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## Droit De Suite: Only Congress Can Grant Royalty Protection for Artists

*Congress has enacted the 1976 Copyright Act which does not grant resale royalties to fine artists. It does, however, add a strong preemption provision that was not a part of the 1909 Act. This provision emphatically preempts any state law granting a right equivalent to a right granted by the federal statute to any work which is the subject matter of copyright. In its desire to increase protection for fine artists, the State of California has enacted the first droit de suite legislation in the United States, patterned after European copyright law, which extends resale royalties to fine artists.*

*This comment demonstrates that despite the fact that the 1976 Act does not mention a resale royalty for fine artists the California Resale Royalties Act is preempted by federal law since droit de suite covers subject matter which is copyrightable and is equivalent to a right granted by the 1976 Act. The author believes that workable droit de suite legislation must be enacted and enforced on the federal level in order to allow fine artists to benefit as their work increases in value.*

### I. BACKGROUND

#### A. The Copyright Act of 1976

In 1976 the United States Congress enacted the Copyright Act of 1976,<sup>1</sup> the first major revision of federal copyright law since 1909.<sup>2</sup> This legislation implemented many changes in the copyright law. The 1976 Act provides increased protection to artists beyond that given by the 1909 Act.<sup>3</sup> Among the major differences

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\* A version of this article has won the Nathan Burkan Memorial Competition at Pepperdine University School of Law and has been entered in the 1981 national competition sponsored by ASCAP.

1. 17 U.S.C. § 101 (1976) [hereinafter cited as 1976 Act]. The effective date of the 1976 Act was January 1, 1978, except for §§ 118, 304(b), and ch. 8, which became effective on October 19, 1976.

2. Copyright Act, ch. 320, 35 Stat. 1075 (1909) (repealed January 1, 1976; current version at 17 U.S.C. § 101 (1976)) [hereinafter cited as 1909 Act]. Prior to the enactment of the 1976 Act, the 1909 Act defined the scope of copyright protection accorded authors, artists, and inventors. See also U.S. CONST. art. I, § 8, cl. 8, which provides: "The Congress shall have Power . . . [t]o 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."

3. "What the statute confers on authors that some of them could not have obtained before is access to the federal courts and to their heavy battery of statutory remedies, such as nationally enforceable injunctions, minimum damages, and discretionary attorney's fees." Brown, *Unification: A Cheerful Requiem for Common*

is the 1976 Act provision which extends the term of copyright protection to the artists for life plus fifty years,<sup>4</sup> as contrasted with the 1909 Act coverage of fifty-six years.<sup>5</sup> Another important revision in the new law is the express reversal of the presumption that by selling a tangible work without placing any conditions or restrictions upon the sale, the artist also assigns the copyright to the buyer.<sup>6</sup>

The purpose of extending copyright protection to artists is to encourage the production of creative expression.<sup>7</sup> This is accomplished by the inducement of giving the artist a property right in the fixed form of his expression.<sup>8</sup> The property right given is es-

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*Law Copyright*, 24 U.C.L.A. L. REV. 1070, 1089 (1977). See also 1976 Act, *supra* note 1, at §§ 502, 504(c) and 505.

4. 1976 Act, *supra* note 1, at § 302(a).

5. Upon registration under the 1909 Act an automatic term of coverage of 28 years was granted. In addition, upon the expiration of this term, coverage could be renewed for 28 years by an affirmative act. 1909 Act, *supra* note 2, at § 24.

6. That presumption had been firmly established in *Pushman v. New York Graphic Soc'y*, 287 N.Y. 302, 39 N.E.2d 249 (1942). In *Pushman* the artist never expressly agreed to sell his common-law copyright and reproduction rights along with his painting, nor did he forbid it. *Id.* at 305, 39 N.E.2d at 250. Common-law copyright attached to a work upon its creation. 1909 Act, *supra* note 2, at § 2. Statutory protection was not afforded until a work was actually published. *Id.* at § 10. A work of art is "published" when a copy is distributed to the public "by sale or other transfer of ownership, or by rental, lease, or lending." 1976 Act, *supra* note 1, at § 101. The Court of Appeals of New York held that "an artist must, if he wishes to retain or protect the reproduction right, make some reservation of that right when he sells the painting." 287 N.Y. at 308, 39 N.E.2d at 251. The 1976 Act reversed this presumption by conferring federal statutory copyright protection upon a work of art from its fixation in a tangible form. 1976 Act, *supra* note 1, at § 102. "On and after January 1, 1978 . . . no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." *Id.* at § 301(a). The 1976 Act thereby emphatically did away with common-law copyright.

7. U.S. CONST. art I, § 8, cl. 8. See *Mazer v. Stein*, 347 U.S. 201 (1954), in which the Court stated: "The economic philosophy behind the [constitutional] clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Id.* at 219. See also *Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 912 (D. Conn. 1980). WKND broadcast copyrighted musical compositions without paying royalty fees. The court held the station liable for copyright infringement. Because infringement so powerfully violates the Congressional policy that artists be given economic incentive, the plaintiffs were granted the full range of remedies, including statutory damages, injunctive relief, and reasonable attorney's fees.

8. Section 106 of the 1976 Act provides in pertinent part that, subject to certain limitations enumerated in §§ 107 through 118,

the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . .

entially a monopoly.<sup>9</sup> However, because it is only the expression and not the underlying idea that is being protected,<sup>10</sup> "Congress and the courts have been careful to limit the copyright monopoly."<sup>11</sup> Among these limitations is section 301 of the 1976 Act<sup>12</sup> which expressly preempts any state law purporting to give a right equivalent to a right granted by federal statute<sup>13</sup> concerning any work covered by the Copyright Act.<sup>14</sup>

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(5) in the case of . . . pictorial, graphic, or sculptural works . . . to display the copyrighted work publicly.  
1976 Act, *supra* note 1, at § 106.

9. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980). "A grant of copyright in a published work secures for its author a limited monopoly over the expression it contains." *Id.* at 974. See also, Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. REV. 1107 (1977).

10. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). The idea-expression dichotomy that Judge Learned Hand spoke of, *id.* at 121, was codified in the 1976 Act at sections 102 and 103. Section 102 describes the subject matter as follows:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

1976 Act, *supra* note 1, at § 102.

Section 103 adds compilations and derivative works to the subject matter of copyright.

In formulating the 1976 Act, Congress expressly recognized that the idea-expression dichotomy must be preserved:

Copyright does not preclude others from using the ideas or information revealed by the author's work. . . .

Section 102(b) in no way enlarges or contracts the scope of copyright protection under present law. Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.

H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 56, 57 (1976).

11. Goldstein, *supra* note 9, at 1107.

12. 1976 Act, *supra* note 1, at § 301. See notes 32 and 34 *infra*.

13. *Id.* at § 106. See note 8 *supra*.

14. *Id.* at § 102. See note 10 *supra*.

## B. The California Resale Royalties Act

In 1976 the California legislature also sought to expand upon the rights of artists by passing the California Resale Royalties Act,<sup>15</sup> a form of *droit de suite*. Literally translated as a follow-up

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15. CAL. CIV. CODE § 986 (West Supp. 1981) [hereinafter cited as section 986]. Section 986 provides:

(a) When ever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or his agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. . . .

(1) When a work of art is sold at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist.

(2) If the seller or agent is unable to locate and pay the artist within 90 days, an amount equal to 5 percent of the amount of the sale shall be transferred to the Arts Council.

(3) If a seller or his agent fails to pay an artist the amount equal to 5 percent of the sale of a work of fine art by the artist or fails to transfer such amount to the Arts Council, the artist may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer.

(4) Moneys received by the council pursuant to this section shall be deposited in an account in the Special Deposit Fund in the State Treasury.

(5) The Arts Council shall attempt to locate any artist for whom money is received pursuant to this section. If the council is unable to locate the artist and the artist does not file a written claim for the money received by the council within seven years of the date of sale of the work of fine art, the right of the artist terminates and such money shall be transferred to the operating fund of the council as reimbursement to fund programs of the council.

(6) Any amounts of money held by any seller or agent for the payment of artists pursuant to this section shall be exempt from attachment or execution of judgment by the creditors of such seller or agent.

(b) Subdivision (a) shall not apply to any of the following:

(1) To the initial sale of a work of fine art where legal title to such work of fine art where legal title to such work at the time of such initial sale is vested in the artist thereof.

(2) To the resale of a work of fine art for a gross sales price of less than one thousand dollars (\$1,000).

(3) To a resale after the death of such artist.

(4) To the resale of the work of fine art for a gross sales price less than the purchase price paid by the seller.

(5) To a transfer of a work of fine art which is exchanged for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art where the fair market value of the property exchanged is less than one thousand dollars (\$1,000).

(c) For purposes of this section, the following terms have the following meanings:

(1) "Artist" means the person who creates a work of fine art.

(2) "Fine art" means an original painting, sculpture, or drawing.

(d) This section shall become operative on January 1, 1977, and shall apply to works of fine art created before and after its operative date.

(e) If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected, without the invalid provision or application, and to this end the provisions of this section are severable.

right, this concept enables a fine artist "to claim a percentage of the sales price each time his work of art is resold".<sup>16</sup> The California Act covers all sales by California residents and any other sales which take place in the state.<sup>17</sup> The Act pertains only to "fine art," defined as "original painting, sculpture, or drawing."<sup>18</sup>

*Droit de suite* is a pecuniary right which is part of the artist's copyright.<sup>19</sup> It was devised as an "attempt to equalize the copyright status of artists with that of authors."<sup>20</sup> An author realizes the fruits of his labor through reproduction of his work. The original manuscript rarely provides additional, substantial income for an author. The right to control reproductions, therefore, is the all-important right for an author.<sup>21</sup> The prime source of income for the artist, however, remains the tangible embodiment of the artistic expression. The sale of the original work usually represents the only income which will be received from a particular work. "It was this disparity in meaningful copyright protection between the writer and the graphic artist that *droit de suite* was intended to correct."<sup>22</sup>

The California Resale Royalties Act specifically provides for a five percent royalty<sup>23</sup> to be paid to a living artist<sup>24</sup> upon the resale<sup>25</sup> of his work of fine art<sup>26</sup> if the seller is a resident of California or if the sale takes place in the state.<sup>27</sup> An administrative scheme has been set up to insure that royalties paid get to the artist.<sup>28</sup> The California Arts Council is to receive the royalties when an artist cannot be located by a seller.<sup>29</sup> In such cases, if the Arts Council "is unable to locate the artist and the artist does

*Id.*

16. 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, 22 (1966-67).

17. Section 986, *supra* note 15, at (a).

18. *Id.* at (c)(2).

19. Schulder, *supra* note 16, at 22.

20. M. Nimmer, *LEGAL PROTECTION FOR THE ARTIST I-1* (1970) (unpublished manuscript in U.C.L.A. Law Library).

21. This reproduction right is covered by the "bundle of rights" protected by § 106 of the 1976 Act. 1976 Act, *supra* note 1, at § 106.

22. M. Nimmer, *supra* note 20, at I-2.

23. Section 986, *supra* note 15, at (a).

24. *Id.* at (b)(3).

25. *Id.* at (b)(1).

26. *Id.* at (a), (c)(2).

27. *Id.* at (a).

28. *Id.* at (a)(2), (3), (4), (5) and (6).

29. *Id.* at (a)(2).

not file a written claim for the money . . . within seven years of the date of sale of the work of fine art, the right of the artist terminates" and the money is permanently transferred to the Council to fund its programs.<sup>30</sup> If, however, neither the artist nor the Arts Council receives the 5% royalty, the artist has "three years after the date of sale or one year after discovery of the sale, whichever is longer," to bring an action for damages against the seller.<sup>31</sup>

This article will discuss the concept of *droit de suite* and will analyze the only American version, the California Resale Royalties Act, in light of the strong federal preemption provision of the 1976 Copyright Act. The California Act has been challenged only once to date, in *Morseburg v. Balyon*.<sup>32</sup> There, however, the challenge was under the 1909 Copyright Act since the paintings in question were resold in 1977,<sup>33</sup> before the effective date of the 1976 Copyright Act.<sup>34</sup>

## II. DROIT DE SUITE

The rationale underlying the *droit de suite* is fostered by certain assumptions society clings to regarding the plight of artists. It rests on the romantic notion of the starving artist languishing in his garret and sly vultures attempting to divest him of his creations for a mere pittance.<sup>35</sup> As one commentator noted, "[t]he

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30. *Id.* at (a)(5). The programs for which the Arts Council can use funding include promoting the employment of artists and craftsmen, exhibiting art works in public buildings throughout California, and awarding prizes and grants to individuals or organizations to promote the arts. CAL. GOV'T CODE § 8753 (West 1980).

