



## Hugh Stephens Blog

Insights on International Copyright Issues

# The Artists' Resale Right: A Matter of Simple Fairness



*Credit photo: author*

Canadian artist [E.J. Hughes](#), although likely not a household name to many outside Canada, is nonetheless one of the iconic artists of the west coast of Canada. His paintings chronicle the relatively recent history of the coast of British Columbia (BC), as the example above shows. His works, full of life and colour, record the steamships that used to call in at small settlements along the coast, fishing boats and little car ferries, not to mention spectacular mountain scenery, colourful fishing wharves, houses and sheds.

Hughes was born in BC in 1913 and lived to a ripe old age, passing away at the age of 93 in 2007. Except for a period during the Second World War as a war artist overseas,

he spent virtually all his time in coastal communities, the last half century in the Cowichan Valley where many of his paintings were executed.

Recently a Hughes painting, *Steamer Arriving at Nanaimo* (home of course to the eponymous “[Nanaimo Bars](#)”), [sold at auction](#) for \$841,250 and *Three Tugboats, Nanaimo Harbour*, for just over \$600,000. That may not seem like the [big leagues](#) when compared to a recent sale of Monet’s *Meules*, which fetched over \$110 million in 2019, but for Canadian art it is a lot. What is worth knowing about *Steamer Arriving* is that when Hughes first sold it in the 1950s, it earned him all of \$150. Another of Hughes’ paintings, [Fishboats Rivers Inlet](#) fetched over \$2 million at auction in 2018. It was painted in 1946 using materials that Hughes had left over from his days as a war artist. I could not find a record of what it originally sold for, but it couldn’t have been much as Hughes was living hand to mouth at the time. Another work of his that sold for over \$400,000 in 2007 was [reportedly](#) purchased for just \$200 at a garage sale a few years earlier (although not directly from Hughes, who painted it in 1959). These examples all illustrate the common phenomenon of rapidly escalating values of artistic works that were often originally purchased for just a pittance.

In Hughes’ case, he had a longstanding relationship with Montreal art dealer Max Stern who reached a standing arrangement with the artist to purchase all his work. That suited Hughes who then had a steady source of income. By all accounts, Hughes lived modestly and was not demanding of Stern, who often had to insist on increasing the price he paid Hughes for his paintings. Toward the end of his life, (in 2000), Stern was paying Hughes in the vicinity of \$10,000 for new works. This was a fair return given that Hughes was becoming more and more well known, elected to the Royal Canadian Academy of Arts in 1968. As artists become better known, the value of their new paintings generally increases as well as their older works—yet they receive nothing from these earlier works when they are resold. This is a situation that the Artists Resale Right (ARR), which does not exist in either Canada or the US, seeks to redress.

For the past few years, the charge on the ARR has been led in Canada by CARFAC (*Canadian Artists Representation*), an advocacy group for Canadian artists, and its sister Quebec-based group, RAAV (*Le Front des Artistes Canadiens*). France is the original home of the ARR, where it is known as the *droit de suite*, and both CARFAC

and RAAV are in regular contact with their French colleagues. The *droit de suite* was first adopted in France in 1920, and the organization and copyright collective representing French artists, the Society of Authors in the Graphic and Plastic Arts – known as [AGADP](#) in France – continues to lobby for global application of the ARR. This is primarily because, although the right was adopted into the Berne Convention in 1948, it is optional rather than compulsory for Berne Convention states and operates strictly on the basis of reciprocity. Thus, broader global coverage brings greater returns for French artists. In 2019, of 15.5 million Euros in *droit de suite* payments made to French artists, roughly a third or 4.6 million Euros came from payments from sister organizations in foreign countries collecting on behalf of French artists.

But first, let's examine how the Artist Resale Right works. While structured somewhat differently in various countries, the principle is that where sales of artistic works (works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs) take place beyond the initial sale, a small proportion of the re-sale price shall be remitted to the original artist or their estate, with post-mortem payments limited to a specified number of years. Often there is a sliding scale for payments, with the percentage going to the artist decreasing as value increases. Sometimes there is a ceiling beyond which a resale royalty is not levied. There can also be a ceiling on the amount paid. In the case of France at the present time that amount is €12,500, a limit to which AGADP objects. It is also important to note that the *droit de suite* does not apply to private sales that take place without the participation of an art market professional, nor to sales by individuals to public museums.

Normally one would expect the payment to be made by the seller from the proceeds, much as the seller in a real estate transaction is responsible for paying the commission to a realtor. While this is normally the case, in France there was a [protracted legal battle](#) over this point when Christie's auction house tried to impose contracts requiring that the *droit* be paid by the buyer. French dealers objected, claiming that it was illegal to shift the burden from seller to buyer. After eight years and several levels of appeal, the French Supreme Court ruled that it was possible for the seller of a work of art to agree with the buyer that the buyer be liable for paying

the royalty, provided the royalty was still paid to the artist. The royalties are paid to collecting societies who charge a commission (to the artist) for tracking sales and disbursing to artists.

