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A Critical Comment on California's Droit de Suite, Civil Code Section 986

By STEPHEN S. ASHLEY*

Upon hearing sad stories of the plight of artists whose early works sold for fortunes while the artists froze and starved in Paris garrets and their heirs sold flowers in the streets,¹ the French parliament in 1920 created *le droit de suite*, the right of an artist or of his heirs to collect a percentage of the price of each of his works on each subsequent resale.² Germany and Italy followed suit.³ American lawmakers, unlike their continental counterparts, for long remained indifferent to the artist's lot. In September 1976, however, the governor of California came to the apparent rescue of local artists by signing a bill enacting the first American *droit de suite* statute.⁴ The statute, codified as section 986 of the California Civil Code,⁵ provides that when a work of art sells for more than \$1,000 the seller must pay the artist five percent of the sales price.

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1. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 11 ASCAP COPYRIGHT L. SYMP. 1, 2-3 (1962) [hereinafter cited as Hauser].

2. Law of May 20, 1920, as amended by Copyright Act of 1957, Law of March 11, 1957, art. 42, [1957] Journal Officiel de la Republique Francaise [J.O.] 2723, [1957] Bulletin Législatif Dalloz [B.L.D.] 197.

3. See Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333 (1968) (citing Copyright Act of 1965, art. 26 (W. Ger.) and Copyright Law No. 633 (Apr. 22, 1942), art. 144-55 (Italy)) [hereinafter cited as Price].

4. Ch. 1228, § 1, 1976 Cal. Legis. Serv. 5392-93 (West) (codified as CAL. CIV. CODE § 986).

5. CAL. CIV. CODE § 986 (West Supp. 1977). The statute reads as follows:

SECTION 1(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 his 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 is not transferable and may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale.

(1) When a work of 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 with-

hold 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 his 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.

(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 operating fund of the council as reimbursement to fund programs of the council.

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

(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) 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).

(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.

(2) "Fine art" means an original painting, sculpture, or drawing.

(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.

SECTION 2. The rights of an artist of a work of fine art to receive payment of an amount equal to 5 percent of the amount of a sale of fine art within the provisions of Section 936 shall be vested at the time of such sale; except that an artist shall have no rights to any payment pursuant to this act, if any provision therein is subsequently repealed so as to remove the provisions for such payment, as to any sale which occurs subsequent to such repeal; and except that, in the event any provision in this act is otherwise subsequently amended or changed, an artist shall have only those rights to payment provided for by such subsequent amendment or change and shall have no rights to any payment pursuant to this act, as to any sale which occurs subsequent to such amendment or change.

This statute will produce windfall benefits to California artists who sold art works before the statute became a serious possibility because the legislature decreed that the statute would apply to the resale of works of art created and sold before its operative date, January 1, 1977.⁶ To the extent that it is effective, however, the statute will make other California artists worse off by rendering their works less marketable. Its effectiveness is doubtful though because the statute contains numerous loopholes that allow art dealers easily to avoid paying artists a share of the proceeds.⁷ Consequently it may only slightly dampen the primary market in the works of living artists. The statute's real danger and possibly lasting consequence is that it may lull the legislators into believing that by enacting Civil Code section 986 they have effectively served the needs of artists. Unfortunately, California's *droit de suite* statute will not accomplish the legislature's laudable goal of aiding California artists.

Droit de Suite Legislation Generally

A majority of art patrons, in all probability, buy art primarily to enjoy its aesthetic features rather than to speculate on the artist's rising reputation,⁸ but such art purchasers must participate in a marketplace that includes buyers who purchase art solely because of its investment value. The art dealer or speculator has a finite amount of money available for investment, and his decision to invest will be influenced by the price and his judgment concerning the probability of an increase or decrease in the market value of his purchase. If two works share the same price and, in his judgment, the same potential for appreciation in value, the art investor theoretically will be as willing to purchase the one as the other. If, however, one piece is subject to *droit de suite* legislation, the factors influencing the dealer's decision are no longer the same for each piece and his decision, as well as the actions of the selling artist, will be affected accordingly.

