

## Decision on the California Resale Royalties Act could mean more art business

10 JULY 2018

**CATEGORY:**  
ARTICLE

**CLIENT TYPES:**  
ART AND CULTURAL INSTITUTIONS



On Friday, July 6, 2018, the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) confirmed that the 1977 California Resale Royalties Act (the “California Act”) is generally preempted by the 1976 federal Copyright Act and therefore only applies in limited circumstances.<sup>1</sup> With the elimination of this royalty withholding requirement, could this mean more art business in California going forward?

### ***The California Resale Royalties Act***

As originally enacted, the California Act applied to sales of fine art in California or by a California seller (whether inside California or not). However, in the 2015 case, *Sam Francis Found. v. Christie's, Inc.*, the Ninth Circuit limited the statute to regulate only sales in California.

The California Act's requirements were that the seller of a work of fine art or the seller's agent ( e.g., an auction house, gallery, dealer, or broker) withhold 5% of the sale price as a royalty to the artist. If the seller or agent was unable to locate and pay the artist within 90 days, the 5% royalty would go to the California Arts Council. In that event, the Council would have to attempt to locate and pay the artist. If the artist was not located after 7 years, the Council could then use the funds to acquire fine art for public buildings. If the seller or agent failed to pay the 5% royalty, the artist had the right to bring an action for damages and attorneys' fees.

In addition:

- The artist's right to the 5% royalty could not be waived or reduced by contract.
- The artist had to be a citizen of the United States or a resident of California.
- The sale had to occur after the initial sale by the artist ( i.e., it had to be a resale).
- The sale had to be for US\$1,000 or more.
- The sale had to be for more than the purchase price paid by the seller.
- The sale had to occur during the artist's life or within 20 years of the artist's death.

### ***Close v. Sotheby's, Inc.***

On July 6, 2018, in *Close v. Sotheby's, Inc.*, the Ninth Circuit decided that because the 1976 federal Copyright Act *exclusively* governs distribution rights, the California Act could only apply to sales of artwork made *after* the California Act's effective date (effective as of January 1, 1977) and *prior* to the enactment of the 1976 federal Copyright Act (effective as of January 1, 1978). Therefore, the California Act could only apply to sales of art made during the one-year period from January 1, 1977 to January 1, 1978, and the lower court will address claims made during this period on remand.

### ***Impact on the Art Market.***

The preemption holding from *Close v. Sotheby's, Inc.* will likely deter states from enacting resale royalty legislation, because the holding confirms that resale royalties would have to be legislated at the federal level through an amendment to the Copyright Act or other specific legislation. In 1992, Congress considered such legislation based upon a report from the Copyright Office, but thus far, Congress has chosen not to act upon such

recommendations.

Many countries, especially in Europe, collect artist resale royalties in art transactions.<sup>2</sup> The California Act was the first and only attempt to establish such a system in the United States.<sup>3</sup> With no resale royalty system in the United States, there is a cost saving benefit to conducting art transactions in the United States versus other countries where artist resale royalties are collected. Now that this issue has been resolved, it will be interesting to see whether auction houses and galleries increase their activities in California in the future.

#### FOOTNOTES

[1] *Close v. Sotheby's, Inc.*, 2018 U.S. App. LEXIS 18407 (9th Cir. July 6, 2018).

[2] *Id.* at \*4.

[3] *Id.* at \*7.

# Authors

Diana Wierbicki

PARTNER | NEW YORK

Art law

 +1 212 848 9857

 [diana.wierbicki@withersworldwide.com](mailto:diana.wierbicki@withersworldwide.com)

Amanda A. Rottermund

ASSOCIATE | NEW YORK

Art law

 +1 212 848 9892

 [amanda.rottermund@withersworldwide.com](mailto:amanda.rottermund@withersworldwide.com)

Sarah Verano

ASSOCIATE | NEW YORK

Art law

 +1 212 848 9831

 [sarah.verano@withersworldwide.com](mailto:sarah.verano@withersworldwide.com)