

# ARTISTS' RIGHTS: THE KENNEDY PROPOSAL TO AMEND THE COPYRIGHT LAW\*

## I. INTRODUCTION

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In 1987, Senator Edward Kennedy, Democrat of Massachusetts, introduced legislation to extend the United States copyright law<sup>1</sup> to provide additional protections and benefits for the visual artist. The bill, in its original form,<sup>2</sup> contained three major provisions: (1) a waiver of the copyright notice required by federal law for visual artworks;<sup>3</sup> (2) a grant to the artist of the rights of paternity and integrity in his or her work (collectively known as the "moral rights" of the artist);<sup>4</sup> and (3) a royalty to the artist upon resale of artwork to the visual artist.<sup>5</sup>

The Senate Subcommittee on Patents, Copyrights, and Trademarks held a hearing on the Bill in December, 1987.<sup>6</sup> Experts in the field of visual arts testified as to the relative merits of each of the bill's provisions. Opening the hearing, Senator Kennedy acknowledged the important role visual arts play in our society and that current federal law inadequately addresses the "legitimate aesthetic and economic needs and interests" of visual artists.<sup>7</sup> Each of the Bill's provisions would help close the existing gaps in current copyright law.

First, elimination of the copyright notice for visual artists would bring American copyright law into line with European law,

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<sup>1</sup> 17 U.S.C. § 101 (1982 & Supp. V 1987).

<sup>2</sup> Visual Artists Rights Act of 1987, S. 1619, 100th Cong., 1st Sess., 133 CONG. REC. S11502 (daily ed. Aug. 6, 1987) [hereinafter Visual Artists Rights Act]. The preamble to the bill reads as follows: "[T]o amend the copyright law to secure the rights of authors of pictorial, graphic, or sculptural works to prevent the distortion, mutilation, or other alteration of such works, to provide for resale royalties, and for other purposes. . . ." *Id.*

<sup>3</sup> *Id.* at § 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Visual Artists Rights Act of 1987, *Hearing on S. 1619 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Judiciary Comm.*, 100th Cong., 1st Sess. 2 (1987) [hereinafter *Hearing on S. 1619*].

<sup>7</sup> *Id.* at 2 (remark of Sen. Kennedy).

which has long made the copyright notice on visual artworks an option.<sup>8</sup> Copyright protection would be granted without artists having to “blemish” their artworks with an unsightly symbol. As Senator Kennedy put it: “Artists are entitled to sign their works, but the Government does not have to sign them too.”<sup>9</sup>

Second, the moral rights provision of this Bill would grant to American artists the rights of paternity and integrity, long enjoyed by their European counterparts. The concept of moral rights, or *droit moral*, comes from the French civil law.<sup>10</sup> The European *droit moral* is a bundle of rights, including the right to create, the right to control the disposition of one’s artwork, and the right of paternity.<sup>11</sup> After an artist makes a decision to communicate his creation to the public, he has an interest in seeing it attributed to him, regardless of whether it is a masterpiece. The right of paternity is primarily intended to protect the creative act itself, rather than an artist’s individual reputation.<sup>12</sup> The right of paternity does, however, include the right of the artist not to have his name attached to a work which he does not acknowledge as his own.<sup>13</sup>

When the work of a particular artist is disseminated, he has an interest in seeing that it retains its original form. The right to integrity primarily depends on a clear and explicit recognition of the intimate relationship between the artist and his creation.<sup>14</sup> Without this right, American artists are virtually foreclosed from a remedy when their works are altered, mutilated, or destroyed—even if this is done intentionally.<sup>15</sup> While several states have en-

<sup>8</sup> See *infra* notes 37-40 and accompanying text.

<sup>9</sup> *Hearing on S. 1619, supra* note 6, at 2 (remark of Sen. Kennedy).

<sup>10</sup> Loi de 11 Mars, 1957, sur La Propriete Litteraire Et Artistique, 1957 J.O. 2723, 1957 B.L.D. (1977)[hereinafter Loi De 11 Mars, 1957].

