

Artist's Resale Rights: French preliminary question to the ECJ

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Brad Spitz (REALEX)

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Can an auction house transfer the responsibility of paying the resale right royalty from the seller to the buyer?

Directive 2001/84/EC created a resale right ('droit de suite') in the EU for the benefit of the author of an original work of art. This resale right is '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' (Article 1). The directive was adopted in 2001 but only came into force on 1 January 2010.

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 intermediaries 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'.

But can an auction house transfer the responsibility of paying the royalty from the seller to the buyer by contract? Regarding the general terms and conditions of Christie's France, which include such a clause, the Court of Appeal of Paris has rendered two completely contradictory rulings, separated by only a few months:

- a first judgment (12 December 2012, No 11/11606) ruled that the obligation of the seller is based on public policy, not only in order to protect the receipt of the royalty by the beneficiary, but also in order to protect the art market. Such clauses are therefore null and void, and the National Union of Antique Dealers ('SNA'), which is a third party to the contract, may make claim for their annulment;

- a second judgment (3 July 2013, No 11/20697) ruled that it is possible to derogate by contract from this rule, and that such a derogation is likely to facilitate the payment of the royalty to the beneficiary. In this ruling, the Court of Appeal of Paris considers that Article L.122-8 paragraph 3 of the French Intellectual Property Code, which implements Article 1(4) of the directive and provides that the royalty is payable by the seller, is not mandatory, as it only concerns the method of payment and is therefore not a matter of a public policy.

Christie's France appealed the first judgment before the Supreme Court (22 January 2014, 13-12675), which confirmed that the SNA has a legitimate right to take action and referred the following preliminary question to the ECJ (Case C-41/14):

'Must the rule laid down by Article 1(4) of Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, which makes the seller responsible for payment of the royalty, be interpreted as meaning that the seller is required definitively to bear the cost thereof without any derogation by agreement being possible?'

Recital 25 of the directive seems to allow the Member States to derogate from this rule, as it states: 'The person by whom the royalty is payable should, in principle, be the seller. Member States should be given the option to provide for derogations from this principle in respect of liability for payment...'

The ECJ will therefore certainly also answer the following question: are the Member States allowed to make mandatory the rule that requires the seller to pay the royalty, without any possibility to derogate from this principle by contract?

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