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Friction as Artists File Suit Over Resale Royalties

By PATRICIA COHEN
Published: November 1, 2011

When the taxi baron Robert Scull sold part of his art collection in a 1973 auction that is considered the beginning of today's money-soused contemporary-art market, several artists watched the proceedings from a standing-room-only section in the back. There, Robert Rauschenberg saw his 1958 painting "Thaw," originally sold to Scull for \$900, bring down the gavel at \$85,000. At the end of the Sotheby Parke Bernet sale, Rauschenberg shoved Scull and yelled that he didn't want to work so hard "just for you to make that profit."

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The artist Chuck Close.

The uproar that followed led the California legislature to pass a law, the California Resale Royalties Act, requiring anyone reselling a piece of fine art who lives in the state, or who sells the art there for \$1,000 or more, to pay the artist 5 percent of the resale price.

That law is now at the center of a pair of class-action suits brought by the artists [Chuck Close](#) and Laddie John Dill and the estate of the sculptor Robert Graham against the auction powerhouses [Sotheby's](#) and [Christie's](#) and the online auction site [eBay](#) for failure to pay royalties.

"It's a question of basic fairness," Mr. Close said recently in an interview. When purchasers are getting extraordinary returns on their investment, he said, a royalty resale law allows the artist to share, at least in a small way, in the increase in value. (Under the California law, no payment is due if the price drops.)

The suits do not specify damages, nor do they list specific sales of art by California residents. Rather, as Eric George, the lawyer who filed them, explained, the complaints seek to force the auction houses to reveal the identities or locations of sellers: information that is often kept secret.

"What's so perverse," Mr. George said, is that the houses conceal "the very information necessary to know whether a royalty is due."

The California law, which applies to living artists and those who have died in the past 20 years, states that if the seller is not able to locate the artist within 90 days, he or she is required to send the payment to the California Arts Council, a state agency charged with locating the creators.

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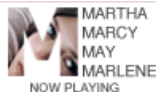
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Sotheby's responded to the suit with a terse statement: "We believe the claim is meritless, and it will be vigorously defended." Christie's said that it "views the California Resale Royalties Act as subject to serious legal challenges" and that it "looks forward to addressing these issues in court." The law has so far survived two legal challenges, and experts in art law are divided about whether it might be vulnerable on constitutional grounds.

The larger issue of whether visual artists should receive a cut of future sales remains a subject of vigorous debate. Dozens of countries already have a version of a resale royalties law, generally referred to by the French phrase *droit de suite*. Starting in 2012, Britain and other members of the European Union will adhere to a uniform standard that applies to both living artists and those who have died within the past 70 years. Indeed, Christie's, on its Web site, informs prospective clients that it collects the royalty mandated at the time of the sale.

For many visual artists, the issue is clear. "We need legislation to enact the right to royalties," said Frank Stella, the president of the International Council of Creators of Graphic, Plastic and Photographic Arts, "and we need to align it with what goes on in Britain and the E.U." Literature, music, film, computer programming and patents all have better intellectual-property protection than American visual art, Mr. Stella added. The Visual Artists and Galleries Association, a nonprofit group that seeks to protect the intellectual-property rights of artists, also supports a national law.

The idea has never really caught on in the United States, though, and California remains the only state that requires royalties when a painting is resold. In 1986 Senator Edward M. Kennedy was unsuccessful in efforts to include a similar provision in the national Visual Artists Rights Act. And a study by the Copyright Office in 1992 concluded that it was "not persuaded that sufficient economic and copyright policy justification exists to establish *droit de suite* in the United States."

In the 34 years that the California law has been in effect, about 400 artists have received a total of \$328,000, said Patty Milich, the resale royalty act coordinator at the California Arts Council. That list includes the estates of the Grateful Dead guitarist Jerry Garcia (who made drawings), Jean-Michel Basquiat, Albert Hirschfeld and Larry Rivers.

Most artists and galleries either don't know about the law or ignore it, several art lawyers in California said. People often don't realize, for example, that if a California hotel with paintings on the walls changes ownership, or if a donated sculpture sells for more than its original price at a fundraising auction, a royalty may be due.

Sellers, museums and galleries generally dislike the idea, which they view as an added tax that raises the cost of doing business and cuts into profits. And the law's main beneficiaries, those opposing it contend, are artists who need it the least: those, like Mr. Close or Mr. Stella, whose work is famous enough to sell again and again.

Opponents add that resale royalties can hurt new artists selling their work for the first time — on what is known as the primary market — by reducing future resale value.

Some artists agree. In 2006, when Britain agreed to adhere to the European Union's policy on resale royalties, David Hockney argued: "The arrival of this levy will do little or nothing for the vast majority of British artists. It will undoubtedly envelop the market, on which we as artists depend, in red tape, and it will discourage art dealers from buying particularly the work of emerging artists."

According to one study of the *droit de suite* in France, approximately 70 percent of the royalty payments went to the estates of a handful of famous 20th-century artists, like Picasso. Still, in California, Ms. Milich said that while it was easier for well-known artists to track resales, "I have contacted artists with a \$2,000 royalty, and they were really happy

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John Henry Merryman, a law professor at Stanford University and an expert on art and cultural-property law, said that advocates of the droit de suite ignore how the art market operates. The increased price for Rauschenberg’s “Thaw” at the Scull auction was due not only to the artist’s continuing creative efforts, he said, but also to the dealers, collectors, auction houses and critics who took a risk in supporting and buying Rauschenberg’s work before he was famous. He noted that the increased price for a single painting simultaneously raises the value of all the artist’s work.

Mr. Merryman dismissed the argument that the droit de suite was analogous to music or literary royalties. “The idea that somehow artists are hurt because they don’t have copyright is nonsense,” he said. Artists retain copyright and must be compensated if their work is reproduced. The difference, he explained, is that “the realization of a work of art is in exhibition, not in duplication.”

The Whitney Museum of American Art at one time compensated artists for exhibiting their work. The idea never caught on, but it makes more sense, Mr. Merryman said.

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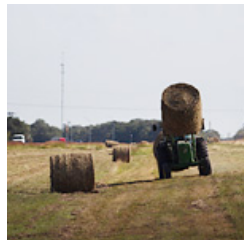
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