



RESALE ROYALTIES: AN UPDATED ANALYSIS

OFFICE OF THE REGISTER OF COPYRIGHTS

DECEMBER 2013





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The Register of Copyrights of the United States of America

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

December 12, 2013

Dear Mr. Nadler:

On behalf of the United States Copyright Office, and in response to your request, I am pleased to deliver an updated report examining the issues surrounding visual artists and resale royalties in the United States. This report is an adjunct to the Office's 1992 report, *Droit de Suite: The Artist's Resale Royalty*, and takes into account changes in law and practice over the past two decades.

In developing the current report, the Office solicited and received public comments from a diverse array of stakeholders and held a public roundtable, at which you appeared and offered remarks. Based on this process and independent research, the Office has concluded that certain visual artists may operate at a disadvantage under the copyright law relative to authors of other types of creative works. Visual artists typically do not share in the long-term financial success of their works because works of visual art are produced singularly and valued for their scarcity, unlike books, films, and songs, which are produced and distributed in multiple copies to consumers. Consequently, in many, if not most instances, only the initial sale of a work of visual art inures to the benefit of the artist and it is collectors and other purchasers who reap any increase in that work's value over time. Today more than seventy foreign countries – twice as many as in 1992 – have enacted a resale royalty provision of some sort to address this perceived inequity.

That said, the issues are as complex as the art market itself. We believe that Congress may want to consider a resale royalty, as well as a number of possible alternative or complementary options for supporting visual artists, within the broader context of industry norms, market practices, and other pertinent data.

Please let me know if you have any questions. I would be happy to discuss the Report with you or your staff.

Respectfully,

Maria A. Pallante
Register of Copyrights and Director
U.S. Copyright Office

Enclosure

The Honorable Jerrold Nadler
2110 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20510

Congress of the United States
Washington, DC 20510

May 17, 2012

The Honorable Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20540

Dear Ms. Pallante,

Works of visual art, including paintings and sculptures, are among the most valuable and treasured creative works protected by our copyright law. These works frequently appreciate in value over time, thereby returning a profit to the collectors or investors who purchase them along the way, but not necessarily to the artists who create and sell the works in the first instance. For example, it is not uncommon for collectors to sell works of visual art at auction for many times the artist's initial sale price. The law requires no additional payment to the artist in such circumstances.

As you know, the copyright law provides a bundle of exclusive rights to authors. These exclusive rights are the basis of copyright protection for most creative works in the United States and around the world, yet in the case of many artworks, these rights are not as valuable as the original itself. By contrast, the authors of books, songs, films and other creative works may benefit over and over again by selling or licensing multiple copies or repeat programming.

We are also aware that the first sale doctrine is an important limitation under copyright law that allows the lawful owner of a particular work, such as a painting or book, to freely sell or otherwise dispose of the work without permission of the author or other copyright owner. Accordingly, our objective is not to prevent such lawful, downstream sales, but rather to ensure that artists of visual artworks are effectively compensated within the existing marketplace.


In 1992, the Copyright Office reviewed this issue and released a public report assessing whether changes to U.S. copyright law were needed to provide remuneration for visual artists whose works were subsequently resold for significant amounts at public auctions or in other situations. As the Office noted at that time, only a few countries had resale royalty legislation, but since that time, several additional countries and the European Union have adopted legislation to provide royalties to visual artists when their works are resold.

In December 2011, we introduced S.2000/ H.R.3688, the "Equity for Visual Artists Act of 2011" (EVAA), which would enable visual artists to benefit from subsequent sales of their works by providing a royalty to artists when their works are resold at public auctions. We

intended this bill to serve as a starting point for discussion, and therefore request that the Copyright Office undertake a comprehensive review of this issue. We ask that the review assess how existing law affects and supports visual artists and how a federal resale royalty provision would affect copyright law, visual artists and those involved in the sale of art work. As an initial step in the examination, we request that the Office meet with and solicit comments from stakeholders and work closely with our staff throughout the review process.

Thank you for your expert assistance in this matter. We look forward to working with you and receiving your analysis.

Respectfully yours,



HERB KOHL

Senate Committee on the Judiciary



JERROLD NADLER

House Committee on the Judiciary

cc: Senator Patrick J. Leahy, Chairman, Senate Committee on the Judiciary
Senator Chuck Grassley, Ranking Member, Senate Committee on the Judiciary
Representative Lamar Smith, Chairman, House Committee on the Judiciary
Representative John Conyers, Jr., Ranking Member, House Committee on the Judiciary

ACKNOWLEDGMENTS

This Report reflects the dedication and expertise of the Office of Policy and International Affairs at the U.S. Copyright Office. Karyn Temple Claggett, Associate Register of Copyrights and Director of Policy and International Affairs, managed the study process, including the public hearings, analysis, drafting, and development of recommendations. The Report benefited greatly from the focused attention of Counsels Kevin Amer and Jessica Sebeok, and Attorney-Advisor Aaron Watson who, along with the Associate Register, were its principal authors.

Jacqueline Charleworth, General Counsel and Associate Register, and Senior Counsels Catherine Rowland and Maria Strong reviewed the Report and provided important suggestions and recommendations during its drafting. Counsel Jason Okai provided assistance during early stages of the study, including legal research and preparation for the public hearings. Counsel Molly Torsen Stech, Attorney-Advisors Katie Alvarez, Rick Marshall, Frank Muller, Abioye Oyewole, and John Riley, along with law clerks Christa Boyd, Sofia Castillo, and Dawn Leung and intern Dominique Brooks, contributed valuable research and citation assistance.

Finally, I would like to thank the wide range of hearing participants and other interested parties who contributed comments to the study. Their observations and suggestions were critical to the formulation of our overall recommendations.

Maria A. Pallante
Register of Copyrights and Director
U.S. Copyright Office

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EXECUTIVE SUMMARY

A well-functioning copyright law must provide robust support for authors, who are, after all, the first beneficiaries of the copyright system. Indeed, U.S. copyright law derives fundamentally from the principle that authors' interests are inseparable from the broader public interest. While "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor," the "ultimate aim is . . . to stimulate artistic creativity for the general public good."¹ Accordingly, to the extent that the current copyright system is not working effectively for authors – or is disfavoring a discrete class of authors – Congress should be concerned.

In the framework of the resale royalty discussions, the authors at issue are certain visual artists, including painters, illustrators, sculptors, and photographers (hereinafter "visual artists" or "artists").² Based on the information and comments provided during the preparation of this report, as well as the Office's independent research, the Office agrees that, under the current legal system, visual artists are uniquely limited in their ability to fully benefit from the success of their works over time. The distinctive nature of the creation and marketing of visual art has not changed since the Office's main study on the topic, published in 1992.³ At the same time, recent developments – including in particular the adoption of resale royalty laws by more than thirty additional countries since the Office's prior report – would seem to warrant renewed consideration of the issue.

In general, visual artists do not share in the long-term financial success of their works. Instead, the financial gains from the resale of their works inure primarily to third parties such as auction houses, collectors, and art galleries.⁴ Moreover, the income typically available to other

¹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

² If Congress were to enact a resale royalty right, it would need to define the eligible categories of works. In 1990, for purposes of the Visual Artists Rights Act of 1990, tit. VI of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 602 (1990) ("VARA"), Congress enacted the following definition of "work[s] of visual art" in Section 101 of Title 17:

(1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

³ See U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY* (Dec. 1992) ("1992 REPORT"), available at http://www.copyright.gov/history/droit_de_suite.pdf.

⁴ See Artists Rights Society ("ARS"), Comments Submitted in Response to U.S. Copyright Office's Sept. 19, 2012 Notice of Inquiry at 1 (undated) ("ARS Comments") ("The benefits derived from the appreciation in [visual artists'] works accrue primarily to collectors, auction houses, and galleries."); VAGA, Comments Submitted in Response to U.S. Copyright Office's Sept. 19, 2012 Notice of Inquiry at 1 (Dec. 1, 2012) ("VAGA Comments") ("[T]he artist . . . usually does not benefit directly from the increasing value of his work. Those rewards go to the art market: collectors, dealers, galleries and auction houses.").

All public comments submitted in response to the Office's Sept. 19, 2012 Notice of Inquiry are available at <http://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/>.

authors through reproduction and derivative uses of their works is more limited for artists. Although the Internet has provided artists with greater opportunities to exploit derivative images and/or sell mass-produced copies of their works, stakeholders agree that “for most visual artists . . . the amounts involved in reproduction or representation are generally insignificant.”⁵ Indeed, it appears to be common ground that reproduction rights represent a “very minor aspect of [most artists’] careers”⁶ and that the first sale of a work is “the main or exclusive source of income for almost all American artists.”⁷

The Copyright Office agrees that these factors place many visual artists at a material disadvantage vis-à-vis other authors, and therefore the Office supports congressional consideration of a resale royalty right, or *droit de suite*,⁸ which would give artists a percentage of the amount paid for a work each time it is resold by another party. A large and growing number of countries around the world – more than seventy in total – now follow that approach. Other potential responses might include the facilitation of voluntary initiatives among stakeholders in the art market, amending the copyright law to give artists a continuing economic interest in their works through, for example, greater interests in public display or commercial rental rights, and increased federal grants for visual art programs.

That said, an “information problem” in the art market – something that many have acknowledged – does present certain challenges. Any assessment of the treatment of visual artists under U.S. law suffers from a lack of independently verifiable data about the operation of the art market and a resulting difficulty in determining whether a resale royalty in particular would truly operate to place artists on equal footing with other authors. At the same time, the Office recognizes that many of the arguments against the right are overblown. Moreover, according to the most recent studies, a number of the adverse consequences that this Office’s previous report predicted might follow from implementation of the right have not materialized in countries that have adopted *droit de suite* since that time. Accordingly, the Office finds no clear

⁵ Société des auteurs dans les arts graphiques et plastiques (“ADAGP”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 2 (Nov. 29, 2012) (“ADAGP Comments”); *see also* Tr. at 93:20-94:01 (Robert Panzer, VAGA) (“When we’re talking about fine art in particular, it’s about the unique work. And so even though there’s a little market for reproduction rights, it’s a very small market.”); *id.* at 111:06-08 (Simon Frankel, Sotheby’s Inc.) (“[F]or most artists . . . the only market they have, [is for] the original sale of their works.”).

Throughout this Report, the transcript of the Office’s April 23, 2013 public roundtable is cited with the abbreviation “Tr.” along with the page and line numbers. These citations also include the name of the speaker and organization (if any) with which the speaker is affiliated. The complete transcript is available at <http://www.copyright.gov/docs/resaleroyalty/transcripts/0423LOC.pdf>.

⁶ Tr. at 107:12-13 (Robert Panzer, VAGA).

⁷ Sotheby’s, Inc. & Christie’s, Inc., Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 4 (Dec. 5, 2012) (“Sotheby’s/Christie’s Comments”); *see also* Tr. at 100:09-10 (Tania Spriggens, Design and Artists Copyright Society (“DACS”)) (explaining that for most visual artists, reproduction rights generate but “a tiny portion of their income”); Tr. at 106:14-19 (Robert Panzer, VAGA) (“For reproduction rights, when you’re dealing with fine art, really, the vast majority of that money goes to 20 artists in the entire world, and then everybody falls away after that. That’s not where the money’s made.”); *id.* at 109:02-05 (Morgan Spangle, Dedalus Foundation, Inc.) (“[T]he amount of money that comes in from reproduction rights . . . is a very, very, very small amount of money.”).

⁸ While this study uses both of these terms to describe resale royalty schemes, we generally employ the term “*droit de suite*,” French for “right of following on,” in specific reference to the right as it has been developed and implemented in Europe.

impediment to implementation of a resale royalty right in the United States and supports the right as one alternative to address the disparity in treatment of artists under the copyright law.

The Copyright Office makes the following observations and recommendations:

- Although visual artists possess the same exclusive rights under copyright law as other authors, they are disadvantaged as a practical matter by certain factors endemic to the creation of works that are produced in singular form (or in very limited copies) and are valued for their scarcity. There are sound policy reasons to address this inequity, including the constitutionally-rooted objective to incentivize the creation and dissemination of artistic works.
- While a resale royalty could be one of many factors affecting the location of auctions and other art sales, there is no evidence to conclusively establish that it would harm the U.S. visual art market. Studies produced since this Office last examined the issue in 1992 belie earlier assumptions that a resale royalty would substantially reduce prices in the primary art market or shift the secondary art market away from the United States.
- Although adoption of a resale royalty right is one option to address the disparate treatment of artists under the law, it is not the only option, and more deliberation is necessary to determine if it is the best option. The Office's 1992 report highlighted the fact that resale royalties appear to benefit only an extremely small number of artists. Current studies and reports remain consistent with this view. In light of the potentially limited benefits, the costs of the law (*e.g.*, administration and enforcement), while not insurmountable, suggest that Congress should approach this issue with some caution.
- Should Congress wish to adopt a resale royalty right in the United States, the Office recommends that the legislation:
 - Apply to sales of works of visual art by auction houses, galleries, private dealers, and other persons and entities engaged in the business of selling visual art;
 - Include a relatively low threshold value to ensure that the royalty benefits as many artists as possible;
 - Establish a royalty rate of 3 percent to 5 percent of the work's gross resale price (*i.e.*, a range generally in line with royalty rates in several other countries) for those works that have increased in value;
 - Include a cap on the royalty payment available from each sale;
 - Apply prospectively to the resale of works acquired after the law takes effect;
 - Provide for collective management by private collecting societies, with general oversight by the U.S. Copyright Office;
 - Require copyright registration as a prerequisite to receiving royalties;
 - Limit remedies to a specified monetary payment rather than actual or statutory damages;

- At least initially, apply only for a term of the life of the artist; and
- Require a Copyright Office study of the effect of the royalty on artists and the art market within a reasonable time after enactment.

I. INTRODUCTION AND BACKGROUND

A. HISTORY OF *DROIT DE SUITE*

The resale right, or *droit de suite*, as it is often called in Europe, derives from a bundle of privileges commonly and collectively known as “moral rights.”⁹ Where other moral rights assure attribution (paternity) or protect against mutilation (integrity), the resale right provides visual artists with an opportunity to benefit from the increased value of their works over time by granting them a percentage of the proceeds from the resale of their original works of art. France was the first country to implement *droit de suite* in 1920, after a widely published lithograph by artist Jean-Louis Forain poignantly portrayed “starving artists.”¹⁰ Within a few years, Belgium (1921) and Czechoslovakia (1926) each followed suit with similar legislation.¹¹ Soon after, the French government proposed addition of *droit de suite* to the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) at the 1928 revision conference in Rome.¹² The Berne Convention was formally amended at the 1948 Brussels revision conference to include *droit de suite* under then-Article 14*bis*.¹³

As a result of subsequent minor amendments and renumbering, the *droit de suite* provision of the Berne Convention, which is essentially identical to the original Article 14*bis*, is now found under Article 14*ter*.¹⁴ Article 14*ter* provides authors of original works of art and original manuscripts an inalienable right to an interest in any subsequent sale of the work after the first transfer by the author.¹⁵ Because several countries opposed addition of the right at the 1948

⁹ See 1992 REPORT at xiii. Moral rights, recognized in certain countries, are those noneconomic rights that are considered “personal” to authors, typically including rights of attribution and integrity. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01[A] (rev. ed., 2013) (“NIMMER”); see also Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*(1), Sept. 9, 1886, as revised July 24, 1971 and as amended Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 3 (entered into force in the United States Mar. 1, 1989) (“Berne Convention”) (“Independently of the author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which shall be prejudicial to his honor or reputation.”).

¹⁰ See Carole M. Vickers, *The Applicability of the Droit de Suite In the United States*, 3 B.C. INT’L & COMP. L. REV. 433, 438 n.16 (1980) (describing the reaction to Forain’s lithograph, which depicts two impoverished children looking into an auction house window where a painting, apparently created by their father, is on display for a high price, with the caption “*Un tableau de Papa!*” (“One of father’s paintings!”)). For a reproduction of Forain’s lithograph, see ARS Comments at Appendix B.

¹¹ 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND §11.54 (2d ed. 2006) (“RICKETSON & GINSBURG”).

¹² See *id.* §11.59.

¹³ See *id.* §11.61.

¹⁴ See *id.* (paragraph (1) substituted the word “transfer” for “disposal” and paragraph (2) substituted the word “degree” for “extent”).

¹⁵ Article 14*ter* provides:

Brussels conference,¹⁶ the resale right in Berne ultimately was made optional and reciprocal – Member States were not required to implement the right, but if they failed to do so their citizens could not benefit from the right in other countries.¹⁷ Thus, although the United States is a signatory to the Berne Convention, it is not required to implement *droit de suite* under its domestic copyright law. As a result of this omission, United States artists are prevented from recouping any royalties generated from the sale of their works in those countries that do have a resale royalty right.¹⁸ In the words of one commenter, “a generation of resale royalties has been lost to American artists [as well as] the reciprocity that should have been sent overseas”¹⁹

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

Berne Convention art. 14*ter*.

¹⁶ Notably, Norway and Finland did not see the need for a resale royalty for their artists. The United Kingdom did not actively oppose the right, but asserted that U.K. law was not yet ready for the *droit de suite*. The Dutch voiced the most basic objection, arguing that the resale right does not relate to copyright protection, therefore the right is an inappropriate subject for the Berne Convention. 1 RICKETSON & GINSBURG §11.61.

¹⁷ Berne Convention art. 14*ter*(2). Article 14*ter* is one of four exceptions to the general obligation under Berne Article 5(1) that member countries provide “national treatment,” or treatment no less favorable they accord their own nationals. *See also* MIHÁLY FICSOR, WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS 297 (2003) (“FICSOR”) (listing Article 14*ter*(2), along with Article 2(7) on the protection of works of applied arts/industrial designs, Article 6(1) on “backdoor protection,” and Article 7(8) on “comparison of terms,” as the enumerated exceptions to national treatment under the Berne Convention); 1 PAUL E. GELLER & MELVILLE B. NIMMER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE §5[4][b][ii] (2012) (“GELLER & NIMMER”) (explaining that “Berne applies national treatment to *droit de suite* only in cases where the claimant’s country provides for the entitlement [because] it was never clear whether *droit de suite* falls inside or outside core author’s rights”); 1 RICKETSON & GINSBURG § 3.45 (asserting that “the effect of this article was to create a sub-Union between those states which did recognize *droit de suite*”).

¹⁸ *See, e.g.*, Copyright Agency/Viscopy, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 5 (Dec. 2012) (“Viscopy Comments”) (two Australian agencies who collect resale royalties on behalf of artists stated that, between 2007 and 2011, works by forty-seven American artists generated sales of \$2,606,343.00 or 10.4 percent of the total sales of foreign artists in Australia. Despite Australian’s resale royalty provisions, Australian collecting societies do not pay royalties to U.S. artists because the United States does not provide a resale right.). Under Berne Article 14*ter*, countries may apply reciprocity rather than national treatment.

¹⁹ Tr. at 50:22-51:03 (Cynthia Turner, American Society of Illustrators Partnership (“ASIP”).

B. U.S. CONSIDERATION OF *DROIT DE SUITE*

1. Prior Legislative Attempts

Although the United States has not adopted a resale royalty, artist rights communities, art market professionals, legislators, and scholars have debated the issue of artist/author parity under the copyright law for many years.²⁰ Similar to the way legislators in France were reportedly spurred on by Forain's lithograph, the United States began seriously considering a resale royalty as a result of another seminal moment in the art industry – the 1973 auction of Robert Rauschenberg's 1958 painting "Thaw." Rauschenberg originally sold "Thaw" for \$900, but fifteen years later it was resold at auction for \$85,000 without any additional compensation to the artist.²¹ The sale was marked by a now legendary exchange, captured on film, between Rauschenberg and well known art collector and taxi service owner Robert Scull.²² Just after the sale, Rauschenberg approached Scull and said, "I've been working my ass off for you to make all this profit. . . . The least you could do is send every artist in this auction free taxis for a week."²³ After this incident, Rauschenberg began campaigning for an artist's resale right.²⁴

At the federal level, policy makers have introduced several proposals to create a resale right. During the 95th Congress, Representative Henry Waxman introduced the Visual Artists' Residual Rights Act of 1978 ("Waxman Bill"), which would have provided a 5 percent royalty to the artists (subject to several exceptions) to be paid by the seller, on resales of artwork for \$1,000 or more.²⁵ The Waxman Bill also would have created a National Commission on the Visual Arts and a Visual Arts Fund under the Department of the Treasury for the purpose of administering the right.²⁶ To qualify for the royalty, the work would have had to be registered with the Commission prior to resale,²⁷ and the Commission would have had the right to enforce or collect the royalty.²⁸ If a court found that the seller intentionally failed to make the required royalty payment, liability

²⁰ See 1992 REPORT at 86-95 (providing an overview of the history of efforts to incorporate a resale royalty into federal law); Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 16 COLUM.-VLA J.L. & ARTS 395, 396 n.11 (1991-1992) ("Perlmutter") (explaining that proposals to incorporate a resale right under federal law had been discussed by legislators as far back as the 1960s, culminating in several unsuccessful legislative proposals, discussed in further detail below).

²¹ See Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, N.Y. TIMES, Nov. 1, 2011, <http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html?pagewanted=all>.

²² Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-up Study*, 46 J. COPYRIGHT SOC'Y U.S.A. 531, 531 (1998-1999) ("Wu") (describing the 1974 documentary film by E.J. Vaughn, entitled "America's Pop Collector: Robert C. Scull – Contemporary Art at Auction").

²³ Wu at 531.

²⁴ *Id.*

²⁵ Visual Artists' Residual Rights Act of 1978, H.R. 11403, 95th Cong. (1978) (Section 4(e) of the Act provided that the right did not apply to: any sale or resale of an artist's own work; sales occurring after the life of the artist plus fifty years; works resold for less than the purchase price plus five percent of the sales price; resale of the work between dealers, within two years of the initial sale; or resale of a work in connection with a building if the art is an integral part of the structure.); see also 1992 REPORT at 87-88 (containing an analysis of the Visual Artists' Residual Rights Act of 1978).

²⁶ H.R. 11403 §§ 3(a), 6(a) (1978).

²⁷ *Id.* § 5(c).

²⁸ *Id.* § 4(d).

would have included punitive damages of three times the amount of the royalty due or \$5,000 (whichever was greater), plus reasonable costs, including attorney fees.²⁹ Finally, the right would have been prospective, beginning one year after enactment, and apply only to qualifying resales of works that were initially sold on or after the effective date of the legislation.³⁰

In 1986, Senator Edward Kennedy introduced the Visual Artists Rights Amendment of 1986,³¹ which, in addition to establishing limited moral rights for visual artists, would have provided that the seller pay a royalty of 7 percent of the difference between the purchase price and the sales price, when the resale price was more than \$500 and 140 percent higher than the price paid by the seller.³² The following year, Senator Kennedy introduced a new proposal entitled the Visual Artists Rights Act of 1987 (“Kennedy-Markey Bill”), which would have established a 7 percent royalty on sales of visual art that was sold for \$1,000 or more and over 150 percent of the purchase price paid by the seller.³³ In addition, the Kennedy-Markey Bill required registration of the work with the U.S. Copyright Office to qualify for the royalty³⁴ and excluded works made for hire.³⁵

At the 1987 hearings on the Kennedy-Markey Bill, both sponsors highlighted “the serious problem” facing artists within the current system.³⁶ Representative Edward Markey, who sponsored the legislation in the House, added that “visual artists . . . need the right to participate economically in the success of the work.”³⁷

Congress, however, removed the resale right provision from the version of the bill that it eventually passed as the Visual Artists Rights Act of 1990 (“VARA”).³⁸ Instead, VARA provided more limited moral rights for artists, namely, those of attribution and integrity in certain situations.³⁹ With respect to resale royalties, VARA’s section 608(b) directed the Copyright Office to conduct a study, in consultation with the Chair of the National Endowment for the Arts, on the feasibility of future resale royalty legislation.⁴⁰

²⁹ *Id.* § 4(d)(1)(C).

³⁰ *Id.* § 8.

³¹ Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986).

³² *Id.* § 3 (1986); *see also* 1992 REPORT at 88-90 (analyzing the bill and its House counterpart).

³³ Visual Artists Rights Act of 1987, S. 1619, 100th Cong. § 3 (1987). An identical companion bill, H.R. 3221, 100th Cong. (1987), was introduced by Representative Edward J. Markey on August 7, 1987.

³⁴ S. 1619 § 3.

³⁵ *Id.* § 8.

³⁶ *The Visual Artists Rights Act of 1987: Hearings on S. 1619 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 100th Cong. 2 (1987) (statement of Senator Kennedy) (explaining that the bill was intended to address “the serious problem of economic exploitation of visual artists by permitting them to share in the appreciating commercial value of their work.”).

³⁷ *Id.* at 15 (statement of Representative Markey).

³⁸ VARA §§ 601-10 (codified at 17 U.S.C. § 106A).

³⁹ *Id.* § 603 (17 U.S.C. § 106A(a)).

⁴⁰ *Id.* § 608(b). VARA also directed the Copyright Office to study the impact of a provision permitting waiver of the moral rights conferred by the statute. *Id.* § 608(a). The Office’s final report on that issue was published in March 1996. *See* U.S. COPYRIGHT OFFICE, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS (1996).

2. The Copyright Office's 1992 Report

In response to VARA's directive, the Copyright Office published its comprehensive examination of *droit de suite* in December 1992 ("1992 Report"), concluding that the Office was "not persuaded that sufficient economic and copyright policy justification exists to establish *droit de suite* in the United States."⁴¹ The Office expressed concern that implementing a resale royalty right might be harmful to visual artists who lack a viable resale market because primary market prices might decline as a result of factoring in the future royalty.⁴² The Office further explained that imposing a federal resale royalty on sales transactions may conflict with the copyright law's first sale doctrine, reasoning that "the notion of an encumbrance attaching to an object that has been freely purchased is antithetical to our tradition of free alienability of property."⁴³ The Office also acknowledged, however, that the international community was "focusing on improving artists' rights, including the possibility of harmonization of *droit de suite* within the European Community," and that, "[s]hould the European Community harmonize existing *droit de suite* laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its member States."⁴⁴ At the time of the 1992 Report, approximately thirty-six countries had adopted the resale right.⁴⁵ As will be discussed in further detail below, all Member States in the European Union now have fully implemented *droit de suite*, and more than seventy countries currently provide the right.⁴⁶

The Office concluded the 1992 Report with proposed alternatives to a resale royalty, including compulsory licenses, broader display rights, rental rights, and federal grants for public works of art.⁴⁷ The Office also outlined a "model *droit de Suite* system," identifying eight areas to be considered if legislation were to be proposed: oversight and administration of the right; the types of sales to which the royalty would apply; the threshold amount that would trigger the royalty and percentage of royalty; the length of the term for the right; the effect on foreign authors; alienability of the right; the types of works to which the right would apply; and whether the royalty would be applied retroactively.⁴⁸ Ultimately, Congress did not enact legislation creating a federal resale royalty right, and until 2011, there had been no further formal congressional deliberation on the topic.

C. RECENT DEVELOPMENTS

To reboot the discussion of a federal resale royalty right, then-Senator Herb Kohl and Congressman Jerrold Nadler introduced the Equity for Visual Artists Act of 2011 ("EVAA") on

⁴¹ 1992 REPORT at 149.

⁴² *Id.* at 133.

⁴³ *Id.* at xi.

⁴⁴ *Id.* at 149.

⁴⁵ *Id.* at ii.

⁴⁶ See Selected Countries with Laws Containing Provisions on the Resale Right at Appendix E.

⁴⁷ 1992 REPORT at 149-51.

⁴⁸ *Id.* at 151-55. For example, the Office recommended that the term for the royalty be coextensive with the copyright term for the work; that the right be inalienable; that the right only apply to works of visual art as defined under 17 U.S.C. §101; and that the royalty only apply to works created on or after the law's effective date. *Id.* at 154-55.

December 15, 2011.⁴⁹ The EVAA, described in more detail in Section II.C.2.b, would amend section 106 of the Copyright Act to provide that the party responsible for collecting the “money or other consideration” pay a 7 percent royalty on works sold at public auction for \$10,000 or more, which would be split between the author of the work and nonprofit art museums.⁵⁰

As part of this wider discussion, a May 2012 letter by Senator Kohl and Representative Nadler requested that the Copyright Office take another look at the issue, focusing on two particular questions:

- (1) how the current copyright legal system affects and supports visual artists; and
- (2) how a federal resale royalty provision would affect copyright law, visual artists and those involved in the sale of artwork.⁵¹

In response, the Office published a general Notice of Inquiry in September 2012 seeking written public comments.⁵² The Office asked interested parties to consider and comment on several policy implications that could be associated with implementing a resale royalty, including how such a right would be implemented under U.S. law; whether such a law would further the constitutional directive that U.S. copyright law promote creativity; the effect that the right would have on the U.S. art market; notable changes that have occurred since the 1992 Report; and potential alternatives. The Office ultimately received fifty-nine comments addressing a wide variety of issues, including constitutional and economic considerations, as well as fact-specific experiences and perspectives of individual artists, collectors, corporate entities, and collecting societies.

The Office published a second general Notice of Inquiry in March 2013,⁵³ seeking additional input on the issues raised in the public comments and inviting interested parties to participate in a public roundtable hearing. The hearing, held on April 23, 2013, addressed some of the most prominent issues raised in the public comments: the changing legal landscape and the portability of the art market; the impact of the resale royalty on visual artists, sales of visual art works, and the incentive to create new works; and constitutional concerns, including the effect of retroactive implementation of the right, and whether a resale royalty would conflict with the first sale doctrine, the Fifth Amendment’s Takings and Due Process Clauses, or the Article I constitutional prohibition against bills of attainder.

In addition to the written public comments and roundtable discussions, the Office conducted its own legal and policy research in preparing this analysis, including a survey of

⁴⁹ S. 2000, 112th Cong. (2011); H.R. 3688, 112th Cong. (2011).

⁵⁰ *Id.* § 3.

⁵¹ Letter from Hon. Herb Kohl, Senate Committee on the Judiciary, & Hon. Jerrold Nadler, House of Representatives Committee on the Judiciary, to Hon. Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office 2 (May 17, 2012).

⁵² Resale Royalty Right, 77 Fed. Reg. 58,175 (Sept. 19, 2012). The Office published a second Federal Register notice on October 16, 2012, which extended the comment period to December 5, 2012. Extension of Comment Period: Resale Royalty Right, 77 Fed. Reg. 63,342 (Oct. 16, 2012). Federal Register notices are attached as Appendix A.

⁵³ Resale Royalty Right; Public Hearing, 78 Fed. Reg. 19,326 (Mar. 29, 2013).

relevant domestic and foreign laws, governmental reports, and academic and other third-party studies.

II. THE CURRENT LEGAL LANDSCAPE

A. THE TREATMENT OF VISUAL ARTISTS UNDER CURRENT LAW

Under the United States Copyright Act, artists, like all other authors, are provided a bundle of exclusive rights, including rights to reproduce, distribute, and create adaptations of their works.⁵⁴ Federal copyright law, however, generally does not grant artists, or any other authors, rights to control, or benefit from, the subsequent use of the original work.⁵⁵ Rather, the first sale doctrine generally permits the owner of a lawfully made copy of a work to display, sell, or dispose of that copy without the authorization of the creator, thereby depriving visual artists of much of the display right's value once the work is sold.⁵⁶

To be sure, the exclusive rights under Section 106 are available to visual artists just as they are available to other authors; as a practical matter, however, artists' ability to exploit those rights is limited. In the case of the reproduction right, visual artworks differ from other works – say, books – in that a work of visual art is produced once. Indeed, a novelist and her publisher may offer millions of copies of the same book to buyers, a filmmaker may distribute millions of DVDs of a film, and a songwriter may authorize millions of downloads or streams. In each case, every purchaser receives the same work, for the same value as the original, and the author is compensated for each transaction.

Put another way, if a publisher sells five thousand books on behalf of an author, five thousand purchasers will own five thousand identical copies of the original work. The author (and publisher) will have a financial interest in all five thousand copies, and all five thousand purchasers will then be free to retain or resell their copies under the first sale doctrine without any separate financial obligation to the author or publisher. But in the case of many visual artists, there is but one painting, drawing, print, or sculpture, and one purchaser, and therefore the visual artist has but one financial interest, or, at best, a financial interest in a few limited editions of the work, as in a series of numbered prints or sculptures. While some artists may successfully exploit their works in other ways, such as through reproductions, for many others, the very nature of their visual art may limit the ability to create such markets, and the income realized from the sales of these items is not likely to approach the income that the original artwork will bring if it increases in value and is sold and later resold.⁵⁷

⁵⁴ 17 U.S.C. § 106(1)-(3).

⁵⁵ As noted, visual artists are granted very limited moral rights to prevent certain modifications to some of their works under 17 U.S.C. §106A of the Copyright Act. Section 106A does not provide additional economic benefits for visual artists.

⁵⁶ 17 U.S.C. § 109(c); *see also* 1992 REPORT at 126-27 (explaining that “[a]uthors and composers receive royalties through reproduction and performance rights for all the copies of their works that are exploited Visual artists, on the other hand, are paid [only] for the initial sale of their works, have a minimal market for exploiting their reproduction rights, and lose their most remunerative right – that of public display – once they sell their creations.”) (citations omitted).

⁵⁷ *See, e.g.,* Joshua Rogers, *How to Outsmart the Billionaires Who'll Bid \$80 Million for "The Scream,"* FORBES, Apr. 4, 2012 (“Rogers”), <http://www.forbes.com/sites/joshuarogers/2012/04/04/how-to-outsmart-the-billionaires-wholl-bid-80-million-for-the-scream/> (explaining that “[t]he wealthy don’t merely collect art – they invest in it. Many even regard art as just another asset class, like real estate, precious metals,

Another issue concerns the ability of visual artists, relative to other authors, to exploit the right to create derivative works. For example, a literary author may sell rights in his or her novel to a publisher, sell the right to create a screenplay to a writer, or sell the right to create a motion picture from that screenplay. At each point in the life cycle of that novel, numerous opportunities arise for the author to earn income from the original novel without having to write another book or restrict the number of books available for purchase in the marketplace. By contrast, in the case of certain visual artworks, there only can be one sale at a time, and only the initial sale will inure to the benefit of the actual creator. A sculptor or painter may spend months or years creating a unique and singular work of art, the value of which is likely to be based on its originality and scarcity, rather than on its potential for use in derivative works.⁵⁸ As explained by then-Register of Copyrights Ralph Oman during a 1989 hearing before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Administration of Justice, on what was to become VARA:

Works of visual art present special challenges in copyright law because of the nature of their creation and dissemination. They are neither mass produced nor mass distributed. They often exist only in a single copy. After the sale of that unique work the first sale doctrine of the copyright law has prevented artists from sharing in the increased value of their works the way composers, playwrights and choreographers can.⁵⁹

Over time, therefore, it may be a collector or other downstream entity that will derive the most financial benefit from subsequent sales of a visual artwork.⁶⁰ According to some sources, certain fine art can appreciate by more than 10 percent in value per year.⁶¹ That appreciation, however, typically accrues to the benefit of someone other than the original artist, typically a collector or investor. As is discussed below, an artist may, by contract, attempt to negotiate a future financial interest in his work with a buyer. This, however, is by no means a common practice, even for accomplished artists, and it seems unlikely for one who is just starting out.

commodities, stocks, bonds or cash"); ARS Comments at 1 ("The benefits derived from the appreciation in [visual artists'] works accrue primarily to collectors, auction houses, and galleries."); VAGA Comments at 1 ("[T]he artist . . . usually does not benefit directly from the increasing value of his work. Those rewards go to the art market: collectors, dealers, galleries and auction houses.").

⁵⁸ See VAGA Comments at 1 ("[F]ine art's value is derived from its singularity, its scarcity, and the reputation of its creator.").

⁵⁹ *Hearing on H.R. 2690, Visual Artists Rights Act of 1990 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 27 (1989) (statement of Hon. Ralph Oman, Register of Copyrights).

⁶⁰ See Tr. at 93:20-94:01 (Robert Panzer, VAGA) ("When we're talking about fine art in particular, it's about the unique work. And so even though there's a little market for reproduction rights, it's a very small market."); *id.* at 94:21-95:02 (Panzer) ("I can't think of any artist who said, I want to be an artist because I'm going to sell posters, or I'm going to put my art on book covers . . ."); *id.* at 100:07-14 (Tania Spriggins, DACS) ("The artist survives on the sale of the original. Let's be honest, the reproduction rights [a fine artist] enjoys generates a tiny portion of their income. Compare that to the careers of musicians where a majority of their income is generated from the reproduction of their music and the sale of those reproductions.").

⁶¹ See Rogers (citing studies showing that "art produced an annualized return of 10.9 percent between 2000 and 2010").

The Copyright Act does contemplate that an author who conveys rights in a work should, under some circumstances, be entitled to benefit from its subsequent appreciation in value. Title 17 gives authors the right to terminate a prior transfer or license of copyright after a specified period of years has elapsed.⁶² In this way, the copyright law addresses circumstances in which an author who bargains away rights in a work early in her career may later seek to participate in that work's increased value in the marketplace. For most visual artists, however, this termination right likely provides little practical value. An artist has the option to retain ownership of his or her copyright after selling the physical object embodying the work,⁶³ and in fact, there is broad agreement that fine artists typically do retain copyrights in their works and with them the ability to license or approve third-party uses of those works.⁶⁴ But because most artists earn little or no income from derivative uses of that type, they likely remain excluded from the benefits of their works' appreciation even if they retain their copyrights or recover them through termination.

⁶² 17 U.S.C. §§ 203, 304.

⁶³ See 17 U.S.C. § 202 (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”).

⁶⁴ See, e.g., Jock Reynolds (Director, Yale University Art Gallery), Email to the U.S. Copyright Office (Oct. 31, 2013) (on file with U.S. Copyright Office) (“Almost all contemporary artists . . . retain copyrights to their artwork. Some . . . also donate these rights to certain museums of their choice . . . often with some guidance provided as to how the reproduction of their work should be guided in the future. Other artists sometimes leave their copyrights to foundations they create and still others frankly spend little or no time monitoring how their work is reproduced unless they encounter uses that somehow offend them and seem to be inappropriate.”); Jonathan Freiman (Partner, Art Law Practice Group, Wiggin & Dana), Email to the U.S. Copyright Office (Oct. 31, 2013) (on file with U.S. Copyright Office) (“[C]ontemporary artists nearly always retain the copyright when they first sell their works. . . . The one exception is commissioned work. Even there, it’s rare for a buyer to get the copyright as well. . . . What happens more often is that the buyer carves out some of the copyright rights.”).

Some commenters nevertheless perceive a bargaining imbalance between emerging artists who wish to retain copyright on the one hand, and art dealers and collectors wary of buying a work for which the artist retains any exclusive rights on the other. See Kernochan Center for Law, Media and the Arts, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 3 (Dec. 5, 2012) (“Kernochan Center Comments”) (“Unfortunately, many artists assign the copyrights in their works to others for compensation”); see also DESIGN AND ARTISTS COPYRIGHT SOCIETY (“DACS”), DACS ARTIST SURVEY 3 (2011), http://www.dacs.org.uk/DACSO/media/DACSDocs/DACS-artist-survey_summary.pdf (stating that of the artists surveyed who found copyright to be a barrier to their creative output, “63 percent said that attempts to ‘rights grab’ their copyright had created barriers in their work as a visual artist. Most commonly described were instances where the visual artist lost a contract as they were not prepared to assign their rights”); RUPERT MYER, COMMONWEALTH OF AUSTRALIA, REPORT OF THE CONTEMPORARY VISUAL ARTS AND CRAFT INQUIRY 82 (June 14, 2002) (“MYER REPORT”), http://arts.gov.au/sites/default/files/pdfs/Report_of_the_Contemporary_Visual_Arts_and_Craft_Inquiry.pdf (noting that “[a]rtists are reliant upon their own efforts and resources when negotiating with commercial operators, which can lead to a disparity of bargaining power between the artist and the commercial gallery or dealer”); Timothy M. Sheehan, *Why Don’t Fine Artists Use Statutory Copyright? – An Empirical and Legal Survey*, 22 BULL. COPYRIGHT SOC’Y U.S.A. 242 (1974-75) (reporting that, in the context of the 1909 Copyright Act, which required an artist to place a copyright notice on their work to avail themselves of statutory copyright, at least some of the art gallery directors surveyed “would not sell a painting when an artist reserves copyright,” because some “buyers might think [the painting] was less theirs . . .” and that reservation of copyright is “like putting a restriction on the purchaser”).

B. OTHER U.S. LAWS SUPPORTING VISUAL ARTISTS

In addition to their rights under federal copyright law, U.S. visual artists may benefit from various other federal, state, and municipal laws and programs intended to support the creation and dissemination of fine art. These provisions, several of which are described in Appendix D, include state moral rights laws, tax incentives for arts and cultural districts, tax exemptions for art-related purchases, protections for artists selling works on consignment, and federal grants to cultural institutions. Yet while these and other programs provide meaningful support for artists in various aspects of their careers, they do not address the specific market-based limitations described above. Indeed, none of the participants in the Office’s current review suggested that such programs provide an adequate remedy for visual artists’ inability to participate in the appreciating value of their works.⁶⁵

C. LEGAL CHANGES AND DEVELOPMENTS SINCE THE 1992 REPORT

1. International Developments

a. European Union harmonization

Although the Office ultimately did not recommend adoption of a resale royalty right in the 1992 Report, it noted that Congress may want to reexamine the issue if the European community were able to successfully harmonize its varied *droit de suite* laws.⁶⁶ The European Union (“EU”) harmonized its *droit de suite* laws in 2001 with the adoption of Directive 2001/84/EC (“Directive”). The Directive had two primary objectives: ensuring that authors of graphic and plastic works of art share in the economic success of their original works of art,⁶⁷ and generally requiring Member States to implement harmonized resale royalty legislation by 2006.⁶⁸ The Directive also allowed Member States that did not previously have a resale right under national law to limit application of the right to works of living artists until 2010, or, upon notice from the Member State to the European Commission (“EC”), for an additional two years, with full implementation required by all Member States by January 1, 2012.⁶⁹

The Directive requires Member States to establish a royalty for qualifying art sales following the initial sale that involve “art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.”⁷⁰ Member States have some flexibility in implementing the right in that they may decide whether to set the threshold resale price that would trigger the royalty below the maximum €3,000 (approximately \$4,000 USD); whether to provide for compulsory or optional collective management of the royalty; as well as whether to

⁶⁵ Cf. Perlmutter at 419 (“Increased funding is certainly a direct and effective way to help artists. It is not, however, a substitute for generally applicable copyright-type rights.”).

⁶⁶ 1992 REPORT at 149.

⁶⁷ Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, recital 3, 2001 O.J. (L 272) 32–36, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=180301.

⁶⁸ *Id.* art. 12.

⁶⁹ *Id.* art. 8(2)-(3).

⁷⁰ *Id.* art. 1.

apply a higher (5 percent) royalty rate for sales in the lowest price bracket (see below).⁷¹ The Directive caps the royalty to be paid at €12,500 (approximately \$17,000 USD), regardless of the resale price.⁷² As a result of the Directive, *droit de suite* is now a component of national laws across the European community.

The royalty rate for all European Union Member States, which is determined based on the sale price, is set as follows:

- (a) 4 percent for the portion of the sale price up to €50 000;⁷³
- (b) 3 percent for the portion of the sale price from €50 000,01 to €200 000;
- (c) 1 percent for the portion of the sale price from €200 000,01 to €350 000;
- (d) 0,5 percent for the portion of the sale price from €350 000,01 to €500 000;
- (e) 0,25 percent for the portion of the sale price exceeding €500 000.⁷⁴

The United Kingdom – the largest art market in the EU without a resale royalty right prior to the 2001 Directive – is a key example of how EU countries have implemented the Directive.⁷⁵ In 2006, the United Kingdom partially implemented the resale royalty for living artists,⁷⁶ and exercised the option under Article 8 of the Directive to delay extending the royalty to the heirs and estates of deceased artists until 2012.⁷⁷ Per Article 4, paragraph 3 of the Directive, the United Kingdom has opted to use a threshold lower than the €3,000 ceiling mandated by the Directive – just €1,000.⁷⁸ Additionally, under U.K. law, the resale right is

⁷¹ *Id.* arts. 4(2)-(3) and 6(2). If a Member State does set the minimum sale price at lower than €3,000, the Directive requires that “the Member State shall also determine the rate applicable to the portion of the sale price up to EUR 3000; this rate may not be lower than 4 percent.” *Id.* art 4(3).

⁷² *Id.* art. 4(1).

⁷³ *Id.* art. 4(2) (allowing that, “[b]y way of derogation from paragraph 1, Member States may apply a rate of 5 percent for the portion of the sale price referred to in paragraph 1(a).”).

⁷⁴ *See Id.* art. 4(1).