<sup>11</sup> The European *droit moral* also includes the right to withdraw publication. This right is not part of the Kennedy Bill, mainly because it pertains only to literary artists and not to the visual artists who are the focus of this bill.

<sup>12</sup> L. DuBOFF, *THE DESKBOOK OF ART LAW* 802 (1977) [hereinafter ART LAW].

<sup>13</sup> *Id.* at 803.

<sup>14</sup> *Id.* at 831.

<sup>15</sup> See *Behrens v. City and County of Denver*, No. 79CV1644 (Colo. Dist. Ct. 1980). The artist donated a glass and metal sculpture, “Earth Crystal,” which was vandalized and subsequently suffered extensive water damage. The City of Denver refused to repair the artwork. The artist sued, eventually negotiating a settlement for the repair and maintenance of the sculpture. Denver responded by enacting an ordinance requiring any donated artwork to be accompanied by a fund equal to 10% of its value for repair and maintenance. See *Zahourek v. Johns-Manville Corp.*, No. 79-0417 (Colo. Ct. App., Dec. 20, 1979). In *Zahourek*, an artist sold his painting to defendant corporation for display in one of its offices, retaining the “reproduction rights.” He later discovered his painting had been mutilated, but was unable to collect damages for the vandalism. See also *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (1949), discussed more fully *infra* notes 58-63 and accompanying text.

acted legislation granting the right to integrity,<sup>16</sup> the national character of the art market necessitates moral rights legislation at the federal level. In the proposed Bill, the remedies now available under the current copyright law would apply to the infringement of an artist's moral rights. These include injunction, actual and statutory damages, and attorney's fees.<sup>17</sup>

Generally, European moral rights are inalienable and perpetual in duration, surviving the transfer of the copyright in an artwork. The basis for these rights is not the economic interest of the artist, but the protection of his personality and the integrity of the culture.<sup>18</sup>

The third provision of this Bill would grant visual artists the right to a royalty on resale of their artworks equal to seven percent of the difference between the original purchase price and the resale price, provided the artwork's value has increased at least 150% from the time of the first sale.<sup>19</sup> The resale royalty would apply to qualified sales that occur during the artist's life and within fifty years of his death.<sup>20</sup> While recognizing the resale royalty provision as the most controversial aspect of the Bill, Senator Kennedy urged its adoption because it "alleviates the serious problem of economic exploitation of visual artists" by allowing them "to benefit from such increasing value" of their artworks.<sup>21</sup>

The resale royalty is by no means a novel concept. Like the *droit moral*, the concept of *droit de suite*, or economic rights of the artist, originated in France and is based on the premise that an artist has a right to participate in any exploitative use of his creation.<sup>22</sup> The notion of *droit de suite* has gained some favor in this

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<sup>16</sup> California Art Preservation Act, CAL. CIV. CODE § 987 (West 1982 & Supp. 1989); Art-Preservation from Defacing: Artist's Right to Claim Authorship, 1988 Conn. Acts 284 (Reg. Sess.); Artists' Authorship Rights Act, LA. REV. STAT. ANN. §§ 51:2151 to -56 (West 1987); Massachusetts Art Preservation Act, MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1988); Maine Preservation of Works of Art Act, ME. REV. STAT. ANN. tit. 27, § 303 (1989); New Jersey Artists' Rights Act, N.J. STAT. ANN. §§ 2A:24A-1 to -8 (West 1987); Artists' Consignment Act, N.M. STAT. ANN. §§ 56-11-1 to -3 (1986); New York Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. LAW §§ 5-62-1 to -6 (McKinney 1987); PA. STAT. ANN. tit. 73, § 2101-10 (Purdon 1988); R.I. GEN. LAWS § 5-62-2 to -6 (1988).

<sup>17</sup> Visual Artists Rights Act, *supra* note 2, § 6.

<sup>18</sup> ART LAW, *supra* note 12, at 805; Judgment of Jan. 5, 1850, Conseil d'etat, Paris, 1850 Recueil 'Periodique et Critique [D.P.] III 14, (an artist has an interest in his reputation which is independent of any pecuniary interest).

