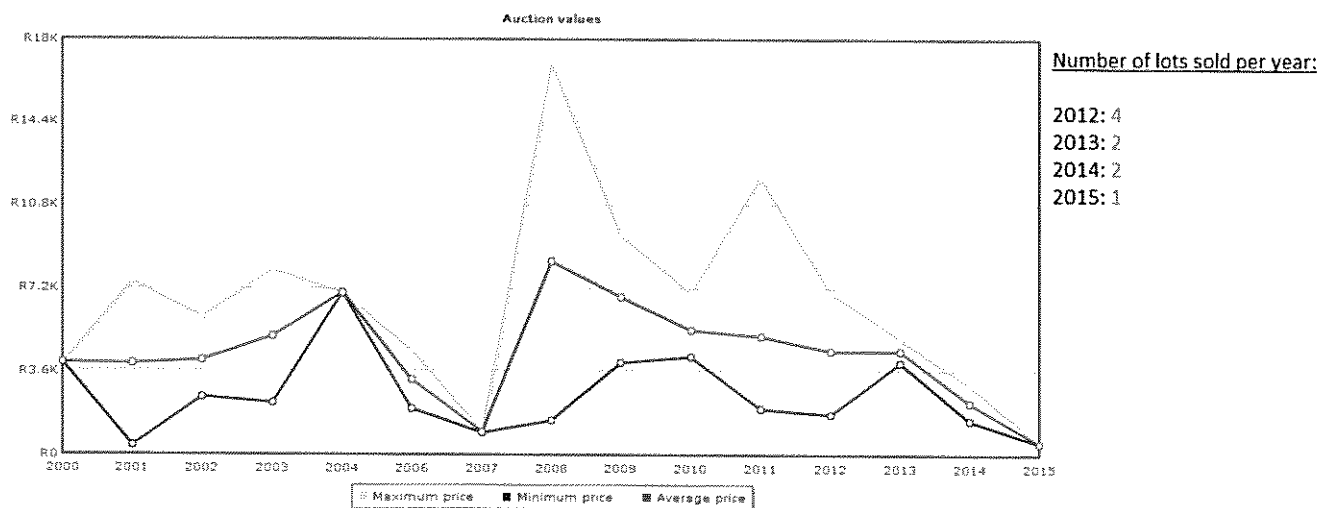
(1) Ranking in Number		(2) Ranking in Value (ZAR)	
Battiss, W.W.	172	Stern, Irma	191,994,082
Pierneef, J.H.	147	Pierneef, J.H.	54,057,195
Boonzaier, G.J.	142	Preller, A.	28,351,046
De Jongh, M.J.	99	Laubser, Maggie	25,855,537
Kentridge, W.J.	94	Battiss, W.W.	17,589,558
Skotnes, C.E.F.	86	Kentridge W.J.	17,212,052
Stern, Irma	76	Wenning, P.W.F.	16,747,396
Hodgins, R.G.	75	Skotnes, C.E.F.	16,583,494
Laubser, Maggie	74	Pinker, S.F.	12,363,648
Sumner, M.F.E.	73	Van Wouw, A.	12,293,910
Van Heerden, P.	73	Van Essche, M.C.L.	10,833,474
Boyley, E.S.	70	Sumner, M.F.E.	10,291,257
Coetzer, W.H.	70	Boonzaier, G.J.	9,983,796
Naude, P.H.	68	Hodgins, R.G.	9,979,309
Coetzee, C.	67	Naude, P.H.	9,968,253
Catherine, N.C.	65	Villa, E.D.	6,751,302
McCaw, T.J.	64	Rose-Innes, A.	6,410,483
Rose-Innes, A.	63	Kibel, W.	5,991,833
Van Essche, M.C.L.	61	Sekoto, G.	5,752,026
Boshoff, A.H.	60	Sithole, L.T.	5,554,460
Villa, E.D.	56	Meintjes, J.P.	5,483,585
Volschenk, J.E.A.	56	Tretchikoff, V.G.	5,323,160
Meintjes, J.P.	55	Boshoff, A.H.	5,204,236
Büchner, C.A.	54	Laubscher, F.B.H.	5,124,628
Pinker, S.F.	50	Lock, F.	4,859,340
Van der Westhuizen, P.	48	Welz, J.M.F.	4,824,195
Krige, F.	46	Pemba, G.M.M.	4,795,130
Timlin, W.M.	46	Kumalo, S.A.	4,100,373
Claerhout, F.M.	43	Coetzee, C.	3,627,285
De Jongh, G.C.	43	Catherine, N.C.	3,586,680
Mayer, E.K.E.	43	Clarke, P.	3,429,238
Domsaitis, P.	40	Oerder, F.D.	3,319,728
Preller, A.	40	Krige, F.	3,301,645
<b>Source:</b> Professor J.W. Fedderke & Kaini Li, 2014. 'Art in Africa: Market Structure and Pricing Behaviour in the South African Fine Art Auction Market, 2009 – 2013'			