Market Impact and the Artist's Forced Investment

Suppose that one piece, a Madonna by artist X, is for sale in state A and that another, a still life by artist Y, is for sale in state B. The asking price is the same for each and the prospective buyer considers them equally valuable investments. A statute has just

6. CAL. CIV. CODE § 986(1)(d).

7. See notes 30-32 & accompanying text *infra*.

8. Price, *supra* note 3, at 1351.

been enacted in state *B* requiring the art buyer to pay *Y* \$100 if he purchases *Y*'s still life for \$1,000 and later sells it for \$2,000, the price that the buyer expects both works to reach at some time in the future. In such circumstances the buyer would no longer be as willing to purchase the still life as the Madonna. Indeed, artist *Y* would have to allow the buyer a discount on the still life in order to lure him away from the Madonna.

Artists, however, generally do not realize that the *droit de suite* statutes have an effect on the original market price of the works they sell in that they will have to discount their offering prices in order to compete with artists living in jurisdictions without *droit de suite* legislation.⁹ Although this result is often unforeseen, ample evidence of the debilitating effect of a *droit de suite* statute comes from the source, France. There, the Commissaires-Priseurs acknowledged that the *droit de suite* had jeopardized France's position in the international art market. They proposed decreasing the share of the artists' heirs under the French statute or encouraging other countries to adopt equally burdensome *droit de suite* legislation.¹⁰

To the extent of the discount that *Y* had to offer the buyer in the above example, state *B*'s *droit de suite* statute makes *Y* an involuntary investor in his own work. If, in their effort to assist *Y* and as an alternative to this forced investment, the *B* legislators were to hand *Y* the amount of the discount and offer him the opportunity to spend the money currently to buy groceries and pay rent or to invest the money either in a savings account or in a highly speculative venture, such as a five percent interest in one of his own paintings, *Y*'s response would depend on his present financial condition. If he is the penniless victim of popular imagination, he would probably buy food and shelter. If he is more comfortable, he might put the money into some safe investment, such as a savings account. Only if *Y*'s wealth belies his popular image would he take a chance on such a risky investment as a painting by a living artist. Lacking these alternatives, *Y* would probably say that the legislature's decision to force him to invest in his own paintings made him worse

9. Only if the forced discount were visible to the artist would he realize that he is not being exploited when he does not share in the proceeds from the resale of one of his early works that has soared in value. It is evident that artists presently feel outraged when an early work sells for many times the original price and they fail to share in the gain.

10. DOSSIER DE LA CHAMBRE NATIONALE DES COMMISSAIRES-PRISEURS SUR LE DROIT DE SUITE AUX ARTISTES (1964), discussed in Price, *supra* note 3, at 1334 n.7, 1349-50 nn.47-48.

off because it precludes consideration of Y's present financial condition. The nature and absurdity of a legislated mandatory investment would be evident to all if state B had passed a statute prohibiting Y from selling every twentieth painting for twenty years or until the prices of the paintings doubled. If Y had wanted to acquire a five percent interest in his own future reputation, he could simply have put every twentieth painting he produced in his closet.

The Droit de Suite Interest as a Contract Term

Writers have noted that artists might, by contract, bargain for a term nearly equivalent to a *droit de suite* interest,¹¹ and the writers have often attributed the artists' failure to do so to ignorance of their legal rights.¹² Such lack of knowledge in a bargaining situation represents a transaction cost that prevents those exchanges from taking place that would otherwise occur if such a cost were not present. If artists' failure to bargain to retain special rights in their work is the result of their ignorance of this possibility, the legislature could provide a service by filling in this gap.¹³ If the legislature could determine that artists and their patrons would customarily agree to a *droit de suite* were it not for their ignorance of the legal possibility of such an arrangement, then they would serve the artists and their patrons by implying into every contract for the sale of fine art the *droit de suite* term the parties would have included if they had been aware of the possibility.

