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Expert Analysis

Should Visual Artist's Resale Royalty Right Be Considered a 'Copy' Right?

By
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On Feb. 26, 2014, Congressman Jerrold Nadler (D-N.Y.) introduced a bill, H.R. 4103, to the U.S. House of Representatives called the "American Royalties Too Act of 2014," or the "ART Act."[1] Senators Edward Markey (D-Mass.) and Tammy Baldwin (D-Wis.) introduced similar legislation, S.2045, on the same day.[2] The ART Act would amend the U.S. Copyright Act, 17 U.S.C. §§101, et seq., to provide for a resale royalty right for the authors of certain "works of visual art."

The ART Act is conceived upon the following principle: Visual artists (such as painters, photographers and sculptors) who have sold their works should be entitled to share in the later appreciation of the value of those works, at least to some extent, if and when the art is subsequently resold. This principle is embraced and known in other parts of the world as "droit de suite." As Baldwin, one of the ART Act's sponsors, explains:

> Artists and arts organizations make valuable contributions to our communities and strengthen our quality of life. Just as our copyright laws extend to musicians and authors to encourage their artistic creativity, they should also apply to our visual artists.[3]

The ART Act's purpose of incentivizing visual artists to contribute to the cultural fabric of our society is certainly commendable. And, in one sense, the ART Act may seem to accord with the Copyright Clause of the U.S. Constitution in that Congress is empowered "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[4]

Nevertheless, the ART Act conflicts with a basic philosophical underpinning of the Copyright Act, which would appear difficult for the courts to reconcile in the absence of greater instruction from Congress.

Unlawful Copying

As its name implies, the Copyright Act protects against the unlawful copying of protected works.[5] Generally speaking, the statute protects against the infringement of certain enumerated "exclusive rights" of copyright holders, including the rights "to reproduce the copyrighted work," "to prepare derivative works based upon the copyrighted work," "to distribute copies or phonorecords of the copyrighted work," and "to perform" and "display the copyrighted work publicly" in certain ways.[6] Visual artists are also afforded special "rights of attribution and integrity" to prevent "any intentional distortion, mutilation, or other modification" of their works that might harm their reputations.[7]

What the Copyright Act expressly does not legislate, however, is the transfer of legal title to physical works that embody copyrights.[8] Section 202 of the Copyright Act makes clear:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Similarly, Section 109(a) of the Copyright Act, known as the "first sale doctrine," provides that "the owner of a particular copy…is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy."[9] The legal owner of an original work of art owns that "particular copy" and may dispose of it as she/he desires, without regard for the artist (i.e., the "copyright owner").

Thus, the Copyright Act distinguishes legal "property rights in any material object" from the intangible "copyright" attendant to that object: The Copyright Act legislates the latter but not the former. That is because the Copyright Act legislates unlawful copying for limited times, not the permanent legal transfer of objects themselves.

The ART Act appears to run contrary to Sections 202 and 109(a) of the Copyright Act. The ART Act proposes to amend Section 106 of the Copyright Act to include a new "exclusive right" for visual artists: the right "to collect a royalty for the work if the work is sold by a person other than the author of the work for a price of not less than $5,000 as the result of an auction."[10] Moreover, the ART Act proposes to enlarge the Copyright Act's definition of "infringement" to include not just unlawful copying, but also the "[f]ailure to pay a royalty provided for under this subsection."[11]

In other words, the ART Act proposes now to use the Copyright Act to redistribute wealth based upon the transferred ownership of physical objects embodying certain "works of visual art." The ART Act is unconcerned with the question of whether those works of visual art have been copied, only whether the work has been resold through certain forums (i.e., certain auction houses). This would fundamentally repurpose the Copyright Act in discord with Section 202 as well as the first sale doctrine. It is not clear how the courts would reconcile those provisions of the Copyright Act with the ART Act in the absence of greater congressional direction.

An Apparent Conflict

"Display" under the Copyright Act means the showing of a "copy" of a work.[12] Under the first sale doctrine, however, the owner of the physical art to be sold (i.e., the "particular copy") "is entitled, without the authority of the copyright owner, to display that copy publicly, either

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directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."[13] Thus, the owner of a work of visual art currently may cause the work to be displayed, and sold, physically at an auction without the artist's involvement.[14]

Other copies of the work displayed, for example, in an auction house's catalogue, may require the permission of the artist (the copyright owner), but the Copyright Act already provides the artist with whatever protection may be warranted. The ART Act does not purport cumulatively to address those separate "displays" of other copies of the art. Rather, the ART Act goes a step further and seeks to reward the artist for the possible economic consequences following all of a work's combined "displays" at an auction—even if the sale was based on a display of the physical work itself, for which the owner required no artist/copyright owner permission under the first sale doctrine. The ART Act does not seem philosophically tethered to other sections of the Copyright Act in this regard.

Moreover, the ART Act would create a distinction between the sales of physical objects in the "visual art" context, and the sales of physical objects in all other contexts, such as music and film. As quoted above, this distinction has been justified as providing a means for visual artists to be on a compensatory par with musicians and literary authors, who typically continue to receive royalties based upon the later sales of copies of their original works.

But visual artists, too, retain copyrights in their works after they have sold the physical embodiments of their works. Furthermore, in recognition of the reality that copyrighted works may appreciate in value, Section 304 of the Copyright Act entitles all authors to renew the terms of their copyright protection so as to exercise greater bargaining leverage later.[15] There is no discriminatory treatment within the current language of the Copyright Act that would put visual artists at a disadvantage for the later copying of their works.