31. Section 986, *supra* note 15, at (a)(3). The seller is under statutory duty to report each resale for which a royalty should be paid to the artist to whom the royalty is due. He is mandated to "locate the artist and pay the artist." *Id.* at (a)(1). If the seller cannot locate the artist through reasonable efforts then he must pay the royalty to the Arts Council which will, in turn, attempt to locate him. See notes 29 and 30 *supra*, and accompanying text.

32. 621 F.2d 972 (9th Cir. 1980). The court in *Morseburg* held that the California Resale Royalties Act, section 986, was not inconsistent with the Copyright Act of 1909. The 1976 Act, however, substantially revised the 1909 Act and included a provision which expressly states that "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 . . . and come within the subject matter of copyright as specified by sections 102 and 103 . . . published or unpublished . . . are governed exclusively by this title." 1976 Act, *supra* note 1, at § 301(a). This article will show that because of this dramatic preemption provision, section 986 is inconsistent with the 1976 Act and, therefore, invalid.

33. 621 F.2d at 975.

34. The effective date of the 1976 Copyright Act was January 1, 1978. 1976 Act, *supra* note 1, at § 301.

35. This theory has been eloquently advanced, somewhat tongue-in-cheek, by Professor Monroe E. Price who does not believe in the "theology" behind the *droit de suite*:

At its core is a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns

*droit de suite* is *La Boheme* and *Lust for Life* reduced to statutory form."<sup>36</sup>

This sentimental rationale overlooks the fact that many artists today are well-known and wealthy during their lifetimes.<sup>37</sup> In addition, it is often those "vultures", the canny investors, who bring fame and fortune to these artists.<sup>38</sup> Illustrative of this is the well publicized 1973 confrontation between artist Robert Rauschenberg and modern art collector Robert Scull.<sup>39</sup> When Scull auctioned off Rauschenberg's painting "Thaw" for \$85,000, after having purchased it from the artist in the early 1960's for about \$900, Rauschenberg loudly told Scull: "I've been working my ass off just for you to make that profit. . . ."<sup>40</sup> In the early sixties Rauschenberg and other then-unknown modern artists were grateful for the attention of collectors like Scull.<sup>41</sup> The attention brought by such a well-known purchaser helps escalate the prices of future paintings done by an artist, enabling him to realize greater profit upon subsequent initial sales.<sup>42</sup>

Although this is the professed rationale underlying the *droit de*

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into a misunderstood masterpiece. The painting is sold for a pittance, probably to buy medicine for a tubercular wife. 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 Park-Bernet and Christie's.

Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1335 (1968).

36. *Id.*

37. See, e.g., *In re Estate of Rothko*, 77 Misc. 2d 168, 352 N.Y.S.2d 574 (1974), in which the artist left a hotly contested estate in excess of five million dollars. See also *Estate of Rothko*, 84 Misc. 2d 839, 379 N.Y.S.2d 923 (1975); *In re Estate of Rothko*, 71 Misc. 2d 320, 336 N.Y.S.2d 130 (1972); *Estate of Rothko*, 71 Misc. 2d 74, 335 N.Y.S.2d 666 (1972); *Estate of Rothko*, 69 Misc. 2d 818, 330 N.Y.S.2d 915 (1972). Pablo Picasso also died a very wealthy man. Andy Warhol, a contemporary artist, has his name in the society columns regularly and is a fixture on the New York social scene. His "soup can art" of the sixties made him a millionaire.

38. See notes 35-36 *supra* and accompanying text.

39. See R. DUFFY, *ART LAW: REPRESENTING ARTISTS, DEALERS AND COLLECTORS* 264 (1977) (hereinafter cited as R. DUFFY) (citing Wall St. J., Feb. 11, 1974, at 1; TIME, March 11, 1974, at 66); Isenberg, *The Art Royalties Act: The 5% Evasion*, L.A. Times, Dec. 21, 1980, (Calendar), at 1.

40. R. DUFFY, *supra* note 39, at 264.

41. The pop artist James Rosenquist reacted in astonishment when Scull purchased one of his paintings in 1962. "I didn't think there'd be anyone crazy enough to buy it." *Id.* at 264 n.1.

42. Rauschenberg serves as a case in point. Since "Thaw" brought Scull \$85,000 upon resale, Rauschenberg will most likely sell future paintings or paint-



*suite*, California's version will help only those artists whose works have significantly appreciated in value during their lifetimes, or those whose works were originally sold at a price of at least \$1,000 and have appreciated, however slightly.<sup>43</sup> The California Resale Royalties Act applies to those works of fine art resold for a gross sales price of more than \$1,000,<sup>44</sup> but only when that resale is a profitable one for the seller.<sup>45</sup> According to Gilbert Edelson, secretary-treasurer of the Art Dealers Association of America, ninety-nine percent of all works by living artists actually declines in value.<sup>46</sup> He contends that "no more than 200 U.S. artists working today have produced works that have appreciated in value."<sup>47</sup> Despite the rationale behind California's Resale Royalties Act,<sup>48</sup> Edelson claims that instead of helping the lesser-known artists who need an economic shot in the arm, section 986 only succeeds in "making some wealthy artists slightly wealthier."<sup>49</sup>

*Droit de suite* was first enacted in France in 1920 following testimony before the French Parliament containing lengthy descriptions of poverty-ridden artists whose works were bringing enormous amounts upon resale.<sup>50</sup> French legislation sought to remedy the situation by extending a three percent royalty to artists and their heirs on all original works of graphic or plastic art

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ings he has already created but has not yet sold for a similar price. One can be sure that he will never sell an original work to a collector for \$900 again.