Not all artists would choose to give a discount in exchange for a *droit de suite* term, even if the artist and the dealer knew of that possibility. A statute implying a *droit de suite* into every art sale would, as pointed out, make such an artist an involuntary investor in his own future reputation. Thus, it would make sense for a *droit de suite* statute to permit the artist to waive the right and use for immediate needs the discount the market would otherwise force him to exchange for it. Reflecting the view that artists lack the good sense to manage their own affairs, the *droit de suite* statutes typically forbid waiver or alienation of the right.¹⁴

11. Price, *supra* note 3, at 1363. Apparently a growing number of artists are bargaining for *droit de suite* terms in their sales contracts. Hochfield, *Artists' Rights: Pros and Cons*, ARTNEWS, May 1975, at 20, 24.

12. See Price, *supra* note 3, at 1358, 1363.

13. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 18 (1972) (proposed solution to conflicting property interests).

14. Hauser, *supra* note 1, at 13; Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 Nw. U.L. REV. 19, at 22

There are several reasons why informed artists would reject a legislature's paternalistic attitude represented by a compulsory *droit de suite* and insist instead upon the ability to waive such a term implied into their sales contracts. First, the *droit de suite* rewards an artist only if his work is frequently resold. It rewards the artist for later recognition of his accomplishment only to the extent that frequency of resale is a function of the increase in market value. A worthless painting will not enjoy frequent resales, but a priceless painting may likewise remain in one owner's hands indefinitely because the resale market in contemporary art is not large and many works typically pass by inheritance or from private collections into museums.¹⁵ Likewise, the recent trend toward art works of monumental size excludes an increasing number of artists from the potential benefits of a *droit de suite*; such objects, often immovable, rarely change owners.¹⁶

The *droit de suite* extends protection to the works of only a narrow set of artists: those whose art both increases in value during the artist's lifetime and experiences frequent resale. As one unnamed observer of the art marketplace commented, "There are less than 100 living artists who have a secondary market . . . but legislation like this makes people unwilling to buy the work of any living artist. So who's helped? Does Chagall need the money? The law helps those who least need help at the expense of those who do."¹⁷ In 1968 Professor Price surveyed the *Art Prices Annual* and estimated that a *droit de suite* for living artists would benefit no more than about fifteen percent of the artists whose works were sold that year

& n.15 (citing M. DUCHEMIN, *LE DROIT DE SUITE DES ARTISTES* 30 (1948)) [hereinafter cited as *Schulder*].

Professor Price's description of the *droit de suite* sheds light on this limitation on alienation: "The *droit de suite* evolved from a particular conception of art, the artist, and the way art is sold. At its core is a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece. The painting is sold for a pittance, probably to buy medicine for a tubercular wife. The purchaser is a canny investor who travels about artists' hovels trying to pick up bargains which he will later turn into large amounts of cash. Thirty years later the artist is still without funds and his children are in rags; meanwhile his paintings, now the subject of a Museum of Modern Art retrospective and a Harry Abrams parlor-table book, fetch small fortunes at Parke-Bernet and Christie's. . . . The *droit de suite* is *La Bohème* and *Lust for Life* reduced to statutory form." Price, *supra* note 3, at 1335 (footnote omitted).

15. Price, *supra* note 3, at 1351.

16. *Id.* at 1341.

17. *THE ARTNEWSLETTER*, Oct. 26, 1976, at 3.

and that a *droit de suite* whose protection survived the artist by fifty years would raise the figure to no more than thirty-five percent.¹⁸

The second reason why an artist might not seek a *droit de suite* term concerns the way art is sold in the United States. Auctions play an unimportant role in the resale of art in the United States.¹⁹ Enforcement of a *droit de suite* depends upon an artist's ability to know when his work has been resold, and sales other than at public auctions would be difficult to verify.²⁰ Consequently, an artist would likely be unwilling to give a purchaser much of a discount in exchange for a term that may be of no practical value to him.

