

1-1-1993

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Recommended Citation

Richard Mayer, *California Arts Legislation Goes Federal*, 15 HASTINGS COMM. & ENT. L.J. 981 (1993).
Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol15/iss4/7

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California Arts Legislation Goes Federal*

*comments by
Richard Mayer***

Initially, Alexander Calder was pleased with the year 1958. His monumental mobile, *Pittsburgh*, had been purchased by G. David Thompson from the Carnegie Institute's Bicentennial International Exhibition of Contemporary Art. The sculpture, with black arms and white paddles, measured some thirty feet tall. Thompson then donated the sculpture to the county so it could hang in the rotunda of the Pittsburgh Airport. But soon after its installation, the airport officials determined that they didn't like Calder's black and white color scheme, and they repainted the sculpture green and gold—the colors of Allegheny County. They didn't ask Calder if they could repaint his mobile. They just did it. After all, it was their property.

Over Calder's angry protests, these officials also altered the orientation of the mobile's elements in order to provide more headroom at the bottom, and they fixed the piece in a rigid configuration. So much for the year 1958. Calder struggled in vain, over the eighteen years remaining in his life, to restore the integrity of his work. Two years after he died, the airport commissioners finally agreed to restore the sculpture in accordance with the artist's wishes.

David Smith was furious when he discovered, in 1960, that the collector who owned his sculpture entitled *17 H's* had had the work stripped of its red paint. His fury was compounded when he discovered that there was no legal remedy; this altered sculpture would continue to misrepresent him as an artist, and he was powerless to disassociate himself from it.

Clement Greenberg, noted art critic and executor of Smith's estate, had a number of painted sculptures stripped—in direct contradiction to the late sculptor's artistic intention. Greenberg thought that Smith's sculptures looked better and could sell for more money if they were unpainted.

A documentary film maker captured Bob Rauschenberg seething at a 1973 auction in New York. Robert Scull had just sold the painting

* This essay was presented at the Association of American Law Schools Symposium on Art Law at the Oakland Museum on January 6, 1993.

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Thaw for \$85,000. He had purchased the painting from Rauschenberg in 1960 for \$900. Rauschenberg, normally a true man of peace, gave his collector an unfriendly shove exclaiming, "Congratulations, I've been working my ass off just for you to make that profit!" Those attending the auction sensed a scandal. The inequity of Scull's fat profit was so gross, and publicity about the auction results was so widespread, that public attention was galvanized around a new cause: artists' rights.

New questions were being asked. For example, why did *Thaw* resell for so much money? Did Rauschenberg somehow contribute to its increasing value after it had been sold to Scull? What if Rauschenberg had stopped painting in 1961? Is it likely that Scull could have realized a profit of \$84,100 by selling *Thaw* twelve years later?

Could it be that the driving force in the escalation of *Thaw's* price was Rauschenberg's continuing investment and growth in his career, and that the value of *Thaw*, in 1973, was a function of Rauschenberg's history as an artist? Does the worth implicit in a work of art reside as much with the artist as it does with the object created by the artist? Ought artists be accorded some economic participation so that they might enjoy a more equitable role in the marketplace? While these questions swirled within the dust cloud of controversy engendered by the Scull auction, the quest for artists' resale royalties was born.

The National Artists Equity Association (NAEA), founded in 1947 to take collective action on issues concerning the visual artists' profession, took up this quest. In 1974, artists representing NAEA's three California chapters, in cooperation with California Lawyers for the Arts (CLA) and other arts groups, met with then California State Assemblyman Alan Sieroty. They discussed the need for legislation that would secure residual rights for visual artists. In March of 1975, Sieroty's California Resale Royalties Act was introduced to the State Legislature as AB 1391—and things have never been quite the same in the art world since.

While the royalties bill received scant opposition as it moved through the legislature's committees, all hell broke loose when it arrived on Governor Jerry Brown's desk. Opponents had gotten the message by this time and lobbied frantically, urging the Governor to veto artists' royalties. The NAEA and its allies rallied supporters. The Governor's mail was running fifty-fifty, and he withheld action on the bill. At the eleventh hour, California Arts Council member Peter Coyote (who later went on to an acting career), argued before Jerry Brown the justice of artists' royalties and the merits of Assemblyman Sieroty's legislation. When Governor Brown signed the bill into law on September 22, 1976, he wrote across the top of Sieroty's copy, "What hath art wrought?"

What art had wrought was the first salvo by Alan Sieroty in a not-so-quiet revolution in arts legislation.

