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Sculptors and the Resale Royalty

Thomas Goetzl
Golden Gate University School of Law, tom_goetzl@yahoo.com

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Sculptors and the Resale Royalty:

The Shape of the Future

Thomas M. Goetzl

Sculptors throughout America have good reason to celebrate the enactment of the Visual Artists Rights Act of 1990. Signed into law by President Bush to take effect June 1, 1991, these amendments to the Copyright Act of 1976 grant recognition to important moral rights of visual artists (see "Advice: Visual Artists Rights Act," *Sculpture*, March–April 1991). Thus, sculptors now have statutory protection for the integrity of their works. No longer can owners of sculpture alter, mutilate or even destroy them with impunity. Now there is protection against such a travesty as that which befell **Alexander Calder**'s mobile *Pittsburgh* in 1958, when the Allegheny County Airport Commission that owned it repainted it in the county colors and then immobilized the piece before installing it in the main lobby of the Pittsburgh, PA, airport. Calder was acutely embarrassed by these actions, but had no legal recourse since he no longer owned the mobile. The Visual Artists Rights Act also enables an artist to assert his/her right to claim attribution or, where appropriate, disclaim attribution if a work of art he/she created has been mutilated and no longer represents his/her work.

Although the bill known as the Visual Artists Rights Act of 1986 had included a provision for a resale royalty right for visual artists, the Visual Artists Rights Act that was signed into law in 1990 did not include such a right. This article will discuss the resale royalty right as it exists under California law (Civil Code Section 986) and the prospect for such a federal right in the wake of the Visual Artists Rights Act.

California Resale Royalty Act

On January 1, 1977, the California Resale Royalty Act took effect. Modeled on the French *Droit de Suite*, this law became the first of its kind in the United States. Although this right has existed for decades in many other countries around the world and a number of states have considered its adoption since that time, it remains to this date unique to California. With certain exceptions, the California law requires all sellers of fine art to pay the artist five percent of the proceeds derived from resale. The California statute defines fine art as "an original painting, sculpture, drawing or work of fine art in glass." To qualify for a resale royalty, a sculpture must have been resold for a price of $1,000 or more, and that price must exceed the price that the seller paid for it. Although an artist is allowed to assign the right for purposes of aiding in its collection, any attempted waiver of the right is unenforceable. Thus, the California law posits the creation of an A.S.C.A.P. or B.M.I. type of association someday to collect the royalties for artists. Waivers were denied for fear that otherwise too many artists would be unfairly pressured to waive them by more powerful dealers.

Because the law is intended to apply to a resale by a collector, it exempts most sales from one dealer to another. The artist must be either an American citizen or have been a California resident for two years. Because there are limits placed upon a state's right to affect acts beyond its boundaries, the California resale royalty does not apply unless either the seller is a California resident or the resale itself occurs in California.

There continues to be considerable disagreement about how successful the operation of the California Resale Royalty Act has been. Many denigrate the law arguing that it simply doesn't work. The fact is that, since no records are maintained of resales of artworks, there can be only anecdotal evidence regarding the effectiveness of the resale royalty. It is known that many resale royalties have been collected, ranging from a minimum of $50 to as much as $7,000. It is also acknowledged that there are too many instances where resale royalties were due but payment was neither volunteered by the seller nor demanded by the artist. Indeed, since an artist is not always informed that a work of art has been resold, the importance of artists tracking the provenance of their works becomes clear.