Third, an artist desiring the protection of a *droit de suite* could achieve the same result by far less complicated means. As mentioned above, the artist could put every twentieth painting in the closet and wait for his talent to be discovered. Once discovered, he could imitate art from his most successful period or he could sell preparatory drawings or models.²¹

There are artists who are aware of the possibility of bargaining for a *droit de suite* term and do not need the legislature to imply such a term into their sales contracts. If they should choose to bargain for such a term a different problem arises. In any state having adopted the Uniform Commercial Code, an artist would have a difficult time agreeing with his dealer on a *droit de suite* term that would encompass later purchasers of his art. If the artist sold or consigned his work to a solvent dealer willing to acquiesce in a *droit de suite* term, the two could agree that the dealer would pay the artist a percentage of the purchase price on the occasion of each later resale of the painting. If the dealer's continued solvency is questionable, the artist might want to bind later purchasers to the *droit de suite* term but is prevented from doing so under the rules of the UCC. By

18. Price, *supra* note 3, at 1349. The Art Dealers Association estimates that there are only fifty living artists with a resale market. Hochfield, *Legislating Royalties for Artists*, ARTNEWS, Dec. 1976, at 52 [hereinafter cited as Hochfield].

19. Price, *supra* note 3, at 1342.

20. The original French statute applied only to public auctions; the law was not amended to cover private sales until 1957. Copyright Act of 1957, Law of March 11, 1957, art. 42, [1957] J.O. 2723, [1957] B.L.D. 197 (amending Law of May 20, 1920). A decade after the amendment no *droit de suite* proceeds were collected from private sales because the art dealers persuaded M. Malraux, then Minister of Cultural Affairs, not to sign needed regulations. Schulder, *supra* note 14, at 34 (citing an interview with the Secretary General of the French Union of Artistic Property, in Paris, Aug. 9, 1964); see Price, *supra* note 3, at 1333 n.1.

21. Price, *supra* note 3, at 1340. Picasso is reported to have signed a napkin and given it to a poor friend, urging her not to sell it too cheaply. S. BURNHAM, *THE ART CROWD* 87 (1973).

entrusting his art to the dealer, the artist would give the dealer the power to transfer all the artist's rights to a buyer in the ordinary course of business.²² Even though the artist had retained a security interest in his art as a circuitous route to a *droit de suite* this interest would not survive a sale by the dealer to a later purchaser.²³ A legislature would perform a useful service if it would create some legal mechanism that would allow the artist to reserve special interests in his art by putting later purchasers on notice that the artist has reserved these interests.²⁴

The California Statute

California's *droit de suite* legislation is subject to the criticism that can be levelled against all legislation of this kind. In addition, because it will place the California art marketplace at a competitive disadvantage in relation to the markets in other states, it has the potential to disrupt the relationship that exists between California artists and their dealers as well as the relationship that exists among the dealers themselves. The statute does, however, contain loopholes that may blunt its impact on these relationships and the California art market generally. The result in either case will be unfortunate because the statute, despite its loopholes, will be expensive to administer.

Impact on Relationships in the Art Market

Art dealers typically support undiscovered artists by agreeing to buy their work created early in the artists' careers.²⁵ The dealers assume the risk that the artists may not succeed, and the risk is great. The Art Dealers Association estimates that 99 percent of the art works produced now decrease in value.²⁶ If the artist becomes famous, the dealer collects his compensation for bearing the risk on all the works when he resells appreciated art at a handsome profit. If the state imposes a five percent surcharge on resales, dealers realize that the system by which young artists have been supported until

22. U.C.C. § 2-403(2).

23. U.C.C. § 9-307(1); see generally J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 25-12 to 15 (1972).

24. One possibility is the creation of an art registry. Such a registry might also help protect purchasers from forgeries. See Du Boff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973, 1016-18 (1976); Schulder, *supra* note 14.