43. Section 986, *supra* note 15, at (b)(3) limits the Resale Royalties Act protection to living artists.

44. *Id.* at (b)(2).

45. *Id.* at (b)(4). For example, if a painting was originally bought for \$100,000 and thereafter resold for \$99,000 the original artist would receive no royalty under the California Resale Royalties Act even though the resale was in excess of \$1,000. This is because the seller made no profit on the transaction. If, however, the painting was resold for \$100,001, the artist would receive a 5% royalty upon the resale because the gross sales price was more than the purchase price paid by the seller. *Id.* Section 986 does not take into account the possibility that such a sale, given the reality of dealer or gallery commissions, would actually be unprofitable to the seller. The sole criterion for extending the 5% royalty to the artist for any artwork resold at a price in excess of \$1,000 is that the gross sales price is more than that paid by the seller. *Id.*

46. Isenberg, *supra* note 39, at 6.

47. *Id.*

48. See notes 35-36 *supra* and accompanying text.

49. Isenberg, *supra* note 39, at 6.

50. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 6 COPYRIGHT SOC'Y BULL. 94, 95 (1958). Hauser tells the tearjerking tale of Millet's grand-daughter who sold flowers on the street to survive at a time when the artist's paintings brought large sums of money to others upon resale. *Id.* See also Schulder, *supra* note 16, at 23. But see Price, *supra* note 35, who believes that the myth perpetuated about the starving, helpless artist is exaggerated. It was the telling of stories such as Millet's, calculated to leave nary a dry eye in the house, which prompted the French *droit de suite* legislation. Hauser, *supra* note 50, at 95.

which are resold for a price in excess of 100 new francs.<sup>51</sup> Private sales are not exempted by the law, but the law in practice covers only sales at public auctions or those by public dealers.<sup>52</sup> The three percent royalty must be paid regardless of whether the resale has been profitable.<sup>53</sup>

A formal procedure for collection of royalties has been established in France. All royalties are collected by the *Societe de la Propriete Artistique des Dessins et Models* (S.P.A.D.E.M.), which then distributes the funds to an artist whose work has been resold.<sup>54</sup> The French *droit de suite*, due to S.P.A.D.E.M.'s practical supervision and operation of collection, has been successful, at least regarding those sales which are public.<sup>55</sup>

In West Germany, there is a different rationale behind *droit de suite*. While the French theory "considers the artist's share in the proceeds of the sale as a share in the exploitation of his work",<sup>56</sup> the West German rationale "insists that the increased value which is later recognized in a work has always been there in latent form, and is due solely to the artist's earlier labors."<sup>57</sup> The West German version of *droit de suite* assumes that it would be unjust enrichment to the speculator if the artist were precluded from sharing in the increased value of his own work.<sup>58</sup> Despite the "metaphysical" theory behind it, West Germany extends a royalty of five percent of the resale price of any original art work to artists and their heirs when the resale price exceeds 100 marks.<sup>59</sup> In practice, then, since the artist will get his royalty

51. R. DUFFY, *supra* note 39, at 266-67. Note that protection under the French *droit de suite* extends for the life of the artist plus fifty years. Price, *supra* note 35, at 1333 n.l.

52. R. DUFFY, *supra* note 39, at 266. The French have found it to be too difficult to police private sales; thus, the law has only been enforced upon public sales.

53. *Id.* at 267.

54. *Id.* at 268. S.P.A.D.E.M. may retain as much as 30% of the 3% royalty as an administrative charge. *Id.* at 269.

55. *Id.* See also Hauser, *supra* note 50, at 101.

56. Schulder, *supra* note 16, at 30. See also note 50 *supra* and accompanying text.

57. Schulder, *supra* note 16, at 30. Schulder describes this "theory of intrinsic value" as a "metaphysical explanation."

58. *Id.* Schulder notes that under such a rationale the artist should only be able to obtain a royalty on the amount of money by which the speculator has been enriched, the increase in value between the present and immediately prior sales. She calls it the "capital gains theory." *Id.*

59. R. DUFFY, *supra* note 39, at 269. Note that the West German *droit de suite* extends the resale royalty right to artists for life plus seventy years. *Id.* at 270. The French follow-up right, as well as the Italian, see note 64 *infra* and accompa-

upon resale regardless of whether there has been an increase in value or unjust enrichment to the seller, the West German law does not support its own theory.<sup>60</sup> It is, in fact, very similar to the French version of *droit de suite*.

Italy subscribes wholeheartedly to West Germany's "theory of intrinsic value"<sup>61</sup> and puts it to actual use. Italy's *droit de suite* operates by placing an assessment of between one and ten percent on all sales of works of art which have increased in value since the prior sale.<sup>62</sup> The greater the increase in value, the greater the artist's percentage.<sup>63</sup> The royalty is paid for the life of the artist, and then to his heirs for fifty years.<sup>64</sup> Since the Italian royalty is based on the increase of value between the present and the prior sale, there is the distinct possibility that an artist will receive a royalty although the sale from which the royalty is derived was for an amount less than that in the original sale from the artist to the first speculator.<sup>65</sup> Such would be the case in a hypothetical situation wherein an artist sold a painting for \$100,000 which subsequently resold for \$30,000. The artist would receive no royalty at this juncture because there has been no increase in sales price from the prior sale. If, however, the painting is again resold, this time for \$50,000, a royalty would be payable under Italian law on the difference between that sales price and the directly prior sales price of \$30,000, even though the \$50,000 price is half the amount originally paid to the artist on first sale.<sup>66</sup>

In addition to legislation in France, West Germany, and Italy, at least eleven other countries have enacted forms of *droit de suite*: Belgium, Portugal, Czechoslovakia, Yugoslavia, Turkey, Tunisia, Morocco, Algeria, Luxembourg, Chile, and Uruguay.<sup>67</sup> California's

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nying text, extends to the life of the artist plus fifty years. See note 40 *supra*. In contrast, the royalty right under the California Resale Royalties Act ends at the death of the artist.