⁷⁵ *See* CLARE MCANDREW, TEFAF ART MARKET REPORT 2013: THE GLOBAL ART MARKET, WITH A FOCUS ON CHINA AND BRAZIL 51 (2013) (“TEFAF REPORT 2013”) (identifying the U.K. as the third largest global art market in 2012).

⁷⁶ Artist’s Resale Right Regulations, 2006, S.I. 346, art. 17 (U.K.), *available at* <http://www.legislation.gov.uk/ukxi/2006/346/contents/made>.

⁷⁷ Artist’s Resale Right (Amendment) Regulations, 2009, S.I. 2792, art. 2 (U.K.), *available at* http://www.legislation.gov.uk/ukxi/2009/2792/pdfs/ukxi_20092792_en.pdf; *see also* EXPLANATORY MEMORANDUM TO THE ARTIST’S RESALE RIGHT REGULATIONS 2006 NO. 346 7 (2006) (explaining that the U.K. delayed extending the resale royalty to sales of deceased authors because it was “desirable to give the art market a period during which it can adjust to the introduction of resale right . . .”), *available at* http://www.legislation.gov.uk/ukxi/2006/346/pdfs/ukxiem_20060346_en.pdf.

⁷⁸ Artist’s Resale Right Regulations, 2006, art. 12(3)(b).

administered by compulsory collective management.⁷⁹

After initial implementation of the right, the U.K. Intellectual Property Office (“IPO”) commissioned an independent public research group, the Intellectual Property Institute, to study the effect of the new law on the U.K. art market.⁸⁰ The study, published in January 2008, relied on analysis of global art auction database data, interviews, and questionnaire surveys of artists, art dealers, auction houses, and collecting societies “to provide an overview of the impact of the legislation since its introduction on eligible artists, dealers and auction houses operating in the UK.”⁸¹ Notably, the study found no evidence that the resale right – which at that time the report was issued, was limited to living artists – had reduced art prices and no evidence that the right had diverted business away from the U.K. art market.⁸² It concluded that “the art market in the UK, either despite or because of the introduction of [the artists resale royalty], appears to be doing well.”⁸³

The IPO has not released another study on the effects of implementation of the resale right since the 2008 study was published and the resale right was fully implemented to extend to heirs and estates of deceased artists in 2012. Further examination of the resale royalty is on IPO’s list of 2013/2014 research priorities.⁸⁴

b. Past and pending review of the law by the EC

The EU Directive requires the European Commission to submit a report on the implementation and effect of the resale royalty regime.⁸⁵ In particular, Article 11 directs that every four years, the Commission reexamine the resale right’s “impact on the internal market and the effect of the introduction of the resale right in those Member States that did not apply the right in national law prior to the entry into force of this Directive.”⁸⁶ The most recent report (“EC

⁷⁹ *Id.* art. 14(1).

⁸⁰ See KATHRYN GRADY, NOAH HOROWITZ, & STEFAN SZYMANSKI, A STUDY INTO THE EFFECT ON THE UK ART MARKET OF THE INTRODUCTION OF THE ARTIST’S RESALE RIGHT (2008) (“U.K. REPORT”) available at <http://www.ipso.gov.uk/study-droitdesuite.pdf>.

⁸¹ *Id.* at 3.

⁸² *Id.* at 2.

⁸³ *Id.* at 17.

⁸⁴ See U.K. INTELLECTUAL PROPERTY OFFICE, IPO RESEARCH PRIORITIES 2013/2014: THE “CORE PROGRAMME,” available at <http://www.ipso.gov.uk/iporesearch-20130322.pdf>. The U.K. provided additional insight into implementation of the resale right as part of the EC’s 2011 review of the EU harmonization of the resale royalty right. In its response to Question 7 of the EC’s Consultation in preparation of a Commission report on the implementation and effect of the Resale Right Directive (2001/84/EC), the U.K. stated that “[d]uring the existence of [the] resale right in the UK, almost 2,000 [l]iving artists have received royalties totaling around £12M.” U.K. INTELLECTUAL PROPERTY OFFICE, COMMENTS SUBMITTED IN RESPONSE TO THE EUROPEAN COMMISSION’S CONSULTATION ON THE IMPLEMENTATION AND EFFECT OF THE RESALE RIGHT DIRECTIVE 2001/84/EC. Written comments submitted to the EC as part of this 2011 consultation process can be found on the EC’s website at http://ec.europa.eu/internal_market/consultations/2011/resale_right_en.htm, under “Contributions authorised for publication.”

⁸⁵ Directive art. 11(1).

⁸⁶ *Id.*

Report”) notes that, at the time of publication in 2011, four Member States (Austria, Ireland, the Netherlands, and the U.K.) that did not apply the resale right in national law at the time the Directive entered into force in 2001, together with Malta (which joined the EU in 2004), had opted to delay applying the right to the estates of deceased artists until 2012.⁸⁷

To create its report, the Commission solicited responses from its Member States to a questionnaire, which probed various aspects of the EC resale royalty scheme and their effect on Member States’ artists and art markets.⁸⁸ The EC received over five hundred public comments from citizens, artists and their estates, and art market professionals.⁸⁹ Regarding the impact on artists and successors, the Commission’s subsequent report found that the “overwhelming majority . . . welcomed the resale right system as making a difference, both financially and in terms of recognition.”⁹⁰

Regarding the royalty’s impact on the art market, the EC Report highlighted statistics indicating that the EU and the United States both lost global market share between 2005 and 2010, while China gained market share.⁹¹ The report, however, also found: (1) that EU market share in the works of living EU artists actually rose between 2002 and 2010, as the Directive was being implemented,⁹² and (2) that some countries that implemented *droit de suite* in 2006, such as Austria, the Netherlands, and Italy, saw their market shares for living EU artists increase after implementation.⁹³ In comparing the Member States that did not, at first, apply the royalty to the works of deceased artists (*i.e.* Austria, Ireland, the Netherlands, and the U.K.), the EC report found “no discernible pattern to suggest that Member States which do not levy the royalty on the works of deceased artists have performed better over the period [between 2008 and 2010] than those that do.”⁹⁴

These findings led the EC to report that there was “currently insufficient evidence to indicate that the loss of EU market share for works of living artists over the period in question is directly attributed to the harmonisation of the resale right in 2006.”⁹⁵ Nor, it found, “can any clear patterns currently be established that would indicate systematic trade diversion within the EU away from those Member States which introduced the right for living artists in 2006.”⁹⁶ The Commission stated that it would continue to monitor market developments and publish its

⁸⁷ EUROPEAN COMMISSION, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE: REPORT ON THE IMPLEMENTATION AND EFFECT OF THE RESALE RIGHT DIRECTIVE (2001/84/EC) 3 (2011) (“EC REPORT”), *available at* http://ec.europa.eu/internal_market/copyright/docs/resale/report_en.pdf.

⁸⁸ *See* EUROPEAN COMMISSION, CONSULTATION ON THE IMPLEMENTATION AND EFFECT OF THE RESALE RIGHT DIRECTIVE 2001/84/EC (“EC CONSULTATION PAPER”), *available at* http://ec.europa.eu/internal_market/consultations/docs/2011/resale_right/consultation_paper_en.pdf.

⁸⁹ EC REPORT at 4.

⁹⁰ *Id.* at 10.

⁹¹ *Id.* at 5-6.

⁹² *Id.* at 5.

⁹³ *Id.* at 5, referring to Annex 1, Table 1.

⁹⁴ *Id.* at 6.

⁹⁵ *Id.* at 5.

⁹⁶ *Id.* at 10.

findings in a subsequent report, which is expected in 2014.⁹⁷

c. Non-EU countries with resale royalties

Many other regions in addition to the EU have adopted resale royalty rights since the Office's 1992 Report. In 1992, approximately thirty-six countries had adopted some form of *droit de suite*.⁹⁸ In the past thirteen years, that number has more than doubled. Today, more than seventy countries have resale royalty rights.⁹⁹ These include more than thirteen countries in Latin America, sixteen countries in Africa, as well as Australia, the Philippines, and the Russian Federation.¹⁰⁰

Countries not bound by the EU Directive implement the resale right in a wide variety of ways, ranging from a simple provision of the right to an intricate set of definitions and regulations.¹⁰¹ As an example of the former, Azerbaijan provides artists with an inalienable right to collect a 5 percent resale royalty on works of fine art and original manuscripts that were resold for a gain of 20 percent over the previous sale, in just two sentences:

In each case of public resale of originals of fine art works or manuscripts of the writer and the composer (through auction, fine arts gallery, art salon, shop and so on) after the first transfer of the ownership right to such works, if the price is 20% more than the previous sale, the author or his heirs shall have the right to receive 5% of sale price (resale right).

That right is inseparable during the lifetime of author and transferable only to the author's heirs by Law or testament throughout the duration of the copyright.¹⁰²

At the other end of the spectrum, Australia's 2009 Resale Royalty Right for Visual Artists Act¹⁰³ is a thirty-nine page document that comprehensively details all aspects of implementation of the artist's resale right in Australia. Australia's resale royalty scheme provides artists with a royalty of 5 percent on sales over \$1,000 AUD for the life of the author plus seventy years.¹⁰⁴ Sellers are required to report, in writing, all commercial resales over the threshold amount within ninety days of the resale, including sufficient detail to allow the collecting society to decide whether a royalty is required to be paid.¹⁰⁵ Notably, Australia's resale royalty is

⁹⁷ *Id.* at 11. The EC did note that in some Member States, inefficient administration of the resale right creates a burden on the market. Those administrative costs may, in turn, lead to unnecessary reductions in the royalties paid to artists and their heirs. *Id.* at 10-11.

⁹⁸ 1992 REPORT at 1.

⁹⁹ See Selected Countries with Laws Containing Provisions on the Resale Right at Appendix E.

¹⁰⁰ See *id.*

¹⁰¹ See Comparative Summary of Select Resale Royalty Provisions at Appendix C.

¹⁰² *Law of the Republic of Azerbaijan on Copyright and Related Rights* (as last amended by Law No. 1079-IIIQD of Sept. 30, 2010), Article 16(2), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=222982.

¹⁰³ *Resale Royalty Right for Visual Artists Act 2009* (Cth) (Austl.), available at <http://www.comlaw.gov.au/Details/C2009A00125>.

¹⁰⁴ *Id.* ss 18, 10(1)(a), 36.

¹⁰⁵ *Id.* s 28.

prospective, and if a work was acquired before the resale royalty scheme took effect, no royalty is due for the first sale after enactment.¹⁰⁶ Failure to pay a resale royalty does not subject the seller to copyright infringement, but does expose the seller to monetary and criminal penalties.¹⁰⁷

Prior to implementing the right, the Australian parliament requested a review of the legislation with the aim of determining the potential impact that enacting the right would have on artists and the art market.¹⁰⁸ As part of the review, a legislative committee considered forty submitted comments and the testimony of twenty witnesses over two days of hearings.¹⁰⁹ The resulting report, published in 2008, explains that Australia had been considering implementation of an artist resale royalty since a 1989 Australian Copyright Council report first advocated for the scheme.¹¹⁰ The 2008 report concluded that there was general, widespread support for an artist resale royalty,¹¹¹ noting an extensive 2002 study by the Australian government that also recommended introduction of a resale royalty scheme.¹¹² The committee recommended that the bill proceed and that it be “similar in design and structure to those already in existence so as to maximize these benefits through country to country reciprocity agreements mandated through the Berne Convention.”¹¹³ The committee also made several key recommendations, including: amending the bill to cover sales taking place on the Internet, as well as sales by part-time art dealers; amendment of certain provisions to avoid conflict with Aboriginal customary law; establishment of a visual artist’s registration database to assist in “timely distribution of information and payment of royalties”; and a recommendation that the committee undertake another review of the scheme within three to five years of implementation.¹¹⁴ Upon the committee’s recommendation, the Australian legislature implemented the right in June 2010.

The Australian government is now undertaking a comprehensive review of its resale royalty scheme, in accordance with the requirements of Australia’s Office of Best Practice Regulation.¹¹⁵ In June 2013, Australia published a discussion paper, requesting input from artists, art market professionals, and visual arts organizations.¹¹⁶ The discussion paper provides a few notable statistics: 26 percent of artworks sold on the secondary art market reportedly are eligible for the royalty; the scheme generated \$1,567,042 in royalties between the date of implementation

¹⁰⁶ *Id.* s 11.

¹⁰⁷ *Id.* pt 4 divs 1, 2.

¹⁰⁸ HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON CLIMATE CHANGE, WATER, ENVIRONMENT AND THE ARTS, RESALE ROYALTY RIGHT FOR VISUAL ARTISTS BILL 2008 (“AUSTRALIA REPORT”).

¹⁰⁹ *Id.* at Appendix A.

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.* at 41.

¹¹² *See* MYER REPORT at 14 (declaring in Recommendation 5 that “the disadvantaged position of Indigenous visual arts and craft practitioners in the market . . . has strengthened the call for the introduction of resale royalties to protect the rights of Indigenous people . . .”).

¹¹³ AUSTRALIA REPORT at 7.

¹¹⁴ *Id.* at 41-44.

¹¹⁵ OFFICE FOR THE ARTS, DEPARTMENT OF REGIONAL AUSTRALIA, LOCAL GOVERNMENT, ARTS AND SPORT, 2013 REVIEW OF THE RESALE ROYALTY SCHEME, DISCUSSION PAPER AND TERMS OF REFERENCE 2 (2013) (“AUSTRALIA 2013 REVIEW”), available at <http://arts.gov.au/sites/default/files/visual-arts/Discussion%20Paper%20-%202013%20Review%20of%20Resale%20Royalty%20Scheme.pdf>.

¹¹⁶ *Id.* at 2.

and May 2013; 49 percent of the royalty payments to artists have been between \$101.00 and \$500.00; and 91 percent of the recipients of royalties were living artists.¹¹⁷ The comment period has now closed, and the forthcoming review is expected to contain a “high-level analysis of the art market and modelling of the future of the Scheme.”¹¹⁸

While countries approach *droit de suite* differently, the Office notes the following key similarities among the countries it studied in detail:¹¹⁹

- (1) for the vast majority of jurisdictions, the right is inalienable;
- (2) the royalty rate is between 3 percent and 5 percent for countries outside the EU;
- (3) most countries have set the threshold amount around €1,000, with several countries well below that;¹²⁰
- (4) the right generally lasts for the term of copyright in the work;
- (5) most countries extend the royalty to sales by private dealers, auction houses, and galleries; and
- (6) resale rights are managed and administered by collective management organizations.

d. Other international developments: Canada and China

Among the developed countries lacking some form of *droit de suite*, which include Canada, China, Japan, and Switzerland, two – Canada and China – are currently considering implementing a resale royalty right. In Canada, Bill C-516 was introduced in Parliament on May 29, 2013, and would provide a 5 percent royalty to artists on secondary sales of works over \$500.¹²¹ In the same month, Motion M-445 was introduced, which generally calls for the Canadian government to implement an artist’s resale right.¹²²

The People’s Republic of China is undergoing a process to revise its Copyright Law of 2001 (as amended through 2010).¹²³ The National Copyright Administration of China (NCAC) has prepared several draft revisions, the second of which was circulated in July 2012, and proposed provisions that would establish a resale royalty. The third revision draft was finalized in late 2012, but was not made widely available to the public.¹²⁴ In early 2013, several art business news sources reported on the resale royalty proposal in the pending draft.¹²⁵ According

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.*

¹¹⁹ See Comparative Summary of Select Resale Royalty Provisions at Appendix C.

¹²⁰ France’s threshold is € 750; Germany’s threshold is € 400; Denmark’s threshold is € 300; and Finland’s threshold is € 255. See Comparative Summary of Select Resale Royalty Provisions at Appendix C.

¹²¹ Bill C-516, *An Act to amend the Copyright Act (artist’s resale right)*, 1st Reading, May 29, 2013, 41st Parliament, 1st Session, 2013, available at <http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6186580&File=30#2>.

¹²² See Notice Paper No. 251, Friday, May 10, 2013 10:00am, available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6148285&Language=F&Mode=1&Parl=41&Ses=1&File=11>.

¹²³ See discussion *infra*, Section 3a.

¹²⁴ See Hao Nan, *After a long review, latest draft of new copyright law*, CHINA DAILY, Nov. 7, 2012, http://www.chinadaily.com.cn/cndy/2012-11/07/content_15884557.htm.

¹²⁵ See Katie Hunt, *China debates droit de suite*, THE ART NEWSPAPER, Feb. 18, 2013, <http://www.theartnewspaper.com/articles/China-debates-droit-de-suite/28565>; *Will droit de suite be established in China?*, ART

to these sources, the latest draft of the revised Chinese copyright law included a *droit de suite* provision that would apply a resale royalty to original works of fine art, photography, and literary and musical transcripts.¹²⁶ It is difficult to confirm details affecting resale royalty elements that may appear in the version currently before the State Council-Legislative Affairs Office.

2. U.S. law and developments

a. California's Resale Royalty Act¹²⁷

The only resale royalty legislation passed in the United States has been at the state level in California, where it has operated with mixed success.¹²⁸ The California Resale Royalty Act ("CRRA") was enacted in 1976 and, to the extent it is not preempted by federal copyright law,¹²⁹ imposes several conditions prior to payment of the royalty: (1) the artist must either be a U.S. citizen or a California resident for at least two years at the time of the sale; (2) either the seller must reside in California, or the sale must be executed in California; (3) the artwork must be a work of "fine art," as defined under California law; (4) the work must be sold for a gain; and (5) the sale must be for \$1,000 or more.¹³⁰ The seller or seller's agent is required to pay the 5 percent royalty directly to the artist or the artist's assignee,¹³¹ and if the artist cannot be found, the seller or seller's agent must pay the royalty to the California Arts Council,¹³² to be deposited in a Special Deposit Fund in the State Treasury.¹³³ The California Arts Council must continue the search for the beneficiary artist for seven years, at which time, if the artist or beneficiary has not been located, the royalty is transferred to the Council to be used in acquiring fine art for public buildings.¹³⁴ Finally, under the California Penal Code, it is a misdemeanor offense to make "a

MEDIA AGENCY, Feb. 20, 2013, <http://www.artmediaagency.com/en/61427/will-droit-de-suite-be-established-in-china/>.

¹²⁶ See Hunt, *China debates droit de suite*.

¹²⁷ See Comparative Summary of Select Resale Royalty Provisions at Appendix C.

¹²⁸ At the time the 1992 Report was published, *droit de suite* legislation had been introduced, but not enacted in eleven other states: Connecticut, Florida, Illinois, Iowa, Maine, Michigan, Nebraska, New York, Ohio, Rhode Island, and Texas. 1992 REPORT at 75.

¹²⁹ As the Nimmer treatise explains, "the Copyright Act pre-empts state law provided the following two elements coalesce: (1) the rights created under state law must be 'equivalent' to one or more of the rights contained in the Copyright Act; and (2) such rights under state law must be applicable to works that constitute 'works of authorship' within the subject matter of the Copyright Act." 2 NIMMER § 8C.04[C]. In the 1992 Report, the Office concluded that then-current case law, "together with the view of copyright experts[,] firmly suggest that any state *droit de suite* provision would be preempted under [U.S.] Copyright Law." 1992 REPORT at 86. "Given the potential problems of preemption, enforcement, and multiple application," the 1992 Report recommended that "any resale royalty law in the United States that is enacted should be at the federal level." *Id.* at 86. *But see* discussion *infra* of *Baby Moose Drawings, Inc. v. Dean Valentine et al.*, 2011 U.S. Dist. LEXIS 72583 (C.D. Cal. 2011) (holding that the CRRA is *not* preempted by the Copyright Act).

¹³⁰ CAL. CIV. CODE § 986 (Deering 2013).

¹³¹ *Id.* § 986(a)(1).

¹³² *Id.* § 986(a)(2).

¹³³ *Id.* § 986(a)(4).

¹³⁴ *Id.* § 986(a)(5).

false statement as to the price obtained for any property consigned or entrusted for sale,”¹³⁵ giving artists at least some ability to obtain the sales information required to enforce payment of a resale royalty in the absence of an affirmative right to sales information.

Soon after the CRRA was enacted, an art dealer seeking to avoid paying royalties required under the act brought suit, claiming that the state royalty provision was preempted by federal copyright law, in *Morseburg v. Balyon*.¹³⁶ On appeal, the Ninth Circuit held that the CRRA was not preempted by the Copyright Act of 1909 and explicitly limited its decision to the 1909 Act, as the transactions at issue took place prior to enactment of the Copyright Act of 1976.¹³⁷

Recently, the CRRA has been challenged again in *Estate of Graham v. Sotheby’s Inc.*¹³⁸ In *Estate of Graham*, plaintiffs, a collection of artists and heirs, claimed that defendant auction houses, acting as agents of California sellers, sold works of fine art at auctions taking place in New York, but failed to pay the appropriate royalty under the CRRA.¹³⁹ In response, the defendant auction houses argued that the CRRA was unconstitutional under the dormant Commerce Clause of the U.S. Constitution “by purporting to regulate transactions that take place wholly outside of California.”¹⁴⁰ The Central District of California agreed with the defendants, declaring that the CRRA violates the dormant Commerce Clause “*per se*,” having the “practical effect of controlling commerce occurring wholly outside the boundaries of California,” and impinging on the federal government’s authority to control commerce among the states.¹⁴¹ The court examined the CRRA’s legislative history, which showed that the California legislature considered and rejected limiting the royalty only to sales occurring in California, and would not have enacted the CRRA if the royalty was only limited to in-state sales.¹⁴² The court then concluded that the CRRA could not be saved by the statute’s severability provision and that the entire statute must fall.¹⁴³

The defendants in *Estate of Graham* also argued that the CRRA was unconstitutional as a taking of private property and that it was preempted by federal copyright law.¹⁴⁴ The district court declined to address the defendants’ takings and preemption arguments, finding the Commerce Clause argument dispositive, and limiting the *Morseburg* decision specifically to works governed by the 1909 Copyright Act.¹⁴⁵ Additionally, the district court distinguished its

¹³⁵ CAL. PENAL CODE § 536 (Deering 2013).

¹³⁶ *Morseburg v. Balyon*, 1978 U.S. Dist. LEXIS 18831, at *1 (C.D. Cal. 1978).

¹³⁷ *Morseburg v. Balyon*, 621 F.2d 972, 975 (9th Cir. 1980).

¹³⁸ *Estate of Graham v. Sotheby’s Inc.*, 860 F. Supp. 2d 1117 (C.D. Cal. 2012).

¹³⁹ *Id.* at 1119.

¹⁴⁰ *Id.* at 1120.

¹⁴¹ *Id.* at 1124-25 (internal quotations omitted).

¹⁴² The legislative history indicated that legislators rejected the limitation because “were the CRRA to apply *only* to sales occurring *in* California, the art market would surely have fled the state to avoid paying the 5 percent royalty.” *Id.* at 1126.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1119.

¹⁴⁵ *Id.* at 1122.

2011 ruling in another case, *Baby Moose Drawings, Inc. v. Dean Valentine et al.*,¹⁴⁶ in which the court, deciding solely on preemption grounds, found that the CRRA is not preempted by federal copyright law.¹⁴⁷ The plaintiffs have appealed the case to the United States Court of Appeals for the Ninth Circuit, where the issue of preemption has once again been raised.¹⁴⁸

Although there have been a few studies on the effect of the CRRA, there is no definitive evidence that the CRRA has harmed the California art market. In their recent public comments, Sotheby's and Christie's point to Sotheby's decision to cease holding contemporary art auctions in Los Angeles shortly after the royalty was enacted as evidence that the CRRA has harmed California's art market.¹⁴⁹ Otherwise, a majority of the discussion surrounding the CRRA's effect on the California art market highlights the sparse and contradictory data on the subject. For example, a 1979 study concluded that the CRRA could possibly have a negative effect on some smaller galleries, but also noted that the CRRA "has been widely ignored by art dealers," and therefore could not have had much of an impact, at least with regard to the art dealers ignoring the royalty.¹⁵⁰ Another study, conducted by the Bay Area Lawyers for the Arts ("BALA") in 1986, found generally that sales generating a royalty were rare.¹⁵¹ Likewise, a 1998 study, written as a follow up to the 1980 study, found that "the resale right is barely enforced in California,"¹⁵² and most recently, the district court in *Estate of Graham* cited a 2011 *New York Times* piece, which found that in the thirty-four years since the enactment of the CRRA, only 400 artists had received a royalty, for a total of \$328,000.¹⁵³

¹⁴⁶ *Baby Moose Drawings, Inc. v. Dean Valentine et al.*, 2011 U.S. Dist. LEXIS 72583 (C.D. Cal. 2011).

¹⁴⁷ *Id.* at *10. The district court in *Baby Moose Drawings* cited the House Judiciary Committee report on the enactment of the Visual Artists Rights Act of 1990, to find that "Congress clearly intended for the Royalty Act to withstand preemption by the Copyright Act," noting the House Judiciary Committee understood that the Copyright Act "will not preempt a cause of action for . . . a violation of a right to a resale royalty" under the CRRA. *Id.* at *9-*10 (citation omitted).

¹⁴⁸ *Estate of Graham*, 860 F. Supp. 2d 1117, *appeal docketed*, No. 12-56077 (9th Cir. June 8, 2012).

¹⁴⁹ Sotheby's/Christie's Comments at 13. This position also has been taken by some scholars. See, e.g., John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103 (1993); Gilbert S. Edelson, *The Case Against an American Droit de Suite*, 7 CARDOZO ARTS & ENT. L.J. 260 (1989). But see *The Visual Artists Rights Act of 1987: Hearings on S. 1619 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 100th Cong. 110 (1987) (statement of Henry Hopkins, Director of the Frederick R. Weisman Foundation of Art) ("My own personal opinion on that is that Sotheby's was not doing enough business in California to justify their being there, and they used that as a convenient excuse to leave.").

¹⁵⁰ Tom R. Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 146, 149 (1980-1981); see also Wu at 531.

¹⁵¹ See Alma Robinson, BALA SURVEYS ARTISTS AND GALLERIES ON RESELL ROYALTIES, 4 BALA-GRAM 1 (Nov.-Dec. 1986) ("BALA STUDY"), reprinted in *The Visual Artists Rights Act of 1987: Hearings on S. 1619 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 100th Cong. 119 (1987). BALA is now known as California Lawyers for the Arts. For this study, a total of 289 questionnaires were sent to eighty-one San Francisco Bay Area art dealers, and 208 questionnaires were sent to visual artists. Only fifteen art dealers and thirty-six visual artists responded. See also 1992 REPORT at 69-71 (reviewing the BALA Study).

¹⁵² Wu at 538.

¹⁵³ *Estate of Graham*, 860 F. Supp. 2d at 1121 n.3 (citing Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, N.Y. TIMES, Nov. 1, 2011, <http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html?pagewanted=all>).

In addition to a lack of compliance and enforcement, it should be noted that the California Arts Council has had some difficulty in administering the right. In 1986, BALA reported that \$13,435 was being held by the California Arts Council, on behalf of fourteen artists that could not be located.¹⁵⁴ The Council currently is holding royalties for ninety-eight artists or estates, either because the artist or estate can not be located, or due to difficulty in communicating with the artist or their estate.¹⁵⁵ This figure represents nearly one fourth of the four hundred artists in total who had received the royalty in the time period from the CRRA's enactment in 1976 to the 2011 New York Times article cited by the court in *Estate of Graham*. Given the inconsistent application and enforcement of the CRRA, and, until recently, the lack of case law, it is difficult to ascertain the effect the law has had on California's artists and art market.¹⁵⁶

b. The EVAA

On December 15, 2011, Senator Kohl and Representative Nadler introduced bills in the 112th Congress titled *Equity for Visual Artists Act of 2011* ("EVAA"), S. 2000 and H.R. 3688 respectively.¹⁵⁷ Under the EVAA, whenever a "work of visual art"¹⁵⁸ is sold as the result of an auction of that work by someone other than the artists who is the author of the work, the entity that collects the money or other consideration paid for the sale of the work shall, within ninety days of collecting such money or other consideration, pay out of the proceeds of the sale a royalty equal to 7 percent of the price.¹⁵⁹

The proposed royalty would be triggered when a work of visual art is sold at auction for at least \$10,000 by someone other than the authoring artist. The EVAA would limit the royalty to sales at auction, excluding Internet sales, and defines "auction" to mean "a public sale run by an entity that sells to the highest bidder works of visual art in which the cumulative amount of such works sold during the previous year is more than \$25,000,000 and does not solely conduct the sale of visual art by the entity on the Internet."¹⁶⁰

Following the sale, the entity receiving the proceeds pays a royalty of 7 percent to a qualifying visual artists' collecting society,¹⁶¹ which in turn is required to distribute 50 percent of the net royalty to the artists or successor as copyright owner and place the other 50 percent of the

¹⁵⁴ BALA STUDY at 2.

¹⁵⁵ California Arts Council, *California Resale Royalty Act List of Artists*, <http://www.cac.ca.gov/artsinfo/rrartists.php> (list last updated May 29, 2012).

¹⁵⁶ See 2 NIMMER § 8C.04 (noting that, since the enactment of the CRRA in 1976, the annotated California Code reveals "only a trickle of cases" regarding the section.). Nimmer is unable to conclude whether the dearth of litigation on the subject is due to the fact that art resale transactions have moved outside the state to avoid the royalty, or whether the royalty is largely being ignored.

¹⁵⁷ See *supra* note 49.

¹⁵⁸ See EVAA § 2 (defining "work of visual art" to include "a painting, drawing, print, sculpture, or photograph, existing either in the original embodiment or in a limited edition of 200 copies or fewer that bear the signature or other identifying mark of the author and are consecutively numbered by the author, or, in the case of a sculpture in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author").

¹⁵⁹ *Id.* § 3.

¹⁶⁰ *Id.* § 2.

¹⁶¹ *Id.* § 3.

net royalty into an escrow account to support U.S. nonprofit museums in their future purchases of visual art created by living artists domiciled in the United States.¹⁶² Failure to remit the royalty to the collecting society constitutes copyright infringement, subject to statutory damages.¹⁶³ The EVAA also directs the Register of Copyrights to issue regulations governing the designation and oversight of visual artists' collecting societies.¹⁶⁴

3. Changes in the art market

The value of the global art market appears to have increased since the Office published its 1992 Report. According to one researcher,¹⁶⁵ the market was worth \$9.7 billion USD in 1991¹⁶⁶ and approximately \$59 million in 2012.¹⁶⁷ Along with this change in value, a number of other significant changes have occurred.

a. Decline of U.S. market share/growth of the Chinese art market

The structure of the art market has undergone fundamental changes over the past decade. Historically, the art market was dominated by the United States and the United Kingdom, and in particular, the cities of New York and London.¹⁶⁸ In recent years, the Chinese art market has exploded and in 2010, China replaced the United Kingdom as the second largest art market by value.¹⁶⁹ In 2011, China became the largest art market in the world, although the United States regained that position in 2012.¹⁷⁰ The U.S. market share was 46 percent in 2006, but only 33 percent in 2012.¹⁷¹ Meanwhile, the U.K. market share fell from 27 percent to 23 percent over the

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* § 5. As the Office was finalizing this study, Representative Nadler announced that he planned to introduce a new artist's resale royalty bill in early 2014. Helen Stoilas, *Revised artists resale rights bill coming to Washington in January*, THE ART NEWSPAPER, Nov. 28, 2013, <http://www.theartnewspaper.com/articles/Revised-artists-resale-rights-bill-coming-to-Washington-in-January/31205>.

¹⁶⁵ We note that much of the statistical research cited by both supporters and opponents of a resale royalty is the work of a single author, economist Clare McAndrew.

¹⁶⁶ CLARE MCANDREW, THE INTERNATIONAL ART MARKET IN 2011: OBSERVATIONS ON THE ART TRADE OVER 25 YEARS 65 (2012) ("OBSERVATIONS ON THE ART TRADE").

¹⁶⁷ CLARE MCANDREW, TEFAF ART MARKET REPORT 2013: THE GLOBAL ART MARKET, WITH A FOCUS ON CHINA AND BRAZIL 20, 21 tbl. 2a (2013) ("TEFAF REPORT 2013") (cited as €43,023 million).

¹⁶⁸ OBSERVATIONS ON THE ART TRADE at 68-69 (London and New York combined for at least 75 percent of sales in the late 1980s and most of the 1990s.).

¹⁶⁹ CLARE MCANDREW, THE GLOBAL ART MARKET IN 2010: CRISIS AND RECOVERY 23 (2011) ("CRISIS AND RECOVERY"). *But see* David Barboza, Graham Bowley, & Amanda Cox, *A Culture of Bidding: Forging an Art Market in China*, N.Y. TIMES, Oct. 28, 2013, <http://www.nytimes.com/projects/2013/china-art-fraud/> (at the end of a six month review of the Chinese art market, the New York Times concluded that "many of the sales – transactions reported to have produced as much as a third of the country's auction revenue in recent years – did not actually take place," citing forgery of works, fraud, and price manipulation as causes.). If accurate, the *New York Times* review would call into question some of the statistics cited by art economists regarding art sales in China.

¹⁷⁰ OBSERVATIONS ON THE ART TRADE at 23; TEFAF REPORT 2013 at 24 fig.2a (2013).

¹⁷¹ CRISIS AND RECOVERY at 23; TEFAF REPORT 2013 at 24 fig.2a (2013).

same period.¹⁷² China's share grew from 5 percent in 2006 to 25 percent in 2012, down from its historical high of 30 percent in 2011.¹⁷³

b. Growth of the online market for visual art; increase in popularity of art fairs

Since the 1992 Report, the art market has seen an increase in the number of dealers opting to sell works from their homes or offices and at centralized events, such as art fairs.¹⁷⁴ Art fairs, in which artists, dealers, and galleries come together to sell works of modern and contemporary art directly to the public, have become a very important part of the art market in the last twenty years. There are now almost 200 art fairs held around the world each year.¹⁷⁵ More than 30 percent of dealers' sales now occur at art fairs.¹⁷⁶

Many of these art fairs occur outside of New York and London. For example, Art Basel, one of the most popular art fairs in the world, showcases work annually in Miami and Basel, Switzerland. In May 2013, over 60,000 people attended Art Basel's first Hong Kong art fair.¹⁷⁷ In 2012, more than 50,000 people attended Art Basel Miami¹⁷⁸ and more than 70,000 attended Art Basel in Basel.¹⁷⁹ The Venice Biennale, which has always been well attended, continues to break records for the crowds it attracts.¹⁸⁰ The trend suggests that the art world is becoming less an exclusive club and more of a general market.

The Internet may be enhancing these new sales models by providing an efficient and inexpensive means to communicate with buyers, regardless of geographic location. Most dealers and galleries now have websites and can conduct business online,¹⁸¹ and major auction houses like Bonhams, Christie's, and Sotheby's offer buyers the ability to place real time bids for live auctions via their websites.¹⁸² In addition, online auction and market websites, such as eBay.com and Amazon.com, now include works of fine art among their items for sale.¹⁸³ A recently

¹⁷² CRISIS AND RECOVERY at 23; TEFAF REPORT 2013 at 24 fig.2a.

¹⁷³ OBSERVATIONS ON THE ART TRADE at 69; TEFAF REPORT 2013 at 24 fig.2a.

¹⁷⁴ OBSERVATIONS ON THE ART TRADE at 112.

¹⁷⁵ TEFAF REPORT 2013 at 57.

¹⁷⁶ OBSERVATIONS ON THE ART TRADE at 114.

¹⁷⁷ See Art Basel, *Facts and Figures about Art Basel in Hong Kong* (Sept. 2013), <https://www.artbasel.com/en/Press/Facts-and-Figures/General-Information>.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ *2013 Venice Biennale Passes 400,000 Visitors, Sets New Single-Day Attendance Record*, BLOUIN ARTINFO (Nov. 7, 2013), <http://blogs.artinfo.com/artintheair/2013/11/07/2013-venice-biennale-passes-400000-visitors-sets-new-single-day-attendance-record/>.

¹⁸¹ OBSERVATIONS ON THE ART TRADE at 102.

¹⁸² See *How to Place a Bid*, BONHAMS, http://www.bonhams.com/how_to_buy/9879/; *Christie's LIVE Online Bidding*, CHRISTIE'S, <https://www.christies.com/livebidding/>; *BIDnow/Watch Live*, SOTHEBY'S, <http://www.sothebys.com/en/auctions/watch-live.html>.

¹⁸³ See Julia Halperin, *Amazon to launch virtual art gallery*, THE ART NEWSPAPER, June 27, 2013, <http://www.theartnewspaper.com/articles/Internet-retail-giant-to-launch-virtual-art-gallery/29989>.

published report by art insurer Hiscox and art market analysis firm ArtTactic, the 2013 Online Art Trade Report, highlights the trend towards buying art online.¹⁸⁴ The report analyzed data gathered by a Hiscox survey of the art collectors, auctioneers, museums, and galleries it insures regarding the online buying habits they had observed, with a focus on purchasers of contemporary art.¹⁸⁵ According to the report, 71 percent of art collectors surveyed reported that they had purchased art online “sight unseen.”¹⁸⁶ Twenty-six percent of art collectors surveyed having spent £50,000 (approximately \$82,000 USD) or more buying art online,¹⁸⁷ although the majority of online art sales were for less than £10,000 (approximately \$16,000 USD).¹⁸⁸ Online art sales are expected to grow substantially in the next three years due to the recent launch of peer-to-peer online art markets and the fact that 59 percent of the galleries surveyed are planning to implement e-commerce options into their websites.¹⁸⁹

III. POLICY CONSIDERATIONS

A. TRANSPARENCY IN THE ART MARKET

It is important to state at the outset that a dearth of information about art purchases will likely complicate congressional analysis of the policy considerations relevant to the feasibility of a resale royalty.¹⁹⁰ In brief, there is a paucity of independent empirical information about the art market, partly as a result of the secrecy and opacity that tend to characterize the purchase, investment, and sale of artwork.¹⁹¹ This “information problem” presents a challenge for policymakers contemplating the codification of a federal resale royalty right in the United States and exploring possible alternatives to a royalty.¹⁹² “[E]xisting resale royalty laws assume a world in which certain information is available to various parties, such as sellers, artists, and collecting societies. However . . . [s]ecrecy norms pervade the art market, especially in the United States: market players fiercely guard . . . the very information that is necessary for the resale royalty right to operate effectively in practice.”¹⁹³

¹⁸⁴ HISCOX & ARTTACTIC, THE ONLINE ART TRADE 2013, April 9, 2013 (“HISCOX REPORT”), <http://www.arttactic.com/market-analysis/art-markets/us-a-european-art-market/559-hiscox-report-online-art-trade-2013.html?Itemid=102>.

¹⁸⁵ *Id.* at 2.

¹⁸⁶ *Id.* at 3. For the purposes of the report, Hiscox defines “sight unseen” to mean the purchase of the work based on a digital image only.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 18 (“A large majority (78%) of the online transactions, are below £10,000.”).

¹⁸⁹ *Id.* at 4-5.

¹⁹⁰ Stephanie B. Turner, *The Artist’s Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 333 (2012) (“Turner”).

¹⁹¹ See, e.g., Olav Veltuis, *Art Markets*, in A HANDBOOK OF CULTURAL ECONOMICS 36 (Ruth Towse ed., 2011) (“HANDBOOK OF CULTURAL ECONOMICS”) (“[T]he art market is characterized by a lack of transparency. Information regarding the quality of art supplied or the willingness to pay on the side of buyers is incomplete, difficult and often expensive to gather. Prices for which art dealers sell works of art are frequently unknown . . . The lack of transparency is also striking when it comes to the identity of buyers and sellers, whose names are not usually disclosed”).

¹⁹² See Turner at 333 (describing “information problem” as a “lack of empirical data to support . . . claims” by both supporters and opponents of a resale royalty).

¹⁹³ *Id.* at 334.

The Copyright Office recognized this information problem in its 1992 Report and scholars and journalists, too, have frequently referenced the problem over the years.¹⁹⁴ In fact, the 1992 Report recommended against adopting the resale royalty right partly because it lacked “sufficient current empirical data” to evaluate the possible consequences of introducing the right into U.S. law.¹⁹⁵ The Office encountered the same difficulty in its recent reassessment of the resale royalty right. As noted in Sections I and II above, even where economic or statistical information about the art market and the actual or projected impact of the resale royalty exists, much of that information derives from one or two sources,¹⁹⁶ and proponents and opponents of a resale royalty cite the same information to support contrary conclusions.¹⁹⁷ A number of those who submitted comments in response to the Copyright Office’s NOI and attended the Office’s

¹⁹⁴ See 1992 REPORT at vii, x, 3, 101, 145; see also, e.g., Anna Dempster, *Trust, but verify, as they say*, THE ART NEWSPAPER, July 11, 2013, <http://www.theartnewspaper.com/articles/Trust-but-verify-as-they-say/30096> (“Historically, the trust-based art world has also been characterised by a lack of transparency [O]pacity and a lack of verifiable information, particularly in terms of price and provenance, make it difficult to make good decisions and monitor risk”); Olav Velthuis & Erica Coslor, *The Financialization of Art*, in THE OXFORD HANDBOOK OF THE SOCIOLOGY OF FINANCE 482 (Karin Knorr Cetina & Alex Preda eds., 2012) (“SOCIOLOGY OF FINANCE”) (“[A] considerable amount of the information necessary for the valuation of works of art, such as the authenticity of an artwork or information about the career prospects of a contemporary artist, is difficult, costly, or even impossible to obtain”); Wu at 533 (“Because of the illiquid, largely unrecorded nature of the market for contemporary art, however, much of this debate has taken place in the absence of empirical data.”); Daniel Grant, *Secrets of the Auction Houses*, WALL ST. J., Oct. 31, 2007, <http://online.wsj.com/news/articles/SB119378936198176920> (“[T]he art trade seems convinced that secrecy is vital to making deals.”).

¹⁹⁵ See 1992 REPORT at xv.

¹⁹⁶ Commenters and others cite most frequently to data provided by two sources: Arts Economics, a research and consulting firm headed by Dr. Clare McAndrew that “carr[ies] out bespoke research and analysis on the fine and decorative art market for private and institutional clients” (see <http://www.artseconomics.com/>), and the studies of Kathryn Graddy et al. (see U.K. REPORT and KATHRYN GRADDY & CHANONT BANTERNGHANSA, *THE IMPACT OF THE DROIT DE SUITE IN THE UK: AN EMPIRICAL ANALYSIS* (Apr. 29, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345662).

¹⁹⁷ For example, pro-royalty comments the Copyright Office received from European Visual Artists (“EVA”), which represents the interests of authors’ collective management societies for the visual arts in Europe, and VG Bild-Kunst, the fine art artists’ management society in Germany, and anti-royalty comments from Simon J. Frankel, representing Sotheby’s and Christie’s, and Simon Stokes, all cite the European Commission’s 2011 *Report on the Implementation and Effect of the Resale Right Directive*. That Report, in turn, derives all of its statistical data from Arts Economics. See EC REPORT at 4 n.3.

EVA argued that, despite fears that “shares of the markets would be shifted to third countries. . . . [s]uch effect could not be registered by the Commission’s observations.” European Visual Artists (“EVA”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 3 (Dec. 2, 2012) (“EVA Comments”). Likewise, VG Bild-Kunst asserted that the EC Report “clearly shows” that the “[a]rt trade did not move to other countries without [a] resale right.” VG Bild-Kunst, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 2 (Dec. 5, 2012) (“VG Bild-Kunst Comments”). To the contrary, Sotheby’s, Inc. and Christie’s, Inc. argued that the EC Report showed that “one effect of the EU’s resale royalty has been to increase the likelihood that sales of higher-priced works are diverted ‘to markets where transaction costs overall are lower.’” Sotheby’s/Christie’s Comments at 13 (citation omitted). Simon Stokes conceded, specifically citing the EC Report, that “[a]s for the long term possibility that art sales in the UK (and EU more generally) will be diverted to non [resale royalty] states (e.g. New York and Switzerland) the evidence here is not definitive.” Simon Stokes, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 4 (Dec. 2, 2012) (“Stokes Comments”).

resale royalty roundtable also directly acknowledged the information problem. As one roundtable participant observed: “[a]ll we have is some anecdotal information and statistics. . . . [H]ere, statistics are purely a Rorschach Test. Everybody is looking at the statistics and seeing what it is that they want to see.”¹⁹⁸ Thus the positions of many of those participating in the resale royalty discussion rest, at least to some extent, on anecdotes, assumptions, and hypotheses unsupported by empirical information.¹⁹⁹

That said, there have been improvements. The emergence of various auction price databases, indexes, and news and analytics resources²⁰⁰ has made the art market somewhat more transparent, particularly in the last twenty years as art increasingly has become an appealing addition to diverse investment portfolios and as private equity art funds have evolved.²⁰¹ The growth of art market services represents only a partial improvement, however, because although they supply helpful information about trends in the market, “[t]hey are often neither entirely transparent nor systematic, leave out swathes of unreported transactions, while calculation methods are fiercely debated by both practitioners and academics.”²⁰² In addition, the identities of buyers and sellers are still routinely concealed and the largely subjective methods by which visual artworks are valued remain something of a cipher to those not invited behind the scenes in

¹⁹⁸ Tr. at 103:17-22 (Apr. 23, 2013) (Victor S. Perlman, American Society of Media Photographers (“ASMP”)).