<sup>19</sup> Visual Artists Rights Act, *supra* note 2, § 3.

<sup>20</sup> *Id.*

<sup>21</sup> Hearing on S. 1619, *supra* note 6, at 2 (remark of Sen. Kennedy).

<sup>22</sup> ART LAW, *supra* note 12, at 857. Germany justifies economic rights for its artists on slightly different grounds; there the assumption is that the value of the artist's work is latent, or "intrinsic" in the work, and only becomes realized upon a later sale. Thus, the

country as well. The city of Seattle, Washington was the first jurisdiction to enact a resale provision as part of its "Art in Public Places" ordinance.<sup>23</sup> California enacted the first statewide resale royalties statute in 1976. The statute provides that when a work of fine art is resold for more than \$1,000 by a California resident, or where the sale takes place in California, the seller must pay five percent of the resale price to the artist.<sup>24</sup>

Those who oppose adopting an American resale royalty right for visual artists posit two principal arguments. One argument is that the resale royalty will benefit only a few, already successful artists. Consequently, only a small number of artists whose work has great resale value would benefit from the resale royalty.<sup>25</sup> Proponents take the position that the resale royalty is analogous to the royalty writers and composers receive under current copyright law. Only a small number of those artists collect royalties, yet the law remains intact.<sup>26</sup> Furthermore, a right to resale proceeds would give artists an incentive to continue to create works of high quality and stimulate public demand, thereby adding to the value of their works already sold.<sup>27</sup>

The opponents of the provision also assert that dealers and collectors will view the resale royalty as a surtax on artwork and will be discouraged from buying and selling in the American art

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German artist has a right to share in the profits from a resale, receiving twenty-five percent of the difference between the present and prior selling price. For a description of the various adaptations of the *droit de suite* and an argument for its adoption in the United States, see 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 (1966); but see Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 Yale L.J. 1333 (1968) (arguing the *droit de suite* is incompatible with existing property law and fails to benefit those artists who most need it).

<sup>23</sup> Seattle, Wa. Ordinance 102210.

<sup>24</sup> CAL. CIV. CODE § 986 (West 1982 & Supp. 1989). The California resale royalties statute survived a constitutional challenge. *Morseburg v. Balyon*, 621 F.2d 972, 975-78 (9th Cir.), cert. denied, 449 U.S. 983 (1980). See *infra* note 184. The Copyright Act of 1909 did not preempt the state resale royalty right and the court indicated that the same result would occur under the 1976 Copyright Revision Act. *Id.* For a study showing wide support for the California resale royalty statute, see Robinson, *BALA (Bay Area Lawyers for the Arts) Surveys Artists and Galleries on Resale Royalties*, BALA-GRAM, Nov./Dec. 1986, at 1, reprinted in part in *Hearing on S. 1619, supra* note 6, at 344.

<sup>25</sup> See, e.g., S. WEIL, *BEAUTY AND THE BEAST* (1983), reprinted in part in *Hearing on S. 1619, supra* note 6, at 103 (between 90 and 99 of every 100 artists never see an increase in the value of their works); but see Letter from Gerhard Rupp to Martin Bressler (Dec. 1, 1987), reprinted in *Hearing on S. 1619, supra* note 6, at 344 (discussing how the German *droit de suite* is helping both known and unknown artists).

<sup>26</sup> *Hearing on S. 1619, supra* note 6, at 115 (remark of Leonard D. DuBoff, Professor of Law).

