

**MULTISTATE PERFORMEANCE TEST
FEBRUARY 2012**

The MPT Question administered by the State Board of Law Examiners for the February 2012 Maryland bar examination was *Franklin Resale Royalties Legislation*. Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners (NCBE) publishes the MPT Question and the “point sheet” describing the issues and the discussion expected in a successful response to the MPT Question. The “point sheet” is analogous to the Board’s Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the “point sheet” on the Board’s website. However, the NCBE does offer the MPT Question and “point sheet” for sale on its website.

Materials for an unsuccessful applicant: An applicant who was unsuccessful on the February 2012 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the “point sheet” for the February 2012 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests, in writing, a copy of the answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is July 3, 2012.

Materials for anyone other than an unsuccessful applicant: Anyone else may obtain the MPT Question and the “point sheet” only by purchasing them at the NCBE Online Store.

Use the following link to access the NCBE Online Store: www.ncbex2.org/catalog/

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REPRESENTATIVE ANSWER 1

TO: Charles Lieb

FROM: Examinee

DATE: February 28, 2012

RE: Material to be inserted into the bracketed portions of the Proposed Resale Royalties Legislation "leave behind"

Introduction:

Franklin Assembly Bill 38 ("F.A. 38") is a necessary measure to insure the ongoing creativity and opportunity of Franklin artists by providing a route through which up-and-coming artists may actually receive some benefit from their works after those works have entered the stream of commerce. The bill focuses specifically on "visual art," defined at 986(a)(2), as that art which is an original painting, sculpture, or drawing existing in single copy. Because this sort of visual art does not benefit from the reproduction values that other art might, the artists who create such masterpieces are often left with the short end of the stick: only earning a meager amount when compared to what such unique pieces may fetch after gaining some notoriety. This injustice, paired with the inequality within the art world, minimal impact on the market, and commitment of our state to young and aspiring artists makes F.A. 38 a bill to support.

Why Legislation is Necessary and Appropriate

There are many good arguments supporting F.A. 38 and few tenable arguments against it.

Arguments Supporting F.A. 38

- The significant majority of visual artists earn less than \$35,000 annually. (In Olympia, this majority equals 97%!) This is because the vast majority of a visual artist's income comes only from the original sale of their work. (In Olympia: 93% of their income!) This is because visual artists do not benefit from the significant reproductions. Under the current law, they only get money from the original sale. By passing F.A. 38, visual artists will be able to earn a percentage off later sales and better support themselves and their craft as their incomes rise.
- The difference in resale value can be huge! An original work of Olympia artist Lawrence Huggins sold, originally, for \$45. A few years later, that same work was sold for \$780,000--but Huggins didn't see *any* of that increased value! The entire gain was buy art dealers. By passing F.A. 38, art dealers will only have to accommodate for a moderate adjustment to honor the rights of the artist when setting their prices and both will benefit from increased notoriety of a work. Further, as those artists are able to produce more art, the art dealers will have more off which to sell and profit.
- Visual art is not cheap to make! Sculptors must purchase stone and metals and the tools to craft it with, plus the space to run the equipment and store everything as well. Painters have to keep canvas, paint, and brushes. As some works get relatively big, this can all cost significant

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money to sustain. In order to allow for young artists to make a foray into the art world, F.A. 38 will help them defray these costs with added income at little impact to the art buyer. Who knows: we might help foster the next Michaelangelo here in Franklin!

- Artists starve for a reason, and when they do, they often leave starving loved ones behind. Those loved ones need help to sustain their own lives, often sacrificed to some degree to support the artists. (To reference Mr. Huggins again: while his works may now be fetching close to \$1,000,000, his widow lives in poverty.) By passing F.A. 38, we can give an opportunity to those loved ones to earn an income off their deceased loved one's talents as those works are resold. This is no radical idea, the same scheme has been applied to reproductions of copyrighted works for generations!

- Similar legislation has been in place in neighboring Columbia since 1973. Though they saw an initial dip in the art market, they have since returned to the high level of sales as enjoyed before the legislation. Franklin art houses will be able to quickly learn from the experiences of their Columbia counterparts to quickly adjust to the legislation and keep our art, and economy, strong!

- Visual art does not benefit from copyright protection the same way copyrighted material does. This is because such visual art, that which F.A. 38 targets, is not reproduced. One of a kind art becomes valuable because it is one of a kind. Inspiring individuality and expression has always been the American way, and F.A. 38 will allow more of that American spirit to prosper in Franklin.

The Arguments Against F.A. 38 are Untenable

- Detractors to the bill might say that artists can "already earn a living." \$35,000 is a living, but is it enough to support a wife and family? Those same detractors might point out that some visual artists earn over six figures a year... but how many is that? In Olympia, only 3%! A young artists might have to put in his time and pay his dues and earn his respect, but there is no reason he should be forced to live with such a low income, especially considering the costs of his supplies and overhead. To do so is forcing them to choose between their art and everything else in life.

