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Thomas M. Goetzl

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Visual Arts and the Public: A Legislative Agenda for the 1990s

by
THOMAS M. GOETZL*

Introduction

The general public's awareness of the visual arts recently has been drawn to two dominant themes by the media. First, the astronomical prices commanded by many works of art on the auction block have attracted enormous public attention. Second, a few highly publicized incidents involving attempts at censorship, where particular works of art evidently touched a raw nerve, have sparked demands by elected public officials for the suppression of offensive images.

At first glance, these two themes appear to bear little relationship to one another. Yet, upon closer scrutiny, a distressing common denominator can be found. Each, in its own way, manifests a profound hostility toward both the creative process and the creator.

This Essay will examine these phenomena and recommend a role, albeit modest, which the law can play in minimizing the negative impact of these forces. Legislation reinforcing the natural nexus between the object created and its creator should facilitate a heightened appreciation of the arts. Accordingly, this Essay urges both that the artists' right to protect the integrity of their creations be extended¹ and that the resale royalty right, which allows artists in California to share in the proceeds from the resale of their artwork, be made available to artists throughout the country.

Although society cannot legislate solutions for all its ills, the suasion of the law should not be underestimated. Clearly, the law can, and does, do much more than merely punish or require particular behavior: the law plays an important role in establishing societal norms. Thus, for example, anti-discrimination laws not only proscribe certain acts, but eventually affect how we view one another. While the law cannot command

* A.B. 1965, University of California, Berkeley; J.D. 1969, University of California (Boalt Hall School of Law). Professor of Art Law, Golden Gate University. Member, Board of Directors of the California Lawyers for the Arts since 1980. Author of the initial draft of the California Art Preservation Act (Civil Code § 987).

1. Ten states now provide for this right. See *infra* note 26.

citizens to respect one another, by guaranteeing certain rights it can create an environment where perhaps respect will be forthcoming.

In this regard, it is significant that the California legislature has sought to promote a healthy climate for the arts and the artists who create them during the last two decades.² Significantly, California explicitly acknowledges their contributions to our culture.³

The purpose of art preservation and resale royalty laws is to enrich the arts for both the artists and the public, upon whose patronage the arts ultimately rely. For artists—few of whom are drawn to their vocation by promised financial rewards—these laws affirm the ties that naturally bind them to their creations, freeing them to pursue their muses. For the viewing public, a keener awareness of that link can enhance aesthetic pleasure by redirecting public attention from the *business* of art to the *aesthetics* of art.

I

High Prices, Low Appreciation

In December 1989, the *New York Times* reported that the ten highest prices paid for individual works of art ranged from a low of \$11.93 million to \$53.9 million, the sum paid for Vincent van Gogh's *Iris* a year earlier.⁴ Since that report, there have been a spate of multimillion dollar sales. Reporting on the results of the most recent auctions conducted by Sotheby's and by Christie's (two of the world's most famous auction houses), *ARTnews* matter-of-factly stated that while "[t]here was no escalation in the topmost reaches of the market, . . . there was plenty of action in the \$10 million to \$20 million range."⁵ It is not just the works of the long-dead Great Masters that are igniting this buying frenzy. Much of the art now reaching the \$10 million plateau is the work

2. See, e.g., CAL. CIV. CODE §§ 986 (resale royalty), 987 (art preservation), 989 (art preservation on behalf of the public), 997 (porcelain painting and stained glass are fine art), 1738 (artist-dealer relations), 1740 (fine art multiples) (West 1982 & Supp. 1990); CAL. EDUC. CODE §§ 8950 (state summer school for the arts), 49350 (toxic substance labeling) (West 1982 & Supp. 1990); CAL. GOV'T CODE § 15813 (art in public buildings) (West Supp. 1990). CAL. HEALTH & SAFETY CODE §§ 17958.11 (artists' live/work space) (West 1980), 28741.5 (West Supp. 1984), 28744.5 (West Supp. 1984), 28758.5 (West 1971), 28794-28795 (West 1984); CAL. LAB. CODE § 3351.5 (work for hire) (West 1969); CAL. REV. & TAX CODE § 17216.2 (artists' charitable deduction) (West 1963).

