Resale Royalty and the Primitive Artist

Anne Coladarci

Follow this and additional works at: https://via.library.depaul.edu/jatip

Recommended Citation
Available at: https://via.library.depaul.edu/jatip/vol4/iss2/3

This Case Notes and Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
RESALE ROYALTY AND THE PRIMITIVE ARTIST

Anne Coladarci*

I. INTRODUCTION

In 1939, Bill Traylor was living on the streets of Montgomery, Alabama. Born into slavery in 1854, on a plantation near Benton Alabama, he was emancipated at age 11, but continued to live and work on the plantation until 1938, when the last members of the white family that had owned him died and the plantation was sold. Penniless, he walked to Montgomery, where, after working briefly in a shoe factory, he became homeless and slept on a pile of rags between caskets in a Montgomery funeral home.

From 1939 to 1942, Traylor drew pictures of people, animals and scenes from the streets of Montgomery on pieces of cardboard which he hung on a clothesline for sale. Charles Shannon, now in his eighties, bought the brightly colored drawings that Traylor was selling for as little as five cents. Mr. Shannon, who was an artist himself, provided material and supplies to Traylor, organized local exhibits, and bought most of his work.

Bill Traylor died in 1947. During the past fifteen years, Traylor's work has been recognized as some of the most important of the genre known as 20th Century American Folk Art. Sotheby's recently sold a piece of Traylor's work for $20,000. A book entitled Bill Traylor, His Art, His Life was published by Knopf in 1991, and sells for $50.00 a copy. His work is highly coveted, is in permanent collections in many museums, including the Museum of American Folk Art in New York and has been the subject of numerous shows and articles.

In August, 1991 at a family reunion in Atlanta members of Bill Traylor's family learned for the first time about their ancestor, and the importance of his

* Anne Coladarci will graduate from DePaul University College of Law in May of 1994.
6. Id.
7. Id.
8. Id.
artwork. In November, 1992, the family filed a lawsuit against Charles Shannon, his wife, and Hirschl & Adler Galleries, which has acted as Mr. Shannon’s dealer in New York, claiming that Bill Traylor’s artwork belongs to them. New York was chosen as the state to bring suit because of a favorable ruling in a case involving an art theft from the Guggenheim which allowed the museum to sue a private collector to recover a stolen work despite the passage of time. In *Guggenheim Foundation v. Lubell,* the court upheld the application of the Demand and Refusal Rule to defeat a statute of limitations defense. The court held that a cause of action to recover the stolen art did not accrue until the museum made a demand for its return, and that demand was refused by the good-faith purchaser to whom the stolen works had subsequently been sold. The New York court further held that the museum had no duty to exercise reasonable diligence to recover the stolen work, and that its failure to do so did not trigger the three year statute of limitations for causes of action in replevin. The significance of this ruling in the Traylor case is obvious: Traylor’s art work was acquired by Shannon over fifty years ago. Any action in replevin against Shannon would be barred by the statute of limitations without the Demand and Refusal Rule, especially if Shannon could prove that members of the Traylor family were aware of the existence of the art work prior to the lawsuit in 1992.

The issues in the lawsuit concern whether Charles Shannon stole the art work, whether he paid a fair price for the art work, whether Bill Traylor was the victim of racial exploitation, whether the art work that Mr. Shannon bought from Bill Traylor could be categorized as “work for hire”, whether Mr. Shannon properly protected the copyright, whether Mr. Shannon can prove legal ownership, and whether the Traylor family should be entitled to a share of the proceeds from any subsequent sales.

The resale royalty right, or *droit de suite* as it is more commonly known, will be the subject of this Article. In addition I will discuss the effects of a federal statute enacting the Berne Convention on artists and their heirs, collectors, galleries and the marketplace, as well as on existing state legis-

15. The *droit de suite* is the right of an artist to collect a royalty on the price paid for a piece of his art work when that piece is resold. It is based on the concept that an artist retains a right in his work and that his continuing efforts as an artist that add value to the already existing works. The *droit de suite* recognizes the distinction between literary and musical works that can be protected by copyright law, and a visual artist’s work, which is typically an individual piece, sold to a single buyer. Executive Summary, *infra* note 22, at ii.
17. *Id.* Article 14ter of the Berne Convention.
litation. I will also attempt to discuss whether the resale royalty right is in line with the express purpose of federal copyright legislation (the Copyright Act of 1976), and whether that purpose is sufficient to meet the needs of our society and the artists themselves, and how a federally enacted resale royalty right would affect the recently enacted Visual Artists Rights Act of 1990. I will attempt to frame this discussion around the problems posed by Bill Traylor and other similarly situated American folk artists, because by definition, the folk artist is usually naive, poor, lacks bargaining power, and as an artist, typically lacks any of the trappings, such as an art degree, which would indicate to the courts that his work should be classified as art meriting legislative protection.

Because the folk artist, by virtue of his naivety and vulnerability is easy prey for exploitation, legislative protection would appear desirable. On the other hand, the art is often so primitive and unusual, the artists themselves so innocent and seemingly fragile, that subjecting their work to the scrutiny of a court in order to determine whether it meets the statutory standard for fine art, and thus is capable of protection, risks the threat of arbitrary classification of the work by a possibly insensitive court. It is the very unique, individualistic quality of the art which inherently defies classification. Legislative protection could inadvertently destroy those unique qualities by establishing guidelines and forcing the art to fit within them.

Furthermore, registration requirements would in all likelihood not be met by the primitive artist, who often lives in a remote area, is typically uneducated, and, initially at least, does not create to make money, but rather to answer an inner voice or vision. It seems equally unfeasible to expect a primitive artist to protect his rights through contract.

Curiously, the folk artist is the exact embodiment of the romantic view of an artist that inspired the concept of the droit de suite in the first place.

The Droit de suite evolved...from a conception of art, the artist, and the way art is sold. At its core is a vision of a starving artist, with his genius unap-
preciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece. The painting is sold for a pittance... the purchaser is a canny investor who travels about artists' hovels trying to pick up bargains which he will later turn into large amounts of cash. Thirty years later the artist is still without funds and his children are in rags; meanwhile his paintings, now the subject of a Museum of Modern Art retrospective, and a Harry Abrams parlor-table book, fetch small fortunes at Parke-Bernet and Christie's.

