ARTIST-COLLECTOR RELATIONS

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I would like to talk about artist-collector relations. The first thing you can believe, or not believe, is that a work of art has no physical existence.[1] It is a very difficult point to understand, but actually it provides the framework for understanding art law, especially as it relates to artists and users of their works.

Perhaps you can visualize that a work of art is not a physical object when you look at different types of artistic works and works of authorship. For instance, imagine Homer reciting his *Iliad* or *Odyssey*, and remember that the *Iliad* and the *Odyssey* were passed down orally for thousands of years without ever being written down. Now, the *Iliad* and the *Odyssey* were works of authorship back then even though they were never reduced to writing. You may also remember that Mozart supposedly composed complete musical pieces in his head, and the only reason he wrote them down was so that musicians could play them. And when Schubert was writing the *Trout Quintet*, he had it in his head as a complete work. It is true, however, that he did write it down on a napkin in a Viennese cafe. But that was only because of convenience.[2]

The same is true with a work of art, as reflected in the language of the Copyright Act. Section 102(a) of the Copyright Act[3] mentions that copyright protection subsists in original works of authorship fixed in tangible media of expression, which implies that unfixed works of authorship or unfixed works of art can exist.[4] In fact, in the California Civil Code,[5] there is a mention of unfixed works of

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1. *See* Karlen, *Legal Aesthetics: Property Rights in Art, Part I*, ARTWEEK, Mar. 31, 1984, at 10; Karlen, *Legal Aesthetics: Property Rights in Art, Part II*, ARTWEEK, June 30, 1984, at 15.

2. For a more thorough discussion of the intangible nature of works of art, *see* Karlen, *Property Rights in Aesthetic Creations*, 45 J. AESTHETICS & ART CRITICISM 183 (1986).

3. 17 U.S.C. § 102(a) (1982).

4. According to § 102(a) of the Copyright Act, protection is extended to "pictorial, graphic, and sculptural" works which include works of art such as paintings, sculptures and drawings.

5. CAL. CIV. CODE §§ 980-982 (West Supp. 1987).

authorship, which include unfixed works of art as well. Section 202 of the Copyright Act[6] confirms the very same thing because it implies that there is a distinction between the art object and the work of art, at least with respect to copyright law.

So, a work of art is not a physical thing, believe it or not; it is actually an intangible, and that is what intellectual property law is all about. Art lawyers have to deal with intangibles, and that gets us right into some of the areas that I would like to talk about, including copyright law, moral rights, resale of royalties, fine print laws and other miscellaneous laws affecting artists and collectors.

I. COPYRIGHT LAW

When an artist sells a work of art to a collector, who owns the copyright? The answer is that the artist always owns the copyright unless, of course, the artist has created the work as a "work made for hire."[7] What this means is that when the artist sells the work to the collector without a written copyright assignment,[8] the artist, not the collector, has the exclusive right to reproduce, adapt, publicly distribute copies of the work and publicly display the work.[9] Only if the artist signs a written transfer under section 204 of the Copyright Act does the artist lose the copyright.

This principle means that, if an artist paints a portrait of a collector, the collector cannot reproduce the portrait. I have had many cases involving people who pose for portraits. What these people did was to use their portraits on magazine covers and on other publicity materials. They found that even though they had purchased their own portraits, they had no rights to reproduce them because the artists owned the copyrights.[10]

II. THE ART OBJECT

One thing that artists should remember when they sell works of art is that even though they may hold the copyright, they lose the

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6. 17 U.S.C. § 202 (1982).

7. *See* definitions of "work made for hire" at 17 U.S.C. § 101 (1982).

8. 17 U.S.C. § 204 (1982) allows for copyright transfers but only if memorialized in written instruments.

9. The five exclusive rights belonging to the copyright proprietor are listed at 17 U.S.C. § 106 (1982). The *performance* right does not apply to pictorial, graphic or sculptural works.

10. Of course, just because the artist owns the copyright does not mean that he or she can commercially exploit the portrait which depicts the *likeness* of the collector. *See* CAL. CIV. CODE §§ 990, 3344 (West Supp. 1987) on statutory publicity rights.

art object. This means that it may be impossible for the artist to regain physical possession of the art object, even to exercise his or her rights under the copyright. For example, an artist may want to reproduce a work of art sold to a collector to derive royalties from the sales of these reproductions. But the artist has no right to enter the collector's home and take the work off the wall to reproduce it because the collector owns the art object itself.[11]

Also, if the artist wants the right to exhibit a work after selling the art object, he or she must secure a contract, preferably written, which entitles the artist to gain physical possession. Furthermore, the artist may sell a work of art yet want to ensure that the work stays on public display because public display is very advantageous to the artist's reputation. The artist should reserve in writing this right to display. Further, when someone purchases a work from an artist, the artist usually has no right to determine where the work will be placed. For instance, let's imagine Richard Serra's work in New York called *Tilted Arc*, an enormous work that was placed in the middle of a public square and which created a lot of controversy. I believe that the work is going to be removed, or was removed, and yet the artist has had no say as to where the work can be reinstalled because he sold the art object. Moreover, after selling the art object, if the work is damaged or deteriorates, the artist may have no access to the work to make repairs unless there is a written agreement to reserve this right.