60. See notes 50-59 *supra* and accompanying text.

61. See notes 57-58 *supra* and accompanying text.

62. Schulder, *supra* note 16, at 31. See also R. DUFFY, *supra* note 39, at 271. Duffy notes that the monetary limits beyond which the royalty must be paid vary with the type of artwork sold. All paintings exceeding 5,000 lire, all sculpture exceeding 10,000 lire, and drawings and prints exceeding 1,000 lire give the original artist the right to a royalty under the Italian *droit de suite*. *Id.*

63. Price, *supra* note 35, at 1333 n.2. See also R. DUFFY, *supra* note 39, at 271. Duffy points out that this sliding scale is more beneficial to the successful artist whose work sells at a higher price and who, therefore, receives a higher percentage. In order to assist the more needy artist, it would be more appropriate to reverse the scale. *Id.* at 271 n.23.

64. *Id.* at 272.

65. Schulder, *supra* note 16, at 31-32.

66. *Id.*

67. R. DUFFY, *supra* note 39, at 265.

Resale Royalties Act<sup>68</sup> has been the first successful attempt to introduce *droit de suite* into the United States.<sup>69</sup> While similar legislation has been proposed in other states, none have yet passed a *droit de suite* statute. At least one attempt has been made to introduce a bill on the federal level,<sup>70</sup> but to date without success.<sup>71</sup> One can only speculate as to why Congress has not seen fit to grant a resale royalty right to artists as many European countries have done. Perhaps it is felt that the artist reaped his reward upon first sale and needs no further reward for his creativity. He has gotten the benefit of his bargain and is entitled to no more since he was not forced to part with the work at the particular price received. Until Congress is confronted with an amendment to the Copyright Act which proposes to give artists a resale royalty, the true reason will not be known.

### III. FEDERAL COPYRIGHT PREEMPTION

The Copyright Act of 1976 carries on the tradition of previous copyright legislation by providing economic incentives to artists by granting bundles of rights.<sup>72</sup> It has long been acknowledged that personal gain is the best way to encourage the talents of artists, authors, and inventors, thereby advancing the public welfare.<sup>73</sup> As early as 1788, James Madison stated: "The utility of this [copyright] power will scarcely be questioned. . . . The pub-

68. See note 15 *supra*.

69. Isenberg, *supra* note 39, at 1. See also Katz, *Copyright Preemption Under the Copyright Act of 1976: The Case of Droit de Suite*, 47 GEO. WASH. L. REV. 200, 205 (1978). In his 1978 article, Katz pointed out that the legislatures of New York, Ohio, and Illinois were considering *droit de suite* legislation. At the time of this writing, however, no state other than California has passed a law giving resale royalty rights to fine artists.

70. R. DUFFY, *supra* note 39, at 274. Schulder proposed a model *droit de suite* statute in 1966 to be considered by Congress in its deliberations in revising the 1909 Act. Schulder, *supra* note 16.

71. Since Schulder's model statute was proposed in 1966 to be considered by Congress in its revision of the 1909 Act, it may be assumed that, for now, Congress has rejected a federal version of *droit de suite*.

72. 1976 Act, *supra* note 1, at § 106. See note 8 *supra*.

73. *Mazer v. Stein*, 347 U.S. 201, 219 (1954). This case concerned the question of whether original statuettes which were reproduced and used as bases for electric lamps were copyrightable. The Supreme Court held that the statuettes were copyrightable works of art even though they were used for an industrial purpose and might also qualify for a design patent, since the policy behind granting both copyrights and patents were the same. See 1 NIMMER ON COPYRIGHT § 1.03[A] (1981).

lic good fully coincides with the claims of individuals.”<sup>74</sup> Because the California Resale Royalties Act gives an artist, under certain circumstances,<sup>75</sup> an economic right in his work additional to those rights given by the 1976 Copyright Act, the question of whether that additional right is compatible with the federal law must be raised.

Preemption of a state law by federal statute occurs when Congress enacts a broad scheme of federal regulation in a particular field, thus demonstrating its intent for national uniformity.<sup>76</sup> This doctrine was derived from the supremacy clause of the United States Constitution,<sup>77</sup> which was interpreted by the United States Supreme Court in *McCulloch v. Maryland*<sup>78</sup> to mean that “the States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.”<sup>79</sup> In the case of copyright law the Constitution expressly vests in Congress the power to establish copyright protection.<sup>80</sup> If any state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”<sup>81</sup> by encroaching upon the domain of a federal statute enacted by Congress pursuant to its constitutional authority, then, as the Supreme Court stated in *Sears, Roebuck & Co. v. Stiffel Co.*,<sup>82</sup> “it is ‘familiar doctrine’ that the federal policy ‘may not be set at naught, or its benefits denied’ by the state law . . . even if the state law is enacted in the exercise of otherwise undoubted state power.”<sup>83</sup>

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74. THE FEDERALIST NO. 43 (J. Madison) (J.E. Cooke ed. at 288 (1961)).

75. See notes 23-31 *supra* and accompanying text.

76. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941). “Where the federal government. . . has enacted a complete scheme of regulation. . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law. . . .” *Id.* at 66. *Hines* invalidated an Alien Registration Act adopted by the Commonwealth of Pennsylvania because it encroached on powers vested in Congress and was preempted by the subsequent passage of a federal Alien Registration Act passed pursuant to those constitutional powers.

77. U.S. CONST. art. VI, cl. 2, provides in pertinent part: “This Constitution and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . .”

78. 17 U.S. (1 Wheat.) 316 (1819).

79. *Id.* at 436.

80. U.S. CONST. art I, § 8, cl. 8. See note 2 *supra*.

81. *Hines v. Davidowitz*, 312 U.S. 52 (1941). See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974); *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963); see also note 121, *infra*.

82. 376 U.S. 225 (1964). See notes 93 and 94 *infra* and accompanying text.