II. THE MORAL RIGHTS

The concept of a resale royalty right embraces the natural rights theory that an artist retains an interest in his creation after he has sold it. That, by his labor and his creativity, the artist has actually infused the art with a part of himself; that the art work is in fact a part of his individual, psychological identification, and exists independently of its qualities as property. It is the recognition of this interest which would allow an artist to continue to retain some control over his art work after he has parted with it. In order to properly understand the resale royalty right, or droit de suite, the discussion necessarily must start with an explanation of the droit moral, or moral right, in which an artist retains certain rights in his art work after he sells it.

Historically, there are two divergent rights that arise from an artist's creation of his art. One right is the economic right, based on the view of the art as a chattel, which in the U.S. has emerged into the statutorily created copyright protection. The other is the personal right, the theory of which is clearly manifested in French law. This theory stems from the romantic conception, arising from a natural rights view, that the integrity of the artist, the work's cultural value, and therefore public interest, reside in artwork beyond its sale to a third party. The rights that an artist retains in his works are called moral rights, or the droit moral.

In France, these moral rights derived originally from common law and were statutorily enacted in 1957. Personal, perpetual, inalienable, unassignable, and

28. Hauhart, supra note 26, at 56.
inheritable by the artist's heirs, the *droit moral as it is known in France is a bundle of rights*. These include the right of creation, the right of disclosure, the right to withdraw, the right to claim authorship, and the right of integrity, which is the right to preserve work from alterations and modifications, destruction or mutilation. 30

These rights are personal to the artist, and survive regardless of contract or sale. The touchstone of liability is damage to the reputation of the artist. 31 Deriving from notions of paternity, the rights that protect the art work and the artists' interests in the artwork are equitable, rather than economic. 32 This is the source of conflict with the United State's law. Statutory copyright, as well as common law copyright is designed to protect an author's economic interest, rather than the integrity of the work itself or the personal rights of the artist in the artwork. 33 It is from the early divergence of natural law and positive law that the modern dilemma between moral rights and statutory protections for artists and authors emerges. 34 Natural law has as its basis the belief that universal fundamental truth exists, and may be recognized through the use of reason and conscience. 35 Natural law concepts recognize the inviolability of an author's personality in his work. 36 Positive law, on the other hand, is a product of state-enforced social relationships where man is protected or constrained from acting by the power of the state. 37 Positive law protects an author's personality in his work only through state common law actions: breach of contract, unfair competition, invasion of privacy, defamation. 38

Natural right theories of jurisprudence may be traced back to the Greek Philosophers, in particular Plato and Aristotle. 39 These theories were later transformed during the period of the Stoics into the concept of *jus gentium*, or law...
of Nations; a concept of law that is universal in its application to all people. Emphasizing what is ethical and just, the *jus gentium*, and a basically identical theory, *jus naturale*, became the basis of the Roman Law. Because these concepts were based on natural reason, they were used to override local positive laws, customs, and ordinances. Natural rights concepts predated the idea of property rights as the basis for a legal system. Natural Law theorists argue that positive law was formed in order to provide protection for the moral rights and duties that are imposed by God in a state of nature, and which are discernible through the use of reason. Interestingly, it was the problems of plagiarism, censorship, misappropriation and mutilation of literary documents that spurred Cicero and Gaius to introduce natural law theories into Roman law. These theories would arise later as moral rights to protect authors.

The debate has gone back and forth through history: whether positive law emanates from natural law concepts, or whether the origin of positive law was a product of utilitarian use of the state to order society. The rise and fall of the current popular attitude corresponds with social and industrial evolution: In the seventeenth and eighteenth century, the periods of individualism and rationalism, the natural rights doctrine was in the forefront with its adherence to the belief that innate rights issued from the very nature of man as a rational being. The Industrial Revolution saw an emphasis on science, empirical thinking and a distinct movement away from the metaphysical emphasis of natural law theories.

Natural Law and a value-oriented approach to thinking, which emphasized human rights, resurfaced in the twentieth century. It is from this period, which was influenced by earlier natural rights declarations, such as the American Declaration of Independence and the French Declaration of the Rights of Man, that the Berne Convention, with its doctrine of moral rights emerged.

41. E. Patterson, *Jurisprudence Men and Ideas of the Law* 342 (1953); *Jus gentium* was a distinct body of legal concepts developed by Roman Jurists for litigation involving claims not only of Roman citizens, but of foreigners as well.
42. The difference between the *jus gentium* and the *jus naturale* appears to be that the *jus gentium* tolerated slavery, and thus was the law common to all free men, while the *jus naturale* was common to all men. E. Patterson, *Jurisprudence Men and Ideas of the Law* 344 (1953).
44. Hauhart, *supra* note 26, at 54.
46. Hauhart, *supra* note 26, at 59 (*citing J. Muirhead, The Institutes of Gaius and Rules of Ulpian I, § 1 (1904)). Marcus Tullius Cicero (B.C. 106-43) was a Stoic follower, famous as an orator, a politician, and a lawyer. Cicero espoused "true law": a concept that transcended laws and customs of different nations, and "right reason" which existed in nature, in the universe, and in the minds of the most learned men. Gaius (c. 110-180 A.D.) was a Roman jurist who stated that the source of *jus gentium*, the universal aggregate of laws, was the natural reason of man, or naturales ratio.
48. Id. at 60.
51. Id. (*citing N. Korkunov, General Theory of Law 379-80 (1909)).
III. THE BERNE CONVENTION

The Berne Copyright Convention is a unilateral, international copyright treaty which affords adhering nations broad protections of moral rights. Formally recognized as part of the Universal Declaration of Human Rights, it is a powerful assertion of natural rights and natural law. Adopted by 12 countries in 1886, it now has eighty-two signatory nations. The Berne Convention is dedicated to the idea of universal copyright protection and provides that the citizens of its member states are afforded the same degree of protection that each state has provided for its own citizens. The Berne Convention is administered by the World Intellectual Property Organization (WIPO).

