

## REMARKS

### KEYNOTE ADDRESS: VISUAL ARTS LAW

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Visual Arts Law is a glamorous and seductive field. But behind the glamour and the seductiveness is a concrete reality which we can call the Art World. It is made up of people and institutions that closely and intricately relate to each other in ways in which they do not relate with other institutions and people. The principal components of the Visual Arts World are artists, of whom we have roughly 400,000 in the United States; art collectors—we do not know how many tens or hundreds of thousands of those there are, but there are lots of them; museums—there are close to a thousand art museums; dealers; auction houses; art historians and university art departments; art critics; the relevant staff at the National Endowments for the Arts and the Humanities; the art press; and so on. What you have here is a kind of ecological system. What affects one part of it affects every other part. You push at one point and everybody feels it.

It follows that in order to make art law intelligently, in order to practice it well and productively, in order to mold policy usefully for the visual arts, you have to consider the systemic effects of what you propose and what you do. And in order to consider those effects, you have to know something about the reality with which you are dealing; you have to be familiar with the art world and how it operates. In other words, you have to pay some dues. These are generalizations. Let me give some specific examples which I will draw from the field of artists' rights. The examples are timely because of a bill that has been recently introduced by Senator Kennedy of Massachusetts.<sup>1</sup> The bill has three parts. One part would eliminate the requirement of a copyright notice on a work of art in

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1. S. 2796, 99th Cong., 2d Sess. (1986).

order to protect the artist's copyright in it. That is a thoughtful and realistic provision. The United States is one of only two nations in the world that require a copyright notice in order to protect copyright in a work of art. (The other is the Philippines.) In the rest of the world, copyright vests and is protected without the copyright notice. It is true that the small c in a circle, or the word "copyright," or the abbreviation "copr" is all that is needed. It seems a small thing, an easy thing, and yet many artists refuse to use it because they think the copyright notice disfigures the work of art. Others say they do not like it because it makes the artist look commercial, as though he thinks of his work as a piece of property rather than as a pure work of art. One can laugh at that or not, but the fact is that a number of artists do not add the copyright notice to their work and thus lose their copyright. The Kennedy bill would correct that.

A second part of the Kennedy bill would federalize something that now exists only in California (the first state in the United States to adopt it), Massachusetts (in roughly the same form) and New York and Louisiana (in a much weaker and paler form). It is called the "moral right" of the artist and it exists everywhere else in the world outside the Common Law nations: throughout Europe, Latin America, most Asian countries and many Middle Eastern and African countries. Its crucial part is the right of the artist to prevent others, including the owner of the work of art from altering it, disfiguring it or destroying it. Again, this would be a very good idea. The preservation of the work of art, as it emerges from the artist's hand in its true, authentic form is important to art history, to preservation of the culture. Adoption of this provision would put the U.S. in the company of most of the world and would enable us to join the Bern International Copyright Convention, which includes a moral right provision in Article 6*bis*.

The third part of the Kennedy bill would establish on a federal level something else that California has already enacted: the resale proceeds right—the right of the artist to a percentage of the proceeds on a profitable resale (not the original sale) of a work of art. At first glance, to the outsider, the resale proceeds right looks like a wonderful idea, something that is fair and desirable. Here are these artists who create the work of art and sell it for a certain price and some years later the work may be resold at a much higher price without the artist's participation in any way in that increase in value. Once paid on the original sale, that is all the artist gets.

The argument in favor of the resale proceeds right is that the artist should participate in the “unearned profit” of the speculating collector who resells the artist’s work. This attitude has made the resale proceeds right a sentimental favorite. This sentiment was given sympathetic publicity in 1973 at a famous auction held at Sotheby’s New York of part of the collection of Robert and Ethel Scull. At that sale, a work by Robert Rauschenberg, for which he was paid originally \$1,000 or so in the early 1960’s, sold at auction for \$90,000 or so. Mr. Rauschenberg was present at the sale, which was a big social event, and accosted Mr. Scull with (and I apologize for the coarseness of language): “I have been working my ass off for you and you’re getting all the profit.” The encounter was captured for posterity on a widely distributed documentary film that helped lead to California’s enactment of the resale proceeds right law, with a lot of help from Mr. Rauschenberg, other artists and enthusiastic art supporters

Now, who could oppose such a law? I will try to persuade you that anyone who a) knows anything about how the art world works and b) is able to think clearly should oppose it. Let me explain. The first thing to consider is the impact of such a law on the art market. You may say that you don’t care about the art market, but that is very foolish. The art market is important to everybody in the art world. It is as important to artists as it is to dealers and auction houses and collectors. The art market is where information about the work of art is focussed. It is where the utility and value and importance of a work of art can be measured. It is also the channel for distributing art, and the more efficient the market is, the more efficiently will works of art get distributed and the more likely they are to go to the places they should go. In short, the market is as important in the art world as it is in any area of productive activity.

