Of Moral Rights and Resale Royalties: The Kennedy Bill

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II. OF MORAL RIGHTS AND RESALE ROYALTIES: THE KENNEDY BILL

MARSHALL A. LEAFFER***

A. The Dilemma of the Fine Artist: The Inadequacies of the Current American Copyright Law

Art is a unique form of intellectual property requiring special protection. However, many say that American law discriminates against artists and our artistic heritage, and have called for amendments to the Copyright Act of 1976 ("Copyright Act"). The current legislative attempt to undo this perceived insensitivity is the Visual Artists Rights Act ("Kennedy Bill"), introduced by Senator Edward M. Kennedy (D-Mass.), in varying forms, since 1986.

As its name suggests, the objective of the Kennedy Bill is to provide increased protection to the rights of visual artists. The purpose of this portion of the symposium is to examine the status of the artist under the inadequacies of the current American copyright law, and to examine the scope and content of the Kennedy Bill. It will also explore the now defunct resale royalty provision of the pre-1988 Kennedy Bills. This provision, although omitted from the current Kennedy Bill, continues to be a goal of the creative artistic community, and thus merits discussion. In the final analysis, federal legislation is the preferable solution to the current concerns of artists, and with certain modifications the Kennedy Bill is a solid legislative initiative that deserves widespread public support.

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53 The Kennedy Bill was first introduced as the "Visual Artists Rights Amendments of 1986." S. 2796, 99th Cong., 2d Sess., 132 CONG. REC. S12,185 (daily ed. Sept. 9, 1986). The Kennedy Bill has gone through several significant changes. Most notably, in its present 1988 version, supra note 34, it no longer contains its most controversial aspect: the provisions concerning a resale royalty for certain works of art. See Visual Artists Rights Act, supra note 2.

Additionally, earlier versions of the Bill contained a provision deleting the notice requirement for works of art. This aspect of the Bill is moot in view of the United States' recent adherence to the Berne Convention and the abrogation of the notice requirement for all works of authorship. See Berne Convention, supra note 38. What is essentially left in the 1988 version of the Bill are the moral rights provisions. Senator Kennedy plans to reintroduce this 1988 version in virtually the same form to the 101st Congress. Companion legislation has been introduced into the House by Representative Markey. See H.R. 3221, 100th Cong., 1st Sess., 139 CONG. REC. H7352 (daily ed. Aug. 7, 1987) [hereinafter Markey Bill].
The key provisions of the Kennedy Bill establish a "moral right of integrity" for certain visual artists and, in its earlier versions, a resale royalty. As used in the Kennedy Bill, the term "visual artist" is a misnomer because not all visual artists benefit from this legislation. The more appropriate term would have been "fine artist." The fine artist occupies a disfavored position in the world of copyright. Unlike other authors who benefit from selling multiples of their works, notably an author or musician, the fine artist is often limited to a single sale of a one-of-a-kind work. In significant ways, the fine artist loses total control over his work. Section 109(a) of the Copyright Act, known as the "first sale doctrine," permits the owner of an artistic work to dispose of it physically, so long as the owner of that work does not reproduce it, adapt it or commit any other acts contrary to the exclusive rights granted under section 106. Thus, once a painting or sculpture is sold, nothing in the Copyright Act would prohibit its buyer from defacing it, destroying it, or cutting it up into little pieces and selling it in fragmented form. When any of these acts occur, both the artist and our cultural heritage are harmed.

The need for our legal system to sanction rights of integrity is illustrated by the inequitable result reached in the seminal case of Crimi v. Rutgers Presbyterian Church. Crimi had painted a large
fresco on the wall of Rutgers Presbyterian Church depicting Christ in a graphically physical manner. Crimi's portrayal of Christ offended some of the parishioners, who eventually had the fresco painted over in 1946. Outraged by the destruction of his work, Crimi sued the church, but without success. He based his suit on the doctrine of *droit moral*, or the moral right of the artist to maintain the integrity of his work. Crimi sought an action to compel the Church to remove the painting, or to permit him to remove the fresco for his own use and to pay damages. The court refused Crimi's request, unable to find redress under American law for the injury that the artist suffered. According to the court, any control the artist may have over his work's physical destruction was defined under the existing contract law. However, few if any artists consider negotiating such matters in a contract prior to the sale of a painting or sculpture.