The moral rights provision of the Berne Convention for the Protection of Literary and Artistic Works was added to the Convention in 1928. It establishes certain minimum moral rights and ensures mutuality between member countries. Article 6bis recognizes two aspects of intellectual property: the economic rights, and, independent of the economic aspect, the personal rights. The legal protection of the personal, or natural rights is the droit moral.

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work, and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

There are two moral rights recognized in article 6bis: the right of attribution, which is the artist's right to claim authorship of his work and to control the association of his name in the work, and the right of integrity, or respect, which is the right to protect the integrity of the author and his work. The right

52. The Berne Convention, supra note 16.
53. Hauhart, supra note 26, at 62, see UNIVERSAL DECLARATION OF HUMAN RIGHTS, GENERAL ASSEMBLY OF THE UNITED NATIONS ARTICLE 27 (1948).
54. Hauhart, supra note 26, at 62.
57. Ross, supra note 55, at 364.
58. Id.
59. The Berne Convention, supra note 16, art. 6bis (hereinafter Article 6bis).
60. Engvall, supra note 56, at 352. (The Rome Convention of 1928).
61. Id.
62. Id. at 350.
64. Berne Convention supra note 16, Article 6bis(1).
65. Damich, supra note 63, at 949.
of respect protects the artwork against mutilation, distortion, and any "other derogatory action in relation to the said work which would be prejudicial to his honor or reputation." 67

The protections provided by Article 6bis are broad. They are not limited to works of visual art. 68 Article 2(1) states: "The Expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be its mode or form of its expression." 69 The term of the Article 6bis protection requires that moral rights last as long as economic rights. 70 Currently, those rights provide for protection for the life of the author plus 50 years. 71 The right is descendible. Article 2(6) provides that: "This protection shall operate for the benefit of the author and his successors in title." Article 6bis also provides that, after the death of the artist, the rights descend in accordance with the laws of the country where the rights are implemented. 72

Other moral rights provided by the Berne Convention are the rights of anonymity and pseudonymity, 73 which protect an author's wish to remain anonymous or to publish his art under a pseudonym.

BERNE RECOGNITION OF DROIT DE SUITE

Article 14ter of the Berne Copyright Convention recognizes an inalienable right to an interest in any sale of a work of original art subsequent to the first transfer. France, Italy, Germany, and Brazil, are all countries that have major art markets that have enacted legislation recognizing the droit de suite. 74 In the United States, only California has adopted legislation conferring certain rights in the resale of art. 75 The droit de suite originated in France, 76 and provides that "authors of graphic and plastic works shall have, regardless of transfer of the original work, an inalienable right to participate in the proceeds of any sale of their work by public auction or through a dealer." 77 Intended to ameliorate what appeared to be a great injustice when wealthy collectors were selling artist's work for huge profits while the artist or his family lived in poverty, 78 the legislation has presently been adopted in some form by Algeria, Belgium, Czechoslovakia, France, West Germany, Italy, Morocco, Poland, Turkey,

67. Berne Convention, supra note 16, art. 6bis, para. 1, at 41.
68. Damich, supra note 63, at 945.
69. Berne Convention supra note 16, art. 2(1).
70. Berne Convention supra note 16, art. 6bis(2).
71. Berne Convention, supra note 16, art. 7(1).
72. Id.
73. Berne Convention, supra note 16, art. 7(3).
78. Siegal, supra note 20, at 1, 2 (1988).
The droit de suite is a means of providing on-going protection to fine artists similar to that provided to authors by the copyright laws. A basic inequity between authors and fine artists is the author's ability to continue realizing income from the reproduction of his writing, while the fine artist can profit only from the first time sale of his art. This inequity could be corrected by a resale royalty. While recognized in the Berne Convention and many European nations, the U.S., with the exception of California, has failed to recognize the resale royalty. The Artist's Rights Act of 1990, did, however, direct the Copyright Office to conduct a study considering whether there should be federal legislation enacting Article 14ter.

Article 14ter (1) states: "The author, or after his death the persons or institutions authorized by national legislation, shall with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to the interest in any sale of the work subsequent to the first transfer by the author of the work." The act provides for reciprocity only in Berne member nations that have legislation that permit a resale right, and only to the extent provided for in the country where the right is claimed. National legislation of each country that enacts article 14ter shall determine how the royalty is collected, and the amounts of the royalties.

As envisioned by the Berne convention, the resale royalty stands for an inalienable, unwaivable right to share in the proceeds of subsequent sales of one's art. Historically, artists in the United States have had to deal with the perceived injustice through contract. In 1948, Grant Wood sold a painting called Daughters of the America Revolution to a dealer. Some time shortly thereafter, the dealer resold the painting for four times the original price. Wood, infuriated, included a contractual stipulation into his work that he would receive 50 percent of the profits each time a work is resold. In 1973, Robert Scull, a wealthy art collector, sold a Robert Rauschenberg assemblage at auction for $85,000. He had purchased it from the artist in 1958 for $900. Rauschenberg received none of the profits. It was the result of this recognized inequity that resale royalty rights legislation was first introduced into Congress and in the California and Ohio State legislatures.
Without laws to protect him, it is incumbent upon the U.S. artist himself to negotiate any resale rights. When you consider the naive artist who’s work may not be recognized in his own lifetime, who is not creating from an economic motive and who often lives in isolation, the burden of protecting his own rights in his artwork is onerous. The European model anticipates that an artist, before his talent is recognized, needs the protection of law. By making the benefits of a resale right perpetual, inalienable, unwaivable and unassignable, the droit de suite is given moral right status which recognizes a property right in the intangible product of the artist’s effort and the development of the artist through the creation of a body of work throughout his lifetime. It also anticipates that the value of an artist’s work is seldom recognized at the initial sale, before the passage of time, and until the work has been viewed by the public in sufficient amounts for it to gain recognition and status.

