

Kluwer Copyright Blog

ECJ: Auction houses may transfer cost of artist's resale royalties to the buyer

Brad Spitz (REALEX) · Friday, February 27th, 2015



An auction house may transfer the responsibility of paying the artist's 'droit de suite' from the seller to the buyer.

This judgment, rendered by the European Court of Justice on 26 February 2015 in response to a reference from the French Supreme Court, will satisfy the auction houses and art dealers in Europe (*Christie's France SNC v Syndicat national des antiquaires, Case C-41/14*). The ECJ has held that under Article 1(4) of [Directive 2001/84/EC](#) on the resale right for the benefit of the author of an original work of art, the seller or an art market professional involved in a transaction may agree with any other person, including the buyer, that the said other person will bear the cost of the resale royalty to be paid to the author (the resale right system in France is presented in [Brad Spitz, Guide to Copyright in France, Wolters Kluwer, 2015](#), p. 79 et seq.).

[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. Under Article 1 of said Directive, authors and their heirs are entitled to receive an 'inalienable' resale right, 'which cannot be waived, even in advance'. These royalties are '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(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'.

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 (see our blogpost [Artist's Resale Rights: French preliminary question to the ECJ](#))? In these two cases, the Court of Appeal had to rule whether the general terms and conditions of Christie's France could include a clause transferring the obligation to pay the artist's resale royalty to the

buyer. The Court of Appeal of Paris rendered two completely contradictory rulings:

- 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 a claim for their annulment;
- a second judgment (3 July 2013, No 11/20697) ruled that it is possible to derogate from this rule by contract, 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 \(22 January 2014, 13-12675\)](#), and the following preliminary question was referred 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?'

In [Christie's France SNC v Syndicat national des antiquaires, Case C-41/14](#), the ECJ answers that Article 1(4) of Directive 2001/84/EC allows such an agreement between the parties, as this provision '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 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 ECJ 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 ECJ 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 ECJ finally admits that its position 'may to some extent have a distorting effect on the functioning of the internal market', but that 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).

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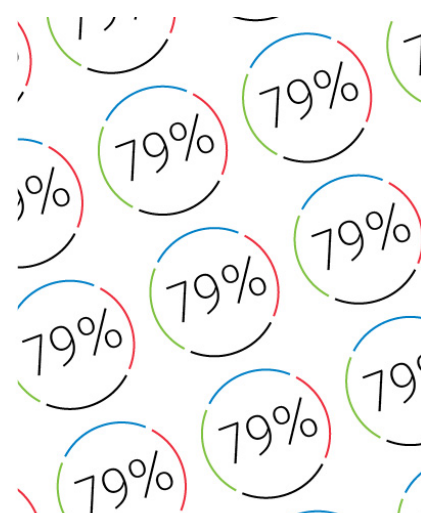
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