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by
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On January 6, 1993, continuing its tradition of off-site meetings, the American Association of Law Schools (A.A.L.S.) Art Law Section left San Francisco and crossed the Bay Bridge to hold its annual meeting and field trip at the Oakland Museum.[1] The program was entitled "California Art Legislation Goes Federal." Because the Visual Artists Rights Act of 1990[2] (VARA) has its historic roots in legislation pioneered in California,[3] we took this opportunity to gather individuals who could review that history and offer some insights into the future of artists' rights at the federal level.

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I would like to thank my research assistant, Glen St. Louis, J.D. 1993, Golden Gate University, School of Law, for his able assistance. I would also like to thank some of the people behind the scenes who helped make this program a success. Ms. Kay Winer, acting director of the Oakland Museum last summer, first acceded to my request to have the museum host our section meeting and field trip. Ms. Harriet Wright, the Special Events Coordinator at the Oakland Museum, secured the auditorium for us and made arrangements for the reception. Ms. Traci Thomas and Ms. Jane La Barbera, both from the A.A.L.S. in Washington D.C., took responsibility for all the details on behalf of the association. Professor Sherri Burr, last year's program chair, was willing to share the benefits of her experiences in staging last year's successful program. Professor Leonard DuBoff, the outgoing Chairman of the Art Law Section, has been a driving force in earning this section the credibility it now enjoys. And, of course, I'm grateful to all the panelists who participated in this program.

1. It was author and art patron, Gertrude Stein, an Oakland native, who once proclaimed that "there is no there there" in Oakland. But, that was a long time ago, before the Oakland Raiders and the Oakland A's put Oakland on the national map. Neighbor to Berkeley and the University of California, Oakland is home to two fine women's colleges, Mills College and Holy Names College. Additionally, the Oakland Museum's Museum of California is the only institution in the state whose art, history, and natural science exhibits are devoted exclusively to California. Although seriously damaged by the Loma Prieta Earthquake and then by the Oakland hills fire, Oakland is recovering from those enormous losses, demonstrating its resilience.

2. Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33 (1990) (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, and 506 (Supp. III 1992)).

3. CAL. CIV. CODE §§ 986-987 (West Supp. 1993).

Over the past two decades, state legislatures addressed many of the issues facing visual artists.[4] During the 1970s, a number of states sought to accord visual artists a greater measure of protection. Artist-dealer statutes were passed to protect artists from losses resulting from damage to their works of art while on consignment, and to reduce artists' losses when dealers became insolvent.[5] Provisions were made to acquire art for public places, often through so-called "percent-for-art" statutes.[6] Encouraged by the prospect of serving as conduits for promised federal

4. For a thorough, albeit informal, survey of each state's legislative accomplishments affecting the visual arts, see ARTS TASK FORCE, NATIONAL CONFERENCE OF STATE LEGISLATURES, ARTS AND THE STATES 74-82 (1981).

5. ALASKA STAT. §§ 45.65.200-.250 (Supp. 1992); ARIZ. REV. STAT. ANN. §§ 44-1771 to -1778 (1987 & Supp. 1993); ARK. CODE ANN. §§ 4-73-201 to -207 (Michie 1991); CAL. CIV. CODE §§ 1738-1738.9 (West 1985); COLO. REV. STAT. §§ 6-15-101 to -104 (1989); IDAHO CODE §§ 28-11-101 to -106 (1993); ILL. ANN. STAT. ch. 815, para. 320/1 to 320/8 (Smith-Hurd 1993); IOWA CODE ANN. §§ 556D.2-.5 (West Supp. 1993); KY. REV. STAT. ANN. §§ 365.850-.875 (Baldwin 1992); MASS. GEN. LAWS ANN. ch. 104A, §§ 1-6 (West 1984); MINN. STAT. ANN. §§ 324.01-.05 (West Supp. 1993); MO. ANN. STAT. §§ 407.900-.910 (Vernon 1991); MONT. CODE ANN. §§ 22-2-501 to -505 (1993); N.H. REV. STAT. ANN. §§ 352:3-:12 (Supp. 1992); N.J. STAT. ANN. §§ 12A:2-329 to -336 (West Supp. 1993); OHIO REV. CODE ANN. §§ 1339.71-.78 (Anderson Supp. 1992); OR. REV. STAT. §§ 359.200-.255 (1987 & Supp. 1992); PA. STAT. ANN. Tit. 73, §§ 2121-2130 (1993); TENN. CODE ANN. §§ 47-25-1001 to -1007 (1988); WASH. REV. CODE ANN. §§ 18.010-.905 (West 1989); WIS. STAT. ANN. §§ 129.01-.08 (West 1989 & Supp. 1992).

6. "Percent-for-art" statues vary considerably in design. California relies upon a line item appropriation. CAL. GOV'T CODE § 15813 (West 1992). Other states authorize a designated percentage of allocated costs of construction, improvement, lease, or purchase of buildings or facilities used for public purposes, to be used for acquiring art as defined by the particular statute or designated agency. See, for example, HAW. REV. STAT. § 103-8.5(a) (Supp. 1992) in which one percent is allocated. See also COLO. REV. STAT. § 24-80.5-101 (1989) where no less than one percent is appropriated for art projects in public places. Yet in Michigan, amounts appropriated for art cannot exceed one percent of total project cost. MICH. COMP. LAWS ANN. § 18.73(b) (West 1981).

