

**THIRD SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3535 of 1st June, 2006

B. 21/06

BILL

FOR

AN ORDINANCE to amend the Intellectual Property (Copyright and Related Rights) Ordinance 2005 in order to transpose into the law of Gibraltar 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, and matters connected thereto.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1. This Ordinance may be cited as the Intellectual Property (Copyright and Related Rights) (Amendment) Ordinance 2006 and comes into operation on the day of publication.

Amendment of the Intellectual Property (Copyright and Related Rights) Ordinance 2005.

2.(1) The Intellectual Property (Copyright and Related Rights) Ordinance 2005 is amended in accordance with the provisions of this section.

(2) The following Part is inserted after Part III—

“PART IV

ARTISTS RESALE RIGHT

Interpretation.

254.(1) In this Part–

“author”, in relation to a work, means the person who creates it;

“collecting society” has the meaning given in section 266(5);

“contract date”, in relation to a sale, means the time at which the contract of sale was made;

“EEA state” means a member State, Iceland, Liechtenstein or Norway and a reference to EEA State shall be deemed to include a reference to Gibraltar;

“qualifying body” has the meaning given in section 259(4);

“qualifying individual” has the meaning given in section 262(3);

“resale” is to be construed in accordance with section 264;

“resale right” has the meaning given in section 255 (and, unless the context otherwise requires, includes a share in resale right);

“resale royalty” has the meaning given in section 255;

“sale” is to be construed in accordance with subsection (2);

“sale price” has the meaning given in section 255(4);

“work” has the meaning given in section 256;

“work of joint authorship” has the meaning given in section 257(4).

(2) The following provisions apply in relation to the construction of “sale” and “contract of sale”–

- (a) a contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price;
- (b) there may be a contract of sale between one part owner and another;
- (c) a contract of sale may be absolute or conditional;
- (d) where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale;
- (e) where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell;
- (f) an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Artist's resale right.

255.(1) The author of a work in which copyright subsists shall, in accordance with this Part, have a right ("resale right") to a royalty on any sale of the work which is a resale subsequent to the first transfer of ownership by the author ("resale royalty").

(2) Resale right in a work shall continue to subsist so long as copyright subsists in the work.

(3) The royalty shall be an amount based on the sale price calculated in accordance with Schedule 4.

(4) The sale price is the price obtained for the sale, net of the tax payable on the sale, and converted into Euro at the European Central Bank reference rate prevailing at the contract date.

(5) For the purposes of subsection (1), "transfer of ownership by the author" includes in particular—

- (a) transmission of the work from the author by testamentary disposition, or in accordance with the rules of intestate succession;
- (b) disposal of the work by the author's personal representatives for the purposes of the administration of his estate; and
- (c) disposal of the work by an official receiver for the purposes of the realisation of the author's estate.

Works covered.

256.(1) For the purposes of this Part, "work" means any work of graphic or plastic art such as a picture, a collage, a painting, a drawing, an engraving, a print, a lithograph, a sculpture, a tapestry, a ceramic, an item of glassware or a photograph.

(2) However, a copy of a work is not to be regarded as a work unless the copy is one of a limited number which have been made by the author or under his authority.

Joint authorship.

257.(1) In the case of a work of joint authorship, the resale right shall belong to the authors as owners in common.

(2) The right shall be held in equal shares or in such other shares as may be agreed.

(3) Such an agreement must be in writing signed by or on behalf of each party to the agreement.

(4) "Work of joint authorship" means a work created by two or more authors.

Proof of authorship.

258.(1) Where a name purporting to be that of the author appeared on the work when it was made, the person whose name appeared shall, unless the contrary is proved, be presumed to be the author of the work.

(2) In the case of a work alleged to be a work of joint authorship, paragraph (1) applies in relation to each person alleged to be one of the authors.

Assignment etc.

259.(1) Resale right is not assignable.

(2) Any charge on a resale right is void.

(3) Subsection (1) does not prevent the transfer of a resale right which was transmitted to a qualifying body under section 261 (or is deemed to have been so transmitted under section 268), provided that the transfer is to another qualifying body.

(4) A qualifying body is a body which—

- (a) is a charity within the meaning of the Charities Ordinance; or
- (b) is a foreign charity, and has its central administration in an EEA state or a country listed in Schedule 5.

