

THE RESALE RIGHT

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Abstract

The article analyses one of the most important rights of the authors of original works of art namely: the resale right. It will be analyzed the subject matter of the resale right, the works of art to which the resale right relates, the rates applicable to the resale right, the persons entitled to receive royalties, the term of protection of the resale right, third-country nationals entitled to receive royalties and the right to obtain information. Also, the article will refer to the EU Directive in the field: Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art. It will be the subject of the article, also, the European Court of Justice jurisprudence related to the resale right, for example the judgment in the case C-518/08 (VEGAP vs. ADAGP), underlying that, in the light of the objectives pursued by Directive 2001/84, Member States may make their own legislative choice in determining the categories of persons capable of benefiting from the resale right after the death of the author of a work of art. One of parts of the article, will analyses the collective management for the resale right, especially: the terms of the collective management, forms of the collective management and examples. For all the above mentioned reasons, the article will refer to the main aspects of the resale right in a comprehensive manner and will analyses in a scientifically manner this very important right of the authors of original works of art.

Keywords: *authors of original works of art, the resale right, Directive 2001/84/EC, jurisprudence, collective management.*

1. Introduction

The resale right is one of the most important rights of authors of original works of art. The resale right was born in France in 1920 and since then it developed, currently being recognized by sixty national legislations¹. In 2001, the European Commission recognizing the importance and the value of this right adopts the Directive 2001/84/EC on resale rights for the benefit of the authors of original works of art. The major objective of the Directive was to ensure the proper working of the modern and contemporary art market in the European Union² and to end the discrimination suffered by some artists resulting from where it their works are resold³.

As was pointed out in the doctrine⁴, the resale right was meant to repair an injustice done to young authors of original works of art, being at the beginning of their career, which are selling their works with a low price and then becoming famous their works are sold with very high prices. From these resale profit only the assignees. This was the reason for which was regulated the resale right in order to compensate in an equitable manner the lost brought to the authors of original works of art and for them to benefit also from the successive resale of their works. For the above mentioned reasons,

the resale right was termed in the doctrine⁵ as a pecuniary right to a fair partition.

In favor of the resale right, was taken also into account the fact that the communication to the public and the reproduction rights, have an insignificant value as regards the original works of art

From this point of view, the resale right is becoming the most important economic right of the authors of original works of art and the most common way to exploit the original works of art.

Although the state of knowledge in the concerned field is high enough, the article aims to point the most important aspects regarding the resale right. In order to do this, the article will present the applicable statutory provisions as regards the object, the subject and the content of the resale right, the EU Directive on resale rights for the benefit of the authors of original works of art, will analyses the European Court of Justice jurisprudence related to the resale right, for example the judgment in the Case C-518/08 (VEGAP vs. ADAGP) and some aspects related to the collective management of the resale right.

2. Content

At the international level, the resale right was regulated by **article 14 third of the Berne**

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¹ <http://www.adagp.fr/en/author-right/property-rights/resale-right>.

² http://europa.eu/rapid/press-release_IP-01-1036_en.htm?locale=ro.

³ *Idem*.

⁴ Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, "Dreptul de autor și drepturile conexe – Tratat", All Beck Publishing House, Bucharest, 2005, p. 283.

⁵ *Idem*.

Convention, but the Convention provides that the resale right is available only if legislation in the country to which the author belongs so permits. The right is therefore optional and subject to the rule of reciprocity.

In 2001, after barely surviving its perilous journey between the Commission, the European Parliament and the Council (and back again), the **Resale Right Directive**⁶ was finally adopted⁷.

The Directive promoted harmonization of the substantive conditions for the application of the resale right:

1. eligibility and the duration of protection;
2. the categories of works of art to which the resale right applies;
3. the scope of the acts to be covered i.e. all acts involving dealers in works of art;
4. the royalty rates applicable across defined price bands;
5. the maximum threshold for a minimum resale price attracting the right (€3,000);
6. provisions on third country nationals entitled to receive royalties.

