

California Royalties Act

Young artists, who are not yet established and who are forced to sell their work at relatively modest prices, may in later years see those same works of art sold for much more. Famous artists, for example Van Gogh, have died penniless leaving their families destitute, while art collectors have resold their creations for millions. Moreover, fine artists, who produce paintings and sculpture, seem to be at a disadvantage with respect to other creators of intellectual property, such as authors. An author may collect a royalty every time his or her book is sold. A fine artist, however, is only paid at the initial sale.

In order to address these concerns and help struggling artists the California legislature has passed the California Royalties Act. The California Royalties Act of 1976 entitles the artist to 5% of the sales price on an appreciated work of art. For the artist to collect the royalty the sale must take place in California or the seller must reside in California. In addition, the artist must be either a resident of California for the last two years or a U.S. citizen. This is an inalienable right of the artist that may not be sold.

It is the seller's responsibility to locate and pay the artist the royalty. If the seller does not pay the royalty, the artist may sue for damages and attorney fees. The right to the royalties lasts for the artist's life plus twenty years. If the seller cannot locate the artist in 90 days, the royalty is transferred to the California Arts Council. After the royalties have been transferred to the Arts Council, it must attempt to locate the artists. If the artist does not claim the royalty within seven years of the sale date, the funds are transferred to the Council for expenditure on art in public buildings.

The artist cannot collect royalties on fine art that is sold for less than \$1,000 or is sold for less than the price the seller originally paid. In addition, for the first ten years, unbroken sale of the art among art dealers is exempt from the royalty payment.

The act only covers fine art. Specifically exempt is the sale of stained glass attached to real property. Fine art is defined as an original painting, sculpture, or drawing, or an original work of art in glass. The royalty is to be collected on works created before and after enactment. The transfer of sculpture accompanying the sale of real property is subject to royalty. In fact, most of related court cases have involved attempts to recover royalties on sculptures that have accompanied the sale of real property.

California is the only state with an artist's royalty act. It is modeled after a European law called "droit de suite" that was first enacted into law by France in 1920. Politicians in other states and at the federal level have attempted to enact similar laws, but these have been unsuccessful. Numerous arguments have been levied for and against this act.

By making the artist's right to royalties non-transferable, the act forces the artist to retain partial rights to his work. It in effect forces the artist to invest in his own work.

You might consider whether this is any different from an ESOP (Employee Stock Ownership Plan) in which employees of a company invest in the stock of the company they work for. By giving the employees an interest in the company, the objectives of the employees are brought into line with the objectives of the company. Does the royalty act have a similar impact on the interest of artists and art investors? Concerns have been raised that ESOPs may expose employees to unacceptable levels of financial risk. If the company were to go bankrupt, employees could simultaneously lose both their job and their investment.

You might also consider whether there are alternative ways in which artists can invest in their artwork. At his death, Picasso owned an enormous quantity of his own work, some of which was used to pay his estate tax to the French government. Moreover, why is the act needed if it is possible for an artist to privately enter into a similar agreement? This can be accomplished with what is known as a Projansky agreement, a document that has been seldom used. However, it is not clear whether this agreement can extend beyond the first resale. Furthermore, supporters claim that artists are not able to get a buyer's agreement on royalties because they lack sufficient market power.

Proponents of the artist's royalty argue that the law places the artist in the same position as a copyright holder. The author of a written work is entitled to a royalty on each additional sale of the article or book. The artist can only profit on the original sale of the artwork. The act provides the artist with the same ability as the copyright holder to economically exploit his or her work product. However, the owner of the copyright may not be entitled to royalties on secondary sales and the author can sell the rights to all future royalties to another party. The copyright is not inalienable.

Those against the act argue that it favors a few well-known artists at the expense of lesser known struggling artists. Few artists see their work appreciably increase in value. Most work at low-incomes and are more concerned with immediate needs. In addition, they argue that the artist should not be singled out for special treatment. Art ownership is not much different from stock ownership. Stockholders get to keep all of the appreciated value in a stock.

The artist's royalty may be thought of as an excise tax on the sale of a good. The unique characteristic is that the tax is returned to the original seller. Obviously, a tax on an initial sale returned to the seller would have no net effect on price unless it increased transactions costs, in which case it would lower the net price. The question you must consider is whether a tax on resale returned to the original artist will help or hurt the art market.

