

The Artist's Right to a Percentage of the Resale of Fine Art

By Stephen K. Rush

Introduction

Imagine that in 2005 you either lived in California or traveled to California on business or holiday with your family. Being a lover of beautiful paintings, while in the Golden State you purchased a work of fine art by a local artist from a gallery for \$5,000. Then in 2010 you negotiate to sell the work to a buyer in California for \$8,000, making a nice profit on your original investment. Can you simply pocket all of the money and smile all the way to the bank?

No. Under California Civil Code § 986, you as the seller of the work of art are required to retain 5% of the resale price and to pay it over to the artist or the artist's agent within 90 days of the sale. If you are unable to locate the artist, you must pay the 5% royalty over to the California Arts Council. In the event you fail to pay the artist or to remit the royalty to the Arts Council, the artist may bring an action against you for damages, with the prevailing party being entitled to reasonable attorney's fees. This action may be brought within three years after the sale or one year after the discovery of the sale, whichever is longer.

Discussion

This right granted to artists or their heirs, in some jurisdictions, to receive a fee on the resale of their works of art is known as a *droit de suite* (French for "right to follow").

The *droit de suite* was created in France in the 1920s and influenced by the sale after the First World War of Jean-Francois Millet's famous 1858 painting, *The Angelus*. The owner of the painting came away with a substantial profit while Millet's family lived in poverty. The French law was also passed to assist the widows of artists killed in WWI. Many countries have enacted some form of *droit de suite* and it is incorporated in Article



14^{ter} of the Berne Convention for the Protection of Literary and Artistic Works. The underlying premises in favor of the resale right are (i) that the value of works of fine art lies in the original work or in a limited edition, and not in the prospects of mass distribution under applicable copyright law, and (ii) that artists who typically sell their

works at very low prices should be allowed to share in the increase in value upon resale. There are certainly contrary viewpoints. This right lasts only while the work of art is subject to copyright protection so there is no need to pay a royalty to the estates of Rembrandt, Raphael or Da Vinci.

California is apparently the only state in the United States to have enacted a form of *droit de suite*. Under the statute “Artist” is defined as the person who creates a work of fine art and who, at the time of resale, is a citizen of the United States, or a resident of California who has resided there for a minimum of two years. “Fine Art” is defined as an original painting, sculpture, or drawing, or an original work of art in glass. But the law provides several limitations and protections. Although upon the death of the artist the rights to the 5% royalty pass to the heirs, the rights expire 20 years after the death of the artist. The artist cannot waive the right to receive the royalty unless there is a written contract for the seller to provide the artist with a royalty of greater than 5%. However, the royalty obligation does not apply to any sale of fine art where the gross sales price is less than the purchase price paid by the seller. So in the hypothetical above if the sales price is less than the \$5,000 originally paid for the painting, no royalty would be due the artist. Finally the royalty obligation does not apply to the resale of fine art for a gross sales price of less than \$1,000.

Conclusion

The conditions under California that will trigger the seller’s obligation to pay the 5% resale fee are:

- The seller resides in California or
- The sale takes place in California and
- The artist resides in the U.S. or has resided in California for a minimum of 2 years and
- The resale price is greater than the original purchase price and the resale price is greater than \$1,000 and
- If the artist is deceased, the death occurred less than 20 years earlier.

The right of an artist to share in the resale of fine art has not found much favor in the U.S., Canada, New Zealand or Asia with the exception of the form of the right adopted in California. This is unfortunate as visual artists should enjoy legal protections similar to what other artists enjoy. Pursuant to the copyright laws in most countries, a license fee is paid to the author or artist when a piece of music or film is played. The creative effort that an artist invests in a work of fine art should be acknowledged with an ongoing proprietary interest in the revenue when the work is sold. More states should take California’s lead in protecting their indigenous artists.

This article is intended to provide a general summary and should not be construed as a legal opinion nor a complete legal analysis of the subject matter. Stephen Rush is an

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