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Resale Royalties for Visual Artists: Promoting Equity and Expression

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RESALE ROYALTIES FOR VISUAL ARTISTS: PROMOTING EQUITY AND EXPRESSION

ALMA ROBINSON†

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I. INTRODUCTION

California Lawyers for the Arts (CLA) has historically supported the concept of resale royalties as a matter of fairness for visual artists and has continued to make its position known through *amicus* briefs in the current litigation challenging the validity of the California Resale Royalty Act before the U.S. Court of Appeals.¹

CLA is a statewide nonprofit organization founded in 1974 to provide legal support, education, and advocacy for artists and arts organizations.² CLA’s membership includes artists of all disciplines, attorneys, and other allied professionals who support our goals of empowerment for artists as vital contributors to our shared democratic ideals.

Through United States copyright protection, statutory frameworks, and industry practices, artists (such as musical, literary, and performance artists) benefit economically from future resales of their works, derivative copies, and adaptations.³


³ *See* 17 U.S.C. § 106 (2012); *see also* Stephanie B. Turner, *The Artist’s Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 344 (2012) (“Under most countries’ copyright law, a book author, for example, reaps continuous benefits from the sale of his books; he generally receives royalties each time his book is sold, so that ‘when his book is popular, he is enriched.’ In contrast, a world with no resale royalty right, ‘[t]he sale of [an artist’s]’ painting or sculpture is a single, final event for him; the copyright mechanism offers him no technique for obtaining the comforts of continuing
Singularly, visual artists have not had a national framework for reaping such rewards; and for artists working in this genre, most resales involve a single work of art that changes hands after an initial sale—not sales of copies or derivatives.

II. RESALE ROYALTIES

The resale royalty, or “droit de suite,” provides the visual artist with an economic incentive to continue to work in a demanding, and often financially challenging as well as lonely, profession. Through the possibility of participating in the financial rewards of secondary sales, visual artists would have external incentives to continue to work in what may be the loneliest environment of all—

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4 “Visual Art” is defined in the Copyright Act, 17 U.S.C. § 101, as:
(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.


7 “The phrase droit de suite comes from French real property law. An owner or creditor has a ‘right of following’ (literal translation) to pursue the current holder of the property, even a bona fide one, to satisfy claims against it.” Michael B. Reddy, The Droit De Suite: Why American Fine Artists Should Have the Right to a Resale Royalty, 15 LOY. L.A. ENT. L. REV. 509, 509 n.5 (1995).
working alone in a studio without the benefits of teamwork and comradery that many other art disciplines provide through group efforts and support. Musicians, for example, often benefit from strong union support and lobbying organizations that represent their interests before legislative bodies.

In a 2012 survey of CLA members, 84% of the respondents said that the California resale royalty is an important incentive for them to continue their work, even though most have not received such payments. If an artwork gains value because of the growing reputation of its creator, artists have an important financial incentive to create new art. Other considerations are fairness—when compared to other art disciplines—and recognition of their contributions to the vitality of the secondary art market.

III. THE NEED FOR FEDERAL RESALE ROYALTY PROTECTION IN THE UNITED STATES

Artists look forward to fair compensation for the effort involved in increasing their reputation as well as the value of their artwork in the commercial marketplace. Artists who have realized resale royalties are able to re-invest in their work, knowing that their efforts are paying them future dividends, similar to those in other professions. And when the resale royalty provides for payments for a number of years after the death of an artist, artists are assured that a financial legacy is left for their heirs or estates. Considering the growing trend of artist-endowed foundations, there could also be a public benefit in instances where the artist has

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8 Id. at 512 (advocating that a resale royalty right would provide an economic incentive to create new works).
10 See Survey, California Lawyers for the Arts, California Resale Royalty Act (on file with author).
established a foundation as part of his or her estate.\textsuperscript{12}

Furthermore, as the art market continues to expand globally through international art fairs and Internet commerce, American artists are prevented from receiving lucrative resale royalties under article 14 of the Berne Convention from sales in other countries, which artists from more than seventy countries are currently receiving.\textsuperscript{13} Under the Berne Convention, the resale royalty will not be administered on behalf of artists whose country of origin does not provide such royalties.\textsuperscript{14}

Over the past twenty years, the stature of visual artists in the United States has been eroded as a result of two additional phenomena. First, the lack of funding by the National Endowment for the Arts (NEA) for individual visual artists sends a strong signal that these artists are not worthy of national recognition and support at the highest level of federal government patronage.\textsuperscript{15} This lack of support for visual artists was the result of a political compromise worked out in the 1990s in order to save the NEA from elimination after providing grants for venues that showed controversial art projects.\textsuperscript{16} It could be time to re-examine this


\textsuperscript{13} AN UPDATED ANALYSIS, supra note 6, at 2, 8.