- Detractors might say F.A. 38 could impact the art house market. This is an overstatement. This is not a tax, but a honor to an artist's work. Art houses can adjust to accommodate that, and if they do, they'll be able to profit off the greater amount of work coming from those profitable artists. Furthermore, F.A.38 has aspects built in that keep art houses from having to pay low-level costs when works are not selling for profitable amounts. For example, a resale that is less than \$1,000 may occur without having to pay the artists, and transactions between dealers for the first ten years are also exempt. This will keep art houses from having to suffer any great burdens and allow them to still profit as the works become more and more valuable (just finally giving something back to the artists!).

- Detractors might say that F.A.38 will harm the secondary market. However, because it only applies to sales over \$1,000; and because artists can waive their rights in effort to help develop the secondary market, this is not true. Pieces can still be sold and resold without worrying about

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the rights of the artists as the artists name develops to be strong enough to allow for a robust secondary market, and a savvy artist will waive a few small dollars now in order to help establish that sort of name.

- Detractors might say F.A. 38 is "paternalistic" or "harmful to the artistic community." Nothing but the opposite. F.A.38 keeps a clear avenue of rights open straight to the artists. This isn't Big Brother trying to control expression, this is a grant of respect to the artistic endeavors of our creative minds that allows them to collect on their works and produce more.

Why Any Legal Objection Is Not Valid

Detractors to F.A. 38 might argue that it is preempted by the 1976 Federal Copyright Act (Title 17 USC). Such objections are meritless. As noted by the United States Court of Appeals for the 15th Circuit in the *Samuelson v Rogers* case, federal law preempts state law to the extent that the federal law has "occupied the field" and state law "conflicts" with the federal law. In that case, the 15th Circuit looked to the US Supreme Court's ruling in *Goldstein v. California* when analyzing a still-imposed Columbia statute under the 1906 Copyright Act. The Columbia statute was similar to F.A. 38: it allowed an artist to collect royalties from an art dealer how made subsequent sales of the artist's original work. According to the 15th Circuit, the Columbia statute (like F.A. 38) was not in conflict with the federal statute because it only afforded an additional right not granted by the federal statute. Even if the economic constraints were implicit in both, the legal constraints were different. If the Columbia statute was sound, 15th Circuit precedent supports F.A. 38 as being sound and not pre-empted under federal law.

A recent Franklin Court of Appeals decision, one from *Franklin Press Service v. E-Updates*, touched again upon the impact of the federal Copyright Act. However, the Franklin Court of Appeals was now dealing with the 1976 Copyright Act, which was revised from the 1906 Copyright Act analyzed in the *Samuelson* case. Even though the new act has new language, it does not pre-empt F.A. 38. According to the *E-Updates* case, a protection will only be preempted by the federal Copyright Act if it meets two criteria: first, the work must "come within the subject matter of copyright," and two, the state protection cannot include elements of proof that are additional to or different from the Copyright Act's.

In regards to that first element (whether the state protection applies to anything within the scope of the federal act's protection), the rights protected by F.A. 38 do not fall within the federal act's protection. While §102 of the federal act lists protection as being given to "pictorial, graphic, or sculptural works," §106 then states the exclusive rights only applies to *copies* and not the original work. F.A. 38, on the other hand, works to protect those original works specifically. Furthermore, §109 of the federal act states that a subsequent owner of a piece is entitled, "without authority of the copyright owner" (i.e. the artist) to resell or dispose of the work. Again, this is exactly the legal right that F.A. 38 looks to impart. For these reasons, F.A.38 works to give a right additional to and beyond that afforded by the federal statute, taking F.A. 38 beyond the bounds of preemption concerns.

Some might argue that §301(a) of the federal act works to explicitly preempt all state statutes or common law but to say so requires a very loose reading of the statute. While section §301(a)

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does say that the federal statute is to be exclusive, it says so only in reference to the "scope of copyright *as specified by section 106.*" Again, §106 only deals with "distribut[ion] of copies" and not the original works. Though §301 references the original works, it only does so as a reminder of the material from which the copyright springs.

In short, where the federal statute deals with the *copy* right, F.A. 38 deals with the *original* right. For this reason, F.A. 38 is not preempted and deserves your support.

REPRESENTATIVE ANSWER 2

Introduction: Franklin Assembly Bill 38 would require royalties - payments for continuing use of artworks - to be paid to artists and their heirs for resales of artworks in the state. F.A. Bill 38 would allow artists and their heirs to collect a 5% royalty from the profit of such sale whenever a work of visual art is sold by a seller residing in Franklin or the sale takes place in Franklin. This Act does not apply to the initial sale by the artist, or to any re-sale which generates a profit less than \$1,000, or to any sales between art dealers within 10 years of the initial sale from the artist to an art dealer.

Why Legislation is Necessary and Appropriate:

Works of visual art are different from other types of creative works (such as music, literature, and drama). As Carol Whitford, a Sculptor from our sister state of Olympia stated, "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)." Visual arts are different because they receive very little, if anything at all, from their intangible copyright rights or reproduction of copies - since most visual arts (paintings, sculptures etc.) are never reproduced.