In all, more than half the states have some form of a "percent-for-art" statute. ALASKA STAT. § 44.27.060 (1989); ARK. CODE ANN. § 13-8-207 (Michie 1987); CAL. GOV'T CODE §§ 15813.2 -.8; COLO. REV. STAT. §§ 24-80.5-101 to -102 (Supp. 1993); CONN. GEN. STAT. ANN. § 7-122b (West 1989); FLA. STAT. ANN. § 255.043 (West 1991 & Supp. 1993); HAW. REV. STAT. § 103-8.5; ILL. ANN. STAT. ch. 20, para. 3105/14 (Smith-Hurd 1993); IOWA CODE ANN. § 304A.10 (West 1988); ME. REV STAT. ANN. tit. 27, §§ 451-459 (West 1964 & Supp. 1992); MASS. GEN. LAWS ANN. ch. 10, §§ 56-58; MICH. COMP. LAWS ANN. §§ 18.71-.73; MINN. STAT. ANN. § 16B.35 (West 1988); MONT. CODE ANN. §§ 22-2-401 to -408 (1993); NEB. REV. STAT. §§ 82-317 to -329 (1943); NEV. REV. STAT. § 244.377 (1986); N.H. REV STAT. ANN. §§ 19-A:8-:12 (1988 & Supp. 1992); N.M. STAT. ANN. § 13-4A-1 to -11 (Michie 1992); N.C. GEN. STAT. §§ 143-408.1-.7 (1990); OHIO REV. CODE ANN. § 3379.10 (Anderson 1990); OR. REV. STAT. §§ 276.073-.090 (1986); R.I. GEN. LAWS §§ 42-75.2-1 to -10 (1956 & Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 1-22-9 to -17 (1992); VT. STAT. ANN. tit. 29, §§ 41-48 (Supp. 1992); WASH. REV. CODE ANN. §§ 43.17.200-.210, 28B.10.025-.027 (West Supp. 1993); WIS. STAT. ANN. § 44.57 (West 1987); WYO. STAT. §§ 16-6-801 to -805 (Supp. 1993).

money,[7] art councils were formed in all states.[8] The role of art in public education came under scrutiny, resulting in a variety of statutory approaches.[9] Additionally, in 1976, California also enacted its still one-of-a-kind Resale Royalties Act.[10] California also enacted legislation author-

7. *See* National Foundation on the Arts and Humanities Act of 1965, Pub. L. No. 89-209, § 11, 79 Stat. 845, 853-54 (1965) (codified as amended at 20 U.S.C. §§ 951-960 (1988 & Supp. IV 1992)).

8. ALA. CODE §§ 41-9-20 to -47 (1991); ALASKA STAT. §§ 44.27.040-.060 (1989 & Supp. 1992); ARIZ. REV. STAT. ANN. §§ 41-981 to -985 (1992); ARK. CODE ANN. §§ 13-8-101 to -106 (Michie 1987); CAL. GOV'T CODE §§ 8750-8755.5 (West 1992); COLO. REV. STAT. §§ 23-9-101 to -107 (1988 & Supp. 1993); CONN. GEN. STAT. ANN. §§ 10-369 to -373r (West 1986 & Supp. 1993); DEL. CODE ANN. tit. 29, § 8728 (1991); FLA. STAT ANN. § 265.285 (West 1991); GA. CODE ANN. §§ 50-12-20 to -26 (Michie 1990); HAW. REV. STAT. §§ 9-1 to -4 (1985 & Supp. 1992); IDAHO CODE §§ 67-5601 to -5608 (1989 & Supp. 1993); ILL. ANN. STAT. ch. 20, para. 3915/0.01 to /6 (Smith-Hurd 1993); IND. CODE ANN. §§ 4-23-2-1 to -5 (Burns 1990 & Supp. 1993); IOWA CODE ANN. § 303C.7 (West 1993); KAN. STAT. ANN. §§ 74-5202 to -5206 (1992); KY. REV. STAT. ANN. §§ 153.210-.235 (Baldwin 1992); LA. REV. STAT. ANN. §§ 25:891-:892 (West 1989 & Supp. 1993); ME. REV. STAT. ANN. tit. 27, §§ 401-408 (West 1964 & Supp. 1992); MD. ANN. CODE art. 83A, §§ 6-501 to -509 (1991 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 6, §§ 19-20 (West 1986); MICH. COMP. LAWS ANN. §§ 2.121-.126 (West 1981); MINN. STAT. ANN. §§ 129D.01-.05 (Supp. 1993); MISS. CODE ANN. §§ 39-11-1 to -11 (1972); MO. ANN. STAT. §§ 185.010-.060 (Vernon 1991); MONT. CODE ANN. §§ 22-2-101 to -109 (1993); NEB. REV. STAT. §§ 82-309 to -316 (1943); NEV. REV. STAT. §§ 233C.010-.090 (1992); N.H. REV. STAT. ANN. §§ 19-A:1-:7 (1988 & Supp. 1992); N.J. STAT. ANN. §§ 52:16A-25 to -28 (West 1986 & Supp. 1993); N.M. STAT. ANN. §§ 18-5-1 to -7 (Michie 1991); N.Y. ARTS & CULT. AFF. LAW §§ 3.01-.13 (McKinney 1984); N.C. GEN. STAT. §§ 143B-87 to -88 (1992); N.D. CENT. CODE § 54-54-01 to -09 (1989 & Supp. 1993); OHIO REV. CODE ANN. §§ 3379.01 -.09 (Anderson 1990); OKLA. STAT. tit. 53, §§ 161-172 (1991); OR. REV. STAT. §§ 359.010 -.150 (1987 & Supp. 1992); PA. STAT. ANN. tit. 71, §§ 1530.1-.7 (1990); R.I. GEN. LAWS §§ 42-75-1 to -11 (1956); S.C. CODE ANN. §§ 60-15-10 to -90 (Law. Co-op. 1990); S.D. CODIFIED LAWS ANN. §§ 1-22-2 to -8 (1992); TENN. CODE ANN. §§ 4-20-101 to -107 (1991); TEX. GOV'T CODE ANN. §§ 444.001-.012 (West 1990 & Supp. 1993); UTAH CODE ANN. §§ 9-6-201 to -205 (1992); VT. STAT ANN. tit. 16, §§ 111-114 (1989); VA. CODE ANN. §§ 9-84.01:1 to .07 (Michie 1950); WASH. REV. CODE ANN. §§ 43.46.005-.095 (West Supp. 1993); W. VA. CODE § 29-1-3 (1992); WIS. STAT ANN. §§ 44.51-.565 (West 1987 & Supp. 1992); WYO. STAT. §§ 9-2-901 to -904 (1977).

