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A Proposal for National Uniform Art-Proceeds Legislation

Art-proceeds legislation allows the artist to receive a portion of the profit upon each resale of his work. The movement for such legislation is growing out of an increasing recognition by artists and their supporters of the need to protect the right to share in profits resulting from the reputation of the creator of the work; as an artist's work gains recognition it can be sold for increasingly higher prices and although the profit realized on each resale is due to the artist's growing reputation, it is enjoyed only by the seller. This misallocation of profit is remedied by allowing a percentage of the proceeds to flow to the artist upon each resale of his work. Art-proceeds legislation, statutorily mandating what percentage of profit should be reallocated to the artist and under what terms and conditions, has recently gone into effect in California. Such legislation could possibly serve as a model for other states to adopt.

This note analyzes the rationale behind art-proceeds legislation, reviews the problems which such innovative legislation creates and examines the desirability of an expansion of this type of legislation on a national level.

EUROPEAN AND AMERICAN PRECEDENT

Art-proceeds legislation has long been in existence in Europe.¹ The right to receive art-proceeds could be considered a corollary of the well-established moral rights doctrine² since it protects the pecuniary rather than the moral rights of the creator³ in his intellectual property. The rationale behind art-proceeds legislation varies in the different European countries where it is recognized. Legislation in France, Germany and Belgium represent the three major theories.

In France the *droit de suite*⁴ is considered an extension of the artist's right to be protected by copyright.⁵ The theory supporting the *droit de suite*

¹See Sherman, *Incorporation of the Droit de Suite into United States Copyright Law*, 18 ASCAP COPYRIGHT L. SYMP. 50, 54-56 (1970) [hereinafter cited as Sherman].

²The bundle of rights usually held to be within the moral rights doctrine includes: the right of disclosure of a piece, the right of withdrawal, the right of paternity and the right of integrity of the piece. Sarraute, *Current Theory on the Moral Right of Authors & Artists Under French Law*, 16 AM. J. COMP. L. 465, 467 (1968).

³See Monta, *The Concept of "Copyright" Versus the "Droit d'Auteur"*, 32 S. CAL. L. REV. 177, 183 (1959).

⁴*Droit de Suite* is roughly translated "follow-up right," the French equivalent of our art-proceeds right or resale royalties right.

⁵Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U.L. REV. 19, 24 (1966).

is that the artist should receive payment commensurate with the use made of his creation.⁶ *Droit de suite*, comparable to a rental payment, accomplishes this because the author is paid for the use of his work whether or not it has increased in value at the time of resale.

In Germany art-proceeds legislation is based on recognition of the latent value in a piece of work.⁷ Fairness is achieved by allowing an artist to participate in profits which arise later in the life of the piece, the theory being that the potential for such profit existed from the moment of creation.⁸

By contrast, the Belgian theory is analogous to the American contract principles of changed circumstances and unjust enrichment.⁹ Under the doctrine of changed circumstances, the parties may revise the terms of a contract under which performance would cause hardship for one of the parties; the artist is allowed to collect subsequent profits in order to effectively revise the original contract to account for the increase in the value of a piece from its original sale price. Under the unjust enrichment theory there is a continuing relationship between the artist and those who purchase his work which is traceable to the growing reputation of the artist; the artist is compensated for the profits which arise due to his reputation, thereby preventing subsequent purchasers from being unjustly enriched.¹⁰

Although artists' moral rights have never been explicitly recognized in the United States,¹¹ there is precedent in many areas of American law which, by analogy, lays a foundation for art-proceeds legislation.¹² Support can be drawn from contract¹³ and property law concepts,¹⁴ as well as the doctrines of libel, unfair competition, copyright and the right of privacy.¹⁵ Under all of these theories intellectual property is legally protected from exploitation, distortion or intrusion by another. Similarly, art-proceeds legislation protects the artist's intellectual property against economic exploitation by the seller.

Another possible basis for art-proceeds legislation is the Universal Declaration of Human Rights to which the United States is a signatory. Article 27(2) recognizes an author's moral rights.¹⁶ This provision reads:

Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

⁶*Id.*

⁷Sherman, *supra* note 1, at 59.

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 355 (1975).

¹²Note, *Moral Right in the United States*, 35 CONN. B.J. 509, 515-16 (1961).

¹³See Sherman, *supra* note 1, at 59.

¹⁴Strong, *Artists' Property Rights*, in ART LAW 47 (L. Duboff ed. 1975).

