

# Artist Resale Royalties--New Cases under California Law

*October 26, 2011 by Sheppard Mullin*

On October 17, a proposed class of artists filed three federal lawsuits against auction houses Christie's, Inc., and Sotheby's, Inc., and internet auctioneer eBay, Inc., alleging that the defendants sold their artwork at California auctions and on behalf of California sellers, but failed to withhold royalties due. The complaints seek class-action status to represent many other artists and allege that the auctioneers engaged in a ongoing pattern of concealing the identities and residencies of sellers who live in California, thereby avoiding the five percent royalty due as agents for the sellers. All three complaints, filed in the U.S. District Court for the Central District of California, allege violations of California's Resale Royalties Act as well as California's Unfair Competition Law.

Spokespersons for both Christie's and Sotheby's indicated that the auction houses intend to vigorously defend the lawsuits. Likely defenses will include a challenge that the federal Copyright Act preempts the California Resale Royalty Act; although reviewing courts upheld the Resale Royalty Act's constitutionality in prior challenges based on the 1909 Copyright Act, that topic has not been substantially revisited in light of Congress' robust amendments to the Copyright Act in 1976.

Enacted in 1977, the California Resale Royalty Act (Civil Code section 986), grants artists five percent of the proceeds from the resale of their artwork in certain circumstances, including if the seller lives in California or the sale occurs in California. Artist's heirs are included in the resale rights for up to twenty years after the artist's death. The law is based on the French ideal that artists have certain moral rights in their works. The particular right upon which the California Act is based is the "droit de suite" or "art proceeds right." European countries and the European Union have laws similar

to California's Resale Royalties Act, but California is unique among U.S. states in having such a law.

The Resale Royalty Act states that an artist shall be entitled to a royalty upon the resale of the artist's work of art provided that (a) the artist at the time of the sale is a United States citizen or has been a California resident for at least two years; (b) the seller resides in California or the sale takes place in California; (c) the work is an original painting, drawing, sculpture or original work of art in glass; (d) the work is sold by the seller for more money than she or he paid; (e) the work is sold for a gross price of more than \$1,000 or is exchanged for one or more works of art or for a combination of cash, other property, and one or more works of fine art with a fair market value of more than \$1,000; and (f) the work is sold during the artist's lifetime or within 20 years of the artist's death.

On the other hand, the Resale Royalty Act does not apply if: (a) the sale is the initial sale of the work and the legal title of the work at the time of such initial sale is vested in the artist; (b) the resale of fine art is by an art dealer to a purchaser within 10 years after the initial sale by the artist to an art dealer, provided that all intervening sales are between art dealers; or (c) the sale consists of a work of stained glass artistry permanently attached to real property and it was sold as part of the sale of the real property to which it was attached.

If a gallery or auction house cannot find an artist, the royalty payments are to be sent to the California Arts Council to distribute to the artist, if the Council can locate the artist. In the event that an artist cannot be located, the funds are to be used pursuant to the Art in Public Buildings program.

Though this little-known law has seemingly slumbered for thirty-plus years, it has been gaining wider attention recently. We will continue to monitor these lawsuits on this blog.