9. CONN. GEN. STAT. ANN. § 10-16b (West 1986); DEL. CODE ANN. tit. 29, § 8727 (1991); FLA. STAT. ANN. § 240.535 (West 1989 & Supp. 1993); HAW. REV. STAT. § 9-4 (Supp. 1992); ILL. ANN. STAT. ch. 105, para. 5/2-3.65 (Smith-Hurd 1993); IND. CODE ANN. § 4-23-12-1 to -3 (Burns 1990); KAN. STAT. ANN. § 74-5204(h) (1992); ME. REV. STAT ANN. tit. 20-A, §§ 4711, 4722 (West 1964); MD. ANN. CODE art. 83A, §§ 6-501(d), -507(9), -502 (1991); MICH. COMP. LAWS ANN. § 388.1061 (West 1988); MINN. STAT. ANN. §§ 124C.07 -.09, 129C.10 -.15 (West Supp. 1993); MISS. CODE ANN. § 37-35-1 (Supp. 1993); MO. ANN. STAT. § 173.724 (Vernon 1991); N.Y. ARTS & CULT. AFF. LAW §§ 7.01 - 9.17 (McKinney 1984 & Supp. 1993); N.C. GEN. STAT. §§ 116-63 to -69 (1989); UTAH CODE ANN. § 9-6-201(b) (1992); VT. STAT. ANN. tit 16, § 114 (1989).

10. CAL. CIV. CODE § 986. This law requires one who resells a painting, sculpture, drawing, or original work of art in glass to pay the artist who created the work of art five percent of the resale price. The law applies if the reseller is a California resident or if the resale takes place in California. The artist must either be a U.S. citizen or have been a California resident for two years. The resale must have occurred during the artist's lifetime or within 20 years thereafter, must have been for $1000 or more, and at a price in excess of the price paid originally for the work of art. There are other exceptions as well. *See* Morseberg v. Balyon, 621

izing local governments to relax their building regulations to facilitate the availability of joint living-working spaces for artists.[11]

In the early 1980s, California enacted the nation's first moral rights law.[12] The statute empowers artists to protect their right to claim authorship of their works of art, as well as the integrity of those works.[13] During the next decade, ten more states, inspired by California's new law, enacted their own art preservation statutes.[14]

At the federal level, a somewhat more sinister voice could be discerned during the 1980s. During this decade, many artists directed their creative energies to addressing critical social and political issues, like discrimination on the basis of race or sexual preference, AIDS, and the plight of the homeless. Perhaps in response to their awareness of the power of the arts, which are capable of portraying far more than mere beauty and grace, powerful Washington voices questioned some of the funding choices made by the National Endowment for the Arts, whose money was used to aid artists taking on such issues. These voices went so far as to call for the abolition of the agency.[15] This attack from the right, combined with increasing demands from the left to adhere to the "politically correct,"[16] threatened to create a climate of censorship.[17]

F.2d 972 (9th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980) (upholding the constitutionality of The California Resale Royalties Act).