III. RESALE ROYALTIES

With regard to resale royalties, under the California resale royalties statute,[12] anytime a collector sells a work in California or the seller happens to be a California resident, the seller may have to pay the artist five percent of the gross proceeds derived from the resale.[13] Naturally, this statute should have caused large numbers of collectors to emigrate from California. In the same fashion, the statute only protects artists who are either California residents or United States citizens.[14] These rules then should have caused a great wave of immigration to California and the United States by

11. *See* 17 U.S.C. § 202 (1982) for the proposition that ownership of the copyright is distinct from ownership of the physical art object. *Compare* CAL. CIV. CODE § 988 (West Supp. 1987) for the proposition that a transfer or license of rights under the copyright does not confer ownership of the physical art object.

12. CAL. CIV. CODE § 986 (West Supp. 1987).

13. *Id.* subd. (a).

14. *Id.* subd. (c)(1).

discontented artists from all over the world. In fact, the statute has had very little impact because it applies to so few sales.

First, there are the residency restrictions. Second, the statute does not apply unless the seller resells the work for $1,000.00 or more.[15] Third, the statute does not apply to stained glass works in buildings because it would be impossible to attribute what proceeds came from the sale of the building from those of the work of art itself.[16] Also, sales by art dealers, under certain circumstances, are exempted.[17] Moreover, the statute is restricted to certain media of expression, namely, paintings, drawings, sculptures and original works of art in glass.[18]

The resale royalties statute has so many restrictions that most collectors are not affected and, for the most part, artists never enforce their rights even though the statute permits awards of attorney's fees if the artist has to bring a collection action.[19] In fact, I have had only one or two artists whom I have helped to collect resale royalties. So, it is not very much of a practical concern in California.[20]

However, I must disagree with Professor Merryman about enacting a resale royalties statute at the national level.[21] I think that a new federal statute on resale royalties would help create a lot more litigation and work for attorneys. Imagine all the work for attorneys created by the requirement that sellers of art works register their sales with the Copyright Office so that artists can collect their royalties. Also, the registrations would help with determining provenance and ultimately with detecting forgeries. Imagine how nice it would be if we had a statute that required absolutely every work of art in the United States to be registered and sold with a pink slip!

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15. *Id.* subd. (b)(5).
16. *Id.* subd. (b)(7).
17. *Id.* subd. (b)(6).
18. *Id.* subd. (c)(2).
19. *Id.* subd. (a)(3).
20. The prophets of doom were wrong: The resale royalty statute did not destroy the art market. The prophet's words are expressed in Asimow, *Economic Aspects of the Droit de Suite* in LEGAL RIGHTS OF THE ARTIST (M. Nimmer ed. 1971).
21. *See* Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong., 2d Sess. (1986). This is the legislation proposed by Senator Edward Kennedy (D. Mass.) which provides for moral rights and resale royalties through amendments to the copyright laws.

III. MORAL RIGHTS

Section 987 of the California Civil Code[22] was replicated in a diluted and altered form in New York[23] and later in Massachusetts.[24] The California statute gives artists the right to prevent the physical destruction, alteration, mutilation and defacement of their works of fine art even though they may no longer own the works.[25] Thus, even though an artist sells a work to a collector, the collector cannot damage, destroy or alter the work.

Professor Merryman wrote an article in the *Hastings Law Journal* concerning the Refrigerator of Bernard Buffet,[26] a French artist. Buffet had painted a refrigerator on all six sides but, believe it or not, ambitious art dealers and collectors cut up the refrigerator into separate panels and sold them individually. If this had happened in California, the California Art Preservation Act could have been used to punish such conduct.

Now I have had cases like the *Buffet* case where dealers or collectors divided up a piece so that they could see more of it in different places. In one case, we had a watercolor divided into four separate pieces. In another case, a dealer and his collector friends decided that some sculptures were "evil figurines" and thereafter conducted an exorcism ceremony during which they carved crosses on the sculptures. This type of conduct is forbidden by the statute even though the dealers or collectors may own the works of art.

I had another case recently where a collector bought large murals to be installed at the Horton Plaza construction project in downtown San Diego. The murals were used to surround the construction site and aesthetically disguise the construction project. When the art works were purchased, the artists transferred in writing all of their property rights to the collector. Afterwards, when the construction was finished, the collector decided that the works would be better used not as art works but rather as barricades and gates, and a couple of the murals were knocked down and dirt and debris piled on top of them. This is definitely the type of conduct forbidden by the statute because it damaged the artists' reputations.