3. See, e.g., CAL. CIV. CODE § 987(a), which provides: "The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations."

4. Reif, *Art Prices Are Still Astonishing, But Fever Seems to Be Cooling*, N.Y. Times, Dec. 6, 1989, at C19, col. 4.

5. Stretch, *Healthy, Wealthy—and Wise*, ARTNEWS, Jan. 1990, at 53.

of contemporary artists—Picasso, de Kooning, and Johns. An even greater number of artists now see their works resell at prices between one million and ten million dollars.

Of course, with such high prices involved it should not be surprising to learn that Sotheby's, which three years ago provided a buyer with interim financing to purchase *Iris*, recently found itself obliged to "fore-close" upon the painting. The buyer apparently was unable to assemble the necessary long-term financing. Significantly, possession of *Iris* was never delivered to the buyer, so Sotheby's—which had paid the seller in full—returned *Iris* to the auction block.⁶

As further evidence that art is rapidly becoming important merely as an investment vehicle, one of France's largest banks has announced the formation of a subsidiary which will solicit 250 co-investors, each of whom will put up \$40,000 to be invested in French art. The proposed plan is to resell the collection at auction in seven to eight years,⁷ making it unlikely that these investors will share any aesthetic experience in assembling their collection.

The concept of using "blue chip" art as pure investment gained wide attention in the early 1970s, when the British Rail Pension Fund obtained leave to commit some of its moneys to the acquisition of art.⁸ At the time, it was widely reported that such art was out-performing other, more traditional, investment vehicles. This increasing use of art as investment may be viewed with alarm. To the extent that aesthetics are ignored in favor of economics, a total collapse in value becomes more likely. Without aesthetic value, there is only paint and canvas and wood. The irony is that as works of art *appreciate* in dollar value at some point, they cease to be *appreciated* for their aesthetic value.

The danger in this phenomenon is that fine art is increasingly perceived merely as an object of commerce—indeed, of unabashed speculation. Lewis Hyde, in his provocative book, *The Gift: Imagination and the Erotic Life of Property*,⁹ distinguishes a market economy from a gift economy. The former is characterized by negotiations and can countenance usury. The latter, of course, is not and cannot.¹⁰ Hyde posits that art

6. See generally Reif, *Sothebys is Ending Its Art Sales on Margin*, N.Y. Times, Jan. 11, 1990, at A1, col. 2.

7. Adam, *Full-Service Financing*, ARTNEWS, Jan. 1990, at 54.

8. See Barker, *British Rail's Runaway Renoir*, ARTNEWS, Summer 1989, at 39, noting that the real return, after inflation, on British Rail's Impressionist and modern art works was 11.9% per annum, more than 50% greater than the growth on the London stock market during the same period.

9. L. HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* (1979) (see especially xi - xvii, and generally 1-159).

10. The market economy, by definition, contemplates negotiated exchanges of specific consideration which can be enforced by the law. The imposition of interest on any unpaid

can participate in both economies simultaneously, but only by maintaining a precarious balance. Thus, it may be possible to destroy a work of art by converting it into a pure commodity. Surely we all share the intuition that the more commercial the design, the less it deserves the label "art." The risk is real; we must not forfeit our cultural and spiritual values.