**ATTACHMENT B**

ABCDEFGHIJKLMNOPQRSTUVWXYZ

# Motswai, Tommy (Thomas) Trevor

Add this artist to my favourites



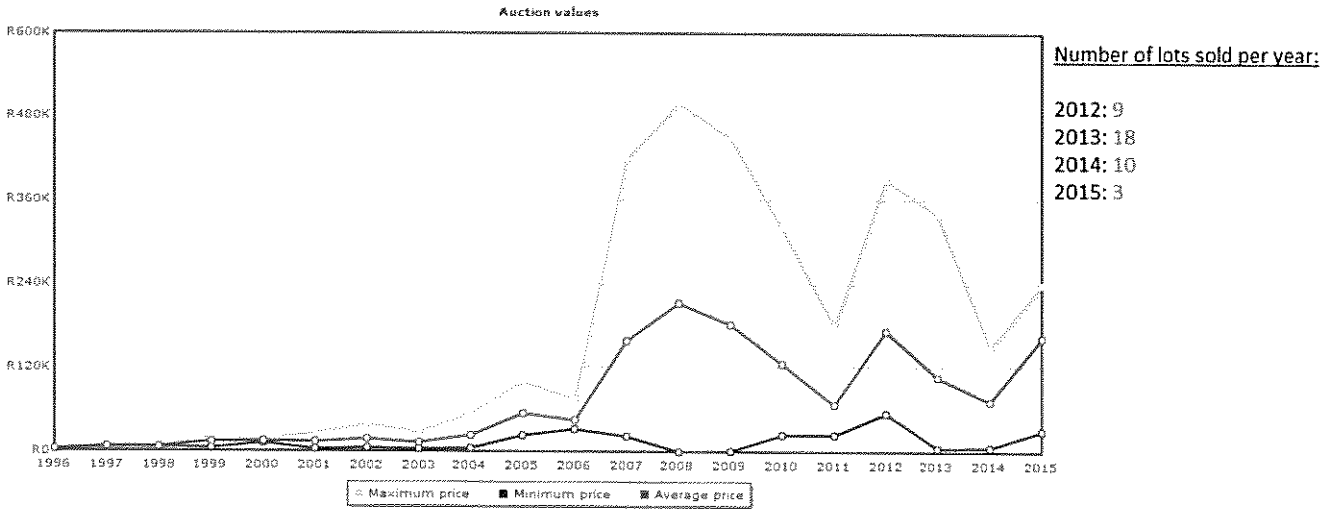
All media

**ATTACHMENT C**

ABCDEFGHIJKLMNOPQRSTUVWXYZ

# Ngatane, Ephraim Mojalefa

Add this artist to my favourites



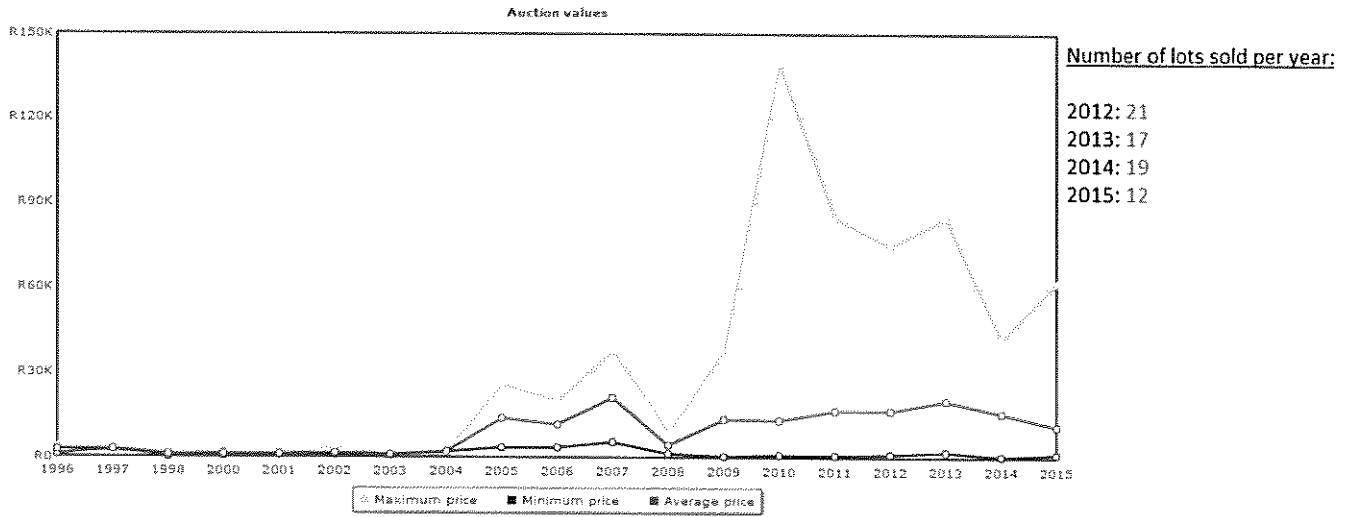
All media

**ATTACHMENT D**

ABCDEFGHIJKLMNOPQRSTUVWXYZ