¹⁹⁹ See Wu at 533 (“Artists, dealers, art and legal scholars, and economists . . . largely . . . rely on theoretical models or anecdotal evidence”). Law scholar John Henry Merryman, a well-known critic of the resale royalty, even more pointedly accused those who support the royalty as having a “critical/analytical vision [that] is clouded by unfamiliarity with the art world and by a folklore that sentimentally misportrays the artist’s life, invidiously caricatures collectors and dealers, does not even mention museums, ignores art market realities, [and] disregards art world interdependencies.” U.K. REPORT at 51 (citing JOHN HENRY MERRYMAN, *THE PROPOSED GENERALISATION OF THE DROIT DE SUITE IN THE EUROPEAN COMMUNITIES* 20 (1996)).

²⁰⁰ Examples of sources for art market prices, research, and analysis include: ArtPrice (<http://www.artprice.com>), ArtNet (<http://www.artnet.com>), Invaluable (<http://www.invaluable.com/>), Art Market Research (<http://www.artmarketresearch.com>), Mei Moses (<http://www.artasanasset.com/>), ArtTactic (<http://www.arttactic.com/>), and Skate’s Art Market Research (<http://skatesartinvestment.com/>).

²⁰¹ See Erica Coslor, *Wall Streeting Art: The Construction of Artwork as an Alternative Investment and the Strange Rules of the Art Market* 21 (2011) (unpublished Ph.D. dissertation, University of Chicago) (on file with U.S. Copyright Office) (“Wall Streeting Art”). As sociologist Erica Coslor explains, art investment generally has “found new support through the understanding of artwork as a component of a diversified portfolio and through the development of the private equity fund structure.” *Id.* at 21. Nevertheless, the art market remains something of a niche within the larger investment world. See *SOCIOLOGY OF FINANCE* at 482 (“Currently, art investment lacks widespread legitimacy for both the art community and the financial community; the former because of opposition to the redefinition of works of art into speculative assets, the latter because of the market’s lack of standardization, information, and liquidity.”); see also Jessica DeBartolo, *The Resurgence of Art Funds: Leveraging a Passion for Art into Investment Returns*, ART & ADVOCACY 2 (Fall 2011), <http://www.herrick.com/siteFiles/Practices/C73D72EA66970AF8145C4E9084A5D326.pdf> (explaining that art funds have emerged as “an attractive alternative investment that may serve as a hedge against inflation and a source of returns uncorrelated to the general equity and debt markets. . . . But, unlike other tangible assets held by many other types of private investment funds, art has no inherent value and, indeed, its valuation is highly subjective”).

²⁰² Dempster, *Trust, but verify*; see also *SOCIOLOGY OF FINANCE* at 482 (“Generators of generalized knowledge such as securities analysts . . . are notably absent in the art market. As a result, information remains asymmetrically distributed, resulting in high uncertainty and lack of liquidity.”).

the art market.²⁰³ Sixty percent of art sales are private sales conducted by “galleries, dealers and art consultants, as well as auction houses selling by private treaty. Prices for these types of private exchanges are neither reported, nor are they publicly available.”²⁰⁴ Auction houses, dealers, and galleries maintain that these practices are in place principally to protect the privacy of buyers and sellers.²⁰⁵ But the emphasis on discretion also serves other purposes: for example, “[l]ess information means higher prices”²⁰⁶ and “non-transparent pricing . . . makes it possible to charge customers dramatically different prices for similar work[s].”²⁰⁷

Public auctions, which are the focus of the EVAA, offer more transparent transactions, but auction houses, too, conceal or closely guard information about buyers, sellers, valuations, and prices.²⁰⁸ Non-participating third parties can “learn that the sale has occurred and the prices for which particular works of art are sold at auction. However, other information – such as the parties’ identities and the chains of title for particular artworks – is far less accessible.”²⁰⁹ In

²⁰³ See HANDBOOK OF CULTURAL ECONOMICS at 36 (“The transparency of the art market has been improved considerably . . . by companies that have specialized in providing market information Because of this, buyers and sellers all over the world may now know instantly where particular pieces of art have been auctioned and for how much. However, lack of transparency remains a problem, and information asymmetries abound on the art market.”). Furthermore, Velthuis notes, the value of art “cannot be objectively and individually determined, but relies to a large extent on the credibility of the experts involved in the collective evaluation processes that take place within art worlds.” *Id.* at 37.

²⁰⁴ Erica Coslor, Transparency in an Opaque Market: Auction Prices as Anchors and Guideposts 16 (March 22, 2011) (unpublished manuscript) (on file with U.S. Copyright Office), available at http://aahvs.duke.edu/uploads/media_items/coslor-transparency-in-an-opaque-market-03-22-2011.original.pdf. Coslor acknowledges, however, that there is disagreement over the ratio of public to private sales. For example, Clare McAndrew estimates that “in 2012, auction houses accounted for just 21 percent of domestic sales, with dealers and galleries accounting for 79 percent.” TEFAF REPORT 2013 at 15.

²⁰⁵ For instance, many buyers “choose to hire intermediaries to conduct art transactions without using names or revealing identities in order to reduce the risk of theft.” Gregory Day, *Explaining the Art Market’s Thefts, Frauds, and Forgeries (And Why The Art Market Does Not Seem to Care)*, 16 VAND. J. ENT. & TECH. L. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322421.

²⁰⁶ VAGA Comments at 5.

²⁰⁷ DONALD N. THOMPSON, THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART 194 (2008) (“THOMPSON”); see also Dempster, *Trust, but verify* (“When prices are not openly quoted, dealers can and do discriminate between clients, based on characteristics such as their age, nationality and visibility in the market”).

²⁰⁸ See Grant, *Secrets of the Auction Houses* (arguing that auction houses “keep a lot of secrets”); see also THOMPSON at 131 (“A few things about an auction are completely transparent – the number of people bidding in the room, the hammer price, the auctioneer’s performance. Almost everything else is opaque.”); Alexander Bussey, *The Incompatibility of Droit de Suite with Common Law Theories of Copyright*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1063, 1084 (2013) (“Bussey”) (auction houses “are notoriously secretive about buyers and sellers of fine art”); see also, generally, THOMPSON at 36.

²⁰⁹ Turner at 355. Even active participants in public auctions may have difficulty obtaining full information about the transactions taking place, due to the purported use of techniques such as “chandelier bidding,” where an auctioneer calls out a nonexistent bid in order to mask the reserve price of, and create the illusion of demand for, a work. See Orley Ashenfelter & Kathryn Graddy, *Art auctions*, in HANDBOOK OF CULTURAL ECONOMICS at 20-21 (“Auctioneers are very secretive about whether and at what level a reserve price may have been set In short, the auctioneers do not reveal the reserve price and they make it as difficult as they can for bidders to infer it”); see also Grant, *Secrets of the Auction Houses* (chandelier bids

short, public auctions of fine art also leave “a trail of question marks.”²¹⁰

The overall lack of regulation in the art market, particularly in the United States, is a related factor.²¹¹ As discussed in Appendix D, there are a number of state laws protecting artists and regulating certain art transactions, including some consumer protection rules that apply to auctioneering. But the art market in the United States generally has been resistant to new forms of government oversight.²¹² Some make the argument, too, that art market transparency simply cannot be regulated; rather, “[f]unctional market transparency is based on accepted norms of behaviour that are willingly subscribed to by all participants, not imposed from above.”²¹³

“get the momentum going and build excitement in an auction”); Daniel Grant, *Legislators Seek to Stop ‘Chandelier Bidding’ at Auction*, ARTNEWS, Sept. 4, 2007, <http://www.artnews.com/2007/09/04/legislators-seek-to-stop-chandelier-bidding-at-auction/> (“Chandelier bids are nonexistent bids that auctioneers call out – usually with their gaze fixed at a point in the auction room that is difficult for the audience to pin down – in order to create the appearance of greater demand or to extend bidding momentum for a work on offer.”); Robin Pogrebin & Kevin Flynn, *As Art Values Rise, So Do Concerns About Market’s Oversight*, N.Y. TIMES, Jan. 27, 2013, http://www.nytimes.com/2013/01/28/arts/design/as-art-market-rise-so-do-questions-of-oversight.html?pagewanted=all&_r=0 (“Pogrebin & Flynn”) (“At major auctions the first bids announced for a piece are typically fictional – numbers pulled from the air by the auctioneer to jump-start bidding.”). Auction houses, for their part, refer to chandelier bids as “bids made on behalf of the consignor” and argue that disclosing the reserve price of a work would depress competition or slow bidding momentum for that work. Grant, *Legislators Seek to Stop ‘Chandelier Bidding.’* They also assert that chandelier bidding serves to “ward off organized bidders, often groups of dealers called ‘rings’ that converge at a sale with the idea of jointly keeping the prices low.” Grant, *Secrets of the Auction Houses*.

²¹⁰ Roberta Smith, *The Coy Art of the Mystery Bidder*, N.Y. TIMES, May 8, 2010, <http://www.nytimes.com/2010/05/09/weekinreview/09smith.html>.

²¹¹ Indeed, many say that the art market is the “last major unregulated industry.” Wall Streeting Art at 193; see also SOCIOLOGY OF FINANCE at 482 (explaining that an “institutional characteristic that renders the art market less attractive to professional investors is its highly unregulated character . . . Insider trading – in the sense that assets are bought or sold because a buyer has insider knowledge about conditions or events that will affect the value of a piece of art – is by and large legal.”); Toby Hill, *The Art Market: Unregulated Unscrupulous And Worth Billions*, ARTLYST (Nov. 13, 2012), <http://www.artlyst.com/articles/the-art-market-unregulated-unscrupulous-and-worth-billions> (“A paucity of regulation, combined with certain features of the market itself, allows a range of dubious practises to persist that have long been driven close to extinction elsewhere.”); Marion Maneker, *Art market analysis: A market in need of supervision*, THE ART NEWSPAPER, Feb. 8, 2012, <http://www.theartnewspaper.com/articles/Art-market-analysis-A-market-in-need-of-supervision/25637> (noting that the art market “largely functions along self-regulating lines. Prices, authenticity, standards and practices are all arrived at among the art world itself, without much reference or recourse to government”); William D. Cohan, *A Bull Market in Sketchy Art*, N.Y. TIMES (Aug. 19, 2010), http://opinionator.blogs.nytimes.com/2010/08/19/a-bull-market-in-sketchy-art/?_r=0 (“[U]nlike Wall Street, which is now sorting through a new 2,200-page law that re-regulates it, the art market is utterly unregulated.”); Daniel Grant, *Do Art Gallery Practices Constitute Restraint of Trade?*, HUFFINGTON POST (Oct. 1, 2012), http://www.huffingtonpost.com/daniel-grant/do-art-gallery-practices_b_1922981.html (“The art trade doesn’t exist outside of economic theory and consumer protection, but it does have its own set of rules that may range from the objectionable to the legally unenforceable.”); THOMPSON at 29 (“The art trade is the least transparent and least regulated major commercial activity in the world.”).

²¹² For example, according to a recent *New York Times* article, some allege that art galleries in New York “ignore with impunity a 42-year-old law that says they must post their prices.” Pogrebin & Flynn; see also Day, *Explaining the Art Market’s Thefts* (“[T]he art industry actively suppresses reliable information about its products – a behavior that the governing legal regime reinforces.”).

²¹³ Dempster, *Trust, but verify*.

The lack of information and transparency make it difficult fully to anticipate the potential effect(s) of a resale royalty in the United States. “The secrecy that veils most art transactions in the United States may not only hinder the Copyright Office from conducting proper studies . . . but it may also obstruct a resale royalty from working as intended.”²¹⁴

B. LEGAL AND PRACTICAL QUESTIONS

The questions the Copyright Office posed to stakeholders in its NOI, as well as the Office’s follow-up questions to roundtable participants, provide the general framework for the specific policy discussion in this report. These considerations, discussed in succession below, help to answer the larger question of whether, as a matter of public policy, the benefits of a resale royalty would outweigh its costs.

1. Are artists in any way disadvantaged under the current copyright legal system as compared to other authors?

We address, first, the fundamental question of whether artists are disadvantaged under the current legal system. As discussed in Section II.A, visual artists are unable to reap significant benefits from the exploitation of the full range of exclusive rights available to authors generally, such as through the creation of derivative works or reproductions. For the most part, visual artists must live off initial sales of their original works, which have value based on “singularity . . . scarcity, and the reputation of [their] creator[s].”²¹⁵ Reproduction and other such rights generate only a small fraction of a typical fine artist’s income,²¹⁶ and therefore artists generally do not benefit from “successive exploitations of their works through the reproduction and sale of large quantities of each individual work,” as do composers, filmmakers, or novelists, for example.²¹⁷ Visual artists, unlike those authors, are thus excluded from the most significant profits that their

²¹⁴ NYU School of Law Art Law Society, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 8 (undated) (“NYU Art Law Society Comments”). Interestingly, some critics of the resale royalty contend that a resale royalty would have the unintended effect of reducing transparency in the art market. First, a resale royalty might “drive a greater number of sales to less public (and less publicly documented) venues, such as galleries, private dealers, and internet sales.” Sotheby’s/Christie’s Comments at 15; *see also* Tr. at 208:03-09 (Jane Levine, Sotheby’s, Inc.) (“[T]he auction process creates a public record for an artist’s work. There’s significant benefit to all kinds of artists from the public auction market, so to put the incentive to drive that into more private sales, or other types of sales, reduces that availability.”). Second, because collecting societies “do not release details of payments made to artists,” “very little is known about who actually benefits from the ARR [artist’s resale royalty] and what becomes of the considerable volumes of undistributed money.” European Coalition for Art Market Organisations (“CINOA”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 4 (Mar. 2011) (“CINOA Comments”).

²¹⁵ VAGA Comments at 1; *see also* Perlmutter at 403 (“It is no thanks to copyright law that [artists] might benefit from scarcity; the fact remains that copyright law has effectively discriminated against them in many respects for centuries”).

²¹⁶ *See* Tr. at 100:08-14 (Apr. 23, 2013) (Tania Spriggs, DACS) (“Let’s be honest, the reproduction right[] . . . generates a tiny portion of their income”); *see also id.* at 107:11-13 (Apr. 23, 2013) (Robert Panzer, VAGA) (“Reproduction rights for fine artists are really a very, very, very minor aspect of their careers.”).

²¹⁷ VAGA Comments at 1.

works may generate over time.²¹⁸ Accordingly, without a resale royalty, many if not most visual artists will not realize a benefit proportional to the success of their work.

There are, of course, arguments on the other end of the spectrum. Opponents of a resale royalty aver that U.S. copyright law endows all creative authors with equivalent rights.²¹⁹ Visual artists, like all authors, have the right to sell the original embodiments of their works and to license reproductions and derivatives of those works.²²⁰ Moreover, a visual artist may make more money from the initial sale of her work than, say, a novelist or songwriter will earn from the initial sale of a manuscript or song that is produced and sold in copies. And, if there is demand for reproductions of a particular visual artist's work, then that visual artist may have multiple opportunities to license images of her works as a comparably successful novelist or songwriter will have to license copies of his work.²²¹

Many opponents of the right insist, furthermore, that even if one accepts that the Copyright Act fails to accommodate the particular nature of visual art, it is not the role of copyright law to ensure both statutory and market parity among authors.²²² Different creative forms are amenable to different business models subject to fluctuating demand and evolving technologies. For example, advancing technology and the Internet have created new genres and

²¹⁸ Proponents also complain that any such downstream profits go “predominantly to collectors, auction houses, and galleries.” ARS Comments at 1; *see also* VAGA Comments at 1. Some opponents of a resale right counter that this position fails to capture the many “intangibles” – such as enhanced reputation, which in turn may lead to more sales of future works – that accrue to an artist whose work is sold in the secondary market. They also insist that many actors other than the artist (dealers, collectors, curators, and the like) contribute substantial value to the underlying work of art. *See, e.g.*, MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 339-340 (2010) (“LEAFFER”) (“[A]rt works increase in value for many reasons, some of which have little to do with the artist. The resale royalty, however, fails to take into account the value added by other persons and institutions in the art world such as critics, museums, collectors, dealers, and auction houses.”); Sotheby's/Christie's Comments at 7 (“[I]t is important to recognize the role played by others in the art world – including dealers, auction houses, online brokers, critics, and museums – in establishing and increasing the value of an artist's work.”).

²¹⁹ The Office's 1992 Report concluded that, “from a purely economic perspective, the copyright protection extended to fine artists is more favorable, or at least equal to, that given to authors and composers.” 1992 REPORT at 131 n.25.

²²⁰ *See, e.g.*, Sotheby's/Christie's Comments at 5 (“For all creators, U.S. copyright law applies the same basic trade-off: Under the first sale doctrine, codified in Section 109(a) of the Copyright Act, once the author of a work sells a piece that embodies the work, he or she is not entitled to further compensation should that piece be sold again, yet the author generally retains copyright in the underlying work.”).

²²¹ *See, e.g.*, Tr. at 168:15-21 (Simon J. Frankel, Sotheby's, Inc.) (“[F]or example, the estate of Andy Warhol receives significant licensing revenues on reproductions. The reason is, there's demand for them and it goes back to the point that, it all depends on what works are successful in the market as to different rights.”); *see also* Sotheby's/Christie's Comments at 5 (“What matters is not whether the painter has the same opportunities to sell reproductions, but whether there is demand for the work itself.”).

²²² *See, e.g.*, Jo Backer Laird, Comments Submitted in Response to U.S. Copyright Office's Sept. 19, 2012 Notice of Inquiry at 3 n.3 (Dec. 3, 2012) (“Laird Comments”) (“It is not the intent or purpose of the copyright law to assure that copyright holders of different sorts of work achieve equal compensation.”); Sotheby's/Christie's Comments at 6 (asserting that copyright law “provides all authors with the same bundle of rights, but the varying business models most appropriate for different forms of expression . . . may mean that certain rights under Section 106 of the Copyright Act will have greater or lesser value depending on the category of work. Granting the authors of works of visual art *additional* rights would not remedy an inequity, but create a new one.”).

now provide visual artists with a variety of new and expanded opportunities to sell their works in the first instance and to benefit from subsequent exploitations of their works.²²³ This has led to expanded opportunities for some visual artists to create their particular kinds of artworks in perfect multiples and to either benefit from the greater opportunity for sales or to move away from sales and embrace the ongoing licensing of access instead.²²⁴ No one business model is intrinsically more equitable than the others;²²⁵ nor, for that matter, do different market practices necessarily reflect a statutory defect. In fact, critics of a resale royalty also query why visual artists should have the right to “share in a collector’s profits if the value of his art goes up, without having a corresponding obligation to compensate the collector for his losses” if the work’s value declines.²²⁶

One commenter suggested that information comparing the relative earnings of visual artists and other kinds of creators would be instructive, to the extent it is possible to compare the particular sales and licensing markets for different types of creative works in any meaningful way.²²⁷ In 1992, the Copyright Office attempted to assess whether artists are financially rewarded to the same level as other authors, but concluded that because it lacked “hard data and quantifiable experience to make such a comparison . . . it [could not] compare the respective remuneration of artists and other creators with any empirical certainty.”²²⁸ As a result, the Copyright Office was compelled to “base its conclusions on anecdotal evidence and existing literature, with the attendant imprecision.”²²⁹

²²³ Online art sales – including online auctions – have “come a long way since the first online art businesses emerged in the late 1990s. As technology is improving and the resistance towards buying goods online is fading, the art market is following, albeit at a slower pace, the evolution in other industries such as music, publishing and film . . .” HISCOX REPORT at 7; *see also, e.g.*, eBay, Inc., Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 3 (Dec. 5, 2012) (“eBay Comments”) (noting that the “emergence and growth of Internet marketplaces during the last two decades have fostered an increase in artistic endeavors by providing more outlets for discovery and remuneration”). There is also some evidence that there are a growing number of licensing opportunities for visual artists, especially as new digital media emerge and expand. *See* Daniel Grant, *For Artists, a Change of Canvas Can Be Good Business*, WALL ST. J., Apr. 29, 2013, <http://online.wsj.com/article/SB10001424127887324640104578163423236599156.html>; *see also* Stokes Comments at 3 (“[I]n today’s highly digital visual world artists are able to fully participate in exploiting the reproduction and communication to the public rights in their works, as well as merchandising opportunities.”); Sotheby’s/Christie’s Comments at 6 (“Popular websites like Ebay [sic] and Etsy have created additional opportunities for artists of all kinds to develop a market for derivative uses of their work.”).

²²⁴ Digital art has emerged as a more widespread genre in recent years. Although digital art is by no means the most prevalent art form, the point is that the law does work for some visual artists.

²²⁵ Sotheby’s/Christie’s Comments at 5 (“None of these models is inherently more lucrative – or fair – than the others.”).

²²⁶ Laird Comments at 7 n.4. Some counter this argument by pointing out that other authors are not usually expected to share in the risk of loss, either. “Because they do not typically exploit their own work, but assign rights to a publishing, recording or production company which invests in bringing the work to the public, they benefit from a combination of up-front payments and royalties . . .” Perlmutter at 417.

²²⁷ *See* NYU Art Law Society Comments at 6.

²²⁸ 1992 REPORT at x; *see also* Perlmutter at 404 (“The Report cites no empirical proof that artists make more from the sales of their works than do other authors.”).

²²⁹ 1992 REPORT at x.

Since 1992, more demographic information comparing visual artists with other creative authors in the United States has become available. For example, a study published in 2011 by the National Endowment for the Arts, *Artists and Arts Workers in the United States: Findings from the American Community Survey (2005-2009) and the Quarterly Census of Employment and Wages (2010)*,²³⁰ analyzes individual artist occupations and specific industries. The study reports that from 2005-2009, the median wages and salary of fine artists (including painters, sculptors, illustrators, and multimedia artists, but excluding photographers and graphic designers) was \$33,982 – notably less than the \$44,792 in median wages and salary for writers and authors (including advertising writers, magazine writers, novelists, playwrights, film writers, lyricists, and crossword-puzzle creators, among others) but more than the \$27,558 in median wages and salary for musicians (including composers).²³¹ The U.S. Bureau of Labor Statistics (“BLS”) also makes available employment and wage estimates for the various creative industries, including fine artists. The most recent statistics provided by BLS, from May 2012, estimate a median annual wage of \$44,850 and a mean (average) annual wage of \$54,000 for fine artists;²³² by comparison, writers and authors earned an estimated median annual wage of \$55,940 and a mean annual wage of \$68,420²³³ and composers earned an estimated median annual wage of \$47,350 and a mean annual wage of \$53,420.²³⁴

On the one hand, these numbers²³⁵ belie the image of the “starving artist” that proponents of a resale royalty often paint and that opponents of the right dismiss as a romantic fiction.²³⁶ On

²³⁰ NATIONAL ENDOWMENT FOR THE ARTS, RESEARCH NOTE #105: ARTISTS AND ARTS WORKERS IN THE UNITED STATES: FINDINGS FROM THE AMERICAN COMMUNITY SURVEY (2005-2009) AND THE QUARTERLY CENSUS OF EMPLOYMENT AND WAGES (2010) (Oct. 2011) (“ARTISTS AND ARTS WORKERS IN THE UNITED STATES”), available at <http://arts.gov/sites/default/files/105.pdf>. Note that survey respondents were only classified as artists if they identified art as their “primary” job – in other words, as accounting for the majority of the hours worked in a given week. For a comparative perspective, see MARTIN KRETSCHMER ET AL., COPYRIGHT CONTRACTS AND EARNINGS OF VISUAL CREATORS: A SURVEY OF 5,800 BRITISH DESIGNERS, FINE ARTISTS, ILLUSTRATORS AND PHOTOGRAPHERS 3 (2011), available at <http://www.cippm.org.uk/publications/DACS-Report-Final.pdf> (“Visual artists have precarious careers, with typical earnings well below the UK national median wage of £21,320. In 2009/10, the typical photographer earned £15,000 (median), the illustrator earned £15,723 while the typical fine artist earned only £10,000 (median).”).

²³¹ ARTISTS AND ARTS WORKERS IN THE UNITED STATES at 10.

²³² U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES: 27-1013 FINE ARTISTS, INCLUDING PAINTERS, SCULPTORS, AND ILLUSTRATORS, MAY 2012, <http://www.bls.gov/oes/current/oes271013.htm>.

²³³ U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES: 27-3043 WRITERS AND AUTHORS, MAY 2012, <http://www.bls.gov/oes/current/oes273043.htm>.

²³⁴ U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES: 27-2041 MUSIC DIRECTORS AND COMPOSERS, MAY 2012, <http://www.bls.gov/oes/current/oes272041.htm>.

²³⁵ To put these figures into broader perspective, the Department of Health and Human Services’ 2013 poverty guidelines specify a threshold of \$11,490 for an individual, \$15,510 for a family of two, \$19,530 for a family of three, and \$23,500 for a family of four. Annual Update of the HHS Poverty Guidelines, 78 Fed. Reg. 5182 (Jan. 24, 2013).

²³⁶ See U.K. REPORT at 45; see also Mara Grumbo, Note, *Accepting Droit de Suite as an Equal and Fair Measure Under Intellectual Property Law and Contemplation of Its Implementation in the United States Post Passage of the EU Directive*, 30 HASTINGS COMM. & ENT. L.J. 357, 362 (2008) (“Many critics of droit de suite also argue that there are no longer starving artists; such a phenomenon is a myth, and resale royalties for visual artists are aimed at aiding a group that no longer needs the government’s paternalistic assistance.”); Bussey at 1087 (“The reality of the myth of the starving artist is itself questionable”). Note,

the other hand, these statistics do not distinguish between first sales and licensing revenues. These figures also cannot account for artists who are unable to make a living in the art field, and therefore self-identify in other sectors.²³⁷ And because different art forms privilege different kinds of revenue streams, it is difficult – and perhaps misleading – to attempt to quantify sales and licensing revenues in one artistic field relative to sales and licensing revenues in another.²³⁸ Thus, while this data may cast doubt on the notion that visual artists as a group are economically “worse off” than other creators, it cannot by itself resolve the broader question of the current law’s structural fairness.

The existence of a legal disadvantage has been addressed consistently and recently by foreign countries. France adopted *droit de suite* in 1920 because, “[a]s French copyright law developed, it became clear that although fine artists theoretically had the same protections as other ‘authors’ of works, they were unable to exploit their works in the same way.”²³⁹ Eighty years later, one of the European Union’s stated goals in introducing the Directive in 2001 was to “redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.”²⁴⁰ Most recently, when the Australian government considered a resale royalty in 2009, the Australian Minister for the Environment, Heritage and the Arts observed: “[h]istorically, the achievements of our visual artists have not been recognised to the same extent as those of our composers, authors and performers [T]his bill[] addresses a situation which is plainly inequitable.”²⁴¹

It is at least clear that the market for works of visual art differs from markets for other

however, that the earnings statistics Bussey cites date to 1979 and 1992, and he admits in a footnote that “many artists are forced to work second jobs in addition to making art because it is difficult to make sales. Furthermore, many artists struggle to get paid by their gallerists, even when they have successful exhibitions, due to poorly managed galleries or questionable business practices.” *Id.* at 1087 n.137; *see also* Perlmutter at 413 (criticizing the 1992 Report for suggesting “both that artists are not low-paid, and that they voluntarily choose to be low-paid” and for refusing “to acknowledge the inherently unequal bargaining power between artist and buyer”). And even if most artists are not technically starving, many artists reportedly still find that “the challenge posed by raising a family and paying basic living costs is in constant conflict with finding the time in which to create, and finding income to support the purchase of essential materials and other necessities, ranging from finding a suitable workshop to funding new work.” Design and Artists Copyright Society (“DACS”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 3 (undated) (“DACS Comments”).

²³⁷ *See* ARTISTS AND ARTS WORKERS IN THE UNITED STATES at 4 (“To be counted as an artist, survey respondents must have identified a job within one of these 11 occupational categories as accounting for the most number of hours worked in a given week. In other words, being an artist is their ‘primary’ job. A separate data source, the U.S. Current Population Survey, reveals that in 2010 roughly 264,000 U.S. workers had a ‘secondary’ job as an artist – that is, they worked most of their weekly hours in another job.”).

²³⁸ This kind of comparison only makes sense, moreover, if “one compares the markets at a fixed point in time.” Perlmutter at 403. One must also be cautious not to posit “apples against oranges” and confuse sales and licensing. Laird Comments at 2.

²³⁹ Toni Mione, Note, *Resale Royalties for Visual Artists: The United States Taking Cues from Europe*, 21 CARDOZO J. INT’L & COMP. L. 461, 465 (2013); *see also* Perlmutter at 395 (“The rationale behind this right was that artists did not benefit from copyright law as did other authors, since their works were seldom reproduced and sold in copies.”).

²⁴⁰ Directive recital 3.

²⁴¹ *See* Viscopy Comments at 2.

artistic works and that the Copyright Act does not specifically account for that difference. To be sure, a visual artist might receive equal or greater compensation from the sale of a single unique piece of visual art than a songwriter or novelist will earn from selling multiple copies of a song or novel. For most visual artists, however, the opportunity to generate additional revenue from a work permanently ends, as a practical matter, with that first sale. Even those who disagree about whether there is a structural inequity in the copyright law or a “mere” market failure concur that licensing does not (as yet) yield substantial income for the majority of fine artists.²⁴² Meanwhile, authors in other creative mediums can, through any number of sales and licensing arrangements, continue to generate new income streams from copies of a work, often for many years after the work’s first commercial distribution.²⁴³ “While artists may receive their full reward for creation sooner than authors, there is no reason to believe they will receive more in absolute dollars.”²⁴⁴ It is thus “more likely that the time value of the artist’s money up front will be matched, if not outweighed, by the author’s opportunity to participate in an unlimited future market.”²⁴⁵ On the whole, then, the Office agrees that the obstacles visual artists face under the current legal system have few clear parallels in other creative contexts.

2. Would a resale royalty incentivize creativity?

Article I, Section 8 of the U.S. Constitution empowers Congress to “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.” This constitutional mandate to maintain and foster incentives for continued creativity is, therefore, a critical factor in an analysis of the policy considerations surrounding a resale royalty, including any comparison with other countries that have implemented, or are considering implementing, the right.²⁴⁶

²⁴² See, e.g., Tr. at 106:14-19 (Apr. 23, 2013) (Robert Panzer, VAGA) (“For reproduction rights, when you’re dealing with fine art, really, the vast majority of that money goes to twenty artists in the entire world, and then everybody falls away after that. That’s not where the money’s made.”); *accord id.* at 111:05-08 (Simon J. Frankel, Sotheby’s, Inc.) (“[A]rtists are primarily focused on the primary market as for most artists, the vast majority . . . the only market they have, [is] the original sale of their works.”). *But see* Sotheby’s/Christie’s Comments at 6 (“Artists (and their estates) often supplement . . . first sale income by licensing their works for limited-edition prints, merchandise, and other commercial reproductions. Popular websites like Ebay and Etsy have created additional opportunities for artists of all kinds to develop a market for derivative uses of their work.”). By the “majority of fine artists,” we mean those artists who fall somewhere between commercial artists whose work is unlikely ever to be sold in the secondary market (particularly in auctions) or displayed in museums and “blue chip” fine artists like Takashi Murakami, whose work appears in MoMA and on Louis Vuitton bags alike. See, e.g., MUSEUM OF MODERN ART, http://www.moma.org/collection/artist.php?artist_id=8480 and LOUIS VUITTON, http://www.louisvuitton.com/front/#/eng_US/Journeys-section/Friends-of-the-House/Personalities/Takashi-Murakami.

²⁴³ Other authors also enjoy a number of ways to make profits that do not entail selling duplications of their works. For instance, “[a] play will make a profit if many people come to see it, despite the fact that additional copies are not made for their enjoyment [and] . . . [p]erformers in a concert may play a work from memory without using any copies, yet the entire audience will buy tickets for the pleasure of hearing it.” Perlmutter at 405.

²⁴⁴ *Id.* at 403.

²⁴⁵ *Id.* at 403-04.

²⁴⁶ See, e.g., Perlmutter at 405-06 (“The most critical issue is whether a resale royalty right will further the Constitutional goal of copyright by serving as an incentive for creation. If so, it is at least justifiable as copyright legislation, whether or not advisable or ideal.”). Although the copyright laws of other countries do not, to our knowledge, require the promotion of creativity in the same way as U.S. copyright law, a number of foreign commenters and roundtable participants emphasized that the resale royalty fosters

Proponents of the resale right argue that current U.S. copyright law fails to provide much “incentive to create unique works”²⁴⁷ and they assert that the resale royalty would operate in a number of ways to correct this putative failure of copyright law. First, they contend that artists benefit *financially* from a resale royalty and that royalties received in an artist’s lifetime help to sustain that artist’s career, thereby encouraging that artist to continue creating new works. Even if the individual sums artists receive are small, they arguably provide a meaningful supplement to the incomes of visual artists, who must often work second or third jobs to support their artistic careers.²⁴⁸ Specifically, even modest royalties can “support an artist’s practice, paying for studio rent or purchase of equipment and materials.”²⁴⁹

Supporters also point to less direct incentives. In the case of *post mortem* resale royalties, it is suggested that the right acts as a spur to the creativity of living artists, because they will be motivated to create art today in anticipation of supporting their heirs after their deaths.²⁵⁰ Additionally, proponents assert that artists benefit *psychologically* from a resale royalty. “[M]any artists value the recognition and validation of their creativity conferred by royalty payments as much as the financial remuneration they represent.”²⁵¹ What is more, the resale royalty arguably will inspire more individuals to choose art as a career and motivate those already working as artists “to produce more and better work to establish a reputation that will lead to more sales and more resale royalties.”²⁵² Although the copyright law does not expressly “look to personal motive” and other intangibles, it does operate “on the assumption that making the act of creation

creativity. *See, e.g.*, ADAGP Comments at 4 (“By providing authors with proper economic rewards in line with the market, the resale right has a clear stimulating effect on creation.”); Sociedad de Artistas Visuales Argentinos (“SAVA”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 2 (“SAVA Comments”) (asserting that a resale royalty can be an “excellent stimulus that will allow the artist to create more works that will enter the market”); Irish Visual Artists Rights Organisation (“IVARO”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 4 (“IVARO Comments”) (arguing that a resale right is an “important incentive for the creation of new works”).

²⁴⁷ Tr. at 94:03-04 (Robert Panzer, VAGA).

²⁴⁸ According to the comment submitted by the U.K.’s DACS, “[w]hilst the individual sums may appear modest, they are disproportionately significant for visual artists who rely on a portfolio of earnings from different sources.” DACS Comments at 2.

²⁴⁹ *Id.* at 3. Notably, “[e]ven a high profile painter such as William Crozier, whose work is exhibited internationally in public collections such as European Commission’s in Brussels to Melbourne’s National Gallery of Australia, says that money from the Artist’s Resale Right is almost entirely reinvested in providing better quality materials and framing for his work which, he adds, acts as a ‘win-win’ for the gallery which benefits from this enhanced marketability.” *Id.* In this regard, DACS also cites its 2011 Artists’ Rights Survey, in which 56 percent of respondents “said their royalties were spent on purchasing equipment and materials, and 18 percent used royalties to fund professional development.” *Id.*; *see also* HUNGART, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 1-2 (“HUNGART Comments”) (“The resale right . . . enables artists to invest in materials and to launch new art projects.”).

²⁵⁰ *See, e.g.*, American Society of Illustrators Partnership (“ASIP”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 2 (“ASIP Comments”).

²⁵¹ DACS Comments at 3; *see also* Tr. at 102:01-07 (Tania Spriggens, DACS) (“We hear very personally from our artists that the 40 pound royalties that we send them mean an enormous amount to them, not just for the financial recognition, but for the moral recognition that it tells them that their work is moving through the art market, that it rewards them for their effort.”).

²⁵² VAGA Comments at 3.

financially advantageous will overall, in the long run, lead to increased creation.”²⁵³

Opponents of the resale royalty offer several arguments why the right would do little or nothing to incentivize creativity and promote the dissemination of works of visual art. First, they contend, visual artists are inspired to create art whether or not they get a royalty.²⁵⁴ Additionally, they predict that a resale royalty will discourage art dealers and collectors from “investing over longer periods of time in younger emerging artists” and make them “less likely to purchase works outright from artists at the start of their careers.”²⁵⁵ Most crucially, they claim, a resale royalty will drive down demand for works and lower prices in the primary market because buyers will offer less for an encumbered work than for one that could be purchased free and clear.²⁵⁶ The effect, opponents argue, will be to dampen rather than kindle artists’ incentives to create new works.²⁵⁷ And because the overwhelming majority of resale royalties will inure to a small group of well established artists, most artists could never expect to offset their diminished primary market income through later resales.²⁵⁸

It does appear that most of the direct benefits created by resale royalty schemes inure to artists at the higher end of the income spectrum. “Researchers are virtually unanimous” that the “distribution of payments under an ARR regime is greatly skewed” in favor of a minority of

²⁵³ Perlmutter at 406.

²⁵⁴ At least some supporters of the resale right also believe that fine artists are compelled to create art whether or not they will sell their work, although they generally take the view that no matter what the internal motivations of the artist, the artist is nevertheless entitled to a measure of compensation from future dispositions of his or her work. See, e.g., Tr. at 127:18-22 (Tania Spriggs, DACS) (“I think artists are incentivized to make art because they’re artists . . . they would just be making art no matter what.”); *id.* at 98:06-08 (Frank Stella) (explaining that artists “just want to make something that’s really good to look at and don’t care whether they sell it or not”). One commenter posited that artists “may in fact produce art more for personal satisfaction than for monetary benefit . . . [and] studies conducted by Buccafusco and Sprigman suggest that what artists care about most is attribution, not payment”; for that reason, “any incentive effect the resale royalty may have could be blunted . . .” NYU Art Law Society Comments at 3. Other studies that have been done on the “economic aspects of the motivation of individuals to create,” however, show that “economic factors play a role in influencing the creator’s decision about how ‘creative’ they choose to be.” Ruth Towse, *Creativity*, in HANDBOOK OF CULTURAL ECONOMICS at 134.

²⁵⁵ TOBY FROSCHAUER, THE IMPACT OF ARTIST RESALE RIGHTS ON THE ART MARKET IN THE UNITED KINGDOM 19 (2008) (“FROSCHAUER”), available at http://www.lapada.org/public/Impact_Study_by_Toby_Froschauer.pdf; see also Tr. at 85:16-19 (Simon J. Frankel, Sotheby’s, Inc.) (“[D]ealers are less willing to purchase works outright from artists, and dealers are being discouraged from investing in emerging artists.”); Laird Comments at 4 (“The financial incentives for a collector to take a risk on an as-yet unproven artist will be artificially distorted, to the detriment of those artists.”). There is some countervailing evidence that, with respect to risk assessment and investment portfolio diversification, someone who invests in art “is almost always better off with ten works at \$50,000 by developing artists rather than a single work costing half a million.” THOMPSON at 248.

²⁵⁶ The resale royalty will “lower primary market prices for all artists, even though only a tiny fraction of artists will ever receive any kind of resale royalties on secondary sales.” Tr. at 84:17-20 (Simon J. Frankel, Sotheby’s, Inc.).

²⁵⁷ Sotheby’s/Christie’s Comments at 10 (“[E]conomic analysis suggests that a resale royalty would *reduce* artists’ incentive to create new works,” because the “risky component of the [artist]’s expected remuneration will increase relative to the certain component.”) (quoting WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003)).

²⁵⁸ See *id.* at 8-9.

established, blue-chip artists.²⁵⁹ But it is not clear that this disparity would create adverse incentives for artists, since such stratification is already common in our capitalism-based copyright system, where “success is rewarded, with incentives tied to popularity.”²⁶⁰ The same kind of imbalance exists for authors, composers, and other creators, and therefore there is no reason benefits should “be distributed more equitably among artists than they are among authors or composers.”²⁶¹ Artists themselves are philosophical on the point of unequal distribution, recognizing that all artists start their careers in relative obscurity and that a resale royalty represents “a promise, equally available to all, of reward for future success.”²⁶²

Neither supporters nor opponents of a resale royalty provided the Copyright Office with much evidence other than artist surveys, anecdotal reports, and personal testimony to bolster their claims that the right incentivizes or fails to incentivize artistic creativity. The idea that a resale royalty encourages creativity does find some support in social psychology literature, specifically the concept of “optimism bias,” which refers to an individual’s irrational or unrealistic optimism that his or her work will be successful or otherwise highly valued. Some research suggests that optimism bias is “well-established in many settings, and there is evidence that the same is true for artists. Indeed . . . creative artists value their work far higher than do potential buyers.”²⁶³ Nevertheless, any forecast “as to the effect that a resale royalty might have on the production of creative works would be speculative at best. There are arguments that could be put forth with apparent logic on either side of the equation, but ultimately they appear to be based completely on guesswork.”²⁶⁴ Thus although there are some indications that a resale royalty might incentivize the creativity of visual artists, there is insufficient evidence to conclude that a resale royalty is an effective, much less optimal, means of incentivizing such creativity.

Another consideration in assessing whether a resale royalty would further the fundamental purpose of copyright law is the extent to which a resale royalty might incentivize public dissemination of copyrighted works. As the Supreme Court recently held in *Golan v.*

²⁵⁹ U.K. REPORT at 47.

²⁶⁰ Perlmutter at 416.

²⁶¹ Perlmutter at 416. Certainly, for example, “bestselling authors benefit much more from their copyrights than do authors who have not made it into the pages of the *New York Review of Books*.” *Id.*

²⁶² *Id.*

²⁶³ See Kal Raustiala & Christopher Jon Sprigman, *Artist Resale Royalties: Do They Help or Hurt?*, FREAKONOMICS (Dec. 22, 2011), <http://freakonomics.com/2011/12/22/artist-resale-royalties-do-they-help-or-hurt/>; see also Christopher Buccafusco and Christopher Jon Sprigman, *The Licensing of Intellectual Property: The Creativity Effect*, 78 U. CHI. L. REV. 31, 51 (2011) (“Creators are likely to overvalue works that they were internally motivated to create and that required substantial creative effort compared with both potential purchasers and mere owners of the works. Our data suggest this valuation anomaly is driven primarily by creators’ irrational optimism about their works’ likelihoods of success.”). Professor Sprigman in particular is skeptical of the resale royalty, but, if artists believe, however irrationally or unrealistically, that their works are likely to be successful on the secondary market, then the optimism bias – embodied as a resale royalty – might incentivize greater creativity. See NYU Art Law Society Comments at 2 (“For resale royalty rights to provide an incentive to artists to create art, artists must believe that their artwork will at some point sell for the threshold set by the law to qualify for such a right . . .”).

²⁶⁴ American Society of Media Photographers (“ASMP”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 3 (Nov. 28, 2012) (“ASMP Comments”).

Holder, copyright law promotes both creativity *and* public diffusion of creative expression.²⁶⁵ There is some evidence, though, that the current structure of the art market may encourage visual artists to hold back their works until such time as the artists' increased popularity yields higher prices for their works.²⁶⁶ Some have argued, moreover, that "savvy and successful artists" who set aside some of their inventory essentially create their own personal "pension trusts" that obviate the need for a resale royalty.²⁶⁷ In any event, to connect any increase in dissemination to a resale royalty would seem to depend upon two issues discussed above, namely, transparency in the marketplace and utilization or enforcement of the resale right by those eligible.

It may be unrealistic, however, to expect that the majority of visual artists have the desire or the wherewithal to withhold inventory.²⁶⁸ Artists often face asymmetries of bargaining power in the art market and many do not truly have the choice of "selling today or holding the work as an investment until it appreciates in price," because they "have too great an immediate need for money to pay for the necessities of life as well as materials for further creation."²⁶⁹ Indeed, in the end, "[t]his is always an individual decision and not one that seems to be made with any kind of predictability or consistency."²⁷⁰ Nevertheless, a resale royalty may prove to be a more appealing "gamble" to many artists than self-initiated efforts to withhold certain artworks, because a resale royalty would offer an automatic and more predictable, if possibly less lucrative, means of speculating on future returns. In other words, the prospect of a resale royalty – codified in the copyright law – might incentivize visual artists to release more works of art into the stream of commerce, because wider exposure may lead, in turn, to greater popularity and more secondary sales.

3. Would a resale royalty negatively or positively affect the primary art market?

There is markedly less statistical and other information available about the primary art market than there is about the secondary art market. In the primary art market, "a consensus of art experts regarding [artworks'] value is by and large absent, uniform standards of value are lacking, and the careers of their producers are frequently unstable"; therefore "economic value on

²⁶⁵ See *Golan v. Holder*, 132 S. Ct. 873, 889 (2012) ("Our decisions . . . recognize that 'copyright supplies the economic incentive to create *and disseminate* ideas.'" (internal citation omitted)).