Member States had to implement this Directive before 1 January 2006.

On the Report on the Implementation and Effect of the Resale Right Directive⁸ dated 14.12.2011, the European Commission stated that 4 Member States did not implement the Directive: Austria, Ireland, the Netherlands and the UK. These Member States enjoyed a transitional period to 1 January 2010 during which they could choose not to apply the resale right to the works of eligible deceased artists. These Member States, together with Malta, made use of this provision, and of the option to extend the derogation period for a further 2 years. This derogation ended on 1 January 2012, at which point the Directive was fully implemented in all Member States.

The subject matter of the resale right⁹ - the author of an original work of art will benefit of the resale right, defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.

The resale right will apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.

From the above mentioned aspects, result **the characteristics of the resale right**: inalienable and it cannot be waived. These characteristics transform the resale right in a **unique**¹⁰ **economic right of the authors**, because all the economic rights of the authors can be transferred or renounced.

Also, the unique characteristics of the resale right result from the fact that is not a right to authorize or to prohibit the use of the work, but a possibility to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.

The debtors of the resale right are the sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art. So, the debtor of the correlative obligation of the author resale right is, in all the cases, the seller¹¹.

The works of art to which the resale right relates¹² are the original works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art. Results that are covered by the resale right **the original works of art and the copies considered to be original works of art**. In order to comply with the Directive, the copies of works of art have to fulfill the following conditions: have been made in limited numbers by the artist himself or under his authority and have been numbered, signed or otherwise duly authorized by the artist.

Therefore, the works of art to which the resale right relates are the ones done personally by the author and the ones done with its authorization, for example by heirs or third parties.

The Directive sets a **minimum sale price** from which the sales shall be subject to resale right. This minimum sale price may not under any circumstances exceed EUR 3 000¹³.

One of the most interesting aspects of the Directive refers to the **rates** applied to the selling price. In the case of the minimum sale price, the rate may not be lower than 4 %¹⁴. The total amount of the royalty may not exceed EUR 12.500.

The Directive sets down **the term of protection** provided in the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights¹⁵ and the Berne

⁶ European Parliament Directive and that of the Council 2001/84/CE from the 27th of September 2001 on resale right for the benefit of the author of original works of art, published in the Official Journal of European Communities no. L 272 from the 13th of October 2001.

⁷ Derclaye, "Research Handbook on the Future of EU Copyright", Edward Elgar Publishing Limited, UK, 2009, p. 16.

⁸ http://ec.europa.eu/internal_market/copyright/docs/resale/report_en.pdf

⁹ Art. 1 Directive 2001/84/EC.

¹⁰ N. Binctin, "Droit de la propriété intellectuelle", L.G.D.J., Paris, 2010, p. 112 – for these reasons the author named the resale right a "strange" right.

¹¹ Art. 1 (4) Directive 2001/84/EC.

¹² Art. 2 Directive 2001/84/EC.

¹³ Art. 3 Directive 2001/84/EC.

¹⁴ Art. 4 (3) Directive 2001/84/EC.

¹⁵ Art. 1.

Convention¹⁶: **the life of the author and for 70 years after his death**, irrespective of the date when the work is lawfully made available to the public.

The resale right affects directly only trade in Contemporary and Modern fine art i.e. works by EU living artists, or by EU artists deceased within 70 years of sale.

The Directive allowed Member States to provide for **compulsory or optional collective management** of the resale right royalty¹⁷. While the majority of Member States provides for obligatory collective management of the resale right, a significant number opted for optional collective management. Beyond this, the Directive is silent on the implementation and administration of the right. There are significant divergences in the national systems resulting in differences in terms of ease and cost of administration, both for art market professionals and collecting societies administering the resale right.

The collective management organizations that are administering the resale right in Europe are: Bildrecht¹⁸ (Austria), SABAM¹⁹ (Belgium), SOFAM²⁰ (Belgium), GESTOR²¹ (Czech Republic), COPYDAN²² (Denmark), EAU²³ (Estonia), KUVASTO²⁴ (Finland), ADAGP²⁵ (France), La Saif²⁶ (France), Bild-Kunst²⁷ (Germany), FOEBUS²⁸ (Greece)²⁹, IVARO³⁰ (Ireland), Myndstef³¹ (Island) SIAE³² (Italy), AKKA-LAA³³ (Latvia), LATGA³⁴ (Lithuania), PICTORIGHT³⁵ (Netherlands), BONO³⁶ (Norway), SPAUTORES³⁷ (Portugal), LITA³⁸ (Slovakia), VEGAP³⁹ (Spain), Bildupphovsratt⁴⁰ (Sweden), Prolitteris⁴¹ (Switzerland) and DACS⁴² (UK).

In Romania, the collective management organization which is administering the resale right is VISARTA⁴³.

In **Romania**, the Directive was fully implemented in Law no. 8/1996 on copyright and related rights, as amended and supplemented (hereinafter Law no. 8/1996), in the articles 21-23.

The art. 21 (1) of Law no. 8/1996 stipulates that the resale right is applying to **original works of graphic or plastic art or of photographic works**. From this point of view, the Law is limiting the works subject to the resale right only to works of graphic or plastic art or of photographic works. The Law is not enumerating like the Directive the works to which the resale right is applying. From this point of view, in the specialized literature⁴⁴ was mentioned that the enumeration from the Directive should had been implemented also in the Law no. 8/1996, because only to this works the resale right can be recognized.

The right is applying also to the **copies of the original works of art or photographic works** that have been made in a limited number by their author himself or with his consent⁴⁵. As was stated also in the doctrine⁴⁶, the number of the copies that are considered original works of art, with the condition that the copies were made by the author, was not regulated either by the Directive or by the Law and is stipulated in the Fiscal Code⁴⁷: 8 copies for tapestries and glassware and 30 copies for photos.

Regarding the **rates** applied to the selling price, the Law establishes the following⁴⁸:

- a) from EUR 300 to EUR 3,000 – 5%;

¹⁶ Art. 2.

¹⁷ Art. 6 (2) Directive 2001/84/EC.

¹⁸ <http://www.bildrecht.at/>

¹⁹ <http://www.sabam.be/>

²⁰ <http://www.sofam.be/>

²¹ <http://www.gestor.cz/cs/>

²² <http://www.copydan.dk/>

²³ <http://www.eau.org/>

²⁴ <http://kuvasto.fi/>

²⁵ <http://www.adagp.fr/>

²⁶ <http://www.saif.fr/spip.php?page=accueil>

²⁷ <http://www.bildkunst.de/index.html>

²⁸ <http://www.foebus.gr/stcontent.asp?catid=1>

²⁹ <http://www.hungart.org/>

³⁰ <http://ivaro.ie/>

³¹ <http://www.myndstef.is/>

³² <https://www.siae.it/it>

³³ <http://www.akka-laa.lv/lv/>

³⁴ <http://www.latga.lt/>

³⁵ <http://www.pictoright.nl/>

³⁶ <http://www.bono.no/>

³⁷ <https://www.spautores.pt/>

³⁸ <http://www.lita.sk/>

³⁹ <http://www.vegap.es/inicio.aspx>

⁴⁰ <http://www.bildupphovsratt.se/>

⁴¹ <http://prolitteris.ch/>

⁴² <https://www.dacs.org.uk/>

⁴³ <http://www.visarta.ro/>

⁴⁴ Viorel Roş, "Dreptul proprietăţii intelectuale – Vol I. Dreptul de autor, drepturile conexe şi drepturile sui-generis", C.H. Beck Publishing House, Bucharest, 2016, p. 349.

⁴⁵ Art. 21 (3) Law no. 8/1996.

⁴⁶ Viorel Roş, *op.cit.*, p. 349.

⁴⁷ Art. 312 Fiscal Code.

⁴⁸ Art. 21 (4) Law no. 8/1996.