¹⁵Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 578 (1940). Roeder, however, does not feel these doctrines offer adequate support.

¹⁶Ratified by the United States, Dec. 10, 1948 (1 U.N. Bulletin § 6, at 6, 8 (Jan. 1, 1949)).

Many policies of American law also support the artist's right to subsequent profits. Like consumer protection legislation, art-proceeds legislation is designed to protect an element of society which deserves protection but may not have the economic strength to protect itself. Other creators in American society, such as authors and composers, receive royalties for their works, and the graphic artist deserves the same protection.¹⁷ Art-proceeds legislation provides an economic incentive to artists which will benefit the public by spurring more art production.¹⁸ Ultimately it does not matter whether art-proceeds legislation is justified as a natural right or as a form of pecuniary protection;¹⁹ the right should not be denied recognition for lack of an appropriate label.

ARGUMENTS AGAINST ART-PROCEEDS LEGISLATION

The desirability of art-proceeds legislation is not universally accepted. Five major arguments often raised against it are: (1) that it conflicts with basic concepts in American property and contract law; (2) that it will hinder the art market; (3) that the "wrong" artists will benefit; (4) that it is chauvinistic, elitist legislation because it applies only to classical art forms and (5) that the amounts which will be collected are too insignificant to merit legislative action.

The contention that art-proceeds legislation conflicts with property and contract law tenets is based on the American concept of ownership under which the owner has complete rights in the property, including the right to receive all profits upon disposal. But there is room within this ownership framework for art-proceeds legislation. As previously noted, art-proceeds legislation provides a pecuniary reservation analogous to royalty rights of authors and composers.²⁰ In many other aspects of American law private property rights are also subjected to legislative limitations²¹ not unlike the limitation art-proceeds legislation would impose upon an art owner at the time of resale.²²

¹⁷Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U.L. REV. 25 (1966).

¹⁸Sherman, *supra* note 1, at 57.

¹⁹*Cf.* Hepp, *Royalties from Works of the Fine Arts: Origin of the Concept of Droit de Suite in Copyright Law*, 6 BULL. COPYRIGHT SOC'Y 91 (1958) (Hepp applies this reasoning to copyright protection).

²⁰Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 11 ASCAP COPYRIGHT L. SYMP. 1, 26 (1962).

²¹*Id.*

²²Many states have incorporated into their property statutes the Rule Against Perpetuities which holds that no interest, other than one in the grantor-testator, is good unless it must vest or fail to vest (if it is a remainder), or become possessory or fail to become possessory (if it is an executory interest), if at all, not later than 21 years after some life in being at the creation of the interest. *E.g.*, IND. CODE § 32-1-4-1 (1976).

Critics who claim art-proceeds legislation will hinder the art market²³ argue that potential buyers will be deterred by the prospect of having to give up a percentage of future profits and will invest instead in commodities, such as antiques, which are not subject to art-proceeds restrictions. This argument ignores the fact that art-proceeds legislation will not have sufficient monetary or administrative effect to dissuade the art lover from purchasing art.²⁴ In fact, many purchasers may be pleased to compensate the artist with a percentage of profit.²⁵ Although those purchasers who buy art more as an investment than for love of the piece may invest in other commodities, the number so shifting should not cause the art market to shrink. Furthermore, any disadvantage to artists due to diminution of the art market must be balanced against the expected gain from art-proceeds legislation; it is probable that in the long run the artist will benefit more by receiving a portion of resale profits than he will suffer by losing a potential buyer.

Critics also contend that the "wrong" artists will benefit from such legislation since art-proceeds will only benefit well-known artists whose works sell at high prices, instead of the struggling artists who need economic incentive.²⁶ This argument perpetuates the stereotyped image of the starving artist by refusing to concede that a good artist who is also a good businessman should be rewarded. An artist is not less entitled to receive the benefits of art-proceeds legislation merely because he is financially successful; indeed the financially successful artist may be more deserving of such benefits since his work sells for increasingly higher prices in which he does not share.²⁷

European art-proceeds laws apply only to classical art forms; such legislation has been criticized as chauvinistic and elitist because it does not apply to such art forms as conceptual art, jewelry, architecture and carpentry.²⁸ However, unlike the artisan who receives adequate compensation at the first sale of the item he produces,²⁹ the author of fine art is often forced to sell his work at a price which does not adequately compensate him for labor or materials.³⁰ Art-proceeds legislation remedies this discrepancy by recognizing the potential value in a piece which exists at the time of the original sale.