²⁶⁶ See, e.g., *Visual Artists Rights Act of 1987: Hearing on S. 1619 Before the Subcomm. on Patents, Copyrights & Trademarks of the H. Comm. on the Judiciary*, 100th Cong. 327-328 (1987) (statement of John B. Koegel) ("In the case of pictorial, graphic and sculptural works, large gaps or deficiencies have developed. Due to an intrinsic difference in the distribution of these works . . . the Copyright Act fails to give full aesthetic control and full economic participation. It thereby produces a difficult, unintended and undesirable incentive to withhold works from distribution.").

²⁶⁷ U.K. REPORT at 54.

²⁶⁸ Jock Reynolds, director of the Yale University Art Gallery, stated that "[s]ome artists hold back some of their best work and others do not wish to do so, or may feel that they cannot afford to do so. . . . As in all forms of business, some people are shrewder and/or more self confident than others when it comes to protecting and maximizing their own economic interests." Email from Jock Reynolds, Director of the Yale University Art Gallery, to U.S. Copyright Office (Nov. 14, 2013) (on file with U.S. Copyright Office).

²⁶⁹ Perlmutter at 413.

²⁷⁰ Email from Jock Reynolds, Director of the Yale University Art Gallery, to U.S. Copyright Office (Nov. 14, 2013) (on file with U.S. Copyright Office).

the primary art market is radically uncertain.”²⁷¹ It also is exceedingly difficult to draw clean empirical distinctions between the primary and secondary art markets, because many of the same art market professionals operate in both markets, albeit in different capacities, and decisions taken in one market have a corresponding effect in the other market.²⁷² As cultural economist Olav Velthuis has explained: “[a]rt dealers . . . tend to adjust price levels to prices achieved at auction, although only in a piecemeal fashion. Vice versa, estimates that auction houses provide in their catalogues tend to be based on price levels on the primary market.”²⁷³ Nor are these prices necessarily the result of a transparent, predictable, or objective calculus. Prices in the primary market are set based on a wide range of factors, including the color, size, style, or subject matter of the work;²⁷⁴ the reputations of art dealers, galleries, and interested buyers (including any well-regarded museums); what critics say about an artist’s work; the premature death of the artist; any increase or reduction in the supply of the artist’s work, and his or her “failure to live up to earlier promise”;²⁷⁵ and the location(s) where a work was or will be exhibited.²⁷⁶ Art dealers influence prices through tactics such as “bidding up” prices at auctions of works by the artists they represent,²⁷⁷ buying back work at an auction “to protect the artist from going unsold,”²⁷⁸ establishing waiting lists to control the market for their artists,²⁷⁹ and limiting sales “exclusively to loyal clients, well-known collectors or important public institutions.”²⁸⁰ Again, all of these phenomena have an effect on valuation in the primary, as well as the secondary, art markets.

²⁷¹ See HANDBOOK OF CULTURAL ECONOMICS at 38.

²⁷² Professor John Henry Merryman, a leading opponent of the resale royalty, described the art market as an ecology, where “what affects one part resounds throughout the system and is felt by all the others.” John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 105 (1993); see also THOMPSON at 35 (“[O]ne of the inducements offered to consignors and secondary market collectors is the opportunity to purchase over-subscribed work from primary artists. Selling work from those primary artists produces many of the collector contacts that result in secondary market sales.”).

²⁷³ HANDBOOK OF CULTURAL ECONOMICS at 39.

²⁷⁴ See Dominique Sagot-Duvaurox, *Art prices*, in HANDBOOK OF CULTURAL ECONOMICS at 44 (“The price of works of art of equal artistic value varies according to the size, the technique used, the style or the subject matter. The price of a painting increases at a decreasing marginal rate with size.”); see also, e.g., Rob Wile, *Here’s Why Someone Just Paid \$142 Million for a Painting*, BUS. INSIDER, Nov. 13, 2013, <http://www.businessinsider.com/heres-why-someone-just-paid-142-million-for-a-work-of-art-2013-11> (“Scale can also affect price . . . [a]nd the brightness of a painting can also drive up its value . . .”).

²⁷⁵ 1992 REPORT at 147; see also HANDBOOK OF CULTURAL ECONOMICS at 24 (“Lower prices may also be observed because of downward price trends when an artist falls out of fashion, or for other idiosyncratic reasons.”).

²⁷⁶ See Bussey at 1072 (“[T]he value of art is dependent on many variables. While the quality of a painter’s craft is important, it also matters what the art press says about the art, where it is being exhibited, and who is buying it, for example.”); see also THOMPSON at 13 (“A work of art that was once shown at MoMA, or was part of the MoMA collection, commands a higher price . . .”).

²⁷⁷ See Olav Veltuis, *Art dealers*, in HANDBOOK OF CULTURAL ECONOMICS at 29.

²⁷⁸ See THOMPSON at 47.

²⁷⁹ Signally, dealers’ waiting lists can even have an impact on an artist’s creative process, because the artist may feel obligated to produce art in the particular style or genre desired by collectors on the waiting list. For information about these waiting lists generally, see Christopher Mason, *She Can’t Be Bought*, N.Y. MAG., Mar. 7, 2005, <http://nymag.com/nymetro/arts/art/11265/> and Daniel Grant, *Like an artist’s work? Pay up, and then take a number*, CHR. SCI. MON., Dec. 23, 2002, [http://www.csmonitor.com/2002/1223/p16s01-wmcn.html/\(page\)/2](http://www.csmonitor.com/2002/1223/p16s01-wmcn.html/(page)/2).

²⁸⁰ HANDBOOK OF CULTURAL ECONOMICS at 39.

Because it is relatively difficult to obtain information about the primary art market, it is especially challenging to assess – much less predict – the ways in which a resale royalty affects primary markets. As the Australian government noted in its report on the *Resale Royalty Right for Visual Artists Bill 2008*: “any new impost in a [primary] market is likely to cause some behavioural changes between those directly involved in that market,” but without “further empirical data, it is difficult . . . to say whether artwork is price elastic or inelastic, whether the buyer or seller will end up paying the royalty or whether the cost of royalty scheme is likely to be borne by artists in the primary market.”²⁸¹ Five years later, the Australian government is still seeking answers to these questions. According to the Australian government’s 2013 discussion paper on the country’s resale royalty scheme, it remains “difficult to ascertain whether the five per cent resale royalty is discouraging collectors from selling art, or discouraging consumers from buying art.”²⁸²

It is almost universally agreed that the primary market is the only market for most artists; as a result, a select number of already successful artists are the major beneficiaries of any resale royalty scheme.²⁸³ The fact that the resale royalty might disproportionately benefit a small number of successful artists, however, may be “no argument for withholding its benefits from all.”²⁸⁴ There are number of mechanisms in European resale royalty schemes that were included

²⁸¹ AUSTRALIA REPORT at 34 (2008).

²⁸² AUSTRALIA 2013 REVIEW, at 6.

²⁸³ In 1992, the Copyright Office cited evidence that “as few as one percent of artists will qualify for the royalty.” 1992 REPORT at 145. A 1999 study found that “of the 233,000 U.S. citizens who classified themselves as ‘painters, sculptors, craft-artists, and artist printmakers,’ 357 (0.15 percent) have an art resale market of greater than \$1,000 over the last fifty-one-month period.” Wu at 543 (citation omitted); *see also* HANDBOOK OF CULTURAL ECONOMICS at 38 (“In most Western European countries and the USA, only a small percentage of contemporary artists can make a living from selling their work on the market. Works made by an even smaller percentage of living artists are traded on the secondary market.”); Sotheby’s/Christie’s Comments at 4 (“For the vast majority of individuals who regard themselves as full-time artists . . . the secondary market holds little significance.”); Tr. at 256:07-08 (Jane Levine, Sotheby’s, Inc.) (“[F]or most artists, the primary market is the only market.”); Stokes Comments at 3 (“[S]tudies of the art market (in particular auction house data) generally indicate that the main beneficiaries of [resale royalty rights] are the estates of dead artists and generally the larger estates (e.g. Dali, Picasso, Matisse and so on).”; CINOA Comments at 4 (“[T]he reality is that the work of only a small minority of, mostly already successful, artists appears on the secondary market.”); FROSCHAUER at 18 (suggesting that self-reported information from dealers and auction houses in the U.K., collected between 2006 and 2007, “indicates that [the artist’s resale right] largely benefits a minority of successful artists and provides marginal benefits for less established artists; the bottom 30 percent of artists received payments of less than £100”). Taking a somewhat different position, one commenter asserted that although “various studies [in Canada] demonstrate that visual artists’ revenues derived from their artistic practice generally come from sales on the primary market . . . [a]rtists derive only limited benefit from the initial sale of their works, compared with resale, which often generates significant financial gains that accrue exclusively to collectors, auction houses and art galleries.” Society for Reproduction Rights of Authors, Composers and Publishers in Canada (“SODRAC”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 3 (Dec. 5, 2012) (“SODRAC Comments”).

²⁸⁴ ARS Comments at 2; *see also* MYER REPORT at 163 (June 14, 2002) (“MYER REPORT”) (“[T]he fact that the majority of resale royalties would be distributed to more successful artists, or their heirs, does not undermine the stated object of resale royalties in the Australian context: to allow creators to benefit economically from the appreciation of their works of art.”).

Additionally, even though some works (or genres of works) are not circulating in the secondary market in appreciable numbers at the present time, they may nevertheless become popular in the resale market at

“in order to bring greater benefit to artists at the start of their career,” including the tiered royalty rates that decrease as the value of the work increases and lower threshold rates.²⁸⁵ Those mechanisms were designed to ensure “that it isn’t just the rich artists” who benefit.²⁸⁶

Moreover, concerns that a resale royalty would discourage buyers from purchasing works in the primary market may be overblown, as many buyers in the primary market are motivated by factors other than the prospect of future profit. “[I]t’s actually been forgotten here,” artist Frank Stella lamented, “that some collectors and people who buy art actually like what they buy, and they don’t actually get the idea to resell it until some other time. And . . . those people who like to speculate don’t have anything to do with the primary market . . . They only buy artists that are established.”²⁸⁷ In other words, a significant number of buyers (especially high net worth individuals interested in works of art priced in excess of \$1 million) may not base their purchasing decisions – at least not exclusively – on the presence or absence of a resale royalty.

Commenters and participants in the Office’s roundtable representing collecting societies in countries where a resale royalty right is in effect offered testimony that the right at least has not harmed the primary market in those countries. In this vein, they point to the Directive, which provides an optional derogation that allows Member States to exempt resales of works where the seller acquired the work directly from the artist less than three years before that resale and where the resale price does not exceed €10,000.²⁸⁸ This exception was specifically intended to

some future time. For instance, certain kinds of illustrations, such as those from magazines, are increasingly appearing for resale in galleries and auction houses. As Brad Holland, an illustrator and resale royalty roundtable participant explained: “[I]f this bill had been in effect back when Senator Kennedy introduced it, I would probably be able to benefit from it now, and I’m neither a rich artist nor a dead one. So I can stand as testimony that it would actually constitute an incentive because I was just barely out of high school when I started doing this work, and I was doing it for very little money at the time.” Tr. at 261:21-22, 262:01-07 (Brad Holland, ASIP).

To be sure, arguing that a royalty (assuming it is defensible on legal and policy grounds) should be denied to an entire class of recipients, merely because the amount paid to most recipients happens to be *de minimis* or because the royalty mostly benefits a subset of those recipients at a particular moment in time, risks calling into question the assessment of royalties in other copyright contexts. At any one moment in time, “an active resale market [for an artist] may or may no longer exist. Some art dealers, such as the illustrious Paris and New York Wildenstein Gallery, are known to have had works for decades in inventory before they finally managed to sell them.” HANDBOOK OF CULTURAL ECONOMICS at 35-36; *see also* Perlmutter at 403 (“Value is not static, and scarcity cannot make a work valuable until there is demand for the work that exceeds its availability—a point in time that may well be subsequent to the initial sale”).

²⁸⁵ Tr. at 116:05-07 (Tania Spriggens, DACS).

²⁸⁶ *Id.* at 117:05 (Tania Spriggens, DACS). And even if the resale royalty does tend to favor artists at the top of the market, “moral principle” dictates that all fine artists should have the opportunity to benefit from resales of their works as those works move into and through the secondary market. “We don’t complain about J.K. Rowling getting royalties. Why are we complaining about other artists getting royalties?” *Id.* at 117:13-16 (Spriggens).

²⁸⁷ *Id.* at 86:13-22 (Frank Stella). Similarly, another participant in the Roundtable noted: “I find it very hard to believe that any artist, any dealer, any collector that is really interested in buying a young artist would take into a consideration . . . peanuts when they’re thinking about buying art that has a huge upside potential.” *Id.* at 81:14-20 (Morgan Spangle, Dedalus Foundation, Inc.). Nevertheless, “[e]ven collectors of contemporary art who have acquired works because they loved them, believe the value of those works will appreciate.” THOMPSON at 239.

²⁸⁸ Directive art. 1(3).

safeguard relationships between artists and dealers in the primary market by ensuring that dealers would not be deterred from purchasing artists' work.²⁸⁹ In fact, the European collecting societies do not report that the royalty has altered relations between artists and art market professionals in any way that has been felt in the primary market. "We have not anecdotally . . . had an indication that . . . relationships with artists have been damaged. In fact, the majority of primary galleries . . . support a resale right, because they have a direct connection with an artist."²⁹⁰ The collecting societies also report that the majority of artists who respond to their surveys and other inquiries do not feel that the resale royalty has had a deleterious effect on the primary market for their works.²⁹¹

Those who oppose a resale royalty presume that the royalty will damage the primary art market, mostly because buyers will demand reduced first sale prices to compensate for assuming the risk that they may have to pay royalties in the secondary market.²⁹² Consequently, the royalty might "lower primary market prices for all artists, even though only a tiny fraction of artists will ever receive any kind of resale royalties on secondary sales" and, of the fraction of artists who will see a royalty, most will only earn nominal sums.²⁹³ Furthermore, if the right is inalienable, artists cannot elect to waive the right in exchange for a higher first sale price.²⁹⁴ A resale royalty may also result in dealers having fewer resources to support the careers of their artists in the primary market, because they are forced to pay the royalty twice – first as buyers and then again as sellers.²⁹⁵ Opponents of the right thus argue that, on balance, the costs of the royalty to the

²⁸⁹ Tr. at 82:22, 83:01-06 (Tania Spriggs, DACS).

²⁹⁰ *Id.* at 83:16-22, 84:01 (Tania Spriggs, DACS).

²⁹¹ Citing its survey conducted in advance of the European Commission's inquiry into the resale right, DACS noted: "99 percent of artists came back and said they felt that their [primary] market had not been negatively impacted. Furthermore, 70 percent of them were incentivized by the royalties that they had received." *Id.* at 101:13-18 (Tania Spriggs, DACS).

²⁹² *See, e.g., id.* at 78:17-21 (Clare McAndrew, Art Economics) (from "an economist's point of view, obviously, if you put a levy, or a fee on a sale, if a seller knows that they have to pay that, they might reduce the price they're willing to pay"); *see also* LEAFFER at 339 ("More often than not, contemporary art works sell at a loss rather than a profit. . . . But the resale royalty is a one-way street, and the artist whose work declines in value is not expected to compensate disappointed buyers.").

²⁹³ Tr. at 84:17-20 (Simon J. Frankel, Sotheby's, Inc.); *see also* Alexandra Darraby ("Darraby"), Comments Submitted in Response to U.S. Copyright Office's Sept. 19, 2012 Notice of Inquiry at 3 ("Darraby Comments") (contending that a resale royalty only benefits artists whose "initial sales in the primary market were robust enough to sustain a profitable secondary market"); Association of Art Museum Directors ("AAMD"), Comments Submitted in Response to U.S. Copyright Office's Sept. 19, 2012 Notice of Inquiry at 3 ("AAMD Comments") (arguing that the resale royalty will exert downward pressure on prices in the primary art market and that not enough artists will receive the royalty to compensate for the depressive effect of the royalty on initial prices).

²⁹⁴ *See* U.K. REPORT at 50. Note that Graddy and her co-authors do not necessarily agree with this view; rather, they are merely noting that this is one argument advanced by opponents of a resale royalty. In this same vein, they also point out that inalienability of the right undermines "claims that the [artist's resale right] is genuinely indebted to establishing economic parity amongst these actors" because other creators, such as novelists and songwriters, do not have an unwaivable right to royalties. *Id.*

²⁹⁵ *See* Tr. at 79:10-16 (Clare McAndrew, Art Economics) ("I can also say, more anecdotally, from talking to dealers and collectors, that they have noticed that [the resale royalty] is a disincentive for sales in the primary market – it's kind of souring the relationship between some collectors and artists because they're being asked to take the hit twice."); *see also* CLARE MCANDREW, TEFAF ART MARKET REPORT 128 (2012) ("TEFAF REPORT 2012") (suggesting that resale royalties tend to "deter art buyers, as they are

primary art market outweigh the benefits to the few artists who will ever enjoy a royalty or any supposed benefits to society in the form of greater artistic creativity.²⁹⁶

There is, however, little empirical evidence that a resale royalty has actually harmed primary art markets when applied in practice. Of the art dealers who responded to a survey conducted by the authors of the U.K.'s 2008 report, for example, 73 percent opined that the resale royalty has had a "negative or very negative" impact on the London art market, yet 55 percent reported that the resale royalty has had "no impact at all" on their own business. Fifty percent said that the resale royalty has had no effect on the likelihood they will take works on consignment (rather than purchase from the artist) and 48 percent said that the resale royalty "made no difference" to their inclination to deal in primary rather than secondary markets.²⁹⁷

Put simply, it is difficult, without more quantitative, longitudinal information, to evaluate or predict with any confidence the effect on the primary market of a resale royalty in the secondary market.²⁹⁸ In addition, as noted previously, the lines between the primary and secondary art markets are blurry; one economist explicitly noted at the Copyright Office's roundtable that she has been unable to "distinguish the primary sales versus those in the secondary resale market when I'm doing my polling of galleries and things like that."²⁹⁹ At minimum, though, the claims that a resale royalty would severely undercut the primary art market do not appear to be borne out by information collected to date from countries that have implemented the right.³⁰⁰ There is also a more fundamental theoretical problem with the argument that a resale royalty will have a meaningful effect on the economic incentives of primary market participants, especially buyers: "[i]f the royalty will not provide enough money to artists to justify its existence, how will it have a significant deleterious effect on the art

structured in such a way that the buyer is still forced to pay the levy even if he lost money on a subsequent sale").

²⁹⁶ See U.K. REPORT at 49. Graddy and her co-authors do not necessarily endorse this argument; rather, they merely include it in their discussion of the various arguments made by opponents and proponents of a resale royalty, as part of their historical review of the resale royalty.

²⁹⁷ *Id.* at 24.

²⁹⁸ One criticism of the Copyright Office's 1992 Report is that "speculation" as to the effect of a resale royalty on the primary market, "whether or not supportable in theory, is given more weight in the Report than reports of actual experience." Perlmutter at 407.

²⁹⁹ Tr. at 78:11-14 (Clare McAndrew, Art Economics).

³⁰⁰ See generally EC REPORT and U.K. REPORT; see also, e.g., Tr. at 101:05-15 (Tania Spriggs, DACS) ("I also want to point out that we surveyed out artists a couple years ago ahead of the European Commission's inquiry into the resale right and asked them whether they felt that their market had been negatively affected by the introduction of the resale right, they should know, they are the generators and the instigators of their primary market by creating the work, and 99 percent of artists came back and said they felt that their market had not been negatively impacted") (citing DACS artists survey, available at http://www.dacs.org.uk/DACSO/media/DACSDocs/DACS-artist-survey_summary.pdf). The empirical evidence available in 1992 also failed to prove that the primary market was and would continue to be harmed by the application and extension of a resale royalty. Indeed, as Shira Perlmutter argued in 1992, there are conflicting accounts of the effect of a resale royalty on the primary art market, but "each side is not equally persuasive. On the one hand, there is statistical evidence from the European collecting societies indicating that art sales have not been diverted from countries with a *droit de suite*. On the other, there are unsupported assertions of competitive harm to the market by auctioneers and dealers." Perlmutter at 408.

market?”³⁰¹ In other words, “either a royalty will help the artist and hurt the collector, or it will do neither.”³⁰²

4. Would a resale royalty negatively or positively affect the secondary art market?

A resale royalty is chiefly a phenomenon of the secondary art market. Unsurprisingly, proponents and opponents of a resale right disagree about the extent to which the royalty does – or, in the case of the United States, would – benefit or harm the secondary market. Here, again, the available information is limited and conflicting, but recent studies from governments that have implemented the right tend to belie the contention that market harm is an inevitable consequence of its adoption.

Proponents argue that a resale royalty would have a net positive effect on the secondary art market in the United States, both because it would affirmatively benefit individual artists and because there is no evidence that it would negatively affect the secondary art market. With respect to individual artists, it is argued, the resale royalty would encourage more artists to produce more (and hopefully better) work that will eventually make its way to the secondary market.³⁰³ In addition, reciprocity with resale royalty schemes abroad would produce new foreign revenue streams for American artists.³⁰⁴

Although a resale royalty undoubtedly would add to the administrative costs of those who transact business in the art market, supporters of the right maintain that the royalty’s “impact will be negligible.”³⁰⁵ In any event, the royalty would be but one of a number of transaction costs already charged to buyers and sellers.³⁰⁶ A buyer’s premium, for instance, is a non-negotiable

³⁰¹ Perlmutter at 415.

³⁰² *Id.* at 409.

³⁰³ *See, e.g.*, Center for Art Law, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 2 (Dec. 5, 2012) (“If working artists, in addition to those who sell at mega prices at auction, can see that the royalty is enforced and that the proceeds are actually distributed, its enactment would enhance the economic incentive to create”); Kernochan Center Comments at 1 (“Artists may be inspired to create more works if they feel they will receive a piece of the work’s appreciated future value.”); SAVA Comments at 2 (arguing that a resale royalty “can be an excellent stimulus that will allow the artist to create more works that will enter the market too, and benefit all the participants in the chain of value”).

³⁰⁴ *See, e.g.*, DACS Comments at 6 (“The introduction of a resale royalty in the U.S. will have a mutually beneficial impact for both British and American artists when the Right is reciprocated. American artists and their heirs will benefit from royalties arising from the significant market in American art in the UK, and vice versa.”); European Grouping of Societies of Authors and Composers (“GESAC”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 2 (Dec. 5, 2012) (“GESAC Comments”) (“[B]y the recognition of the resale right, the artists in the US will benefit from the resale of their works in other countries thanks to the reciprocity principle.”); EVA Comments at 5 (“US American artists will benefit from the resale right in all 27 countries of the EU as well as in other countries where it is successfully implemented”).

³⁰⁵ VAGA Comments at 3.

³⁰⁶ For an overview of these transaction costs, *see* HANDBOOK OF CULTURAL ECONOMICS at 23-24; *see also id.* at 35 (“[T]ransaction costs are hardly negligible. For instance, at auction, buyers and sellers of works of art may have to pay up to 20 per cent of the sales price. These transaction costs render art even less attractive as a financial asset class (as do insurance and storage costs related to art investments).”).

amount added to the hammer price that a buyer pays to an auction house;³⁰⁷ auction houses will also sometimes charge sellers a fee for unsold items, in order to “make sure the seller bears some of the cost of auctioning but not selling an item.”³⁰⁸ These existing transaction fees have “no benefit whatsoever for the creator” and, in fact, “far exceed the proposed resale royalty.”³⁰⁹ Perhaps instructively for purposes of considering a resale royalty, when the buyer’s premium was first introduced in the 1980s, art market professionals “laughed at the premium and said it would trigger a buyer revolt” but “[n]either European nor North American buyers revolted.”³¹⁰ In fact, just this year, both Sotheby’s and Christie’s increased their buyer’s premiums.³¹¹ Proponents of a resale royalty assert, moreover, that a resale royalty would not impose an unusual administrative or enforcement burden on the auction houses, because “it would be no more complicated to administer and collect the resale royalty that [*sic*] it currently is to compute, deduct and pocket” the buyer’s premium and other charges and taxes.³¹² As long as the qualifying threshold for a royalty is set at an appropriate level, the argument goes, the cost of administering the royalty is unlikely to outweigh the benefits of the royalty.³¹³

³⁰⁷ THOMPSON at 101.

³⁰⁸ HANDBOOK OF CULTURAL ECONOMICS at 23; *see also* Daniel Grant, *The Auction World’s Buy-Ins and Post-Sales*, HUFFINGTON POST (July 14, 2010), http://www.huffingtonpost.com/daniel-grant/the-auction-worlds-buy-in_b_645575.html (“Consignors of bought-in lots, especially those with reserve prices, may owe the auctioneer money – called a “buyback” – for various fees, such as for catalogue photography, outside expertise, insurance and shipping, which provides them with a strong incentive to lower their reserve or bottom price in order to sell the object.”).

³⁰⁹ VAGA Comments at 3; *accord* Perlmutter at 409 (“[T]he market has successfully absorbed dealer commissions and auction fees that dwarf the rates being considered for resale royalties.”).

³¹⁰ THOMPSON at 101.

³¹¹ Kathryn Tully, *Sotheby’s Increases Buyer’s Premium On Back Of Lackluster Results*, FORBES, Feb. 28, 2013, (“*Sotheby’s Increases Buyer’s Premium*”), <http://www.forbes.com/sites/kathryntully/2013/02/28/sothebys-increases-buyers-premium-on-back-of-lackluster-results/>; CHRISTIE’S, <http://www.christies.com/features/guides/buying-guide/related-information/buyers-premium/>. These increases in the buyer’s premium perhaps suggest “a new confidence from the auction houses that buyers will swallow higher commissions and still show up.” *Sotheby’s Increases Buyer’s Premium*. Note, too, that Sotheby’s and Christie’s charge the resale royalty to the buyer in all countries except in France, where a 2006 law requires the royalty to be borne by the seller. *See The Syndicat National des Antiquaires wins against Christie’s*, Art Media Agency, Dec. 20, 2012, <http://www.artmediaagency.com/en/58344/the-syndicat-national-des-antiquaires-wins-against-christies/>.

³¹² VAGA Comments at 5; *accord* Tr. at 221:16-22 (Bruce Lehman, VARA) (“We certainly know that, right now, by far, far, far, the largest amount of money and burden on an auction sales transaction are the buyers’ and sellers’ commissions that these very well heeled and very prosperous auction houses charge, none of which is, of course, shared with a single creator.”); *see also, e.g.*, ASMP Comments at 4 (“[A]ny definitive statement on the effect of a resale royalty on the art marketplace [*sic*] appears to ASMP to be highly speculative. However, there does not seem to be any demonstrable reason to believe that it would have any more of an effect than state and local sales taxes.”).

³¹³ *See* DACS Comments at 8. Two commenters, who did not support the introduction of a resale right, suggested that “[r]equiring formalities of marking and registration upon imposing a resale royalty obligation would partially mitigate the high administrative and transactional costs that can be anticipated here” and posited that such formalities would not violate Berne Article 5(2). The Internet Association (“IA”) & Computer & Communications Industry Association (“CCIA”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 5 (Dec. 5, 2012) (“IA/CCIA Comments”).

With respect to a royalty's effect on the overall health of the secondary art market, resale royalty supporters assert that, if nothing else, the resale royalty has not had a negative effect on the secondary art market, as originally feared. These claims are bolstered to some extent by recent art market studies and reportage, particularly those covering the art market in the United Kingdom.³¹⁴ Graddy and Banerghansa's econometric study of the effect of the resale royalty in the United Kingdom, for example, found "that over the period 1996 to 2007, the total price growth in the UK market segment subject to RR [resale royalties] increased significantly relative to other countries and relative to the segment of the market that is not subject to RR."³¹⁵ This report concluded that "the art market in the UK, either despite or because of the introduction of ARR, appears to be doing well."³¹⁶ Moreover, some have declared that 2012 – the same year the United Kingdom expanded the resale royalty to the estates of deceased artists – was one of the strongest years on record for the country's post-war and contemporary art market.³¹⁷ Indeed, the U.K. retained its third position (after the United States and China) in the global art market share.³¹⁸

Opponents of a resale royalty counter that because a resale royalty scheme only helps a small number of already-successful artists, a resale royalty's administrative and enforcement costs are disproportionate to its benefits.³¹⁹ According to the U.K.'s 2008 report on its resale

³¹⁴ See, e.g., Daniel Grant, *UK's Artist Resale Royalty Law Didn't Damage the Art Market (Despite All the Claims)*, HUFFINGTON POST (Sept. 14, 2012), http://www.huffingtonpost.com/daniel-grant/uks-artist-resale-royalty_b_1881430.html ("Wasn't the sky supposed to fall? The United Kingdom's six year-old artist resale royalty law . . . was supposed to have a 'corrosive effect' on the British art market. . . . Tell that to the dealers of contemporary art in the UK and to the auction houses, which have racked up strong prices for Modern and contemporary artworks back in January and in the recent June sales in London.").

³¹⁵ Victor Ginsburgh, *Resale rights*, in HANDBOOK OF CULTURAL ECONOMICS at 399; see also ARS Comments at 5 ("Far from falling, art market sales in the U.K. . . . have reached record levels in the U.K. and exceed those that occurred before adoption of the law, nor has the market fled elsewhere.").

³¹⁶ U.K. REPORT at 17.

³¹⁷ See, e.g., See, e.g., ANDERS PETTERSON & NATHAN ENGELBRECHT, GLOBAL ART MARKET OUTLOOK 2013 (Feb. 11, 2013) ("PETTERSON & ENGELBRECHT"), <http://www.arttactic.com/market-analysis/art-markets/us-a-european-art-market/546-global-art-market-outlook-2013.html?Itemid=102> (commenting that 2012 was "one of the best years for London's Post-war Contemporary art market, with all sales seasons (February, June and October) experiencing an increase from 2011"); *British Art Exports Hit Post-Credit-Crunch Peak*, REUTERS, Aug. 11, 2013, <http://www.reuters.com/article/2013/08/12/us-britain-art-exports-idUSBRE97B00220130812> ("The value of British art exports has surged to its highest level since the credit crunch, despite new rules giving deceased artists' estates a share of their work's resale price.").

³¹⁸ TEFAF REPORT 2013 at 23; see also, e.g., News Release, ThompsonReuters, UK Art Exports Hit Highest Point Since Credit Crunch (Aug. 12, 2013), http://www.sweetandmaxwell.co.uk/about-us/press-releases/uk_art_exports_highest_since_credit_crunch.pdf ("A dramatic rise in the value of the UK's art exports suggests that new rules to give artists some of the proceeds of an artwork's resale price may not have impacted growth of the UK's booming art market. . . . The most likely identifiable category of art to be affected by the Artist's Resale Rights levy – modern art – saw its licensed export sales grow even faster than the broader market – jumping 105% . . .").

³¹⁹ See, e.g., Darraby Comments at 2 (asserting that there are "serious practical issues about at what point the costs of administration of such a royalty in the arts would undermine any meaningful financial advantage to the intended beneficiary of artists"); Sotheby's/Christie's Comments at 3 ("[I]ncreased administrative costs would in turn lead to reduced investment in young, unproven artists – the very artists that the resale royalty is intended to benefit."); Stokes Comments at 4 ("There is also no doubt that the UK art market has incurred and continues to incur significant costs to put in place recording and reporting mechanisms to ensure the law is complied with."); FROSCHAUER at 12, 18 (self-reported information from

royalty scheme, many auction houses and dealers feel that the “administrative burdens of ARR are very high.”³²⁰ Similarly, the European Commission noted in its 2011 report on the implementation and effect of the Directive that the “inefficient administration of the resale right” in some member states “presents a not insignificant burden on art market professionals and may also lead to unnecessarily high deductions from the royalties due to artists and their successors.”³²¹ In addition, because the effective administration of a resale royalty scheme inevitably requires the production of certain information about covered transactions, some are concerned that the privacy of buyers and sellers will be compromised.³²²

Nonetheless, the U.K.’s report concludes that “the cost of administration does not appear burdensome relative to the benefit to the artists.”³²³ “In the long run,” even accounting for the possibility that the extension of the resale royalty to deceased artists might increase due diligence costs, “this administrative cost is much smaller than the benefit received.”³²⁴ The European Commission’s report does not issue a definitive statement with regard to the impact of administrative costs on the overall success of the resale royalty in Europe. Rather, despite its rather critical view of how certain member states administer their resale royalty regimes, it concludes on an optimistic (or at least practical) note, suggesting that an “exchange of best practices” through stakeholder dialogue, and a higher “standard of governance and transparency” in collecting society operations, will help to manage and minimize administrative costs in all EU

dealers and auction houses, collected between 2006 and 2007 in the U.K., makes it “evident that the high cost of collection and distribution outweighs the benefits gained by the majority of artists. 140 artists received less than the aggregate cost of collection”; in addition, “[c]ollecting agencies are not able to provide suitable indemnities that would free galleries and auction houses from having to perform time-consuming research to determine [artist’s resale right] qualification, and this has added significantly to the cost per transaction.”).

³²⁰ U.K. REPORT at 36.

³²¹ EC REPORT at 11; *see also id.* at 8 (“The costs of administering the right have been estimated at up to €50 per transaction. These are primarily staff costs associated with (i) the determination of qualifying artists; (ii) the determination and location of heirs and other right holders (iii) processing omissions and refunds; together with IT system costs.”).

³²² In 2008, the Australian government noted its concern regarding, for example, “what the collecting society must publish on their website following a commercial resale of artwork. . . . If privacy is not maintained then some people may be reluctant to undertake to purchase or sell their artwork commercially.” AUSTRALIA REPORT at 37; *see also* 1992 REPORT at viii-ix (“Concerning the issue of administration and collection of the royalty right . . . [s]ome suggested some form of art registry, but opponents were concerned about the privacy interests of parties to art transactions in not having their purchases and sales prices made public.”).

³²³ U.K. REPORT at 36.

³²⁴ *Id.* at 36; *accord* Tr. at 267:05-08 (Tania Spriggens, DACS) (“Administratively, it isn’t a problem. We’ve done it for six years. My colleagues from France and Germany have done it for far longer.”). Viscopy, Australia’s not-for-profit rights management organization for the visual arts, wrote in its comment to the Copyright Office that initial concerns that the country’s resale royalty scheme’s “administration will be a nightmare for the art market” and “so expensive that artists will not get anything” have proved to be “unfounded.” Viscopy Comments at 4. Specifically, Viscopy’s “extensive consultation with art market professionals has assisted to ensure that administration as simple and streamlined; administration has been assisted by an online facility we established; [and] administration has also been simplified for auction houses by a facility provided by the operator of Australian Art Sales Digest, a website that reports auction sales.” *Id.*

member states.³²⁵

Critics of a resale royalty also allege that a resale royalty dampens enthusiasm for resales, thereby depressing the secondary market in its entirety. Conversely, “resales in the secondary market . . . benefit artists creating works because those resales lift the primary market for those artists.”³²⁶ As noted above, however, the U.K. art market for post-war, modern, and contemporary art may have been stronger than ever in 2012-2013, notwithstanding the recent worldwide recession.³²⁷ Further, there is some evidence that global markets for post-war, modern and contemporary art – the only categories to which a resale royalty applies – may be performing at record high levels, even as the art market as a whole is underperforming.³²⁸

To be sure, even though the available quantitative information can be interpreted in various ways, there is certainly no conclusive proof that the U.K. or EU markets have suffered (or, for that matter, benefitted), directly or indirectly, from the resale royalty. Resale right skeptics themselves admit that it is impossible to single out a resale royalty as the cause of the art market’s woes.³²⁹ Auction houses, for instance, indicate that there may be a variety reasons for

³²⁵ EC REPORT at 11.

³²⁶ Tr. at 131:18-21 (Simon J. Frankel, Sotheby’s, Inc.).

³²⁷ See, e.g., PETERSON & ENGELBRECHT (stating that 2012 “was one of the best years for London’s Post-war Contemporary art market, with all sales seasons (February, June and October) experiencing an increase from 2011”); see also, e.g., Press Release, Christie’s, Inc., Christie’s £18.8M Basquiat is Most Valuable Work of London Post-War & Contemporary Art Week, London (June 28, 2013), available at http://www.christies.com/presscenter/pdf/2013/Release_Post_War_and_Contemporary_London_June_2013.pdf (“In an unprecedentedly crowded salesroom, Christie’s six-hour-long day auction saw strong bidding over the phone, on the internet, and in the room” (quoting Darren Leak and Beatriz Ordovas, Co-Heads of the Post-War and Contemporary Art Day Auction, Christie’s London)); Press Release, Sotheby’s, Inc., Sotheby’s Reports Second Quarter and First Half 2013 Financial Results (Aug. 6, 2013), available at <http://www.marketwatch.com/story/sothebys-reports-second-quarter-and-first-half-2013-financial-results-2013-08-06> (noting that in June 2013, Sotheby’s sales of contemporary art in London “brought a total of \$147.6 million, well within the pre-sale estimate”).

³²⁸ In 2013, even with “slow economic activity across Europe, successful auctions in Italy, Ireland, and Spain have contributed to Q3 growth, suggesting that the European art market as a whole may be stabilizing.” Press Release, ArtNet, ArtNet releases Third Quarter 2013 Global Art Auction Report (Oct. 23, 2013), http://bluemedium.com/wp-content/uploads/2011/07/Artnet_Q3PressRelease2013.pdf. The post-war and contemporary art sector in particular – the largest in the art market – has “regained aggregate sales well above its pre-crisis levels. Although the market saw only moderate growth of 5 percent in 2012, it reached just under €4.5 billion, its highest ever recorded level.” TEFAF REPORT 2013 at 44. Signally, the 2013 TEFAF Report makes no mention of the effect of the resale royalty in Europe or elsewhere. Some are now sounding a note of caution, however, that the global “contemporary art market bubble [is] about to pop,” even in the U.K. and possibly in the U.S. Kathryn Tully, *Contemporary Art: End Of A Bubble Or Already Bust?*, FORBES, Nov. 4, 2013, <http://www.forbes.com/sites/kathryntully/2013/11/04/contemporary-art-end-of-a-bubble-or-already-bust/> (noting that that earnings from the most recent London contemporary art auctions were 8 percent below estimates and 24 percent lower than the same amount achieved during the previous year’s auctions. “In fact, the only sale of the group where the low estimate was achieved was the one held at Christie’s. Also alarming was the fact that 11 art works with high price tags at Sotheby’s (with an average estimate of £8.4 million) failed to sell.”).

³²⁹ See, e.g., CLARE MCANDREW, SOME KEY STATISTICS RELEVANT TO ARTISTS’ RESALE RIGHTS (2013) (on file with the U.S. Copyright Office) (“[T]here is a correlation between introduction of ARR and losing market share but no proof of causality. A number of factors are involved and cannot be deemed conclusively to be responsible.”). For example, changes in the relative geographic distribution of high net

art market downturns, ranging from supply-side problems – including stiff competition for high-end consignments in a sluggish recessionary economy – to the “fatigue” induced by the relentless international art fair and auction circuit.³³⁰ And the European Commission concluded in its 2011 review that “[n]o clear patterns can be established to link the loss of the EU’s share in the global market for modern and contemporary art with the harmonisation of provisions relating to the application of the resale right in the EU on 1 January 2006.”³³¹ From a macroeconomic perspective, it is also true that the resale right quite simply “represents a negligible percentage of the value” of the overall art market.³³² In the United Kingdom, for example, “[o]n average the resale royalties collected each year . . . equate to less than 0.15 percent of the value of the entire UK art market, and 0.4 percent of the modern and contemporary art market.”³³³ In France, too, “resale royalties are extremely low compared to the art market turnover.”³³⁴

Another major argument of those who oppose the enactment of a resale royalty in the United States is that introducing the right would cause the secondary market to flee from the United States to China, Switzerland, or another country currently without a resale royalty.³³⁵ To support this proposition, they rely on basic assumptions about how economic markets operate, but

worth individuals – whose spending is critical to the post-war and contemporary art market – may be a more significant factor in the decline of continental Europe’s market share than the resale royalty; in 2012, “[e]conomic recession in many European countries, combined with widespread equity price declines and relatively subdued housing markets, all led to contractions in the number of millionaires in many European nations.” TEFAF REPORT 2013 at 75; *see also* CLARE MCANDREW, *THE ROLE OF ART & ANTIQUE DEALERS: AN ADDED VALUE* 38 (2011), <http://www.cinoa.org/> (asserting that dealers take numerous factors into consideration when choosing where to transact their business, including “the mounting costs of VAT, resale royalties and other internal policies”).

³³⁰ *See, e.g.*, Scott Reyburn, *Phillips Sale Ends \$241 Million Contemporary Art Marathon*, BLOOMBERG, June 29, 2013, <http://www.bloomberg.com/news/2013-06-29/phillips-sale-ends-241-million-contemporary-art-marathon.html> (“The auction houses are having problems feeding all-year-round demand for quality works by the market’s 50 or so investment-grade favorites.”); Carol Vogel, *Sotheby’s Raises Commissions, Following Lead of Christie’s*, N. Y. TIMES (Feb. 28, 2013), <http://artsbeat.blogs.nytimes.com/2013/02/28/sothebys-raises-commissions-following-lead-of-christies> (“For the full year, Sotheby’s saw both its revenues and profits decline. Revenues in 2012 were \$768.5 million, an 8 percent decline from the previous year; the company attributed much of that fall-off to a reduction in commissions.”); *Sotheby’s Increases Buyer’s Premium* (“Sotheby’s president and CEO, Bill Ruprecht, said . . . that competition to snare high-end consignments is denting commission revenue. He said that the increase in buyer’s premium was needed to prop up profit margins and revenue, because although sales are up 30 percent so far in 2013, they have been in the most competitive parts of the impressionist, modern and contemporary art market where the competition for high-end consignments is steep and commissions the slimmest.”).

³³¹ EC REPORT at 10.

³³² DACS Comments at 1; *see also, e.g.*, GESAC Comments at 2 (“Considering how small a component it represents of total art market turnover, resale right cannot seriously be considered as a shaping factor on the art market . . .”).

³³³ DACS Comments at 1.

³³⁴ ADAGP Comments at 6.

³³⁵ Note that auction houses have sounded the alarm about market flight in other contexts in which laws or regulations have been proposed. For example, in response to a 2007 New York State Assembly Bill that proposed to prohibit chandelier bidding and require auction houses to post reserve prices, Sotheby’s responded that the legislation “would be very damaging to the New York auction market and would drive a substantial amount of business to London.” *Auctioneers defend phantom bidding*, THE ART NEWSPAPER, Sept. 2007, http://www.parkinsonsappeal.com/pdfs/The_Art_Newspaper_Sept2007.pdf.

volunteer few concrete examples of transactions that have moved in response to the right.³³⁶ The European Commission's 2011 report, referenced by several commenters and participants in the Copyright Office's roundtable, asserts that charges such as the resale royalty are "more likely to lead sellers to divert sales to markets where transaction costs overall are lower" and the report takes as a given that sellers "will rationally move to do business in those markets where the transaction will be most beneficial, and the resale right is one in a number of factors that play a role in the choice of sales locations."³³⁷

It is far from certain, however, whether any such moves – and, again, few actual examples have been cited – can be attributed specifically to a resale royalty. The U.K.'s 2008 report generally observes that "owners of art by living UK artists have not noticeably moved to other locations."³³⁸ The report does offer two examples of art market business that may have relocated because of a resale royalty, but then goes on to state that the "problem with each of these examples . . . is that causality can seldom be explained by [the artist's resale royalty], alone: the presence of such royalties is but one of multiple criteria vendors take account of when making sales decisions (VAT and other taxes, currency exchanges rates, time constraints and strength of the particular salesroom all factor prominently.)"³³⁹ Likewise, a recent public consultation by the French government on the resale royalty concluded that, in what is essentially a speculative market, a decision to sell in one country or another is based on a variety of considerations,

³³⁶ See, e.g., Stokes Comments at 4-5 ("As for the long term possibility that art sales in the UK (and EU more generally) will be diverted to non RRR states (e.g. New York and Switzerland) the evidence here is not definitive. However . . . it would not be surprising if trade were diverted from the UK in the future, if indeed there is not already an effect. This will however require further research."). In addition, a significant number of collectors acquire art for aesthetic reasons, but "[t]he validity of the diversion scenario depends on the assumption that art is purchased solely or primarily for its investment value." Perlmutter at 408.

³³⁷ EC REPORT at 7-8; accord U.K. REPORT at 49 ("The other major cost feared by opponents is the flight of capital from ARR jurisdictions to markets where the right does not exist. The simple intuit is that vendors would have incentives to relocate sales items to non-ARR jurisdictions so long as shipping and insurance costs are less than the royalty they would otherwise be liable to pay.").