\textsuperscript{15} NICK RABKIN & E. C. HEDBERG, NORC AT THE UNIVERSITY OF CHICAGO, ARTS EDUCATION IN AMERICA: WHAT THE DECLINES MEAN FOR ARTS PARTICIPATION 42 (2011), available at http://arts.gov/sites/default/files/2008-SPPA-ArtsLearning.pdf (“The early disinclination to consider the arts as serious academic subjects continues to this day. The arts are widely assumed to be expressive and affective, not cognitive or academic.”).

\textsuperscript{16} For discussion and analysis of the compromise reached, see Kimberly A. Schmaltz, Note, National Endowment for the Arts v. Finley: Viewpoint
solution. Second, the lack of support for arts in public education has also degraded the public standing of visual artists.  

By not investing in visual literacy and skills among the general public, a likely result is that artists are marginalized as either frivolous and/or elite in popular culture, and in any case, not worthy of public support. Providing a resale royalty for visual artists would be one means of helping to elevate their status through a statutory framework that requires the private marketplace to provide resale royalties.

IV. THE CALIFORNIA RESALE ROYALTY ACT

Uniquely in the United States, the California legislature enacted the California Resale Royalty Act in 1976—an act that is now under review in federal court in Estate of Graham v. Sotheby’s, Inc. If the Act is ultimately found to be unconstitutional because of restraints on interstate commerce, this would provide another rationale for enactment of a federal resale royalty.

In 2012, Judge Jacqueline Nguyen of the U.S. district court ruled in favor of the defending auction houses in response to a motion to dismiss the artists’ and estates’ complaint alleging failure to pay royalties, citing the Dormant Commerce Clause of the U.S.

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Constitution.\textsuperscript{21} The plaintiffs have appealed and await the decision of the Ninth Circuit Court of Appeals.

\textit{A. Resale Royalty Rights}

There are several elements to review when considering the efficacy of various resale royalty laws: the percentage of the royalty, the domicile of the artist and the seller, the nature of the artwork, the administrative structure, and whether the royalty is applied after the death of the artist.

California Civil Code section 986, the California Resale Royalty Act (CRRA), provides that an artist is entitled to a resale royalty of 5\% if the work is resold for more than the seller paid for it\textsuperscript{22} and for a gross resale price of at least $1,000.\textsuperscript{23} This royalty can only be waived in a written agreement for a higher royalty.\textsuperscript{24} The work must be an original work of visual art (defined as a painting, drawing, sculpture or original work of glass);\textsuperscript{25} and the royalty applies if the seller resides in California or the sale takes place in California.\textsuperscript{26} The artist must be a U.S. citizen or a California resident for at least two years,\textsuperscript{27} and the work of art must be sold during the artist’s lifetime or within twenty years of the artist’s death.\textsuperscript{28} If the seller cannot locate the artist, the royalty is to be paid to the California Arts Council,\textsuperscript{29} which holds the funds in trust for the artist for at least seven years—after which the funds are paid to

\begin{itemize}
\item \textsuperscript{21} \textit{Graham}, 860 F. Supp. 2d at 1124.
\item \textsuperscript{22} \textit{CAL. CIV. CODE} § 986(a) (West 2014).
\item \textsuperscript{23} \textit{Id.} § 986(b)(2).
\item \textsuperscript{24} \textit{Id.} § 986(a).
\item \textsuperscript{25} \textit{Id.} § 986(c)(2) (defining “Fine art” as referred to by the statute as “an original painting, sculpture, or drawing, or an original work of art in glass”).
\item \textsuperscript{26} \textit{Id.} § 986(a).
\item \textsuperscript{27} \textit{Id.} § 986(c)(1) (defining an “artist” as a person “who, at the time of resale, is a citizen of the United States, or a resident of the state who has resided in the state for a minimum of two years”).
\item \textsuperscript{28} \textit{Id.} § 986(a)(7).
\item \textsuperscript{29} \textit{Id.} § 986(a)(2).
\end{itemize}
The Council's Art in Public Buildings Program.\textsuperscript{30}