²³See, e.g., Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1352 n.52 (1968) [hereinafter cited as Price].

²⁴See Sherman, *supra* note 1, at 53.

²⁵Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U.L. REV. 19, 43 (1966).

²⁶Price, *supra* note 23, at 1366.

²⁷For example, well-known artist Robert Rauschenberg sold his collage "Thaw" to collector Robert Schull in the 1950's for \$800.00. Schull later auctioned the piece for \$85,000.00. Chamberlain, *Artists' Royalty Agreement*, 38 AM. ARTIST 45 (May 1974).

²⁸Vail, *Droit de Suite*, in ART LAW 45, 46 (L. Duboff ed. 1975).

²⁹Strong, *Comments on Droit Moral*, in ART LAW 69 (L. Duboff ed. 1975).

³⁰The conceptual artist, dealing in a perishable medium, realizes the monetary limitations of his art. He does not expect to profit over the years from a piece which will disintegrate within a day or an hour.

A final criticism of art-proceeds legislation is that its effect is minimal and therefore does not warrant legislative mandate. This criticism recognizes the changing nature of the art market; resales are less frequent as institutional, corporate and municipal buyers increase, and production of originals is becoming less frequent as the market for reproductions increases.³¹ But the philosophy of art-proceeds legislation is not defeated by the art market transition. If a piece is never resold no one profits from the artist's original creativity; if the piece is resold, art-proceeds legislation justly reimburses the artist for the economic exploitation of his original creativity³² even if such reimbursement is only a modest sum.

THE CALIFORNIA ART-PROCEEDS ACT

California recently enacted the Resale Royalties Act,³³ the first art-proceeds statute enacted in the United States.³⁴ The California Resale Royalties Act applies whenever a work of fine art³⁵ is sold in California or when the seller resides in California.³⁶ Under the Act, the artist receives from the seller five percent of the total sales price of the work,³⁷ which is to be paid to the artist or artist's agent within ninety days of the sale, the responsibility for locating the artist resting on the seller or seller's agent.³⁸ If the artist is not located, the money is deposited by the California Arts Council in a "Special Deposit Fund" in the State Treasury where it may be claimed by the artist any time within seven years of the sale, after which time the money goes into an operating fund which supports Council programs.³⁹ The five percent royalty right is non-transferable and non-waivable by the artist, except by contract providing for a royalty of greater than five percent.⁴⁰

The Act is not all encompassing, however; it extends only to works of fine art and does not apply to the initial sale of a work of fine art if the artist has title to the piece at the time of the sale, to the resale of a work for a gross sales price of less than \$1,000, to resale after the artist's death, to resale for a gross sales price less than the purchase price paid by the seller, or where there is a transfer or exchange involving a work of fine art with a fair market value of less than \$1,000.⁴¹

³¹Price, *supra* note 23, at 1342.

³²Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 11 ASCAP COPYRIGHT L. SYMP. 1, 25 (1962).

³³CAL. CIV. CODE § 986 (West 1976).

³⁴"Resale Royalties" is synonymous with art-proceeds, the term used in this article.

³⁵A work of "Fine art" means an original painting, sculpture or drawing. CAL. CIV. CODE § 986(c)(2) (West 1976).

³⁶*Id.* § 986(a).

³⁷*Id.*

³⁸*Id.* § 986(a)(2) and (3).

³⁹*Id.* § 986(a)(4) and (5).

⁴⁰*Id.* § 986(a). This provision is intended to prevent pressure by an art dealer on artists in economically weak bargaining positions.

⁴¹*Id.* § 986(b).

The California Act should be characterized as a statutory enactment to protect an artist's property right rather than as an attempt to provide economic support for artists. Viewed as an economic support measure the bill would be a failure since five percent is monetarily very little in terms of resale, most art works are not resold with significant frequency, and a majority of artists are not selling works in the \$1,000-and-up price bracket. As a protection of property rights, however, the bill has merit. The right being protected is the property owner's right to benefit from the sale of his property, the property being protected is the artist's reputation, and the protection afforded is a five percent royalty. This analysis requires conceptualizing the payment received for a work of art in two parts: the amount allocable to the physical item and the amount allocable to the artist's reputation. Since it is impossible to determine what amount of the sale price the buyer would attribute to each of the two parts, setting a predetermined amount as a royalty payment is the only way to guarantee protection of the artist's art-proceeds right.