Success stories involving the resale of sculptures can illustrate both the importance as well as the propriety of

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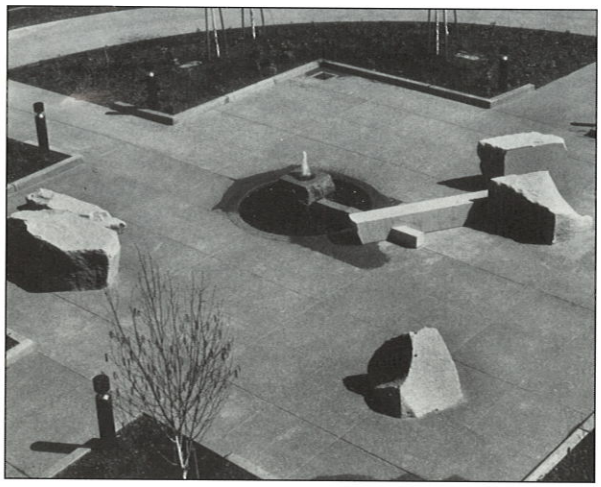

Jack Nielsen, *Untitled*, 1990. Water, Granite, Black Stones, 4 x 40 x 40 ft. Photo courtesy of artist.

Nielsen received a resale royalty after the complex that included his fountain was sold.

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this right. One of the first instances of the statute generating a resale royalty involved **Richard Mayer**'s sculpture *K-3*, resold in 1978 to collector **Marcia Weisman**, who promptly suggested renaming the piece *Section 986*. Richard Mayer was a party to the 1980 case Morseburg v. Balyon where the federal courts upheld the constitutionality of the California Resale Royalty Act.

In another case in the early 1980's, Ghirardelli Square, a major commercial real estate development near San Francisco's Fishermen's Wharf, was sold for $40 million. This complex of 13 buildings, containing over 60 retail stores and more than a dozen restaurants, features artist **Ruth Asawa**'s fountain in its center plaza. An appraisal determined that the value of her fountain represented $100,000 of that total sales price; she was paid a resale royalty of $5,000 by the seller. Considering she had only netted about $2,000 after expenses on the original $40,000 commission, the resale royalty for her fountain was a welcome sum of money.

Another important art project also involved Asawa. She spent two and a half years designing and casting another fountain for the Hyatt-on-Union-Square, a major hotel in downtown San Francisco. After deducting all her expenses from her commission, she lost money on the sculpture. However, when the hotel was sold in the late 1980s, she was able to collect a $7,000 resale royalty on the fountain.

Recently another California sculptor collected a resale royalty in a challenging case. In 1989, **Jack Nielsen** created a sculpture as a centerpiece for a new office complex in Sacramento. Before the doors of the building had opened, the developer's bankruptcy caused the complex, including the sculpture, to be sold by the bank that had repossessed the property. Nielsen was confident he was entitled to a resale royalty. However, he was denied his request and told that none was owing because the complex had been sold for $7 million, $3 million **less** than the purchase price. Nielsen sued in small claims court, successfully proving that the value of his sculpture had appreciated from $30,000 to $125,000 in the intervening time, entitling him to a resale royalty of five percent. Nielsen collected $5,000, the maximum award a small claims court can make.

All artists will agree that often the original sale of a work of art barely compensates the sculptor for the materials and expenses incurred in its creation. Many sculptors, eager for the exposure the work will result in, can too easily be exploited by the commissioning body. It is only upon an objective appraisal of the sculpture that its true value is discerned. The resale royalty then gives the sculptor an opportunity to share, in a modest way, in the more accurate assessment of the piece's worth.

Richard Mayer, *Section 986*, 1973. Painted Steel, 55 x 22 x 5½ in. Photo courtesy of artist.

Originally titled *K-3*, this sculpture was one of the first to generate a resale royalty. The title was changed to *Section 986* in honor of the California statute establishing resale royalty rights for visual artists.

Visual Artists Rights Act of 1990

A federal resale royalty right was first proposed in Congress in 1978 by Representative **Henry Waxman** from California, who convened a discussion on the subject with about 35 or 40 interested parties, including this writer. His conclusion was that the California experiment should be observed for a longer period before Congress could undertake federalizing this new concept. Eight years later, in 1986, S.2786 was introduced in the Senate by Senator Edward Kennedy of Massachusetts. At the same time, a companion bill was introduced in the House of Representatives by Massachusetts Representative **Ed Markey**. However, the resale royalty still generated too much controversy and was ultimately dropped from the bill. Subsequent versions of the bill for the Visual Artists Rights Act retained only the artists' rights of integrity and attribution.