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22. For a general discussion of the California Art Preservation Act, *see* Karlen, *Moral Rights in California*, 19 SAN DIEGO L. REV. 675 (1982).
23. N.Y. ARTS AND CULT. AFF. LAW § 14.03 (McKinney Supp. 1987).
24. MASS. GEN. LAWS ANN. ch. 231, § 855 (West Supp. 1987).
25. CAL. CIV. CODE § 987(c) (West Supp. 1987).
26. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976).

Section 987 of the Civil Code also gives the artist the right to claim credit for his work of art or to disclaim credit for just and valid reason.[27] This means that collectors cannot use a work of art without crediting the artist for it and thus depriving the artist of the publicity value connected with the work. It also means that if a work is improperly displayed or mutilated so that its display injures the artist's reputation, the artist can insist on not being credited as the creator of the work.

Again, what this statute says to collectors is that they may own the art object, but there are reserved rights that the artist has which affect the artist's reputation and ultimately determine how the collector can use the work of art.

IV. DANGEROUS ART WORKS

Other considerations for artists and collectors are maintenance and safety. Just because the artist gives the art object to the collector and receives payment does not mean that the relationships between the artist and the collector and between the artist and his work end. The artist may still have responsibilities to the collector and even to the public at large.

If the work decays or deteriorates, the artist may have an obligation to repair it for the collector. When an artist sells the work, there is always some implied warranty of merchantability, according to the Uniform Commercial Code,[28] which makes the artist liable to the collector if the work immediately falls apart or deteriorates because of defective workmanship.

If the artist installs a dangerous work or the installation itself is dangerous, the artist may be responsible for injuries, including personal injuries to the collector. In other words, the artist has the obligation to make the work safe.[29] I even know of a case where an artist was held responsible for pestilence infecting a work composed of organic materials.

A good example of these considerations is a proposed mammoth work of art which was to be installed in downtown San Diego. The work was a sculptural work of approximately 10,000 square feet consisting of a mound of soil and local plant life, including trees to

27. CAL. CIV. CODE § 987(d) (West Supp. 1987).
28. *See, e.g.*, CAL. COM. CODE § 2314 (West 1964).
29. *Cf.* CAL. CIV. CODE § 1899.6 (West 1985) (concerning artistic and other properties loaned to museums which may become hazards to the health and safety of the public or to the museum's staff because of deterioration or otherwise).

be planted in the soil. One purpose of the work was to depict natural soil formations and plant life in San Diego County. I advised my client that it had the obligation to ensure that the work did not fall down and to ensure that people were not injured while climbing or walking on the work. I also warned my client about the work becoming slippery when it rained. My client also realized that it would need an environmental impact report, believe it or not, because installing a "natural" work in the middle of downtown San Diego might create problems in an unnatural environment.

V. FINE PRINT STATUTES

One other set of statutes affects artists and collectors. Sections 1740-1745.5 of the California Civil Code,[30] which concern fine art multiples, were designed to protect collectors primarily against rapacious art dealers, especially those who sell limited edition fine prints after making false representations regarding the limited editions. The statutes also affect artists who authorize the creation of limited edition fine art multiples, including prints, sculpture castings and photographs.

The problem in California and other states was that when dealers sold limited edition fine art multiples, they often misled collectors about the authenticity and originality of the fine art multiples and about the sizes of the limited editions. For example, a dealer might tell a collector that the only edition consisted of not more than 100 copies and that the plate had been destroyed when in fact there were three editions each having 200 copies and the plate was still intact.

These statutes require the art dealer to disclose certain information about the limited edition fine art multiples which he is selling or advertising.[31] The dealer has to disclose how many editions were made, how many copies were in each edition, whether the template from which the multiples were made was destroyed, when the multiple was made and what process was used in making it. If all this information is not disclosed, the purchaser of a limited edition fine art multiple can insist on a refund and, in some cases, the aggrieved collector can sue the dealer for three times the amount of the sale

30. CAL. CIV. CODE §§ 1740-1745.5 (West 1985) are California laws inspired by former State Senator Alan Sieroty, the author of most of the California art-related legislation. *See* Karlen, *Artists' Rights Today*, 4 CAL. LAW., No. 3, at 22 (1984), for an interview with Senator Sieroty about his art-related legislation.

31. CAL. CIV. CODE §§ 1742, 1744 (West 1985).

plus interest, plus an award of attorney's fees.

These statutes also apply to artists because according to section 1742(e) of the Civil Code, under certain circumstances, the artist must disclose the same information about his or her limited edition fine art multiples.

CONCLUSION

You can see from my brief talk that buying and selling a work of art is not as simple as it seems to be. The dealings between artists and collectors not only involve physical art objects but also copyrights, moral rights and other residual rights which may affect the artist's reputation and earnings and the collector's ability to make use of the work of art. With all of the new art laws on the books, as far as the collector is concerned, he or she is really in the realm of *Believe It or Not.*