(5) In subsection (4) "foreign charity" means a body which is established outside Gibraltar for purposes similar to those for which a body within subsection (4)(a) may be established, and which is subject to similar rules regarding the distribution and application of its assets.

Waiver etc.

260.(1) A waiver of a resale right shall have no effect.

(2) An agreement to share or repay resale royalties shall be void.

(3) Subsection (2) does not affect any agreement made for the purposes of the management of resale right in accordance with section 266.

Persons entitled on succession.

261.(1) Subject to section 262(2), resale right in respect of a work is transmissible as personal or moveable property by testamentary disposition or in accordance with the rules of intestate succession; and it may be further so transmitted by any person into whose hands it passes.

(2) Resale right may be so transmitted only to—

- (a) a natural person; or
- (b) a qualifying body.

(3) Notwithstanding subsection (2), a resale right may be transmitted as bona vacantia.

(4) Where a resale right is transmitted to more than one person, it shall belong to them as owners in common.

Requirements as to nationality etc.

262.(1) Resale right may be exercised in respect of a sale only by a person who, at the contract date, is—

- (a) a qualifying individual; or
- (b) a qualifying body.

(2) Resale right may be transmitted under section 261 only by a person who, at the time of his death, is a qualifying individual.

(3) A qualifying individual is a natural person who is—

- (a) a national of an EEA state; or
- (b) a national of a country listed in Schedule 5.

(4) Nothing in this section prevents a resale right from being exercised after it has been transmitted as bona vacantia.

(5) Resale right may vest by operation of law in—

- (a) a personal representative of a deceased person; or
- (b) an official receiver,

and nothing in this section prevents a resale right from being exercised by any person acting in that capacity.

Trusts.

263. Nothing in sections 259, 261 or 262 prevents a resale right from being—

- (a) held, and exercised in respect of a sale, by any person acting as trustee for the person who would otherwise be entitled to exercise the right ("the beneficiary"); or
- (b) transferred to such a trustee, or from the trustee to the beneficiary.

“Resale”.

264.(1) The sale of a work may be regarded as a resale notwithstanding that the first transfer of ownership was not made for a money (or any) consideration.

(2) The sale of a work may be regarded as a resale only if the conditions mentioned in subsection (3) are satisfied in respect of that sale.

(3) The conditions are that—

- (a) the buyer or the seller, or (where the sale takes place through an agent) the agent of the buyer or the seller, is acting in the course of a business of dealing in works of art; and
- (b) the sale price is not less than 1,000 Euro.

(4) The sale of a work is not to be regarded as a resale if—

- (a) the seller previously acquired the work directly from the author less than three years before the sale; and
- (b) the sale price does not exceed 10,000 Euro.

Liability to pay resale royalty.

265.(1) The following shall be jointly and severally liable to pay the resale royalty due in respect of a sale—

- (a) the seller; and
- (b) the relevant person (within the meaning of subsection (2)).

(2) The relevant person is a person who satisfies the condition mentioned in section 264(3)(a) and who is—

- (a) the agent of the seller; or
- (b) where there is no such agent, the agent of the buyer; or
- (c) where there are no such agents, the buyer.

(3) Liability shall arise on the completion of the sale; however, a person who is liable may withhold payment until evidence of entitlement to be paid the royalty is produced.

(4) Any liability to pay resale royalty in respect of a resale right which belongs to two or more persons as owners in common is discharged by a payment of the total amount of royalty to one of those persons.

Collective management.

266.(1) Resale right may be exercised only through a collecting society.

(2) Where the holder of the resale right has not transferred the management of his right to a collecting society, the collecting society which manages copyright on behalf of artists shall be deemed to be mandated to manage his right.

(3) Where there is more than one such collecting society, the holder may choose which of them is so mandated.

(4) A holder to whom subsection (2) applies has the same rights and obligations, in respect of the management of his right, as have holders who have transferred the management of their right to the collecting society concerned.

(5) For those purposes—

- (a) “collecting society” means a society or other organisation which has as its main object, or one of its main objects, the administration of rights on behalf of more than one artist; and
- (b) the management of resale right is the collection of resale royalty on behalf of the holder of the right in return for a fixed fee or a percentage of the royalty.

Right to information.

267.(1) A holder of resale right in respect of a sale, or a person acting on his behalf, shall have the right to obtain information by making a request under this section.

(2) Such a request—

- (a) may be made to any person who (in relation to that sale) satisfies the condition mentioned in section 264(3)(a); but

(b) must be made within three years of the sale to which it relates.