83. 376 U.S. at 229 construing *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942). In *Sola* a patent licensee challenged a price-fixing clause in his agreement by showing that the patent itself was invalid. The lower court held that he was estopped to deny the patent's validity because he accepted a license under

*A. Copyright Preemption Under the 1909 Act*

The constitutionality of the California Resale Royalties Act has been challenged in the courts only once, in *Morseburg v. Balyon*.<sup>84</sup> That attempt proved unsuccessful. In *Morseburg* it was alleged that section 986 of the California Civil Code was preempted by the Copyright Act of 1909.<sup>85</sup> Preemption under the 1976 Act was expressly not considered in the court's decision.<sup>86</sup>

Morseburg, an art dealer, based his challenge upon those sections of the 1909 Act which gave the copyright holder the exclusive right to "vend" the copyrighted work<sup>87</sup> and prohibited the placing of restrictions on "the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."<sup>88</sup> He asserted that the California Resale Royalties Act, because of the required five percent royalty to an artist upon resale, impaired the artist's ability to vend his copyrighted work of fine art and that it restricted the transfer of that artwork when it was in the hands of a lawful purchaser, thus directly conflicting with the 1909 Act.<sup>89</sup>

The *Morseburg* court looked for guidance to prior United States Supreme Court decisions regarding preemption in the fields of copyright and patent law, including *Goldstein v. California*,<sup>90</sup> *Sears, Roebuck & Co. v. Stiffel Co.*,<sup>91</sup> and its companion case,

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that patent. The U.S. Supreme Court noted that the questions of price-fixing and patents were so dominated by the federal statutory scheme that conflicting state law and policy must yield.

84. 621 F.2d 972 (9th Cir. 1980). See notes 32-34 *supra* and accompanying text.

85. 621 F.2d at 975.

86. The court stated: "We emphasize that this case concerns the preemptive effect of the 1909 Act only. We do not consider the extent to which the 1976 Act, particularly section 301 (a) and (b) . . . may have preempted the California act." *Id.* at 975.

87. Section 1 of the 1909 Act provides in pertinent part: "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work. . . ." 1909 Act, *supra* note 2.

88. *Id.* at § 27.

89. 621 F.2d at 975. Morseburg argued that the California Resale Royalties Act rewrites pre-Act sales contracts by placing additional obligations on a purchaser of a work of fine art which he did not bargain for when the work was bought. The court held, however, that the contracts clause, U.S. CONST. art. I, § 10, cl. 1, gives the States the right to adopt regulatory measures which serve public purposes, without concern that private contracts will be impaired as a result. The impairment in this case is not so severe as to restrict that power. *Id.* at 979.

90. 412 U.S. 546 (1973).

91. 376 U.S. 225 (1964).

*Compco Corp. v. Day-Brite Lighting, Inc.*<sup>92</sup>

In both *Sears* and *Compco*, where the plaintiffs brought suit under an Illinois unfair competition law, the lower court allowed the recovery of damages for the copying of industrial designs which were unpatentable and, therefore, unprotected under federal law.<sup>93</sup> The Supreme Court held that a state unfair competition law which gave a remedy for the copying of an unpatentable design, thus granting relief under color of state law when none could be had under the federal regulatory scheme, conflicted with federal patent law.<sup>94</sup> It noted that "the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition."<sup>95</sup> This is accomplished by Congressional grant of a limited statutory monopoly to reward the author or inventor with the right, for a limited term of years, to exclude others from the use of his invention.<sup>96</sup> Thus, the Court reasoned, when a state granted protection where none was prescribed by the federal law it ran afoul of the supremacy clause.<sup>97</sup>

After *Sears* and *Compco*, but while the 1909 Act was still in effect, the Supreme Court weakened the broad preemption rule by holding that not all state concerns must yield to federal copyright and patent laws. In *Goldstein v. California*,<sup>98</sup> the Court upheld a state law which made the "pirating" of sound recordings a criminal offense concluding that there was no preemption by federal copyright law.<sup>99</sup> The Court looked to legislative history, something it did not do in *Sears* and *Compco*, and found no conflict with uniformity of federal regulation since Congress "left the area

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92. 376 U.S. 234 (1964).

93. In *Sears*, the defendant had copied plaintiff's pole lamp design. 376 U.S. at 226. In *Compco*, fluorescent lighting fixtures were copied. 376 U.S. at 235.

94. The *Sears* court noted that:

To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. . . . This would be too great an encroachment on the federal patent system to be tolerated.

376 U.S. at 231-32. See also, *Compco*, 376 U.S. at 237.

95. *Sears*, 376 U.S. at 230-31. See also, THE FEDERALIST No. 43 (J. Madison) (J.E. Cooke ed. (1961)).

96. 376 U.S. at 229.

97. See notes 76-79 *supra*, and accompanying text.

98. 412 U.S. 546 (1973).

99. *Id.* at 570-71. The "piracy" in question was prior to the congressional amendment to the 1909 Act which made sound recordings part of the subject matter of copyright. Pub. L. No. 92-140, 85 Stat. 391 (1971). That amendment, however, specifically excluded from its jurisdiction sound recordings fixed prior to February 15, 1972; even if the amendment had already been enacted it would not have affected the outcome. The fact that such an amendment was passed does show, however, that there was animosity toward record piracy.

unattended, [and thus] no reason exist[ed] why the State should not be free to act."<sup>100</sup> Additionally, the Court observed that while there was good reason for a uniform national system, not all "writings" were necessarily of national interest due to the vast diversity of regional interest in our country of more than 200 million people and, therefore, the individual states held copyright power concurrently with the federal government.<sup>101</sup>

The *Morseburg v. Balyon*<sup>102</sup> court held that the rule laid down in *Goldstein* governed its decision. It reasoned that Congress, in the 1909 Act, did not explicitly forbid the enactment of a *droit de suite* law by a state<sup>103</sup> and that such a bar could not be implied by a reasonable interpretation of the congressional grant of the exclusive right to vend or by the prohibition against restricting transfer embodied in sections 1 and 27 of the 1909 Act.<sup>104</sup> The court interpreted the right to vend as merely meaning "the exclusive right to transfer the title for a consideration to others,"<sup>105</sup> not as a right to transfer the work at all times free and clear of all claims of others. Therefore, the court reasoned that the California Resale Royalties Act did nothing to impair a seller's right to vend. It also held that there was no restriction on transfer as prohibited by section 27 of the 1909 Act. Rather than placing a legal restraint on transfer, the court concluded that section 986 of the

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100. 412 U.S. at 570. The Court noted that when the 1909 Act was passed, the record industry was extremely small and piracy, the unauthorized duplication of musical performances, was non-existent. Congress thus did not see the need to cover the mechanical reproductions at that time. As technology expanded, the 1909 Act was amended, first in 1912, to include motion pictures, and again in 1971, to finally include sound recordings. Since sound recordings had not been covered by the 1909 Act prior to the effective date of the amendment, which was February 15, 1972, the sound recordings which Goldstein pirated could be covered by state law. Note, however, that the 1909 Act contained no preemption section, as contrasted with the 1976 Act.