<sup>27</sup> *Id.* "[I]t has been said that a resale proceeds right has as its purpose that which is stated under copyright law: 'to stimulate and encourage production of artistic works by assuring that an adequate financial reward will accrue to the creator of the work.'" *Id.* (citation omitted).

marketplace. Some opponents further argue that America could lose its supremacy in the art world because of the resale royalty.<sup>28</sup> Although they assert that France suffered a similar decline, no link between France's diminished stature in the art market and the *droit de suite* has been shown. France's experience probably has more to do with its failure to maintain its position as a world power since the Second World War.<sup>29</sup> Furthermore, the fact that the nation's art center, New York, has a fairly high sales tax has not caused the art market to relocate to a state which has no sales tax.<sup>30</sup> Only those dealers who view art as a fungible commodity will be adversely affected by the resale royalty provision. Collectors who place the aesthetic value of art above its economic value will continue to buy what they like.<sup>31</sup> The return on such investments is the pleasure of owning the work of art.<sup>32</sup> Senator Kennedy noted that the battle lines on this issue seem to be drawn between the dealers and the artists, with artists supporting the resale royalty and dealers opposing it.<sup>33</sup>

After considering the testimony received at the December, 1987 hearing, an amended bill was introduced in October, 1988 ("Kennedy Bill").<sup>34</sup> The Kennedy Bill eliminates the resale royalty provision, replacing it with a mandate for a one year study, to be carried out jointly by the National Endowment for the Arts and the United States Copyright Office. The study is to determine "the feasibility of implementing new initiatives to enable . . . [visual artists] to participate in the commercial exploitation of

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<sup>28</sup> *Id.* at 304 (remark of Michael L. Ainslie, President, Sotheby's Holdings, Inc.).

The reasons for that [enormous growth in the field of collecting works of art in recent years], in my view, are the fact that the United States and the United Kingdom are the two, and perhaps only two, largely unregulated art markets in the world. France has fallen from preeminence. Certainly I would not blame it entirely on the "droit de suite" legislation, but upon that and a number of other regulations that the Government there has imposed.

*Id.*

<sup>29</sup> *Hearing on S. 1619, supra* note 6, at 112 (statement of Professor DuBoff). "We have seen France lose many of its colonies, we have seen France decline economically, and I would be very surprised if its loss of colonies . . . can be attributed to the 'droit de suite.' Indeed, there are other historical problems." *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 116. "The argument that dealers will not resell contemporary art applies only to the dealer . . . who, with no emotional ties to the work, holds the art only to profit by selling it." *Id.*

<sup>32</sup> See ART LAW, *supra* note 12, at 364.

<sup>33</sup> *Hearing on S. 1619, supra* note 6, at 321 (remark of Sen. Kennedy): "We have the dealers saying they are speaking for the artists, but the artists are coming up with a different message, and that is something we have to consider." *Id.*

<sup>34</sup> Visual Artists Rights Act, S. 1619, 100th Cong., 2d Sess. reprinted in 36 PAT. TRADE-MARK & COPYRIGHT J. (BNA) No. 892, at 384-386 (Aug. 11, 1988)[hereinafter Kennedy Bill].

their work after the first sale of such work."<sup>35</sup> Within one year of the legislation's enactment, the two government bodies are to submit a joint report on the results of the study and make recommendations to Congress based on those results.<sup>36</sup>

The United States' accession<sup>37</sup> to the Berne Convention,<sup>38</sup> effective March 1, 1989, moots the copyright notice provision in the prior Kennedy Bill.<sup>39</sup> What remains in the Kennedy Bill is the moral rights provision, granting visual artists the rights to paternity and integrity.<sup>40</sup> These rights include the artist's ability to claim authorship of any of his works of visual art which are publicly displayed, or to disclaim authorship because of any intentional or grossly negligent mutilation or alteration of the work that harms the reputation of the author.<sup>41</sup> These rights will survive the transfer of the artist's copyright in his work, and can not be waived, assigned, or vicariously asserted by anyone other than the artist during his lifetime.<sup>42</sup> The moral rights do not attach to works of visual art that are affixed to buildings and that may not be removed without mutilation or alteration, absent execution of a properly recorded instrument prior to the commission for such a work.<sup>43</sup>

The proposed legislation would apply to two- or three-dimensional works of *fine* art in single copy or in multiples of no more than two hundred.<sup>44</sup> Utilitarian art is expressly excluded. However, the Kennedy Bill's exclusion of crafts artists such as

<sup>35</sup> *Id.* at § 8(a).

<sup>36</sup> *Id.* at § 8(c).