11. CAL. HEALTH & SAFETY CODE § 17958.11 (West 1984). *See, e.g.*, SAN FRANCISCO, CA., PLANNING CODE 204.4(b) (1978).

12. CAL. CIV. CODE § 987 (effective January 1, 1980). This legislation is known as The California Art Preservation Act.

13. *See also* CAL. CIV. CODE § 989 (West Supp. 1993) (creating a cause of action on behalf of the public to protect the integrity of works of art).

14. CONN. GEN. STAT. ANN. §§ 42-116s to -116t (West 1990); LA. REV. STAT. ANN. §§ 51:2151-:2156 (West 1992); ME. REV. STAT. ANN. tit. 27, § 303 (West 1991); MASS. GEN. LAWS ANN. ch. 231, § 85S (West 1992); NEV. REV. STAT. ANN. §§ 598.970-.978 (Michie Supp. 1991); N.J. STAT. ANN. §§ 2A:24A-1 to -8 (West 1992); N.M. STAT. ANN. §§ 13-4B-1 to -3 (Michie 1992); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1992); PA. STAT. ANN. tit. 73, §§ 2101-2110 (Supp. 1993); R.I. GEN. LAWS §§ 5-62-2 to -6 (1991).

15. *See, e.g., Helms v. NEA: Putting on the Political Figleaf*, WALL ST. J., Aug. 10, 1989, at 12; Kim Masters, *NEA and the West Coast Protests*, WASH. POST, Mar. 6, 1990, at C1, 8; Allan Parachini, *Heightened Visibility for the Endowment Controversy*, L.A. TIMES, Apr. 27, 1990, at F24; Robert Shepard, *House Cuts Funds in Protest Over Art Exhibits*, UPI, Jan. 2, 1982, *available in* LEXIS, Nexis Library, UPI file.

16. "Politically correct" refers broadly to a standard, imposed primarily by the political left, intended to inhibit certain critical references to racial and ethnic minorities, women, homosexuals, or the disabled, or favorable references to certain religious beliefs. *See, e.g.*, Michael M. Bowden, *Political Correctness and the First Amendment: The False Threat*, 79 A.B.A. J. 66 (1993); Stephen L. Carter, *The True Believer vs. the Politically Correct*, THE RECORDER, Oct. 5, 1993, at 8; Robbie Conal, *War in the Worlds of Art: David vs. Political Goliath*, L.A. TIMES, Nov. 26, 1989, at M3.

17. Grace Glueck, *Border Skirmish: Art and Politics*, N.Y. TIMES, Nov. 19, 1989, § 2, at 1.

And yet, the 1990s began with the enactment into law of VARA.[18] This new federal legislation will enable artists throughout the United States to protect the integrity of their creations from alteration or destruction even after they have been sold. It will also protect the right of artists to assert their claims to the authorship of their works of art.

This important federal legislation, initially introduced by Senator Edward Kennedy in 1986,[19] represents the first federal legislation that has been specifically devoted to the rights of visual artists. Although the Copyright Act[20] sets forth the rights of authors and artists in their creations, the peculiar problems[21] that confront visual artists have never before received the attention they deserve from the Congress.

Congress had addressed the arts twice before, each time providing important financial support. During the 1930s, as part of the New Deal, Congress created the Federal Arts Project, a program under the Works Progress Administration.[22] Intended to make the arts more accessible to the public, this program provided employment for many artists and ultimately spent more than $35 million to that end.[23] Then, in the 1960s, as part of the Great Society, Congress created the National Endowment for the Arts.[24] In addition to funding arts organizations and individual art-

18. Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33 (1990) (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, and 506 (Supp. III 1992)). President Bush, not known for his support of the arts, signed into law the Judicial Improvements Act of 1990, which, among other things, authorized him to make additional judicial appointments to the federal bench. Title VI of that Act comprised the Visual Artists Rights Act of 1990.

19. S. 2796, 99th Cong., 2d Sess. (1986); H.R. 5722, 99th Cong., 2d Sess. (1986). As originally introduced, this bill would have created a federal resale royalty right (in § 106(d)(1) of the Senate bill) and would have eliminated the requirement that artists affix copyright notices to their works in order to achieve copyright protection. The former proved too controversial and was deleted from subsequent bills. The latter was dropped following Congress' enactment of the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.), which removed that requirement.

20. Codified in scattered sections of 17 U.S.C..

21. Many of these issues arise because the value of most visual art is due to its uniqueness. As a result, few images find a market through reproductions, copies (17 U.S.C. § 106(1), (3) (1988)), or in derivative works (17 U.S.C. § 106(2) (1988)). Unlike literary, musical, or dramatic works, visual art cannot be "performed" (*compare* 17 U.S.C. § 106(4) (1988)). Perhaps most importantly, the exclusive right to display such works (17 U.S.C. § 106(5) (1988)) is lost to the visual artist upon the first sale of the work. 17 U.S.C.§ 109(c) (1988). In connection with the latter, see Thomas M. Goetzl & Stuart A. Sutton, *Copyright and the Visual Artists Display Right: A New Doctrinal Analysis*, 9 COLUM.-VLA J.L. & ARTS 15 (1984).

