Resale Royalties In The United States For Fine Visual Artists (1993)

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(Note: Although footnotes have been omitted from this version, the article is available in its entirety on WESTLAW.)

I. INTRODUCTION

On December 1, 1990, President Bush signed into law the Visual Artists Rights Act of 1990, which was generally effective on June 1, 1991, and extends to visual artists the federal moral rights of attribution and integrity.

The legislation also requires the Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, to study the feasibility of implementing a resale royalty on the sale of works of visual art. This royalty would allow a fine artist to share monetarily in the enhanced value of his work through the payment at resale of a percentage of the increase in the work, or a portion of the total sales price.

The resale royalty, or droit de suite, which posits a continuing remunerative relationship between a visual artist and his creation, surviving the sale of the material object embodying the work, is a foreign concept born of different social and legal systems, and is antithetical to the Anglo-American tradition of free alienability of property. Additionally, since the copyright model in the United States is market-driven and rewards only successful creation, it is an inappropriate means to reallocate wealth to struggling contemporary artists. Grounded in the principles of the free-market, U.S. copyright law functions adequately if fine artists and other creators can compete effectively in the marketplace. Yet faced with deciding whether to incorporate a resale royalty into U.S. law, Congress is confronted with a paucity of economic data comparing the remuneration of fine artists with others who create in multiple copies. Lacking such data, the proponents of the resale right have not demonstrated empirically that the Copyright Act, in fact, treats fine artists less favorably than authors and composers who create numerous copies of their works. Nor have they shown that the creation of a resale royalty would promote the broad availability of works and stimulate artistic creation: the constitutional foundations of the Copyright Act. Finally, because of inherent problems with the droit de suite and the difficulties of integrating the right into the domestic marketplace, even were it shown that the Copyright Act does discriminate against visual artists, the resale royalty is not an adequate means of rectifying the situation.

II. THE ORIGIN OF THE DROIT DE SUITE

The rights of visual artists in Europe have evolved around the recognition that artistic creations deserve special protection. Unlike authors and composers, who are able to distribute identical copies of their works, each having the same value, artists create unique or a limited number of objects. Artists are also different from other authors in that they cannot generally rely on repeated use of copies of their works. Since it has been

argued that works of fine art are exploited with each sale, whether or not there is a profit, resale royalties rest on the desire to encourage artistic production by guaranteeing creators compensation, as with other economic rights.

One particularly romantic argument advanced in support of the royalty maintains that the original buyer, possessing artistic taste and courage, should benefit from any increase in the value of a work of art since he gambled his money on it when it had no established market value. Yet when the subsequent purchaser is a businessman without any artistic taste who wants a good business deal by buying the article—now of recognized high value—it is fairer to give the increase to the artist or his heirs.

In France, the seller pays for the privilege of having enjoyed a work of art during the time he owned it. Much like the author who receives royalties, the artist participates in the continuing exploitation of his works. Under French law, the artist shares in the total sales price of his work at resale. This approach, however, focusing strictly on the personality rights of the artist, accounts for neither the low profit margin on art sales, nor the seller's costs and dealer commission. Nor does it contemplate the inequity of permitting an artist to benefit from increases, without also having to share in the risk of loss.

The artist's royalty in Germany is premised on the belief that the increased value of a creation was always latent in it, and that increases in individual works are also due to the artist's continuing body of work. Thus, the increase in value in a particular work over time is what the artist should have received originally. Artists are exploited, in this view, because a work's true value is not realized until many years after its original sale, and without resale royalties the creators do not share in any appreciation. Since good art is ahead of public whim, artists should not be punished for their prescience.

In a free-market, however, the value of an object is what a willing buyer will pay a willing seller at a given time. Thus, when a young artist without a recognized market sells a work to a collector—who assumes the considerable risk that the work may decline in value—market forces dictate the price and terms of the exchange. And consistent with free-market property rights, the collector receives the interests he negotiated in the work as a quid pro quo for his gamble.

The intrinsic value supposition is also marked with other flaws. First, there is nothing inherent in the concept of art which furnishes artists with particular privileges. The relationship between the artist and his work is largely driven by cultural interests, and whether a work is valued, in and of itself, is a matter that varies from time to time and society to society. Second, factors other than the continuing efforts of the artist raise the value of a work. These include the premature death of the artist, his failure to live up to earlier promise, and any reduction in supply of an artist's work or inclusion in a well-known collection, as well as inflation in the art market generally.

The price of art, like other commodities, varies with supply and demand, and the artist is only one of the many factors that impact on price. Third, it is an economic reality that most art depreciates in value, so a royalty based on profit will not benefit most artists. As

a matter of fairness, as well, it is difficult to ignore devaluation of currencies and conservation costs. Fourth, the intrinsic value concept relies on the attenuated connection between artists and subsequent and unknown sellers: eventually purchasers buy a share of the artist's fame instead of a work. Finally, the complexity of calculations makes a royalty based on appreciation difficult to implement.

In Belgium, the contract principles of changed circumstances and unjust enrichment underlie the royalty right. Based on the continuing relationship between the artist and those who purchase his work, it is believed that a subsequent seller should not benefit unjustly from any increased value in an artist's work. Changed circumstances and unjust enrichment presuppose that value increases are not the result of any specific activity or ability of the owner of a work who, therefore, should not benefit at the creator's expense.

The Belgian and intrinsic value theories, however, share many of the same problems. Initially, the putative enrichment is based on a contract between a willing seller and buyer that was legitimate at the time of the transaction. Then, no injury was caused when the purchaser paid the artist a modest sum to buy a work. Only later when the work increased in value—whether through the artist's additional efforts or not—did the price become insufficient.

For unjust enrichment to be truly equitable, the seller would be permitted to deduct the cost of resale and the expenses of ownership.

III. RESALE ROYALTIES AND THE U.S. COPYRIGHT ACT

Copyright legislation in the United States is founded in the constitutional clause, which provides that Congress shall have the power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Copyright motivates creativity, while encouraging the broad public dissemination of works. Thus, in contemplating changes to the copyright law—whether resale royalties constitute authors' rights or are more in the nature of moral rights—this constitutional framework serves as a logical matrix for balancing creator and user rights.

One can argue that the potential for increased remuneration is a potent incentive for further creation. But it is not clear whether the royalty is too far removed from the act of creation to be a motivating force. On the other hand, the decreased prices for works of visual art in the primary market—the consequence of the later royalty payment—will not help a damaged contemporary art market. With increased sales charges, institutional collectors, such as museums, will be discouraged from taking risks on portfolios of contemporary art. Yet the royalty cost may be absorbed like other costs associated with art transactions, without causing a ripple in the art market.

Some argue that the Copyright Act has failed to provide economic incentives for visual artists comparable with those granted to authors and composers. Unlike other creators

who can produce and market endless copies of their works, the fine artist creates only one or a very limited number of works—the very value of which lies in their uniqueness.

Authors and composers receive royalties through reproduction and performance rights for all the copies of their works that are exploited. Visual artists, on the other hand, are paid only for the initial sale of their works and have commercially insignificant reproduction rights. And unfortunately, they lose their most remunerative right—that of public display—once they sell their creations.

However, the comparison of the relative protection and remuneration of artists and other creators is rife with subjective determinations, and it is extremely difficult to establish with any empirical certainty that the copyright treatment of fine artists is detrimental, and not just disparate. Although authors who do not create unique works are rewarded by royalties and can produce numerous copies and reap the benefits, the value of works of fine art is determined by scarcity and such works do not require the same level of demand to secure a living for an artist. Indeed, even though some fine artists cannot fully exploit their reproduction rights, it may be argued nevertheless that the marketplace favors these artists. Additionally, successful artists—and those are really the only ones that copyright and droit de suite reward—secure ever increasing prices as their reputations grow and they sell successive works. In this way, in fact, they continue to maintain a connection with their body of work, even after sale, undercutting another primary argument supporting the resale royalty.

Most importantly, the sale of works subject to continuing royalties and works of fine art are not analogous. First, the former are sold in thousands of copies to large groups of customers, and until the last copy is sold, the author, entitled to remuneration for all copies, does not know the total revenue from the work; works of fine arts, on the other hand, are sold to one or a limited number of customers and the creator can control the distribution of his works and has all, or virtually all, this information at the time of sale. Second, the triggering event for the resale royalty is the substitution of one owner for another, rather than the distribution of another example of the original work, as is the case with works created in many copies. A more apt point of comparison perhaps would be the resale of a first-edition book, for which authors typically are not paid a royalty.