<sup>37</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 9, 102 Stat. 2853 (1988) [hereinafter Berne Implementation Act].

<sup>38</sup> Convention concerning the Creation of an International Union for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971, reprinted in 4 M. NIMMER, NIMMER ON COPYRIGHT App. 27 (1985) [hereinafter Berne Convention].

<sup>39</sup> The United States was one of the few remaining notice jurisdictions in the world; in most other countries, the copyright notice has long been optional for works of visual art. See, e.g., DuBoff & Caplan, *Creativity and Copyright*, OR. ST. B. BULL., Jan. 1989, at 7.

<sup>40</sup> Kennedy Bill, *supra* note 34, § 3. The following provision would be inserted after § 106 of the Copyright Act:

(a) Independent of the copyright owner's exclusive right provided in section 106, the author of a work of visual art, whether or not he is the copyright owner, shall have the right during his life to claim authorship of any of his works of visual art, which are publicly displayed or to disclaim authorship of any of his works of visual art, which are publicly displayed because of any substantial mutilation or alteration thereof that harms the reputation of such author.

*Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at § 4.

<sup>44</sup> *Id.* at § 2.

weavers, potters, and glass artists is unnecessarily discriminatory, especially when many states, including Pennsylvania<sup>45</sup> and Massachusetts,<sup>46</sup> regard craftspeople as "fine artists" for some purposes.<sup>47</sup> Discrimination based on the medium in which one works or the shape of the art one creates is unfair.<sup>48</sup> Consequently, the scope of the Kennedy Bill should be expanded to include crafts artists.

In January 1988, the Art Law Section of the Association of American Law Schools met in New Orleans, Louisiana, to consider the proposed legislation. Speakers focused on the various provisions of the Bill. Professor Leaffer, of the University of Toledo College of Law, examined the current American copyright law's inability to protect the rights of the visual artist.<sup>49</sup> Professor Leaffer also urged the adoption of moral rights legislation that will extend protection to visual artists beyond the pecuniary rights that the Copyright Act currently confers. Professor Goetzl, of Golden Gate University School of Law, and one of the leading California art lawyers, discussed the California Art Preservation Act and the state's five percent resale royalty statute.<sup>50</sup> Professor Goetzl, who has personally drafted much of the state's art legislation, favored the adoption of a national resale royalties provision. Finally, Mr. Edelson, of the New York law firm of Rosenman and Colin, spoke in opposition to resale royalty.<sup>51</sup> Mr. Edelson referred to the resale royalty as "compulsory profit-sharing," and he asserted that a regulated art market in America will hurt artists because collectors will buy and sell their art works in markets that do not impose resale royalty.

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<sup>45</sup> PA. STAT. ANN. tit. 73, §§ 2121-30 (Purdon 1988). Section 2122 defines an artist as "[A]n individual who is the creator of a craft or work of fine art." *Id.* § 2122.

<sup>46</sup> MASS. GEN. LAWS ANN. ch. 104A, §§ 1-6 (West Supp. 1989).

<sup>47</sup> *Id.* Section 1 defines fine art as "a painting, sculpture, drawing, work of graphic art, including an etching, lithograph, offset print, silk screen, or work of graphic art of like nature, a work of calligraphy, or a work in mixed media including a collage, assemblage, or any combination of the foregoing media." *Id.* at § 1.

<sup>48</sup> *Hearing on S. 1619, supra* note 6, at 118 (remark of Prof. DuBoff): "The protection afforded under the copyright statute as it exists today and that promised by S. 1619 should be expanded to protect these [crafts] people as well. Works created in utilitarian shapes are discriminated against even though their contribution to society is substantial. . . ."

<sup>49</sup> This inability has been somewhat altered by the United States' accession to the Berne Convention and the protection the Convention affords artists. *See supra* notes 37-38. *See generally infra* notes 52-141 and accompanying text.

<sup>50</sup> *See generally infra* notes 142-210 and accompanying text.

<sup>51</sup> *See generally infra* notes 211-37 and accompanying text.