To compound the problem, changes in 1986 to federal income tax laws both drastically reduced allowable deductions for the donation of appreciated property, and reduced overall tax rates, thereby making deductions less significant.¹¹ As a result, museums have seen great collections of art escape them as wealthy collectors and their estates have chosen to forego the modest tax benefits that presently result from contributing art to museums. The temptations of the auction block are too great. Consider, for example, when Sotheby's offered a \$100 million guarantee in exchange for the right to auction art from the estate of Campbell Soup Company heir, John T. Dorrance. The *Wall Street Journal* was moved to comment that Sotheby's action closely resembled an underwriting by an investment bank.¹²

Another consequence of the escalating prices of major works of art is the disappearance of those works from public access. Whether owned before sale by a public institution or by a private owner, few public institutions can now afford to purchase high-priced works. Sculptor George Segal, upon learning that two of his pieces were auctioned for a total of almost \$900,000, declared that "[e]verybody . . . wants to sell. There is no tax incentive for bettering the community cultural good by giving art to museums. This way it becomes a competition for private acquisition."¹³ Even the very wealthy who leave their collections to public museums often allow their egos to interfere with their gifts, so that the public's aesthetic experience of the art within their collection is seriously prejudiced.¹⁴

At the same time, while the public learns to associate sky-high dollar value with artistic merit, little concern is shown for the artists whose

balance is commonplace. In comparison, although gift transactions may entail an expectation of a return gift, such expectations cannot be legally enforced. Usury is also not permitted. See generally *Deuteronomy* 23:20, "Unto thy brother thou shalt not lend upon usury, that the Lord thy god may bless thee in all that thou settest thine hand to."

11. Glueck, *Donations of Art Fall Sharply After Changes in Tax Code*, N.Y. Times, May 17, 1989, § 1, at 1, col. 1.

12. Peers, *Sotheby's Bids \$100 Million to Guarantee Its Role as Auctioneer*, Wall St. J., Oct. 19, 1989, § 3, at 1, col. 3.

13. Reif, *A de Kooning Work Sets a Record of \$20.7 Million*, N.Y. Times, Nov. 9, 1989, at C22, col. 5.

14. For an interesting analysis exploring the potential role of *cy pres* where museums have accepted gifts burdened with noxious conditions (such as a requirement that the collection be

spirits and labors gave birth to these works. Through the lone exception of the modest protection provided in California by the Resale Royalty Act,¹⁵ artists enjoy no participation whatsoever in these wildly appreciated prices.

Like the takeovers and leveraged buyouts of the 1980s, financed by the sale of junk bonds, the astronomical prices paid for artworks, as promoted by the auction houses, may yet produce a bust. Drexel Burnham Lambert Group Inc., the "inventor" of junk bond financing, has filed for bankruptcy.¹⁶ The financial fallout from that failure is yet to be assessed. In addition, the foreclosure of *Iris*es may presage a cap on the art market: No economy can long sustain itself when it loses sight of the intrinsic value of the objects of its commerce.

II

Censorship: Beyond the Law

Americans were shocked last year when the Ayatollah Khomeini offered a reward for the assassination of Salmon Rushdie, author of *The Satanic Verses*. Yet attempts to suppress expression of disfavored ideas are not unique to totalitarian societies. The United States, too, has seen a growing number of notorious instances of mutilation, defacement, and destruction of art; sometimes, these activities have been sanctioned by governmental authority. The cancellation of the exhibition of photographs by the late Robert Mapplethorpe at the Corcoran Gallery in Washington, D.C., is one example;¹⁷ the defacement of a portrait depicting the Reverend Jesse Jackson depicted as a white man is another. Intolerance of artistic expression is occurring with alarming frequency, disclosing a disturbing hostility to artists. The artists are concerned about remaining in control of their artworks and the effects governmen-

displayed as if it were in the donor's home, amidst the donor's furnishings), see Sare, *Art for Whose Sake? An Analysis of Restricted Gifts to Museums*, 13 COLUM. J.L. & ARTS 377 (1989).