The essence of the resale royalty is the disparity between the initial sales price and the price for which a work is later sold. This concept fits easily within the European natural law systems that recognize a continuing relationship between an artist and his work, even after sale. Consistent with this view, possession of art is not like owning a widget: even after a work is sold it remains under the influence of its creator. The United States, however, follows the more traditional view of property rights—that the purchaser of an item for a freely negotiated price is the absolute owner—and is less receptive generally to restraints on free alienability. Indeed, the lack of alienability in the droit de suite is the most substantial restriction of the owner's rights: the transferee may receive and assign any or all of the author's exclusive rights that he has acquired in a work, but he is barred from obtaining the resale royalty.

The royalty also raises significant privacy concerns because artists would need to obtain certain information about sales prices and ownership that sellers, purchasers and other owners may not want to disclose.

IV. INHERENT PROBLEMS OF THE DROIT DE SUITE

Even assuming that fine artists do have a more difficult time than other creators exploiting their works under the Copyright Act, it is not clear that resale royalties are the best means by which to level the playing field. Although the point is not without strong disagreement, it has been argued, for example, that the presence of royalties has had an adverse effect on the art markets in California and France.

The droit de suite also depends on frequent resale, making the right valueless unless art changes hands within the term of the royalty. And since artists benefit more from frequent resales than larger appreciation of individual works that do not sell as often, the royalty reflects velocity of turnover rather than market-based recognition of value. Moreover, most artists, not having a resale market, will suffer as purchasers pay less in the primary market, factoring in the future royalty. The right is administered best when applied to public sales, like auctions, and most works are not sold in this manner. When the right is applied to dealer and private sales, it is difficult to administer and the costs may outweigh the benefits of the system. Finally, galleries spend equal amounts promoting their artists, experienced or not. But the works of young artists are not profitable and need to be subsidized by more successful, established artists. For smaller galleries particularly, the resale royalty could reduce the number of exhibitions of inexperienced artists.

It is imperative, as well, to identify the wrong that resale royalties would right. As a matter of policy, does Congress want to help struggling artists or provide an economic right that, like copyright rewards only commercially successful creators and frequent resellers? There is a considerable body of literature concluding that the royalty favors artists who are already established and does not aid the plight of those without a market for their works. Thus, if Congress wants to provide an additional source of income for successful visual artists with frequent resales, royalties will help. On the other hand, royalties are an inappropriate mechanism to reallocate wealth to struggling artists.

Moreover, are the benefits of the royalty worth the concomitant costs: for example, does Congress want to make inherent value judgments about why people should buy art—whether for consumption or investment—and reward the true connoisseur who does not contemplate reselling his work? The resale royalty also encourages the creation of particular types of art. To be truly effective the droit de suite must be an incentive to produce works that are resold frequently: easel paintings and traditional sculpture, for example, where conception is embodied in a single object. Finally, does Congress want to eliminate, or even qualify, the First Sale doctrine, and abandon well-settled principles of free alienability in Anglo-American property jurisprudence?

V. ECONOMIC PROBLEMS WITH THE RESALE ROYALTY

Regardless of whether the resale royalty is based on the entire sales price or merely the increase in value of the art work, there are consequences to the integration of the royalty into the domestic free-market system. For example, if the royalty encumbers future sales and depresses the art market, to the extent that works of visual art can be substituted readily by another commodity, patterns of demand will be altered, and prices and sales volume will be reduced.

Moreover, the commercial insignificance of the fine artist's reproduction right is one of the main economic arguments justifying the resale royalty, it is not clear that artists are using all available media to exploit their works—posters, cards, prints, shirts, rugs, art books—media in which they can benefit from the exploitation of numerous copies, in addition to the unique or limited copies of their original work. And if fine artists are not using their full economic potential, should society subsidize them?

Finally, even though almost all works of living artists decline in value, purchasers may not deduct these losses on their taxes, even though any profit is fully taxable. Seen in these terms, the royalty is a deterrent to and not an incentive for the collection of modern art, and the money for administration of the right may come from collectors who would otherwise have used their funds to acquire art.

A. The "Starving" Artist

Society's perceptions of the role of artists and their economic status is also crucial to assimilation of the royalty. The notion of starving artists being exploited by wealthy, savvy investors may not do justice to reality. Rather, it might be that, as Monroe Price argued forcefully a quarter of a century ago, the concept of droit de suite is based on romantic nostalgia:

> The droit de suite springs from a nostalgic recollection of the late nineteenth century. It is a
> case, not unusual, of legislation passed to correct a situation that no longer exists with the
> intensity that provoked reform.