Rather, the ART Act proceeds upon a more practical and market-based reality that works of visual art, unlike works of music and literature, are not often copied because there is not a significant demand for copies of visual art: Art purchasers and collectors tend to value originals. Of course, that same market-based reality dictates that visual artists may command relatively higher prices for the one-time sales of their works.[16]

In any event, the ART Act proposes to transform the Copyright Act beyond its generally stated intent of granting exclusive intangible rights (copyright protection) for limited times to authors. The ART Act would use the Copyright Act effectively to vest certain visual artists with more expansive reversionary rights of co-ownership in the tangible works of art themselves for resale purposes, as opposed to the copyrights embodied therein. This is not the historical province of the Copyright Act, and Congress may wish to consider how to reconcile its effort to codify droit de suite with Sections 202 and 109(a) of the act.

Unconstitutional Taking

Whether Congress views its power to regulate the resales of visual works of art as derivative of the Copyright Clause of the Constitution, or perhaps the Interstate Commerce Clause, the Fifth Amendment's Taking Clause may override all such possible sources of legislative authority with regard to previously purchased works of visual art.[17]

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The Taking Clause provides that "private property [shall not] be taken for public use, without just compensation."[18] Taking Clause cases have produced "two polar propositions [that] are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of 'A' for the sole purpose of transferring it to another private party, B, even though A is paid just compensation. On the other hand, it is equally clear that a state may transfer property from one private party to another if future 'use by the public' is the purpose of the taking."[19]

The ART Act would require the owners of certain visual works of art to share their resale proceeds with the artists. An "owner" of such art would have to be viewed as holding her property in partial constructive trust for the artist. The ART Act would thus override traditional notions of property ownership, which may be viewed as a "regulatory taking" by the federal government, at least to the extent that the ART Act does not purport to exempt works of visual art purchased prior to the proposed act's effective date.[20]

The Supreme Court "has identified several factors that should be taken into account when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking.' Among those factors are: 'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[21]

The "character of the governmental action" inherent in the ART Act can be viewed as intrusive of property rights and the meaning of "ownership": persons who otherwise own certain kinds of property (certain works of visual art) would no longer be entitled to profit equally from the resale of their property.[22]

Likewise, the ART Act "economically impacts" the property of owners of certain works of visual art, in that it threatens to "impair the value or use of property" according to how such owners may generally be understood to use their visually artistic property.[23] The ART Act was conceived to address the reality that many owners of visual art sell their art precisely to realize a substantial appreciation in value. That is the very intended use that the ART Act intends to impact. For the same reason, the ART Act may be understood to interfere with "reasonable investment-backed expectations" of owners of visual artworks.[24]

As also discussed above, there is a well-established legal tradition that authors of art are entitled to copyright protection after selling the physical embodiments of their works, but that the Copyright Act does not extend to the physical works themselves. The ART Act can be understood to interfere with those expectations as well.

Finally, on its face, the ART Act would transfer money from party A (owners of works of visual art) to party B (artists), without any future "use by the public" contemplated. Nor is any "just compensation" offered to the owners who would be reselling their art and having to share a portion of the proceeds with the artists.

Conclusion

The ART Act's purpose is laudable. Nevertheless, the Copyright Act is not a blank canvas. The ART Act creates conflicts with Sections 202 and 109(a) of the Copyright Act, and possibly to some extent with the Taking Clause as well. If Congress does not consider these legal issues now, it is likely federal courts will have to struggle with them in the future.

1. H.R. 4103, 113th Cong. (2013-2014).
2. S.2045, 113th Cong. (2013-2014).
3. www.markey.senate.gov/news/press-releases/markey-baldwin-and-nadler-introduce-legislation-to-level-the-playing-field-for-american-visual-artists.
4. U.S. Const., art. 1, §8, cl. 8.
5. E.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).
6. 17 U.S.C. §§101, 106, 501.
7. 77 U.S.C. §106A.
8. 17 U.S.C. §202.
9. 17 U.S.C. §101.
10. 17 U.S.C. §109(c).
11. See also http://nysbar.com/blogs/EASL/2012/02/use_of_art_images_in_gallery_a.html.
12. 17 U.S.C. §101.
13. 17 U.S.C. §109(c).
14. See also nysbar.com/blogs/EASL/ 2012/02/use_of_art_images_in_gallery_a.html.
15. See also *Stewart v. Abend*, 495 U.S. 207, 218-19 (1990) ("The renewal term permits the author, originally in a poor bargaining position, to renegotiate the terms of the grant once the value of the work has been tested.") (citation omitted).
16. It is nonetheless clear that the economic potential of visual art may not be realized until later in or even after an artist's life.
17. U.S. Const., art. 1, §§3, 8, amend. V; see also *Estate of Robert Graham v. Sotheby's, Inc.*, 860 F.Supp.2d 1117 (C.D. Cal. 2012) (striking down California Resale Royalty Act on Interstate Commerce Clause grounds) (currently on appeal).
18. U.S. Const., amend. V.
19. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).
20. H.R. 4103, §7 ("This Act and the amendments made by this Act shall take effect on the date that is 1 year after the date of enactment of this Act.")
21. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).
22. See *Monsanto*, 467 U.S. at 1002; *Armstrong v. United States*, 364 U.S. 40, 48 (1960).
23. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).
24. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring).