February 2012 MPT

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MPT-1: *Franklin Resale Royalties Legislation*

LIEB & LIEB
Attorneys at Law
988 Mirrow Street
Franklin City, Franklin 33602

MEMORANDUM

To: Examinee
From: Charles Lieb
Date: February 28, 2012
Re: Proposed Resale Royalties Legislation

The Franklin State Assembly is considering legislation that would require royalties—payments for continuing use of artworks—to be paid to artists and their heirs for resales of artworks in the state (bill no. F.A. 38). Such royalties would benefit artists and their heirs, who, under current law, receive nothing from such resales.

Our client, the Franklin Artists Coalition, is strongly in favor of the legislation and has asked for our assistance in its efforts to persuade the legislature to enact the legislation.

I am attaching a letter from our client and materials which will provide background on the legislation and its subject matter, and from which you may discern the arguments being advanced for and against enactment. Please assist me in preparing a document (a so-called "leave-behind") which may be given to legislators and their staff members after in-person visits by our client. The purpose of the "leave-behind" is to persuade legislators to vote in favor of the legislation. (Note that the recipients of the "leave-behind" will include nonlawyers.)

Your draft of the "leave-behind" should accomplish two goals: 1) it should make the case for the legislation and respond to the arguments against, and 2) it should persuasively deal with the single legal issue involved. I am attaching a template for the "leave-behind" for you to use. Draft only the material indicated in brackets, and do not repeat the opening and closing text.

Franklin Artists Coalition
285 Dolley Avenue
Franklin City, Franklin 33600

February 23, 2012

Charles Lieb, Esq.
Lieb & Lieb
988 Mirrow Street
Franklin City, Franklin 33602

Dear Charlie:

As we discussed on the phone earlier today, we would like you to assist us in seeking enactment of legislation pending in the Franklin State Assembly that would mandate royalties on resales of works of visual art. I am enclosing the text of the proposed legislation, Franklin Assembly Bill 38 (F.A. 38).

Our neighboring state of Columbia enacted such a statute in 1973. Similar legislation was introduced in our other neighboring state of Olympia in 2006 but, unfortunately, never got out of the Olympia Senate's Committee on the Arts, which voted to table the proposed legislation "for further study." I am enclosing hearing testimony given by the witnesses who appeared for and against the Olympia legislation. F.A. 38 was drafted to address some of the objections to the Olympia bill.

I know that the effort in Olympia raised a purely legal aspect of this issue which we must address as well, and which I will leave in your capable hands.

As I mentioned, we need a "leave-behind" that we can use to persuade legislators to vote our way, and given your firm's experience with the Franklin legislature, we could really use your help.

Thanks and kind regards,

Melody Muni

Melody Muni, Executive Director

TEMPLATE FOR "LEAVE-BEHIND"

THE FRANKLIN ARTISTS COALITION URGES SUPPORT FOR F.A. 38.

The Franklin Artists Coalition, representing over 5,000 visual artists who live and work in our state, urges your support for Franklin Assembly Bill 38.

[**Introduction**: Describe the proposed legislation in a few sentences.]

[**Why Legislation Is Necessary and Appropriate**: Explain the arguments for and answer the arguments against the proposed legislation in short paragraphs or bullet points of a few sentences each.]

[**Why Any Legal Objection Is Not Valid**: Respond to any legal objection to the proposed legislation. Your response should be detailed and thoroughly discuss the issue, but keep in mind that many of the legislators and their staffers are not attorneys.]

Franklin's visual artists, who contribute so much to our state's economy and culture, look to the legislature to enable them to earn a fair living as artists by enacting F.A. 38.

F.A. 38 DESERVES YOUR SUPPORT.

TESTIMONY OF

CAROL WHITFORD, Sculptor and Member, Olympia Art Collective

BEFORE THE COMMITTEE ON THE ARTS, OLYMPIA STATE SENATE

October 19, 2006

Mr. Chairman, I appreciate the invitation to appear before the Committee to testify in favor of the "Olympia Resale Royalties Act." As a working artist with close ties to the entire Olympia art community, I can tell you that Olympia's artists strongly support this legislation.

The life of an artist is a difficult one. The great satisfaction we get from creating works of art is tempered by the harsh economic realities we face. Works of visual art are different from other types of creative works (such as music, literature, and drama). The value in those other types of works is found either in the use of their intangible copyright rights (such as the right to publicly perform musical works) or in the sale of mass-produced physical copies (such as the sale of books). But most visual artists receive very little, if anything, from the exploitation of their intangible copyright rights, for most paintings and sculptures are never reproduced in copies (such as in posters or art books).