³³⁸ U.K. REPORT at 16; see also Henry Lydiate, *Artists Resale Right: 4th Year Report*, ARTQUEST (2010), <http://www.artquest.org.uk/articles/view/artists-resale-right-4th-year-report> ("The UK Government was persuaded by art market professionals in the UK to be cautious about the introduction of ARR [artist's resale right] during the 1980s and 90s, through fears that the secondary market for modern and contemporary art would be damaged by buyers and/or sellers choosing to trade in countries that did not operate ARR – such as the USA, Switzerland, or China. Such fears have proved unfounded to date: four years on, no evidence has been produced showing that the UK art market has suffered from the introduction of ARR"). Viscopy, Australia's not-for-profit rights management organization for the visual arts, also reported that "as in the United Kingdom, there is no evidence that the art market has suffered as a result of the introduction of the right or that sales have moved offshore." Viscopy Comments at 4.

³³⁹ U.K. REPORT at 49. The U.K. Report cites the following two specific examples: "[T]he royalty's 1977 introduction in California saw Sotheby Parke Bernet promptly terminate its operations in Los Angeles and realign its interests out of State (New York being the obvious beneficiary). Another well known case-in-point occurred in 2001 when Frenchman René Gaffe's £50 million collection of Impressionist and contemporary artworks was auctioned in New York at the request of the sale's beneficiary, UNICEF, to avoid droit de suite charges in Paris." *Id.* It also is worth noting that the U.K.'s 2008 report did express concern that because "biases against the British art trade [we]re likely being hidden by the unprecedented growth of the contemporary art market and the strength of the British pound" during the time period of the study, the U.K. art market might yet flee in the event that prices were to level off or drop. *Id.* at 50. As of 2013, however, there is little evidence that this scenario has or will come to pass for the U.K. art market.

including aggressiveness and expertise of art market personnel in attracting consignments, concentration and turnover in the fortunes of art buyers, visibility of national artists, and local tax and other regulatory burdens.³⁴⁰

5. What other factors affect the secondary art market?

The secondary art market is a complex ecosystem, with many correlating and confounding variables that affect market transactions. First, art markets are “susceptible to . . . changes in perception of the investment value of art.”³⁴¹ In other words, the overall health of the global market – or, more precisely, the relative strength of different investment vehicles and the relative performance of different financial markets and currencies – informs and motivates decisions about whether to buy and sell art and, if so, when and where. These decisions are complicated by the fact that the art market may not even “respond to traditional economic theory.”³⁴² Many buyers “do not see artwork primarily as a financial investment” and several studies show that “[c]ollectors retain art for an average of 30 years, far longer than their other assets . . . and the main reasons for selling are what auctioneers call the ‘Three D’s’ – death, debt and divorce – not pure profit-taking.”³⁴³ “No matter what the state of the market, divorce happens, people die, and debt has to be paid,” so even in a market downturn, some collectors are

³⁴⁰ See CONSULTATION PREPARATOIRE AU RAPPORT DE LA COMMISSION EUROPEENNE SUR LA MISE EN OEUVRE ET LES EFFETS DE LA DIRECTIVE 2001/84/CE DU PARLEMENT EUROPEEN ET DU CONSEIL DU 27 SEPTEMBRE 2001 RELATIVE AU DROIT DE SUITE AU PROFIT DE L’AUTEUR D’UNE OEUVRE D’ART ORIGINALE 25 (May 2011), [https://circabc.europa.eu/sd/d/5447f8e9-c1e2-4d30-a4d6-12e529510bdf/Authorities of France.pdf](https://circabc.europa.eu/sd/d/5447f8e9-c1e2-4d30-a4d6-12e529510bdf/Authorities%20of%20France.pdf). This same report notes that even though the resale royalty undoubtedly places a burden of some kind on art market professionals, it is “nearly impossible to evaluate with any certainty the impact that a royalty – or the absence of a royalty – may have on micro-economic decisions.” *Id.*; see also, e.g., GESAC Comments at 2 (“Where the art market is located depends on a wide range of factors (geographic closeness, public taste, market size and structure, tradition, the presence of experts, the expertise and proactivity of operators, legislation, taxes, etc. It starts up where the general climate, and the cultural, social and economic environment is most conducive.”).

In 2012, François Curiel, the president of Christie’s in Hong-Kong (and former chair of Christie’s France for nine years), asserted that “[w]hen the resale right was introduced in France and several other European countries, as well as in England for deceased artists, certain people thought that the market would settle in Switzerland where there is no *droit de suite* – but that was not the case. The major markets for . . . modern paintings and contemporary art are in London and New York, and I cannot imagine that contemporary works will soon be sold in Hong Kong simply because of the resale right. I think, for now, the markets will remain where they are. . . . It’s just another tax.” Shane Ferro, *François Curiel définit l’importance de la vente Liz Taylor sur le futur de la joaillerie*, BLOUIN ARTINFO FRANCE (Jan. 13, 2012), [http://fr.blouinartinfo.com/news/story/778305/fran percentC3 percentA7ois-curiel-d percentC3 percentA9fi nit-l percentE2 percent80 percent99importance-de-la-vente-liz-taylor-sur-le-futur-de-la-joaillerie](http://fr.blouinartinfo.com/news/story/778305/fran%20percentC3%20percentA7ois-curiel-d%20percentC3%20percentA9fi%20nit-l%20percentE2%20percent80%20percent99importance-de-la-vente-liz-taylor-sur-le-futur-de-la-joaillerie). During the Copyright Office’s resale royalty roundtable, Karen Gray, General Counsel and Chief Administrative Officer of Christie’s, responded to Mr. Curiel’s comment, stating “I have a great deal of respect for my colleague Francois Curiel in Hong Kong, but one thing he is not is an economist and I can assure you that he has not done research into this issue, so I just wanted to put that comment in context.” Tr. at 33:10-15 (Karen Gray, Christie’s, Inc.). For a discussion of the argument that California’s resale royalty law prompted Sotheby’s to move its auctions out of that state, see *supra* at p. 22 & note 149.

³⁴¹ EC REPORT at 7.

³⁴² Grant, *Secrets of the Auction Houses*; see also HANDBOOK OF CULTURAL ECONOMICS at 35 (“[T]he art market deviates radically from the textbook theory of perfect markets.”).

³⁴³ Grant, *Secrets of the Auction Houses*.

willing to sell at a discount.³⁴⁴

Second, business models in the art market are shifting from an emphasis on public auctions to other, globalized venues for art market transactions. International art fairs are “more and more, where the art world does business”³⁴⁵ and are “attracting both the new moneyed classes that fly in from Kiev, Shanghai, Doha or Abu Dhabi and the serious American collectors who now prefer to do their browsing at fairs at home and abroad.”³⁴⁶ Importantly, with respect to both the primary and secondary markets, art fairs also “have an impact on artists, who are producing work according to the demands of the art fair calendar rather than their own creative rhythms.”³⁴⁷

Auction houses, too, are rebranding themselves as global businesses that offer their clients more than public auctions, including private treaty sales.³⁴⁸ To that end, they are opening sales offices and galleries in emergent markets like India and the Emirate of Dubai and developing digital platforms that allow their clients not only to conduct Internet bidding, but also to transact business “at any time, any place, and on any device.”³⁴⁹ Private sales are “lucrative and inexpensive” for the auction houses and also hold a particular appeal for buyers and sellers who want their transactions to remain confidential, especially during difficult economic periods.³⁵⁰ When the financial markets are robust, “an auction is the obvious choice for any

³⁴⁴ Richard M. Smith, *The Art of Auctions: Christie’s CEO Edward Dolman*, NEWSWEEK, Feb. 11, 2010, <http://www.newsweek.com/art-auctions-christies-ceo-edward-dolman-74999>; see also Daniel Grant, *The Auction World’s Buy-Ins and Post-Sales*, HUFFINGTON POST (July 14, 2010), http://www.huffingtonpost.com/daniel-grant/the-auction-worlds-buy-in_b_645575.html (generally speaking, “the ‘three d’s’ that bring a large percentage of consignments to auction – death, debt and divorce – often encourage a willingness to be flexible” in setting (and accepting) a certain price).

³⁴⁵ Graham Bowley, *For Art Dealers, a New Life on the Fair Circuit*, N.Y. TIMES, Aug. 21, 2013, http://www.nytimes.com/2013/08/22/arts/for-art-dealers-a-new-life-on-the-fair-circuit.html?_r=0; see also Souren Melikian, Op-Ed: *Why the Future Lies in Art Fairs*, N.Y. TIMES, Mar. 8, 2013, http://www.nytimes.com/2013/03/09/arts/In-Maastricht-the-Trump-Card-of-Art-Fairs.html?pagewanted=1&_r=0 (asserting that the explosion of the international art fair scene “epitomizes the profound transformation of the art market in recent decades”).

³⁴⁶ Bowley, *For Art Dealers, a New Life on the Fair Circuit*.

³⁴⁷ *Id.*

³⁴⁸ A private treaty sale “is the term auction houses use for all secondary art sales carried out by means other than direct consignment for auction.” THOMPSON at 158.

³⁴⁹ *Sotheby’s Reports Strong Sales In Half Year Financial Results*, ARTLYST (Aug. 9, 2013), <http://www.artlyst.com/articles/sothebys-reports-strong-sales-in-half-year-financial-results>. Sotheby’s worldwide S/2 galleries are a prime example of this evolution; there are currently S/2 galleries in New York and London and there have been “pop-up” exhibitions in Los Angeles and Hong Kong. See Cheyenne Westphal, *S/2 Comes to London*, SOTHEBY’S (Sept. 3, 2003), <http://www.sothebys.com/en/news-video/blogs/all-blogs/contemporary/2013/08/s2-comes-to-london.html>. In some cases, the auction houses will also bring the art directly to collectors. See THOMPSON at 108-09 (“Before its record sale of Picasso’s *Dora Maar au Chat*, Sotheby’s created a list of fifteen UHNW [Ultra High Net Worth] potential bidders, then flew the painting to London, New York, Chicago, Moscow, Bahrain, and Tokyo to visit them.”).

³⁵⁰ Carol Vogel, *More Artworks Sell in Private in Slowdown*, N.Y. TIMES, Apr. 25, 2009, http://www.nytimes.com/2009/04/26/arts/design/26private.html?_r=0; see also *Sotheby’s Reports Strong Sales In Half Year Financial Results*, ARTLYST (Aug. 9, 2013), <http://www.artlyst.com/articles/sothebys-reports-strong-sales-in-half-year-financial-results> (“Private sales and private selling exhibitions are an increasingly important part of Sotheby’s business as the Company leverages experts’ expertise and experience with a low level of

collector wanting to sell a work of art. But as the recession takes its toll, many collectors have changed strategies and retreated to the . . . world of private sales.”³⁵¹ The Copyright Office is not aware, however, of any evidence that the growth in popularity of art fairs, private sales, and other nontraditional venues for art sales is the result, or a byproduct, of the spread of resale royalty schemes around the world.

What is certain is that the proliferation of art fairs and private sales worldwide is at least partly a reaction to changes in the global allocation of wealth, particularly in the highest echelons.³⁵² The top end of the art market is booming, many argue, because there are an increasing number of high net worth individuals around the world with “cash from newer institutions” who are “seeking works that boost their investment portfolio and social status.”³⁵³ For example, “22% of the first-time buyers in Sotheby’s worldwide Spring 2013 sales were from Asia. Further, just five years ago, 21% of Sotheby’s sold lots were purchased by buyers from ‘new markets;’ today that figure is 39%—nearly double.”³⁵⁴ Christie’s has recently shown major works in Dubai, Shanghai, and Moscow.³⁵⁵ And business is not only moving to emerging markets – it is also flowing back to the traditional centers of the art market: for example, London is “increasingly becoming a hub for Asian, Middle-Eastern and Russian collectors.”³⁵⁶ On a

associated expenses”); THOMPSON at 158-159 (“What makes private treaty sales so profitable for auction houses is that there are almost none of the catalogue, promotion, and physical overhead costs associated with auctions. Private treaty departments can also offer sellers intangibles like access to lists of auction bidders and collector contracts.”). Auction houses – and buyers and sellers – also like private treaty sales because such sales “provide price certainty” and because a work of art “offered by private treaty that fails to sell will not be publicly branded as being burned.” THOMPSON at 159.

³⁵¹ Vogel, *More Artworks Sell in Private in Slowdown*; see also Scott Reyburn, *Sotheby’s Boosts Private Sales With Beuys at New Gallery*, BLOOMBERG BUSINESSWEEK, Sept. 2, 2013, <http://www.businessweek.com/news/2013-09-02/sotheby-s-boosts-private-sales-as-billionaires-head-for-frieze> (“Discreet transactions are a significant growth area for Sotheby’s and Christie’s International, the world’s two biggest auction houses. . . . Private sales at Sotheby’s increased 11 percent in 2012, accounting for \$906.5 million of a \$5.4 billion total. . . . A figure of 631.3 million pounds (\$981 million) – an increase of 26 percent – was achieved by London-based Christie’s, which took a record \$6.23 billion last year”); see also Turner at 352-353 (“As uncertainty infiltrates the market, and prices are in flux . . . Christie’s and Sotheby’s have responded . . . by focusing on the private sales sectors of their businesses.”).

³⁵² See HANDBOOK OF CULTURAL ECONOMICS at 39-40 (“Since the late 1990s . . . art markets have become global to an unprecedented extent; they now encompass many more regions than in the past. New collectors from Latin America, the former Soviet Union and Asia have entered the art market”); see also, e.g., Richard M. Smith, *The Art of Auctions: Christie’s CEO Edward Dolman*, NEWSWEEK, Feb. 11, 2010, <http://mag.newsweek.com/2010/02/11/death-debt-and-divorce.html> (“The amount of wealth in individuals’ hands would have been unimaginable 10 or 15 years ago, particularly in Kazakhstan and Moscow and Ukraine and the Middle East and China.”).

³⁵³ Paul Casciato, *Bacon, Warhol sales to test health of global art market*, REUTERS, Oct. 15, 2013, available at <http://www.reuters.com/assets/print?aid=USBRE99E0MQ20131015>.

³⁵⁴ *Sotheby’s Reports Strong Sales In Half Year Financial Results*, ARTLYST (Aug. 9, 2013), <http://www.artlyst.com/articles/sothebys-reports-strong-sales-in-half-year-financial-results>.

³⁵⁵ Casciato, *Bacon, Warhol sales to test health of global art market*; see also Georgina Adam, *What’s in store for the market?*, THE ART NEWSPAPER (Jan. 10, 2013), <http://www.theartnewspaper.com/articles/Whats-in-store-for-the-market/28378> (explaining that in March 2013, “Sotheby’s . . . [held] a selling show of art from Armenia, Georgia, Azerbaijan and the “Stans” –Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan – in London”).

³⁵⁶ PETERSON & ENGELBRECHT.

closely related note, the last few years have witnessed a boom in museum purchases from around the world, as museums in newly-wealthy countries seek to build world-class collections of art.³⁵⁷

Third, the secondary art market is shaped by the wide range of factors that affect individual art transactions. These factors include auction house levies, commissions, and advances;³⁵⁸ insurance fees;³⁵⁹ storage and transportation costs; public relations and marketing costs;³⁶⁰ and the variety of monetary and non-monetary enticements that auction houses in competition for consignments.³⁶¹ A relatively new phenomenon, the third-party guarantee, has recently – and significantly – changed auction house buying and selling practices.³⁶² And, of

³⁵⁷ “[F]our new museums in the United Arab Emirates – the Louvre and Guggenheim in Abu Dhabi, one in Dubai and one in Sharjah, plus a new contemporary museum in Qatar, will between them absorb four hundred to five hundred works each year for the next ten to fifteen years.” THOMPSON at 231; *see also* Adam, *What’s in store for the market?* (noting that in 2013, “oil-rich Azerbaijan[’s] . . . ruling family arranged meetings across Europe and in the US with leading figures in the art world to promote the country’s plans to build museums and produce new art events. Christie’s was quick to recognise an opportunity and organised a shindig in Baku to show off some of the things the newly rich Azeris could buy.”); Alexandra Peers, *Qatar Purchases Cézanne’s The Card Players for More Than \$250 Million, Highest Price Ever for a Work of Art*, VANITY FAIR, Feb. 2, 2012, <http://www.vanityfair.com/culture/2012/02/qatar-buys-cezanne-card-players-201202> (explaining that in 2012, the nation of Qatar “purchased a Paul Cézanne painting, *The Card Players*, for more than \$250 million. The deal, in a single stroke, sets the highest price ever paid for a work of art and upends the modern art market For a nation in the midst of building a museum empire, it’s instant cred. . . . And Qatar is also buying 20th-century art: *The Art Newspaper* . . . earlier this year crowned the nation the biggest single contemporary-art buyer in the world.”).

³⁵⁸ *See, e.g.*, SOCIOLOGY OF FINANCE at 482 (“Buying or selling a work of art at auction tends to involve a fee of up to 25 percent, while a private art dealer may ask commissions of 20 or 30 percent. These expenses, together with high costs for insurance and storage, significantly depress the potential returns.”).

³⁵⁹ *See, e.g.*, Daniel Grant, *The Auction World’s Buy-Ins and Post-Sales*, HUFFINGTON POST (July 14, 2010), http://www.huffingtonpost.com/daniel-grant/the-auction-worlds-buy-in_b_645575.html (“Bonhams and Butterfields in San Francisco assesses . . . an insurance fee of one-and-a-half percent of the reserve.”).

³⁶⁰ *See, e.g.*, THOMPSON at 102 (“The auction house performs a great many other functions in return for its seller’s commission and buyer’s premium. After obtaining the consignment, it stores and transports the art, researches authenticity and provenance, catalogues, photographs and transports the art, and exhibits, and conducts credit checks on potential bidders. After the auction it collects payment and arranges delivery Services provided to bidders include condition reports, specialist advice, telephone bidding, receptions, boardroom lunches, VIP events, seminars, transporting paintings to visit collectors in other cities, and support of foreign and regional offices.”).

³⁶¹ In a recent letter to the Chairman of Sotheby’s, the CEO of Third Point LLC, a hedge fund that is Sotheby’s largest stakeholder, accused Sotheby’s of having “aggressively competed on margin, often by rebating all of the seller’s commission and, in certain instances, much of the buyer’s premium to consignors of contested works” at the expense of its “ability to generate the highest possible price for its customer.” Letter from Daniel S. Loeb to William F. Ruprecht (Oct. 2, 2013), *available at* <http://www.sec.gov/Archive/s/edgar/data/823094/000119312513388165/d605390dex993.htm>; *see also, e.g.*, THOMPSON at 109 (“If pressed, an auction house might compete by permitting the consignor’s teenage children to accompany a painting on its promotional tour. . . . If pushed further, the auction house may reluctantly offer a job to the consignor’s offspring.”).

³⁶² Auction houses traditionally offered select sellers financial guarantees – minimum returns promised to sellers regardless of their works’ success at auction – in exchange for coveted consignments. In recent years, however, auction houses have increasingly shifted this risk to third-party guarantors. “Third-party guarantors, also called irrevocable bidders, are a select and mostly anonymous group of deep-pocketed collectors and dealers who, approached by the auction houses, agree to bid for specified works up to a

course, taxes play a significant role “in the development, and the relative competitiveness of [art] markets” around the world.³⁶³ “Many of the multi-millionaires and billionaires who count themselves among the world’s biggest art collectors,” for example, “use tax havens to buy and sell art.”³⁶⁴

Finally, intangibles such as status, branding, cachet, celebrity, and aesthetics all influence the character and relative competitiveness of global secondary art markets, particularly for high-end contemporary art. “Changing tastes and fashion,” for example, “can radically increase or diminish the artistic and economic value of objects within art markets.”³⁶⁵ Even though tastes and fashions change, however, New York and London have long remained the twin pillars of the art world. “Brand equity . . . has a huge effect on art pricing” and New York and London are themselves the preeminent “brands” in the global art marketplace.³⁶⁶ Indeed, some buyers will pay a premium for a work sold at a prestigious auction in New York or London.³⁶⁷ If nothing

minimum price. If bidding stops there, they acquire the lot; if they are outbid, they split any profit from its sale with the consignor and, if this is part of the agreement, with the auction house.” Judd Tully, *Assurance Policies: Third-Party Guarantees May Reduce Risk and Yield Rewards*, BLOUIN ARTINFO (Sept. 22, 2011), <http://www.blouinartinfo.com/news/story/38646/assurance-policies-third-party-guarantees-may-reduce-risk-and-yield-rewards>. These arrangements, like so many others in the art world, are both complex and closely held: “[e]ach house has its own criteria for such transactions, the details of which are strictly confidential.” *Id.*; see also, e.g., *Sotheby’s extends guarantees to \$166M before auctions*, CRAIN’S N.Y. BUS., Sept. 6, 2013, <http://www.crainsnewyork.com/article/20130906/ARTS/130909941> (Sotheby’s “said Thursday night it’s reducing its exposure by ‘irrevocable bids’ of \$23.5 million, which are from undisclosed third-party guarantors. It may further reduce risk by additional ‘irrevocable bids’ before auctions in the fourth quarter. . . . Sotheby’s previously reduced guarantees after it lost \$60 million from them in 2008, as artworks sold for less than the minimum guaranteed price or didn’t sell at all.”).

³⁶³ EC REPORT at 7. In the United States, for example, “the tax rate and availability of deductions will differ depending on whether a person is a dealer, investor, or collector.” PRACTISING LAW INSTITUTE, *THE COLLECTION AS INVESTMENT PROPERTY 2* (2005), http://www.pli.edu/product_files/EN0000000046693/89177.pdf. For an overview of the complexity of art taxation in the United States, see, e.g., U.S. INTERNAL REVENUE SERVICE, TOPIC 409 - CAPITAL GAINS AND LOSSES (Apr. 1, 2013), <http://www.irs.gov/taxtopics/tc409.html>; Patricia Cohen, *Art’s Sale Value? Zero. The Tax Bill? \$29 Million*, N. Y. TIMES, July 22, 2013, http://www.nytimes.com/2012/07/22/arts/design/a-catch-22-of-art-and-taxes-starring-a-stuffed-eagle.html?_r=1&; U.S. Internal Revenue Service, “Paintings, Antiques, and Other Objects of Art,” Publication 561 (Apr. 2007), <http://www.irs.gov/publications/p561/ar02.html#d0e617>; Alan Breus, *Valuing Art for Tax Purposes*, J. OF ACCOUNTANCY (July 2010), <http://www.journalofaccountancy.com/issues/2010/jul/20092096>; Ginger Broderick, *The Art of the Deal: Tax Consequences of Collecting*, CPA J. ONLINE (Apr. 2005), <http://www.nysscpa.org/cpajournal/2005/405/essentials/p54.htm>.

³⁶⁴ Mar Cabra & Michael Hudson, *Mega-Rich Use Tax Havens to Buy and Sell Masterpieces*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 3, 2013), <http://www.icij.org/offshore/mega-rich-use-tax-havens-buy-and-sell-masterpieces>. “Many art dealers and big collectors use companies in the Cayman Islands, Luxembourg, Monaco and other ‘loosely regulated’ jurisdictions to trade and own art in much the same way they use offshore entities to make investments, reduce their taxes and protect their fortunes.” *Id.*

³⁶⁵ HANDBOOK OF CULTURAL ECONOMICS at 37; see also EC REPORT at 7.

³⁶⁶ See THOMPSON at 16 (“Having a painting on your wall acquired in New York has a lot more cachet than having one purchased in Milwaukee”); accord Wall Streeting Art at 11 (“Other cities may host key sales, such as the Hong Kong sales of Chinese art, or Paris for Impressionists, but New York and London dominate in contemporary art.”).

³⁶⁷ See THOMPSON at 15 (“A work offered in a prestigious evening auction at Sotheby’s or Christie’s will bring on average 20 percent more than the same work auctioned the following day in a less prestigious day sale.”); see also HANDBOOK OF CULTURAL ECONOMICS at 46 (“[T]he same item fetches appreciably

else, the fact that New York and London are still the most sought-after brands in the art market suggests that, notwithstanding a resale royalty, the United States and the United Kingdom will continue to serve as the loci for the post-War and contemporary art market, particularly at the highest levels.³⁶⁸

6. How might a resale royalty implicate the first sale doctrine?

Some opponents of a resale royalty argue that it is an impermissible restriction on the first sale doctrine, which permits the owner of a lawfully made copy of a work to sell or otherwise dispose of that copy “without the authority of the copyright owner.”³⁶⁹ In their view, the royalty would undermine the doctrine – which rests on the fundamental principle of free alienation of property – by “prevent[ing] buyers from ever acquiring unencumbered title to a work of art.”³⁷⁰ They further contend that the royalty would impermissibly favor visual artists over other creators, who lack resale royalty rights in similarly situated works (for example, the rare first edition of a book).³⁷¹ Finally, they argue that a resale royalty is unnecessary given that the first sale doctrine merely states a default rule. Artists and purchasers are free, they observe, to contract around the doctrine in a variety of ways, such as through an agreement to give the artist a share of future resale proceeds in exchange for a lower sale price.³⁷²

Proponents respond that a resale royalty does not conflict with the ability to freely transfer property because it simply would require payment when a subsequent sale has been made and would not otherwise restrict the transfer or sale. They note that the royalty would “not confer any rights to regulate the distribution of the original,” meaning that “an author would not have to be consulted before the work is sold[,] nor would permission for this transaction be necessary.”³⁷³ Rather, “[i]t would merely affect the total or net purchase price,”³⁷⁴ and thus, in their view, would be analogous to a tax or commission – charges that many buyers and sellers, particularly at auctions, are already used to paying.³⁷⁵ One commenter further observed that Congress has previously allowed exceptions to the first sale doctrine in the contexts of sound recordings and

different prices depending on the auction house that sells it, even if the sale takes place in the same town at the same time.”).

³⁶⁸ See, e.g., Tr. at 28:08-17 (Gerhard Pfennig, VG Bild-Kunst) (“The experience shows that even galleries from Switzerland, where there is no resale royalty, moved to London. The big gallery Hauser and Wirth, from Zurich, moved to London and I think they opened the fourth place in London, recently, which shows that resale royalty, which they have to pay in London, doesn't have any affect on these business developments because the buyers come to London.”).

³⁶⁹ 17 U.S.C. § 109(a).

³⁷⁰ Christie’s, Inc. & Sotheby’s, Inc., Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 7 (Dec. 5, 2012) (“Christie’s/Sotheby’s Comments”).

³⁷¹ *Id.* at 7.

³⁷² *Id.* at 7-9.

³⁷³ DACS Comments at 2; accord VAGA Comments at 2 (“While a resale royalty would obviously impact sellers of works of art by requiring them to pay rights holders, the right would not *prevent* the further sale or distribution of the work.”).

³⁷⁴ ASMP Comments at 2.

³⁷⁵ See *id.* at 3 (“Sellers are accustomed to paying commissions to auction houses and should not be taken aback by the payment of a retail [sic] royalty from the proceeds.”).

computer software.³⁷⁶

In the 1992 Report, the Copyright Office acknowledged that “[i]mplementation of the royalty would require qualification of the First Sale doctrine”³⁷⁷ and suggested that such a law could amount to an “abandon[ment] of well-settled principles of free alienability in Anglo-American property jurisprudence.”³⁷⁸ At the same time, the Office recognized that the doctrine can present unique and substantial challenges for visual artists:

The copyright law recognizes a distinction between a work and its material embodiment. This separation largely disappears, however, when a work is created in unique form. Once a collector has purchased an original painting, for example, the artist no longer possesses either the work or the object to display, whether or not he or she has retained the copyright. And even if the artist creates several copies of a work, he or she must compete with the copy owner’s right of public display.³⁷⁹

Should Congress conclude that these considerations (or others discussed above) warrant qualification of the first sale doctrine, there would be no constitutional bar to such action. As a general matter, Congress has broad authority “to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the [Copyright] Clause.”³⁸⁰ Judicial review in this context is accordingly limited to asking whether the relevant law “is a rational exercise of the legislative authority conferred by the Copyright Clause.”³⁸¹ On that question, moreover, courts “defer substantially to Congress.”³⁸² This latitude almost certainly permits Congress to place limited burdens on the first sale right as part of a broader legislative effort to incentivize the creation of new works or to “encourage the dissemination of existing and future works.”³⁸³

The resale right’s opponents appear to agree. During the roundtable, for example, counsel for one of the companies advancing the first sale argument acknowledged that, “within certain broad contours,” Congress probably “can either have or not have the First Sale doctrine.”³⁸⁴ He also described the first sale issue as “something of a policy inquiry” that is “separate” from the question of a resale royalty law’s constitutionality.³⁸⁵

³⁷⁶ VAGA Comments at 2; *see* 17 U.S.C. § 109(b)(1)(A).

³⁷⁷ 1992 REPORT at 148.

³⁷⁸ *Id.* at 134.

³⁷⁹ *Id.* at 148.

³⁸⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003); *see* U.S. CONST. art. I, § 8, cl. 8.

³⁸¹ *Eldred*, 537 U.S. at 204.

³⁸² *Id.*; *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.”).

³⁸³ *Golan*, 132 S. Ct. at 889.

³⁸⁴ Tr. at 192:02-04 (Paul Clement, Christie’s, Inc.).

³⁸⁵ *Id.* at 170:04-06 (Paul Clement, Christie’s, Inc.); *see also id.* at 170:12-16 (Clement) (“[I]n a policy level, I think the question of whether this is consistent with the First Sale doctrine is an important question to ask, even though it doesn’t determine a constitutional question . . .”).

Furthermore, as noted, Congress has already provided qualifications to the first sale doctrine in other contexts. For example, Section 109(b)(1)(A) of Title 17 prohibits the owner of a phonorecord or a copy of a computer program from renting, leasing, or lending those items for commercial advantage without authorization from the copyright holder.³⁸⁶ The House report accompanying that legislation made clear that its purpose was to “modif[y] the first sale doctrine.”³⁸⁷ Similarly, under VARA, the owner of a visual artwork is prohibited from modifying the work in a manner that would be prejudicial to the artist’s honor or reputation.³⁸⁸ Thus, although the Office identified the United States’ “well-settled principles of free alienability” as potentially conflicting with a resale royalty policy, we must acknowledge that where Congress has felt it important to act as a policy matter to restore a greater balance in the copyright system, it has freely done so, even where those changes created limited exceptions to the traditional first sale right.³⁸⁹

In view of all of these factors, the Office concludes that the first sale doctrine presents no legal barrier to the enactment of a resale royalty right. Even if the right is viewed as a partial modification of the doctrine, such a change is within Congress’s power to implement, subject to the constitutional considerations discussed next.

7. Would a resale royalty implicate the Fifth Amendment or the Bill of Attainder Clause?

a. Fifth Amendment

There are some important constitutional questions regarding whether a resale royalty could be applied retroactively – that is, to the resale of works that were initially sold by artists prior to the statutory effective date. Two commenters argued that imposing a royalty on such works would amount to an impermissible taking and a violation of due process under the Fifth Amendment.

i. Takings Clause

Opponents of the resale right contend that imposing it on sales of existing works – which they define as those “that have already entered the stream of commerce”³⁹⁰ – would raise takings concerns by upsetting current artwork owners’ settled property expectations. Noting that the Supreme Court has identified takings implications in laws transferring an ownership interest from one private party to another, they maintain that a retroactive resale law “would directly eliminate one of the specific property rights within the bundle of ownership rights – namely, the right to free alienation of the property.”³⁹¹ Each current owner, they argue, purchased a work against the backdrop of the first sale doctrine, and thus the price he or she paid necessarily reflected the understanding that the sale would extinguish the artist’s ownership interest in the physical

³⁸⁶ 17 U.S.C. § 109(b)(1)(A).

³⁸⁷ H.R. REP. NO. 98-987, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2898, 2901.

³⁸⁸ 17 U.S.C. § 106A(a)(3)(A).

³⁸⁹ *See* Perlmutter at 410-411.

³⁹⁰ Christie’s/Sotheby’s Comments at 3.

³⁹¹ *Id.* at 15.

object.³⁹² In their view, engrafting a royalty obligation onto future sales of the same work “would discard that bargain through government fiat by unilaterally increasing the value of the work to the artist and decreasing the value to the purchaser,” in contravention of the latter’s constitutionally protected reliance interests.³⁹³

The Supreme Court has recognized two separate categories of government takings: physical takings (often referred to as “*per se*” takings) and regulatory takings.³⁹⁴ Physical takings relate to the government’s duty under the Fifth Amendment’s “plain language” to provide compensation whenever it “acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation.”³⁹⁵ Cases presenting a “classi[c] taking”³⁹⁶ of this type typically “involve[] the straightforward application of *per se* rules.”³⁹⁷ Regulatory takings, meanwhile, generally involve an “interference” with property that “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”³⁹⁸ In contrast to the *per se* approach, regulatory takings cases are governed “by ‘essentially ad hoc, factual inquiries,’ designed to allow ‘careful examination and weighing of all the relevant circumstances.’”³⁹⁹

The commenters asserting the takings argument have not specified whether they believe such a law would constitute a *per se* or a regulatory taking. The Supreme Court’s takings jurisprudence, however, suggests that economic legislation challenged on retroactivity grounds generally should be analyzed under the regulatory takings framework. In *Eastern Enterprises v. Apfel*,⁴⁰⁰ a plurality of the Court applied a regulatory takings analysis to a federal law requiring a former coal operator to fund health benefits for retirees who had worked for the company before it left the coal industry. In our view, a court would likely follow that same approach in considering the takings issue raised here.⁴⁰¹

³⁹² *Id.* at 11-12.

³⁹³ *Id.* at 12.

³⁹⁴ See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321-22 (2002).

³⁹⁵ *Id.* at 322.

³⁹⁶ *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (plurality) (alteration in original) (quoting *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982)).

³⁹⁷ *Tahoe-Sierra*, 535 U.S. at 322.

³⁹⁸ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

³⁹⁹ *Tahoe-Sierra*, 535 U.S. at 322 (citations omitted) (quoting *Penn Central*, 438 U.S. at 124, and *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring)).

⁴⁰⁰ See *supra* note 396.

⁴⁰¹ It potentially could be argued that the Takings Clause has no application in this context. Five Justices in *Eastern Enterprises* concluded that the Takings Clause does not apply to government-imposed financial obligations that do “not operate upon or alter an identified property interest” or that are not “applicable to or measured by a property interest.” *Eastern Enters.*, 524 U.S. at 540 (Kennedy, J., concurring in judgment and dissenting in part); *accord id.* at 554 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (concluding that Takings Clause did not apply because “[t]his case involves not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties”). In the case of a resale royalty law, however, the required payment would be tied to an owner’s property interest in a specific work of art. Indeed, the payment obligation would arise only upon the sale of that property, and the amount due would be based directly on its value. Thus, even if a court

“[B]y its nature,” the regulatory takings inquiry is highly fact-specific and “does not lend itself to any set formula.”⁴⁰² Nevertheless, the Supreme Court has “identified several factors . . . that have particular significance: ‘[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.’”⁴⁰³

As to the first factor – economic impact – it is arguably possible that a resale royalty law could impose a financial burden on at least some parties, though the effect would be mitigated if the legislation capped the royalty amount due on each sale, as many countries do. A more significant question could be presented by the second factor – interference with reasonable investment backed expectations. In applying that factor, the Court has looked to, among other considerations, “[t]he distance into the past that the [law] reaches back to impose a liability . . . and the magnitude of that liability.”⁴⁰⁴ A plaintiff could argue that, for at least some current artwork owners, the law would reduce the value of works acquired years or decades earlier, when there was no reasonable expectation that the artist would be entitled to a percentage of any resale proceeds. To that extent, it could be argued that the legislation “attache[d] new legal consequences to events completed before its enactment.”⁴⁰⁵

On the other hand, “Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties.”⁴⁰⁶ That authority includes the power to “impose retroactive liability to some degree, particularly where it is ‘confined to short and limited periods required by the practicalities of producing national legislation.’”⁴⁰⁷ Furthermore, a mere “reduction in the value of property is not necessarily equated with a taking.”⁴⁰⁸ Ultimately, a court’s resolution of this factor would turn on the specific terms of the legislation and, perhaps, on the particular circumstances of the plaintiffs challenging it.⁴⁰⁹

The effect of the third factor – the character of the governmental action – on the takings analysis is somewhat uncertain. The Supreme Court has indicated that a law’s “unusual” nature may be relevant to this inquiry.⁴¹⁰ Opponents of the right might argue that this factor tips in their favor because retroactively imposing an encumbrance on a physical object is a significant departure from traditional concepts of property ownership. Supporters might respond that resale royalty rights are the prevailing norm in a vast and growing number of countries throughout the world, and thus their enactment here could hardly be considered unprecedented. And, as noted,

were to conclude that the Takings Clause does not reach an ordinary obligation to pay money, it still could find the Clause applicable to a resale royalty scheme.

⁴⁰² *Id.* at 523.

⁴⁰³ *Id.* at 523-24 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

⁴⁰⁴ *Id.* at 534.

⁴⁰⁵ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

⁴⁰⁶ *Eastern Enters.*, 524 U.S. at 528.

⁴⁰⁷ *Id.* (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984)).

⁴⁰⁸ *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

⁴⁰⁹ Note, for example, that the Court in *Eastern Enterprises* invalidated the statute at issue there on as-applied, rather than facial, grounds. See 524 U.S. at 538 (plurality); *id.* at 550 (Kennedy, J., concurring in judgment and dissenting in part).

⁴¹⁰ *Id.* at 537.

the often substantial charges that parties to art sales already expect to pay (auction house commissions and sales taxes, for example) arguably limit the extent to which a resale royalty could be said to disrupt settled expectations.

Overall, the Office believes that the outcome of a takings challenge on this basis cannot be predicted with certainty – particularly given the fact-bound nature of the analysis. To be clear, the Office takes no position on the merits of these or any other potential takings arguments. Nevertheless, in the interests of avoiding constitutional doubt and of minimizing the federal government’s exposure to unnecessary litigation, we recommend that Congress strongly consider making any resale royalty legislation prospective in application.⁴¹¹ Importantly, the resale right’s opponents do not argue that a prospective royalty would trigger takings concerns; in fact, they appear to disclaim such an argument.⁴¹²

A prospective royalty law could take a number of forms. The 1992 Report recommended that such a law be “effective only as to the resale of eligible works created on or after the date the law becomes effective.”⁴¹³ This approach would provide the greatest degree of notice to artists and prospective purchasers. Another model would be to apply the royalty to preexisting works but to provide an exemption for the first sale of such works following the law’s effective date.⁴¹⁴ Both of these approaches are discussed in further detail in our recommendations in Section IV.

ii. Due Process Clause

The commenters’ due process argument largely parallels their takings argument. In their view, the retroactivity concerns discussed above also implicate owners’ interests in “fair notice and repose” under the due process clause.⁴¹⁵

The Supreme Court has held that economic legislation imposing retroactive liability must satisfy due process requirements. In *Usery v. Turner Elkhorn Mining Co.*, for example, the Court noted that such legislation may raise distinct due process concerns: “It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.”⁴¹⁶ To prevail on such a claim, a plaintiff must establish “that the legislature has acted in an arbitrary and irrational way.”⁴¹⁷

⁴¹¹ Should a court find a taking, the remedy might take the form of declaratory and injunctive relief rather than an award of damages. *Cf. Eastern Enters.*, 524 U.S. at 521 (concluding that, in the context of a takings challenge to legislation requiring a direct transfer of funds from one private party to another, “it cannot be said that monetary relief against the Government is an available remedy”).

⁴¹² See Christie’s/Sotheby’s Comments at 12-13 (“[A] resale royalty right that attached only to newly created works could arguably be said to ‘promote the progress of . . . useful arts’ . . .” (citation omitted)); Tr. at 186:02-05 (Paul Clement, Christie’s, Inc.) (“[S]urely, Congress has some authority to shape prospective copyrights and what that bundle of rights is.”); *id.* 193:13-94:01 (Clement) (agreeing that prospective application is “a very big difference” for constitutional purposes).

⁴¹³ 1992 REPORT at 155.

⁴¹⁴ Australia follows this approach. See *Resale Royalty Right for Visual Artists Act 2009* (Cth) s 11.

⁴¹⁵ Christie’s/Sotheby’s Comments at 11.

⁴¹⁶ 428 U.S. 1, 16-17 (1976).

⁴¹⁷ *Usery*, 428 U.S. at 15.

Although recognizing a role for due process analysis in the economic context, the Court has nonetheless “expressed concerns about using the Due Process Clause to invalidate economic legislation.”⁴¹⁸ Thus, the plurality in *Eastern Enterprises* found it unnecessary to reach the plaintiff’s due process claim because it found the statute unconstitutional under the takings clause.⁴¹⁹ Accordingly, a court could determine that the Takings Clause, not the Due Process Clause, provides the proper framework for addressing a retroactivity challenge in this context.

In any event, like the takings argument, the due process objection applies only to resale legislation covering previously purchased works or those previously contracted for. Therefore, it can likewise be addressed by making the law prospective in application.

b. Bill of Attainder Clause

On a separate note, the same commenters argue that any resale royalty law that applied only to auction houses meeting a certain annual sales threshold would implicate the Constitution’s Bill of Attainder Clause,⁴²⁰ which prohibits “statutes that inflict punishment on [a] specified individual or group.”⁴²¹ In their view, such concerns would arise if the law “were drawn to target a handful of large auction houses, while excluding large swaths of the art market, such as smaller auction houses, Internet-based sellers, galleries, and private sales.”⁴²²

The Supreme Court has described a bill of attainder as “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.”⁴²³ In determining whether a law “inflicts punishment,” the Court has recognized “three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, ‘viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes’; and (3) whether the legislative record ‘evinces a congressional intent to punish.’”⁴²⁴

An auction house or other plaintiff seeking to apply these criteria to a resale royalty law likely would face a considerable challenge. For one thing, the payment of a royalty – particularly one subject to a cap along the lines of the EU model – bears little resemblance to the forms of punishment historically associated with bills of attainder, which include the death penalty, “imprisonment, banishment, . . . the punitive confiscation of property,” and “bars to participation by individuals or groups in specific employments or professions.”⁴²⁵ Beyond that, a resale royalty law surely would be found to further nonpunitive legislative purposes, particularly in light

⁴¹⁸ *Eastern Enters.*, 524 U.S. at 537 (collecting cases).

⁴¹⁹ *Id.* at 538. Justice Kennedy took a different view, concluding that the statute did not effect a taking but was nevertheless invalid under the Due Process Clause. *Id.* at 539-50 (Kennedy, J., concurring in judgment and dissenting in part).

⁴²⁰ U.S. CONST. art. I, § 9, cl. 3.

⁴²¹ *Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 851 (1984).

⁴²² Christie’s/Sotheby’s Comments at 17.

⁴²³ *Selective Serv. Sys.*, 468 U.S. at 846-47 (quoting *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 468 (1977)).

⁴²⁴ *Id.* at 852 (quoting *Nixon*, 433 U.S. at 473, 475-76, 478).

⁴²⁵ *Id.*

of the broad deference afforded Congress when it legislates pursuant to its Copyright Clause authority.⁴²⁶

In any event, as discussed in Section IV, the Office recommends that any resale royalty law not be limited to large auction houses. While we reach that conclusion for reasons independent of the bill of attainder question, we note that broadening the legislation's scope in such a manner would have the additional benefit of foreclosing any possible constitutional challenge on this basis.

IV. OVERALL FINDINGS AND RECOMMENDATIONS

For the reasons discussed above, the Copyright Office agrees that the current U.S. copyright system leaves many visual artists at a practical disadvantage in relation to other kinds of authors. It is true that the general lack of reliable empirical evidence in this area makes any comparison of the relative positions of visual artists and other creators inherently imprecise. However, the available information does indicate – and indeed, supporters and opponents of a resale royalty generally seem to agree – that, for most visual artists, the financial benefit from the sale of a given work is limited by the nature of the work. Because most artworks are not produced in copies, the visual artist receives a financial interest in only one work – or at best a few copies of that work. Other creators face no comparable limitation, as their works are sold in perfect copies, and the copyright law generally enables them to be paid a share of every copy. To alleviate the effects of this financial disparity, the Office believes that Congress should consider ways to rectify the problem and to further incentivize and support the development and creation of visual art.

As some seventy countries have recognized, adoption of a statutory resale royalty right is one way to level the playing field, and the Office accordingly supports Congress's consideration of such legislation. At the same time, the Office believes that there may be other ways to accomplish these goals, some of which may even be more effective. To be sure, a number of the market-based considerations that historically have been raised in opposition to the right – including some of those discussed in this Office's 1992 Report – have proven to be largely unfounded in the countries where it has been implemented, and those concerns may well diminish further as the right becomes more widespread internationally. However, many experts and stakeholders continue to question the extent to which a resale royalty would actually benefit a meaningful number of artists, and, as discussed above, the available information on that question is at best inconclusive.

Therefore, while the Office supports legislation as a possible means to address the disparity in the treatment of artists under the current legal system, Congress may also wish to consider various non-legislative measures. Such approaches might include encouragement, or even oversight, of voluntary initiatives and best practices among participants in the visual art market.

⁴²⁶ See *Eldred*, 537 U.S. at 204 (on question of “whether [legislation] is a rational exercise of the legislative authority conferred by the Copyright Clause,” courts “defer substantially to Congress”); *id.* at 222 (“As we read the Framers’ instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.”); *Sony Corp.*, 464 U.S. at 429 (“[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.”).

