EXPLANATORY MEMORANDUM TO

THE ARTIST RESALE RIGHT (AMENDMENT) REGULATIONS 2009

2009 No. 2792

1. This explanatory memorandum has been prepared by The Department for Business Innovations and Skills and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

This is a draft instrument subject to the negative resolution procedure. If approved the Regulations will further implement Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art ("the Directive") by extending the derogation on resale right to deceased artists from the 1st January 2010 to the 1st January 2012.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None

4. Legislative Context

4.1 The Directive was implemented in the United Kingdom in 2006 by the Artist's Resale Right Regulations 2006 ("2006 Regulations") which created an intellectual property right ("resale right") previously unknown in the United Kingdom although it had long existed in other European countries. Resale right consists in the entitlement of artists to receive a royalty on the resale of their works, provided that an art-market professional is involved in that sale and the sale price is above a specified minimum threshold. This right lasts for as long as the copyright in the work subsists, which is normally for 70 years after the death of the artist; it may accordingly be inherited by the artist's successors.

4.2 Article 8(2) of the Directive provides a special derogation which is limited to those Member States which did not previously have resale right in their national law. Such a State may prevent successors of a deceased artist from exercising their resale right until 1st January 2010 and regulation 17 of the 2006 Regulations takes advantage of that derogation.

4.3 Article 8(3) allows this derogation to be extended until 1st January 2012 but only "if necessary to enable the economic operators in that Member State to adapt gradually to the resale right system while maintaining their economic viability" and if the Member State has informed the EU Commission of its reasons for the extension so that the EU Commission can give an opinion, after appropriate consultations, within three months of receipt of the information. If the Member State does not follow the opinion of the EU Commission, it is required within one month of receipt of the opinion to inform the EU Commission and justify its decision.

4.4 Regulation 2 will implement this further derogation.

5. Territorial Extent and Application

This instrument applies to all of the United Kingdom

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- ***What is being done and why***

7.1 Following a consultation in the summer of 2008 the UK Government concluded that the economic climate had affected the UK art market's ability to cope with the application of resale right to the works of deceased artists. It was estimated that there would be a four-fold increase in the number of transactions subject to resale right which would add to the administrative burden of the art market and require a change in working practices. It was considered doubtful that the UK art market could deal with these changes during such a difficult economic climate and continue to remain viable especially if, at the same time, they also had to deal with a reduction in volume of sales and a possible diversion of sales to other markets outside the EU which are not subject to resale right obligations.

7.2 Artists are also affected by the state of the art market. If the UK art market shrinks then the UK art trade will buy and sell fewer works of art from artists, which will make the financial situation of living artists even more difficult. Applying resale right to the works of deceased artists in the UK may reduce the size of the UK art market which will therefore have a knock on effect to artists.

7.3 John Denham, the Secretary of State for Innovation, Universities and Skills, wrote to the EU Commission on 18th December 2008 in accordance with article 8(3) of the Directive setting out the reasons why he considered the conditions for the extension of the derogation in article 8(3) were met. At the Contact Committee meeting convened in accordance with article 11(2) of the Directive on 24th February 2009 the EU Commission asked the United Kingdom to provide further written details of these reasons, namely the impact of economic downturn, any evidence of diversion of sales from non-derogated states to derogated states within the EU and information on the administrative burden imposed by extending resale right to deceased artists.

7.4 The Intellectual Property Office ("IPO") provided this information in a letter dated 16th March 2009. The EU Commission did not give an opinion in accordance with article 8(3) before the three month deadline expired at the end of March 2009. The conditions for extending the derogation under the Directive have been met.

- ***Consolidation***

7.5 There are no plans to consolidate the Regulations.

8. Consultation outcome

A consultation regarding extending the derogation until the 1st January 2012 was undertaken between 30th June 2008 and 22nd September 2008. This was a full consultation period of 12 weeks plus a week extension for late responses.
All major stakeholders were engaged and replied to the consultation including the two collecting societies operating in the field (DACS and ACS), the major stakeholders within the art industry (including representative bodies, auction houses, wholesalers and individual artists and their families) and also consumers and the general public. There were over 400 responses to the consultation and an analysis of the responses can be found on the IPO website: http://www.ipo.gov.uk/response-artist.pdf

9. Guidance

9.1 The IPO currently has guidance on its website; this will be updated to explain that resale right payments will not be made to those entitled to these payments following the death of an artist, until 1st January 2012.