For many works under copyright, the reproduction right provides for steady ongoing revenues to authors, songwriters and performers but in the case of graphic and plastic arts, revenue from licensing of reproductions (print or digital) is generally limited. This raises the question of what art works should qualify for the ARR. Under Berne, it applies to unique works of art or those with very limited authorized reproductions, such as numbered limited editions or signed prints, which themselves could be collected or re-sold. The need to provide some “aftersales” revenue to artists, many of whom struggle financially, is one of the main arguments in favour of establishing an ARR. Artists whose fame increases during their lifetimes usually command higher prices for their new, later works, yet often the production of these artists decreases as they get older. At the same time, the value of their earlier works also rises, but they derive no benefit.

Another argument often used to support the establishment of an ARR is its effect in offsetting some of the imbalance between third world creators and first world art collectors, galleries, dealers and auction houses. Original works in developing countries are often sold for a very low initial price, yet subsequent profits and benefits flow exclusively to dealers and collectors in major capitals rather than to the artist—unless an ARR is in place. For payments to flow back to artists, however, it is important that their country of residence itself offers an ARR since the right operates only on a reciprocal basis. (Many countries in Africa, especially in francophone Africa, have incorporated the ARR into domestic law for precisely this reason). This argument can be applied to Canada and the US with respect to Indigenous art. In the Canadian case, the work of Inuit artists (soap stone carvings, prints) is the most notable example. As I cited in an [earlier blog on copyright and Indigenous art](#), the renowned Inuit artist Kenojuak Ashevak sold the original of her famous print [Enchanted Owl](#) in 1960 for just \$24. It sold in 2018 for \$216,000 of which Kenojuak's estate (she died in 2013) received not a penny.

CARFAC is working to build support for amendments to the Copyright Act in Canada to establish an ARR of 5 percent, pointing out that over 80 countries have an ARR

arrangement, including similar jurisdictions like the UK (2006) and Australia (2010). CARFAC proposes that an ARR be applied to secondary sales of \$1000 or more that are conducted by a dealer or auction house, at a flat rate of 5%, with the liability to pay shared between the seller and the dealer, as is currently the case in the UK. It would apply only to Canadian artists and artists of countries that offer an ARR. Payment would be collected through a copyright collective, Copyright Visual Arts, owned jointly by CARFAC and RAAV. The idea has been around in various forms for several years and has been the subject of a private member's bill although never receiving government support. More recently it was examined by the two Parliamentary committees reviewing the Copyright Act, with recommendations ranging from adoption to more study.

The issue is also a live one in the US, where [various attempts](#) have been made to pass ARR legislation, most recently in 2018. The draft US legislation set a much higher threshold than that proposed in Canada (\$5000), would apply only to auction houses with at least \$1 million annually in sales, would have a payout ceiling of \$35,000 and, as in Canada, would be at a set rate of 5%. Recently the new Register of Copyrights, Shira Perlmutter, [expressed support](#) for an ARR in the US. Not surprisingly, it is not supported by the major auction houses, notwithstanding that they comply with ARR legislation in other major art markets, like the UK and France. Neither the US nor China, the two largest art markets, have a resale right although ARR supporters argue that it would strengthen these markets if they did so by encouraging European artists to offer their works for sale there. European artists would benefit from the existence of an ARR in the US and China because of the reciprocity principle and artists from China and the US would then likewise benefit from the ARR in effect in Europe.

In the final analysis, this is more about artists than dealers, despite the symbiotic relationship between the two. Some dealers, in fact, offer voluntary re-sale royalty payments, either European dealers who are not obligated to compensate US or Canadian artists but do so, or North American dealers who have decided that it is in their interest to do so because of their relationship with artists. (A [similar concept](#) has recently been introduced by some second hand book dealers to pay authors when used copies of their books are sold). But business being business, most dealers and auction houses will not do so unless required by law. Extension of the ARR to

North America would increase harmonization of international art markets, (although if China remains an outlier this could become a competition problem) and is widely supported by artists in both Canada and the US. It is also, not surprisingly, supported by collecting societies as it provides them with a new revenue stream.

If Canada had an ARR as proposed by CARFAC, the sale of *Steamer Arriving in Nanaimo* would have brought \$42,000 to Hughes' estate. Were Hughes still alive that would have been a nice supplement to a lifetime career of hand-to-mouth painting income. With an ARR much of the revenue paid goes to artists still alive, usually in their declining years. In Australia, studies showed that 46% of payments went to living artists; in the UK over 80% of artists use ARR revenues to cover living expenses. The argument that it would inflate art prices seems hard to credit, given the ever-increasing value of good art in countries where no ARR is in place. Share the wealth, I say.

The real issue is getting the attention of government at a time when there are many priorities, including of course dealing with the current pandemic. Artists and their advocates are speaking out, but they need a champion. It seems to be a simple matter of fairness—although in the art world, as in other domains, nothing is really that simple.

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I am a former Canadian foreign service officer and a retired executive with Time Warner. In both capacities I worked for many years in Asia. I have been writing this copyright blog since 2016, and recently published a book "In Defence of Copyright" to raise awareness of the importance of good copyright protection in Canada and globally. It is written from and for the layman's perspective (not a legal text or scholarly work), illustrated with some of the unusual copyright stories drawn from the blog. Available on Amazon and local book stores.

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