101. 412 U.S. at 556-58. *But see* notes 123-26 *infra* and accompanying text. Additionally, Professor Nimmer has noted that the Court had to uphold the states' concurrent copyright powers at the time of the *Goldstein* decision because to do otherwise would unceremoniously throw all unpublished works covered by state common law copyright into the public domain without warning. He notes, however, that "state laws, pursuant to such concurrent power, are, of course, subject to preemption by federal statute." As will be shown, the 1976 Act created a single federal system for both published and unpublished works, making the states' concurrent copyright powers "almost completely without practical significance."  
1 NIMMER ON COPYRIGHT § 1.01[A] (1981).

102. 621 F.2d at 977.

103. *Id.* at 977.

104. *Id.* at 977-78.

105. *Id.* at 977, quoting *Bauer v. O'Donnell*, 229 U.S. 1, 11 (1913).



California Act merely created an in personam right against a seller of a work of art; which was in *Goldstein*, a right additional to those covered by the 1909 Copyright Act.<sup>106</sup> *Sears and Compco* were distinguished, as they were in *Goldstein*, on the ground that since there was no conflict between the state and the federal laws, both could function harmoniously. Therefore, the constitutionality of the California Resale Royalties Act was upheld despite the 1909 Copyright Act.

#### *B. Copyright Preemption Under the 1976 Act*

*Goldstein* cannot, however, control the preemption issue under the 1976 Act. Congress clearly addressed the issue of copyright preemption in the revised law. Section 301 of the 1976 Act states that after January 1, 1978, all legal or equitable rights equivalent to any rights granted by the Act to copyright owners which come within the subject matter of copyright as defined in sections 102 and 103 are governed exclusively by federal copyright statutes.<sup>107</sup> The legislative history of the 1976 Act indicates that section 301 was seen by Congress as "one of the bedrock provisions of the bill . . . [which] adopts a single system of Federal statutory copyright from creation."<sup>108</sup> Furthermore, it was noted that the policy of section 301 was "intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively. . . ."<sup>109</sup>

Section 301 (a) sets up two conditions which must be met before the 1976 Act eclipses state law.<sup>110</sup> First, a right given by state law must be equivalent to one of the exclusive rights speci-

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106. 621 F.2d at 977-78.

107. Section 301 of the 1976 Act reads in pertinent part:

Sec. 301. Preemption with Respect to Other Laws

(a) 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 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

1976 Act, *supra* note 1, at § 301(a). See also notes 8 and 10 *supra*.

108. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. at 129 (1976). [hereinafter cited as H.R. 94-1476].

109. *Id.* at 130. It was further noted that "[t]he preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been." *Id.* at 131.

110. See note 107 *supra*.

fied in section 106. Second, the right must come within the subject matter of copyright as specified by sections 102 and 103. To answer the statutory preemption puzzle, therefore, an examination of these sections is required.

The question of whether the subject matter covered by the California Resale Royalties Act comes within the subject matter of copyright as specified by sections 102 and 103 of the 1976 Act is easily solved. Sections 102 and 103 define the subject matter of copyright. Section 102 provides copyright protection for all "works of authorship", which include "pictorial, graphic, and sculptural works."<sup>111</sup> This, too, is the subject matter of section 986, the California Resale Royalties Act; therefore, the subject matter of the California law is equivalent to that of the federal statute.<sup>112</sup>

Whether the California Resale Royalties Act grants a right equivalent to one of the exclusive rights in copyright authorized by the 1976 Act requires a more complex inquiry. Section 106 lists the fundamental rights given copyright owners: the exclusive rights of reproduction, adaptation, publication, performance, and display.<sup>113</sup> These rights are not absolute, however, since Congress has expressly seen fit to limit them. The legislative history of the bill tells us that the rather broad exclusive rights set forth in section 106 are limited, qualified, or excepted because "[e]verything in section 106 is made 'subject to sections 107 through 118,' and must be read in conjunction with those provisions."<sup>114</sup>

The exclusive right granted by section 106(3) of the 1976 Act upon which the California Resale Royalties Act touches is the right "to distribute copies . . . to the public by sale or other transfer of ownership. . . ."<sup>115</sup> However, this distribution right has been limited by section 109, which prescribes the protection given by section 106(3) to only distribution prior to first sale or transfer. Once the copyright owner has sold or transferred title to a particular copy of his work, he relinquishes his distribution right as to

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111. 1976 Act, *supra* note 1, at § 102(a)(5). See note 10 *supra*.

112. The subject matter of section 986 is "fine art," defined as "an original painting, sculpture, or drawing." Section 986, *supra* note 15, at (c)(2).

113. See note 8 *supra*.

114. H.R. 94-1476 at 61.

115. 1976 Act, *supra* note 1, at § 106 (3). Section 101 of the 1976 Act defines "copies" so as to include originals: "the material object, other than a phonorecord, in which the work is first fixed." *Id.*

that copy and the lawful owner "is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy. . . ."116 The legislative history of the 1976 Act discloses that Congress intended the distribution rights of the copyright owner go no further than the first distribution: "As section 109 makes clear . . . the copyright owner's rights under section 106(3) cease with respect to a particular copy . . . once he has parted with ownership of it."117

Since the 1976 Act makes it abundantly clear that once a copyright owner divests himself of ownership of a particular copy of his work, all his distribution rights, including the economic benefits of distribution, cease; therefore, the California Resale Royalties Act must fail. The five percent royalty conferred on the copyright owner upon resale extends the economic benefit he derives beyond that received from the original distribution of his work.<sup>118</sup> Congress stressed that a state law is equivalent to copyright and subject to preemption even if the precise contours of the state-created right may not be coextensive with the comparable right under the Copyright Act of 1976.<sup>119</sup> Therefore, although the conditions which the California statute places upon the distribution right of the copyright owner do not control that limited right, it sufficiently conflicts with congressional intent to be abrogated and preempted by the 1976 Act.