The first sale doctrine discriminates against fine artists in another significant way—it deprives them of their ability to control the secondary market for their work. After an artist sells a painting for a modest sum, art speculators are able to resell the same painting for a significantly higher sum. The inequity is that the fine artist can only benefit from the first sale of his work.

One of the fundamental questions engendered by the dispute

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59 Id. at 573, 89 N.Y.S.2d at 816.
60 See supra notes 37-43 and accompanying text.
61 Crimi, 194 Misc. at 576, 89 N.Y.S.2d at 819.
62 Id. To retain the right to prevent obliteration by express contract, Crimi would have had to do so in writing, in conformance with § 242 of the New York Real Property Law.
63 A Calder mobile donated to the Pittsburgh airport provides another example of the powerlessness of the artist facing the destruction or mutilation of his work of art. Alexander Calder, the artist who created the mobile, lost all right to control the display of his work once title was conveyed. See Rose, Calder's Pittsburgh: A Violated and Immobile Mobile, ARTNEWS, Jan. 1978, at 39.
64 [T]he copyright owner's exclusive right of public distribution would have no effect upon anyone who owns "a particular copy or phonorecord lawfully made under this title" and who wishes to transfer it to someone else or to destroy it. For example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. H.R. REP. NO. 1476, 94th Cong., 1st Sess., reprinted in 17 U.S.C. § 109, at 35 (1982) (historical revisions and notes).
65 Contractual arrangements for a royalty upon a subsequent resale of a work have largely been unsuccessful due to either the artist's lack of awareness of the possibility of a contractual arrangement or the artist's inferior bargaining position. The best known attempt at a contractual solution is known as the Projansky contract, under which the artist retains a 15% royalty on the enhanced value of his work. Under this contract, "the buyer agrees that he will not alienate the work without procuring the transferee's agreement to be bound by the terms of the original contract." Solomon & Gill, *Federal and State Resale Royalty: What Hath Art Wrought?*, 26 UCLA L. REV. 322, 327 (1978).
over resale royalties is whether the artist should have the right to share in the profits derived from the subsequent sale of his works. An often cited example of this inequity was the sale of a Robert Rauschenberg painting for $85,000 which the seller, Robert C. Scull, had bought for $1,000 several years earlier. Rauschenberg, of course, would have liked to have shared in the enormous profit and believed he had a right to share the profit.

Fine artists have long felt short-changed by copyright law. By comparison, the composer of a popular song has a statutory entitlement to a fee for every performance of the song played on the radio, television, and other public settings. Nothing given to the fine artist in the Copyright Act approximates the lucrative performance right of the musical copyright owner. In comparison, the analog of the public performance right — the display right — is ineffective in compensating the fine artist.

Under section 106(5) of the Copyright Act, an author of a pictorial, graphic or sculptural work is given the exclusive right to display his work publicly. At first blush, the display right would appear to confer similar benefits on the fine artist that the performance right does for the musical copyright owner. In reality, however, the explicit limitations on the display right render it a much less powerful “exclusive” right than that of the public performance right. First, section 106(5) limits the display right to public displays. Second, and more important, the limitation on the display right found in section 109(c) gives the owner of a copy of the work the right to display it publicly. Thus, absent an

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66 Artists Decide They Should Share Profits on Resale of Paintings, Wall St. J., Feb. 11, 1974, at 1, col. 4. Due to the inequity resulting from the sale of the Rauschenberg painting, Mr. Rauschenberg and others, such as Rubin Gorewitz, a New York accountant and financial advisor, have lobbied in Washington “for a federal law that would make royalties mandatory for all sales over a certain amount, probably $1,000.” Id. Under the proposed plan, “the artist would validate the authenticity of a work, as well as collect a royalty, each time it changed hands.” Id.

67 There are other examples of even greater discrepancies between the original and resale price. For example, the artist James Rosenquist is said to have originally sold a work for $500 which was subsequently resold for $274,000. See The Great Debate Over Artist’s Rights, Washington Post, May 22, 1988, at F4, col. 2.

68 Composers receive performance fees for the use of the copyrighted composition of the sound recording. See 17 U.S.C. § 102(a) (1982 & Supp. V 1987). Composers are represented by collection agencies such as the American Association of Composers and Performers (“ASCAP”) and Broadcast Music, Inc. (“BMI”), which monitor performances, and, based on statistical extrapolations, collect and distribute payments from the users.