A related phenomenon is the hot competition to acquire expensive cars. Ferrari, Porsche, and Jaguar are each now offering limited-edition cars priced from \$350,000 to \$600,000. Would-be buyers are bidding those prices up as high as \$1,400,000. This purchase money may buy bragging rights, but it is unlikely that these cars will ever be driven. Indeed, a former officer of the Ferrari Club of America, bemoaning this trend, likened the buyers to those who pay millions for a van Gogh and then hide it away. He commented, "These are automotive works of art. People who own these cars have a responsibility to share them with the rest of the world." Dolan, *Well, Would You Expect 475 Horses to Sell for Peanuts?*, Wall St. J., Feb. 15, 1990, § A, at 1, col. 4.

15. CAL. CIV. CODE § 986 (West 1982 & Supp. 1990).

16. See generally Hytton, *The Drexel Collapse*, N.Y. Times, Feb. 15, 1990, at D5, col. 5.

17. In the summer of 1989, Senator Jesse Helms responded to the Mapplethorpe show by seeking to deny federal funding of particular art based on its subject matter. This decision raises complex constitutional issues beyond the scope of this Essay, which are examined elsewhere in this issue of the *Hastings Communications and Entertainment Law Journal*.

tal intrusions will have. Both the public's appreciation and understanding of the arts and the freedom needed and desired by working artists may be jeopardized by these intrusions.

Efforts by the government, led by hypocrites such as Senator Helms,¹⁸ or zealots such as the Chicago aldermen who demanded the removal of a painting of Mayor Harold Washington, in bra and panties, displayed at the Chicago Art Institute,¹⁹ to control unpopular or offensive expression distort the proper relationship between art and government, particularly in a free society. Only Jesse Jackson proved imaginative enough to defend the controversial painting, *How Ya Like Me Now?*, which depicted him as a blond-haired white man. Jackson artfully deflected the issue with his comment, "It's not the picture that's the insult. It's the reality behind the picture. That's the insult."²⁰

III

The Law: A Modest Role

There is much the law can do to foster greater respect both for the rights of artists to express themselves freely and for their completed works of art. Consider sculptor Richard Serra's *Tilted Arc*²¹ in New York City and the *Spirit Poles*²² in Concord, California. In each of these instances, public art duly-commissioned, created and installed infuriated local citizens who felt that their tastes had not been taken into account. After a protracted legal battle, Serra's *Tilted Arc* was finally removed.²³ However, *Spirit Poles* appear to be protected by both the California Art Preservation Act and the contract to which the City of Concord was a party.²⁴

Moral rights appear to be gaining acceptance within the American legal landscape. The California Art Preservation Act,²⁵ the first of its

18. Ironically, the same Senator Helms led the fight against the proposed ban of tobacco smoking on all domestic airline flight, accusing ban proponents of excessive "sanctimony." See Corn-Revere, *The New Assault on Artistic Freedom*, 18 STUDENT LAW. 18, 21 (Feb. 1990).

19. Schmidt, *Chicago Alderman and Police Seize Portrait that Blacks Deem Offensive*, N.Y. Times, May 13, 1988, at A10, col. 1.

20. Roberts, *Jackson: Not Insulted by Portrait*, Wash. Post, Dec. 4, 1989, at B1.

21. See *Serra v. U.S. General Service Admin.*, 847 F.2d 1045 (2d Cir. 1988) for a summary of the facts of this interesting case. The problem is often born of the arrogance of government agencies which fail to adequately involve affected citizens by selecting public art with no more oversight than is applied to contracting to pave city streets.

22. Congbaly, *Report Warns Against Uprooting Culture*, San Francisco Chron., Jan. 31, 1990, at E11.

23. Brenson, *ART VIEW: The Messy Saga of "Tilted Arc" is Far from Over*, N.Y. Times, Apr. 2, 1989, § 2, at 33, col. 1.

24. Copy of contract available from author.

25. CAL. CIV. CODE § 987 (West 1982 & Supp. 1990).

kind in this country, just celebrated its tenth anniversary. The statute protects an artist's right of authorship and integrity in California so that an artist may claim or disclaim credit for her creation. An artist is also empowered to prevent or seek redress for the mutilation or destruction of her artwork.