10. Impact

10.1 The impact on business is minimal in the short term as the extension to the derogation will preserve the status quo. The delay in implementing resale right fully will give the art trade an additional period in which to adapt gradually to the increased costs and administration which will accompany the full implementation of the resale right. This may in turn encourage increased sales at a time where the art market is suffering because of economic pressures.
Payments to living artists will not be affected as the derogation only applies to royalty payments where the work remains in copyright but the artist is deceased. Those entitled to resale right payments on sales of copyright works of deceased artists will not receive payments on sales which take place prior to 1st January 2012.

10.2 The impact on the public sector is none.

10.3 An Impact Assessment is attached to this memorandum at Annex A

11. Regulating small business

The legislation applies to all businesses regardless of size. It is beneficial for business involved with the sale of works the art trade, as it allows a longer period in which to make the transition to the full application of resale right.

12. Monitoring & review

The derogation will not be reviewed again before the 1st January 2012 when it will expire.

13. Contact

Matt Cope at the Department of Business Innovations and Skills Tel: 01633 814274 or email: matthew.cope@ipo.gov.uk can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency:	Title:	
UK-IPO	**Impact Assessment of the possible extension of the derogation for deceased artists in artist's resale right**	
Stage: Consultation	**Version:**	**Date:**
Related Publications:		

Available to view or download at:
http://www.ipo.gov.uk/consult-artist.pdf

Contact for enquiries: Hywel Matthews **Telephone:** 01633 813878

What is the problem under consideration? Why is government intervention necessary?

Artist's resale right was introduced in the UK in 2006; implementing a European Directive. The UK Regulations made use of a derogation within the Directive to allow the right to apply only to works by artists who were living. This derogation permitted the UK to exempt sales by deceased artists until 2010 and gave a possibile extension until 2012. The UK Government must now decide whether to extend its use of the derogation until 2012. This can only be done by the Government writing to the European Commission setting out the reasons for extending and then amending UK Regulations.

What are the policy objectives and the intended effects?

To ensure the continued success and growth of the UK art market and minimise any risk of sales being diverted to countries where the right is not in place. The UK Regulations are intended to encourage creativity whilst minimising any potential risk to the UK art market.

What policy options have been considered? Please justify any preferred option.

Two options are available:

1. Extend the derogation until 2012

2. Allow the derogation to expire in 2010

Option one is the preferred option. This will maintain the current position in the UK. Although currently evidence is inconclusive, the additional two years to allow for the possibility of resale right being adopted in other countries, creating a level international playing field, and time to refine the administrative systems to cope with the large increase in qualifying sales would be beneficial.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The extension is for a fixed two year period only. Further consideration of the overall impact of resale right will be taken during 2009-2010.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Baroness Morgan

..... Date: 21st May 2008

Summary: Analysis & Evidence

Policy Option: 1	Description: Extend use of the derogation until 2012

COSTS

ANNUAL COSTS	Description and scale of **key monetised costs** by 'main affected groups' There will be no changes required to current systems. Those who would have benefitted from the removal of the derogation, the heirs of deceased artists, will not be eligible for resale right on any sales taking place before 2012.
One-off (Transition) **Yrs**	
£	
Average Annual Cost (excluding one-off)	
£ 7.5million	**Total Cost** (PV) **£**

Other **key non-monetised costs** by 'main affected groups'

BENEFITS

ANNUAL BENEFITS	Description and scale of **key monetised benefits** by 'main affected groups' There will be no changes required to current systems. Art market will not have to pay additional resale right royalties, nor cope with additional administration costs associated with these.
One-off **Yrs**	
£	
Average Annual Benefit	
£ 7.5million	**Total Benefit** (PV) **£**

Other **key non-monetised benefits** by 'main affected groups' The additional two years to adjust to the introduction of resale right should strengthen the UK art market's ability to cope when the derogation is removed in 2012.