If resale royalty legislation is proposed, Congress should take steps to ensure that it benefits the greatest number of artists while causing the least amount of disruption in the art market. Congress also should consider delaying full implementation of a resale right (by, for example, limiting the right to living artists) until further study can be completed.

A. RESALE ROYALTY LEGISLATION

Broadly speaking, the policy arguments advanced by supporters and opponents of resale royalty legislation largely focus on two overarching issues: (1) the effect of a resale royalty on the U.S. art market and (2) the extent to which the right would benefit U.S. visual artists. With respect to the first issue, the Office finds that the available information, while preliminary and not fully conclusive, does not support the contention that adoption of a resale royalty right would cause substantial harm to the U.S. art market. As to the second issue – the likely benefit to U.S. artists – the evidence is less obvious. Accordingly, while the Copyright Office finds no significant legal or policy impediments to adoption of a U.S. resale royalty, and indeed supports consideration of a resale royalty right as one option to address the historic imbalance in the treatment of visual artists, it is less persuaded that such legislation represents the best or only solution. We discuss each of these issues in turn.

1. Effect on U.S. art market

As discussed, one of the principal arguments commonly advanced against resale royalty legislation is that it would harm the U.S. art market by driving sales to countries that lack such a right. While any analysis of this issue suffers from some of the same information problems that pervade this area generally, the evidence that is available does not tend to support the claim that market flight invariably follows the adoption of a resale royalty right.

The United Kingdom’s experience seems to illustrate this point. As discussed, the 2008 study commissioned by the United Kingdom’s Intellectual Property Office concluded that “[t]here is no evidence that ARR [artist’s resale right] has diverted business away from the UK, where the size of the art market has grown as fast, if not faster, than the art market in jurisdictions where ARR is not currently payable.”⁴²⁷ The study further found “no evidence that ARR has reduced prices, as prices have appreciated substantially for art eligible for ARR, and faster than in markets where ARR is not currently payable.”⁴²⁸ Nor does the U.K.’s experience indicate a reduced demand for works by British artists eligible for the royalty. According to the study, “it appears that living UK artists have gained in market share in most countries, both by value and by volume. As this gain appears to be across the board, both in countries where ARR is applicable and in countries where it is not applicable, it is unlikely that this change is correlated with the introduction of ARR.”⁴²⁹

The U.K.’s report, however, contains several inherent limitations. Its analysis covers only the first seventeen months after the resale right took effect in Britain.⁴³⁰ That time period

⁴²⁷ U.K. REPORT at 2.

⁴²⁸ *Id.* The study compared total sales in a pre-implementation year with total sales in a post-implementation year. It found an over 400 percent price increase for ARR-eligible artworks sold in the U.K. The same period saw significantly smaller price increases for comparable artworks sold in the U.S. (167 percent increase) and Switzerland (168 percent increase). *Id.* at 19.

⁴²⁹ *Id.* at 16.

⁴³⁰ *See id.* at 6.

predates the financial crisis of 2008, and thus the report arguably sheds little light on the resale royalty's possible effect on art markets during periods of economic downturn.⁴³¹ The report also predates the U.K.'s expansion of its resale royalty law to include the heirs of deceased artists, and thus does not speak to the effect of that broader right. Congress should undertake further study of those issues as it considers possible legislation. At a minimum, however, the available information regarding the U.K.'s recent experience does not support – and in fact seems to contradict – the contention that the adoption of a resale royalty right would inevitably cause significant harm to the U.S. art market.⁴³²

The U.K. report's findings are broadly consistent with those of the European Commission, as set forth in its 2011 EC Report. While EU art markets other than Britain's have experienced a decline in recent years, the report concluded that “[n]o clear patterns can be established to link the loss of the EU's share in the global market for modern and contemporary art with the harmonisation of provisions relating to the application of the resale right in the EU on 1 January 2006.”⁴³³

Moreover, in light of the clear international trend toward adoption of the resale right, the likelihood that participants in the art market will flee to countries without such laws should decrease. As more countries recognize the right, buyers and sellers may find it decreasingly advantageous to relocate their operations to one of the remaining countries that does not. Indeed, the U.K. report suggests that, in many cases, resale royalty payments may already be “roughly equal” to the cost of transporting artworks overseas, and therefore “shipping items to avoid ARR would be unlikely to be attractive even at the top end of the market.”⁴³⁴

It should also be noted that adoption of resale royalty legislation right would remedy at least one market imbalance affecting U.S. artists. As discussed, because U.S. law does not provide resale royalties, American artists are precluded under Article 14*ter* of the Berne Convention from receiving royalties even when their works are sold in countries that recognize the right.⁴³⁵ Enacting the right in the United States would (depending on its scope) entitle American artists to some measure of reciprocal royalties generated from sales of their works in

⁴³¹ See AUSTRALIA REPORT at 33 (“[W]hen the economy is slowing people are more likely to have less discretionary income and price may become for of an issue with respect to the purchase of artwork (price elastic).”).

⁴³² As discussed in Section III, media sources indicate that the British art market has continued to be strong in recent years. See, e.g., PETERSON & ENGELBRECHT (commenting that 2012 was “one of the best years for London’s Post-war Contemporary art market, with all sales seasons (February, June and October) experiencing an increase from 2011”); *British Art Exports Hit Post-Credit-Crunch Peak* (“The value of British art exports has surged to its highest level since the credit crunch, despite new rules giving deceased artists’ estates a share of their work’s resale price.”).

⁴³³ EC REPORT at 10.

⁴³⁴ U.K. REPORT at 38.

⁴³⁵ See Berne Convention art. 14*ter*(2) (resale right “may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed”); see also ARS Comments at 3 (“It must be emphasized that beneficiaries of the *droit de suite* in countries possessing the right[] must hail from a nation which accords the right to foreign nationals on a reciprocal basis. As the U.S. does not afford this right to foreign artists, let alone to its own citizens, American artists are precluded from obtaining resale royalties abroad.”).

those countries.⁴³⁶

2. Benefit to artists

In 1992, the Office found that, in light of a general lack of reliable empirical data, “[a]ny conclusions that we could make about the number of artists who would benefit from the resale royalty must be based . . . on anecdotal evidence and limited sample size.”⁴³⁷ The Office’s reexamination of the issue in connection with this report has revealed a similar dearth of conclusive information.

As discussed, opponents of the resale right contend that it benefits a handful of already prominent artists at the expense of their less successful counterparts. On the whole, it does appear that “a minority of artists reap the lion’s share of financial rewards,” and that the class of beneficiaries is skewed toward higher-income artists.⁴³⁸ In the 1992 Report, the Office cited “evidence that as few as one percent of artists will qualify for the royalty,”⁴³⁹ and opponents point to a subsequent study finding that “only approximately 0.15 percent of U.S. artists have works that have resold for \$1,000 or more.”⁴⁴⁰ Evidence from other jurisdictions provides at least some support for this view. The U.K.’s report, for example, found that “around 70 percent of artists receiving ARR would classify themselves in the top two quintiles [of annual household income] while a relatively small fraction would be likely to appear in the lowest quintile.”⁴⁴¹ Another study from the U.K. found that 80 percent of royalties collected went to only 10 percent of the artists earning royalties, and that “the top twenty artists alone received a full 40 percent of the total collected.”⁴⁴² Opponents also cite a study indicating that 97 percent of living artists in the EU have not earned any resale royalties.⁴⁴³

Supporters of the right generally do not dispute that successful artists claim much, if not most, of the benefits it creates. In their view, however, such evidence is largely beside the point because such disparities are inherent in any system that rewards creators on the basis of their works’ commercial value. As one stakeholder observed, “[L]et’s face it, it’s a royalty system that rewards success. You’re always going to get it favoring the top end of the market. It’s not pretending to be anything else.”⁴⁴⁴ It is true that, as the Artists Rights Society argued, the fact “[t]hat the resale royalty might benefit successful artists is no argument for withholding its

⁴³⁶ See, e.g., DACS Comments at 6 (“The introduction of a resale royalty in the U.S. will have a mutually beneficial impact for both British and American artists when the Right is reciprocated. American artists and their heirs will benefit from royalties arising from the significant market in American art in the UK, and vice versa.”).

⁴³⁷ 1992 REPORT at 145.

⁴³⁸ U.K. REPORT at 47.

⁴³⁹ 1992 REPORT at 145.

⁴⁴⁰ Sotheby’s/Christie’s Comments at 8 (citing Wu at 543-44).

⁴⁴¹ U.K. REPORT at 32.

⁴⁴² Sotheby’s/Christie’s Comments at 9 (citing FROSCHAUER at 17).

⁴⁴³ *Id.* at 9 (citing CRISIS AND RECOVERY at 123).

⁴⁴⁴ Tr. 115:21-116:03 (Tania Spriggens, DACS); see also *id.* at 117:12-16 (Spriggens) (“We don’t complain about Paul McCartney getting royalties. We don’t complain about J.K. Rowling getting royalties. Why are we complaining about other artists getting royalties?”).

benefits from all.”⁴⁴⁵ However, evidence that few artists may benefit from the right does at least call into question its efficacy as a means to remedy the burdens experienced by visual artists as a group.

On the related question of the value of the typical royalty payment to artists, the information is largely inconclusive. Proponents cite evidence indicating that, even though the majority of eligible artists receive small amounts, they typically reinvest those funds in their art practice by, for example, purchasing equipment and materials or funding professional development.⁴⁴⁶ They also cite evidence that royalties provide an intangible psychological benefit, noting that “many artists value the recognition and validation of their creativity conferred by royalty payments as much as the financial remuneration they represent.”⁴⁴⁷ According to a U.K. collecting society, it hears from many artists who say “that they appreciate what the royalty represents as much as the financial reward.”⁴⁴⁸ It remains unclear, however, whether these benefits would offset the potential countervailing costs cited by opponents, such as enforcement and administrative burdens, among others.

As such, the Copyright Office would need greater information – for example, survey information from a significant nucleus of American artists, their heirs, or estates – in order to recommend a statutory resale royalty as the only solution to the burdens faced by visual artists. We note, however, that at the time of this report’s publication, at least two resale royalty jurisdictions – the EU and Australia – are in the process of completing updated analyses of the effectiveness of their own resale royalty schemes.⁴⁴⁹ Congress may wish to forego legislative action pending the release of those studies, which may fill in some of the information gaps noted here.

At the same time, the recent and ongoing evolution of the visual art market may well counsel against a permanent legislative solution. As the market expands, both in popular appeal and in the creation of art forms that are more suitable to production in a meaningful number of copies or multiples, more artists may see benefits under the existing law. Still, Congress could pursue other safeguards, including voluntary initiatives and/or best practices.⁴⁵⁰ Alternatively, Congress could revisit one or more of the legislative proposals raised in the 1992 Report. We briefly consider some of these options below.

⁴⁴⁵ ARS Comments at 2.

⁴⁴⁶ DACS Comments at 3.

⁴⁴⁷ *Id.* at 3; *see also* Perlmutter at 416 (“A resale royalty right is a promise, equally available to all, of reward for future success.”).

⁴⁴⁸ DACS Comments at 3.

⁴⁴⁹ *See supra* pp. 16-19.

⁴⁵⁰ *See* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 344 (2013) (“Pallante”) (“In a framework as dynamic as copyright, it is not unreasonable and is probably prudent for Members of Congress to legislate carefully in response to technological innovation rather than in real time.”).

B. ALTERNATIVE APPROACHES

1. Voluntary initiatives/best practices

A number of groups have implemented voluntary programs intended to provide artists with some measure of the remunerative benefits associated with compulsory royalty schemes. Congress may wish to consider ways to provide support for these and similar programs, and to incentivize greater participation in them.

One such program is the Artist Pension Trust (APT), an investment plan for artists founded in New York in 2004 and currently operating in several additional cities around the world. Under the APT model, artists are selected for participation by a committee of art market professionals. Each artist contributes twenty works to APT over a twenty-year period (two per year for the first five years, one per year for the next five years, and one every two years for the remaining ten years).⁴⁵¹ APT promotes the works through exhibitions and loans, and evaluates and manages potential sales.⁴⁵² For each work sold, the artist receives 40 percent of the net proceeds, 32 percent goes into a pool that is distributed equally among all participants, and the remaining 28 percent covers management and administrative costs.⁴⁵³ The program thus is intended to allow artists to participate in the long-term appreciation of their work, while benefitting from the risk-mitigation features of a traditional financial plan.

Another New York-based art organization, Boyd Level, provides a model to facilitate private agreements for future resale payments. A consulting group representing collectors, Boyd Level allows artists and purchasers to agree to “Negotiated Resale Rights” whereby the purchaser agrees to give the artist a percentage of any profits from future resale in exchange for a discounted initial price.⁴⁵⁴ The artist’s percentage is negotiated on a case-by-case basis, with a portion going to Boyd Level, which documents and manages the agreement.⁴⁵⁵ In contrast to statutory resale royalty schemes, “the royalty payment is to be evenly divided between the dealer and artist in order to align their interests”⁴⁵⁶ This approach could provide a best-practices model for private contractual arrangements between artists and purchasers.

Similar agreements have been employed for decades within the fine art market, though it is unclear how widespread their use has been. In 1971, for example, art dealer Seth Siegel and attorney Robert Projansky created an agreement known as “The Artist’s Reserved Rights Transfer and Sale Agreement” or the “Projansky Contract.”⁴⁵⁷ It generally provides that the seller will pay the artist a royalty of 15 percent of the appreciated value each time a work is resold, donated, exchanged, or otherwise transferred.⁴⁵⁸ In addition to the royalty, the agreement

⁴⁵¹ ARTIST PENSION TRUST, <http://www.aptgloball.org/en/About/FAQ>; U.K. REPORT at 53.

⁴⁵² ARTIST PENSION TRUST, <http://www.aptgloball.org/en/About/FAQ>.

⁴⁵³ *Id.*; see also U.K. REPORT at 53.

⁴⁵⁴ BOYD LEVEL, <http://www.boydlevel.com/home/home.php?p=15>.

⁴⁵⁵ *Id.*; see also U.K. REPORT at 52.

⁴⁵⁶ U.K. REPORT at 52.

⁴⁵⁷ See TAD CRAWFORD, LEGAL GUIDE FOR THE VISUAL ARTIST 117 (5th ed. 2010) (containing reproduction of Projansky Contract); see also 1992 REPORT at 62-64.

⁴⁵⁸ Projansky Contract, art. 2.

requires the owner to notify and seek the consent of the artist whenever the work is exhibited to the public, and also provides the artist with the right to request the work for an exhibition, not to exceed sixty days.⁴⁵⁹ The 1992 Report examined the Projansky Contract at some length, and while it was then unclear whether such a contract could legally bind all subsequent owners of a work, the Office noted the statement of one New York art dealer who reported willing compliance in transactions involving the contract, noting “third generation, and in some cases, fourth generation payments.”⁴⁶⁰

Two commenters proposed other contractual models that could allow artists to preserve an interest in the future appreciation of their works. Under one option, rather than transferring title, an artist could license the work for a term of years.⁴⁶¹ Alternatively, “the artist could acquire an option to repurchase the work at a fixed price, or a reversion interest that vests at the buyer’s death.”⁴⁶² These suggestions likewise could serve as the basis for the development of a best-practices framework for the fine art market.

There also is some precedent for voluntary royalty payments by resale entities. In Canada, Ottawa-based Cube Gallery has been voluntarily paying artists a royalty on the resale of their works for nearly a decade, and prominent Canadian fine art auction house Ritchies plans to pay both Canadian and foreign artists a royalty on the resale of their works.⁴⁶³ Incorporated as part of “Project Contemporalis,” “[t]he resale commission will be derived from Ritchies’ own in-house commissions and will affect neither buyer nor seller.”⁴⁶⁴ A statement from an “open letter to artists, galleries, dealers, curators, and art lovers around the world” posted on Ritchies’ website explains their motivation to voluntarily begin paying an artist’s resale royalty:

While Parliament continues to drag its feet instituting a comparable law in Canada, Ritchies refuses to let artists continue to be exploited. Artists often live in poverty while their work fetches many times over what it was originally sold for and receive absolutely nothing for it. Canada must do more to protect its artists – granting artists resale rights is the first step on a long road.

We call on all Canadian art resellers, beginning with auction houses, to institute their own resale right programs. Auction houses have been profiting from the works of great Canadian artists without giving anything back for far too long. Show your respect and appreciation of artists not with talk, but with real and

⁴⁵⁹ *Id.* arts. 4, 6.

⁴⁶⁰ 1992 REPORT at 63 n.11 (citation omitted). See also Roberta Smith, *When Artists Seek Royalties on their Resales*, N.Y. TIMES, May 31, 1987, available at <http://www.nytimes.com/1987/05/31/arts/when-artists-seek-royalties-on-their-resales.html?pagewanted=all&src=pm> (describing one resale where the Projansky Contract was displayed alongside the work at the auction house, and the operative terms were read aloud prior to bidding, which was nevertheless “brisk and . . . quite competitive”).

⁴⁶¹ Christie’s/Sotheby’s Comments at 8.

⁴⁶² *Id.* at 9.

⁴⁶³ See Sky Gooden, *The Unstoppable Revival of Ritchies Now Includes Artist’s Resale Rights*, BLOUIN ARTINFO (May 15, 2013), <http://ca.blouinartinfo.com/news/story/903138/the-unstoppable-revival-of-ritchies-now-includes-artists>; Leah Sandals, *Ritchies Auctions Resurge with Artist Royalties Call*, CANADIAN ART (May 16, 2013), <http://www.canadianart.ca/news/2013/05/16/ritchies-art-auction/>.

⁴⁶⁴ *Introducing Project Contemporalis*, RITCHIES (May 10, 2013), <http://www.ritchies.com/?p=1133&name=introducing-project-contemporalis>.

tangible support.⁴⁶⁵

Of course, voluntary agreements remain just that. As is true in any negotiation among stakeholders within an industry, any dialogue about potential voluntary initiatives within the art market will take place “in the shadow of the law. In other words, a party’s willingness to commit to a particular practice will depend to a significant degree on what it perceives to be the legal consequence (or lack thereof) of continuing its current course of action, and not committing to any voluntary agreement.”⁴⁶⁶ Given most artists’ comparative lack of bargaining power in relation to auction houses, galleries, and other art market professionals, some level of congressional involvement may be necessary for these negotiations to achieve meaningful results. The Office notes that the House Judiciary Committee has recently expressed an interest in examining the role of voluntary agreements in the intellectual property system generally, as well as the federal government’s role in furthering and recognizing such agreements.⁴⁶⁷ As part of that review, Congress may wish to specifically consider the ways in which it could facilitate agreements among stakeholders in the art market, or even regulate certain standards or other aspects of them – much the way it ensures the resolution of statutory licenses and rates.⁴⁶⁸

⁴⁶⁵ *Id.*

⁴⁶⁶ Motion Picture Association of America, Inc., Comments Submitted in Response to U.S. Patent & Trademark Office’s Request for Public Comments in Voluntary Best Practices Study, No. PTO-C-2013-0036, at 2 (Aug. 21, 2013), *available at* <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

⁴⁶⁷ *See The Role of Voluntary Agreements in the U.S. Intellectual Property System: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013).

⁴⁶⁸ Both the United States Intellectual Property Enforcement Coordinator (IPEC) and the Department of Commerce have recently considered the role of voluntary initiatives in the contexts of intellectual property enforcement and fair use, respectively. In its recently published 2013 Joint Strategic Plan on Intellectual Property Enforcement, the office of the IPEC outlined several areas where private sector entities have implemented voluntary best practices to combat online piracy. *See* U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT (2013), *available at* <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipeec-joint-strategic-plan.pdf>; *see also* Group of Eight, Camp David Declaration (May 19, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/05/19/camp-david-declaration> (emphasizing the importance of intellectual property to the global economy and affirming the importance of private sector voluntary codes of best practices to intellectual property protection and enforcement). The Department of Commerce Internet Policy Task Force has voiced its support for “private efforts to explore the parameters of fair use,” making particular note of the fact that “best practices produced with input from both user groups and right holders can offer the greatest certainty.” DEP’T OF COMMERCE, INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 23 (2013), *available at* <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>; *see also* Copyright Alliance, Comments Submitted in Response to U.S. Patent & Trademark Office’s Request for Public Comments in Voluntary Best Practices Study, No. PTO-C-2013-0036, at 2 (Aug. 21, 2013), *available at* <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf#page=116> (opining that set of best practices for online advertising networks “would have benefited from the inclusion of creators – particularly individuals and small businesses – in the drafting process” and that “[m]ore effective solutions for the full range of interested parties might be developed with broader participation of affected stakeholders”).

Similarly, the American University School of Communication’s Center for Media & Social Impact has published a series of “best practices” guides regarding fair use for various types of works. *See generally Fair Use*, CENTER FOR MEDIA & SOCIAL IMPACT, <http://www.cmsimpact.org/fair-use>.

2. Other legislation

The alternative legislative recommendations set forth in the 1992 Report remain potential alternatives to a resale royalty law.⁴⁶⁹ Congress may wish to explore these options in connection with its broader ongoing review of the copyright law. They included a broader public display right for visual artists (for example, providing a financial benefit for artists when their works are displayed in public exhibitions); a commercial rental right (providing for royalties to the artist for commercial rental of a purchased work); compulsory licensing (requiring a licensing fee for public display of a visual artwork); and on the funding side of the equation, increased federal grants for the arts, and greater public funding for the purchase of artworks for federal buildings.

C. KEY LEGISLATIVE CONSIDERATIONS

Should Congress wish to address the resale royalty issue legislatively, it should tailor the law to ensure that the right benefits the greatest number of artists with the least amount of disruption to the art market. We briefly address several considerations that are essential to striking that balance.

1. Types of sales covered

A resale royalty law should be broad in scope, covering not only sales by large auction houses, but also sales by other art market professionals. This conclusion differs from that of the 1992 Report, which recommended that any resale right be limited to public auction sales initially, with the possibility of expansion later.⁴⁷⁰ The Office explained that applying the right to other categories of sales would be “difficult to administer and the costs may outweigh the benefits of the system.”⁴⁷¹ It noted, however, that “if the European Community adopts a position including dealers within a *droit de suite* requirement, that might be a justification for extending coverage to dealers in this country.”⁴⁷² The EU has since adopted such a provision: as noted, the Directive applies the royalty to qualifying sales involving “art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.”⁴⁷³ Nevertheless, a minority of countries continue to limit their royalty laws to auction sales, presumably because of cost considerations like those cited in the 1992 Report.⁴⁷⁴

While acknowledging the potential administrative and enforcement challenges, we find that a broader approach – one consistent with the EU Directive – would more effectively advance the legislation’s goals than one confined to auction houses. Given that fewer than half of all art sales are made through public auction,⁴⁷⁵ a law limited to those transactions would exclude vast numbers of artists from royalty eligibility. Beyond that, such a law would likely have the effect of driving art sales into the private market, which would undermine the transparency and other public benefits provided by auction sales. As one commenter noted, “many nonprofit

⁴⁶⁹ See 1992 REPORT at 149-51.

⁴⁷⁰ *Id.* at 152.

⁴⁷¹ *Id.* at 146.

⁴⁷² *Id.* at 153.

⁴⁷³ Directive art. 1(2).

⁴⁷⁴ See Comparative Summary of Select Resale Royalty Provisions at Appendix C.

⁴⁷⁵ See *supra* p. 29 & note 204.

organizations such as museums sell solely through auction houses in order to provide the most transparency in their dealings. If legislation is passed that solely targets auction houses, it is organizations such as these that, unable to transfer their sales to the private market, will bear the burden of the royalties.”⁴⁷⁶

Furthermore, several foreign collecting societies expressed support for applying the royalty to other types of sales. The U.K.’s Design and Artists Copyright Society opined that the right should apply “to both auction sales, and private, or gallery, sales (as distinct from a sale between private *individuals*),” noting that “the line between these two professions is becoming increasingly blurred as the large auction houses conduct a significant number of private sales.”⁴⁷⁷ Argentina’s Sociedad de Artistas Visuales Argentinos similarly argued for the right to extend to every resale “made with the intervention of an art market professional and other commercial channels, such as galleries, publicized auctions, private auctions, online or even through direct internet sales.”⁴⁷⁸ And Germany’s VG Bild-Kunst, while generally supporting the EVAA bill, expressed “regret” that it would “provide[] resale royalties only for works having been auctioned, whereas all other sales in the secondary market – galleries and art dealers – are left without remuneration.”⁴⁷⁹ As the entities charged with collecting and distributing resale royalties, these and other collecting societies likely bear a substantial portion of the costs of administration in their respective jurisdictions. That they support applying the right to dealer and gallery sales at least suggests that the costs of doing so may be less burdensome than previously predicted.

We therefore conclude that any resale royalty law should cover, at a minimum, auctions, dealers, and galleries engaged in the business of selling artwork, including instances in which “an art market professional is using a web-based platform or service such as eBay or ArtBank to conduct [his or her] sales.”⁴⁸⁰ It should, however, exclude sales between private individuals, which the collecting societies agree would present substantial enforcement difficulties.⁴⁸¹

2. Threshold value

A resale royalty law should include a minimum price threshold that is sufficiently low to cover a wide range of sales, while not so low as to be offset by the administrative costs of collecting and distributing the royalty. The previously proposed EVAA legislation would apply to works sold for \$10,000 or more. While there was some disagreement, most participants in the Office’s review process felt that an appropriate threshold should fall within the \$1,000 to \$5,000 range.⁴⁸²

⁴⁷⁶ Kernochan Center Comments at 2.

⁴⁷⁷ DACS Comments at 7.

⁴⁷⁸ SAVA Comments at 4.

⁴⁷⁹ VG Bild-Kunst Comments at 2.

⁴⁸⁰ DACS Comments at 7.

⁴⁸¹ *See, e.g., id.*; SAVA Comments at 4.

⁴⁸² *See, e.g.,* DACS Comments at 8 (endorsing U.K.’s €1,000 threshold); ASMP Comments at 5 (recommending a \$5,000 threshold); EVA Comments at 2 (recommending that threshold not exceed \$1,000); Graphic Artists Guild (“GAG”), Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 3 (Nov. 14, 2012) (“GAG Comments”) (recommending \$1,000 threshold); Tr. at 52:22-53:02 (Irina Tarsis, Center for Art Law) (noting Australia’s \$1,000 threshold and suggesting that “we . . . lower the \$15,000 [sic] proposed to something less, but then put a cap on how

A related question is whether the royalty should be based on a work's gross resale price or on the amount it has increased in value relative to its previous sale. In the 1992 Report, the Office noted that the former approach was followed by the majority of countries "that have most successfully implemented the *droit de suite*."⁴⁸³ Since that time, the use of the gross resale price has been adopted even more widely as part of EU harmonization.⁴⁸⁴ Nevertheless, some countries (including Azerbaijan, Brazil, and Turkey) either limit eligibility to those works that have increased in value, or alternatively, calculate the royalty as a percentage of the increase.⁴⁸⁵ Some stakeholders regard this approach as more consistent with the resale royalty's underlying principles. After all, they note, basing the royalty on the total sale price, even if it is lower than the amount for which the artist first sold the work, is in tension with the right's principal rationale, which is to enable artists to participate in any *increases* in a work's value.⁴⁸⁶ They contend, moreover, that it is "unfair to put an additional impost on the seller if the sale results in a net loss"⁴⁸⁷ and that such an obligation would dissuade buyers from investing in *avant-garde* or other works with uncertain prospects for appreciation.⁴⁸⁸

The countries that base the royalty on the gross resale price likely do so largely because of the perceived administrative difficulties of accurately calculating the amount of increase.⁴⁸⁹ In the 1992 Report, the Office observed that "[t]he difficulty in administering a royalty based on the difference between the purchase price and resale price may explain the [resale royalty] law's disuse" in some countries.⁴⁹⁰ It also has been feared that that approach could implicate the transacting parties' privacy interests. Germany, for example, elected to base the royalty on the total resale price in part because "a different construction would necessarily involve identifying the client, which it was feared 'would lead to a decrease in sales, because the sellers of works of art in many cases consider their anonymity of utmost importance.'"⁴⁹¹

While we recognize that limiting royalties only to works that have increased in value could give rise to some administrative burdens, these cost predictions may well be exaggerated. Sellers of art already must calculate and report the value of any gains for tax purposes,⁴⁹² and therefore the additional record-keeping obligations created by a resale law seemingly would be minimal for many covered parties. Congress accordingly may wish to address the potential inequities associated with a gross price-based system either by limiting eligibility for the royalty only to works that have increased in value or by adopting a presumption like that discussed in the 1992 Report: "Any resale royalty legislation could contain a rebuttable presumption that a work

much in total can be collected"); *id.* at 242:08-09 (Victor S. Perlman, ASMP) (recommending that EVAA's \$10,000 threshold be "significantly lowered").

⁴⁸³ 1992 REPORT at 153.

⁴⁸⁴ See Directive art. 4(1) (basing royalty on the work's "sale price").

⁴⁸⁵ See Comparative Summary of Select Resale Royalty Provisions at Appendix C.

⁴⁸⁶ See U.K. REPORT at 51.

⁴⁸⁷ AUSTRALIA REPORT at 12.

⁴⁸⁸ See Kernochan Center Comments at 2-3.

⁴⁸⁹ See AUSTRALIA REPORT at 12-13.

⁴⁹⁰ 1992 REPORT at 153.

⁴⁹¹ *Id.* at 39 (citation omitted).

⁴⁹² See 26 U.S.C. § 1(h)(5) (calculation of "collectibles gain").

has increased in value between the time of purchase and resale. The purchaser/reseller would have the burden of proving to the collecting society that a work has not appreciated in value and therefore a royalty is not due.”⁴⁹³

3. Works subject to resale royalties

A resale royalty should apply only to “work[s] of visual art” as currently defined in Section 101 of the Copyright Act.⁴⁹⁴ During the Office’s review, opponents of the right argued that there is no principled basis for applying a royalty to sales of those works but excluding other artistic works embodied in physical objects whose value may depend on their scarcity, such as architectural structures, jewelry, furniture, and rugs.⁴⁹⁵ No commenters, however, suggested that the secondary markets for these types of articles typically generate substantial profits from which their creators are excluded. Given the resale royalty’s fundamental purpose of addressing the specific challenges posed by the fine art market, the Office sees no need to expand the law’s coverage beyond the Section 101 definition of copyrightable visual artworks.⁴⁹⁶

4. Royalty rate

The rate of a resale royalty should reflect multiple factors, including the amount needed to incentivize creativity and the potential danger that it will raise overall prices in the art market. The EU has a tiered system, with the applicable royalty rate tied to the work’s sale price. The top rate is 4 percent, which applies to the portion of the sale price up to €50,000. The proposed EVAA legislation sets the rate at 7 percent, which would be among the highest in the world.⁴⁹⁷ Many rates worldwide fall between 3 percent and 5 percent⁴⁹⁸ – a range recommended by the Office in the 1992 Report⁴⁹⁹ and generally supported by visual artists’ societies.⁵⁰⁰ The Office adheres to its view that a rate falling within that range would be appropriate for a U.S. resale royalty law.

Some jurisdictions also provide a cap on the maximum royalty payable per transaction to mitigate the effect on purchasers and, in turn, on the secondary art market. The EU, for example, caps the maximum payable royalty per work at €12,500. Commenters generally were supportive

⁴⁹³ 1992 REPORT at 153-54.

⁴⁹⁴ See 17 U.S.C. § 101.

⁴⁹⁵ See Tr. at 96:12-97:16 (Sandra Cobden, Christie’s, Inc.).

⁴⁹⁶ We note, however, that some jurisdictions apply the royalty to articles that may not qualify as visual artworks under U.S. law. See, e.g., *id.* at 100:21-101:02 (Tania Spriggens, DACS) (noting that, “in the U.K., unique works of jewelry, unique works of furniture, rug making, all attract a resale royalty because they are considered to be works of art”).

⁴⁹⁷ EVAA § 3.

⁴⁹⁸ See Comparative Summary of Select Resale Royalty Provisions at Appendix C.

⁴⁹⁹ 1992 REPORT at 153.

⁵⁰⁰ In connection with the 1992 Report, for example, the Artists Rights Society (ARS) testified: “Rather than seven percent of profits, as once proposed in the Senate, ARS would readily accept a lower rate of four or even three percent, provided the royalty were applied across the board as a flat percentage of the sale price, without reference to previous sales.” See Transcript of Hearing, U.S. Copyright Office, at 101 (Mar. 6, 1992) (Ted Feder, ARS), *reprinted in* 1992 REPORT app. pt. III; see also ASMP Comments at 6; GAG Comments at 4.

of such provisions.⁵⁰¹ As noted by a U.K. collecting society, “It is this cap which ensures the behaviour of sellers and buyers is not adversely affected by the royalties.”⁵⁰² The Office agrees that Congress should include a similar cap in any resale royalty legislation.

5. Term

In the EU, the term of the resale right follows the term of copyright (life of the author plus seventy years). The Office recommends a shorter term, at least initially.⁵⁰³ As discussed, the U.K. recently expanded its resale royalty law to include artists’ heirs. That change will dramatically expand the number and amount of resale royalty payments made in Britain. Indeed, the 2008 report commissioned by the U.K.’s Intellectual Property Office predicted a fourfold increase in royalty payments as a consequence of the expansion.⁵⁰⁴ Until the effects of that change on the U.K. art market can be fully evaluated, Congress should consider limiting the royalty term to the life of the artist. This incremental approach, we believe, would address the needs of the law’s primary intended beneficiaries while giving Congress the benefit of further study on the question of extending the right to heirs.

6. Retroactivity

As discussed, it was argued during the Office’s review that applying the royalty to works that already have been purchased would implicate complexities under the Fifth Amendment’s Due Process and Takings Clauses. To minimize the likelihood of a constitutional challenge on this basis, the Office recommends that Congress strongly consider applying any resale royalty legislation prospectively only.

As noted, the 1992 Report defined prospective application to mean that the resale right would cover only those works *created* on or after the date on which the law becomes effective.⁵⁰⁵ Australia’s resale royalty law follows a slightly different approach – one that has the advantage of making works created prior to adoption of the law eventually eligible for the royalty, while still protecting current owners’ reliance interests. It provides that, for preexisting works, there is no resale royalty on the first transfer of ownership on or after the law’s effective date.⁵⁰⁶ In other words, the law covers only resales of works acquired after the legislation has taken effect.⁵⁰⁷ Both of these models would eliminate the retroactivity concern, but at a cost of some delay in the

⁵⁰¹ See, e.g., Kernochan Center Comments at 3 (cap “assures owners of works that have greatly increased in price that they will not have an inordinate burden at the time of sale”); NYU Art Law Society Comments at 7 (“[T]he Copyright Office should consider . . . whether there should be a cap on the resale royalty right.”); Tr. at 52:21-53:03 (Irina Tarsis, Center for Art Law); *id.* at 264:01-08 (Tarsis). *But see* SAVA Comments at 6 (describing EU’s €12,500 cap as “unreasonable, because it limits the exercise of the right even when a work is resold for millions of euros”).

⁵⁰² DACS Comments at 10.

⁵⁰³ In the 1992 Report, the Office recommended that the term be coextensive with copyright, which at that time was life of the author plus 50 years. See 1992 REPORT at 154.

⁵⁰⁴ U.K. REPORT at 2.

⁵⁰⁵ 1992 REPORT at 155.

⁵⁰⁶ *Resale Royalty Right for Visual Artists Act 2009* (Cth) s 11.

⁵⁰⁷ See AUSTRALIA REPORT at 51.

law's intended benefits.⁵⁰⁸

We also note that, although a prospective law may be advisable in light of the constitutional issues discussed, there is some uncertainty as to how other countries would treat a prospective law for purposes of Berne reciprocity. Berne Article 14*ter*(2) provides that a resale right “may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.”⁵⁰⁹ In considering this issue in connection with Australia's resale royalty legislation, an Australian legislative committee observed that “[i]t is not clear what view would be taken” by other Member States, “as the Berne Convention is open to interpretation and it will depend also on the willingness of countries to enter into a reciprocal arrangement.”⁵¹⁰ It certainly can be argued that Article 14*ter*(2) contemplates that a country in which protection is claimed should accord royalty rights to the same extent as are provided to that country's nationals in the artist's country. Under that interpretation, U.S. artists whose works are sold in a Berne Member State should be entitled to prospective royalties in that country – *i.e.*, those arising from the second and subsequent sales of their works following enactment of the U.S. royalty law. Nevertheless, the resolution of this question is uncertain and will depend to a large extent on how Article 14*ter*(2) is construed by the relevant foreign governments.

7. Alienability of the right

Under the EU Directive, the resale royalty right is unassignable and inalienable, the rationale being that artists often find themselves in a weak negotiating position early in their careers and would be pressured to transfer the right as a condition of sale.⁵¹¹ In the 1992 Report, the Office recommended that any resale royalty right adopted in the United States be inalienable and non-waivable, but transferrable for purposes of assigning collection rights.⁵¹²

While making the right inalienable would address the imbalance in bargaining power undoubtedly faced by many artists, and would bring U.S. law into accord with the international norm, there are notable concerns associated with that approach. As resale royalty opponents have argued, many artists might prefer to bargain away speculative future royalty payments “in exchange for the certainty of a higher sale price in the present.”⁵¹³ Given the acknowledged reality that most artists derive the bulk of their income from the primary market, precluding artists from exercising that option may be viewed as counterproductive.⁵¹⁴ Equally important, adoption of an inalienable resale right arguably would create a different royalty regime for visual artists than exists for other copyright holders. Authors, composers, and others who convey the copyrights in their works are not entitled to royalties arising from downstream transactions. Yet

⁵⁰⁸ Because works would have to be transferred twice to trigger a royalty under this system, it would likely take a period of years before most eligible artists would earn payments.

⁵⁰⁹ Berne Convention art. 14*ter*(2).

⁵¹⁰ AUSTRALIA REPORT at 26.

⁵¹¹ *See, e.g.*, DACS Comments at 7 (inalienability requirement “recognises that artists often find themselves in weak negotiating positions, often pressured to give up, or waive their rights”).

⁵¹² 1992 REPORT at 154.

⁵¹³ Sotheby's/Christie's Comments at 12.

⁵¹⁴ *See* U.K. REPORT at 50 (“Though [inalienability] was intended to reconcile artists' weak bargaining power, it negates artists' ability to waive this right and therefore achieve a higher price at first sale.”).

they are free to transfer those rights (in the form of work-for-hire agreements, for example) despite, in many cases, a comparable lack of bargaining power.⁵¹⁵ There accordingly exists at least some risk that, in attempting to remedy the existing disparity in the copyright law, Congress could introduce an entirely new inequity.⁵¹⁶

Notwithstanding these concerns, the Office adheres to its view that the right should be inalienable and non-waivable. As noted, Berne Article 14*ter* provides for an “inalienable right” to resale royalties,⁵¹⁷ and inalienability accordingly has become the prevailing rule internationally. Were U.S. law to follow a different approach, there would arise a risk that other Member States might deem the law insufficient for purposes of according reciprocal benefits to U.S. artists.⁵¹⁸ The effect would be to threaten one of the primary benefits of a resale royalty law – that of enabling U.S. artists to benefit from resale royalty regimes in other Member countries.

8. Provision for foreign artists

In view of the foregoing reciprocity considerations, any resale royalty legislation should apply to foreign artists whose qualifying works are sold in the United States. Congress should make its intention to extend the right to such artists explicit, either in the legislation itself or in legislative history.

9. Collection and administration

Commenters generally recommended,⁵¹⁹ and the Office agrees, that a resale royalty system should be collectively managed by private collecting societies, whose functions would be similar to those of SoundExchange in the music context. The legislation should limit the administrative fees charged by those entities to ensure maximum possible payments to artists. Collecting societies also should be subject to competition, as well as ongoing government oversight to ensure transparency, accountability, and good governance. For an example of such legislation, Congress could look to the EC’s 2012 proposed directive on collective rights management.⁵²⁰ That document provides a variety of administrative, reporting, and dispute resolution obligations intended to promote greater transparency and efficiency among collecting

⁵¹⁵ As noted in Section II.A, such authors may eventually recover their copyrights through the exercise of termination rights.

⁵¹⁶ See U.K. REPORT at 50 (arguing that this distinction “weakens claims that the ARR is genuinely indebted to establishing economic parity amongst these actors”).

⁵¹⁷ Berne Convention art. 14*ter*(1).

⁵¹⁸ See *id.* art. 14*ter*(2) (resale royalty right “may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed”).

⁵¹⁹ See, e.g., DACS Comments at 10-11; ASMP Comments at 6; VAGA Comments at 4, 6-7; EVA Comments at 2.

⁵²⁰ European Commission, *Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market*, COM (2012) 372 final (July 11, 2012), available at http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf.

societies and to “create incentives for more innovative and better quality services.”⁵²¹

Congress also may wish to consider requiring copyright registration of a work as a prerequisite to the collection of resale royalties. The Copyright Office has long supported efforts to promote and incentivize registration, which, among other benefits, serves as “a catalyst for the public record of copyright information” and “provides guidance to the courts in a number of areas, including questions related to the scope of protection and any limitations or presumptions reflected in the certificate.”⁵²² The resale royalty bills introduced in the 1970s and 1980s all would have required some form of registration before a work could qualify for royalties,⁵²³ and two commenters expressed the view that a registration requirement would help to mitigate the administrative and transactional costs associated with a resale royalty scheme.⁵²⁴ Such a requirement, however, might have to be limited to United States works (as defined in 17 U.S.C. § 101) in order to ensure Berne compatibility.⁵²⁵

10. Remedies

Just as it may be prudent to cap the amount of royalties collectable on any given transaction, a limitation on remedies may also be advisable. The 1978 resale royalty bill followed that approach, limiting damages for intentional violations to the greater of three times the royalty amount due or \$5,000, plus reasonable costs, including attorney fees.⁵²⁶ The Office recommends that Congress consider including a similar measure to avoid any unduly harsh effects and the adverse market impact that could result.

11. Right to information

A number of jurisdictions provide artists with the right to obtain transactional information about the resale of their works in order to ensure accurate calculation of the royalty. The EU Directive provides that member states shall require art market professionals “to furnish any information that may be necessary in order to secure payment of royalties in respect of the resale” upon request from an eligible artist or collective management organization within three years of the resale.⁵²⁷

⁵²¹ Press Release, European Commission, Copyright: Commission proposes easier music licensing in the Single Market (July 11, 2012), *available at* http://europa.eu/rapid/press-release_IP-12-772_en.htm?locale=EN.

⁵²² Pallante at 336.

⁵²³ *See* H.R. 11403 §§ 3(a), 5(c) (establishing National Commission on the Visual Arts and requiring registration with that entity); S. 2796 § 3 (requiring registration with Copyright Office); S. 1619 § 3 (same); H.R. 3221 § 3 (same).

⁵²⁴ IA/CCIA Comments at 5.

⁵²⁵ *Cf.* 17 U.S.C. § 411(a) (establishing registration as prerequisite to action for infringement of a “United States work”). The IA and the CCIA note, however, that while Berne Article 5(2) generally prohibits formalities, Article 14*ter*(3) provides that “[t]he procedure for collection” of resale royalties “shall be [a] matter[] for determination by national legislation.” *See* IA/CCIA Comments at 5. “Thus,” they argue, “while a blanket requirement of formalities as to the copyright might be argued to violate Berne Article 5(2), requiring formalities in order to exercise the entitlement to a resale royalty should not.” *Id.*

⁵²⁶ H.R. 11403 § 4(d)(1)(C).

⁵²⁷ Directive art. 9.

While an informational requirement of this type could help to ensure that artists receive the compensation they are due, it also could implicate privacy considerations. As the 1992 Report noted in relation to the resale right generally, “artists would need to obtain certain information about sales prices and ownership that sellers, purchasers, and other owners may not want to disclose.”⁵²⁸ The Directive seeks to address that concern by stating in a recital that “Member States which provide for collective management of the resale right may also provide that the bodies responsible for that collective management should alone be entitled to obtain information.”⁵²⁹ The U.K.’s resale royalty law appears to follow this approach, giving artists a right to obtain information necessary to secure payment, but requiring that such information be “treated as confidential” and providing that the resale right as a whole “may be exercised only through a collecting society.”⁵³⁰ Congress may wish to consider adopting a similar model, perhaps by providing artists with a general right to relevant information while directing the Copyright Office to promulgate regulations governing the acquisition and handling of personal data by collecting societies, as well as transparency generally.

12. Provisions for museums

Some resale royalty proposals provide for a percentage of the royalties collected to be diverted to third-party museums or archives. The EVAA bill, for example, contains a provision for holding 50 percent of the net royalties in an escrow account for purposes of funding purchases by nonprofit art museums.⁵³¹ We note, however, that the Association of Art Museum Directors has opposed EVAA generally and has expressed particular concerns about the escrow provision, citing the potential for conflicts of interest, administrative burdens, and reductions in existing federal arts funding.⁵³² The Office agrees and further believes that such a provision would unnecessarily reduce royalty payments that, in most cases, would already be small in amount. We accordingly recommend that, in order to fully effectuate the purposes of the royalty, all net collections be paid to visual artists.