**U.S. ADHERENCE TO BERNE CONVENTION**

The United States, one of the most important art markets in the world, has been slow to embrace the concept of moral rights for artists. There exists a basic conflict between the traditional American ideals of free alienability of property and the bedrock principles of contract law, which hold, historically at least, that the sanctity of a contract is inviolable, and the civil law belief that an artist’s interest in his artwork endures over and beyond the transfer of ownership. This conflict is overshadowed by the stated purpose of Article I § 8, clause 8 of the Constitution which indicates that the purpose of copyright law is to protect literary and scientific advancements through reward to the creators: advancing secular goals through economic rewards, and providing a statutory and legislative framework within which those goals are to be advanced.

This conflict has been the subject of much interpretation, and the copyright laws have been a pivotal area where these themes recur with regularity. The underlying policy of the copyright law has been to protect the artist, frequently from himself. The renewal term provided for by the Copyright Act of 1909 was just such a protection. It provided for an original copyright period of 28 years with a renewal period for an additional 28 years, which was available by application for renewal within a year before the expiration of the original twenty-

---

90. Ross, supra note 55, at 375.
92. U.S. CONST. art. I §8, cl. 1, 8.
93. See 17 U.S.C. §106 (1982) (copyright owner has exclusive right to reproduction, adaptation, publication, and display for original literary, musical, dramatic, pantomime, choreographic, pictorial, graphic, sculptural, motion picture, audio visual or sound recorded works).
95. §23 of the Copyright Act of 1909, 35 Stat. 1075.
eight year period. This provision allowed an author at the beginning of his career and in need of money to sell the copyright for a limited term, and then to reap the profits of his artistic creation later. An author could thus sell his copyright without losing his renewal interest. Samuel Clemens, (Mark Twain) recounted that he sold the copyright of *Innocents Abroad* for very little money, and it wasn't until the first twenty eight year copyright period expired that he was able to reap the profits of what had turned into a literary masterpiece. This system in effect allowed an artist to recapture the profits of his personal interest in his creation. Its viability as a protection was seriously limited by the decision in *Fred Fisher Music Co. Et. Al. v. M. Witmark & Sons* where it was determined that the renewal rights of the copyright could be assigned prior to the renewal period. Thus, an artist in an inferior bargaining position could essentially be forced to sign away his rights in future profits. The court in Fisher refused to enact a statutory restriction upon an artists ability to alienate his property, stating that an artist may be unable to sell his work if the buyer cannot purchase it outright, and further stating that Congress could not justify enacting legislation that would not only deny authors (or artists) the freedom to dispose of their property as they pleased, but which would make them wards under guardianship of the law.

Although natural law theory, with its tenents that the intangible products of a man's labor can be property meriting protection, was an influencing factor for the framers of our Constitution, and continues to hold an influence in the courts, the conflict between positive law and natural law continues to create an ongoing dialogue. Until the U.S. joined the Berne Convention this dialogue was characterized by a stubborn resistance to any type of natural or moral rights apart from those created and limited by statute or common law. In fact, any common law natural rights that existed in copyright law were effectively preempted by Federal copyright law in the decision *Wheaton v. Peters*, where the majority explicitly stated that common law copyright, based in natural law theories of abstract morality, was subordinated by statutory copyright, which is granted by the Government as a statutory privilege.

When the U.S. finally did join the Berne Convention, it was the result of a desire to increase copyright protections against foreign infringement and to

---

96. 318 U.S. at 654.
97. Id. citing Hearings before the Committee on Patents of the Senate and House of Representa-
tives on Pending Bills to Amend and Consolidate the Acts respecting Copyright, 60th Cong., 1st.
Sess., p. 20. (1906).
99. Id. at 644.
100. Id. at 657.
103. 33 U.S. 591 at 661.
104. Ross, *supra*, note 55, at 365 (The International Trade Commission reported U.S. losses be-
tween $43 billion and $61 billion in 1986 due to piracy and inadequate protection).
create copyright relations with the adhering nations. The U.S. had been the principal in establishing a weaker copyright treaty, the Universal Copyright Convention. The U.C.C. was ineffective, however, in protecting U.S. intellectual property from foreign piracy, and in a climate of rising trade deficits, support for the adherence to the stronger protections provided by the Berne Convention gained momentum. A second and equally compelling reason for U.S. adherence was a belief that accession would strengthen the U.S.'s bargaining position in international trade talks. Furthermore, the U.C.C. is administered by the United Nations Educational and Scientific And Cultural Organization, (UNESCO) from which the United States withdrew in 1984, thereby losing its influence as a voting member.

Congress passed the Berne Convention Implementation Act on October 12, 1988. By its adherence, the U.S. automatically created copyright relations with the other adhering nations; nations with which they had had no prior relationship under the U.C.C.. Adherence also expanded U.S. bargaining power for trade negotiations.

While the protections conferred by the Berne convention are broad, adherence by the U.S. does not automatically confer these rights on the citizens of the U.S. without specific legislative enactment. As part of the legislative history of the BCIA, the “House Committee state[d] unequivocally that Berne is not self-executing, that domestic law is not in any way altered except through the implementing legislation itself, and that the implementing legislation is absolutely neutral on the issue of the rights of paternity and integrity.”

Only very minimal changes in the formalities of certain U.S. law that was clearly incompatible with the Berne Convention were enacted as a result of the BCIA: such things as making copyright notice optional, abolishing the requirement that a copyright transferee record a transfer of copyright before insti-
tuting an infringement action, and abolishing the requirement that foreign nationals need to register infringement claims with the U.S. Copyright office before instituting any claims.

As to the moral rights provided by the Berne Convention, the U.S. felt that there was sufficient recourse through common law and the copyright act without implementing Article 6bis. Any redress for grievances still had to be approached either through the economic rights provided by the existing copyright law, through common-law theories of contract, or through claims based on invasion of privacy, the law of waste, defamation, or unfair competition. These remedies were burdensome and their application was characterized by little coherent or consistent treatment by the individual states or the higher courts.