70 Id.


...the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copy-
agreement to the contrary, the owner of a copy of a painting, drawing, or sculpture can display the work publicly, and charge an admission to see it without ever having to reimburse the author.

The Kennedy Bill does not purport to change the Copyright Act generally, but to aid the fine artist specifically. It would incorporate two aspects of copyright law relatively foreign to American law: what is known as the moral right and, from the 1987 version of the Bill, the resale royalty right.

The moral right and the resale royalty are interrelated concepts. First, both have been recognized for some time in civil law jurisdictions and both are at odds with the basic thrust of American copyright law. Second, the goal of each is to protect the fine artist and encourage artistic creation. This is accomplished by allowing the artist to have a degree of artistic and economic control over a work beyond its initial sale.

The moral right and the resale royalty differ, however, in the interests they protect. The moral right is a personal right protecting an artist’s expression as an extension of the artist’s personality. By comparison, the resale royalty right is basically an economic right — allowing an artist to recover a percentage of the resale price of his work. Although both concepts are foreign to federal copyright law as yet, they have been accepted in varying degrees in state law. The moral right has been adopted by nine states and the resale royalty right by one state, California.

right owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

Id. 72 See, e.g., Plaisant, Droit de Suite and Droit Moral under the Berne Convention, 11 Colum. J. L. & Arts 157, 157 (1986) [hereinafter Plaisant]. “[They] both appear to be the lost children of the Droit D'Auteur.”

73 The droit de suite is part of the law of, for example, the Federal Republic of Germany, Belgium, France, Italy, Luxembourg, and many eastern European and developing countries. See id. at 159. The droit moral is also part of German and French law, and is law in many eastern European and South American countries. Id. at 162-63.

74 See Roeder, The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators, 53 Harv. L. Rev. 554, 578 (1940). Moral rights “may be defined as the right of the creator to create, to present his creation to the public in any desired form or to withhold it, and to demand from everyone respect for his personality as creator and for his works.” Id. (citing Michaelides-Nouaros, LE DROIT MORAL DE L'AUTEUR 68 (1935)).

75 See, e.g., Plaisant, supra note 72, at 159. The resale royalty right provides “a form of maintenance . . . [since] [i]t is unjust that a work, say a painting or sculpture by a young author, should be sold by him for a minimal sum ..., and resold for a larger amount of money without the author or his heirs . . . benefitting from that resale.” Id.

76 See supra note 16.

The basic thrust of the Kennedy Bill is not new. Since the late 1970s, legislation has been introduced proposing moral right protection and resale royalties for artists. What has changed is a heightened interest in copyright and intellectual property in general and a less ethnocentric view of our place in the world community. Congress has recently shown a more receptive attitude toward reassessing our traditional notions of copyright law, as evidenced by America's recent adherence to the Berne Convention. Thus, the 1988 Kennedy Bill has a more favorable chance of being enacted than before; this is particularly true since its most recent version has deleted the highly controversial resale royalty rights provisions.

B. The Moral Right: An Overview

The moral rights provisions in the Kennedy Bill are clearly its most important aspect. The concept of "moral rights," derived from the term droit moral in French law, regards an author's work as an extension of his personality, something that remains a part of his life, even after he has physically parted with the work.

Although its origins can be traced back to the French
Revolution, the moral right does not exist in one definitive version.\textsuperscript{83}

Article \textit{6bis} of the Berne Convention, Paris text, provides in part:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification . . . which would be prejudicial to his honor or reputation.\textsuperscript{84}

In sum, Berne permits an artist—indeed of economic rights—the right to claim authorship of the work (the paternity right)\textsuperscript{85} and the right to preserve this work from any distortion or mutilation of the work (the integrity right). These rights exist independently of a transfer of the copyright. There are other components of the moral right which are sometimes included under this umbrella term. The right of first publication—otherwise known as the right of divulga-
tion—gives an artist the absolute right to determine if and when a work is complete and ready to be shown to the public,\textsuperscript{86} and has long been recognized under American law.\textsuperscript{87} Another component

\textit{Id.}

As \textit{Crimi} indicates, current American copyright law prohibits the new owner of the fresco from intentionally obliterating it. \textit{See supra notes 59-62} and accompanying text. The Kennedy Bill, however, would recognize, for the first time, the moral right of the artist on the federal level, and in doing so, would preempt state statutes. L. \textit{Tribe, American Constitutional Law} 376-77 (1978).