# Mason-Attwood, Judith Seelawder

Add this artist to my favourites



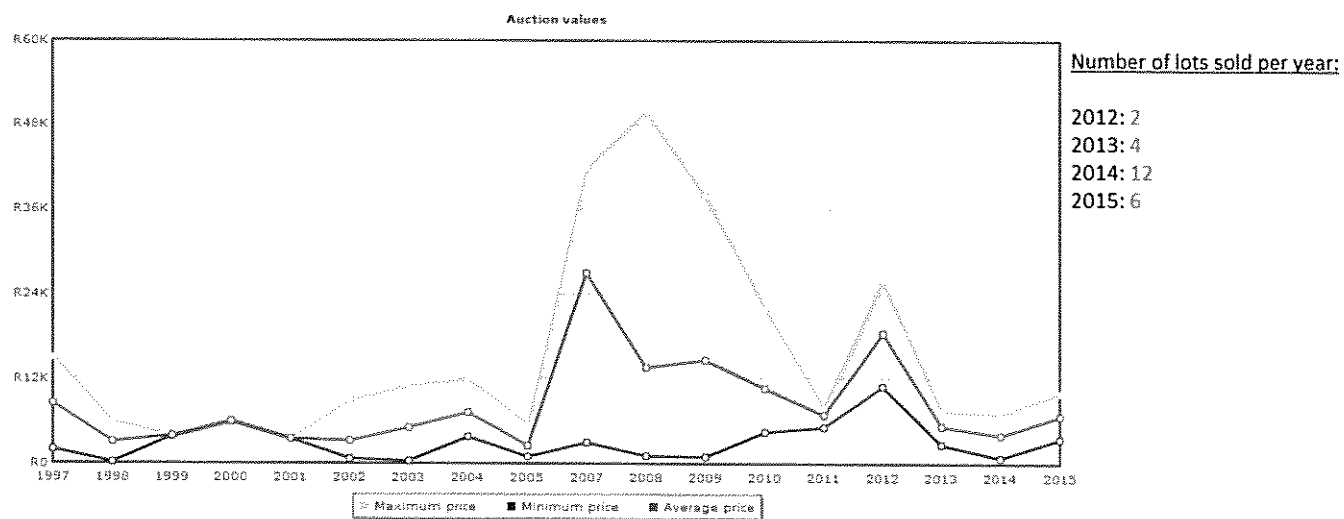
All media

**ATTACHMENT E**

ABCDEFGHIJKLMNOPQRSTUVWXYZ

**Sihlali, Durant Basi**

Add this artist to my favourites

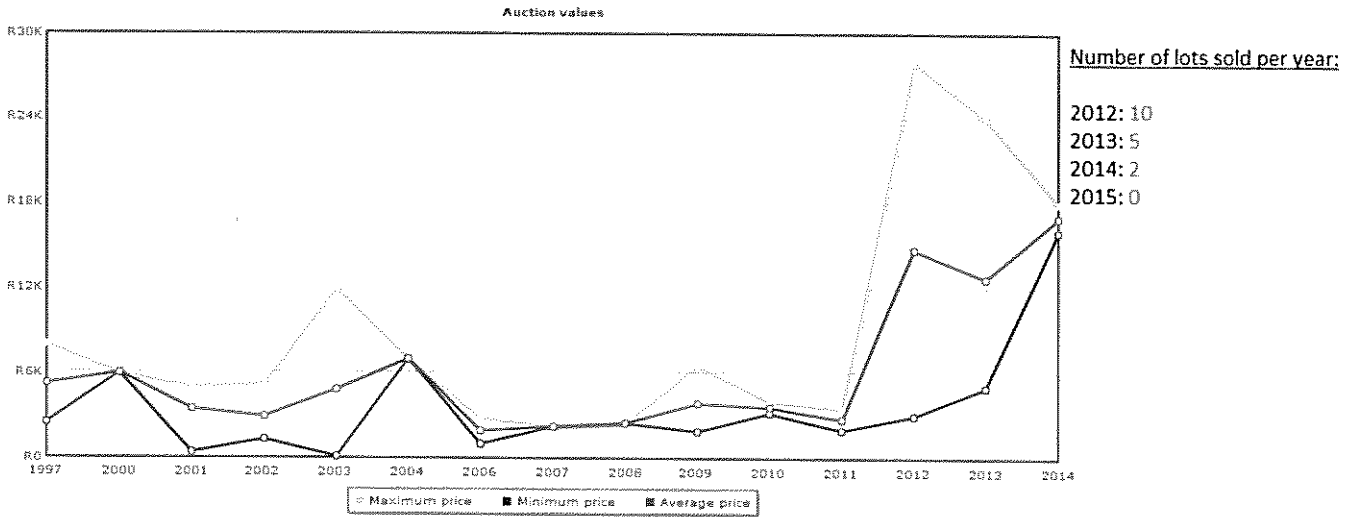
All media

**ATTACHMENT F**

ABCDEFGHIJKLMNOPQRSTUVWXYZ

# Mogano, David (Phoshoko)

Add this artist to my favourites



All media



ATTACHMENT G**CURRICULUM VITAE (Concise Version)****PERSONAL DETAILS:**

NAME	Stephan Aage Welz
BUSINESS ADDRESS	Strauss & Co 89 Central Street, Houghton, 2198 Johannesburg.
POSTAL ADDRESS	P O Box 851, Houghton, 2041
TELEPHONE	+27 11 728-8237
FAX	+27 11 728-8247
NATIONALITY	South African
ID NUMBER	430413 5035 08 9
MARITAL STATUS	Married
LANGUAGES	Afrikaans, English

**ACADEMIC RECORD:**

1971	B Com (Admin) University of South Africa
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**CAREER HIGHLIGHTS:**

2009	Appointed Managing Director of Strauss & Co
2008	Joined Strauss & Co
2006	Stephan Welz & Co sold
1987	Sotheby's bought out – Stephan Welz & Co established
1983	Appointed as a Director of Sotheby's London
1980	Appointed to Directorate of Sotheby's International
1980	Appointed Managing Director of Sotheby's (SA)
1975	Appointed Executive Director of Sotheby's Parke Bernet (SA)
1974	Appointed to the Board of Sotheby's Parke Bernet (SA)
1970 – 1974	Consultant to Sotheby's (SA)

**PUBLICATIONS: VARIOUS INCLUDING:**

1996	Published: <i>Art at Auction in South Africa (Review of South African Art Market 1969 – 1995)</i>
1989	Published: <i>Art at Auction in South Africa</i>
1976	Published definitive reference book: <i>Cape Silver</i>

**BOARDS, COMMITTEES: VARIOUS INCLUDING**

BOARD OF TRUSTEES	William Fehr Collection – The Castle, Cape Town
COUNCIL MEMBER	William Humphries Art Gallery – Kimberley
COUNCIL MEMBER	Africana Library – Kimberley
EXECUTIVE COUNCIL	Ministerial Appointee: National Heritage Council
Council Member	Art Advisory Council: South African Transport Services

**Stephan Welz** could probably be called 'the face of South African Art'. He has been associated with, and indeed a leading figure in, the fine and decorative art markets for 45 years and is considered the foremost authority in the country on authentication and valuation of South African art and antiques.

## EFFECT OF RESALE ROYALTY RIGHTS SYSTEM ON ART SALES AND MARKETS

### POSITION IN OTHER COUNTRIES:

#### SUMMARISED OUTLINE OF STUDIES AND REPORTS ISSUED IN OTHER COUNTRIES

#### 1. DIRECTIVE OF THE EUROPEAN UNION

In 2001 the European Parliament and the Council of the European Union adopted the Directive 2001/84/EC on the resale right for authors of original works of art. The Directive only became effective in 2006. In the Preamble to the Directive reference is made (in clause (6)) to the provision in the Berne Convention (Art 14<sup>ter</sup>) that the resale right will be available only if legislation in the country to which the author belongs so permits. It is then stated that the right is therefore optional and subject to the rule of reciprocity.

It is also stated (in clause (18)) that the scope of the resale right should be extended to all acts of resale, with the exception of those effected directly between persons acting in their private capacity without the participation of an art market professional. It is further stated (clause (21)) that the categories of works of art subject to the resale right should be harmonised. The person by whom the royalty is payable should in principle be the seller (clause 25)).

The EU Directive provides (Art 4) for a sliding scale of royalty rates to apply to art works in different price categories:

- (a) 4% for the portion of the sale price up to EUR 50 000;
- (b) 3% for the portion of the sale price from EU 50 000.01 to EUR 200 000;
- (c) 1% for the portion of the sale price from EUR 200 000.01 to EUR 350 000;
- (d) 0,5% for the portion of the sale price from EUR 350 000.01 to EUR 500 000;
- (e) 0,25% for the portion of the sale price exceeding EUR 500 000.

The total amount of resale royalty to be paid on a work of art is also capped at EUR 12 500.

It is further provided (Art 3) that a minimum sale price may be stipulated as a threshold, below which the resale royalty would not be payable. The minimum sale price is set at EUR 3 000.

After the EU Directive was issued in 2001 and implemented in 2006, member countries of the EU introduced provisions into their laws to provide for a resale royalty right, or amended existing provisions in their laws.