If imitation is the sincerest form of flattery, California has reason to be proud. Nine other states have enacted similar art-protection legislation during the last decade.²⁶ Additionally, Congress is considering two bills that would amend the Copyright Act to provide moral rights modeled on California's Act.²⁷ Each congressional bill would also require the Register of Copyright working with the Chair of the National Endowment of the Arts to conduct a feasibility study of the resale royalties provisions.²⁸

While so-called non-economic or moral rights appear to be gaining acceptance within the American legal landscape, the struggle to extend broader economic rights to artists has met stiffer resistance. These proprietary rights are nonetheless necessary. Census data have consistently revealed that few artists are able to support themselves solely from the sale of their artworks.²⁹ Further, in our culture, the respect given a person—for better or worse—often bears a direct relation to that person's income.

A considerable number of countries already give artists a right to receive a share of the proceeds upon the resale of their works of art. This right, known around the world as *droit de suite* or art proceeds right, has most recently been incorporated into the new copyright laws of Nigeria³⁰ and Spain.³¹ A variety of theories justify resale royalty laws such as these, all of which conclude that the appreciation realized on the resale of

26. CONN. GEN. STAT. § 42-116s (West 1989); LA. REV. STAT. ANN. § 51:2152 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (1988); MASS. GEN. LAWS ANN. ch. 231, § 85a (West Supp. 1989); N.J. STAT. ANN. § 2A:24A-1 (West 1987); N.M. STAT. ANN. § 13-4B-2 (1989); N.Y. ARTS & CULT. AFF. LAW § 14.01 (McKinney Supp. 1990); PA. STAT. ANN. tit. 73, § 2101 (Purdon Supp. 1989); R.I. GEN. LAWS § 5-62-2 (1987).

27. Visual Artists Rights Act of 1989, S.1198, 101st Cong., 1st Sess. (1989) (co-authored by Senators Edward Kennedy (D-Mass.) and Robert Kasten (R-Wis.)); H.R. 2690, 101st Cong., 1st Sess. (1989) (authored by Rep. Robert Kastenmeier (D-Wis.)). For a discussion of the Kennedy bill, see DuBoff, Leaffer, Goetzl and Edelson, *Artists' Rights: The Kennedy Proposal To Amend The Copyright Law*, 7 CARDOZO ARTS & ENT. L.J. 227 (1989).

28. Visual Artists Rights Act of 1989, H.R. 2690, 101st Cong. 1st Sess. (1989).

29. U.S. DEPT. OF LABOR BUREAU OF LABOR STATISTICS, BULLETIN 2300, OCCUPATIONAL OUTLOOK HANDBOOK at 192, 194 (Apr. 1988).

30. Nigeria Copyright Decree 1988 (No. 47 of Dec. 19, 1988), Part I Copyright, Subpart 12, Right to Share in Proceeds of Sale, OFFICIAL GAZETTE OF THE FED. REPUBLIC OF NIGERIA No. 84, Dec. 20, 1988.

31. See Beltran, *Author's Rights in Spain: Comments on the Intellectual Property Law of 1987*, 13 COLUM-VLA J.L. & ARTS 477, 486 (1989).

certain works of art should in some measure redound to the artist.³² Some nations attribute the increase in value to the continuing career development of the artist from the date of the original sale.³³ Other nations have posited—perhaps somewhat romantically—that the higher value always existed, merely awaiting discovery by a more enlightened collector.³⁴ Yet another justification has been set forth in detail by this author.³⁵ Less romantically, it argues simply that an examination of the exclusive rights accorded to authors under the Copyright Act discloses that fairness requires visual artists be granted appropriate additional exclusive rights, specifically, a display right that does not expire upon first sale. While the *public* display of art might occasion a royalty without any intrusion into its owner's privacy, a resale royalty would then become an appropriate opportunity to assess the value of that display right with regard to art not on *public* display.³⁶ California is thus far the only state to grant such a resale royalty; the California Resale Royalty Act³⁷ entitles an artist to a share, albeit minimal, of the price for which a work of art is resold.