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	**Net Benefit Range** (NPV) **£**	**NET BENEFIT** (NPV Best estimate) **£**

What is the geographic coverage of the policy/option?			United Kingdom	
On what date will the policy be implemented?			1st January 2010	
Which organisation(s) will enforce the policy?			N/A	
What is the total annual cost of enforcement for these			£	
Does enforcement comply with Hampton principles?			Yes/No	
Will implementation go beyond minimum EU requirements?			Yes/No	
What is the value of the proposed offsetting measure per year?			£ N/A	
What is the value of changes in greenhouse gas emissions?			£ N/A	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large

Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase £		Decrease £	**Net**	**£** N/A

Kev:	**Annual costs and benefits: Constant Prices**		**(Net) Present Value**

Summary: Analysis & Evidence

Policy Option: 2	Description: Allow the derogation to lapse from 2010 and works by deceased artists to qualify for resale right

COSTS

ANNUAL COSTS	Description and scale of **key monetised costs** by 'main affected groups' The UK art market will have to cope with a significant increase in administration. Additional payments of resale right will need to be made. The collecting societies will experience an increase in costs in administering the additional payments.
One-off (Transition) **Yrs**	
£	
Average Annual Cost (excluding one-off)	
£ 7.5million	**Total Cost** (PV) **£**

Other **key non-monetised costs** by 'main affected groups' The art market and the collecting societies will not have the benefit of additional time to refine the administration systems to cope with the increased volume of transactions. Additional costs of selling art in the UK may lead to sales being lost to overseas markets.

BENEFITS

ANNUAL BENEFITS	Description and scale of **key monetised benefits** by 'main affected groups' The heirs of deceased artists whose works qualify for resale right will gain payments.
One-off **Yrs**	
£	
Average Annual Benefit	
£ 7.5million	**Total Benefit** (PV) **£**

Other **key non-monetised benefits** by 'main affected groups' There is the possibility that the increased flow of money to artists' heirs will lead to better preservation of art collections.

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	**Net Benefit Range** (NPV) **£**	**NET BENEFIT** (NPV Best estimate) **£**

What is the geographic coverage of the policy/option?	United Kingdon
On what date will the policy be implemented?	1 January 2010
Which organisation(s) will enforce the policy?	N/A
What is the total annual cost of enforcement for these	£
Does enforcement comply with Hampton principles?	Yes/No
Will implementation go beyond minimum EU requirements?	Yes/No
What is the value of the proposed offsetting measure per year?	£ NA
What is the value of changes in greenhouse gas emissions?	£ NA
Will the proposal have a significant impact on competition?	No

Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)
Increase £	Decrease £	**Net**	**£**

Kev:	**Annual costs and benefits: Constant Prices**	**(Net) Present Value**

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Introduction

The Resale Right Directive ('the Directive') was adopted in 2001. This required a new right, "artist's resale right" to be introduced into the United Kingdom. The resale right entitles artists and, whilst the work is still in copyright, their successors in title, to a percentage of the sale price whenever original works of art are re-sold in transactions involving art market professionals. Generally, copyright in art works lasts for 70 years after the death of the artist. The Regulations implementing the Directive in the UK came into force on 14th February 2006.

The problem

The Directive contains a derogation which allows those Member States which did not have any resale right within their laws at the time the Directive came into force the option of phasing in its application. Under Article 8(2) of the Directive these Member States may choose to apply the right only to works by living artists until 1st January 2010. The UK took advantage of the derogation.

The purpose of this derogation was to allow the art markets which had never had to deal with resale right payments time to adapt gradually to the new right and to develop systems to cope with making the payments whilst maintaining their economic viability. The Directive recognises that this transition may not be completed by 2010 and allows those Member States that were entitled to use the derogation to extend its application until 1st January 2012. The further two years is an option which Member States may decide is needed to provide an extended period of adaptation for the art market, and possibly the collecting societies, to ensure that the right can be managed efficiently and effectively and to minimise any potential negative impact on the market's economic viability. The UK is entitled to make use of this option if it is needed.

If the UK Government decides to extend its use of the derogation it must write to the European Commission by 31st December 2008, giving its reasons why an extension is needed.

The proposal

The consultation to which this impact assessment is attached suggests that the further extension of the derogation is necessary and that the UK Government should write to the European Commission setting out the reasoning for requiring additional time to allow the art market to adapt to the introduction of resale right whilst maintaining its economic viability.