Significantly, Price warned that the starving artist perception can have perverse effects as the basis for public policy, if the government concentrates on the perceived inequity of the lag time between artistic creation and market acceptance, and droit de suite becomes society's penance.

The 1980 Census data, even though it is 12 years old, still provides the most complete information about the annual earnings of artists as a group. According to that data, artists earn no less than other workers of similar training and personal characteristics. In any event, some individuals are attracted to high-risk careers in the arts, like participants in a lottery, for the possibility of an eventual large payoff or the significant nonmonetary rewards of creation, and are willing to sacrifice consumer goods for other advantages. For example, artists work a substantially lower average number of hours, have more rapid

earnings growth than other workers, and, over the age of 40, earn more than nonartists. Moreover, artists have higher job satisfaction than other workers: fewer of them leave their professions than do workers in other occupations. Finally, those visual artists potentially eligible for a resale royalty have lower unemployment rates than the general civilian labor force.

Since artists enter their profession and the free-market voluntarily, it may be argued that they are not exploited when they enter into a transaction with a wealthy buyer. The artist is faced with a choice of whether to sell his work today, or to hold the art as an investment for a certain time period. A sale will take place if the artist has a greater present need for consumption than the buyer. Although both the artist and the buyer agree on the future price of a work, they differ in their preference for present relative to future consumption.

In any event, to support the argument that the Copyright Act discriminates against fine artists in the economic exploitation of their works, a more appropriate comparison would be the relative remuneration of unique and limited copy creators to authors who create in many copies, rather than a comparison of the salaries of fine artists to the general population. However, despite the implicit argument that the Act favors the exploitation of copyrightable works through reproduction and performance, the little economic data that exists comparing the respective remuneration of the two groups of creators indicates that visual artists earn more annually than musicians and composers, and only slightly less than authors. Moreover, employment projections by the Bureau of Labor Statistics to the year 2005 estimate faster than average growth for visual artists, with only average growth for writers and below average growth for musicians and composers.

CONCLUSION

The natural law concept of resale royalties is the product of European- influenced moral rights, a system that focuses principally on the personality rights of creators. This perspective views art as a metaphysical concept instead of a market commodity, and ignores the realities of low profit margins, expenses of ownership and sale, and the inequity of sharing profit without risking loss. Although the United States recognizes moral rights as an ancillary system to copyright protection, limiting the uses that purchasers can make of acquired works, U.S. law does not extend the remunerative relationship between creator and progeny beyond the sale of copyrighted works. Such an approach is antithetical to copyright's free-market origins, as well as the fundamental tenet of free alienability in American property law. The two approaches are irreconcilable and pose a clash in cultures.

Thus, although the development ofinnovative fine art is an important fulcrum in the advancement of culture in the United States, funding this necessary goal would be served best by an infusion of capital either directly to financially needy artists or into the primary art market generally, instead of the creation of a new right based on the possibility of resale, which might trickle down benefits eventually from secondary and later markets.

U.S. copyright protection rewards market success, and is not an engine for redistributing wealth. Proponents of the resale royalty have not demonstrated empirically that the Copyright Act provides other than a level playing field for fine artists and other creators to exploit their works in the marketplace. As a threshold matter, more detailed economic study is needed of the respective compensable exploitations of fine artists and other authors to show that the Act favors the marketing of works through reproduction and performance.

Royalty advocates have also not effectively shown that the creation of a new encumbrance attached to the distribution right would further the constitutional purposes of encouraging creation and promoting the dissemination of fine art. Rather, there is indication that the possibility of a royalty from the resale of a work is too tentative to spur creation. Adding the burden of the royalty to the already thin profit margins of art sales and the expenses of ownership might also encourage the retention instead of the dissemination of works, and limit the availability of capital to invest in new works.

The U.S. Constitution requires the balancing of creator and user interests, and copyright is a strictly statutory concept, reflecting the economic realities of the marketplace. While legal systems that contemplate only the interests of creators may provide a ready fit for the concept of resale royalties, the approach does not assimilate well within the domestic economic and legal systems. So, even if further economic study discloses the need for financial support of fine artists as a group, the inherent problems of the droit de suite make it an unacceptable candidate for the job.