In *Geisel v. Poynter Products, Inc.*, the well known author and illustrator, Theodor Seuss Geisel, better known as Dr. Seuss, attempted to prevent the assignee of a magazine publisher from manufacturing, promoting and selling dolls based on his drawings, which he had sold under contract to the publisher. Calling the dolls “tasteless, unattractive, and of inferior quality,” Geisel attempted to enjoin the defendants from using the name Dr. Seuss in connection with the advertising and sale of the dolls. Because no independent moral right existed which would have allowed him to prevent the use of his name, or his pseudonym, with the dolls, he pled five causes of action: violation of section 43(a) of the Lanham Act; unfair competition; violation of plaintiff’s right to privacy under New York Law; defamation; and conspiracy with intent to injure plaintiff. All five causes of action essentially failed, the court holding that when he had contracted the work with the original publisher, Geisel had not retained any rights with respect to the characters that he had created. The common law doctrine was that authors or artists generally are presumed to transfer common law literary property rights when they sell their manuscript or work of art unless those rights are specifically reserved.

In *Zim v. Western Publishing Company*, the author of a series of books suc-

---

119. Gantz supra note 91, at 881, see DaSilva, Comment, Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines 60 GEO. L. J. 1939, 1561 (1972); see also Treece, American Law Analogous of the Author’s Moral Right 16 AM. J. COMP. L. 487-500 (1968).
120. NIMMER, supra note 66, § 8.21[A][2][b].
125. Geisel, supra, note 121.
126. Id. at 333.
129. Id. at 334.
cessfully brought a breach of contract action against the publisher when he published a series of books authored by the plaintiff with revisions that the author had expressly disapproved of, where he had disapproved within the contracted 60-day period. The author further recovered under Florida law for the wrongful and unauthorized appropriation of his name when the name appeared on the revised editions of the books. 131

In *Edison v. Viva International Limited*, 132 the author of an article that had been substantially changed by the editor prior to publication brought a breach of contract claim based upon his moral rights, and an action for libel and slander, alleging that the material added by the publisher cast the author into opprobrium in the literary community. 133 The court, holding that the author’s “moral right” had been subsumed by the contract of publication which allowed the publisher to “edit” and “change” the original article, further stated that there was no indication that the changes the publisher had made had cast the author into disgrace or subjected him to ridicule by his literary peers. 134

In *Granz v. Harris*, the court held for the plaintiff under the doctrine of unfair competition, where the defendant record company had taken the original recordings of the plaintiff artist and produced an abbreviated record with a cover that read “presented by Norman Granz”, where the new version substantially departed from the original. 135 The court, in allowing a remedy for unfair competition, held that where the plaintiff had a reputation as an expert in the presentation of jazz concerts, the damage to his reputation from the sale of abbreviated records was irreparable, where his name appeared on the cover, and allowed injunctive relief. 136

*Gilliam v. American Broadcasting Cos.* 137 was brought under §43(a) of the Lanham Act, the trademark statute which provides in part:

> “Any person who ... in connection with any goods or services ... uses in commerce any word, term, name, symbol or device ... or any false designation of origin, or false or misleading description of fact, or false or misleading representation of fact, ... shall be liable in a civil action by any person who believes he ... is likely to be damaged by such act.” 138

*Gilliam* was a case where the plaintiff successfully protected the author’s right of integrity under a section of the Lanham Act 139 (the trademark statute) which protects a producer’s public reputation. In *Gilliam*, ABC had edited portions of Monty Python’s Flying Circus so extensively that the court found that they had distorted the authors’ work and that presentation of the work in the edited form

---

131. 573 F.2d at 1326.
133. 421 N.Y.S.2d at 206-207.
134. Id. at 207.
135. 198 F.2d at 589.
136. Id. at 588.
137. 538 F.2d 14, 24 (2d Cir. 1976).
was deemed a misrepresentation which "impaired the integrity of appellant's work." Recognizing that a cause of action which seeks redress for the defamation of an artist's works has its roots in the continental concept of *droit moral*, the court indicated *in dicta* that a need existed for some sort of independent legal protection for the rights of artists. Stating that although Copyright law seeks to vindicate the economic, rather than the personal rights of authors, the "economic incentive for artistic and intellectual creation that serves as [the] foundation for American copyright law cannot be reconciled with [the] inability of artists to obtain relief for mutilation or misrepresentation of their work to public on which artists are financially dependent." The rights of an artist were directly addressed in the case of *Crimi v. Rutgers Presbyterian Church.* The Church had contracted with an artist to paint a fresco for the back wall of the church. The clergy and parishioners did not like the depiction of Christ with his chest exposed, and had it painted over. The artist sued for restoration of the work. The New York Supreme Court, relying on contract, refused to prevent the destruction of the fresco. Refusing to recognize any residual moral rights of the artist in his creation, the courts stated that all rights had passed from the artist to the church pursuant to contract. The artist had no recourse absent written reservation of his rights in the fresco.

The confusion of applying different doctrines to enforce moral rights, inconsistent verdicts which lead to forum-shopping, a persistent need to address the rights of visual artists, and a need to protect the art itself, led the way to the statutory adoption of the Berne Convention Moral rights provision, article 6bis.

**IV. THE VISUAL ARTISTS RIGHTS ACT OF 1990**

The Visual Artists Rights Act of 1990 amended the 1976 Federal Copyright Act to confer explicit moral right protection for works of visual arts. The Act was a consolidation of bills introduced by Senator Edward M. Kennedy and Representative Robert W. Kastenmeier. Although appreciatively narrowed in scope and application from both the Kennedy and Kastenmeier bills, the law as passed created a new section in the Copyright Act that explicitly gave visual artists the right to claim authorship and the right to integrity. The stat-

140. *Gilliam*, 538 F.2d at 25.
141. *Id.* at 24.
142. *Id.*
143. 194 Misc. 570, 89 N.Y.S. 2d 813 (1949).
144. *Id.* at 575.
147. VARA §610(a).
148. NIMMER, *supra* note 66, at § 8.21[B][2].
151. Schneider, *supra* note 29, at 121.
The goals of the act are: (1) to protect the honor and reputation of visual artists; (2) to protect works of art themselves; and (3) to provide a uniform national standard for these protections. As enacted, however, the law is severely limited, and is in truth an eviscerated version of the Kennedy bill, let alone of the moral rights envisioned by the Berne Convention.