So what is the market effect of the resale proceeds right law? In California, the first thing that happened immediately after enactment of the resale proceeds right law was that Sotheby’s, which at that time had an auction house in Los Angeles, immediately suspended all sales of the work of living artists. It did not want the hassle, it did not want the trouble. It could sell the work of living artists in New York which did not have such a law. There was no reason for it to bother with continuing to do so in California. It continued to operate in California, selling other kinds of things: jewelry, oriental rugs, the work of dead artists, old masters, etc. But the work of contemporary artists, living artists, the artists who

would benefit, according to the nice, sentimental people who favored the resale proceeds right, would no longer be sold. That meant that a very important part of the art market left California.

Now let us suppose that the Kennedy bill were enacted in Congress. That would hurt the resale market for contemporary art in the United States, including New York, which is currently the largest and strongest contemporary art market in the world. That market would leave New York and go to London, where it formerly was. Art is easily transportable, and money is easily transportable. Driving the resale market abroad would affect all parts of the art world in the United States.

A second problem with the resale proceeds right law is this: Art, particularly contemporary art, is a discretionary good. Unlike food, shelter or clothing, no one *has* to have contemporary art; people can live without it. It is something they may freely decide to acquire or not to acquire. Anything that makes the purchase of contemporary art less attractive will reduce the flow of money into the contemporary art market. An excise tax on resales—and that is what the resale proceeds right looks like to museums, collectors, dealers and auction houses—discourages first sales. Less money becomes available to buy the works of living artists.

Third, the resale proceeds right regressively redistributes wealth from the unrecognized, unsuccessful, even if worthy, artist to the recognized, successful, wealthy artist. It is a Robin Hood in reverse: It takes from the poor and gives to the rich.

Consider some cruel realities about the resale of art. Of all the 400,000 artists in the United States, perhaps two hundred have any resale market whatsoever. Over 99% of the art sold on the primary market cannot be resold. No auction house will take it, no dealer (including the dealer you bought it from) wants it. The best you can do is donate it to a charity. The artists whose works have a profitable resale market are the artists who are recognized, whose work is in major museums, whose work is collected by major collectors, whose work is the subject of critical articles in the art press, whose work is discussed in art history courses. It is artists like Jasper Johns, one of whose paintings resold for \$3,630,000 in November, 1986, who would get some money from the resale proceeds right. Robert Rauschenberg, for whom the value of every work in his studio was vastly multiplied as a result of the Scull auction, would make a lot of money out of the resale proceeds right. But the overwhelming majority of living artists, producing artists, would

never get a nickel out of it.

Well, you might say, that is all right, we don't care if a few successful artists get a little more, particularly since it is always possible that one of us may make it, lightning may strike and we may be successful, and then we will get this additional benefit. But there is no free lunch. The additional money that goes to the successful artist has to come from somewhere in the art world.

We have already seen that the amount of money available to buy art is reduced by this law. But the additional point here is that the law regressively redistributes that reduced amount of money. Let me give you a concrete example. Suppose there is an art dealer who is interested in promoting the work of unrecognized but worthy artists. He puts on ten shows a year for his ten artists. He rents gallery space, pays a receptionist, pays for packing and shipping, insurance, utilities, the cost of opening parties, entertaining critics, collectors and curators and so on. Suppose he is a very good dealer, and the work of the artist he is currently showing—ten canvases in the gallery—sells out for \$2,000 a canvas. That is, by any measure, a tremendous success. The dealer takes 50%, or \$10,000, and it turns out that he has lost money after he deducts expenses in connection with keeping the gallery open and putting on the show.

How does he stay in business? Some dealers subsidize their galleries out of their own private wealth. But most dealers have to make a living at it, lacking private wealth. They have to support the "front room" of the art gallery, where the shows are hung, in some way. The way they do that is by being active in the secondary market. They pick up a Sam Francis gouache or a nice Frank Stella painting or a Noguchi sculpture and resell it. The profit they make from those resales subsidizes the front room, paying the expenses of showing the work of less recognized artists. What the resale proceeds right does is take from the dealer a substantial part (5% of the gross retail price in California, which usually means more than 25% of the profit) of his income from the secondary market activity. That reduces his ability to keep the front room open. Instead of ten well mounted and publicized shows a year, he will have to do fewer shows, and do them less well. Sam Francis, Frank Stella and Isamu Noguchi, all successful and affluent artists, will be a little more affluent, but the unrecognized artists that the dealer represents will be much worse off.

That is a simple, practical illustration of how the resale proceeds right law takes from the unrecognized, unsuccessful artist and gives

to the already recognized, successful and affluent artist. It should convince you that the world of art law is not simple. It is glamorous and attracts dilettantes who can do a lot of harm. The Art World is a wonderful place, but it is also complex and interdependent, and if you only look at one little part of it, you will make serious mistakes. Think of the Art World as populated by a variety of people doing honorable work; not just artists, but also dealers, collectors, museum personnel and many others. They are all part of the ecology. It is unprofessional to lose sight of that fact. The bottom line is that professionalism in art law is just as important as it is in any other field in the law.