Rather, the overwhelming value of an artist's visual art is found in the sale of the original physical work (such as an oil painting). After the initial sale of that original physical work, unlike the sale of other types of artistic works, the artist and his or her heirs receive no "back end" remuneration—the money we receive when we first sell our paintings or sculptures is all we ever see.

Yet when our paintings or sculptures are resold by collectors, such collectors frequently reap huge profits because our works have appreciated in value. For example, a sculpture by the late Olympia artist Lawrence Huggins, which a collector originally purchased from him in 1983 for $45, was recently sold at auction for $780,000. There is no market for reproductions of such sculptural works, and Mr. Huggins's widow lives in poverty. It is only fair that artists and their heirs share, even if only to a small degree, in those profits. This legislation, with its modest five percent resale royalty, would make that possible.

Mr. Chairman, visual artists bear certain costs other creators do not. As a sculptor, I must buy the materials—granite, marble, steel—and the tools—chisels, power saws, and drills—I use to create my art. Painters must buy canvas, paints, and brushes. These things are expensive, and resale royalty payments would help defray these costs, unique to visual artists.

The Olympia Art Collective has commissioned an economic study of the visual artist's plight. Here are the report's key findings:

- 97% of Olympia's visual artists earn less than $35,000 annually from sale or other exploitation of their artwork. The remaining 3% earn, on average, $173,000 annually.
- 93% of visual artists' income from artwork comes from sale of the original physical work; the remaining 7% comes from sale of reproduction rights.
- The immediate heirs of visual artists receive, on average, less than $2,000 annually from the deceased artists' artworks, mostly from sales of previously unsold works in "inventory."
- In 1972, the year before the enactment of resale royalty legislation in our neighboring state of Columbia, public sales of works of visual art by auction houses and art galleries totaled $79 million; in 1974, the year after enactment of the Columbia statute, sales totaled $13 million; in 2004, the last year for which we have data, sales totaled $62 million (all figures are adjusted for inflation).

I know many say that resale royalties will only make the rich richer, only aid already-established artists whose works are valuable. But there are many resales for relatively modest sums of works by artists who are not the "stars" of our culture. And we are not asking for welfare. Resale royalties are a matter of equity, and even those who are successful are entitled to a fair return for the exploitation of their creations. In our society, no one would argue that a famous and successful singer-songwriter or author is not entitled to royalties for his creations because he "has enough." That is not the American way.

Mr. Chairman, on behalf of Olympia's artists, who contribute so much to our state's culture, I urge enactment of this legislation.

TESTIMONY OF

JEROME KRIEGER, Owner, K & S Galleries, and President, Olympia Art Gallery Ass'n

BEFORE THE COMMITTEE ON THE ARTS, OLYMPIA STATE SENATE

October 19, 2006

Mr. Chairman, thank you for the opportunity to testify against passage of the proposed "Olympia Resale Royalties Act," which is ill-considered for many reasons:

- Olympia has a thriving art market. Our many wonderful artists can earn a living here, thanks to the many art galleries and auction houses which cater to our state's art lovers and patrons. However, especially in difficult economic times, those galleries and auction houses operate, like all small businesses, on very thin margins. If this tax on resales of artworks is enacted, art collectors will choose to buy and sell their art elsewhere—and ultimately drive those galleries and auction houses out of our state. That will dry up the art market in Olympia, as it did in Columbia after it adopted this type of legislation.
- The legislation also reflects a misunderstanding of the economics of the art market. The vast majority of artists never make it to the resale market. Their art is sold once, but no secondary market ever develops. It is the job of a gallery to develop each new artist's career so that the artist's work will be in demand—both his new works and his older works. A dealer's profit largely comes from selling the works of established artists, often in secondary market sales. If those profits are reduced by this new tax—either because of the expense of the tax itself, or because the secondary market is chased from the state—our galleries will have fewer resources available to give new artists the support they need to develop a market for their work. The legislation will therefore hurt the very people that its proponents say it is necessary to help.
- This legislation makes no distinction between well-off living artists and those few deceased artists whose families might be in need. In the arts, as in most professions, you receive modest payment for your work when you first start out, and as your experience, reputation, and abilities grow, you receive more for your work. We believe that the overwhelming majority of beneficiaries of this resale tax would be living artists who are already successful and do not need any more money.
- This legislation reeks of paternalism—it deprives artists on the one hand, and galleries, auction houses, and collectors on the other, of their basic rights of freedom of contract and private property. All property can increase or decrease in value with changes in the market over time. Why should an art patron who takes a chance and buys a painting from an unknown artist not reap the reward if the painting's value appreciates? After all, there is no guarantee that the work will become more valuable, and if it does not, or declines in value, the art patron will have to bear the entire loss.
- It often takes years for a dealer to develop a market for an artist's work, and there are frequently sales among dealers before the work is sold to the public. Why should those sales among art dealers be taxed?
- This legislation sets no lower limit on the amount of the resale royalty. If I bought a painting for $100 and sold it for $200, the proposed five percent royalty on the gross sales price would net the artist $10—but it would cost me far more than that to find the artist and pay my checking account fees. And note that the legislation you are considering here in Olympia would impose a royalty on the total amount of the sale, not the profit. If I bought a painting for $1,500 and sold it at a loss for $1,000, I would still owe the artist $50, compounding my loss.
- Finally, as our counsel will testify, this legislation would run afoul of the preemption provision of the 1976 Copyright Act.

This bill should not be enacted.

TESTIMONY OF

DANIEL BOYER, ESQ., Counsel, Olympia Art Gallery Association

BEFORE THE COMMITTEE ON THE ARTS, OLYMPIA STATE SENATE

October 19, 2006

MR. BOYER: Good morning. I am the attorney for OAGA. Let me address the preemption issue Mr. Krieger referenced: The federal Copyright Act provides that "all the legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . and come within the subject matter of copyright . . . are governed exclusively by this title. [N]o person is entitled to any such right or equivalent right in any such work under the common law or the statutes of any State." 17 U.S.C. § 301(a). This provision operates here and preempts the proposed resale royalties legislation.

One of the exclusive rights under the Copyright Act is the right to distribute copies of the copyrighted work to the public by sale. 17 U.S.C. § 106(3). Further, once the "first sale" of a copy is made, under authority of the copyright owner, that exhausts the distribution right, and subsequent sales are not under the control of the copyright owner. 17 U.S.C. § 109(a). As the proposed resale royalties statute would impose a tax on such further distribution, it conflicts with the federal Copyright Act and must fail.

SEN. LEDERMAN: But Mr. Boyer, isn't it true that the U.S. Court of Appeals for the Fifteenth Circuit—which includes our state, Columbia, and Franklin—examined that very question as it pertained to Columbia's statute in *Samuelston v. Rogers* and concluded that the preemption provision did *not* apply?

MR. BOYER: Senator, with respect, that's not accurate. *Samuelston* dealt with whether Columbia's resale royalties act was preempted under the prior 1909 Copyright Act, not the current 1976 Act. There is a great difference. You see, there was no specific preemption provision in the 1909 Act. Therefore, *Samuelston* used general federal supremacy jurisprudence and held that preemption occurred only if state law acted in an area which Congress "fully occupied." Because the 1909 Act simply said that a copyright owner had the exclusive right to "vend" copies of the work, but nothing in that Act "restrict[ed] the transfer" of a copy of the copyrighted work once it had been legitimately obtained, *Samuelston* held that Congress had not "fully occupied" this area—the court said that the Columbia statute conferred on the artist a right not provided by the 1909 Act. *Samuelston* also said that Columbia's resale royalties act did not "restrict the transfer" of a copy of an artwork, because transfer was still possible. Thus, the court concluded, state regulation of the market for physical copies of artworks was not in conflict with the intangible copyright rights in the works, and thus the Columbia act was not preempted under the 1909 Copyright Act.

SEN. LEDERMAN: But isn't that decision still applicable in the Fifteenth Circuit, which includes Olympia?

MR. BOYER: No, ma'am, because the 1976 Copyright Act differs from the 1909 Act. First, the 1976 Act contains an explicit preemption provision, in § 301(a), evincing a clear congressional intent to preempt laws like this one. The 1909 Act did not have an explicit provision; *Samuelston* had to rely on implied general supremacy doctrine jurisprudence.

Second, the 1976 Act changed the standard for preemption: instead of some vague notion of Congress "occupying" the area in question, it set forth two explicit criteria in § 301(a). State law is preempted if it applies to works "within the subject matter of copyright," as is the case here, and if it deals with rights that are the equivalent of "exclusive rights within the general scope of copyright," as is also the case here.

SEN. LEDERMAN: Well, I cannot agree with that reading of the law—precedent is precedent. Mr. Chairman, I have no further questions.