\textit{States are [often] deemed powerless to act because of a vacuum deliberately, even if not expressly, created by federal legislation. In such cases, any state or local action, however consistent in detail with relevant federal statutes, is held invalid—not because of a "dormant" federal power thought to be constitutionally exclusive but rather because the federal legislative scheme announces, or is best understood as implying, a congressional purpose to "occupy the field!"}

\textit{Id.}

Tribe notes, however, that the "question whether federal law 'preempts' state action, [is] largely one of statutory construction, [and] cannot be reduced to general formulas." \textit{Id.} at 377.

\textsuperscript{83} \textit{See, e.g., Plaisant, supra note note 72.}


\textsuperscript{85} This often includes the converse right to renounce credit where the artist feels that the integrity of the work has in some way been damaged.

\textsuperscript{86} The right of first publication is generally recognized in the distribution right granted under section 106(3). 17 U.S.C. § 106 (1982 & Supp. 1987). \textit{See supra note 57.}

\textsuperscript{87} Justice Brandeis argued that "[t]he principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against
of the moral right is the right of withdrawal which would allow the author to withdraw a work after the payment of just compensation. This right has seen little practical application even in a country like France, which recognizes it.  

Congress avoided the question of including a moral rights provision in the Berne Convention Implementation Act of 1988. The Berne enabling legislation was instead based on a "minimalist" approach to adherence — that is, to change the Copyright Act only where necessary. Under this approach, moral rights of the author, as required by 6bis of Berne, were deemed to be adequately protected when the entirety of United States law was taken into account. Advocates of the minimalist approach asserted that unfair competition, defamation law, and the adaptation right under copyright law constructed a web of protection equivalent to the paternity and integrity rights. For example, the display of an altered work of art could contravene, depending on the circumstances, one or more bodies of law. It might, for instance, constitute a false designation of origin under Section 43(a) of the Lanham Act or defamation of the artist's professional reputation.

The assertion that the entirety of American law taken as a whole provides de facto protection of the author's moral right is inaccurate.
at best. Protection under the Lanham Act or defamation law falls short of a direct recognition of the artist's moral right.96 First, it is not clear whether an unfair competition action could be brought if a defendant had properly disclosed prior to public showing that the alteration had taken place.97 Second, because these causes of action are based on reputational harm or unfair competition, they fail to protect the artist from the total destruction of a work of art.98 The Kennedy Bill, however, vindicates the moral right of the artist by prohibiting the display of an intentionally altered work of art. It stops short, however, of an absolute recognition of an artist's integrity right.

C. Moral Right Provisions of the Kennedy Bill

In its latest version, the Kennedy Bill creates a moral right for certain visual artists. The Kennedy Bill would add a new section 106(a) to the Copyright Act, giving those artists exclusive unwaivable and unassignable rights of paternity and integrity during their lifetimes.99 This provision, however, both falls short of the

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98 This disclosure may imply the existence of contractual negotiations and terms between the author and the defendant which would protect the defendant against any false attribution claims. See 15 U.S.C. § 1125(a)(1982 & Supp. V 1987) which reads in part:

Any person who shall affix, apply, or annex, or use in connection with any goods or services . . . any false description or representation . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

See also Verbit, Moral Rights and Section 43(a) of the Lanham Act: Oasis or Illusion?, 9 HASTINGS COMM/ENT. L.J. 383, 405-14 (1987).


99 Sec. 3 of the Kennedy Bill reads in relevant part:
Berne Convention—by confining protection to visual artists—
and exceeding it—by specifying that these rights are unassigna-
ble and unwaivable.

As indicated, the Kennedy Bill contains an expanded right of
paternity and a somewhat less protective right of integrity. A pa-
ternity right under the Bill would permit an artist to claim or dis-
claim authorship of publicly displayed works and to bring
infringement actions when such works are mutilated or altered by
acts of intentional or gross negligence.

The author would pos-
sess the exclusive right to bring an action for infringement dur-
ing his lifetime for violation of the paternity right. For example,
the copyright owner who is not the author of the work cannot
claim the paternity right.