22. LEONARD D. DUBOFF, THE DESKBOOK OF ART LAW 316-17 (1977).

23. *Id.* at 318; WILLIAM F. MCDONALD, FEDERAL RELIEF ADMINISTRATION AND THE ARTS 211-23 (1969).

24. National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, § 5, 79 Stat. 845, 846-49 (1965) (codified as amended at 20 U.S.C. § 954 (1988)).

ists directly, the Endowment channels federal monies into each state's arts council.[25]

For the first time in twelve years, there is a Democratic president in the Oval Office. The Clinton administration may provide a new vitality for the arts. The assault on the Endowment is not expected to echo in the White House. President Clinton is known to possess a keen appreciation of and deep commitment to the arts.

It was in this context that our panel commented upon VARA, the most significant step made in the expansion of the rights of visual artists. Richard Mayer,[26] the first speaker and a widely exhibited sculptor,[27] set the stage, tracing a colorful picture of the legal hurdles that have confounded artists.[28] His dramatic illustrations ranged from the disappointments suffered by Alexander Calder, David Smith, and Robert Rauschenberg to the successes of Robert Arneson, Mel Ramos and Kent Twitchell. Mayer reminded the audience that these are not mere abstractions about which we debate, but heart-felt aesthetic issues affecting real artists.

Our second speaker was the Hon. Alan Sieroty.[29] During his distinguished tenure in the legislature, Senator Sieroty sponsored all of California's innovative arts legislation. From his unique perspective, the Senator shared with us some illuminating anecdotes behind the legislative history of California's pioneering arts statutes.[30]

Senator Sieroty began by relating the dilemma that confronted the Speaker of the California State Assembly when the first piece of art legis-

25. 20 U.S.C. § 954(g) (1988).

26. Mr. Mayer holds both a B.F.A. and an M.F.A. degree from the San Francisco Art Institute. Long active in art politics, he served as the President of the Northern California Chapter of Artists Equity Association from 1975 through 1980 and sat on the San Francisco Arts Commission from 1979 through 1981. He has been a vice president of the National Artists Equity Association since 1983.

27. Members of the A.A.L.S. who have visited UC Hastings College of the Law have had the opportunity to view Mr. Mayer's 15 foot tall sculpture, "Gary Diptych #1 (1982)", which stands outside the main entrance to Hastings' 200 McAllister building.

28. *See* Richard Mayer, *California Arts Legislation Goes Federal*, 15 HASTINGS COMM/ENT L.J. 981 (1993).

29. Senator Sieroty, who has a law degree from the University of Southern California, served in the California State Assembly from 1966 until he was elected to the California State Senate in 1976. He retired undefeated from the Senate in 1982. Senator Sieroty served as the first chairman of the Arts Task Force of the National Conference of State Legislatures. The Arts Task Force, now a standing committee known as the Arts, Tourism and Cultural Resources Committee, invited each state to send two of its state legislators to become members. The Committee has become an important vehicle among the states for sharing legislative ideas and successes in the arts.

30. Unlike Congress, California, like other states, maintains no official legislative histories. Therefore, these anecdotal insights, not otherwise available, help the curious understand the derivation of certain provisions in the law.

lation, later the Fine Print Act,[31] was introduced. No one had any idea which committee would be most appropriate to conduct hearings on such a bill, so the bill was initially referred, by default, to the Agriculture Committee. After some reflection, it was agreed that henceforth art bills would be assigned to the Judiciary Committee.

The Senator provided some interesting background on several provisions of the California Art Preservation Act. With respect to art attached to buildings, he explained that because early drafts of the bill protected the integrity of fine art without distinguishing such art from more portable art, strong objections were raised by real estate interests. This powerful lobby expressed concern that the ability of property owners to remodel or raze their buildings would be jeopardized. Efforts to resolve these legitimate points led to the approach ultimately adopted by the statute.[32]

He also related how the definition of "fine art" in the statute came to be modified by the qualification that it be of "recognizable quality."[33] Although in almost every other context[34] the expenses of hiring a lawyer and bringing suit have generally proved sufficient to deter the bringing of trivial causes of action, one California legislator nevertheless insisted upon the addition of the quoted language before he would vote the bill out of committee. His stated concern was to protect the kindergarten teacher who throws away a child's fingerpainting at the end of the day from an action brought on that child's behalf by an aggrieved parent. Senator Sieroty also related how the statute was amended in 1982 to add "original work of art in glass" to the definition of "fine art"[35] at the behest of another legislator's staff member whose spouse was an artist working in glass.

31. CAL. CIV. CODE § 1740 (West Supp. 1993).

32. See CAL. CIV. CODE § 987(h), which distinguishes between those situations where the art work can be removed without injuring it and those where it cannot. If the work cannot be removed from a building without being altered or destroyed, and there is no express reservation of the rights put in writing and recorded, then the rights shall be deemed waived. If the art work could be removed without substantial harm, then the rights generally apply. Compare the treatment of this same issue under VARA. 17 U.S.C. § 113(d). Under VARA, the rights to prevent destruction or alteration generally do not apply if an artwork cannot be removed from a building without destruction or alteration, if the author consented to installation and the work was installed either prior to VARA or a written instrument was signed after VARA was enacted, stating that the work may be subject to destruction. For a seminal discussion of this problem, see Thomas M. Goetzl, *Peril of Art*, S.F. RECORDER, October 8, 1991, at 8.