13. Future review

Any resale royalty legislation should direct the Copyright Office to conduct a preliminary study of the law’s effectiveness and impact on the U.S. art market within a reasonable time after its initial implementation. We recommend that such a study take place three to five years after the law takes effect.

Congress also should consider including a sunset provision in the legislation until its effects can be comprehensively assessed. In our view, the law would need to be effective for at least ten years before such an assessment could fairly be made, particularly if (as we recommend) the law were to apply prospectively only. Given the need for two separate sales under that system, few works would likely qualify for a royalty if the sunset period were made any shorter.

⁵²⁸ 1992 REPORT at 130.

⁵²⁹ Directive recital 30.

⁵³⁰ Artist’s Resale Right Regulations, 2006, arts. 14(1), 15.

⁵³¹ EVAA § 3.

⁵³² See AAMD Comments at 3-4.

APPENDIX A **FEDERAL REGISTER NOTICES**

Order 11612, as amended, to advise the Secretary of Labor on all matters relating to the occupational safety and health of federal employees. This includes providing advice on how to reduce and keep to a minimum the number of injuries and illnesses in the federal workforce and how to encourage each federal Executive Branch department and agency to establish and maintain effective occupational safety and health programs.

OSHA transcribes and prepares detailed minutes of FACOSH meetings. The Agency puts transcripts, minutes, subcommittee reports, and other materials presented at the meeting in the public record of the FACOSH meeting, which is posted at <http://www.regulations.gov>.

Public Participation, Submissions, and Access to Public Record

FACOSH meetings: FACOSH meetings are open to the public. Individuals attending meetings at the U.S. Department of Labor must enter the building at the Visitors' Entrance, 3rd and C Streets NW., and pass through building security. Attendees must have valid government-issued photo identification to enter the building. For additional information about building security measures for attending the FACOSH meeting, please contact Ms. Chatmon (see **ADDRESSES** section).

Please submit your request for special accommodations to attend the FACOSH meeting to Ms. Chatmon.

Submission of requests to speak and speaker presentations. You may submit a request to speak to FACOSH about the topics of the meeting and speaker presentations by one of the methods listed in the **ADDRESSES** section. Your request must include:

- The amount of time you request to speak;
- The interest you represent (e.g., organization name), if any; and,
- A brief outline of your presentation.

PowerPoint speaker presentations and other electronic materials must be compatible with PowerPoint 2010 and other Microsoft Office 2010 formats.

The FACOSH Chair may grant requests to address FACOSH at his discretion, and as time and circumstances permit.

Submission of written comments. You also may submit written comments, including data and other information, using any of the methods listed in the **ADDRESSES** section. You may supplement electronic submissions by uploading documents electronically. If you wish to submit hard copies of supplementary documents instead, you must submit them to the OSHA Docket

Office using the instructions in the **ADDRESSES** section. The additional materials must clearly identify your electronic submission by name, date, and docket number.

Because of security-related procedures, submitting comments, requests to speak, and speaker presentations by regular mail may cause a significant delay in their receipt. For information about security procedures concerning submissions by hand, express delivery, and messenger/courier service, please contact the OSHA Docket Office (see **ADDRESSES** section). OSHA will provide copies of your submissions to FACOSH members prior to the meeting.

Access to submissions and public record. OSHA places comments, requests to speak, and speaker presentations, including any personal information you provide, in the FACOSH public docket without change and those documents may be available online at <http://www.regulations.gov>. Therefore, OSHA cautions interested parties about submitting certain personal information, such as Social Security numbers and birthdates.

OSHA also puts meeting transcripts, minutes, work group reports, and documents presented at the FACOSH meeting in the public record of the FACOSH meeting.

To read or download documents in the public record, go to Docket No. OSHA-2012-0006, at <http://www.regulations.gov>. Although all meeting documents are listed in the <http://www.regulations.gov> index, some documents (e.g., copyrighted material) are not publicly available to read or download through that Web page. All meeting documents, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

Information on using the <http://www.regulations.gov> to make submissions and to access the public record of the FACOSH meeting is available at that Web page. Please contact the OSHA Docket Office for information about materials not available through that Web page and for assistance for making submissions and obtaining documents in the public record.

Electronic copies of this **Federal Register** notice are available at <http://www.regulations.gov>. This notice, as well as news releases and other relevant information about FACOSH, is available at OSHA's Web page at <http://www.osha.gov>.

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice under the authority granted by section 19 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 668), 5 U.S.C. 7902, the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2), 41 CFR part 102-3, section 1-5 of Executive Order 12196 (45 CFR 12729 (7/27/1980)), and Secretary of Labor's Order No. 1-2012 (77 FR 3912 (1/25/2012)).

Signed at Washington, DC, on September 14, 2012.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2012-23106 Filed 9-18-12; 8:45 am]

BILLING CODE 4510-26-P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2012-10]

Resale Royalty Right

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The U.S. Copyright Office is undertaking an inquiry at the request of Congress to review how current copyright law affects and supports visual artists; and how a federal resale royalty right for visual artists would affect current and future practices of groups or individuals involved in the creation, licensing, sale, exhibition, dissemination, and preservation of works of visual art. The Office thus seeks comments from the public on the means by which visual artists exploit their works under existing law as well as the issues and obstacles that may be encountered when considering a federal resale royalty right in the United States.

DATES: Comments must be received no later than 5 p.m. Eastern Daylight Time (EDT) on November 5, 2012.

ADDRESSES: To submit comments, please visit <http://www.copyright.gov/docs/resaleroyalty>. The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, submitters must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: The Adobe Portable

Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post all comments publicly on the Office's Web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202-707-8380 for special instructions.

FOR FURTHER INFORMATION CONTACT:

Jason Okai, Counsel, Office of Policy and International Affairs, by telephone at 202-707-9444 or by electronic mail at jokai@loc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

An artist resale royalty, or *droit de suite* as it is often called in Europe, provides artists with an opportunity to benefit from the increased value of their works over time by granting them a percentage of the proceeds from the resale of their original works of art. The royalty originated in France in the 1920s and is in general practice throughout Europe, but is not part of current United States copyright law.¹ Under the Copyright Act (the "Act"), 17 U.S.C. 101 *et seq.*, artists, like other authors, are provided a bundle of exclusive rights, including rights to reproduce, distribute and create adaptations of the works. Federal copyright law, however, does not generally grant artists or authors rights to control the subsequent use of the original work.² Rather, the first sale doctrine, codified in 17 U.S.C. 109, generally permits the lawful owner of a copyrighted work to display, sell or dispose of the work without the authorization of the creator under most circumstances.

For many authors of works such as books, musical works and sound recordings, the copyright system provides substantial economic benefits and incentives through subsequent uses or performances of those works by way of licensing or contractual arrangements. For example, an author may sell rights in his or her novel to a

publisher, or sell the right to create a screenplay to a writer, or sell the right to create a motion picture from that screenplay. At each point in the life cycle of that novel, numerous opportunities arise for the author to earn income from the original novel without having to write another book or restrict the number of books available for purchase in the marketplace. Indeed, a novelist and his publisher may offer millions of copies of the same book to buyers, a filmmaker may distribute millions of DVDs of his film, and a songwriter may authorize millions of downloads. In each case, every purchaser receives the same work and for the same value as the original.

By contrast, in the case of certain visual artworks, there can only be one sale at a time, and only the initial sale will inure to the benefit of the actual creator. A sculptor or painter may spend months or years creating one work of art and when that work is completed it is a unique and singular representation of the artist's intent. Unlike books, DVDs or songs, the value of the work is based on its originality and scarcity. This means that over time, it may be a collector or other downstream entity that will derive the most financial benefit.

The Office recognizes that buyers of artworks, including collectors, galleries and auction houses, frequently purchase artworks as investments. These persons may act as important catalysts over time, helping to increase the value of certain artworks through exhibitions and additional sales, or by supporting the careers of artists through payment or promotion. The question thus becomes one of perceived fairness under the law. Should these agents and investors benefit exclusively, or should they be compelled to provide some additional compensation to the artists who made the buyers' profits possible? Indeed, California purportedly developed its state law on resale royalties in part as a result of the indignation felt by many within the artistic community when Robert Rauschenberg's 1958 painting "Thaw," which was originally sold for \$900, was resold at auction fifteen years later for \$85,000 without compensation to the artist.³ According to some sources, certain fine art can appreciate by more than 10% in value per year.⁴

To be clear, any artist may by contract attempt to negotiate a partial interest in his work with a buyer, thereby reserving for him or herself a financial interest in its future value. However, this is by no means a common practice for transactions of fine art, even for accomplished artists, and it seems unlikely for one who is just starting out. There are also some accommodations available to visual artists in the broader marketplace. For example, some artists may exploit their works in other ways, such as through reproductions or the creation of derivative works. For some, this may be lucrative; however, for others the very nature of their visual art may limit the ability to create such derivative markets. In general, although visual art may be reproduced or adapted in the form of prints, postcards, miniature models of sculptures or even refrigerator magnets, the income realized from the sales of these items is not likely to approach the income that the original artwork will bring if it increases in value and is sold and resold at auction, in private galleries or through private sales.

A. Previous Inquiry

In 1991, Congress requested the Copyright Office to conduct a study on the feasibility of legislation that would require purchasers of works of art, subsequent to the initial sale of the work, to pay the artist or the artist's heirs a percentage of the sale price. Published in December 1992, the Copyright Office report concluded that there was insufficient economic and copyright policy justification for enacting resale royalty right or *droit de suite* legislation in the United States.⁵ The Office expressed concern that implementing a resale royalty right might be harmful to visual artists who lack a viable resale market because primary market prices might decline as a result of factoring in the future royalty. The Office further explained that imposing a federal resale royalty on sales transactions may conflict with the traditional United States concept of free alienability of property. The Office proposed alternatives to a resale royalty right, including compulsory licenses, broader display rights, rental rights and federal grants for public works of art. The Office also identified eight areas to be considered if legislation were to be proposed: Oversight, types of sales, threshold amount, term, foreign authors,

how-to-outsmart-the-billionaires-wholl-bid-80-million-for-the-scream/.

⁵ See United States Copyright Office, *Droit De Suite: The Artist's Resale Royalty 2* (1992) ("Report"), available at http://www.copyright.gov/history/droit_de_suite.pdf.

¹ Resale royalty rights are optional under applicable international treaties. See Berne Convention for the Protection of Literary and Artistic Works, art. 14*ter*, Jul. 24, 1971, 25 U.S.T. 1341, 8282 U.N.T.S. 221 (as amended Sep. 28, 1979).

² Visual artists are granted very limited rights to prevent certain modifications to their works under the Visual Artists Rights Act (VARA), 17 U.S.C. 106A. VARA does not provide additional economic benefits.

³ See Patricia Cohen, *Artists File Lawsuits Seeking Royalties*, New York Times, Nov. 1, 2011, available at <http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html?pagewanted=all>.

⁴ See Joshua Rogers, *How to Outsmart the Billionaires Who'll Bid \$80 Million for "The Scream"*, Forbes, Apr. 4, 2012, available at <http://www.forbes.com/sites/joshuarogers/2012/04/04/>

alienability, types of works and retroactivity. Congress did not enact legislation creating a resale royalty right at the federal level and there has been no formal congressional deliberation on this topic since the 1992 report. In its report, the Copyright Office also suggested that Congress may wish to review the issue if the European Community extended royalty rights to all of its Member States.

B. International Developments

Since the Office published its study in 1992, the legal landscape in foreign jurisdictions with respect to resale royalty treatment has changed. In 1992, thirty-six countries had resale royalty legislation; today, that number has increased to more than sixty.⁶ In 2001, the European Union adopted a Directive generally requiring Member States to implement harmonized resale royalty legislation by 2006.⁷ The Directive requires Member States to establish a royalty for all resales involving an art market professional, including auctions, private dealers and galleries. Member States have some flexibility to determine what threshold resale price would trigger the royalty below €3,000 (euros), and to provide for compulsory or optional collective management of the royalty. The Directive caps the royalty at €12,500, regardless of the resale price. As a result of the Directive, *droit de suite* is now a component of national laws across the European community. The United Kingdom, which is one of the largest art markets in the world, implemented its resale royalty legislation in 2006. Artists also receive resale royalties in many countries outside of the European Union, including Algeria, Australia, Bolivia, Brazil, Bulgaria, Burkina Faso, Chile, Congo, Columbia, Costa Rica, Croatia, Ecuador, Guatemala, Guinea, Honduras, Iraq, Ivory Coast, Laos, Madagascar, Mali, Mexico, Monaco, Morocco, Nicaragua, Paragua, Panama, Peru, Philippines, Romania, Russian Federation, Senegal, Serbia and Montenegro, Tunisia, Turkey, Uruguay and Venezuela.⁸

⁶ See *id.* at 8; see also The Artist's Resale Right Regulations, 2006 S.I. 346 (U.K.), at art. 2, schedule 2; *Liste de Pays Dont le Ressortissants Beneficiant du Droit de Suite a Juin 2007* ("List of Countries") [List of Countries whose Citizens Benefit from the Resale Royalty Right as of June 2007], Societe des Auteurs dans les Arts Graphiques et Plastiques, available at http://www.adagp.fr/ENG/Liste_pays_droit_de_suite.pdf.

⁷ Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale for the Benefit of the Author of an Original Work of Art, art 1, 2001 O.J. (L 272) 32–36.

⁸ See *Liste de Pays Dont le Ressortissants Beneficiant du Droit de Suite a Juin 2007* [List of

C. State Law

To date, the only resale royalty legislation in the United States has been at the state level in California, where it has operated with mixed success. The California Resale Royalty Act was enacted in 1976 and imposes several conditions prior to payment of the royalty: The artist must be a U.S. citizen or a California resident of at least two years; the seller must reside in California or the sale executed in California; the artwork must be "fine art," (*i.e.*, an original sculpture, painting, drawing, or work in glass); and the work must be sold for more money than was paid for it and for at least \$1,000.⁹ The seller or seller's agent is required to pay the 5% royalty directly to the artist or the artist agent. If the latter cannot be found, the seller or seller's agent must pay the royalty to the California Arts Council, which continues the search for the beneficiary artist. The California Arts Council does not charge an administrative fee for this service.

Notably, after thirty-five years on the books, a federal district in California recently declared the California Resale Royalty Act unconstitutional under the Commerce Clause. The court concluded that the state statute impinged on the federal government's authority to control commerce among the states because it regulated sales occurring wholly outside of California.¹⁰ An appeal is pending in the United States Court of Appeals for the Ninth Circuit.

D. Proposed Legislation

On December 15, 2011, Senator Kohl of Wisconsin and Representative Nadler of New York introduced bills in the 112th Congress titled, *Equity for Visual Artists Act of 2011* (EVAA), S.2000 and H.R. 3688 respectively. The EVAA requires a resale royalty right, under certain circumstances, to be collected from the seller. The proposed royalty would be triggered when a work of visual art is sold at auction for at least \$10,000 by someone other than the authoring artist. Following the sale, the entity receiving the proceeds pays a royalty of 7% to a qualifying visual artists' collecting society. The collecting society is required to distribute 50% of the net royalty to the artists or successor as copyright owner and place the other

Countries whose Citizens Benefit from the Resale Royalty Right as of June 2007], Societe des Auteurs dans les Arts Graphiques et Plastiques, available at http://www.adagp.fr/ENG/Liste_pays_droit_de_suite.pdf.

⁹ CAL. CIV. CODE § 986 (West 2012).

¹⁰ See *Estate of Graham v. Sotheby's Inc.*, 11–CV–08604, 2012 WL 1765445 at *1–2 (C.D. Cal. May 17, 2012).

50% of net royalty into an escrow account to support U.S. nonprofit museums in their future purchases of visual art created by living artists domiciled in the United States. Failure to remit the royalty to the collecting society is copyright infringement subject to statutory damages. The EVAA also directs the Register of Copyrights to issue regulations governing the designation and oversight of visual artists' collecting societies.

In a letter dated May 17, 2012, Senator Kohl and Representative Nadler requested that the Copyright Office "assess how existing law affects and supports visual artists, and how a federal resale royalty provision would affect copyright law, visual artists and those involved in the sale of art work."

The Office therefore seeks comments from interested parties on how visual artists exploit their works under existing law, including any limitations due to the nature of visual art, and the effect, if any, a resale royalty right would have on the promotion, dissemination and sale of works of visual art.

II. Discussion

There are a variety of factors to consider when examining how visual art is treated under the Copyright Act and whether a federal resale royalty right would foster the goals of the copyright system. Among the issues are:

Current Copyright Law Implications: The first sale doctrine (17 U.S.C. 109) is a fundamental tenet of U.S. law. It helps to maintain the copyright system's balance between incentives for authors and the public's interest in widespread dissemination of copyrighted works. How a federal resale royalty right would affect the first sale doctrine is therefore of paramount interest to the Office, as is the interaction with any other exceptions and limitations that support the dissemination of works of art to the public.

Promoting Production of Creative Works: Copyright law furthers the creation and/or distribution of new works and provides authors (and those who invest in the works of authors) with certain incentives and protections under the law. Therefore, whether the adoption of a federal resale royalty regime would further incentivize and protect the authors of certain visual artworks is also of paramount interest to the Office.

Fostering the Art Marketplace: The effect of a resale royalty on current or future markets is a related, important question, though that is not to say that the law must or should protect all existing business models. Is it possible, however, that a resale royalty right

might add to the costs of those who buy and invest in artworks and, if so, are such costs acceptable from a policy perspective? In this regard, the art market should be broadly defined, including emerging artists, heirs, investors and collectors.

Scope and Applicability of a Royalty: A threshold question is what categories of works should be covered under a resale royalty right. For example, the California resale royalty provision governs works of "fine art," while the European Directive covers all "original works of art." The EVAA would cover works of "visual art" as defined in Section 101 of the U.S. Copyright Act. The Office is aware that some artists today work in series, producing limited numbers of identical works and some works that may have been sold as unique creations in the past are now sold in copies including, for example, so-called Internet Art. Moreover, some artists, though certainly not most, are moving from a business model where works are sold to one where access is licensed. Such issues may inform the appropriate scope of fine art, original art or the like.

Contractual Considerations: For any number of reasons, an artist or his or her heirs may not wish to participate in the resale royalty right process through a collecting society, and may wish instead to pursue payment of a royalty directly from the seller; or an artist or his or her heirs may wish to waive or contractually discharge his or her right to receive the royalty. For example, an artist may wish to waive the right to receive the royalty in return for a higher initial sale price rather than wait the years or decades for a work to sell at auction, or an artist may wish to contract privately with the initial seller to provide for a payment of a percentage of any future sales, although the enforceability of this type of contractual term has been questioned. In each instance, however, it is the artist setting their individual terms of sale and determining individual contractual obligations with each initial seller, not a statute. Alternatively, an artist may prefer to receive a lesser royalty in return for a third party to administer and distribute payments due. Perspective on the issue of how to address the contractual issues associated with a resale royalty right, including whether the right should be transferable or waivable, is helpful to the Office in exploring the practical effect of a resale royalty.

Types of Transactions: Art is bought and sold through myriad channels and venues. Many artists are affiliated with galleries that buy, consign, sell and even

resell works to private or corporate clients. Other transactions occur in well publicized auctions, private auctions, online or even through direct internet sales. The laws in California, United Kingdom, France and Australia appear to cover a broad range of transactions involving art market professionals, including those through online sales, private galleries and auctions. Given the variety of ways in which works of art are sold or transferred in the U.S. and across borders, a significant factor for the Office to consider is to what extent a resale royalty should apply or be managed in the numerous commercial channels, or whether the resale royalty should apply to some types of transactions and not others.

Duration of Term: One of the rationales for having a copyright term extending post mortem of the author is to provide income and benefits to the heirs of the artist or author. This rationale may not apply in the same way to a federal resale royalty. Many countries, however, simply follow their general copyright term (such as life of the author plus seventy years), while the California state law uses a term of life of the author plus twenty years. Thus, consideration should be given to the appropriate duration of such a right and how the specific duration or term of a right would support the goals of the copyright system.

Threshold Values: Not every artist's works sell for tens of thousands or even millions of dollars. Many works may be resold by collectors for hundreds or thousands of dollars at local auctions, charity events, or perhaps even some larger sales events. Any such resulting royalty from these smaller payments may be outweighed by the costs incurred by making the payment. Also, if an artwork is sold at a charity event, the proceeds are not realized by the seller, but by the charity. Under a traditional rubric, it appears that the charity would be responsible for payment of the royalty, which lessens the amount it may redirect toward its charitable efforts. The Office would find it helpful to explore the issue of whether a minimum amount of money realized from a sale must be attained in order for the requirement of a royalty payment to be made, and if so, what standards would be appropriate. For example, the California resale royalty applies to sales of \$1,000 or more, while the European directive sets a maximum threshold of €3,000. The EVAA would impose a \$10,000 threshold on transactions subject to the royalty. It would be helpful to receive information about these varying approaches and

how the different thresholds may support the goals behind the royalty.

Payment and Enforcement: It is possible that under a resale royalty scheme, the artist and the subsequent seller may have no contractual relationship and therefore the only obligation on the payer of the royalty would likely be statutory. Therefore, any statute would likely include provisions to enforce the payment of the royalty and remedies to both the artist and the collective management organization should such an organization be utilized. One may also envision a situation in which the artists or his or her heirs are unable to be located. The seller may not know how or have the means to locate the artist or heirs, and may be under obligation to pay the royalty indefinitely.

Calculating a Royalty: The basis for calculating a resale royalty could be set in different ways, for example, based on the present sale price of the art work, or its appreciated value (*i.e.*, the difference between the initial sale price and present sale price). Each formula for calculating a royalty rate could have different consequences for the artist and seller and would need to be considered as part of the royalty mechanisms in place.

Royalty Rate: The amount of the royalty could affect the market and artists in different ways and should be assessed, including reviewing the experience of other jurisdictions. The EVAA would set a royalty rate of 7%, while California and Australia set a royalty of 5%. The European Directive adopts a sliding scale based on the amount of the transaction, from 5% for transactions involving sales of €50,000 to a royalty of only 0.25% for transactions over €500,000. The European Directive also caps the maximum royalty at €12,500. The Office seeks information about what factors should be considered in setting an appropriate royalty rate and how the royalty rate might affect artists and the art market.

Administration of a Royalty: Additionally, if the royalty payments are collectively managed, administrative costs born by the collecting society are usually deducted from the final payment to the artist rather than added to the cost of the royalty paid by the seller. The final amount paid to the artist or his or her heirs will undoubtedly be less than the amount collected and may not be fully known until payment is made. In addition, a certain level of transparency in such a collecting society would be required in order to provide the artists and his or her heirs with a sufficiently clear

accounting of payments in relation to the administrative costs associated with operating as the collecting society. It would be helpful to understand whether collective management of royalty payments should be proposed, and if so, what type of entity should be authorized (e.g., government or private) and what standards should apply.

Experience in other Jurisdictions: As noted above, a resale royalty currently applies under state law in California, as well as in many European and Latin American countries. These jurisdictions have taken different approaches to the issues identified above (i.e., transactions covered, thresholds, royalty rates and administration). It would be helpful for the Copyright Office to receive information on the practical experience of those jurisdictions, any obstacles that may have been encountered, and data on the effect of the right on those markets.

Changes Since the Last Report: The Copyright Office last reviewed the resale royalty in 1992. It is therefore interested in any information addressing whether there have been significant policy or economic changes that should be considered when assessing the current feasibility of a resale royalty.

Alternatives to a Resale Royalty: As the Copyright Office acknowledged in its 1992 report, there may be alternatives to a resale royalty that would further the goals of promoting creativity and the public dissemination of visual art.

IV. Subject of Inquiry and Conclusion

The Office hereby seeks comment from the public on factual and policy matters addressed above, including the potential effect of a resale royalty on visual artists, current copyright law and practical implications for commerce. If there are any pertinent issues not discussed above, the Office encourages interested parties to raise those matters in their comments. The Office may also publish a further Notice of Inquiry posing specific questions and possibly exploring additional alternatives following the receipt of comments in response to this Notice.

Dated: September 13, 2012.

Karyn Temple Claggett,

Senior Counsel for Policy and International Affairs.

[FR Doc. 2012-23076 Filed 9-18-12; 8:45 am]

BILLING CODE 1410-30-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Nixon Presidential Historical Materials: Opening of Materials

AGENCY: National Archives and Records Administration

ACTION: Notice of opening of additional materials

SUMMARY: This notice announces the opening of additional Nixon Presidential Historical Materials by the Richard Nixon Presidential Library and Museum, a division of the National Archives and Records Administration. Notice is hereby given that, in accordance with section 104 of Title I of the Presidential Recordings and Materials Preservation Act (PRMPA, 44 U.S.C. 2111 note) and 1275.42(b) of the PRMPA Regulations implementing the Act (36 CFR Part 1275), the Agency has identified, inventoried, and prepared for public access additional textual materials with certain information redacted as required by law, including the PRMPA.

DATES: The Richard Nixon Presidential Library and Museum intends to make the materials described in this notice available to the public on Tuesday, October 23, 2012, at the Richard Nixon Library and Museum's primary location in Yorba Linda, CA, beginning at 10:00 a.m. PDT/1:00 p.m. EDT. In accordance with 36 CFR 1275.44, any person who believes it necessary to file a claim of legal right or privilege concerning access to these materials must notify the Archivist of the United States in writing of the claimed right, privilege, or defense within 30 days of the publication of this notice.

ADDRESSES: The Richard Nixon Presidential Library and Museum, a division of the National Archives, is located at 18001 Yorba Linda Blvd., Yorba Linda, CA. Researchers must have a NARA researcher card, which they may obtain when they arrive at the Library. Selections from these materials will be available at www.nixonlibrary.gov. Petitions asserting a legal or constitutional right or privilege that would prevent or limit public access to the materials must be sent to the Archivist of the United States, National Archives at College Park, 8601 Adelphi Rd., College Park, Maryland 20740-6001.

FOR FURTHER INFORMATION CONTACT: Paul Wormser, Acting Director, Richard Nixon Presidential Library and Museum, 714-983-9119.

SUPPLEMENTARY INFORMATION: The following materials will be made available in accordance with this notice:

1. Previously restricted textual materials. Volume: 91 documents consisting of approximately 1,000 pages. A number of textual materials previously withheld from public access have been reviewed for release and/or declassified under the systematic declassification review provisions of Executive Order 13526, the Freedom of Information Act (5 U.S.C. 552), or in accordance with 36 CFR 1275.56 (Public Access regulations). The materials are from integral file segments for the National Security Council Institutional Files; and the Henry A. Kissinger (HAK) Office Files.

Dated: September 7, 2012.

David Ferriero,

Archivist of the United States.

[FR Doc. 2012-22993 Filed 9-18-12; 8:45 am]

BILLING CODE 7515-01-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before October 19, 2012. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be

including the validity of the methodology and assumptions used;—Enhance the quality, utility, and clarity of the information to be collected; and—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information

(1) Type of information collection: revision of a currently approved collection.

(2) The title of the form/collection: National Institute of Justice Compliance Testing Program (NIJ CTP). This collection consists of seven forms: NIJ CTP Applicant Agreement; NIJ CTP Authorized Representatives Notification; NIJ CTP Body Armor Build Sheet; NIJ CTP Body Armor Agreement; NIJ CTP Manufacturing Location Notification; NIJ CTP Multiple Listee Notification; NIJ Approved Laboratory Application and Agreement.

(3) Agency Form Number: None. Component Sponsoring Collection: National Institute of Justice, Office of Justice Programs, Department of Justice.

(4) Affected public who will be asked or required to respond, as well as a brief abstract. Primary: Applicants to the NIJ Compliance Testing Program and Testing Laboratories. Other: None. The purpose of the voluntary NIJ Compliance Testing Program (CTP) is to provide confidence that equipment used for law enforcement and corrections applications meets minimum published performance requirements. One type of equipment is ballistic body armor. Ballistic body armor designs that are determined to meet minimum requirements by NIJ and listed on the NIJ Compliant Products List are eligible for purchase with grant funding through the Ballistic Vest Partnership.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: Total of 90 respondents estimated. *NIJ CTP Applicant Agreement*: Estimated 90 respondents at 1 hour each; *NIJ CTP Authorized Representatives Notification*: Estimated 90 respondents at 20 minutes each; *NIJ CTP Body Armor Build Sheet*: Estimated 60 respondents (estimated 300 responses) at 1 hour each; *NIJ CTP Body Armor Agreement*: Estimated 60 respondents (estimated 300 responses) at 20 minutes each; *NIJ CTP Manufacturing Location Notification*:

Estimated 90 respondents (estimated 350 responses) at 20 minutes each; *NIJ CTP Listee Notification*: Estimated 90 respondents (estimated 350 responses) at 20 minutes each; *NIJ Approved Laboratory Application and Agreement*: Estimated 10 respondents at 1 hour each.

(6) An estimate of the total public burden (in hours) associated with the collection: The estimated total public burden associated with this information is 322 hours in the first year and 222 hours each subsequent year.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 2E-508, Washington, DC 20530.

October 10, 2012.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2012-25352 Filed 10-15-12; 8:45 am]

BILLING CODE 4410-18-P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2012-10]

Extension of Comment Period: Resale Royalty Right

AGENCY: Copyright Office, Library of Congress.

ACTION: Extension of comment period.

SUMMARY: The Copyright Office is extending the period of public comment in response to its September 19, 2012 Notice of Inquiry requesting comments regarding issues relating to consideration of a federal resale royalty right.

DATES: Comments are due December 5, 2012.

ADDRESSES: All comments and reply comments shall be submitted electronically. A comment page containing a comment form is posted on the Office Web site at <http://www.copyright.gov/docs/resaleroyalty>. The Web site interface requires commenting parties to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: the Adobe Portable Document File (PDF) format that

contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on the Office's Web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202-707-8350 for special instructions.

FOR FURTHER INFORMATION CONTACT:

Jason Okai, Counsel, Office of Policy and International Affairs, by email at jokai@loc.gov or by telephone at 202-707-9444.

SUPPLEMENTARY INFORMATION: On September 19, 2012, the Copyright Office published a Notice of Inquiry inviting public comments on consideration of a federal resale royalty right. Due to the number and complexity of the issues raised in that Notice, it appears that some stakeholders may need additional time to respond. In order to facilitate full and adequate public comment, the Office hereby extends the time for filing additional comments to December 5, 2012.

Dated: October 10, 2012.

Maria A. Pallante,

Register of Copyrights.

[FR Doc. 2012-25370 Filed 10-15-12; 8:45 am]

BILLING CODE 1410-30-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos.: 50-280 and 50-281; 50-338 and 50-339; NRC-2012-0241]

Virginia Electric and Power Company, Surry Power Station Units 1 and 2 and North Anna Power Station Units 1 and 2, Notice of Withdrawal of Application for Amendment to Facility Operating License

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; withdrawal.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) has granted the request of Virginia Electric and Power Company (the licensee) to withdraw its September 29, 2012, application for proposed amendment to Facility Operating License Nos. DPR-32 and DPR-37, NPF-4 and NPF-7 for Surry Power Station, Units 1 and 2, Surry County,

whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 26th day of March, 2013.

Lyssa E. Hall,

Acting Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2013-07380 Filed 3-28-13; 8:45 am]

BILLING CODE 4510-29-P

LEGAL SERVICES CORPORATION

Notice of Funding Availability for Calendar Year 2014 Competitive Grant Funds Request for Proposals: 2014 Competitive Grant Funds

AGENCY: Legal Services Corporation.

ACTION: Notice.

SUMMARY: The Legal Services Corporation (LSC) is the national organization charged with administering Federal funds provided for civil legal services to low-income people.

This Request for Proposals (RFP) announces the availability of competitive grant funds and is soliciting grant proposals from interested parties who are qualified to provide effective, efficient and high quality civil legal services to eligible clients in the service area(s) of the states and territories identified below. The exact amount of congressionally appropriated funds and the date, terms, and conditions of their availability for calendar year 2014 have not been determined.

DATES: This RFP is available the week of April 8, 2013. Legal Services Corporation must receive all applicants' Notice of Intent to Compete (NIC) on or before May 10, 2013, 5:00 p.m., E.T. Other key application and filing dates, including the dates for filing grant applications, are published at www.grants.lsc.gov/resources/notices.

ADDRESSES: Legal Services Corporation: Competitive Grants, located at 3333 K Street NW., Third Floor, Washington, DC, 20007-3522.

FOR FURTHER INFORMATION CONTACT: The Office of Program Performance by email at competition@lsc.gov, or visit the grants competition Web site at www.grants.lsc.gov.

SUPPLEMENTARY INFORMATION: LSC will accept proposals from any of the following entities: (1) Non-profit

organizations that have as a purpose the provision of legal assistance to eligible clients; (2) private attorneys; (3) groups of private attorneys or law firms; (4) state or local governments; or (5) sub-state regional planning and coordination agencies that are composed of sub-state areas and whose governing boards are controlled by locally elected officials.

The RFP, containing the NIC and grant application, guidelines, proposal content requirements, service area descriptions, and specific selection criteria, will be available at www.grants.lsc.gov the week of April 8, 2013.

Below are the service areas for which LSC is requesting grant proposals. Service area descriptions will be available at www.grants.lsc.gov/about-grants/where-we-fund. LSC will post all updates and/or changes to this notice at www.grants.lsc.gov. Interested parties are asked to visit www.grants.lsc.gov regularly for updates on the LSC competitive grants process.

State or Territory	Service Area(s)
Alabama	MAL.
American Samoa	AS-1.
Arizona	AZ-2, AZ-3, AZ-5, MAZ, NAZ-5, NAZ-6.
Arkansas	AR-6, AR-7, MAR.
California	CA-1, CA-27, CA-28, NCA-1.
Connecticut	CT-1.
Delaware	MDE.
District of Columbia	DC-1.
Illinois	IL-3, IL-7.
Kentucky	KY-10, KY-2, KY-5, KY-9, MKY.
Louisiana	LA-1, LA-12, MLA.
Maryland	MD-1, MMD.
Massachusetts	MA-10, MA-11.
Michigan	MI-12, MI-13, MI-15, MI-9, MMI, NMI-1.
Minnesota	MN-1, MN-4, MN-5, MN-6, MMN.
Mississippi	MS-10, MS-9, MMS, NMS-1.
Missouri	MO-3, MO-4, MO-5, MO-7, MMO.
New Hampshire	NH-1.
New Mexico	NM-1, NM-5, MNM, NNM-2, NNM-4.
New York	NY-9.

State or Territory	Service Area(s)
North Dakota	ND-3, MND, NND-3.
Ohio	OH-18, OH-20, OH-21, OH-23, MOH.
Oklahoma	MOK, NOK-1.
Pennsylvania	PA-24.
Puerto Rico	PR-2.
South Dakota	SD-2, SD-4, NSD-1.
Tennessee	TN-10, TN-4, TN-7, TN-9, MTN.
Texas	TX-13, TX-14, TX-15, MTX, NTX-1.
Vermont	VT-1.
Virginia	VA-17, VA-18, VA-19, VA-20, MVA.
West Virginia	WV-5.
Wisconsin	WI-5, MWI.
Wyoming	WY-4, NWY-1.

Dated: March 21, 2013.

Victor Fortunato,

General Counsel & Vice President, Legal Services Corporation.

[FR Doc. 2013-07269 Filed 3-28-13; 8:45 am]

BILLING CODE 7050-01-P

LIBRARY OF CONGRESS

United States Copyright Office

[Docket No. 2013-3]

Resale Royalty Right; Public Hearing

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of public hearing.

SUMMARY: The United States Copyright Office will host a public hearing to discuss issues relating to the consideration of a federal resale royalty right in the United States. The meeting will provide a forum for interested parties to address the legal and factual questions raised in the comments received by this Office in response to its September 2012 Notice of Inquiry.¹

DATES: The public hearing will take place on April 23, 2013, from 1:00 p.m. to 5:00 p.m. The Copyright Office strongly prefers that requests for participation be submitted electronically. A participation request form is posted on the Copyright Office

¹ 77 FR 58175 (Sept. 19, 2012), available at <http://www.copyright.gov/fedreg/2012/77fr58175.pdf>.

Web site at <http://www.copyright.gov/docs/resaleroyalty/>. Persons who are unable to submit a request electronically should contact Jason M. Okai, Counsel for Policy and International Affairs, at 202-707-9444.

ADDRESSES: The public hearing will take place in the Copyright Office Hearing Room, LM-408 of the Madison Building of the Library of Congress, 101 Independence Avenue SE., Washington, DC 20559.

FOR FURTHER INFORMATION CONTACT: Karyn Temple Claggett, Associate Register of Copyrights and Director of Policy and International Affairs, by email at kacl@loc.gov or by telephone at 202-707-1027; or Jason Okai, Counsel for Policy and International Affairs, by email at jokai@loc.gov or by telephone at 202-707-9444.

SUPPLEMENTARY INFORMATION:

Background

At the request of Congress, the Copyright Office is reviewing: (1) how the current copyright legal system affects and supports visual artists; and (2) how a federal resale royalty right for visual artists would affect current and future practices of groups or individuals involved in the creation, licensing, sale, exhibition, dissemination, and preservation of works of visual art. The Office published a general Notice of Inquiry on September 19, 2012 seeking comments from the public. The Notice provided background on the Office's previous review of this issue in its December 1992 report titled *Droit De Suite: The Artist's Resale Royalty*² (the "1992 Report") as well as recent international developments. After extending the deadline for the public to submit comments until December 5, 2012, the Office received fifty-nine comments from various interested parties. The comments raised a variety of issues, including purely legal matters as well as specific experiences and perspectives of individual artists, corporate entities, and collecting societies. All comments, along with the Notice of Inquiry, are available at <http://www.copyright.gov/docs/resaleroyalty/>. The Office now announces a public hearing to receive further input on issues raised in the comments. The agenda and the process for submitting requests to participate in or observe the public hearing is available on the Copyright Office Web site.

Subjects of Public Hearing

The public hearing will cover the following topics: (1) The changing legal landscape; (2) portability of the secondary art market; (3) effect on the primary art market and the incentive to create new works; (4) first sale and the free alienability of property; (5) visual artists and sales of works; (6) the Equity for Visual Artists Act; (7) effect on museums; and (8) constitutional concerns. Each of these topics is explained in more detail below.

1. *The changing legal landscape.* In its 1992 Report, the Copyright Office did not recommend adoption of a resale royalty right in U.S. law.³ That report, however, also noted that Congress might wish to reexamine whether the United States should implement a resale royalty law if the European Union harmonized its resale royalty law.⁴ In response to the September 19, 2012 Notice of Inquiry, several commenters stated that China, which has established itself as a major art market, is also considering a resale royalty right in pending domestic legislation. Many commenters also noted that even though the European Union harmonized its resale royalty law through its *Droit de Suite* Directive of 2001 (the "EU Directive"), nothing has changed substantively in the United States since the Copyright Office's 1992 Report and there is therefore no need to consider adopting a resale royalty now.

Have there been changes in the worldwide legal landscape, art market, or business practices since the Office's 1992 Report that support or undermine implementation of a resale royalty?

2. *Portability of the Secondary Art Market.* Some commenters expressed concern that if the United States adopts a resale royalty right, a substantial portion of the U.S. art market will shift to markets where no resale royalty exists currently. Conversely, some commenters cited figures showing that the German, United Kingdom, and French markets actually grew after the EU Directive was implemented, while in the United States and Switzerland, where there is no resale right, the markets declined.

What factors, other than implementation of a resale royalty right, affect the portability of the art market? What are the experiences in countries following the implementation of a resale royalty where one did not exist previously? For example, if China implements a resale royalty, how would this impact the worldwide market?

3. *Effect on the Primary Art Market and the Incentive to Create New Works.*

Some commenters addressed whether a resale royalty fosters creativity for young artists, contributes to the financial sustainability of visual artists, motivates artists to produce more artistic works, and enhances an artist's reputation thereby generating more primary and secondary sales. Some comments stated that the existence of a resale royalty would not incentivize artists to create and that the royalty only would benefit a very few artists who are already professionally and financially successful.

The Office is interested in learning more about the effect of a federal resale royalty on the primary art market and whether it is an incentive for artists to create new work. Additionally, the Office would like further information on whether the payment of a resale royalty to artists' heirs foster creativity and, if so, how.

4. *First Sale and the Free Alienability of Property.* Some commenters suggested that a resale royalty is incompatible with the first sale doctrine set forth in 17 U.S.C. 109. These commenters argued that a resale royalty provides an ongoing property right each time an artwork is sold (subsequent to its initial sale), prevents buyers from acquiring unencumbered title to a work of art, and adds a layer of complexity to secondary transactions. Other commenters argued that a resale royalty does not conflict with the ability to freely transfer property because the royalty simply would require payment when a subsequent sale has been made and does not otherwise restrict the transfer or sale of a particular work of art.

In light of these comments, the Office has the following questions: To what extent, if any, are the first sale doctrine and a resale royalty right incompatible? Would a resale royalty have a detrimental effect on the initial sale of the artwork? Should the right to claim royalties on secondary sales be waivable and, if so, what effect would that have on initial sales of artwork?

5. *Visual Artists and Sales of Works.* Many commenters suggested that visual artists are at a great disadvantage in relation to creators of other copyrighted works because visual artists are not paid for the subsequent resale of their original works and do not enjoy a benefit proportional to the success of their work. Thus, these commenters cautioned that without a resale royalty, visual artists are excluded from the most significant profits that their works may generate following its creation.

Commenters opposing a resale royalty noted that copyright law does not assure that each type of work will generate

² U.S. Copyright Office, *Droit De Suite: The Artist's Resale Royalty* (1992), available at http://www.copyright.gov/history/droit_de_suite.pdf.

³ 1992 Report at 149.

⁴ *Id.*

similar levels of remuneration and it is not the role of copyright law to elevate one type of work over another. These commenters further claimed that any perceived inequities in the amount of remuneration for a particular category of work exists because of the characteristics of that type of work and the attendant methods of exploitation for those works.

Thus, the Office is interested in whether there is such an inequity and, if so, to what extent, if any, a resale royalty will affect it.

6. *The Equity for Visual Artists Act.* The Office received twenty-five comments that either cited to the Equality for Visual Artists Act (“EVAA”)⁵ or commented directly on the proposed legislation. The Office is interested in hearing more about what provisions should or should not appear in any resale royalty legislation and, more specifically, views on the following EVAA provisions:

a. *Transaction Types.* The current version of the EVAA applies only to live auction sales when the auction house meets certain eligibility requirements. Many comments noted that a resale royalty limited to certain live auction sales would not represent the majority of secondary art sales and would therefore fail to benefit a significant number of artists. Other commenters noted that, due to the high volume of transactions, it would simply be impractical to apply the right to additional types of sales such as online auctions, private sales, or gallery sales. The Office would like more information on the proper universe of sales to which the resale royalty should be applied.

b. *Scope.* A few comments noted that some art buyers view art as more than paintings, sculptures, or photographs and therefore any definition of art for the purposes of establishing a resale right should be broader than that in the EVAA. The Office thus would like further input regarding what types of artwork should or should not be included in any potential legislation.

c. *Collection and Distribution of Royalties.* Commenters stated that, generally, either a government agency or a designated collection society administers the resale royalty in most jurisdictions that have such a royalty law. These government agencies or collection societies identify qualifying sales, collect funds, deduct an administrative fee, and redistribute the monies to the artists. The collecting society scheme proposed in the EVAA would be different because the

collecting society would not only collect the royalty and redistribute it to the artists, but it would also use royalty monies to fund an escrow account from which it would distribute grants to museums to purchase more art. The Office would appreciate more information on the pros and cons of such a structure.

d. *Duration.* Many commenters favor keeping the term of the resale royalty right consistent with the term of copyright because such a term could easily be tracked and calculated and also allows for the royalty payments to an artist’s heirs. The Office would like to learn more about how to calculate a justifiable term for a resale royalty right.

e. *Threshold Value.* The EVAA establishes that a resale royalty would only be paid on artwork sales of \$10,000 or more. Some comments noted that a \$10,000 threshold amount would exclude many types of works, e.g., photographs and prints, but also many artists whose work is resold in the secondary market for less than \$10,000. Other comments suggested that too low of a threshold would result in a situation where the cost of administering some royalty payments would be higher than the cost of administering the payments. The Office is thus interested in learning more about whether there should be a minimum threshold before a resale royalty is owed and, if so, what that threshold should be.

f. *Payment.* Based on a review of the comments, determining which entity should be responsible for payment of the royalty following the resale of a work is somewhat controversial. Jurisdictions that have a resale royalty differ on which party is responsible for paying the royalty. The EVAA provides that the party responsible for remitting the royalty to the collecting society would be the party responsible for receiving the “money or other consideration” from the sale. The Office would like further information on which party should be responsible for paying any resale royalty to the author.

g. *Royalty Rate.* Some comments noted that the EVAA’s proposed 7% royalty would be one of the highest rates in the world. Many of the comments suggested a 5% royalty with or without a limit on total remuneration as the most consistent with worldwide practice. The Office would like more information on what a reasonable royalty rate could be and how to determine what is reasonable.