The California legislature, mindful of its role as a national innovator in legislative history, sought to right an imbalance between the economic rights of visual artists and other artists who benefit more from copyright law; to foster a vibrant arts community in California; to set an example for the rest of the nation; to bring California law into line with the best practices of other jurisdictions, including the European Union (EU);\textsuperscript{31} and to provide a legacy for the heirs and estates of artists including sales that are transacted within twenty years of the artist's death.

\textbf{B. Procedural History of the CRRA}

CLA has worked vigorously to defend the CRRA. In an early test case, involving preemption of federal copyright law, CLA submitted an \textit{amicus} brief supporting the law. In \textit{Morseburg v. Baylon}, the Ninth Circuit decided that the CRRA was not preempted by the 1909 Copyright Act.\textsuperscript{32}

In 2011, Attorney Eric George filed a lawsuit against several auction houses (on behalf of artists Chuck Close and Laddie John Dill, the Sam Francis Foundation, and the estate of Robert Graham) claiming unpaid resale royalties under the CRRA.\textsuperscript{33} In 2012, the U.S. District Court for the Central District of California ruled for the defendants (Christies, Sotheby’s, and eBay) on a motion to dismiss.\textsuperscript{34} The court found that the CRRA violated the Dormant Commerce Clause of the U.S. Constitution and was

\textsuperscript{30} Id. \textsection 986(a)(5).
\textsuperscript{32} Morseburg v. Baylon, 621 F.2d 972, 977 (9th Cir. 1980).
therefore invalid.\textsuperscript{35} While the Commerce Clause grants Congress the right to regulate interstate commerce, the Dormant Commerce Clause is a doctrine that prohibits states from passing laws that interfere with interstate commerce. Judge Nguyen also concluded that the law was not severable and could not be applied to in-state sales only.\textsuperscript{36} Plaintiffs appealed to the Ninth Circuit, which heard oral arguments in early 2014.

CLA continued to defend the CRRA and filed an amicus brief in \textit{Graham}, arguing that the Dormant Commerce Clause cannot be used to invalidate a statute without a solid factual basis that the CRRA discriminated against interstate commerce.\textsuperscript{37} In responding to the motion to dismiss, Judge Nguyen did not require the auction houses to show how their compliance with CRRA was a substantial burden on interstate commerce.\textsuperscript{38} Rather, her conclusion was based on a hypothetical situation: it was conceivable that the CRRA could affect transactions wholly outside of California.\textsuperscript{39} CLA argued in its amicus brief that the CRRA does not discriminate as it was not designed to favor in-state over out-of-state interests or actors, and that there was no proof that the CRRA harmed the art market.\textsuperscript{40}

While the parties were awaiting a decision, the court of appeals asked for briefs on whether it should hear the case en banc, citing recent cases that it felt were in conflict on the issue of the Dormant Commerce Clause.\textsuperscript{41} The court ruled that the CRRA was not severable and could not be applied to in-state sales only.\textsuperscript{42} Judge Nguyen concluded that the law was not designed to favor in-state over out-of-state interests or actors, and that there was no proof that the CRRA harmed the art market.\textsuperscript{43}


\textsuperscript{35} \textit{Id.} at 1125.
\textsuperscript{36} \textit{Id.} 1125–26 (explaining the extraterritorial reach of the CRRA, Judge Nguyen noted that “were the CRRA to apply \textit{only} to sales occurring \textit{in} California, the art market surely would have fled the state to avoid paying the 5\% royalty”).
\textsuperscript{38} \textit{Id.} at 23–24.
\textsuperscript{39} \textit{Estate of Graham}, 860 F. Supp. 2d. at 1124.
\textsuperscript{40} \textit{See} Brief of Amici Curiae California Lawyers for the Arts in Support of Plaintiffs-Appellants and Reversal, \textit{supra} note 37, at 20–24.
Commerce Clause: *Association des Eleveurs de Canards et d’Oies du Quebec v. Harris*, and *Rocky Mountain Farmers Union v. Corey.*\(^4\) Predictably, the defendants argued that such a re-hearing was not needed,\(^2\) while CLA and the plaintiffs filed briefs in support of the en banc hearing.\(^3\) In October 2014, the Court decided to hear the case en banc in December, 2014.\(^4\) Prior to the en banc hearing, the California Attorney General intervened as an amicus and submitted a brief urging the court to reverse the district court decision.\(^5\)