The scope of application of VARA is significantly more narrow than the scope of either Berne or the proposed Kennedy bill. The definition of the subject matter covered by the act, includes a new category of "work of visual art": "[a] painting, drawing, print or sculpture, existing in a limited edition of 200 copies or fewer, that are signed and consecutively numbered by the author, or, in the case of a sculpture, in a multiple cast." It appears to allow protection to only that art which fits into very narrow categories of fine art and which excludes huge areas of art that should be protected. There may be many artistic works that do not fit neatly into a strict definition of a painting, drawing, print or sculpture. The contrast with the Berne convention definition is especially glaring: "The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of expression." It is apparent that any new or experimental art may not qualify for protection under the U.S. laws. "[S]taid courts confronting avant garde artists may run into problems at the margin in evaluating whether a work qualifies."

Subjecting the qualification of art for protection to the scrutiny of courts risks arbitrary decision making by members of the court who may not be sophisticated or sensitive to artistic currents. As was recognized by Justice Holmes in his opinion in *Bleistein v. Donaldson Lithographing Co.*:

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves as final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, [protection] would be denied to pictures which appealed to a public less educated than the Judge. Yet if they command the interest of any public, they have a commercial value - - it would be bold to say they have not an aesthetic and educational value - -and the taste of any public is not to be treated with contempt."

The "recognized stature" requirement poses another, similar problem. The risk exists that the courts will inflict their own taste upon the decision to qualify

---

154. *Id.*
155. Berne, art.2(1).
156. *Nimmer*, supra note 66, at §8.21[B].
157. 188 U.S. 239 (1903).
158. *Id.* at 251-252.
art, and thus exert pressure and control over what kind of art is produced. Faced with a institutionalized criteria, and because the burden is on the person presenting the work for qualification to prove that it merits protection, the unknown artist may be discouraged from attempting to protect their rights at all.\textsuperscript{160} While not defined in the Act, the Kennedy bill provided that the determination of whether a work is one of recognized stature is to be made by the “court or other trier of fact.”\textsuperscript{161} This requirement is particularly difficult with folk art. Folk art is very primitive, and only recognized and appreciated by a narrow group of admirers. While the Kennedy bill stated that the trier of fact could be aided in his determination of whether the art work is of “recognized stature” by “various persons familiar with the art world,” that would still be a subjective determination, and consequently, the folk artist could be overlooked. This requirement was imposed to limit nuisance law suits, “such as the destruction of a five-year-old’s fingerpainting by her classmate,”\textsuperscript{162} yet it threatens to narrow the art acceptable to protection to the very art that is in least need of protection: if the artist is of recognized stature, then most likely he or she is in a greater bargaining position and in less need of protection.

Folk art is by its very definition not of recognized stature. To an unappreciative eye, it could appear very similar to the fingerpainting of a five year old. The art of Bill Traylor is disarmingly simple. Drawn in lead pencil, often on scraps of cardboard, lacking perspective, and filled with flat, bright colors, its lack of sophistication lends energy and a unique quality of immediateness.

The requirement that a work of visual art, to be protected, must be copyrightable, and that the “courts [should] use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the definition,”\textsuperscript{163} is yet another hurdle that would discourage any but well established artists, or artists with sufficient backing, from protecting their work. The act states that a work is not eligible if it is not a “work of visual art”, if it is made as a work for hire,\textsuperscript{164} if it is not otherwise eligible for copyright protection,\textsuperscript{165} or if it is of unprotected national status. It further provides that the rights are forfeited through lack of notice.\textsuperscript{166} The work for hire restriction again limits the protections provided by the law.

The scope of the artist’s rights conferred by VARA include the rights of attribution and integrity. While the law states that these rights are inalienable,\textsuperscript{167} it also provides that they are waivable if expressly agreed in a written instrument.

\textsuperscript{160} See \textsc{Nimmer}, supra note 66, at §8.21[B].
\textsuperscript{161} Damich, supra note 63, at 953.
\textsuperscript{162} Id. at 945.
\textsuperscript{163} \textsc{Nimmer}, supra note 66, at §8.21[B], citing (H.R. Rep. 101-514, 101st Cong., 2d Sess. 11 (1990)).
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} \textsc{Nimmer}, supra note 66, at § 7.14 [A][1](works first published before March 1, 1989, where pre-existing artworks are retained by the author).
\textsuperscript{167} 17 U.S.C. §106A(e)(1).
signed by the author. The waivability provision is probably the most destructive provision in the law. It basically reduces the moral rights to economic rights that can be bargained away as part of a contract to sell the work. An artist in need of money, anxious to make a sale, and perhaps unaware of his rights, could easily be pressured into signing away his rights in his art work without fully understanding the impact of what he is doing. A folk artist would be especially vulnerable to manipulation at the hands of a dealer or collector, upon whom they are often very dependent. The Kennedy bill did not permit waivers, although it did provide for consent.

The specific rights granted in VARA are generally rights of paternity. The right of attribution includes the right to claim authorship, the right to demand that the artist's name be used in conjunction with the display of her work, or, conversely, the right to prevent use of her name on work she has not in fact created, and the right to prevent the use of her name as author where her work has been subjected to a distortion, mutilation or modification, which would be prejudicial to her honor or reputation.

The right of integrity includes the right to prevent any intentional distortion, mutilation, or other modification, with the requirement that the changes must be prejudicial to the artist's honor or reputation. It also includes the right to prevent destruction of any work of recognized stature. The language of the law states that these rights are inalienable and exist independent of rights of copyright ownership, which is freely alienable. Stating that both the right of economic exploitation (copyright) and the moral rights vest in the author at the creation of work, the language speaks in natural law terms. "An artist's professional and personal identity is embodied in each work created by that artist. Each work is part of his . . . reputation. Each work is a form of personal expression."