- b) from EUR 3,000.01 to EUR 50,000 – 4%;
- c) from EUR 50,000.01 to EUR 200,000 – 3%;
- d) from EUR 200,000.01 to EUR 350,000 – 1%;
- e) from EUR 350,000.01 to EUR 500,000 – 0.5%;
- f) over EUR 500,000 – 0.25%.

These rates are fixed in the same manner like in the Directive.

Therefore the minimum reselling price is EUR 300. Also, the total amount of the royalty may not exceed EUR 12.500. The minimum sale price is justified by the fact that under this amount the costs for administering the resale right can be higher than the amount obtained by the author.

The seller have the following obligations:

- to convey to the author the information regarding the resale of the work, the price paid and the place where the work is, in 2 months from the selling date.
- to withhold from the net selling price, without adding other fees and to pay to the author of the amount owed.

The article 21 (6) of the Law provides that the beneficiaries of the resale right or the representatives thereof may request, within 3 years as of the date of resale, to the persons subject matter of the resale right the necessary information in order to insure the payment of all owed amounts. This obligation is provided also in the art. 9 of the Directive.

Also, according to articles 22 and 23 of the Law, the owner or possessor of a work have the obligations:

- to allow the author access to it and place it at his disposal where necessary for the exercise of his copyright, provided that the owner or possessor's legitimate interests are not thereby prejudiced. The owner or possessor may in such a case claim a sufficient guarantee from the author for the security of the work, and also the insurance thereof for an amount representing the market value of the original, as well an adequate remuneration.
- not to destroy the work before having offered it to the author at the cost price of the material and where the return of the original is not possible, the owner shall allow the author to make a copy of the work in an appropriate manner.

A special regulation is established in the case of an architectural structure, for which the author shall have the right only to take photographs of the work and to request the return of reproductions of the projects⁴⁹.

This disposition of the Law is in accordance with the nature of the architectural work.

As stated in the doctrine⁵⁰, having in mind the frugifer nature of the resale right, it least all the life of the author and is the subject of being inherited for 70 years after the death of author, according to article 25 of Law no. 8/1996⁵¹. Accordingly, the resale is the subject of the legal inheritance for a period of 70 years and can be transferred also by testament⁵².

In Romania, according with art. 123¹ (1) lit. c) Law no. 8/1996, **the resale right is managed compulsory by the collective management organizations.**

Regarding the resale right, the European Court of Justice had ruled only in 2 cases:

The first decisions of the European Court of Justice regarding the resale right was taken in the Case C-518/08 (VEGAP vs. ADAGP)⁵³.

The French legislation limits the beneficiaries of that resale right after the death of the artist to his heirs and excludes all legatees. The artist cannot therefore bequeath that right by will.

The painter Salvador Dalí died on 23 January 1989 in Spain, leaving five heirs at law, who were family members. In addition, by his will, Salvador Dalí established the Spanish State as sole legatee over his intellectual property rights. Those rights are administered by the Fundación Gala-Salvador Dalí, a foundation established under Spanish law, created in 1983 at the initiative of the painter himself.

In 1997 the Fundación Gala-Salvador Dalí granted to VEGAP, a Spanish society, an exclusive worldwide mandate to manage collectively and exercise copyright over the works of Salvador Dalí. VEGAP has, in addition, a contract with its French counterpart, ADAGP, which is responsible for the management of Salvador Dalí's copyright in France. Since then, ADAGP has collected amounts in respect of the exploitation of Salvador Dalí's works, which were transferred by VEGAP to the Fundación Gala Salvador Dalí, with the exception of those in respect of the resale right. Pursuant to French legislation, ADAGP paid the amounts in respect of the resale right directly to Salvador Dalí's heirs. Taking the view that, under Salvador Dalí's will and Spanish law, the royalties levied upon sales at auction of the artist's works in France should be paid to it, the Fundación Gala-Salvador Dalí and VEGAP summonsed ADAGP before

⁴⁹ Art. 23 (3) Law no. 8/1996.