## 2. REPORT BY THE EUROPEAN COMMISSION

In 2011 the European Commission issued a Report on the Implementation and Effect of the Resale Right Directive, implemented in 2006. The Report sets out some interesting statistical background information, inter alia that (in 2010) the EU had a global art market share of 27%, followed by the US (34%), and then by China (23%). It is pointed out that the most marked market trend was the dramatic rise of the Chinese market from 5% in 2006 to 23% in 2010, with the concomitant drop in the shares of the EU and US.

**NOTE:** It should be noted that China to date does not have a resale royalty right provision. However, a process of revising the copyright law of China is currently taking place and proposed provisions have been put forward to introduce a resale royalty system.

The Report then analyses the impact on the art and antiques markets of the introduction of the resale royalty system, but found that there was insufficient evidence to indicate that the loss of the EU market share could directly be attributed to the implementation of the resale royalty right. The Report could also not find clear patterns that would indicate a significant difference in the trends in the EU applicable to the resale of art works only of living artists, and the resale of art works of living and deceased artists (when the heirs benefitted).

The Report noted that many of its respondents have indicated that clients wishing to sell higher priced works often choose to relocate the sales to other markets, such as New York, citing the resale royalty right as a cost factor in that decision. It may be mentioned that the same trend has been identified in regard to the growth in popularity of the Chinese market, where no resale royalty is payable.

The Report then addresses certain practical issues, such as the management procedures to operate the collection and distribution of the resale royalties, and the administrative costs involved in these procedures. The majority of EU member states provide for collective management and distribution of the resale royalty payments, and it was argued that small and medium enterprises would suffer most from the high administration costs. Administration costs would primarily be incurred by the need to determine the identity and location of the artist/creator, the need to identify and determine the location of the heirs, the processing and distribution of the funds, etc. It was pointed out that not all countries maintain records of artists/creators and thus potential beneficiaries. This meant that the task to gather all necessary information would fall to the art market professionals. Records and databases with searchable relevant information may not be readily available.

The Report points out, in its concluding remarks, that the costs and administrative burden to operate the resale royalty system would be particularly high for art auctioneers at the lower end of the market.

It is pointed out in the Report that the EU art market involves around 59 000 businesses, employing close to 270 000 employees with an estimated 110 000 jobs in ancillary and support services. Even in such an environment the cost and the burden of administering the resale royalty system is seen as

prohibitive. It is submitted that a country with a much smaller art market, like South Africa, would find this even more prohibitive: the cost and the burden to administer the resale royalty system would be particularly high and may have the effect of destroying this market as an area of vibrant economic activity in South Africa. As found in the Report, the system may also have the result that art sales, particularly of higher value art works, would be moved to other more benign markets, such as New York or China.

The Report in its final paragraph states the concern of the European Commission regarding the need for collecting societies to operate on a high level of governance and transparency. In a small country like South Africa, where the recorded information regarding living artists or creators and/or their heirs may be more difficult to locate, it would be even more important for collecting societies to manage and administer the system and the funds collected in a responsible and transparent way.

### 3. COUNTRIES WITH LAWS PROVIDING FOR RESALE RIGHTS

According to available records, it seems that 79 countries (78 individual countries plus the EU Directive) have implemented new laws or have amended existing laws to provide for a resale royalty right. Most of the new laws or legislative amendments date from 2006; however, there are a smaller number of countries with provisions going back to the 1990s. There are about 15 countries on the African Continent with such provisions, mostly dating from 2006 but also some going back earlier.

There may be merit, before finalising a model for a resale royalty system in South Africa, in conducting some research into the outcomes of these legal systems in comparable countries.

It would be noteworthy also to have regard to a report issued in 2013 by the US Copyright Office under the title 'Resale Royalties: an Updated Analysis'. It was pointed out that surveys found that the resale royalty right benefits already prominent artists at the expense of their less well-known counterparts. So, it seems that a minority of well-known artists reap the lion's share of the financial rewards. This trend was confirmed by a survey and report issued by the UK in 1992. In structuring a workable model for a resale royalty system for South Africa, it would be prudent to take into account these findings.