Opposition to the resale royalty came primarily from art dealers. They argued that a resale royalty would only benefit those artists with an established secondary market; that is, those who were already financially successful and did not "need" the money. By the same token, they pointed out that the resale royalty would not provide "poor artists with any money." They also claimed that since artists do not share losses when art declines in value upon resale, it is inappropriate that artists participate in the gains.

Proponents of the resale royalty provision countered that all economic benefits under American patent and copyright law flow only to those inventors and authors who have achieved a measure of success. No royalties are ever shared with unsuccessful inventors or authors. There is no reason why sculptors and other visual artists should be treated any differently. Why are artists asked to be the only socialists in a capitalist society? The opportunity to enjoy economic benefits from the exploitation of intellectual property made possible by the copyright law is intended to reward the successful.

An additional opportunity, some call the "psychic dividend," is the pleasure collectors enjoy from viewing and sharing works of art with friends. Obviously, that "profit" is not shared with the artist. The artist loses the exclusive right to display the work of art upon its first sale. Yet, that same work of art will presumably appreciate in value due to the artist's efforts and improved stature within the art market.

A major criticism of the California Resale Royalty Act was that it threatened to push the market for the resale of fine art out of the state. Because a non-resident seller would incur no liability for a resale royalty under the California law if the work of art were commissioned to a New York gallery or auction house for sale rather than to one in California, there was alarm that the California law would result in significant losses for the California art market. There is

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absolutely no evidence that this has proven to be the case. In fact, this criticism supplies an excellent reason to federalize the resale royalty right so that this right could provide no incentive for any collector contemplating selling art to discriminate against California.

However, there are several good reasons why the resale royalty right has caused no losses to the California art market. The above criticism fails to take into account that a seller will choose a resale market where the work of art can be expected to fetch the highest price. Collectors who are concerned about such matters can calculate that retaining 95 percent of a higher sale price is preferable to keeping 100 percent of a lower price. Thus, if a particular artist's works are most in demand in California, it would hardly benefit the collector to commission the work for resale in New York. In addition, there are other considerations, like shipping, insurance and dealer commissions, which may play much larger roles in the selection of the market. Furthermore, as pertaining to sculpture, many are simply not that readily transportable [recall the fountains created by Ruth Asawa and Jack Nielsen]. There is no way the owners could have removed those works out of state to avoid paying a resale royalty. Finally, this whole argument would be rendered moot if the resale royalty were to become part of the federal copyright law, applicable throughout the country. And, so long as there are important collectors here in the United States, the resale market is not going to move overseas just to avoid a five percent royalty.

Another concern raised by opponents of the resale royalty is the reporting requirements that might be imposed in connection with efforts to enforce the law. If sellers were required to report resales, the price obtained and the identity of the purchaser, it is strongly urged that such disclosures would infringe upon the privacy rights of collectors. It is true that many collectors seek to maintain anonymity. For instance, wealthy individuals do not wish to draw the attention of art thieves to their collections. However, to the extent anonymity is sought by a few collectors to avoid the payment of income taxes that might accrue when they have sold assets (art) at a gain or to be able to launder money, there is no reason why an artist's right to a resale royalty should be sacrificed just to shield those who would violate the law.

The few artists who have opposed the resale royalty right have generally based their opposition upon a misunderstanding of freedom of contract, creating what they perceive to be a law patronizing artists. They express annoyance at the non-waivability of the resale royalty. They are usually artists who, either due to their wealth or their stature in the arts community, are no longer subject to the kinds of pressures dealers and collectors impose to obtain wholesale waivers from artists to forego in advance any right to claim a resale royalty. Non-waivability should be distinguished from the prerogative of an artist to refrain from **enforcing** a resale royalty after it has accrued. There is nothing unusual about the provision that certain statutory protections cannot be waived where there are disparities in relative bargaining power. This is the case with many statutes establishing rights of consumers or rights of tenants against landlords.