33. CAL. CIV. CODE § 987(b)(2).

34. It is not necessary for the plaintiff in an action for conversion, trespass, or negligence, for example, to allege and prove that plaintiff's property was of any particular value in order to state a cause of action.

35. CAL. CIV. CODE § 987(c)(2).

After reviewing several such stories, Senator Sieroty concluded with a call for attention to be devoted to some of the problems increasingly confronting musicians whose compositions are being regularly sampled and copied without permission, yielding neither compensation nor credit to the owner of the copyright. He suggested that, perhaps, some kind of "tax" on the sale of blank tapes might be appropriate, with the proceeds then distributed among musicians. He also urged greater attention be paid to assuring the inclusion of arts education in the public schools.

Our next speaker, Peter Karlen,[36] made use of his extensive litigation experience in this area to recount a selection of the issues most commonly raised in cases arising under the California Art Preservation Act.[37] Surprisingly, the requirement that the art be "of recognizable quality" has not been raised as frequently by defendants as might have been anticipated. Karlen suggested that this was probably because the defendant's purchase or other acceptance of ownership of the art tended to estop the defendant from denying the piece was "of recognizable quality." He also indicated that questions about whether the artist had waived her rights were not often raised.[38] Joint authorship and ownership issues have also seldom surfaced.

On the other hand, the issues that have been raised have concerned whether or not a threatened work of art, or one that is already altered or destroyed, is entitled to protection under the statute at all.[39] Another provocative issue identified by Karlen involved the *mens rea* of the defendant. The California Art Preservation Act requires the act which destroyed the artwork to have been done "intentionally."[40] He described an interesting variety of scenarios where this question was at issue, including cases where the defendant claimed not to know where the work had gone. Another issue Karlen discussed concerned the assessment and

36. Mr. Karlen has both a law degree from Hastings College of the Law and an M.S. in Law and Society from the University of Denver College of Law. A prolific author of practical art law articles and an occasional adjunct professor of art law, Mr. Karlen has perhaps more experience representing artists under various art preservation statutes than any other lawyer in California.

37. CAL. CIV. CODE § 987. *See* Peter H. Karlen, *Moral Rights and Real Life Artists*, 15 HASTINGS COMM/ENT L.J. 929 (1993).

38. *See* CAL. CIV. CODE § 987(g)(3) (requiring the artist to have signed a writing expressly providing for such waiver). Compare the provision under VARA, 17 U.S.C. § 106A (e)(1), which also provides for waiver by the artist, specifying the work and the uses of the work to which that waiver applies.

39. CAL. CIV. CODE § 987(b)(2) limits its protection to an "original painting, sculpture, or drawing, or an original work of art in glass."

40. CAL. CIV. CODE § 987(c)(1). Under section 987(c)(2), one who "frames, conserves or restores" a work of fine art is held to a different standard. Such an individual must not have committed "gross negligence," which is defined as having "exercise[d]. . . so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art."

proof of damages to which an artist might be entitled.[41] By and large, however, Karlen's opinion was that the California Art Preservation Act has worked remarkably well. The Act's clarity often helped to resolve disputes without the need for litigation.

Our fourth speaker, Professor Edward Damich,[42] offered a concise survey of the eleven state art preservation acts,[43] comparing and contrasting their features.[44] In addition, he reviewed VARA, examining its coverage against a backdrop of the laws of the eleven states that first granted moral rights.[45] He began by noting that the range of creations that are afforded protection varies among the different statutes protecting moral rights. He assessed the limitations different states place upon those categories as well; some states require protected art works to be of "recognized quality" and others require them to be of "recognized stature." Works of art produced in limited editions receive different treatment by the states, as do works prepared for commercial use or works made as "works for hire." Not surprisingly, he found that the scope of protection granted to the rights of attribution and integrity vary from statute to statute. Indeed, some states prohibit the destruction of qualified works of art as well as their alteration or mutilation. Damich reviewed the varied treatment in the different statutes of the duration of rights, waiver, works in buildings, and joint works. He concluded that the state statutes, which continue to have some vitality, generally provide more extensive protection to the artist than does VARA.[46]

41. *See also* Ronald T. Michioka, Note, *California Art Preservation Act: Proving Actual Damages*, 10 HASTINGS COMM/ENT L.J. 61 (1987).

42. Currently on leave from the George Mason College of Law in order to serve as a Commissioner of the Copyright Royalty Tribunal, Professor Damich holds a J.D. from Catholic University, as well as an LL.M. and a J.S.D. from the Columbia University School of Law. His thesis topic was moral rights. Since that time, Professor Damich has published numerous articles assessing the moral rights laws in the United States.

43. CAL. CIV. CODE § 987; CONN. GEN. STAT. ANN. §§ 42-116s to -116t; LA. REV. STAT. ANN. §§ 51:2151-:2156; ME. REV. STAT. ANN. tit. 27, § 303; MASS. GEN. LAWS ANN. ch. 231, § 85S; NEV. REV. STAT. ANN. §§ 598.970-.978; N.J. STAT. ANN. §§ 2A:24A-1 to -8; N.M. STAT. ANN. §§ 13-4B-1 to -3; N.Y. ARTS & CULT. AFF. LAW § 14.03; PA. STAT. ANN. tit. 73, §§ 2101-2110; R.I. GEN. LAWS §§ 5-62-2 to -6.

44. For a thorough assessment of those similarities and differences, see Edward J. Damich, *State "Moral Rights" Statutes: An Analysis and Critique*, 13 COLUM.-VLA J.L. & ARTS 291, 343-47 (1989).

45. *See* Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off After VARA?*, 15 HASTINGS COMM/ENT L.J. — (1993).

46. *See* 17 U.S.C. § 301 (f). The preemption of state laws by VARA is neither complete nor entirely without ambiguity.

The final speaker on our distinguished panel was Marilyn Kretsinger.[47] As Assistant General Counsel to the Copyright Office, she was largely responsible for reviewing and editing the Resale Royalty Report on the feasibility of implementing a resale royalty right.[48] Kretsinger offered an assessment of the rights of integrity and authorship under VARA[49] from the perspective of the Copyright Office.[50] She proceeded to present an overview of the resale royalty feasibility study. She reminded the audience that sometime in the next year, Congress will be holding hearings on the resale royalty right.[51]

It is clear that the Copyright Office devoted enormous effort and resources to the collection of information and opinions on the resale royalty,[52] all of which are assembled in its Resale Royalty Report. The Resale Royalty Report, however, fails to assess critically the testimony and evidence which was presented to the Copyright Office.[53] Before submitting the report to Congress, the Copyright Office should have first reached an understanding of the underlying purpose of the resale royalty right. It could then have assessed the arguments presented in light of that purpose.

Proponents of the resale royalty right insist that it is justified by the efforts of the individual artist whose work of art was resold, in order to provide parity for visual artists *vis-à-vis* other authors under the Copyright Act.[54] On the other hand, opponents persist in implicitly characterizing the resale royalty as no more than an attempt to provide

47. Ms. Kretsinger has an M.A. in American History from the University of Wisconsin and a J.D. from the University of Texas. Since completing a clerkship with the Texas Court of Appeals in 1979, she has been employed at the Copyright Office.

48. U.S. COPYRIGHT OFFICE, DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY (1992) [hereinafter RESALE ROYALTY REPORT]. A summary of the report is published under the title: *Droit de Suite: The Artist's Resale Royalty Copyright Office Report Executive Summary*, 16 COLUM.-VLA J.L. & ARTS 381 (1992), which the Copyright Office was directed to submit to Congress. *See* Pub. L. No. 101-650, § 608(b) 104 Stat. 5089, 5132 (1990).

49. *See*, in particular, 17 U.S.C. § 106A.

50. Marilyn J. Kretsinger, *Droit de Suite: The Artist's Right to a Resale Royalty*, 15 HASTINGS COMM/ENT L.J. 967 (1993).

51. That, of course, anticipates that a bill to establish such rights is introduced in the interim.

52. As a witness who attended the entire hearing held in San Francisco on January 23, 1992, this writer can bear witness to the thoroughness and fairness with which testimony was taken by William Patry of the Copyright Office.

53. For an excellent critique of the Resale Royalty Report, see Shira Perlmutter, *Resale Royalties For Artists: An Analysis of the Register of Copyrights' Report*, 16 COLUM.-VLA J.L. & ARTS 395 (1992).

54. *See* Thomas M. Goetzl, *In Support of the Resale Royalty*, 7 CARDOZO ARTS & ENT. L.J. 227, 254-60 (1989). The exclusive rights under 17 U.S.C. § 106 enable owners of copyrights to receive recompense for the *use* of their creations; the right to be paid for the physical object is a function of ordinary property law principles. Thus, songwriters, for example, can demand a royalty whenever their compositions are performed publicly. *See also* Thomas M.

financial assistance to artists generally. They criticize it by concluding that only successful artists will benefit from a resale royalty.[55] Interestingly, these same arguments were unsuccessfully urged almost a century ago in opposition to the then-novel proposal to create an exclusive right to the public performance of musical compositions.[56]

If one concludes that a resale royalty right is appropriate, problems associated with its enforcement also ought not to count against its passage. Rather, the resale royalty right ought to be implemented in such a way as to facilitate its enforcement.[57] Indeed, collecting a royalty on the direct resale of a work of art should provide no greater challenge than collecting those royalties due owners of music copyrights when thousands of radio stations play their compositions, a task successfully undertaken by American Society of Composers, Authors and Publishers (A.S.C.A.P.) and Broadcast Music International (B.M.I.) for years.[58]

Perhaps most symptomatic of the Copyright Office's uncritical appraisal of the evidence it collected in the preparation of its Resale Royalty Report is its frequent reference to a fifteen-year-old article written by three economists.[59] The Article suggests that art buyers subject to the California resale royalty will discount the prices they will offer to pay by

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

55. *See, e.g.*, Daniel Grant, *Paying the Painter: Should Artists Get a Cut When Their Works are Resold?*, CHI. TRIB., Mar. 14, 1993, at 32; Andrea Maier, *If Art is Resold, Should Artist Profit?*, N.Y. TIMES, Feb 8, 1992, § 1, at 11.

56. *See* 17 U.S.C. § 106(4)(Added by an Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897)). The 1909 Copyright Act restricted the exclusive right to those performances which were "for profit." 17 U.S.C. § 1(c) (1909 Act). *See generally* Herbert v. Shanley Co., 242 U.S. 591 (1917)(discussing wheter a perfomance was for profit to determine whether it fell under the Copyright Act).

57. Compare the federal Resale Royalty Report to the 1982 amendment to the California Resale Royalty Act, CAL. CIV. CODE § 986(a), authorizing the assignment of the right for the purpose of aiding its collection on the artist's behalf. This amendment was enacted in order to encourage the creation of a collection organization similar to A.S.C.A.P. or B.M.I. This writer participated in the drafting, negotiating, and lobbying relative to those amendments. 1982 Cal. Stat. 167, 602, 604. *See generally*, 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.19 (1991).

58. Consider the wholesale infringement of the exclusive right to make copies of movies and recordings that has been fueled by the proliferation of VCR and tape technologies. 17 U.S.C. § 106(3). There has been no call to repeal those exclusive rights. On the contrary, where the pirating appears to have been undertaken "wilfully and for purposes of commercial advantage or private financial gain," Congress has provided serious criminal penalties. 17 U.S.C. § 506. To consider both the extent of this problem and the limitations on its constraints see Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

59. Ben W. Bloch et al., *An Economic Analysis of the California Resale Royalty Statute*, 10 CONN. L. REV. 689 (1978). Note that by reducing works of art to the level of securities, *id.* at 690, such critics wholly ignore the aesthetic pleasures derived by collectors of fine art. See LEONARD D. DUBOFF, THE DESKBOOK OF ART LAW 364 (1977), in which Professor DuBoff refers to this benefit to the collector as a "psychic dividend."

using a complex formula that takes into account the five percent royalty they may pay later, if their acquisitions appreciate.[60] This is a preposterous suggestion. There is absolutely no evidence to support such a hypothesis, nor could there be. In that same article, the authors point out that only a small number of art works are ever resold.[61] Professor Perlmutter, however, pithily observed that "opponents of resale royalties cannot have it both ways; either a royalty will help the artist and hurt the collector, or it will do neither."[62] Curiously, and significantly, opponents of the resale royalty, in assessing the market impact of a resale royalty right, fail to account for auction house charges to the seller (which are usually ten to twenty percent of the sale price), the charge to the seller of $100 to $900 for a catalog photograph, or the shipping and insurance charges routinely assessed. Indeed, the "buyer's premium", for fine art, was recently raised by both Sotheby's and Christie's from ten to fifteen percent on the first fifty thousand dollars of the purchase price, and ten percent for any remaining amount above fifty thousand dollars.[63] No outcry was raised that these increased "taxes" on resale were responsible for depressing the market for such resales.

In conclusion, our program allowed us to review the accomplishments of the past two and a half decades. Indeed, some important, innovative rights of visual artists have been identified and given statutory protection. It is apparent, however, that much still remains to be done. The resale royalty right is largely misunderstood,[64] there are other rights which advocates of artists' rights need to advance,[65] and, of course, VARA has many problems that need to be identified and resolved.

60. Bloch, *supra* note 59, at 690-95. Therefore, such a collector would only be willing to bid $9,433.96 for a work of art offered for sale for $10,000, depending upon the particular discount rate.

61. "According to the Art Dealers Association, only about fifty living artists have a resale market for their works, and ninety-nine percent of all art depreciates in value." *Id.* at 696.

62. Perlmutter, *supra* note 53, at 409.

63. Telephone Interveiws with Matthew Weigman, Vice-President Manager of Auction Information, Sotheby's, in New York, N.Y. (November 18, 1993), and Carolin Young, Press Librarian, Christie's, in New York, N.Y. (November 19, 1993). Sotheby's raised the buyers premium January 1, 1993; Christie's followed with its raise three months later, on March 1, 1993.

64. *See generally* RESALE ROYALTY REPORT, *supra* note 48.

65. *See supra* text accompanying note 35. Spain, for example, has a display right as part of its copyright law. *See* Article 9, Ley de la Propiedad Intellectual (Jan. 10, 1879). *See also* H.R. 4366, 99th Cong., 2d Sess. (1986) (drafted by this writer, which would have amended the Copyright Revision Act of 1976 to provide an exclusive right to display which would survive a