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Questions

1. Does the Royalties Act help struggling artists? Does it increase the present value of the artist's work? The present value of an asset is the sum of all future returns discounted to current value at an appropriate risk-adjusted interest rate. For the artist, this is equal to the initial sale price plus any future royalties discounted to current value.
2. What affect does this act have on the price of new art? Do you expect the Royalties Act to cause an increase or a decrease in the initial sales price?
3. What affect does this act have on the price of resold art? Do you expect the Royalties Act to cause an increase or a decrease in the resale price?
4. Would the Royalties Act have the same impact on the price of new art produced by established artists and non-established artists?
5. Does the act have a different economic impact on artist who sold their work before the enactment date and artists who sell their work after the enactment date? [Assume that artists who sold their art before the Act was adopted will receive royalties.]
6. Does this act place artists in the same economic position as copyright holders?
7. How is risk allocated in this transaction? Does the Act force the artist to take on more or less risk? Does the act aid or hamper financial diversification for the artist and the art investor?
8. Does the royalty act tie the welfare of the artist to the dealer? Are there benefits from this tying? Is there an incentive for the artist to limit production?
9. Do the personal discount rates of the artist and the art investor play a role in determining whether or not this act helps the artist? A difference in discount rates can lead to a divergence in personal valuation. This may affect the cooperative surplus.
10. Is retrospective regret the source of unfairness? Might this exist in other kinds of transactions? If so, why should the artists be singled out for special legislation?
11. Does the act force a transfer to death beneficiaries? If so, what type of transfer does it create?
12. What impact will this have on the market for art outside of California? California is the only state with an Art Royalties Act.

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California Code Section 986

986. Sale of fine art

(a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. The right of the artist to receive an amount equal to 5 percent of the amount

of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale. An artist may assign the right to collect the royalty payment provided by this section to another individual or entity. However, the assignment shall not have the effect of creating a waiver prohibited by this subdivision.

(1) When a work of fine art is sold at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist.

(2) If the seller or agent is unable to locate and pay the artist within 90 days, an amount equal to 5 percent of the amount of the sale shall be transferred to the Arts Council.

(3) If a seller or the seller's agent fails to pay an artist the amount equal to 5 percent of the sale of a work of fine art by the artist or fails to transfer such amount to the Arts Council, the artist may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer. The prevailing party in any action brought under this paragraph shall be entitled to reasonable attorney fees, in an amount as determined by the court.

(4) Moneys received by the council pursuant to this section shall be deposited in an account in the Special Deposit Fund in the State Treasury.

(5) The Arts Council shall attempt to locate any artist for whom money is received pursuant to this section. If the council is unable to locate the artist and the artist does not file a written claim for the money received by the council within seven years of the date of sale of the work of fine art, the right of the artist terminates and such money shall be transferred to the council for use in acquiring fine art pursuant to the Art in Public Buildings program set forth in Chapter 2.1 (commencing with Section 15813) of Part 10b of Division 3 of Title 2, of the Government Code.

(6) Any amounts of money held by any seller or agent for the payment of artists pursuant to this section shall be exempt from enforcement of a money judgment by the creditors of the seller or agent.

(7) Upon the death of an artist, the rights and duties created under this section shall inure to his or her heirs, legatees, or personal representative, until the 20th anniversary of the death of the artist. The provisions of this paragraph shall be applicable only with respect to an artist who dies after January 1, 1983.

(b) Subdivision (a) shall not apply to any of the following:

(1) To the initial sale of a work of fine art where legal title to such work at the time of such initial sale is vested in the artist thereof.

(2) To the resale of a work of fine art for a gross sales price of less than one thousand dollars (\$ 1,000).

(3) Except as provided in paragraph (7) of subdivision (a), to a resale after the death of such artist.

(4) To the resale of the work of fine art for a gross sales price less than the purchase price paid by the seller.

(5) To a transfer of a work of fine art which is exchanged for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art where the fair market value of the property exchanged is less than one thousand dollars (\$ 1,000).

(6) To the resale of a work of fine art by an art dealer to a purchaser within 10 years of the initial sale of the work of fine art by the artist to an art dealer, provided all intervening resales are between art dealers.

(7) To a sale of a work of stained glass artistry where the work has been permanently attached to real property and is sold as part of the sale of the real property to which it is attached.

(c) For purposes of this section, the following terms have the following meanings:

(1) "Artist" means the person who creates a work of fine art and who, at the time of resale, is a citizen of the United States, or a resident of the state who has resided in the state for a minimum of two years .

(2) "Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass.

(3) "Art dealer" means a person who is actively and principally engaged in or conducting the business of selling works of fine art for which business such person validly holds a sales tax permit.

(d) This section shall become operative on January 1, 1977, and shall apply to works of fine art created before and after its operative date.

(e) If any provision of this section or the application thereof to any person or

circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected, without the invalid provision or application, and to this end the provisions of this section are severable.

(f) The amendments to this section enacted during the 1981-82 Regular Session of the Legislature shall apply to transfers of works of fine art, when created before or after January 1, 1983, that occur on or after that date.

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Related Articles

Rushton, Michael, "The Law and Economics of Artists' Inalienable Rights," *Journal of Cultural Economics*, 25: 243–257, 2001.

Solow, John L., "An Economic Analysis of the Droit de Suite," *Journal of Cultural Economics* 22: 209–226, 1998.