Brothers In Law: Royalty Pains

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(Photo by Keziban Barry)

All is not cool in California. The state's Resale Royalty Act, which gave artists or their agents (including their heirs) a 5 percent royalty on any resale of their art over $1,000 if the seller resided in California or the transaction took place there, was struck down by a federal court in 2012. The law was both welcomed and reviled, depending on whom you asked: Proponents claimed the law gave much-deserved compensation to artists for their efforts, especially for work bought cheaply and later sold at a big profit; critics countered that artists did not deserve special treatment and that the law put a damper on the art market while benefiting successful artists who didn't need help. The gulf between these two views was—and remains—as wide as the Pacific.

Now a move is afoot to make resale royalty the law of the land. The first proposal by New York Congressman Jerrold Nadler, called the Equity for Visual Artists Act of 2011 (EVAA), mandated a 7 percent royalty for works sold at big auction houses (but, interestingly enough, not online auction sites) for $10,000 or more, with half going to the artist and the balance into an account set up to help fund purchases by nonprofit museums. The EVAA sought to prohibit the artist or the artist's successor from waiving the royalty right.

That proposal failed to garner support when it was introduced three years ago. But Nadler now chairs the intellectual property subcommittee of the House Judiciary Committee and put out a new version of the bill, dubbed the American Royalties Too (ART) Act, which was picked up by Representative Louise M. Slaughter of New York as a cosponsor this past March.

Before we address the problems we see with the legislation—and the reasons why many in the art world are up in arms over this issue—a little historical background is in order.

Resale royalty, also known as *droit de suite* (literally, "follow-up right"), originated in France in 1920, when lawmakers there became incensed that works by artists such as Gauguin and Cézanne sold for vast sums while the artists themselves often died penniless. The law passed by the French parliament in 1920 currently gives artists 3 percent of the total price of their works sold through private transaction or public auction. Moreover, since the right can't be waived, artists cannot sell art without passing on the requirement to pay royalties each time the work is sold on the secondary market.

Today, every European country except Switzerland has followed suit and adopted a version of *droit de suite*. In Italy, artists may claim between 2 and 10 percent of the profit (not total price) made on sales of their works. In Germany, artists may collect 5 percent of the total price on works sold at public auction or through a dealer. The laws in some countries—such as Denmark, France, and the U.K.—provide for "collecting societies" that gather royalties from sellers and distribute them to artists.

In 1976 the otherwise laid-back state of California became the only one in the country to pass a version of *droit de suite*. But in the 2012 case *Estate of Graham v. Sotheby's, Inc.*, a federal court in Los Angeles declared that, because the statute regulated art sales outside of California, the law violated the Commerce Clause of the U.S. Constitution, which reserves to Congress the power to regulate interstate commerce. In *Estate of Graham*, various artists' estates and artists filed a class action lawsuit against Christie's, Sotheby's, and eBay for not paying California's resale royalty and for concealing information that would trigger the law, such as hiding the fact that the seller lived in California.

In finding the law unconstitutional, the court in *Estate of Graham* pointed out that the California law regulated transactions occurring anywhere in the United States, so long as the seller resides in California, and that even the artist, who is the intended beneficiary of the law, need not be a citizen of, or resident of, California. The plaintiffs in *Estate of Graham*, who include New York-based Chuck Close, are currently appealing the court's decision.

Supporters say that resale royalties are well deserved by visual artists, especially since their counterparts in other creative fields, like authors and composers, typically earn royalties on their works each time they are sold or played during a lengthy copyright term. Proponents also argue that the act will give artists an incentive to create, and that artists should share in the success of their careers as early works appreciate in value.

Critics point out that, whether or not one supports the philosophical position that artists should receive royalties on future sales, the proposed legislation is ill conceived and for a number of reasons would actually do more harm than good.

First, the proposal only affects sales at public auction, thereby discriminating against auction houses in favor of dealers and pushing the art market further toward private (read: less transparent) treaty sales. At the extreme, sales might move to locations that don't impose resale royalties—hello, Hong Kong! And with an expansion of the language in the law to include online auctioneers and houses pulling in $1 million or more on fine art in the past year, the potential impact is vast.

A second criticism is that, since the new legislation would apply to sales over $5,000, it would not help the proverbial starving artist, whose works presumably sell below that level. In fact, in France almost 70 percent of all resale royalties reportedly go to the estates of just four artists, all of whom were reputedly quite well fed: Braque, Léger, Matisse, and Picasso. Indeed, the art Act might actually hurt emerging artists by dissuading collectors from taking a chance on their works—or by encouraging dealers to pay artists less for their work than they might otherwise.

Third, because of the secretive nature of the art world, there is little hard data available on the effect of resale royalties, including the number or frequency of resales or how often royalties are paid in jurisdictions that have adopted the right. The U.S. Copyright Office actually recommended against adoption of resale royalties in 1992 because of the lack of "sufficient empirical data." More recently, in December 2013, the Copyright Office suggested that Congress might consider endorsing resale royalty rights, but only with "caution."

Fourth, such a law would arguably penalize buyers who take a chance on less-established artists, as they end up paying out more as the work appreciates. As one of our smarter colleagues has observed, the proposed act isn't so much a royalty payment to artists as a tax on collectors.

Finally, say critics—and, in the interest of full disclosure, we are in that camp—the art Act is simply a bad fit for the Anglo-U.S. common law system, which, with some few exceptions, codifies the free alienability of property and freedom of contract. This is in contrast to European "civil law," which recognizes moral rights that are naturally inherent in creative persons. Nevertheless, the U.K. and Australia recently enacted their own resale royalty laws.

For now, whether there is enough support in Congress to carry Representative Nadler's legislation into law is an open question. The proposed *droit de suite* certainly won't be happening *tout de suite*. That is sweet news for those of us who believe in a free-market approach to the art trade.

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