The California Resale Royalties Act¹ soon fell under legal attack when Collectors, Artists & Dealers for Responsible Equity (CADRE), headed by Los Angeles art dealer Howard Morseburg, filed suit in federal court, challenging the law's constitutionality. Artists' interests were successfully represented by California Lawyers for the Arts with John J. Davis, Jr. as the lead attorney. The Federal District Court for the Central District of California² and the Ninth Circuit Court of Appeals upheld the Act.³ Royalty opponents received the final blow to their challenge when, in October of 1980, the United States Supreme Court refused to grant a hearing on their appeal of the lower courts' decisions.⁴

Having launched the resale royalty right (albeit in choppy waters), the NAEA moved on the issue typified by Calder's altered, repainted mobile and by Smith's stripped sculptures. In May 1977, Thomas Goetzl, a Golden Gate University Law School Professor and CLA board member, was asked to develop a preliminary draft of a "moral rights" bill that would protect the integrity of artworks after they leave the artist's possession. On behalf of NAEA, Professor Goetzl's draft was sent to Alan Sieroty (who had by then moved up to the State Senate). Senator Sieroty soon introduced SB 668, "The California Art Preservation Act."

Happily, opponents of artists' royalties supported the NAEA in this cause. While most often I was at the witness table with Tom Goetzl, on August 10, 1978, I sat alongside the arch foe of artists' royalties, Stanford University's Sweitzer Professor of Law John Merryman. We were testifying on behalf of SB 668 before the Assembly Judiciary Committee and we were into the second year of the lobbying effort. Sieroty introduced his bill, explaining that this legislation would protect artworks from being intentionally altered or destroyed.

The committee received this innovative legal concept with comments like: "How did this ever get through the Senate?" And, "I can't believe this." One assemblyman from Los Angeles interrupted Sieroty, asking, "Now, just a minute, Alan. Now I bought this statue that said on the bottom that it was made in China. I had it for awhile and then I decided to drill a hole, carefully, starting at the top of the head, all the way down through the feet [snickers and giggles from other committee

1. CAL. CIV. CODE § 986 (West 1993). Amended in 1983, this nationally unprecedented legislation entitles artists to a five percent royalty on the gross sale price when the artists' work is resold in California, or by a California resident, at an amount greater than \$1,000, and greater than the seller's purchase price.

2. *Morseburg v. Balyon*, 201 U.S.P.Q. (BNA) 518 (1978).

3. *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980).

4. *Morseburg v. Balyon*, 449 U.S. 983 (1980).

members]. And I ran a cord through that hole and made a lamp out of it! [Loud guffaws.] Now you mean to tell me that with this law, some Chinese artist can come after me?" Another said, "O.K. I own this sculpture. Do you mean that I can't cut down this sculpture I bought, reduce its dimensions so that I can get it through the door from my living room into another room in my house?" In his testimony, Professor Merzman did his best to raise the committee's consciousness, offering, "Acts of cultural vandalism are wrong!"

Despite such outbursts, such was Senator Sieroty's wizardry that he converted enough disbelievers. The bill passed the committee and moved on. On July 27, 1979, Governor Brown signed into law the nation's first moral rights legislation for artists.

While the Art Preservation Act received general approbation in the art world, the Resale Royalties Act added to the controversy generated by the Scull auction. Feelings on both sides seemed to run at a higher level than can be explained by economics alone. Perhaps one explanation is the effect that these two new laws have had in altering the relations among the elements that comprise the art world. Artists have acquired a legal umbilical cord to their work after its sale. They are now empowered to preserve the integrity of their work. Further, artists are empowered to move from their prior passive status and become more active participants in art world economics. They have gained access to the resale marketplace.

While acknowledging that none of this would have happened without a lot of help, all of this happened at the initiative of artists. Initiative became action when artists learned how the processes of government worked, learned advocacy techniques, and forged ties with powerful allies. In so doing, they achieved remarkable change in public policy and the arts.

Things looked different in this new landscape. Artists had acquired a new role. Always masters of their universe inside the studio, they now enjoyed influence over the external forces that dictated their fate. Their new empowerment signaled change in the visual artist's profession. But could they still be artists if they acted out this role? Accustomed to forcing changes in the way people see the world, artists often demonstrate a retrograde conservatism when it comes to their vision of their own careers. Many search for their personal Holy Grail (spelled "A-R-T"), preferring not to think of the endeavor as a business. Here, however, we find a group of artists acting like business professionals, working through NAEA, forcing a change in the way artists, and others, see artists.

Debate on roles and rights invites a comparison of artists with other groups (such as women) striving to advance their circumstances in soci-

ety. The women's liberation movement exposed a number of myths and attitudes that served a repressive economic function, compromising the ability, or even the willingness of women to achieve more equitable terms in the job market. As women's rights activists achieved economic gains, perceptions began to shift and the concept of fair play in the job marketplace took root as an issue that would not go away. It turns out that artists have their own "barefoot and pregnant" issues to work through. The false myth here is: "Artists are really spiritual beings, most happy in their studios making art. They're certainly not competitive, aggressive business types, as that would surely corrupt their art. And isn't it noble the way they starve in their garrets?" But with the founding of groups such as the NAEA, whose defined purpose is "To advance, foster and promote a national environment favorable to the creation and reception of works of visual art,"⁵ perhaps this myth can be shattered.