25. Hochfield, *supra* note 18, at 52.

26. *Id.*

they receive public recognition is jeopardized. Because a *droit de suite* has been adopted only in California, other states with active art marketplaces will benefit at the expense of California art dealers. Purchasers will be able to buy the work of a living artist elsewhere and avoid the surcharge imposed by the *droit de suite*.²⁷ According to a leading art magazine, "[T]hose who are most familiar with the California art market are unanimous in their opinion of [new section 986 of the California Civil Code]; they think it is a disaster."²⁸ Current practices among art dealers will also be affected. Dealers sometimes agree among themselves to display the works of artists represented by other dealers. These agreements usually provide that the dealer who displays the work of an artist outside his fold will buy some of the paintings from the artist's sponsoring dealer if he cannot sell a certain minimum. Lending agreements of this kind expose an artist's work to a wider audience and increase his chances for success. A *droit de suite* statute discourages these agreements because the dealer who displays the work is forced to buy unsold paintings if he fails to sell the agreed minimum. The statute will compel the dealer to pay to the artist the statutory percentage.²⁹

Efficaciousness of the Statute

California's *droit de suite* has the potential to cause the damaging results described above. Its impact may be minimal, however, because of the statutory scheme itself and the potential for abuse. Under the statute, an artist must bring an action within three years after the date of sale or one year after the discovery of the sale, whichever is later.³⁰ The statute does not apply to resales for less than \$1,000 or for less than the amount the seller paid for the art work. Furthermore, it does not apply to resales after the artist's death.³¹ Art owners can dispose of their art through long term leases with purchase options that can be exercised after the artist dies.

27. A California dealer explained the situation succinctly: "We supported William T. Wiley for six years until he caught on. In these early days, we had a devil of a time selling him. Now, why should anyone buy a Wiley from us when they can buy it in New York?" *Id.*

28. *Id.*

29. *Id.*

30. CAL. CIV. CODE § 986(1)(a)(3) (West Supp. 1977).

31. *Id.* § 986(1)(b)(2)-(3). Amending legislation has been introduced by State Senator Sieroty, author of the *droit de suite* statute, which would create additional exceptions to the application of the statute. The amendment provides that § 986(a) shall not apply to any of the following transactions: "To the resale of a work of fine

The legislature limited the application of section 986 to transactions in which the seller resides in California or the sale takes place in California.³² Clever dealers can devise a host of ways to avoid the statute by means of its choice of law provision. For example, non-California dealers can remove the art to New York for sale. A California art dealer who has found someone willing to pay a high price for the work of a living artist can sell the art to a dummy Delaware corporation for less than the original purchase price and then consummate the sale outside California.

The California statute applies expressly to sales both at public auction and in private. Auctions play a minor role in the secondary art market in America, however, so that most of the sales to which the California statute applies will take place in private. Because the statute imposes no penalty on sellers who keep resales secret, the art owners will have little incentive not to conceal the fact of resale from the artist. For example, a California artist may discover that a subsequent California purchaser of his art has resold the art at the previous purchase price, \$1,000, to a dummy Delaware corporation, which has resold the work in New York for \$100,000 to another dummy Delaware corporation owned by a California art collector, who has brought the art back to California. In order to recover his share of the proceeds, only \$5,000, the artist has to persuade an attorney to bring a lawsuit, the success of which would depend on the lawyer's persuading a court to pierce the veils of the Delaware corporations in order to reveal the sham transaction for what it is, a sale by a California resident. Furthermore, the artist must both realize he has a claim and find someone to take his case, all within a year of discovering the sale. In these circumstances the artist has neither a realistic chance of recovering his \$5,000 nor much incentive to pursue the process.³³

art by an art dealer to a purchaser within two 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, [and] [t]o the resale of a work of fine art where such resale is merely incidental to the sale of either a newly constructed building for which the work of fine art was commissioned or purchased to be an integral part thereof or an existing building of which the work of fine art was subsequently commissioned or purchased to become an integral part thereof." S.B. 707 (1977).