EXPANSION OF ART-PROCEEDS PROTECTION

Assuming the desirability of protecting artists' rights to a portion of subsequent profits, two critical issues arise: (1) should such protection be afforded through legislation? and (2) if so, should such legislation be enacted at the federal or the state level?

The only real alternative to art-proceeds legislation is a private contractual agreement between the parties to an art transfer.⁴² The advantage of such an alternative is the flexibility it offers. The artist and purchaser can negotiate and agree upon provisions guaranteeing the artist's rights to supervise future repair of the work, to have a say in how the work is displayed, or to repossess the work for brief intervals to set up a private show. The artist could also use a contractual agreement to reserve reproduction rights. But the art contract is not responsive to the serious problem of an artist's often weak economic bargaining position.⁴³ Many artists do not feel they are in a position to risk losing a sale by insisting upon an art-proceeds arrangement with a potential purchaser. Even if artists are in a position to negotiate fair contract terms with the first purchaser, there is no guarantee that subsequent purchasers will send the "transfer form"⁴⁴ to the artist upon resale or, if they do send it, that they will not falsify the values reported to the artist. Indeed, California's art-proceeds legislation was enacted in recognition of the ob-

⁴²The Projansky Agreement, the most well-known example of a work-of-art contract, contains nineteen articles protecting the artist's rights upon the first and subsequent transfers of the work. It is reprinted in 181 *Studio International* 186 (April 1971).

⁴³Hughes, "A Modest Proposal: Royalties for Artists," in *TIME*, Mar. 11, 1974, at 65.

solescence of a freedom-of-contract argument in today's art community.⁴⁵ Art-proceeds legislation on a national scale would mark the ultimate success of California's Act.⁴⁶ This could be achieved either at the federal level through amendment of the Copyright Revision Act, or at the state level through passage of a national Uniform Act.⁴⁷

The present Copyright Revision Act could be easily amended to include art-proceeds protection by qualifying the resale right of an art owner.⁴⁸ The affinity between art-proceeds protection and copyright protection, which raises a federal preemption issue,⁴⁹ attests to the fact that such a qualification would not abrogate the purposes of copyright; the preemption issue would not arise if copyright legislation and art-proceeds legislation were not arguably similar in scope and purpose. Realistically however, it does not appear likely that the Copyright Act will be revised to include art-proceeds legislation within the near future.⁵⁰

Alternatively, enactment of national uniform legislation is the preferable approach to protection of the artist's rights. Although the art market in the United States is of a national character, art-proceeds legislation is more suitably enacted at the state level since regulation of pecuniary rights of citizens is not traditionally an area of federal concern. Art-proceeds legislation standing alone in one state however, is seriously weakened by problems of evasion and enforcement which would be solved by national uniformity. Thus, a National Uniform Art-Proceeds Act, despite being a piecemeal process of achieving national uniformity, is ultimately a faster alternative than to await passage of federal art-proceeds legislation. States having a larger art community would be likely to enact art-proceeds legislation sooner than others, but eventually the possibility of evading payment by selling outside an art-proceeds state would be eliminated as each state adopted uniform legislation.

Although state-by-state enactment of national uniform art-proceeds legislation will inevitably be a long process, there is a great deal which can be done in the meantime. In addition to lobbying for legislation, an artists' organization⁵¹ could lay the ground work to prepare the art community of

⁴⁵See also Drachler & Torczyner, *Fake Paintings in America—A Judicial Still Life of the Moral Right Doctrine*, in FORGERY IN ART & THE LAW 50 (M. Drachler & H. Torczyner eds. 1956).

⁴⁶M. PRICE & H. SANDISON, A GUIDE TO THE CALIFORNIA RESELL ROYALTIES ACT 3 (1976).

⁴⁷Gorewitz, *Artists' Royalties: Should There be a Law*, 62 ART. IN AMERICA 22 (Mar.-Apr. 1974).

⁴⁸Sherman, *supra* note 1, at 85, 91.

⁴⁹See notes 51-67 *infra*.

⁵⁰See 2 LINDEY, ENTERTAINMENT, PUBLISHING AND THE ARTS; AGREEMENTS AND THE LAW 505 (1977 Cum. Supp.). It should be noted, however, that the Carter Administration has shown an interest in art-proceeds legislation, and a Beverly Hills Congressman, Representative Henry Waxman, has announced plans to introduce a royalties measure to Congress this year [1977].