⁵⁰ Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *op. cit.*, p. 285-286.

⁵¹ Art. 25.—(1) The economic rights provided for in Articles 13 and 21 shall last for the author's lifetime, and after his death shall be transferred by inheritance, according to civil legislation, for a period of 70 years, regardless of the date on which the work was legally disclosed to the public. If there are no heirs, the exercise of these rights shall devolve upon the collective administration organization mandated by the author during his lifetime or, failing a mandate, to the collective administration organization with the largest membership in the area of creation concerned.

(2) The person who, after the copyright protection has expired, legally discloses for the first time a previously unpublished work to the public shall enjoy protection equivalent to that of the author's economic rights. The duration of the protection of those rights shall be 25 years, starting at the time of the first legal disclosure to the public.

⁵² Viorel Roş, *op.cit.*, p. 351.

⁵³ <http://curia.europa.eu/juris/document/document.jsf?text=&docid=81364&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7645>.

the Tribunal de Grande Instance de Paris (Paris Regional Court) for payment of those royalties.

In the course of those proceedings, the French court referred to the Court of Justice the question whether Directive 2001/84 precludes a provision of national law which reserves the benefit of the resale right solely to the artist's heirs, to the exclusion of testamentary legatees.

The European Court of Justice Decision in the case C-518/08 (*VEGAP vs. ADAGP*) stated that art. 6 (1) of the Resale Right Directive⁵⁴ must be interpreted in the sense that is not opposing to a national disposition which reserve the benefit of the resale right only to the legal inheritors of the author, excluding the testamentary legatees⁵⁵.

For stating this Decision, the Court took into account on the one hand, the fact that the Directive is intended to assure a certain level of remuneration of authors and this purpose is not compromised by the devolution of the resale right to some legal subjects by excluding others after the death of the artist. On the other hand, although the EU legislator had in mind that legatees to benefit of the resale right after the death of the author, didn't considered that is advisable to interfere in the field of the inheritance national laws, leaving to each state the competence to define the categories of legatees. Results that in the light of the Directive the **Member States have the liberty to establish the categories of persons which can benefit of the resale right after the death of author.**

That being so, the Court explains however that it is for the referring court to take due account of all the relevant rules for the resolution of conflicts of laws of succession in order to determine which national law governs the succession of Salvador Dalí's resale right and, therefore, who is the actual successor to that right under that national law.

The second judgment, rendered by the European Court of Justice on 26 February 2015, regarding the resale right was taken in the Case C-41/14 (*Christie's France SNC vs. Syndicat national des antiquaires*)⁵⁶.

In the framework of two interesting and contradictory cases rendered by the Court of Appeal of Paris, the French Supreme Court referred a preliminary question to the European Court of Justice: can an auction house transfer the responsibility of paying the royalty from the seller to the buyer by contract?

Article 1(4) of Directive 2001/84/EC states that "The royalty shall be payable by the seller", and that Member States may provide that buyers or intermediary art market professionals, such as salesrooms, art galleries and, in general, any dealers in

works of art "shall alone be liable or shall share liability with the seller for payment of the royalty".

The Court stated that "**Article 1(4) of Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art must be interpreted as not precluding the person by whom the resale royalty is payable, designated as such by national law, whether that is the seller or an art market professional involved in the transaction, from agreeing with any other person, including the buyer, that other person will definitively bear, in whole or in part, the cost of the royalty, provided that a contractual arrangement of that kind does not affect the obligations and liability which the person by whom the royalty is payable has towards the author**".

To explain its position, the European Court of Justice states that the objectives of this Directive are (1) to ensure that authors of graphic and plastic works of art share the economic success of their original works of art (para.15), and (2) to 'eliminate differences between laws which lead, inter alia, to unequal treatment between artists depending on where their works are sold' (para. 16). This is why Article 1(1) of the Directive provides, for the benefit of an author, a resale right, defined as an inalienable right (para. 17), which has to be actually paid to the author (para. 18). Nevertheless, Member States alone may determine the person who is responsible for payment of the royalty to the author (para. 19).