V. THE JUSTIFICATION FOR FEDERAL RESALE RIGHTS

Regardless of the outcome of this case, the purported conflict with federal constitutional principles protecting interstate commerce provides a strong argument for a federal resale royalty act.

In 1992, the Copyright Office wrote a report that did not recommend enactment of the royalty, expressing concern that it might depress primary sales, but held open the possibility of harmonizing the *droit de suite* with the European community “if the [European] Community decide[d] to extend the royalty to all

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\(^{4}\) *Association des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).


its member [S]tates.\footnote{46}

Until this right is available in the United States, U.S. artists whose work is sold in countries that administer resale royalties are unable to enjoy this additional income stream.\footnote{47} While the Berne Convention formally adopted the droit de suite legislation at the 1948 Brussels revision conference, several countries opposed it.\footnote{48} As a consequence, the resale right was ultimately made optional and reciprocal. Article 14\textit{ter} of the Berne Convention, “\textit{Droit de Suite}” in Works of Art and Manuscripts (then-titled Article 14\textit{bis}), provides that:

\begin{quote}
(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.
\end{quote}

\footnote{47} Kimberly Lee, 
\footnote{48} AN UPDATED ANALYSIS, \textit{supra} note 6, at 4–5.
As the result of this lack of reciprocity, it is estimated that U.S. artists are losing millions of dollars annually.\(^{49}\)

In 2001, the EU issued a Directive with guidelines for all member countries to implement the resale royalty right.\(^{50}\) Since then, there has been no reported evidence that adopting countries, either in the EU or not, have experienced adverse consequences to their art markets. Instead, it was reported by the U.S. Copyright Office in its 2013 report that the market share of the countries that had enacted the royalty had grown over the eight-year period since the directive was issued.\(^{51}\) By 2013, more than seventy countries had enacted some version of the Resale Royalty Act for visual artists.\(^{52}\)

A. The Recommendation of the U.S. Copyright Office

After receiving comments from a number of stakeholders, the U.S. Copyright office updated its 1992 report, *Droit de Suite: The Artist’s Resale Royalty*, in 2013, recommending that the United States enact a federal law.\(^{53}\) Meanwhile, legislation was introduced in Congress to provide such a royalty.\(^{54}\)

The Copyright Office recommended that the royalty should:

- Apply to sales of visual art by auction houses, galleries, private dealers, and other persons or entities engaged in the business of selling visual art;


\(^{51}\) *See an Updated Analysis*, supra note 6, at 16.

\(^{52}\) *Id.* at 2, 8, 118 app. E.

\(^{53}\) *Id.*

include a relatively low threshold value to ensure that the royalty benefits as many artists as possible;

– establish a royalty rate of 3 to 5 percent of the work’s gross resale price (i.e., a range generally in line with royalty rates in several other countries) for those works that have increased in value;

– include a cap on the royalty payment available from each sale;

– apply prospectively to the resale of works acquired after the law takes effect;

– provide for collective management by private collecting societies, with general oversight by the U.S. Copyright Office;

– require copyright registration as a prerequisite to royalties;

– limit remedies to a specified monetary payment rather than actual or statutory damages;

– at least initially, apply only for a term of the life of the artist; and

– require a Copyright Office Study of the effect of the royalty on artists and the art market within a reasonable time after enactment.55

By enacting a U.S. version of the droit de suite, American artists would be able to participate in the worldwide statutory resale royalties now available in seventy countries. Similarly, artists in those seventy countries would be able to claim resale