⁵¹See Boyer, *Protection for the Artist: The Alternatives*, 21 ASCAP COPYRIGHT L. SYM. 124, 129 (1974).

each state for such legislation. Two aspects of this groundwork might be the establishment of an art registration system⁵² and the education of the art community,⁵³ which would benefit artists and art investors by making them better informed about the business aspects of the art world.

In light of the desirability of national uniform legislation, two factors should be examined in evaluating whether the California Act should serve as a model for national uniform art-proceeds legislation: the possibility of federal preemption of the act, and the administrability of such an Act.

Federal Preemption

California's art-proceeds act faces a significant constitutional issue of preemption as a result of the Copyright Revision Act of 1976.⁵⁴ The new Copyright Act, effective January 1, 1978, contains a federal preemption clause. This clause provides that state laws governing any legal or equitable rights which come within the subject matter of copyright and are equivalent to any of the exclusive rights protected by copyright are preempted by the Copyright Revision Act.⁵⁵ If the art-proceeds right protected by California's Act is within the subject matter of copyright and is "equivalent" to any of the exclusive rights protected by copyright, it is thereby preempted by the Copyright Act.

The subject matter protected by the Copyright Revision Act includes original pictorial, graphic and sculptural works,⁵⁶ so that fine art, as defined by the California Act, clearly falls within the subject matter of copyright.⁵⁷ The more difficult question is whether the art-proceeds right is "equivalent"

⁵²See Ric, *Legal Rights of the Artist, The Droit de Suite*, 20 ART. J. 152 (1961).

⁵³Price, *supra* note 23, at 1364.

⁵⁴Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, to be codified as 17 U.S.C. § 101-810 [hereinafter cited as Copyright Act].

⁵⁵Copyright Act § 301.

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.

Id. § 301(a).

⁵⁶Copyright Act § 102.

Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(5) pictorial, graphic, and sculptural works

Id.

⁵⁷CAL. CIV. CODE § 986(c)(2) (West 1976).

to any of the exclusive rights protected by the Copyright Revision Act. These exclusive rights include the right to distribute copies of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease or lending.⁵⁸ The term "copies" as defined by the Copyright Revision Act includes "the material object . . . in which the work is first fixed," thereby encompassing an original work of art.⁵⁹

Technically, then, the art-proceeds right appears to fall within the scope of copyright, since resale is a form of distribution and a copy is defined in the Copyright Revision Act to include an original.⁶⁰ Both resale and reproduction are forms of art dissemination. By reproducing and distributing a piece of art an owner is economically exploiting the original creativity of the artist; the same is true when an owner resells a piece of art. Reproduction and resale are two of the many possible commercial uses of a piece of art.⁶¹ Thus, copyright and art-proceeds rights are arguably equivalent since both protect the continuing economic rights which an artist has in his work against commercial use without compensation.⁶²

Nevertheless, the applicability of the federal preemption clause to state art-proceeds legislation should be rejected. Neither the substance of copyright legislation, nor the history of its application, indicate any protection of rights in profits on subsequent resales of property.⁶³ The conformity between the art-proceeds right and copyright is linguistic only; even though both protect pecuniary aspects of property ownership, they are qualitatively different. Art-proceeds legislation protects the financial right to *participate in profits* from the property, while copyright protects the right to *control usage* of property for purposes of reproduction of copies. The distinction is analogous to that between the right of a property owner to receive rent from a tenant and his right to control trespass; both are property rights but they are not equivalent since the former is a financial right protected by contract law and the latter is a usage right protected by tort law. The fact that art-proceeds legislation applies only to originals and is not concerned with reproductions brings it

⁵⁸Copyright Act § 106(3).

Exclusive rights in copyrighted works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending

Id.

⁵⁹Copyright Act § 101.

⁶⁰*Id.*

⁶¹Telephone interview with Hamish Sandison, Executive Director, Bay Area Lawyers for the Arts, Inc. (Mar. 24, 1977).

⁶²Note, *Moral Rights in the United States*, 35 CONN. B.J. 509 (1961).