An important change which occurred as a result of the Visual Artists Rights Act of 1990 was in the common law doctrine that literary property rights are presumed to transfer when the manuscript or work of art is sold. This presumption was reversed, and a requirement was added that a specific written

169. 17. U.S.C. § 113(d): Consent applies to instances where the art works are in buildings: for instance murals or installations, and the removal of the art work would result in destruction of the art work, thus violating Section 106A(a)(2) and (3), (rights of disclaimer and integrity). This section disallows the application of Section 106A(a)(2) and (3) if the author consented to the installation of the art work before the effective date of Section 106A of VARA, or, if after the effective date, the owner of the building and the author signed a written instrument that specifies that the installation of the work may subject it to destruction, mutilation, or modification by reason of its removal.
170. NIMMER, supra note 66, at § 8.21[A].
171. Id. at § 8.21[B][2][C][i].
173. NIMMER, supra note 66, at §8.21[B].
175. 17 U.S.C. §106A.
conveyance of rights will now be required in order to transfer the copyright in a sale of any artwork or literature.

Another major deviation from the Berne moral rights, and a major weakness in the VARA, is that the term of the moral rights as amended into the Copyright law exist only for the life of the artist.178 The Copyright Law in the U.S. protects the economic interests of the artist for the life of the author plus fifty years.179 The moral rights in the Berne convention provides protection for the life of the author plus fifty years. The limited protection defeats one purpose of the moral rights legislation, because it is a recognized fact that a work of art is often not appreciated until much later in an artist's career, often not until after his death. Some protection should be provided to the artist's family who may have supported him, and who may have endured poverty in order to allow him to pursue his art. The art itself may need the protection of interested family members if it has yet to be recognized until after the artist's death.

THE RESALE ROYALTY IN THE U.S.

Part of the Visual Rights Act of 1990 required a study of the feasibility of a federal droit de suite, or resale royalty law.180 Currently, the only resale royalty law now in effect exists in California.181 As part of the study the copyright office held public hearings, and heard testimony from artists, gallery owners, museum presidents, art dealers, lawyers, and witnesses that had had experience with the resale royalty scheme under California law. Testimony was also heard from an association that administers royalty distribution under the royalty scheme in France,182 and from a representative of the Federation Internationale des Diffuseurs D'Oeuvre D'Art Originales, which is an association of 2,000 art galleries in Europe.183 The line seems to be rather clearly drawn between the artists and the groups that support them, who are generally supportive of such legislation, and the dealers, museums and galleries who view the royalty as an unfair tax on an already burdened art market.184

The results of the public commentary were inconclusive, in that the committee felt that it lacked sufficient empirical evidence to measure whether the effects of a federal resale royalty would suppress the art market, encourage creativity, protect the artists that needed it the most, or subject the art market to the tastes of Congress. Arguments for and against private versus collective administration, registration, federal preemption of California's law, alienability and waivability, categories of works that should be covered, and triggering mechanisms for royalty payment were all heard.

183. Id.
184. Id.
The committee's conclusions and recommendations concerning the enactment of a resale royalty mirror the arguments for and against the legislative enactment of moral rights in general. Stating that the "notion of an encumbrance attaching to an object that has been freely purchased is antithetical to our tradition of free alienability of property," the study further pointed out that a royalty would raise privacy concerns, because artists would need to learn about prices and ownership in order to monitor their rights. The study indicated there is some evidence that the royalty has had an adverse effect on art markets of several countries and California, and that administration of the royalty where it exists has been besieged by problems.

The study concluded with a recommendation against enacting a royalty provision, stating that European protection of art has evolved from a natural rights basis, where art is protected as an individual intellectual creation, while in the U.S., copyright legislation, the vehicle for implementing moral rights and a resale royalty, is grounded in the constitutional clause, and is driven by economic exploitation. Further arguing that the royalty would only benefit already successful and well established artists, the study indicated that Congress would, in order to make the droit de suite effective, be motivated to encourage the production of work that would be resold, with the effect that traditional art work, such as easel paintings and sculpture would be in effect subsidized, while new, experimental, avant garde or obscure work would suffer. Leaving the door open for reconsideration, especially if the European Community were to harmonize the droit de suite, the study nevertheless concluded that Federal legislation implementing the droit de suite in this country was not currently advisable, and suggested alternative methods of improving artists rights, which would be more in keeping with our statutory scheme of copyright law, among them broader public display rights, commercial rental rights, compulsory licensing, and increasing federal grants and funding.

As an alternative to the droit de suite, a public display right as presented by several commentators merits some consideration. Basing a royalty on the event of public display of the fine art, it has been argued that such an approach would overcome many of the difficulties encountered in trying to implement a resale royalty right. By using existing Copyright law, a public display right would more closely parallel the rights granted to other artists, authors and composers. It is argued that there is a royalty provision based on display rights that lay latent in the existing Copyright law at Section 106(5), the public display right. Stating that the lack of education, the notice requirement,

185. Executive Summary, supra note 22, at xi.
186. Id.
187. Id.
188. Id. at xiii.
190. Id. at 512.
191. Carleton, supra note 189, at 511.
192. Id. at 523, (17 U.S.C. §106(5): The Public Display Right states that a copyright owner has
and the concept of limited publication account for the lack of fine artist’s lack of use of the statutory copyright,\textsuperscript{193} the argument is that with very little modification to existing law, an artist could be compensated for income generated by the display of his art. Based on the idea that a viewer essentially “copies” an authentic work of art when he views it,\textsuperscript{194} a display based alternative does more closely parallel copyright law.

**FEDERAL PREEMPTION**

When an individual state, such as California has enacted legislation which provides greater protections to the artist than does federal law, the question is whether or not federal copyright law preempts state law. It has been argued that until the federal laws recognize moral rights to the full extent provided for by Article 6bis of the Berne convention, then state moral rights that provide more protection should be allowed to bring American law closer to the requirements of Article 6bis.\textsuperscript{195} This would be in keeping with the original reading of the law, which, prior to the enactment of VARA, looked to common law and statutory copyright to provide the required moral rights protections.