Therefore, the Bill precludes an ac-
tion to remedy alterations of the work unless the work was pub-
licly displayed in that condition. Under the Bill, the integrity
right is more limited. It would make the destruction of a work of
recognized stature by an act of intentional or gross negligence an

(a) Independent of the copyright owner's exclusive right... the au-
   thor of a work of visual art... shall have the right during his life to claim...
or to disclaim authorship of... his works of visual art...

(b)(1)(A)... Where the author is not the copyright owner, he alone shall
still have the exclusive right during his lifetime to assert infringement of the
copyright...

(c) The author's rights provided in subsections (a) and (b) may not be
waived or assigned.

Kennedy Bill, supra note 34, § 3 (emphasis added).

A comparison of S.1619 with the provision of the Berne Convention
reveals that the bill's moral rights provisions are both broader and nar-
rower. For example, under Article 6bis of the Convention, all categories of
works are protected. The Kennedy bill would protect only pictorial,
graphic, and sculptural works.... Taken literally, the bill would permit the
creators of publicly displayed works of fine art to disclaim authorship
where any alteration of the work was made. Berne allows the author to
object to changes only when they prejudice the artist's honor or
reputation.

Hearings on S. 1619, supra note 6, at 22 (statement of Ralph Oman, Register of Copy-
rights) [hereinafter Statement of Ralph Oman].

(b)(2)... The destruction, by an intentional act or gross negligence, of
a work of recognized stature is a violation of the exclusive rights of the au-
thor of the work. Where the author is not the copyright owner he shall still
have the exclusive right during his lifetime to assert infringement of the
copyright...

Kennedy Bill, supra note 34, § 3(b)(2).

(b)(1)(A) The substantial mutilation or alteration of a work of visual art,
which is publicly displayed caused by an intentional act or gross negligence
is a violation of the exclusive rights of the copyright owner where the au-
thor of the work is the copyright owner. Where the author of the work is
not the copyright owner, he alone shall still have the exclusive right during
his lifetime to assert infringement of the copyright...

Id. at § 3.
This limited integrity right follows the model of the New York Authorship Act rather than the California Art Preservation Act. As manifested in several key provisions, the Kennedy Bill essentially protects works of fine art, paintings, graphic arts, and sculpture. The Bill applies only to works existing in a single or in a limited number of copies, including limited edition prints or multiple cast sculptures of 200 or less. It also excludes a whole range of works such as photographs, posters, maps, globes, technical drawings, and motion pictures. The Bill does not directly address the colorization of black and white films and excludes works made for hire.

When a work cannot be removed from a building without mutilation or defacement, the artist's moral rights are waived, absent a contract between the owner of the building and the author that indicates otherwise. This contract must be recorded in the applicable state real property registry. The origin of this provision can be traced to a powerful real estate lobby which has always feared moral rights legislation and has focused its attention on this class of works. The fact that most state moral right statutes have public building limitations can be attributed to the efforts of this lobby.

The Bill contains several provisions directed specifically to museums and others who display and conserve art. One provi-
sion allows a work to be displayed in an altered state, when the alteration has occurred from acts beyond the possessor's control.\textsuperscript{113} When a museum conservator actively alters a publicly displayed work, however, the Bill requires this alteration to be accomplished non-negligently.\textsuperscript{114} This provision appears to place enhanced responsibility on conservators of works of art in the exercise of their profession.

The Bill protects only those works that have attained "recognized stature".\textsuperscript{115} This provision of the bill, borrowed from the California Art Preservation Act,\textsuperscript{116} is a radical departure from American Copyright law. Ever since \textit{Bleistein v. Donaldson Lithographing Co.},\textsuperscript{117} courts may not consider artistic quality in deciding whether to protect a work. The purpose of this departure is to preclude nuisance suits brought, for example, by irate parents whose six-year-old's work is thrown away by her teacher.\textsuperscript{118} The occasional nuisance suit, however, hardly justifies a provision which may discriminate against avant-garde or experimental art forms which may not achieve "recognized stature" in traditional art circles.

\textsuperscript{113} "The alteration or mutilation of a work of visual art which is a result of the passage of time or the inherent nature of the materials" is actionable only if the "alteration or mutilation" occurs through gross negligence in maintaining or protecting the work. Kennedy Bill, supra note 34, § 3(B).

\textsuperscript{114} Id. (alteration which occurs from competent and appropriate observation is not a violation).