55 AN UPDATED ANALYSIS, supra note 6, at 3–4, 14, 74, 79 (“most participants in the Office’s review process felt that an appropriate threshold should fall within the $1,000 to $5,000.” The report further notes that Directive 2001/84/EC “caps the royalty to be paid at €12,500 (approximately $17,000 USD), regardless of the resale price.” Additionally, the “Office agrees, that a resale royalty system should be collectively managed by private collecting societies, whose functions would be similar to those of SoundExchange in the music context.”).
royalties in the U.S. market, releasing millions of dollars into the bank accounts of foreign royalties administrators and the artists they represent. The Copyright Office recommended that this should be explicit in U.S. legislation or in the legislative history.\textsuperscript{56}

\textit{B. Congressional Support}

Shortly after the Copyright Office issued its report in 2013, the American Royalties Too Act of 2014 (ART) was introduced in the Senate by U.S. Senators Tammy Baldwin and Ed Markey, along with a companion bill which was introduced in the House by Representative Jerrold Nadler.\textsuperscript{57} The proposed act would apply only to visual artworks sold for at least $5,000 at an auction, limiting the effectiveness of the law by potentially driving some sales away from the auction market.\textsuperscript{58} The royalty would be limited to the lesser of 5\% of the purchase price or $35,000.\textsuperscript{59} The administrator of the auction would collect and pay the royalties to a collecting society.\textsuperscript{60} The collecting society would then transmit the net proceeds after reasonable administrative expenses to the artist or their successor.\textsuperscript{61}

In contrast to the recommendations of the Copyright Office,\textsuperscript{62} the ART would extend the royalty after the artist’s death, providing income for the artist’s heirs and estate.\textsuperscript{63}

\textit{C. Effect of “Droit de Suite” in France}

In further support of federal resale rights in the U.S., \textit{Droit de Suite} is now provided in more than seventy countries throughout

\textsuperscript{56} Id. at 2, 8.
\textsuperscript{58} Id. § 3.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. § 3(b)(3)
\textsuperscript{62} AN UPDATED ANALYSIS, supra note 6, at 4.
\textsuperscript{63} S. 2045 § 3(b)(6)(B)
the world,\textsuperscript{64} including France, which was the first to adopt such legislation. The droit de suite was first legislated in France in 1920 in response to the sale of a painting of French peasants, which Jean-François Millet had painted in 1858.\textsuperscript{65} While the owner made a huge profit for the sale in 1889, the artist’s family lived in poverty.\textsuperscript{66} Currently, the French law provides a resale royalty that is based on an incremental scale of 0.25\% to 4\% of the price, e.g.:

(a) 4\% for the portion of the sale price up to €50,000;

(b) 3\% for the portion of the sale price from €50,000.01 to €200,000;

(c) 1\% for the portion of the sale price from €200,000.01 to €350,000;

(d) 0.5\% for the portion of the sale from €350,000.01 to €500,000;

(e) 0.25\% for the portion of the sale price exceeding €500,000.\textsuperscript{67}

In 2013, Société des Auteurs Dans les Arts Graphiques et Plastiques (ADAGP), the French collecting society for visual artists, distributed royalties to 1840 artists and their estates—44\% were living artists.\textsuperscript{68} The French law extends the resale royalty to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{64} \textit{An Updated Analysis}, supra note 6, at 2, 4, 8.
\item \textsuperscript{66} See Alexander Bussey, \textit{The Incompatibility of Droit de Suite with Common Law Theories of Copyright}, \textsc{Fordham Intell. Prop. Media & Ent. L.J.} 1063, 1068 (2013).
\item \textsuperscript{67} 2001 Council Directive, supra note 60, at 35.
\item \textsuperscript{68} E-mail from Fabienne Gonzalez, Société des Auteurs Dans les Arts Graphiques et Plastiques, to author (January 15, 2015, 13:42 CST) (on file with author).
\end{itemize}
\end{footnotesize}
seventy years after the artist’s death. ADAGP collected over €12.5 million in resale royalties: €8.3 million from sales in France and the rest from foreign markets.

It is time for the United States to join the community of nations on this issue. American artists, too, and their families and estates, should be able to enjoy the legacies of resale royalties.

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70 E-mail from Fabienne Gonzalez, Société des Auteurs Dans les Arts Graphiques et Plastiques, to author (January 15, 2015, 13:42 CST) (on file with author).