⁶³Carroll, *Statutory Copyright—A Valuable Right for the Visual Artist*, 20 BULL. COPYRIGHT SOC'Y 316, 317 (1973); Chisum, *Copyright Law and the Artist*, in ART LAW 119, 120 (L. Duboff ed. 1975).

closer to a regulation of property rights in an article of interstate commerce than to a form of copyright protection.⁶⁴

The legislative history of the Copyright Revision Act also supports the argument against federal preemption.⁶⁵ The federal preemption clause seeks to abolish the dual system of common law and statutory copyright⁶⁶ and to prevent intrusion by the states into this area of federal regulation. Its purpose is to eliminate the uncertainties and complications which result from the regulation of the same matter by both state and federal law and to prevent any obstruction of the objectives of federal copyright protection in promoting writing and scholarship.⁶⁷ Legislation modelled on the California Act would neither interfere with the desirable uniformity of copyright protection nor obstruct any objectives of copyright. The purpose of art-proceeds legislation coincides with the purpose of copyright legislation in spurring creativity. Moreover, federal preemption has not operated to the detriment of state regulation in other areas of the law, such as patents and trademarks.⁶⁸

The strongest argument against federal preemption stems from § 109 of the Copyright Revision Act,⁶⁹ limiting the exclusive rights protected by copyright. This section limits the exclusiveness of a creator's distribution right

⁶⁴Sherman, *supra* note 1, at 82.

⁶⁵U.S. CODE CONG. & AD. NEWS 2541-602.

⁶⁶The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.

H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 130, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 5659, 5746.

⁶⁷By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship.

Id. at 5745.

⁶⁸*See, e.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), wherein the Supreme Court held Ohio's trade secret law was not preempted by the federal patent laws. The Court specified that the States are free to regulate intellectual property rights, such as trade secrets and writings, the only limitation being that regulation in the area of patents and copyrights must not conflict with the operation of federal laws in this area. The Court reasoned that the federal patent policy of encouraging invention was not disturbed by the existence of another form of incentive to invention such as trade secret protection and therefore the state and federal systems were not in conflict. A further rationale for the Court's decision was the fact that trade secret law, since it affords weaker protection than the patent laws, presents no reasonable risk of deterrence from patent application. The same reasoning is applicable to the issue of possible conflict between federal copyright and state art-proceeds legislation: Art-proceeds legislation acts as another form of incentive to creativity in addition to copyright legislation. Also, art-proceeds legislation is narrower in scope than copyright legislation since art proceeds, at least under the California Act, covers only sales, and not rentals, gifts or loans, whereas the Copyright Act applies to distribution by sale or other transfer of ownership or by rental, lease, or lending. *See* CAL. CIV. CODE § 986(1)(a); Copyright Act § 106(3).

⁶⁹Copyright Act § 109.

to the first public distribution of an authorized copy.⁷⁰ After the creator's first distribution, the usage rights of subsequent owners to sell or otherwise dispose of the work are explicitly protected. The owner has an unqualified resale right, not subject to the artist's continuing participation right. If the art-proceeds right and the right to receive copyright protection were equivalent, the subsequent owner would not have an unqualified resale right, but rather would have a resale right qualified by the artist's right to share in resale profits.

Administrative Difficulties

Critics of art-proceeds legislation urge that it will be impossible to effectively administer. Under the California Act upon sale of a work of fine art, a seller with California citizenship, residing in Europe, is required to pay five percent to the artist. The seller can easily avoid the law since the tracing problem will be so difficult. And since there is no art registration system in the United States artists are usually unaware when one of their works is changing ownership. The California Act can also be evaded if the parties to an art transfer transact outside California within the meaning of the Uniform Commercial Code.⁷¹ Tracing the artist may also present problems. Many artists are unaware of their rights under the California art-proceeds act and therefore will not seek their five percent proceeds. Under the California Act,

⁷⁰Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord:

(2) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

Id. § 109(a).

⁷¹Under § 2-401 of the UCC, a sale takes place when title (ownership passes to the buyer, i.e. when the seller "completes performance with respect to physical delivery of the goods . . ."

Where and when title passes depends, in large part, upon the agreement between the buyer and the seller, or, as is usual with art works, the dealer. If the dealer has agreed to deliver the work to an out-of-state buyer, then the transaction is known as a "destination contract": title passes and the sale "takes place" out-of-state. If the dealer agrees to deliver the work to a third party, say cart and crate, within California for shipment to an out-of-state buyer, this transaction is treated as a "shipment contract": title passes and the sale "takes place" in California

The UCC, in § 1-102(3), gives the dealer and the buyer relatively wide leeway to vary the impact of its provisions by agreement. It is possible that dealers and purchasers would, in some instances, seek to take steps to make sure that a sale did not "take place" in California. Because of the physical delivery principle of the UCC, there is a substantial opportunity for the parties to the transaction to shape the sale to avoid the royalty. If the facts are too baldly manipulated, however, and if there is no other valid business reason for the agreement, a court may find that the parties have infringed the rights of the artist.