The European Court of Justice specifies that under Article 1(4) of the Directive, if a Member State decides to provide that the royalty is to be payable by a person other than the seller, it must select that person from among the professional persons referred to in Article 1(2), i.e. sellers, buyers or intermediaries (para. 24).

The European Court of Justice finally admits that its position 'may to some extent have a distorting effect on the functioning of the internal market', but that effect is only indirect, since it would arise as a result of contractual arrangements that are independent of the payment of the royalty to the author, who will in any event receive payment (para. 31).

For the above mentioned reasons, about the judgment was said that it will satisfy the auction houses and art dealers in Europe⁵⁷.

As **comparative law**, article L. 122-8 of the French Intellectual Property Code defines the resale right (**droit de suite**) as "a non-transferable right to participate in the proceeds of any sale of a work after the first sale by the artist or his/her beneficiaries, when

⁵⁴ Article 6 Persons entitled to receive royalties.

1. The royalty provided for under Article 1 shall be payable to the author of the work and, subject to Article 8(2), after his death to those entitled under him/her.

2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.

⁵⁵ Ana-Maria Marinescu, "Gestiunea colectivă a dreptului de autor și a drepturilor conexe. Jurisprudență română și europeană în domeniu", RRDPI no. 4/2014, p. 126-128.

⁵⁶ <http://curia.europa.eu/juris/document/document.jsf?text=&docid=162539&doclang=EN>

⁵⁷ <http://kluwercopyrightblog.com/2015/02/27/ecj-auction-houses-may-transfer-cost-of-artists-resale-royalties-to-the-buyer/>

an art market professional is involved as seller, buyer or broker”.

According to article L. 122-8 of the French Intellectual Property Code the beneficiary of the resale right are the “creators of original graphic and plastic works who are citizens of a member state of the European Community or a country party to the agreement on the European economic area”.

The resale right can also benefit to:

- artists who are not citizens of a member state of the European community or a country party to the agreement on the European economic area “when their national legislation grants this right to artists from the countries mentioned above and their beneficiaries and for the period during which they are allowed to exercise this right in their country” (principle of reciprocity);
- artists who are not citizens of a member state of the European community or a country party to the agreement on the European economic area “who, during their artistic career, have participated in French artistic life and have lived in France for at least five years, even if non-consecutive”.

The resale right cannot be assigned (by the users and by the artists) and it cannot be bequeathed. On the death of the artist, it “continues in favour of his/her heirs and, for the beneficial title stipulated in article L. 123-6, his/her spouse, with the exclusion of all legatees and assigns, during the current calendar year and for the following 70 years”.

The French Intellectual Property Code precisely defines the works to which the resale right might be applicable, namely:

- graphic and plastic works of art

The resale right is only applicable to graphic and plastic works of art.

Article R. 122-3 stipulates that this includes works “such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware, photographs and plastic creations on audiovisual and digital media”.

The list is not limitative (“such as”): all graphic and plastic works of art – in particular design works and applied arts – are included.

- “original” works

The resale right is only due for “original” works. This is a specific criterion of originality, which is not the same as the one on which copyright protection is dependent.

As per article L. 122-8, original works are “the works created by the artist him/herself and the copies produced in a limited quantity by the artist him/herself or under his/her control”.

Two categories of works must therefore be considered as original:

- Works created by the artist him/herself: painting done by the painter, furniture made in a single copy, marble sculpted by the artist, etc.
- Works made in a limited quantity by the artist

him/herself or under his/her control: bronze sculptures, copies of photographs, limited edition designer items. Article R. 122-3 requires that such works are “numbered or signed or otherwise duly authorized by the artist”.

This second point marks the boundary between copies produced “industrially”, which can generate revenues on the basis of the reproduction right, and copies made in a limited number by the artist or under his/her control, which, as originals, have an increased value on the art market: in such a case, the artist can perfectly legitimately participate in this enhancement in value thanks to this resale right.