\textsuperscript{115} Id. The concept of "recognized stature" is a question of fact which may be based on opinions of artists, art dealers, museum personnel, and other specialists. Id. A "work of recognized stature" is defined as:

\begin{quote}
    a work of visual art determined to be of recognized stature. In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators of recognized stature, and other persons involved with the creation, appreciation, history, or marketing of works of recognized stature. Evidence of commercial exploitation of a work as a whole or of particular copies, does not preclude a finding that the work is a work of recognized stature.
\end{quote}

\textsuperscript{116} Id. § 2.

\textsuperscript{117} 188 U.S. 239 (1903). In \textit{Bleistein}, a plaintiff lithographing company designed picture posters for a circus to use as advertisements. Plaintiff lithographing company brought suit against defendant lithographing company for infringement of copyright, claiming defendants reproduced three lithographs prepared by employees of plaintiff for circus advertisements.

The question presented to the Supreme Court was whether the lithographs were within the protection of the copyright law. Justice Holmes, writing for the majority, held that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." Id. at 251.

\textsuperscript{118} See infra note 169 and accompanying text.
D. The Kennedy Bill and Resale Royalty Rights/Droit de Suite

The national resale royalty provision of previous Kennedy Bills is a far more controversial issue than the moral right.\(^\text{119}\) The resale royalty right provision was replaced in the 1988 version of the Kennedy Bill with a mandate to study the resale royalty right for one year in order to determine its feasibility.\(^\text{120}\) Many advocates argue that equitable considerations require that the United States join countries like France and Germany, as well as the State of California,\(^\text{121}\) which recognize the resale royalty.\(^\text{122}\) Resale royalties also advance the policy behind moral rights of maintaining a continuing relationship between the artist and the work of art.\(^\text{123}\)

The Bill’s 1987 version of the royalty provision, like the California Act, applied to works resold for $1,000 or more.\(^\text{124}\) Unlike the California Act, it applied only when the seller resold the work at a price no less than 150% of the purchase price.\(^\text{125}\) The purpose of this provision was to avoid imposing a resale royalty on a work unless a substantial profit was realized. The 150% resale

\(^{119}\) Unlike its treatment of the moral right, the Berne Convention allows but does not mandate recognition of the resale royalty right—droit de suite. The question is left to national legislation. See Berne Convention, Paris Act, supra note 84, art. 14bis.

\(^{120}\) Visual Artists Rights Act, supra note 2, § 3.

\(^{121}\) See generally infra notes 143-210 and accompanying text. In 1976, California enacted a resale royalty right law—the first time such a right was recognized in the common-law world. Id. The 1987 version of the the Kennedy Bill adopted the general structure of the 1976 California Resale Royalty Act. See Cal. Giv. Code § 986 (West 1989). However, it modified some of the California Act’s provisions objectionable to buyers and sellers of art. The 1987 version of the Bill also imposed an unwaivable, although transferable, seven percent royalty on the resale of a work of art as defined by the Bill. Visual Artists Rights Act, supra note 2, § 3:

Whenever a pictorial, graphic, or sculptural work is sold, the seller shall pay a royalty to the author. . . . Such royalty shall be equal to 7 percent of the difference between the seller’s purchase price and the amount the seller receives in exchange for the work. The right of the author to receive this royalty may not be waived.

The royalty would attach to the resale of the work for the life of the author plus fifty years. Id. “Where the author is deceased at the time of the sale, and the sale occurs within 50 years after the death of the author, such royalty shall be paid to the estate of the author.” Id. at (d)(1).

\(^{122}\) Although only twenty-one of the fifty-one nations polled in a 1983 UNESCO survey had resale royalty right laws, in Europe these included France, Germany, and Italy. See J. Merryman & A. Elsen, Law, Ethics, and the Visual Arts 213 (2 ed. 1987)[hereinafter Merryman & Elsen].

\(^{123}\) See Koegel, Memorandum of Support for S. 2796: Introduced in the 99th Congress by Senator Edward M. Kennedy (D. Massachusetts) 11 Colum. J.L. & Arts 347, 349 (1987). “[I]t is hardly unreasonable for artists to seek respect for a continuing connection with the original unique work. It is not inappropriate for this connection to be economic.” Id. at 349.

\(^{124}\) See id. (denying a resale royalty right when the resale price of a work is less than $1,000).

\(^{125}\) See id. (denying a royalty right where the resale price is less than 150% of the price paid by the reseller).
limitation took into account both inflation and the costs of resale so as not to unduly penalize the buyer.\textsuperscript{126} To benefit from the resale royalty, the 1987 Bill required that the artist register the work in the Copyright Office prior to resale.\textsuperscript{127}

Whether the resale royalty act would benefit the fine artist and create a healthier climate for artistic production and dissemination is a widely debated question\textsuperscript{128} which will receive further scrutiny by those who evaluate the feasibility of a national resale royalty as mandated by the current version of the Kennedy Bill.

Supporters of the California resale royalty argue that it benefits artists and encourages creative production, subsidizing the artist as the public performance right does for the composer of music.\textsuperscript{129} While admitting that the resale royalty is often ignored and difficult to enforce, they would point to the considerable number of artists who have benefited from it. For example, studies conducted of both the California statute\textsuperscript{130} and the French resale royalty\textsuperscript{131} show that many artists have been significantly remunerated since the royalty's adoption in 1920.

Critics of the resale royalty claim that it has not worked and has harmed the art market in countries having long experience with it. For example, some French art dealers insist that the resale royalty has driven a portion of the art market away from France. In effect, they argue that a rational buyer will avoid purchasing a work in France if its equivalent can be obtained without incurring extra cost elsewhere. One cannot, however, blame the decline of the French art market on the resale royalty. Although the French art market is not what it was before World War II, its decline cannot be traced to the resale royalty. There are simply too many other factors at play—such as the advent of a dynamic New York market after the Second World War.

Those who disfavor the resale royalty have cogent economic arguments, but have difficulty proving them empirically. Generally, critics argue that the resale royalty will create the worst of all

\textsuperscript{126} One might compare this provision with that of France, which imposes a resale royalty on the gross sale of a work whether it appreciates or depreciates. See Loi de 11 Mars 1957, supra note 10, art. 42.
\textsuperscript{127} Visual Artists Right Act, supra note 2, § 3.
\textsuperscript{129} See supra notes 66-68 and accompanying text.
\textsuperscript{130} Hearing on S. 1619, supra note 6 (remark of Leonard DuBoff).
possible worlds for both artists and art buyers.\textsuperscript{132} Essentially, the resale royalty imposes a seven percent tax on the sale of art, which, like any tax, lowers the demand for a particular good or service. In this case, the seven percent tax on the sale of art will arguably depress the art market. Moreover, critics assert that the resale royalty will remunerate the well-known artist at the expense of the unknown artist.\textsuperscript{133}

Finally, critics argue that the resale royalty will encourage neither the production nor the dissemination of art. Because at least ninety percent of the artwork available does not have a resale market at all,\textsuperscript{134} and most new artists lack any initial market for their work,\textsuperscript{135} an increase of funds is needed to purchase works of art. This increase could be accomplished by providing tax breaks or direct subsidies.\textsuperscript{136} The resale royalty, however, reduces those funds by imposing a tax on a work of art. The result will be a smaller and less dynamic art market.

It appears that a national resale royalty will not become an immediate reality. If the Kennedy Bill is passed, the question will be studied during the one year mandate. We are left, however, with an unsatisfactory situation that calls for national uniformity one way or another. What would happen if another state, besides California, passed a resale royalty law? For example, take the situation in which a California resident sold a painting in New York. Because the two bases of jurisdiction are residency of the seller and the place of sale, could royalties be imposed by both California and New York?\textsuperscript{137} The answer is not clear. Finally, the California Act is subject to strong preemption arguments under section 301 of the Act, even though the issue was resolved in favor of the legislation under the 1909 Act.\textsuperscript{138} The lone state might eventually be deprived of recognizing the resale royalty.

If the resale royalty is revived, it should incorporate the re-

\textsuperscript{132} At the Senate Subcommittee Hearings on Patents, Copyrights, and Trademarks, several speakers argued that "such a law would be difficult to administer, at the least, and possibly injurious to the careers of some young artists." See McGill, \textit{U.S. Bill on Artists Right is Debated}, N.Y. Times, Nov. 19, 1986, at C33, col. 1.
\textsuperscript{135} See Weil, Resale Royalties: Nobody Benefits, ARTNEWS, Mar. 1978, at 58.
\textsuperscript{136} \textit{Hearings on S. 1619, supra note 6. (remark of David Lloyd Kreeger).}