The overwhelming value of an artist's visual art is found in the sale of the original physical work. So when an artist creates his/her piece of visual art, most of what the artist gets in return is from the sale he/she makes of that visual art. Once an art dealer or customer purchases that piece of art, and then later sells it for a huge profit due to an appreciation in value for various reasons, the artist him/herself does not receive anything in return from that resale. 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 an auction for \$780,000. Mr. Huggins' widow lives in poverty. It is only fair that artists and their heirs receive a share of those profits and the proposed 5% is modest. The ol

The visual artist's costs are different than those of other creators. For example, a sculptor must buy the materials - granite, marble, steel - and the tools - chisels, power saws, drills etc. These tools and materials are expensive and such royalty would help defray these costs which are unique to visual artists.

The current lack of a royalty on resales of visual artists has left a gross disparity between visual artists and what other artists are able to make due to the lack of a market for reproductions of visual art and the fact that most of the value of a visual art comes from the initial sale.

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Allowing visual artists to receive a small portion of the profits from resales is the American way. The artists created the artwork and as a matter of equity, they are entitled to such royalties. Regardless of whether the artist is rich or poor, they are entitled to them just as a songwriter, rich or poor, is entitled to royalties on copies of a CD sold.

Opponents will argue that the royalty act will cause art collectors to buy and sell their art elsewhere. While it was initially true in Columbia, such sale numbers have since recuperated since the enactment of the Columbia resale royalty legislation.

Opponents will also argue that the legislation will hurt the artists since the profits would be reduced and thus the galleries who will have to make the royalty payments will have fewer resources available to give new artists the support they need to develop a market for their work. However, the royalty act is asking for a meager 5% and only on certain resales which create a profit of more than \$1,000.

Opponents may argue that the beneficiaries of the resale royalty act would be living artists who are already successful. But, as discussed above, "successful" does not make them any less obligated from receiving royalty payments.

Opponents may also argue that the act would deprive artists and art dealers/collectors of their basic rights of freedom of contract and private property. But, it is important to note again that the act would infringe no contract or property right. It would simply allow for the artist to rightfully collect a small portion of the profit that the art dealer/collector has collected based on the artist's own hard work and creativity so far. Furthermore, visual art is nothing like other property which makes this argument moot.

Opponents may also argue that the royalty act would tax sales amongst art dealers. However, if the resale is by an art dealer within 10 years of the initial sale of the work by the artist to an art dealer and all intervening resales are between art dealers, the Act will not apply, making this argument moot.

Opponents may also argue that there is no lower limit on the amount of the resale royalty and that the royalty would be imposed on the total amount of the sale. However, the Franklin act would only apply to resales where the profit exceeds \$1,000 and the royalty is only on the profit itself, not the total amount of the sale - also making this argument moot.

Why any legal objection is not Valid:

The sole legal issue here is whether the Franklin Act would be pre-empted by the 1976 Federal Copyright Act. Based on precedent, the Franklin Act would not be preempted by the 1976 Copyright Act.

"Preemption" means that the Federal Act here would prohibit the enactment of the proposed Franklin Act.

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Under Samuelston v. Rogers, the Columbia Act was found to be not pre-empted since the Columbia Act applies only after the artist has sold the copy of the work - therefore the Columbia Act provided an additional right not granted by the 1909 Act (The Samuelston case was decided before the 1976 copyright Act was effective). Furthermore, the Columbia Act did not "restrict the transfer" of a copy of work and the court found that having to pay royalties is not a restriction of the 1909 Copyright Act.

Opponents will argue that the Samuelston decision does not apply since it analyzed the law under the 1909 Copyright Act and currently the issue is that the 1976 Federal Copyright Act may preempt the enactment of the Franklin Royalty Act. However, the subsequent Franklin Press decision should quell any fears that such a royalty act is preempted or that the Samuelston decision is not valuable precedent.

Under Franklin Press, the 1976 Copyright Act sets forth two criteria, both of which should be met for preemption.

First - the work must come within the subject matter of the copyright under Sec. 102. Sec. 102 does include pictorial, graphic, or sculptural works - therefore visual arts are included in the subject matter of copyright.

Second - the rights involved must be within the "exclusive rights" granted to a copyright owner. under Sec. 106. Sec. 106 gives copyright owners the exclusive right to distribute copies of the copyrighted work to the public by sale or other transfer of ownership. It does not speak to how the proceeds of such sale shall be distributed or that the proceeds are exclusively the property of the copyright owners.

Sec. 109(a) of the 1976 Copyright Act states that the lawful owner of a particular copy, and any person authorized by the owner, is entitled to sell or otherwise dispose of that copy without authority of the copyright owner. However, the Royalty Act would not violate this section as it does not forbid the re-sale of visual arts - it simply allocates a small portion of the profits to the artist and their heirs.

As you can see above, the Franklin Resale Royalty Act is a much-needed piece of legislation that would protect the interests of the artists of visual arts and their heirs. It is not preempted or forbidden by the 1976 Copyright Act, despite what its opponents may claim.