The case of *Morseburg v. Balyon*\textsuperscript{196} was a challenge of the California *droit de suite* on constitutional and statutory grounds.\textsuperscript{197} The plaintiff’s first claim was that the act interfered with the buyer’s constitutional freedom of contract. But, the court found that the royalty scheme was within the state’s police power. The second constitutional claim was a due process challenge. In rejecting the buyers’ claim that they had lost a property right without due process of law, the Ninth Circuit held that the California Act was neither arbitrary nor capricious, and did not exceed constitutional limits. The California royalty also survived a preemption challenge under the 1909 Copyright Act, the Ninth Circuit holding that the California act created an in personam right against future sellers.\textsuperscript{198} Its viability under the amended 1976 Copyright Act has yet to be tested.\textsuperscript{199}

V. CONCLUSION

The folk artist is the perfect embodiment of the romantic conception of the artist. Naive, innocent, untouched by the realities of modern society, isolated

\begin{flushright}
194. Id. at 510.
198. 621 F.2d 972, at 977 (9th Cir. 1980).
199. 17 U.S.C. §301(a)(1988). This section states that “On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right . . . under the common law or statutes of any State”).
\end{flushright}
geographically, socially and culturally from the outside world, the folk artist is a conduit for ultimate truth. It is this precise quality of innocence and naiveté that provides enjoyment to the artist’s audience, and is where the value of the art is found. It is also the precise quality that renders the artists vulnerable and powerless before exploitative investors, dealers and collectors. The true value of the folk artist’s work is rarely realized at the initial sale. It is only after people have had a chance to view the art that its value begins to be realized, and it is the galleries, the collectors and the museums that provide that environment.

By recognizing a relationship between the artist and his art work that transcends its character as property, proponents of the resale royalty believe that this ongoing relationship demands consideration. If an artist creates a piece of art work early in his career, and sells it for a small price, and then through his own development as an artist the value of his earlier work increases, he should be entitled to a share of the increase in the profit when that piece is resold.

In France, the artists or their heirs get 3 percent of any resale of their art that is sold in galleries or at auction, regardless of whether or not there is a profit.\textsuperscript{200} The resale rights last as long as the economic rights, which is the life of the artist, plus fifty years. The bill introduced by Senator Kennedy sought a seven percent royalty of the appreciated value, and the model \textit{droit de suite} proposed by the Executive Summary suggested a flat royalty between three and five percent with no threshold price. The California Act provides for a royalty of 5 percent for works of fine art that are resold for more than one thousand dollars. The Executive Summary model recommended restricting the royalty to sales at public auction. Both the Kennedy bill and the model proposed that the royalty last as long as the economic rights provided for by the copyright law and that it be descendible in a manner analogous to copyright.\textsuperscript{201} The model also suggested that the \textit{droit de suite} be collectively managed through a private authors’ rights collecting society, with collection of royalties handled on a direct or contractual basis similar to musical performance royalties. The Executive Summary concluded that if a resale royalty was enacted, it should be inalienable, and non-waivable. There has been a substantial amount of work, thought and energy expended in attempting to design a workable system for a resale royalty. It is, in fact, a courageous effort that commands support and input. If we are to ever enact a resale royalty, then we must ensure that it achieves the goals envisioned: it must work to reward, encourage and stimulate new art and to protect artists that have little power or influence.

Moral rights and the resale royalty may initially appear to be an unwarranted restriction upon the property of an individual and contrary to the ideas of free alienability and the sanctity of contract. How can we justify restrictions on property rights for owners of art but not for other property holders.\textsuperscript{202} The recognition of an artist’s right in his creation can, however, be seen as a declaration of

\textsuperscript{200} Executive Summary, supra note 22, at xix.
\textsuperscript{201} Id. at xx.
\textsuperscript{202} Linda J. Lacey, \textit{Of Bread and Roses and Copyrights} 4-6 DUKE L.J. 1532, 1536 (1989).
Resale Royalty & Primitive Artist

Public interest in preserving the integrity of artistic creations.²⁰³ Artist’s rights laws can be analogized with preservation laws, where social interests in promoting historic tradition, culture and art warrants restraining an individual’s freedom to use and dispose of his property.²⁰⁴

Moral rights legislation that provides federal protection to artists regardless of their bargaining power, their contractual status or even their desire may be beneficial to the American Folk artist, and may in fact protect the integrity of their art work by allowing them the freedom to remain isolated, innocent and naive, without forcing them to learn how to protect themselves from the pressures of savvy outsiders. By awarding a resale royalty to the artist, the government would be recognizing in a tangible form the value of the individuality of the artist.

However, moral rights legislation that requires an artist to negotiate for his rights, to register his art,²⁰⁵ or to meet government imposed standards of quality would have little positive effect for the folk artist, or for the art community in general. Any waiver provision²⁰⁶ would largely undermine the purpose of federal moral rights legislation by eliminating moral rights in situations of unequal bargaining power²⁰⁷ and would reduce the moral or resale rights to just another bargaining chip, effectively degrading them to mere economic rights.

The protection of the artists moral rights through the enactment of a statutorily created federal resale royalty right may indeed advance public welfare through the encouragement of individual effort by personal gain, in keeping with the stated purpose of the Constitution’s copyright provision. Our cultural heritage would be enhanced by increasing the respect for the individual artist by recognizing and awarding his natural rights in the work that he creates.²⁰⁸ Consistent with the Berne Convention, our position as a major art market, and as a member of the international community, we should give moral rights, including the resale royalty right as presented in the Berne convention, inalienable and unwaivable, the full support of our laws.

Afterword

On October 6, 1993, a joint statement by both sides in the Bill Traylor dispute was released. Traylor’s family, stating that they now understood that Charles Shannon, rather than exploiting Bill Traylor, actually contributed greatly to his


²⁰⁴. Gantz supra note 91, at 875.

²⁰⁵. 17 U.S.C. §411(a) (West Supp 1992)(“Artists are required to register the copyright to works as a prerequisite to bringing a lawsuit for violation of any of the economic rights in §106 of the Copyright Act.”).


²⁰⁷. Damich, supra note 63, at 966.

²⁰⁸. See L. Duboff, THE DESKBOOK OF ART LAW 798, 805 (1977), stating that moral right is “inalienable and perpetual” to protect the personality and integrity of the culture, “not the economic interest of the artist.”
support as an artist, have agreed to drop the lawsuit. Shannon, on his part, has agreed to give the family 12 pieces of artwork in trust, estimated to be worth $10,000 to $25,000 each.