Change engenders strong feelings—pro and con. It's also true that any time you redirect the money flow (even five percent worth) within an established system of economic self interests, you'd better duck.⁶ Such action evokes comments like: "These pseudo-enlightened individuals would do irreparable damage to the art market, and would truly harm the very artists they would lead you to believe they intend to help!" This "don't kill the goose that lays the golden egg" canard is the kind of language one hears when the workers who produce a commodity seek an increased share of the proceeds derived from the commercial exploitation of their product. Those who exploit the product often warn the workers, "Beware, you will destroy the very industry that supports you." This is why the debate on artists' resale royalties is referred to as the first labor-management dispute in the art world.

While some dealers and collectors are appalled at the idea of artists making money,⁷ many others are pleased to share the wealth, and happy to provide encouragement to artists. My first resale royalty was a modest \$55 that I received when Marcia Weisman bought my sculpture, *K-3*, from the Mark Hopkins Hotel's collection in 1978. A noted collector, Mrs. Weisman was a great champion of artists' rights. She suggested

5. Articles of Incorporation (on file with the NAEA, Washington D.C.).

6. Not long after the royalty law was enacted, I attended a meeting with Alan Sieroty in the office of a prominent contemporary art collector. The collector was not happy, feeling that 5% of his property interest in the artworks had been usurped. He explained: "People generally consider me to be a pretty nice guy, but when somebody comes on my property to take something away from me, I let loose my dogs!" He meant it, too. He went on to fund CADRE's legal challenge. Other collectors and dealers got angry, reacting to artists' royalties like Mr. Bumble did when *Oliver Twist* petitioned: "Please sir, I want some more."

7. I recall Tom Goetzl exclaiming angrily to one of these individuals, "Damnit, why should artists have to be the only socialists in a capitalist system?"

that we change the sculpture's name to *Section 986*, the California Resale Royalties Act's designation in the California Civil Code. I was quick to agree.

Just how effective have the Resale Royalties Act and the Art Preservation Act been? Artists who choose not to use these laws enjoy only a potential benefit. Some artists hesitate to use them, afraid that they might alienate the support structure they depend upon. Some, influenced by the artist's myth of self-deprivation, think it's unseemly to demand payment of royalties owed. Others resist the extra paperwork and buyers resent the novel idea of sharing the resale wealth with artists. Similar reservations were also expressed in the music world in 1909 when radio stations were first required to pay royalties to songwriters.

The artists of today who choose to implement their new rights benefit greatly. On January 8, 1991, sculptor Robert Arneson wrote to me stating, "In the last eight years I have received resale royalties amounting to \$25,520. My experience is not unique. I know of many other artists who have received similar benefits." Mel Ramos, the noted painter, wrote to me about the same time. "Since 1988, I have earned about \$20,000 in resale royalties, and this was not done without effort on my part. . . . I have determined that if there was a federal law similar to California's in place during the late 1980s, I would have collected over \$100,000." Some of that money would have helped during the flattened art market of the 1990s.

Muralist Kent Twitchell can vouch for the effectiveness of Senator Sieroty's Art Preservation Act. On March 18, 1992, Twitchell received a \$175,000 settlement to restore his mural, *Old Woman of the Freeway*, which had been painted over without notice in 1986. Twitchell had sued the owners of his mural, which was painted on the Prince Hotel overlooking the Hollywood Freeway, after the California Supreme Court ruled that the Act protected murals. After the settlement, the defendants' attorney stated that this case was a learning experience, and hoped that it would help preserve other artworks as well.

Mel Ramos' wish for federal legislation in this area had been part of the NAEA's initial wish list as well. From the beginning, the NAEA hoped the California legislation would stimulate the enactment of similar laws in other states, which it has in respect to moral rights, and that the NAEA would ultimately achieve federal legislation. This wish came partially true with the enactment of the Visual Artists Rights Act of 1990 (VARA), sponsored by Senator Edward Kennedy and Congressmen Bob Kastenmeier and Ed Markey.⁸ Moral rights became the law of the land.

8. Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33 (1990).

So the question remains, is all this a good idea? In his March 23, 1978 judgment upholding California's royalty law, United States District Court Judge Robert M. Takasugi wrote:

Not only does the California law not significantly impair any federal interest, but it is the very type of innovative lawmaking that our federalist system is designed to encourage. The California legislature has evidently felt that a need exists to offer further encouragement to and economic protection of artists. That is a decision which the courts shall not lightly reverse. An important index of the moral and cultural strength of a people is their official attitude towards, and nurturing of, a free and vital community of artists. The California Resale Royalties Act may be a small positive step in such a direction.⁹

Nobody knows how many steps will be taken along the path that Judge Takasugi has illuminated. I can report from my own experience that the journey will be interesting.

9. *Morseburg v. Balyon*, 201 U.S.P.Q. (BNA) 518, 520 (1978).