Ruth Asawa, *Andrea*, 1968. Cast bronze, 5 x 10 ft. Photo courtesy of artist.

When Ghirardelli Square was sold in the early 1980's, this fountain generated a resale royalty.

The Copyright Office Report

Although the concept of a resale royalty right proved to be too hot to handle at the time of the enactment of the Visual Artists Rights Act, Congress did warrant that it was an important enough proposal to direct the U.S. Copyright Office to study the feasibility of a national resale royalty right. Not only were all relevant experts to be consulted but the study was to also include an examination of how similar artists' rights have functioned in other countries. The Copyright Office was instructed to submit a report to Congress within 18 months. Accordingly, during 1992, the Copyright Office conducted hearings in San Francisco and New York at which testimony was taken from artists, art dealers and law professors as well as representatives from volunteer lawyers for the arts organizations, museums and auction houses. The Copyright Office completed a lengthy report and submitted it to Congress on December 1, 1992.

The report, *Droit de Suite: The Artist's Resale Royalty*, does a thorough job of summarizing the many views that were expressed during the hearings and submitted in writing, as well as the results of the extensive research done in-house by the Copyright Office. The conclusion was:

> In summary, based on its analysis of the foreign and California experience with *droit de suite*, the administrative record of the hearings and written comments, and independent research, the Copyright Office is not persuaded that sufficient economic and copyright policy justification exists to establish *droit de suite* in the United States. The international community is now focusing on improving artists' rights, including the possibility of harmonization of *droit de suite* within the European Community. Should the European Community harmonize existing *droit de suite* laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its member States.

The report regrettably fails to demonstrate any critical judgment on the validity of the criticisms levied against the resale royalty. For example, the report gives no indication that the Copyright Office ever sought to achieve its own sense of justification for a resale royalty right.

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In that absence, how then can the Copyright Office assess the arguments presented?

Is the purpose of a resale royalty right simply to levy a "tax" to provide subsidies for artists who are in financial need? Only if that were the goal would any assertion that the benefits of a resale royalty will probably be monopolized by those artists who are already successful be of any relevance. Of course, the existence of a resale royalty right, and the hope of one day becoming entitled to collect such a royalty, would make it easier for a young artist to sell works of art for prices far less than the pieces were "worth." But, even if there were no such artists, and even if the royalty were always paid to rich and successful artists who didn't "need" the money, that utterly fails to render the concept inappropriate. After all, no one has ever had the temerity to suggest that copyright royalties for authors are misguided just because James Michener benefits greatly, and the poor, unpublished poet receives no royalties. Neither is Paul McCartney asked to share copyright royalties from his music with other songwriters whose compositions have not sold. And, Neil Simon is not required to share his royalties with unperformed playwrights. More government subsidies for visual artists might well be a worthy pursuit; however, that is not what the resale royalty concept is about.

The California resale royalty does not apply unless either the seller is a California resident or the resale itself occurs in California.

If that is not the purpose, then the above points are merely distractions. On the other hand, if the goal of the resale royalty is to provide an opportunity for fair compensation for artists whose works of art are in demand, then the testimony, written and oral, should have been critiqued in a different light. In that event, the issue is simply whether fairness dictates that an artist should be granted such a right. Problems in the enforcement of a resale royalty right should be solved, not relied upon to deny artists this right.