Soon after the California statute took effect in 1976, Congressman Henry Waxman (D-Cal.) introduced H.R. 11403³⁸ in the House of Representatives. This bill would have amended the Copyright Act to provide a federal resale royalty right. Its introduction presented an opportunity for discussion in which this author was privileged to participate, at which a broad cross-section of interested parties opined on this country's readiness to embrace a resale royalty right. Following the hearings Congressman Waxman apparently concluded that the concept of artists retaining a continuing economic stake in their creations needed more study before a resale royalty right would be accepted.³⁹ Nevertheless, there are places in the western world where artists are paid for the exhibition of their works even though the artists no longer own their work.⁴⁰

Where the moneys for such fees or royalties would come from is still an open question. A resale royalty readily can be paid by the seller from

32. See Goetzl & Sutton, *Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis*, 9 COLUM. J.L. & ARTS 15, 37-38 (1984).

33. *Id.* at 39, n.89.

34. *Id.*

35. See generally *id.*

36. *Id.* See also H.R. 4366, 99th Cong., 2d. Sess. (1986).

37. CAL. CIV. CODE § 986 (West 1982 & Supp. 1990).

38. 95th Cong., 2d Sess. (1978).

39. The author's impression was deduced from attendance at discussion, from subsequent telephone conversations with Congressman Waxman's staff, and from the Congressman's failure to reintroduce the bill in the next Congress.

40. For example, Canada. See Goetzl & Sutton, *supra* note 32, at 36, n.78, 29, n.54. See generally *id.* for a complete discussion of a "display royalty" or "exhibition fee."

proceeds generated from the resale of the work of art. In addition, a display right would require museums and other owners of works of art who publicly display that art to pay a royalty to the artists whose works are displayed. Developing a formula to measure the amount of the royalty for the different media, sizes and locations should be no more difficult than it is for composers and songwriters who author compositions ranging from symphonies to jingles, played everywhere from network television to local taverns. To collect the royalties, some system modeled upon the "blanket license" used by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) would appear appropriate.⁴¹

To generate the necessary revenue, museums might impose reasonable admission fees, or increase existing ones. Although some museums have, in the past few years, begun to charge modest entrance fees, it should be abundantly clear that the market can bear considerably higher ticket prices. General admission to a movie costs more than a ticket to a museum. And even tickets to museum "blockbuster" shows, like the *Treasures of Tutankhamen*, cost about one-fourth the price of a ticket to a professional football game. Theater, concert (pop, rock, or classical), and opera tickets are priced well beyond the means of all but the most devoted. Why? If affordable access by students, senior citizens, and low- or even middle-income persons to the arts is deemed important (this author believes it should be), should not access to the performing arts be as affordable as access to the visual arts? Perhaps this discrepancy exists because playwrights, composers, lyricists, choreographers, and athletes are better organized than painters and sculptors. Or, they are simply unwilling to subsidize their medium to the same extent that visual artists have been called upon to do by foregoing payment for the display of their works. In any case, it is time to end this disparate treatment of authors of intellectual property.

IV Conclusion

Art preservation and resale royalty laws are not designed solely to preserve art and to enrich artists. Artists with whom this writer has spoken express an intuitive understanding that the real value of these laws is that they oblige those who own art to acknowledge the connection between the creator and the creation. Comprehension of this connection enables society to appreciate its cultural icons.

41. See *supra* note 36.

The law can help to lead society toward this goal by affording greater recognition to the continuing economic and moral rights artists have in their creations. California has taken some pioneering steps. A few states have begun boldly to follow. It is time for the remaining states to do their part and for Congress to assume leadership on behalf of our nation's arts and artists.