(3) The information that may be so requested is any that may be necessary in order to secure payment of the resale royalty, and in particular to ascertain—

(a) the amount of royalty that is due; and

(b) where the royalty is not paid by the person to whom the request is made, the name and address of any person who is liable.

(4) The person to whom the request is made shall do everything within his power to supply the information requested within 90 days of the receipt of the request.

(5) If that information is not supplied within the period mentioned in subsection (4), the person making the request may, in accordance with rules of court, apply to the Supreme Court for an order requiring the person to whom the request is made to supply the information.

(6) Information obtained under this section shall be treated as confidential.

Transitional provisions.

268.(1) This Part—

(a) does not apply to sales where the contract date preceded the commencement of the Part; but

(b) applies notwithstanding that the work sold was made before that commencement.

(2) Where the author of a work (or a person to whom the resale right in that work is deemed to have been transmitted under this section) died before the commencement of this Part, and was at the time of his death a qualifying individual—

- (a) if he was the owner of the copyright in the work immediately before his death, and on his death a qualifying person became beneficially entitled to that copyright (or to part of it), the resale right in the work shall be deemed to have been transmitted to that person;
- (b) if he was the owner of the work (but not the copyright in it) immediately before his death, and on his death a qualifying person became beneficially entitled to the work, the resale right shall be deemed to have been transmitted to that person;
- (c) otherwise, the resale right shall be deemed to have been transmitted to the qualifying persons who were beneficially entitled to the residue of his personal estate.

(3) Where the author of the work was one of a number of joint authors, the right deemed to have been transmitted by the author under this section is one of that number of equal shares in the resale right.

(4) Where a resale right is deemed to have been transmitted to more than one person under subsection (2)(a), (b) or (c), the resale right shall be deemed to have been transmitted to them in equal shares as owners in common.

(5) In this section, "qualifying person" means a person to whom a resale right may be transmitted under section 261(2) and (3).

Sales before 1st January 2010.

269. Where a resale right is transmitted under section 261, or deemed to have been transmitted under section 268, it may not be exercised in respect of any sale where the contract date precedes 1st January 2010.””

(3) The existing” Part IV” (Miscellaneous and General) is amended to “Part V”.

(4) Existing sections 254 to 263 are renumbered 270 to 279 respectively.

(5) The following Schedules are inserted after Schedule 3–

“SCHEDULE 4

Section 255(3)

CALCULATION OF RESALE ROYALTY

1. The resale royalty payable on the sale of a work shall be the sum of the following amounts, being percentage amounts of consecutive portions of the sale price–

Portion of the sale price	Percentage amount
From 0 to 50,000 Euro	4%
From 50,000.01 to 200,000 Euro	3%
From 200,000.01 to 350,000 Euro	1%
From 350,000.01 to 500,000 Euro	0.5%
Exceeding 500,000 Euro	0.25%

2. However, the total amount of royalty payable on the sale shall not in any event exceed 12,500 Euro.

SCHEDULE 5

Section 259(4) and 262(3)

**COUNTRIES OUTSIDE THE EEA WHOSE NATIONALS MAY
ENJOY RESALE RIGHT**

COUNTRY/TERRITORY
Algeria
Brazil
Bulgaria
Burkina Faso
Chile
Congo
Costa Rica
Croatia
Ecuador
Guinea
Iraq
Ivory Coast
Laos
Madagascar
Mali
Monaco
Morocco
Peru
Philippines
Romania
Russian Federation
Senegal
Serbia and Montenegro
Tunisia
Turkey
Uruguay

“.

(6) The following consequential amendments have effect.

- (a) the heading to section 275 is amended by substituting for “255-258”, 271-274;

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- (b) section 275 is amended by substituting for “255 to 258”, “271 to 274”;
 - (c) schedule 2 is amended by substituting for “258”, “274”;
 - (d) section 61(3), 62(4) and 63(2) are amended by substituting for “261”, “277”;
 - (e) section 65(2) is amended by substituting for “262”, “278”.
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EXPLANATORY MEMORANDUM

This Ordinance implements 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 (OJ No L 272, 13.10.2001, p.32) ("the Directive").

The Directive came into force on 13 October 2001. It creates a new intellectual property right which entitle authors and their successors in title to a percentage of the sale price, net of tax, whenever original works of art, in which copyright subsists, are re-sold in transactions involving art market professionals.

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