Since it has been long established that visual artists, like authors, are entitled to copyright their creations, fundamental fairness would seem to require that they be granted reasonable opportunities to benefit financially from their creations. So, for example, writers, composers and others who claim a copyright are able to profit by licensing out the right to make copies of their book or by licensing the public performance of their musical compositions or theatrical works. Visual artists do not generally find much of a market for copies of their works of art. It is generally the original that people wish to experience. And visual art obviously, can not be "performed." The way visual art is "consumed" is by its display. And artists lose the right to collect a royalty for that display when they first sell the work. The resale royalty is a modest effort to provide visual artists with an occasion to collect a royalty for the use of the creation.

Two traditional rationales have been offered in support of the resale royalty. One, used in France where the *droit de suite* was conceived, asserts that the primary reason a work of art appreciates in value is because of the career development of the artist during the time between the first sale of that work and its subsequent resale. Clearly, it is argued, the artist deserves to participate in the economic value to which the artist's own efforts have contributed.

The other argument, chiefly relied upon in Germany, where artists are provided with a resale royalty right, asserts that the true value of that work of art was always there; it simply was not yet recognized upon the first sale of the work. Now that it has been acknowledged, as reflected in the higher resale price, the artist deserves to share in it.

However, there is a third rationale for a resale royalty that goes even further. It asserts that artists ought to retain, even after the first sale of the work of art, the right to receive compensation for the display of the work.

Display Right

The whole rationale behind modern copyright and patent laws is "to promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive rights to their writings and inventions." It has long been agreed that the visual arts are entitled to copyright protection. Thus, Congress has the authority to grant visual artists, for a limited time, monopolies over the exploitation of their creations. To implement that monopoly, a copyright affords its owner the exclusive rights to reproduce a protected work in copies; to prepare derivative works from it; to distribute copies by sale, rental, leasing or lending; to perform it publicly; and to display it publicly. Unfortunately, this last exclusive right terminates upon the first sale of a work of art.

For books, musical compositions, plays, indeed for most all subject matter of copyright except the visual arts, copyright law meaningfully establishes that limited monopoly for its owners. Thus, the ways by which those copyrighted works can be exploited will generate royalty payments for their creators. And, Congress, from time to time, has modified the exclusive rights to assure that that limited monopoly is working. Congress recently amended the law to provide a royalty for the use of copyrighted music on jukeboxes. The underlying principle is that all uses, with very limited exceptions, should be governed by the copyright law so that they might become a source of revenue for the individual who created the work.

The visual arts have unfortunately fallen through the legislative cracks. History teaches that people desire to experience visual art in its unique, original form. People will travel halfway around the world to stand before and gaze upon Michelangelo's *David*; a replica will not suffice. Compare the prices commanded in any gallery by original works with those attached to replicas and posters, if indeed any are available. As a result of this phenomenon, few artists find any market for copies of their works.

This writer recommends that the copyright law be amended to provide artists a "durable" right to the public display of works of art; that is, one that would last as long as other copyright exclusive rights last (life of artist plus 50 years), irrespective of the sale of the tangible work of art. Thus, whenever a sculpture was publicly displayed, a royalty would be due to the sculptor.

There is precedent for such a proposal. Canada presently pays artists an "exhibition fee" when their artworks are displayed. Analogous rights exist in Denmark, Germany, Great Britain, Norway and Sweden, where authors of books are entitled to a "lending royalty" when their books are borrowed from the library. The author's right to a royalty should not be a function of the sale of tangible property, but rather a consequence of the use of the ideas represented by the creation.

Of course, a display royalty would only aid those artists whose works were on public display. How could the law begin to provide some equivalent right for those artists whose works are in private collections? It is those works of art that are most frequently resold. The resale royalty right is a companion to the display royalty. The former primarily addresses the private display context; the latter, the public display context.

Notwithstanding the ambiguous findings of the Copyright Office's report, there is substantial precedent for, and the need to enact, resale and display royalties for visual artists. ■

Thomas M. Goetzl is Professor of Law at Golden Gate University School of Law where he has taught a seminar on Law and the Arts for 18 years. He is also a member of the Board of Directors of the California Lawyers for the Arts.