The policy objective

The policy objective is to ensure that the introduction of resale right does not cause damage to the UK's art market. The right must be introduced in such a way as to be managed as efficiently as possible, with minimum administrative burdens on the art market, so as to maintain the strong position of the UK art market.

Rationale for Government intervention

An extension of the derogation can only be achieved by the UK Government writing to the European Commission setting out the reasons for requiring an extension and then by amending the UK law to continue the disapplication of resale right to works by deceased artists.

Options

1. Maintain the current situation by seeking to extend the derogation for two further years in accordance with the Directive.

This would require a change in the law as the current Regulations do not provide for the derogation to continue to operate after 1 January 2010. However, it would not result in a change from the current position within the UK, which would remain exactly the same. Living artists who qualify would continue to be paid resale right royalties when their works are resold and the heirs of deceased artists would continue to be excluded from receiving and resale right royalties.

2. Allow the derogation to lapse so that copyright works by deceased artists qualify for resale right from 1st January 2010.

This would not require a change to UK law but would result in a significant change to the position in the UK. Both living artists and the heirs of deceased artists would qualify for resale right royalties when their works were resold.

Currently, option 1 is the preferred option.

Impact of the preferred option

<u>Living artists</u>

For this group there will be no change in their position. They will continue to receive resale royalties on all sales which currently qualify.

<u>Heirs/beneficiaries of deceased artists</u>

For this group there will be no change in their position. Works by deceased artists will not qualify for resale right and therefore they will receive no payments when works are sold. If this option is not chosen and deceased artists are permitted to qualify for resale right, estimates based on figures for the period February 2006 to July 2007 indicate that there would be a fourfold increase in resale royalties paid if the derogation was not retained. This would indicate that payments would have increase from £2.5million to £10million. Therefore the heirs and

beneficiaries of deceased artists are not benefiting from an additional payment totally £7.5 million per year. However, this would be shared between many people so actually benefits to anyone individual could be very small. It is not possible to estimate how many people would share resale payments as the resale right for a single artist may be shared amongst many of their descendants after their death.

Art market professionals

This option would not change the current situation for art market professionals. However, it will provide them with an additional two years to adapt and refine their systems in order to cope with the increased number of payments they will need to make once resale right is applied to works by deceased artists. Processing of many more claims will result in higher administrative costs for businesses. The initial set up costs for the systems needed to administer resale right will have been made, although there may be a need to amend some of these to cope with the new eligibility criteria. Estimates of costs per transaction for business vary considerably, from less than £10 per transaction to over £40 per transaction. Even assuming that at present costs are at the lower end of this range for most businesses, the fourfold increase in the number of transactions is likely to result in a significant increase in administrative costs.

Collecting societies

This option would not change the current situation for art market professionals. However, it will provide them with an additional two years to adapt and refine their systems in order to cope with the increased number of payments they will need to make once resale right is applied to works by deceased artists. However, the extension of resale right to deceased artists could result in an economy of scale for collecting societies, which under the preferred option they will not benefit from for a further two years. Collecting societies work by taking a fixed percentage from all royalties to cover their administration costs. This means that smaller payments attract a small commission for the collecting society and less money to cover their costs, while higher payments result in greater commission. This results in a cross subsidy between those artists receiving the most money to those receiving the least to cover the costs of administering resale right. If the number of transactions is increased collecting societies are sometimes able to reduce their commission charges whilst still covering their costs. This increases benefit to individual artists.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	***Results in Evidence Base?***	***Results annexed?***
Competition Assessment	Yes	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

Annexes

THE ARTIST'S RESALE RIGHT (AMENDMENT) REGULATIONS 2009

Transposition Note

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.		
Requires all EU Member States to create an unassignable and inalienable right, to be enjoyed by the authors of original works of graphic or plastic art (and after death by their successors), to a share of the resale price of their works when these are sold by, to or through a professional art dealer. Extended to the European Economic Area by Decision of the EEA Joint Committee No 171/2002 of 6 December 2002.		
Article	**Objectives**	**Implementation**
8.3	Further derogation allowing postponement of resale right by an artist's successors up to 1st January 2012 (available to member States, such as the United Kingdom, that have exercised the derogation in article 8.2 to postpone these rights until 1st January 2010)	*Regulation 2*