The requirement of a “limited” number of copies does not mean that this number must be small: it simply means that the number of copies made must be finite. In this regard, the presence of numbering or a signature confirms this limited nature. But if other elements can demonstrate unequivocally that the artist has only authorized a limited number of copies, the works concerned will be eligible for the resale right.

The intellectual property code stipulates that the following in particular should be considered to be originals (article R. 122-3):

- a) Original engravings, prints and lithographs produced in a limited quantity from one or more plates;
- b) Copies of sculptures, limited to twelve, including numbered copies and artist’s proofs;
- c) Handmade tapestries and textile works of art, based on original models provided by the artist, limited to eight copies;
- d) Enamelwork pieces made completely by hand and signed by the artist, limited to eight numbered copies and four artist’s proofs;
- e) Signed photographic works, limited to thirty copies, regardless of the format and medium;
- f) Plastic creations on audiovisual or digital medium, limited to twelve copies.”

For other types of works, three general criteria apply: the copy will be considered an original work if it has been either numbered, signed or duly authorized in another way by the artist.

The resale right only applies to sales in which “**an art market professional is involved as seller, buyer or broker**” (article L. 122-8 of the Intellectual Property Code); this includes galleries, auction houses, art dealers, etc.

The French Intellectual Property Code also requires that the sale “take place on French territory” or that it is “subject to value added tax” there⁵⁸.

However, certain sales are excluded from the scope of the resale right:

- Sales of works for a price under EUR 750 (article R. 122-5).
- The first transfer of the work (sale, gift) made by the artist or his/her beneficiaries (article L. 122-8).
- Resale within less than three years after the direct

⁵⁸ Art. R. 122-2 French Intellectual Property Code.

purchase of the work from the artist, provided that the resale price does not exceed EUR 10,000.

The amount of the resale royalty is determined by applying a percentage to the sale price of the work excluding tax: price awarded by auction for public auctions, sale price received by seller in other cases⁵⁹.

It is calculated by applying a reducing schedule based on the amount for which the work is sold (article R. 122-6):

- 4% for the first tranche of the sale price up to EUR 50,000;
- 3% for the tranche of the sale price between EUR 50,000.01 and EUR 200,000;
- 1% for the tranche of the sale price between EUR 200,000.01 and EUR 350,000;
- 0.5% for the tranche of the sale price between EUR 350,000.01 and EUR 500,000;
- 0.25% for the tranche of the sale price over EUR 500,000.00.

The resale royalty is limited to EUR 12,500. Unfortunately for creators of visual arts, it is the only royalty to be limited.

As example⁶⁰, for a work sold for EUR 230,000, the resale royalty due will be EUR 6,800, i.e.:

- EUR 2,000 for the first tranche of the sale price (4% x EUR 50,000);
- EUR 4,500 for the second tranche (3% x EUR

150,000);

- EUR 300 for the third tranche (1% x EUR 3,000).

According to article L. 122-8 of the intellectual property code, "the resale royalty is payable by the seller".

However, the art professional involved in the sale is responsible for making the payment (if the sale takes place between two professionals, the seller will be responsible).

Art professionals must inform specially approved collecting societies of any sale on which the resale royalty is due⁶¹.

Failure to declare sales or pay the resale royalty is punishable by the fine stipulated for third category offences⁶².

3. Conclusions

Romanian legal regulations concerning the resale right are compliant with the ones provided in the Directive 2001/84/EC.

Accordingly to the detail analyze presented, the main conclusion that rises is that for creators of visual arts, the resale right is currently the most important right in economic terms.

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⁵⁹ Art. R. 122-5 French Intellectual Property Code.

⁶⁰ <http://www.adagp.fr/en/author-right/property-rights/resale-right>.

⁶¹ Art. R. 122-10 French Intellectual Property Code.

⁶² Art. R. 122-12 French Intellectual Property Code.

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