32. CAL. CIV. CODE § 986(1)(a) (West Supp. 1977).

33. Amending legislation introduced by State Senator Sieroty "would permit the prevailing party in an action to recover unpaid royalties to recover costs and attorney's fees and, where the seller or his agent has intentionally avoided payment of such royalties, would permit the artist to recover, punitive damages not to exceed \$500." S.B. 707 (1977).

Even if the statute will be ineffective because of its loopholes, section 986 will be a costly affair. The California Department of Finance estimated that in its first year of operation the statute will cost the state \$236,000 to administer; the cost thereafter is expected to be \$176,000 per year.³⁴

Choice of Law Provision

The legislature, by limiting section 986 to sales that take place in California or that are made by a California resident,³⁵ has effectively mandated a choice of law provision that will have uniquely undesirable consequences. First, as noted before, this provision is underinclusive and will allow art dealers to avoid the statute by removing art from the state prior to sale.³⁶ In addition, the choice of law provision is overinclusive to the extent that it will impose California's five percent surcharge on transactions to which a California court, guided by its usual interest analysis choice of law rules,³⁷ would not otherwise apply California law. This result is illustrated by the following example.

Suppose a New York resident goes to California with his painting by a New York artist and while there sells it to a New York resident at a profit. The New York artist sues in California for his share. If the scope of section 986 had not been expressly made applicable to sales in California or sales by California residents, a California court would have to decide whether to apply the California statute or New York law, which makes no provisions for a *droit de suite*. The California court would probably reason that the California statute advances the state's interest in giving special compensation to California artists. New York's failure to provide for a *droit de suite* advances its interest in rendering art purchases by New York residents fully marketable on resale. The application of New York law would advance New York's interest in protecting New York art patrons because the buyer and the seller are both New York residents. The application of California law would not advance California's interest in compensating its artists because the artist is also a New York resident. Thus, the California court's application of California's interest

34. Hochfield, *supra* note 18, at 52, 54.

35. CAL. CIV. CODE § 986(1)(a) (West Supp. 1977).

36. See note 32 & accompanying text *supra*.

37. See *Hurtado v. Superior Ct.*, 11 Cal. 3d 574, 522 P.2d 666, 128 Cal. Rptr. 106 (1974).

analysis choice of law rules would not apply a California *droit de suite* statute to the transaction described above.

Unless California courts temper section 986 by invoking California's modern choice of law rules despite the statute's clear mandate that it be applied to all sales by California residents and to all sales in California, section 986 will capriciously impose a tax on transactions in which California has no real interest. If the California courts do superimpose a choice of law rule on section 986, however, they will virtually amend it to provide that the statute applies "whenever a work of fine art *by a California artist* is sold *in California* or the seller resides in California."

Conclusion

If the California legislature had determined that artists and their patrons would routinely agree to *droit de suite* terms if such terms were legally enforceable and if the parties were aware of the possibility of such terms, the legislature would have done the art community a service by inserting a waivable *droit de suite* term into every art sale contract. The legislature overlooked the interests of those buyers and sellers who might not choose such an agreement by failing to leave open the possibility of waiver or alienation of the statutory *droit de suite*. Thus, the statute produces windfall benefits to the limited number of artists with secondary resale markets at the expense of less successful living artists. Furthermore, the legislature is now unlikely to enact other legislation that would help all California artists. Therefore, the California statute will leave most artists worse off than if no action had been taken.

Unfortunately, the effects of a *droit de suite* statute will not be immediately apparent to most artists. Consequently, only the dealers will have a sufficiently strong interest to wage a campaign against the statute.³⁸ Hopefully, the art dealers will be able to achieve the statute's repeal, and other legislatures will not imitate California's action in enacting a *droit de suite*. When Governor Brown signed the California statute, he scrawled across the bill, "What hath Art wrought?"³⁹ It is unfortunate that he did not write "vetoed" instead.

38. Art dealers in southern California are reported to be planning a lawsuit seeking to enjoin the enforcement of section 986. Hochfield, *supra* note 18, at 52.

39. *Id.*; THE ARTNEWSLETTER, Oct. 26, 1976, at 2.