Additionally, it must be noted that *Goldstein v. California*<sup>120</sup> cannot conclusively control a preemption issue under the 1976 Act. The 1909 Act which controlled at the time of *Goldstein* did not include any congressional preemption mandate equivalent to that embodied in the 1976 Act. The message the Supreme Court sent Congress in *Goldstein* and later in *Kewanee Oil Co. v. Bicron Corp.*<sup>121</sup> was clear: If federal copyright law was to be presumed to preempt the field, it must clearly assert its power. If not, the states could act independently.<sup>122</sup> With the enactment of section

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116. 1976 Act, *supra* note 1, at § 109 (a).

117. H.R. 94-1476, *supra* note 108, at 62.

118. See notes 23-31 *supra* and accompanying text.

119. H.R. 94-1476, *supra* note 108, at 131. See note 109 *supra*. See also notes 79-83 *supra*; 1 NIMMER ON COPYRIGHT § 1.01[B] (1981).

120. 412 U.S. 546 (1973). See notes 98-101 *supra* and accompanying text.

121. 416 U.S. 470 (1974).

122. See Brown, *supra* note 3, at 1091. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) upheld the power of states to protect trade secrets regarding inventions even if those inventions might have been patentable since trade secrets law encourages invention, as does patent law. *Kewanee*, taken together with the Court's message in *Goldstein*, that subject matter not explicitly covered by federal statute was presumptively within the purview of the states to protect, prompted Congress' strong statement in section 301 of the 1976 Act.

301 Congress resoundingly answered the Court's challenge.<sup>123</sup>

Finally, the *Goldstein* Court noted that its decision was based in part on the fact that not all subjects need be covered by federal law. The California legislature enacted section 986 pursuant to a state policy to encourage artists in their crafts for the benefit of society.<sup>124</sup> The Supreme Court believed that some things worthy of protection might be significant only regionally and should be acted upon by those individual states concerned.<sup>125</sup> However, the nurturing of artists to benefit society cannot be thought of as being of "purely local importance."<sup>126</sup> James Madison was of the opinion that the claims of individual artists in their works coincided with the public good and he thus urged that Congress be authorized to pass laws to protect their rights.<sup>127</sup> Surely California does have a large population of artists, but just as surely artists also flourish throughout the fifty states. The protection of their interests can, therefore, only be deemed to be national in scope.

#### IV. CONCLUSION

The only conclusion which can be reached is that California's version of *droit de suite* has been preempted by the 1976 Act. The California Resale Royalties Act comes within the scope of copyright law<sup>128</sup> and expands upon one of the rights granted by the federal statute.<sup>129</sup> Additionally, since *Morseburg v. Balyon*<sup>130</sup> was not decided under the current law which includes a new, strong preemption provision, it is not controlling.

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123. See notes 107-109 *supra* and accompanying text.

124. CAL. GOV'T CODE § 8750 (West 1980) describes California's legislative perceptions and policy regarding art:

The Legislature perceives that life in California is enriched by art.

The source of art is in the natural flow of the human mind. Realizing craft and beauty is demanding, however, the people of the state desire to encourage and nourish these skills wherever they occur, to the benefit of all.

*Id.*

125. 412 U.S. at 558.

126. *Id.* The perceptions and policy of the California legislature expressed in CAL. GOV'T CODE § 8750 (West 1980), merely echoes the sentiments prompting the constitutional mandate "to promote the Progress of Science and the useful Arts." U.S. CONST. art. I, § 8, cl. 8.

127. THE FEDERALIST NO. 43 (J. Madison) (J.E. Cooke ed. (1961)).

128. See note 111 *supra* and accompanying text.

129. See notes 114-116 *supra* and accompanying text.

130. 621 F.2d 972 (9th Cir. 1980). See notes 84-86 *supra* and accompanying text.

An effective *droit de suite* law is needed in the United States to more completely protect the rights of fine artists in their works. Such a law must come from Congress as an amendment to the 1976 Copyright Act. The individual states cannot infringe upon the sole authority of Congress by granting a right which comes within the purview of copyright.

Hopefully, Congress can learn from the weaknesses of the California Resale Royalties Act and correct them when formulating a federal *droit de suite* law. The California Act does not really benefit most artists, nor does it provide for effective enforcement of its provisions.<sup>131</sup> In practice, only those resales which are in the public eye tend to bring forth the required royalties.<sup>132</sup>

It is time that the United States Congress recognize that fine artists need greater copyright protection to put them in a position comparable to authors and recording artists.<sup>133</sup> As the United States Supreme Court so aptly stated: "Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."<sup>134</sup>

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131. See notes 43-49 *supra* and accompanying text. See also Katz, *supra* note 69, at 220, who points out that the same problem has proven to be a consequence of the French *droit de suite*.

132. Isenberg, *supra* note 39, at 6, quotes a Los Angeles art market management consultant as estimating that "about \$750,000 is due in 1980 artists' royalties" but only a fraction of that amount has been paid.

Isenberg also notes that there is no regulatory body checking on what is being resold. *Id.* The French regulatory body S.P.A.D.E.M., has effected a successful collection operation for that country's artist royalty system. See notes 54-55 *supra* and accompanying text. Artist Billy Al Bengston stated that "the amount of money you collect is never enough to make it worth the hassle." He claims to have written several people whom he believes owe him a royalty but has never received a reply. Isenberg, *supra* note 39, at 6. Andy Warhol complains that "[i]t's hard enough collecting money on the original sale, let alone royalties."

133. See notes 19-22 *supra* and accompanying text. The case of a recording artist is especially noteworthy. He is granted a royalty each time his recording is commercially played. 1976 Act, *supra* note 1, at §§ 114-16. Therefore, in addition to the economic benefit he derives from making the original recording he reaps the benefits of each commercial replay. Why, then, is a fine artist granted pecuniary reward only from the first sale of each copy of his work.

134. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).