M. Price & H. Sandison, *A Guide to the California Resale Royalties Act*, 8, 9 (1976).

for instance, if the seller or seller's agent cannot locate and pay the artist, the California Arts Council is left with the difficult and expensive job of trying to locate artists whose proceeds are waiting in the "Special Deposit Fund" to be collected.

Most of the administrative difficulties of art-proceeds legislation would be eliminated by the adoption of uniform legislation by the states. The tracing problems may be solved by the creation of an agency-administered registration system for works of art;⁷² France has an efficient registration and collection system administered by SPADEM,⁷³ a national agency. In the United States such an agency could function in a manner similar to ASCAP,⁷⁴ and in a short time institutionalize the practice of art registration and art-proceeds collection. The system would establish a chain of title for the piece which would benefit the artist by providing a record of each transfer of ownership. It would also benefit the purchaser since a chain of title would probably increase the value of the piece.⁷⁵ Enforcement under a uniform art-proceeds act would not present significant obstacles, especially if the dollar amount of art-proceeds earned is insubstantial, since it is unlikely many people would go to great lengths to avoid paying it; procuring larger sums may require affirmative artist action. Although artists are not known for their business and financial skills,⁷⁶ the resale benefits proffered by art-proceeds legislation should encourage them to adopt such business practices as a personal registration system if necessary in order to collect their fair share.⁷⁷

As with any new legislation, it will take time to effectively implement a national uniform act. The administrative difficulties which have arisen under California's Act result from the fact that California is the only state having such legislation and from novelty rather than inherent weaknesses of the legislation. The California Arts Council is currently working out these pro-

⁷²Ric, *Legal Rights of the Artist, The Droit de Suite*, 20 ART J. 152 (1961); *The Legal Rights of Artists (A Follow-Up)*, 30 ART. J. 46 (1970).

⁷³Société de la Propriété Artistique et des Dessins et Modèles.

⁷⁴See Boyers, *Protection for the Artist: The Alternatives*, 21 ASCAP COPYRIGHT L. SYMP. 124, 145 (1974). The American Society of Composers, Authors and Publishers is a non-profit association charged with the responsibility and duty of protecting the copyrighted compositions of its members against infringement by illegal public performance for profit. ASCAP issues licenses in behalf of its collective membership to all types of commercial amusement enterprises authorizing the performance for profit of copyrighted compositions. The organization collects the royalties and the revenue from licenses. The expenses of operating ASCAP are deducted from this license revenue. Artists could form a similar society which would organize a registration system for works of art and collect art-proceeds. The revenue from a modest registration fee could be used to defray the society's operating expenses.

⁷⁵See Price & Strong, *Discussion, Registration of Works of Art*, in ART LAW 51 (L. Duboff ed. 1975).

⁷⁶Price, *Artists' Property Rights*, in ART LAW 41 (L. Duboff ed. 1975).

⁷⁷This could be done through an agreement with the original purchaser that the artist is to be notified in writing each time the work changes ownership, *i.e.*, a transfer form. Each subsequent seller would be responsible for requiring his buyer to renegotiate a similar agreement with the artist.

cedural aspects.⁷⁸ Overall, California is a state which is traditionally in the forefront of the law and in the area of art-proceeds the California Act could very well serve as model national uniform legislation for other states to adopt.

CONCLUSION

The difficulty of trying to fit the civil law concept of art-proceeds rights into the American common law structure⁷⁹ should be overcome simply by recognition of the need for this type of legislation. Without art-proceeds legislation artists are not adequately protected. California has taken the initiative to rectify this inequity but the legislation cannot be effective in isolation; national uniformity is a necessity for efficient administration and enforcement. A National Uniform Art-Proceeds Act would provide the requisite uniformity and thereby achieve the desirable goals which the California art-proceeds act has attempted to secure.

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⁷⁸M. PRICE AND H. SANDISON, A GUIDE TO THE CALIFORNIA RESALE ROYALTIES ACT 7-21 (1976).

⁷⁹See Bross, *Bross Muses While Art Burns, The Artist As Economic Man: Droit de Suite*, in ART LAW 54, 54-55 (L. Duboff ed. 1975).