7. *Effect on Museums.* Under the EVAA, museums are eligible to receive grants for purchasing art based on a portion of the resale royalty paid to the

author. One comment noted that the EVAA may inadvertently undermine the ways in which museums acquire and deaccession works as well as limit museums’ access to certain pricing information related to works or art. The Office is interested in learning more about the impact of these grants on museums’ purchasing behavior.

8. *Constitutional Concerns.* Two companies submitted comments highlighting constitutional concerns over federal resale royalties. The Office is interested in hearing from parties wishing to elaborate on the arguments summarized below.

a. *Retroactivity and Due Process.* One comment expressed concerns that if a resale royalty would apply retroactively to purchases already concluded it would benefit artists at the expense of buyers and collectors that already purchased the artwork without the requirement to pay a royalty on the secondary sale. In addition, the comment stated that while application of a royalty to new works may be permissible under the Copyright Clause of the U.S. Constitution, its retroactive application raises due process concerns. Thus, the Office would like to hear more regarding whether retroactive legislation would be barred by the Due Process Clause of the U.S. Constitution.

b. *Takings.* One comment noted that applying a resale royalty to pre-existing works may implicate the Takings Clause of the U.S. Constitution through a limitation on the free alienation of property and the transfer of the royalty payment from one individual to another. The Office would like to learn more about whether pre-existing works would implicate the Takings Clause.

c. *Prohibition Against Bills of Attainder.* One comment noted that a federal resale royalty law such as the proposed EVAA may raise issues under the constitutional prohibition on bills of attainder because it specifies particular types of auctioneers that must pay the royalty. For example, the EVAA proposes that the royalty shall apply if the sale takes place in a public auction house that has annual sales in the previous year of over \$25 million—excluding online and private sales. The Office is thus interested in more information on the relationship between the EVAA’s limitations and the constitutional prohibition on bills of attainder.

Requests To Participate

Requests to participate should be submitted online at <http://www.copyright.gov/docs/resaleroyalty/>. The requestor should also indicate, in order of preference, the sessions in

⁵H.R. 3688, 112th Cong. (2011); S. 2000, 112th Cong. (2011).

which the requestor wishes to participate. Depending upon the level of interest, the Copyright Office may not be able to seat every participant in every session he or she requests, so it is helpful to know which topics are most important to each participant. In addition, please note that while an organization may bring multiple representatives, only one person per organization may participate in a particular session. A different person from the same organization may, of course, participate in another session. Requestors who already have submitted a comment in response to the Office's September 19, 2012 Notice of Inquiry, or who will be representing an organization that has submitted a comment, are asked to identify their comments on the request form. Requestors who have not submitted comments should include a brief summary of their views on the topics they wish to discuss directly on the request form. Nonparticipants who wish to attend and observe the discussion should note that seating is limited and, for nonparticipants, will be available on a first come, first served basis.

Dated: March 25, 2013.

Karyn A. Temple-Claggett,

Associate Register of Copyrights and Director of Policy and International Affairs.

[FR Doc. 2013-07270 Filed 3-28-13; 8:45 am]

BILLING CODE 1410-30-P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Polar Programs; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Polar Programs (1130).

Date/Time: Wednesday, May 1, 2013, 12:30 p.m.–5:00 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Stafford II, Room 555, Arlington, VA—THE ADVISORY COMMITTEE MEMBERS WILL ATTEND VIRTUALLY.

Type Of Meeting: Open.

Contact Person: Sue LaFratta, Office of Polar Programs (OPP), National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. (703) 292-8030.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To advise NSF on the impact of its policies, programs, and activities on the polar research

community, to provide advice to the Director of OPP on issues related to long-range planning.

Agenda: Discussion of Committee of Visitors' reports on Antarctic and Arctic programs.

Dated: March 26, 2013.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2013-07331 Filed 3-28-13; 8:45 am]

BILLING CODE 7555-01-P

NATIONAL SCIENCE FOUNDATION

Request for Information (RFI): Reducing Investigator's Administrative Workload for Federally Funded Research

Key Dates

Release Date: March 25, 2013.

Response Date: May 24, 2013.

Issued by

National Science Foundation (NSF).

Purpose

This RFI offers principal investigators with Federal research funding the opportunity to identify Federal agency and university requirements that contribute most to their administrative workload and to offer recommendations for reducing that workload. Members of the National Science Board's Task Force on Administrative Burdens do not wish to increase your administrative workload with this request and you may choose to answer only those questions that are most pertinent to you. Your responses will provide vital input so that we can implement agency-level changes and offer recommendations to reduce unnecessary and redundant administrative requirements.

Background

Over the past decade two Federal Demonstration Partnership (FDP) Faculty Workload Surveys (2005 and 2012) indicate that administrative burdens associated with Federal research funding are consuming roughly 42% of an awardee's available research time, a figure widely cited in numerous articles and reports. To help address these issues, the National Science Board (Board) recently created a Task Force on Administrative Burdens. The Task Force is charged with examining the burden imposed on Federally-supported researchers at U.S. colleges, universities, and non-profit institutions. Responses to this RFI will be considered as the Board develops recommendations to ensure investigators' administrative workload is at an appropriate level.

Request for Information

The Task Force is seeking a response to the questions below. In your response, please reference the question number to which you are responding.

Sources of Administrative Work and Recommendations for Reducing Work

1. What specific requirements associated with your Federally-funded grants require you personally to do the greatest amount of administrative work? Where possible, please indicate whether the origin of that administrative work is a requirement at your institution, a Federal requirement, or a requirement from another institution. What recommendations would you offer that might help to reduce the level of work?

2. Principal investigators responding to the FDP's 2012 Faculty Workload Survey identified the following sources of administrative work, in addition to human subject protection and animal care treated below, as particularly burdensome for Federal grantees:

- Grant progress report submissions;
- Finances (e.g. managing budget-to-actual expenses, equipment and supplies purchases, and other financial issues/requirements);
- Personnel management, hiring, and employee evaluation, and visa issues;
- Effort reporting;
- Conflict of interest;
- Responsible conduct of research;
- Lab safety/security;
- Data sharing; and,
- Sub-contracts (e.g. overseeing: progress toward project goals and deadlines; budget expenditures, invoices, and other financial matters; and, compliance and safety/security issues).

If not addressed in question 1, for any of the areas listed, do you believe that the associated requirements significantly increase the amount of administrative work you personally need to perform? Where possible please indicate whether the source of the required administrative work is a requirement at your institution, a Federal requirement, or a requirement from another institution. What recommendations would you offer that might help to reduce the level of work?

3. Do you receive administrative support from your institution for Federal grants? If yes, for what specific preparation, reporting, and compliance requirements do you receive administrative support? Is the amount of support excellent, good, adequate, poor, or non-existent? Where does your administrative support come from within the institution (e.g. office of the

APPENDIX B **COMMENTING PARTIES
AND ROUNDTABLE PARTICIPANTS**

Parties Who Responded to the September 19, 2012 Notice of Inquiry

1. American Free Trade Association (AFTA)
2. American Photographic Artists (APA)
3. American Society of Illustrators Partnership (ASIP)
4. American Society of Media Photographers (ASMP)
5. Artists Rights Society (ARS)
6. Association of Art Museum Directors (AAMD)
7. Bamberger, Alan
8. Baruch School of Public Affairs
9. BBK Germany
10. Bertoia, Val
11. Calder Foundation
12. California Lawyers for the Arts
13. Center for Art Law
14. Copyright Agency/ Viscopy
15. Copyright and Communication Consulting Agency/ Latvian Authors Association (AKKA/ LA)
16. Darraby, Alexandra
17. Deeton, Christopher
18. Deeton, Yvette
19. Design and Artists Copyright Society (DACS)
20. Dickey, Tina
21. Dn2erth Music Publishing
22. DoV Systems Unltd.
23. eBay Inc.
24. European Grouping of Societies of Authors and Composers (GESAC)
25. European Visual Artists (EVA)
26. Graphic Artists Guild
27. HUNGART
28. Ibram Lassaw Studio
29. Kernochan Center for Law, Media and the Arts
30. Laird, Jo Backer
31. Liebert, Tobe
32. McKee, Cathy
33. Mellinger, Mark
34. Neighbors, Gwen Winter
35. NYU School of Law Art Law Society
36. Parlá, Rey (submitted two separate comments)
37. Pictoright
38. Sociedad de Artistas Visuales Argentinos (SAVA)
39. Sociedade Portuguesa de Autores (SPA)
40. Società italiana degli autori ed editori (SIAE)
41. Société des Auteurs dans les Arts Graphiques et Plastiques (ADAGP)
42. Société Multimédia des Auteurs des Arts Visuels (SOFAM)
43. Sotheby's, Inc. and Christie's, Inc. (Simon J. Frankel)

44. Sotheby's, Inc. and Christie's, Inc. (Paul D. Clement)
45. Stokes, Simon
46. The European Coalition of Art Market Organisations (CINOA)
47. The Focus Group
48. The German National Committee of the International Association of Art (IGBK)
49. The Internet Association (IA), Computer & Communications Industry Association (CCIA)
50. The Irish Visual Artists Rights Organization (IVARO)
51. The Moholy-Nagy Foundation, Inc.
52. The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC)
53. VAGA
54. VG Bild Kunst
55. Visual Artists' Copyright Society (KUVASTO)
56. Visual Entidad de Gestión de Artes Plásticas (VEGAP)
57. Walker, Stefanie
58. Wilson, Derek

Participants in the April 24, 2013 Roundtable Discussion

Honorable Jerrold Nadler, U.S. House of Representatives

Panel I: Changing Legal Landscape, Portability of the Art Market

1. Brown, Terrence, Society of Illustrators (1984-2008)
2. Ferry-Fall, Marie-Anne, Societe des Auteurs dans les Arts Graphiques et Plastiques (ADAGP)
3. Gray, Karen, Christie's Inc.
4. Hicks, Janet, One Mile Gallery
5. Levine, Jane A., Sotheby's Inc.
6. McAndrew, Clare, Arts Economics
7. Panzer, Robert, VAGA
8. Pfenning, Gerhard, VG Bild-Kunst
9. Spriggens, Tania, Design and Artists Copyright Society (DACS)
10. Tarsis, Irina, Esq., Center for Art Law
11. Turner, Cynthia, American Society of Illustrators Partnership

Panel II: Incentive to Create New Work, Visual Artists and Sales

1. Azar, Joseph, Illustrators Club of DC, MD, & VA
2. Cobden, Sandra, Christie's, Inc.
3. Difanis, Anita, Association of Art Museum Directors (AAMD)
4. Frankel, Simon, Sotheby's, Inc.
5. Holland, Brad, American Society of Illustrators Partnership
6. McAndrew, Clare, Art Economics
7. Panzer, Robert, VAGA
8. Perlman, Victor S. American Society of Media Photographers (ASMP)
9. Spangle, Morgan, Dedalus Foundation, Inc.
10. Spriggens, Tania, Design and Artists Copyright Society (DACS)
11. Stella, Frank, Conseil International des Createurs des Arts Graphiques, Plastiques et Photographiques (CIAGP)
12. Stine, Quinn, Intergalactic Enterprises, LLC

Panel III: First Sale/Free Alienability of Property, Constitutional Issues

1. Azar, Joseph, Illustrators Club of DC, MD, & VA
2. Clement, Paul, Esq., Christie's Inc.
3. Collins Goodyear, Anne, College Art Association
4. Feder, Theodore, Artists Rights Society
5. Frankel, Simon, Sotheby's, Inc.
6. Hicks, Janet, One Mile Gallery
7. Lehman, Bruce, Visual Artists Rights Coalition (VARC)
8. Shore, Andrew, Owners' Rights Initiative
9. Stine, Quinn, Intergalactic Enterprises, LLC

Panel IV: Equity for Visual Artists Act of 2011 (EVAA)

1. Brown, Terrence, Society of Illustrators (1984-2008)
2. Cobden, Sandra, Christie's Inc.
3. Difanis, Anita, Association of Art Museum Directors (AAMD)
4. Feder, Theodore, Artists Rights Society
5. Collins Goodyear, Anne, College Art Association
6. Holland, Brad, American Society of Illustrators Partnership
7. Lehman, Bruce, Visual Artists Rights Coalition
8. Levine, Jane A., Sotheby's Inc.
9. Loengard, Philippa, Kernochan Center for Law, Media & the Arts
10. Oman, Ralph, The George Washington University School Law School
11. Perlman, Victor S., American Society of Media Photographers (ASMP)
12. Tarsis, Irina, Esq., Center for Art Law

APPENDIX C **COMPARATIVE SUMMARY OF
SELECT RESALE ROYALTY PROVISIONS**

Comparative Summary of Select Resale Royalty Provisions

Country or Jurisdiction	Sales Covered	Threshold Value	Works Covered	Royalty Rate	Term	Collection, Enforcement & Remedies
Equity for Visual Artists Act of 2011, “E.V.A.A.” <i>(U.S. proposed bill, S. 2000/ H.R. 3688, Dec. 15, 2011)</i>	Resale in an auction by someone other than the artist	\$10,000	"Visual art" defined as a painting, drawing, print, sculpture, or photograph, in original form or limited edition copies	7% of the resale price	Term of copyright	<ul style="list-style-type: none"> • Compulsory collective management • Seller is liable for the royalty • Remedies include suit for copyright infringement and statutory damages
Armenia	Resale by the owner, auctions, galleries, art salons, stores, or other agent	AMD 250,000	Works of graphic or plastic art, including pictures, drawings, paintings, collages, engravings, tapestries, sculpture, lithographs, ceramics, photographs, and jewelry	5% of the resale price	Term of copyright	<ul style="list-style-type: none"> • Compulsory collective management • Seller and agent, if any, are jointly and severally liable for the royalty
Australia	Commercial resale involving an art market professional ¹	AUD \$1,000	Artists' books, batiks, carvings, ceramics, collages, digital artworks, drawings, engravings, fine art jewelry, glassware, installations, lithographs, multimedia artworks, paintings, photographs, pictures, prints, sculptures, tapestries, video artworks, and weavings	5% of the resale price	Term of copyright	<ul style="list-style-type: none"> • Compulsory collective management • Sellers, art market professionals, agents, and buyers are jointly and severally liable to pay the royalty • Royalty due is considered a debt to the right holder • Remedies include civil and criminal penalties

¹ Based on currently available public information, including unofficial translations.

Country or Jurisdiction	Sales Covered	Threshold Value	Works Covered	Royalty Rate	Term	Collection, Enforcement & Remedies
Azerbaijan	Public resale, including through auction, fine arts galleries, art salons, and shops	No minimum sale price if the sale was for 20% more than the previous sale	Works of fine art and original manuscripts	5% of the resale price	Term of copyright	<ul style="list-style-type: none"> • Optional collective management
Brazil	Each resale of original work of art or manuscript	No minimum sale price if the sale was for a gain in value	Original works of art or manuscripts	5% of any gain in value	Term of copyright	<ul style="list-style-type: none"> • Seller or auctioneer, if any, is considered the depositary of the royalty if the author does not collect it at the time of sale
California, U.S.A.²	Resale at auction, or by a gallery, dealer, broker, museum, or other person acting as seller's agent	\$1,000 gross sale price, and price is more than purchase price paid by seller	"Fine art" defined as an original painting, sculpture, or drawing, or an original art work in glass	5% of the resale price	Life of the author plus 20 years for artists who die after January 1, 1983	<ul style="list-style-type: none"> • Optional collective management • Seller or agent liable for the royalty • California Arts Council manages royalties for artists who cannot be located • Remedies include damages, attorney's fees, and fines
Chile	Resale at public auction or through an established dealer	No minimum sale price	A painting, sculpture, drawing, or sketch by Chilean authors	5% of the resale price	Life of the author	<ul style="list-style-type: none"> • No collective management; burden is on the author to enforce the right • Seller liable for the royalty

² California's Resale Royalty Act, CAL. CIV. CODE § 986, was recently held to be an unconstitutional violation of the dormant commerce clause in *Estate of Robert Graham v. Sotheby's Inc.*, 860 F.Supp.2d 1117 (C.D. Cal. 2012). The case is currently pending appeal in the 9th Circuit. See *Estate of Graham v. Sotheby's Inc.*, 860 F. Supp. 2d 1117(C.D. Cal. 2012), appeal docketed, No. 12-56077 (9th Cir. June 8, 2012).

Country or Jurisdiction	Sales Covered	Threshold Value	Works Covered	Royalty Rate	Term	Collection, Enforcement & Remedies
Denmark	Resale where sellers, buyers, or agents are involved as art market professionals, including auction houses, art galleries, and art dealers	€300	Paintings, collages, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glasswork, and photographs, excluding architectural works	Resale price up to €50,000 = 5% See EU Scheme	Term of copyright	<ul style="list-style-type: none"> • Compulsory collective management • Seller and agent, if any, are liable for the royalty
European Union	Resale involving art market professionals as sellers, buyers, or intermediaries and any dealers in works of art	€3,000 ³	Works of graphic or plastic art, including pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware, and photographs	Resale Price up to €50,000 = 4% or 5% €50,000.01 to €200,000 = 3% €200,000.01 to €350,000 = 1% €350,000.01 to €500,000 = 0.5% More than €500,000 = 0.25% The total royalty may not exceed €12,500	Term of copyright	<ul style="list-style-type: none"> • The royalty is payable by the seller. Member States may, however, permit an art market professional other than the seller to be liable or share liability for payment • Right holder has a right to obtain information regarding eligible sales
Finland	Resale involving an art market professional as a seller, buyer, or intermediary	€255	Works of fine art or limited edition copies (excluding architectural works)	Resale price up to €50,000 = 5% See EU Scheme	Term of copyright	<ul style="list-style-type: none"> • Compulsory collective management • Seller and agent, if any, are generally liable for the royalty • Buyer is liable for the royalty if the buyer is the only art market professional involved in the sale

³ While €3,000 is the highest threshold amount Member States may implement, Directive 2001/84/EC permits Member States to use a lower threshold of their choosing.

Country or Jurisdiction	Sales Covered	Threshold Value	Works Covered	Royalty Rate	Term	Collection, Enforcement & Remedies
France	Resale where an art market professional is involved as seller, buyer or agent. The resale must take place in France or be subject to tax on the value added	€750	Works of graphic and plastic art, including pictures, collages, paintings, drawings, or prints that are original works created by the artist or limited edition copies	See EU Scheme	Term of copyright	<ul style="list-style-type: none"> • Seller liable for the royalty • Right holder has right to information regarding sales
Germany	Resale where an art dealer or auctioneer is involved as a purchaser, vendor, or intermediary	€400	Original artistic work or photographic work (excluding applied art or architectural works)	See EU Scheme	Term of copyright	<ul style="list-style-type: none"> • Compulsory collective management • Seller liable for the royalty
Hungary	When the ownership of an original work of art is transferred by any dealer in works of art	HUF 5,000	"Original work of art" defined as works of fine art (e.g., pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures), applied art (e.g., tapestries, ceramics, glassware), and photographic works that are made by the author or are considered original art works (e.g., limited edition copies)	See EU Scheme	Term of copyright	<ul style="list-style-type: none"> • Compulsory collective management • "Dealer in works of art" liable for the royalty, subject to agreement to the contrary

Country or Jurisdiction	Sales Covered	Threshold Value	Works Covered	Royalty Rate	Term	Collection, Enforcement & Remedies
Iceland	Resale involving art market professionals as sellers, buyers, or intermediaries, including auction houses, art galleries, and art dealers	None ⁴	Works of art, including oil, acrylic, tempera, watercolor, gouache, pastel paintings, pictures, drawings, lithographs, engravings, etchings, prints, sculptures, tapestries, glassware, mosaics, ceramics, porcelain, artistic silver and gold works, and photographs	Resale price up to €3,000 = 10% €3,000.01 to €50,000; = 5% See EU Scheme	Term of copyright	<ul style="list-style-type: none"> • Compulsory collective management • Seller or intermediary is liable for the royalty
India	Resale	10,000 rupees	A painting, sculpture, or drawing, or of the original manuscript of a literary or dramatic work or musical work	The Copyright Board shall fix the royalty share, at a rate not to exceed 10% of the resale price	Term of copyright	<ul style="list-style-type: none"> • Any dispute related to the royalty right is referred to the Copyright Board, whose decision shall be final
Italy	Resale involving art market professionals as sellers, buyers, agents, and art dealers, in places such as auction houses, and art galleries,	€3,000	Paintings, collages, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glass works, photographs, and original manuscripts	See EU scheme	Term of copyright	<ul style="list-style-type: none"> • Compulsory collective management • Seller is liable for the royalty. The art market professionals involved in the sale are jointly and severally liable for the royalty

⁴ Iceland has no threshold, and adds an additional tier to the EU scheme, which provides a 10% royalty for works sold for less than €3,000.

Country or Jurisdiction	Sales Covered	Threshold Value	Works Covered	Royalty Rate	Term	Collection, Enforcement & Remedies
Mexico	Resale at a public auction or commercial establishment, or with the intervention of a trader or commercial agent, or under similar conditions	None	Three-dimensional and photographic works of art (excluding works of applied art) and original manuscripts of literary and artistic works	To be established by the National Copyright Institute (INDAUTOR)	Term of copyright	<ul style="list-style-type: none"> • Optional collective management • Seller liable for the royalty
Nigeria	Any sale by public auction or through a dealer	None	Graphic and three-dimensional works, and manuscripts, excluding applied art and architectural works	To be established by the Nigerian Copyright Commission	Term of copyright	<ul style="list-style-type: none"> • Seller presumably liable for the royalty
Peru	Resale at public auction or through a professional art dealer	None	Original of a work of three-dimensional art	3% of the resale price, with the possibility to agree on a different percentage	Term of copyright	<ul style="list-style-type: none"> • Optional collective management • Seller is liable for the royalty
Philippines	Resale or lease subsequent to the first disposition by the author	None	Painting or sculpture, or the original manuscript of a writer or composer, excluding prints, etchings, engravings, applied art ⁵	5% of the resale price	Life of the author plus 50 years	

⁵ Specifically excluded are “prints, etchings, engravings, works of applied art, or works of similar kind wherein the author primarily derives gain from the proceeds of reproductions.” Intellectual Property Code of the Philippines, Rep. Act No. 8293, §§200- 201 (January 1, 1998) (Phil.).

Country or Jurisdiction	Sales Covered	Threshold Value	Works Covered	Royalty Rate	Term	Collection, Enforcement & Remedies
Spain	Resale involving art market professionals as sellers, buyers, or intermediaries including showrooms, auction halls, art galleries, and art dealers	€1,200	Pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glass objects, photographs, and video art pieces	See EU Scheme	Term of copyright	<ul style="list-style-type: none"> • Optional collective management • The art market professional must collect and distribute the royalty to the rights holder or rights management organization. The art market professionals involved will be jointly and severally liable with the seller for the royalty payment. Claims by the rights holder will be prescribed 3 years from notification of the sale.
United Kingdom	Resale where the buyer, seller, or agent “is acting in the course of a business dealing in works of art”	€1,000	Any work of graphic or plastic art, including a picture, collage, painting, drawing, engraving, print, lithograph, sculpture, tapestry, ceramic, glassware, or photograph that is an original or limited edition copy	See EU Scheme	Term of copyright	<ul style="list-style-type: none"> • Compulsory collective management • Seller, buyer, and their agents are jointly and severally liable to pay royalty • Rights holder has a right to information regarding applicable sales

APPENDIX D **OTHER RELEVANT AREAS OF U.S. ART LAW
THAT SUPPORT VISUAL ARTISTS**

Other Relevant Areas of Law that Support Visual Artists

Outside of copyright law, state and federal law provide additional support for visual artists in a variety of ways.

1. State moral rights provisions

Prior to the 1990 enactment of VARA, which provided U.S. artists with moral rights of attribution and integrity, a number of states enacted moral rights protection for visual artists.¹ Several states provide artists with paternity and integrity rights, including California, New York, Massachusetts, Maine, Louisiana, New Jersey, Pennsylvania, Rhode Island, Connecticut, and Nevada.²

In addition, several states provide certain moral rights for fine art located, or commissioned for use, in public buildings.³ For example, Georgia law provides that artists who have been commissioned to create art for state buildings may include the right to receive a resale royalty on commissioned works subsequently sold by the state to third parties in the original commissioning contract.⁴ All state laws that provide some type of moral rights laws are subject to preemption analysis under Section 301 of the U.S. Copyright Act.

2. Arts and cultural districts

With the dual aim of encouraging local artists and revitalizing distressed neighborhoods, Maryland and Rhode Island provide tax incentives for artists who reside in designated “cultural districts” or “arts and entertainment districts.” For example, in Maryland, qualifying artists, who are broadly defined under the statute to include not only painters and sculptors, but also writers, actors, composers, and jewelry and clothing designers, are granted an income tax deduction of the “amount of income derived within an arts and entertainment district . . . from the publication, production, or sale of an artistic work that the artist created, wrote, composed, or executed in the arts and entertainment district.”⁵ Artists residing in a Maryland arts and entertainment district also receive a property tax credit for up to ten years⁶ and an exemption from tax on gross receipts from any admissions amusement charge levied by the artists.⁷

Rhode Island’s tax code includes a similar statutory scheme to provide tax incentives for qualifying artists, who are defined broadly, as under the Maryland statute, to include not only visual artists, sculptors, and painters, but writers, actors, composers, filmmakers, and dancers.⁸

¹ 2 RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 1266-79 (3d ed. 2005) (“LERNER & BRESLER”) (surveying California, Connecticut, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, Pennsylvania, and Rhode Island, as well as various legal challenges to these laws).

² *See id.*

³ *Id.* at 1271-73 (listing Georgia, Montana, New Mexico, and Utah as states with such provisions).

⁴ GA. CODE ANN. § 8-5 (2013). *See also* LERNER & BRESLER at 1273.

⁵ MD. TAX-GEN. CODE ANN. § 10-207(v) (2013; MD. ECON. DEV. CODE ANN., §§ 4-701(c), 4-706 (2013).

⁶ MD. TAX-PROP. CODE ANN. § 9-240 (2013).

⁷ MD. TAX-GEN CODE ANN. § 4-104(b) (2013).

⁸ R.I. GEN. LAWS § 44-18-30B(b)(1) (2013).

To qualify, the artist must live and work within certain well-defined geographic areas, or “economic development zones.”⁹

3. Sales Tax

New York tax law provides that certain goods purchased for resale can be exempt from sales tax.¹⁰ Under this provision, an artist does not have to pay sales tax on the purchase of art supplies, such as paints and canvas, if the artist provides the seller with a resale certificate that confirms that the purchased art materials will be incorporated into a work of art that will be offered for sale.¹¹ While a somewhat minimal benefit, these provisions provide some economic relief for struggling artists.

4. Consignment laws governing the sales of fine art

Due to perceived inequitable treatment of artists by some dealers in the early 1960’s, New York passed legislation aimed at clarifying the fiduciary relationship between artist and dealer.¹² Aimed at protecting artists selling their work on consignment from art dealers who may wrongfully either retain the work to be sold or the artist’s share of the proceeds, the New York statute has served as the model for similar legislation in at least thirty states.¹³ Under the statute, whenever an artist delivers a work to an art dealer for exhibition, or to be sold on consignment, the work and any proceeds are to be held in trust by the dealer for the artist, unless the work was delivered to the dealer pursuant to an outright sale.¹⁴ Further, the New York statute protects artists from claims by art dealers’ creditors, and also prohibits art dealers from using works they have accepted for sale on consignment as a security interest.¹⁵

5. Federal Programs

The National Endowment for the Arts (NEA), the National Endowment for the Humanities (NEH), and the Institute of Museum and Library Services (IMLS), all provide grants for the promotion of the humanities. However, these organizations primarily, and in the case of the IMLS, exclusively, provide grants to organizations, and therefore, any benefit to individual visual artists would be the indirect result of a grant to an organization, such as a non-profit museum or art gallery, that in turn provided some benefit to the artist.¹⁶

⁹ See R.I. GEN. LAWS §44-18-30BC(c)(5), (describing the precise geographic boundaries of the West Warwick municipal economic development zone).

¹⁰ NY TAX LAW § 1101(b)(4)(i) (Gould 2013).

¹¹ 3 LERNER & BRESLER at 1810.

¹² 1 LERNER & BRESLER at 39-40.

¹³ N.Y. ARTS & CULT. AFF. LAW §12.01 (Gould 2013); 1 LERNER & BRESLER at 39-40.

¹⁴ N.Y. ARTS & CULT. AFF. LAW §12.01(1)(a)(i-v).

¹⁵ *Id.* §12.01(1)(a)(v); 1 LERNER & BRESLER at 40-42.

¹⁶ The NEA provides grants for individual authors for creative writing and translations, but currently does not provide any grants specifically for visual artists. See *generally Grants*, NAT’L ENDOWMENT FOR THE ARTS, <http://arts.gov/grants>. The NEH provides grants for the promotion of excellence in the humanities, but like the NEA, these grants typically go to cultural institutions, such as museums, archives, libraries, colleges, etc. See *generally About NEH*, NAT’L ENDOWMENT FOR THE HUMANITIES, <http://www.neh.gov/about>. The IMLS provides grants primarily to museums, libraries, and tribal

In the past, artists also received benefits through various tax deduction provisions. For example, under the War Revenue Act of 1917, artists were able to deduct the full fair market value of any work donated to a museum, charitable organization, or other tax-exempt entity.¹⁷ The deduction was viewed by many as a means of both supporting artists and of encouraging donations of art to museums.¹⁸ This deduction, however, had two unintended side effects: (1) some artists actually benefited more by donating a work than by selling it; and (2) the deduction favored donations of appreciated property over cash donations drawn from taxable income.¹⁹ Congress substantially limited the deduction in 1969 to prohibit artists from deducting the full market value of their works.²⁰ Instead, artists may deduct only the material costs of creation.²¹ Since this legislation's enactment, some scholars have argued that it has had an adverse impact on museums and other charitable organizations because there no longer is a tax incentive to encourage artists to donate their works.²²

Legislators in both the House and Senate have attempted, so far unsuccessfully, to expand the tax deduction through a series of proposed bills, starting in the 106th Congress.²³ These bills would amend the Internal Revenue Code of 1986 to once again allow artists and other authors to deduct the full fair market value for the charitable donation of their works.²⁴

organizations. *See, Grant Applications: Eligibility Criteria*, INST. OF MUSEUM AND LIBR. SERVICES http://www.ims.gov/applicants/eligibility_criteria.aspx.

¹⁷ War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300 (1917) (current version at I.R.C. § 170(2013)); *see also* Douglas J. Bell, *Changing I.R.C. §170(e)(1)(A): For Art's Sake*, 37 CASE W. RES. 536, 538 (1987) ("Bell"); Sean Conley, *Paint a New Picture: The Artist-Museum Partnership Act and the Opening of New markets for Charitable Giving*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 89, 107 (Fall 2009) ("Conley").

¹⁸ *See* Conley 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 89, 107.

¹⁹ Note, *Tax Treatment of Artists' Charitable Contributions*, 89 YALE L.J. 144, 145-46 (1979).

²⁰ Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(a)(1)(B), 83 Stat. 487, I.R.C. § 170(e)(1)(2013).

²¹ *See* Bell at 543. The Tax Reform Act of 1969 has also been cited as a response to a large deduction taken by President Nixon for the donation of his vice presidential papers. *Id.* at 542.

²² The Library of Congress was among several organizations that noted a precipitous decline in donations of self-created works following enactment of the 1969 Act. *See supra* note 19 at 144 n.2 (1979) (listing testimony submitted to the committee regarding charitable organizations such as the New York Museum of Modern Art and Columbia University), *citing* Letter from L. Quincy Mumford, Librarian of Congress, to Rep. Mills (Feb. 13, 1973), *reprinted in Hearings on General Tax Reform Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess. 6287-88 (1973) (providing statistics showing that contributions of self-generated manuscripts to the Library declined from about 230 musical manuscripts and 179,000 literary manuscripts annually to zero donations in the years following enactment).

²³ The most recent House version of the bill was introduced on June 25, 2013, as the Artist-Museum Partnership Act of 2013, H.R. 2482, 113th Cong. (1st Sess. 2013). The most recent Senate version of the bill was introduced in 2011 as the Art and Collectibles Capital Gains Tax Treatment Parity Act, S. 930, 112th Cong. (1st Sess. 2011).

²⁴ H.R. 2482, 113th Cong., Sec. 2 (2013). Introduced on June 25, 2013, this bill had twenty-five co-sponsors at the time this report was prepared.

APPENDIX E **SELECTED COUNTRIES WITH LAWS
CONTAINING PROVISIONS ON THE
RESALE RIGHT**

Selected Countries with Laws Containing Provisions on Resale Royalties

Country or Jurisdiction	Laws or Provisions on Resale Royalties
Albania	Ligi Nr. 9380, datë 28.4.2005 për të drejtën e autorit dhe të drejtat e tjera të lidhura me të, <i>translated as</i> Law No. 9380 of Apr. 28, 2005, on Copyright and Related Rights, art. 18.
Algeria	Ordonnance n° 03-05 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative aux droits d'auteur et aux droits voisins, <i>translated as</i> Ordinance No. 03-05 of 19 Joumada El Oula 1424 corresponding to July 19, 2003 on Copyright and Related Rights, art. 28 (unofficial translation).
Armenia	Law on Copyright and Related Rights of June 15, 2006, art. 27.
Australia	<i>Resale Royalty Right for Visual Artists Bill 2009</i> (Cth).
Austria	BUNDESGESETZ ÜBER DAS URHEBERRECHT AN WERKEN DER LITERATUR UND DER KUNST UND ÜBER VERWANDTE SCHUTZRECHTE [URHEBERRECHTSGESETZ] [Federal Law on Copyrights on Literary and Artistic Works and Related Rights] BUNDESGESETZBLATT (BGBl) No. 111/1936, as amended on Aug. 10, 2011, §16b.
Azerbaijan	Müəlliflik Hüququ və Əlaqəli Hüquqlar haqqında Azərbaycan Respublikasının Qanunu (enacted Sept. 30, 1997), <i>translated as</i> Law of the Republic of Azerbaijan on Copyright and Related Rights, as amended by Law No. 1079-IIIQD of Sept. 30, 2010, art. 16(2) (unofficial translation).
Belgium	Loi transposant en droit belge la directive 2001/84/CE du Parlement européen et du Conseil du 27 Septembre 2001 relative au droit de suite au profit de l'auteur d'une oeuvre d'art originale [Act transposing into Belgian law Directive 2001/84/EC of the European Parliament and of the Council of 27 Sept. 2001 on the resale right for the benefit of the author of original artwork] of Dec. 4, 2006, BELGISCH STAATSBAD [B.S.] [Official Gazette of Belgium], Jan. 23, 2007, 02962.
Benin	Loi n° 2005-30 du 5 avril 2006 relative à la protection du droit d'auteur et des droits voisins en République du Bénin, <i>translated as</i> Law No. 2005-30 of Apr. 5, 2006 On Protection of Copyright and Neighboring Rights in the Republic of Benin, art. 4.2 (unofficial translation).
Bolivia (Plurinational State of)	Ley N° 1322 de 13 de Abril de 1992, <i>translated as</i> Law No. 1322 of Apr. 13, 1992 on Copyright, art. 50 (unofficial translation).
Bosnia and Herzegovina	Zakon o Autorskom i Srodnim Pravima, enacted July 13, 2010, <i>translated as</i> Law on Copyright and Related Rights, art. 35 (unofficial translation).
Brazil	Decreto No. 9.610, de 19 de Fevereiro de 1998 (Lei dos Direitos Autorais) DIARIO OFICIAL [D.O.] de 20.2.1998, <i>translated as</i> Law No. 9.610 of Feb. 19, 1998 on Copyright and Neighboring Rights, art. 38 (unofficial translation).
Bulgaria	Закон за авторското право и сродните му права (както е изменен през 2011 г.) enacted June 29, 1993, <i>translated as</i> Law on Copyright and Neighboring Rights (as amended Mar. 2011), art. 20, 20a, 99a (unofficial translation).
Burkina Faso	Loi n° 032-99/AN du 22 décembre 1999 portant protection de la propriété littéraire et artistique, <i>translated as</i> Law No. 032-99/AN of Dec. 22, 1999 on the Protection of Literary and Artistic Property, art. 18, 19, 104 (unofficial translation).
Cameroon	Loi n° 2000/011 du 19 décembre 2000 relative au droit d'auteur et aux droits voisins; <i>translated as</i> Law No. 2000/011 of Dec. 19, 2000 on Copyright and Neighboring Rights, art. 20; and Décret n° 2001/956/PM du 1er novembre 2001 fixant les modalités d'application de la loi n° 2000/11 du 19 décembre 2000 relative au droit d'auteur et aux droits voisins, <i>translated as</i> Decree No. 2001/956/PM of Nov. 1, 2001 Implementing Law No. 2000/11 of Dec. 19, 2000 on Copyright and Neighboring Rights, art. 3-7 (unofficial translations).

Country or Jurisdiction	Laws or Provisions on Resale Royalties
Chad	Loi n° 005/PR/2003 du 2 mai 2003 portant Protection du Droit d'Auteur, des Droits Voisins et des Expressions du Folklore, <i>translated as</i> Law No. 005/PR/2003 of May 2nd, 2003 on the Protection of Copyright, Neighboring rights and Expressions of Folklore, art. 33, 130 (unofficial translation).
Chile	Law No. 17336 sobre la Propiedad Intelectual, Octubre 2, 1970, (as amended May 4, 2010) DIARIO OFICIAL [D.O.], <i>translated as</i> Law No. 17.336 on Intellectual Property art. 36 (unofficial translation).
Congo	Loi n° 24/82 du 7 juillet 1982 sur le droit d'auteur et les droits voisins, <i>translated as</i> Law No. 24/82 of July 7, 1982 on Copyright and Neighboring Rights, art. 30 (unofficial translation).
Comoros	Loi du 11 mars 1957 sur la propriété littéraire et artistique, [Law of Mar. 11, 1957 on Literary and Artistic Property] art. 42.
Costa Rica	Ley N° 6683 sobre el Derecho de Autor y Derechos Conexos [Law No. 6683 on Copyright and Related Rights], enacted Oct. 14, 1982, as amended by Law No. 8834 of May 3, 2010, art. 151.
Côte d'Ivoire	Loi n° 96-564 du 25 juillet 1996 relative à la protection des oeuvres de l'esprit et aux droit des auteurs, des artistes-interprètes et des producteurs de phonogrammes et vidéogrammes, <i>translated as</i> Law No. 96-564 of July 25, 1996 on the Protection of Intellectual Works and the Rights of Authors, Performers and Phonogram and Videogram Producers, art. 25, 26, 44, 74 (unofficial translation).
Croatia	Copyright and Related Rights Act and the Act on Amendments to the Copyright and Related Rights Act (OG Nos. 167/2003, 79/2007 & 80/2011), art. 3.3.2 (2011).
Czech Republic	Zákon č. 121/2000 Sb., as amended by Zákon č. 81/2005 Sb., Zákon č. 61/2006 Sb., and Zákon č. 216/2006 Sb., art. 24; and Annex to Zákon č. 121/2000 Sb., art 1, <i>translated as</i> Consolidated version of Act No. 121/2000 on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act), as amended by Act No. 81/2005, Act No. 61/2006 and Act No. 216/2006, art 24; and Annex to Act No. 121/2000 Sb., art 1 (2006) (unofficial translation).
Denmark	Consolidated Act on Copyright (Consolidated Act No. 202 of Feb. 27th, 2010), art. 38.
Djibouti	Loi n°154/AN/06 du 23 juillet 2006 relative à la protection du droit d'auteur et du droit voisin, <i>translated as</i> Law No. 154/AN/06 of July 23, 2006 on the Protection of Copyright and Neighboring Rights, art. 11 (unofficial translation).
Dominican Republic	Ley N° 65-00 de Derecho de Autor, enacted Aug. 21, 2000, as amended Jan. 8, 2007, <i>translated as</i> Law No. 65-00 on Copyright, art. 78.
Ecuador	Ley de Propiedad Intelectual (Codificación N° 2006-013), enacted May 8, 1998, <i>translated as</i> Intellectual Property Law (Codification No. 2006-13), art. 38, 39 (2006) (unofficial translation).
El Salvador	Ley de Fomento y Protección de la Propiedad Intelectual (Decreto Legislativo N° 604, del 15 de julio de 1993) [Law on the Promotion and Protection of Intellectual Property (Legislative Decree No. 604 of July 15, 1993)], as amended Apr. 30, 2009, art. 37.
Estonia	Autoriõiguse seadus Vastu võetud 11.11.1992 RT 1992, 49, 615, <i>translated as</i> Copyright Act, Passed Nov. 11, 1992, as amended by RT I, 01.01.2012 28.12.2011, §§ 15, 81, 98 (2012) (unofficial translation).
European Union	Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32–36.
Finland	Tekijänoikeuslaki 8.7.1961/404, <i>translated as</i> Copyright Act (Act No. 404 of July 8, 1961, as amended up to Apr. 30, 2010) §§ 26i-26l (unofficial translation).

Country or Jurisdiction	Laws or Provisions on Resale Royalties
France	CODE DE LA PROPRIÉTÉ INTELLECTUELLE [Intellectual Property Code], enacted July 1, 1992, as amended by Decree No. 2012-634 of 3 May 2012, art. L122-8, L123-7, L334-1, R122-1 to R122-11.
Georgia	საქართველოს კანონი საავტორო და მომიჯნავე უფლებების შესახებ, enacted June 22, 1999, as amended May 4, 2010, <i>translated as</i> Law of Georgia on Copyright and Neighboring Rights, art. 20 (unofficial translation).
Germany	Gesetz über das Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [Copyright Act], Sept. 9, 1965, Bundesgesetzblatt [BGBl] at 1273, as amended Dec. 17, 2008 (BGBl I S. 2586), <i>translated as</i> Act on Copyright and Related Rights, art. 26.
Greece	Nomos (1993:2121) Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα [Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters], ΦΕΚ 1993, Α:25, as amended Dec. 23, 2010, art. 5.
Guatemala	Ley de Derecho de Autor y Derechos Conexos, Decree Number 33-98 [Law on Copyright and Related Rights], enacted May 19, 1998, as amended Nov. 1, 2000, art. 37, 38.
Guinea-Bissau	Código do Direito de Autor (aprovado pelo Decreto-Lei n° 46.980 de 27 de Abril de 1966), <i>translated as</i> Copyright Code (approved by Decree-Law No. 46.980 of Apr. 27, 1966), art. 59, 60 (1972) (unofficial translation).
Honduras	Ley de Derecho de Autor y de los Derechos Conexos, Decreto 4-99-E [Law on Copyright and Related Rights, Decree No. 4-99-E], enacted Dec. 13, 1999, as amended Mar. 16, 2006, art. 9(29)-(30).
Hungary	1999. évi LXXVI. törvény a szerzői jogról (consolidated text as of Aug. 1, 2013), <i>translated as</i> Act LXXVI of 1999 on Copyright (consolidated text as of Aug. 1, 2013), art. 70 (unofficial translation).
Iceland	Copyright Act No. 73, of 29 May 1972, as amended Apr. 21, 2010, art. 25b.
India	Copyright Act, 1957, as amended by The Copyright (Amendment) Act, 1999, No. 49, Acts of Parliament, 1999, and The Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012, art. 53A.
Ireland	European Communities (Artists' Resale Right) Regulations 2006 (S.I. No. 312/2006).
Italy	Legge 22 aprile 1941, n. 633 sulla protezione del diritto d'autore e di altri diritti connessi al suo esercizio (aggiornata con le modifiche introdotte dal decreto-legge 30 aprile 2010, n. 64) [Law No. 633 of Apr. 22, 1941, for the Protection of Copyright and Neighboring Rights (as amended by Decree Law of Apr. 30, 2010)], art. 144 – 150.
Latvia	Autortiesību likums, enacted Apr. 6, 2000, as amended on Dec. 6, 2007, <i>translated as</i> Copyright Law, as amended on Dec. 6, 2007, § 17 (unofficial translation).
Liechtenstein	Gesetz über das Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, URG) [Law on Copyright and Neighboring Rights (Copyright Law)], enacted May 19, 1999, as amended by Regional Law Gazette 2006 No. 263, art. 15a - 15g .
Lithuania	1999 m. gegužės 18 d. Autorių teisių ir gretutinių teisių įstatymas Nr. VIII-1185 (su pakeitimais, padarytais 2010 m. sausio 19 d. įstatymu Nr. XI-656), <i>translated as</i> Law on Copyright and Related Rights No. VIII-1185 of May 18, 1999, as amended by Law No. XI-656 of Jan. 19, 2010, art. 17 (unofficial translation).
Luxembourg	Loi du 18 avril 2004 modifiant : 1. la loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données et 2. la loi modifiée du 20 juillet 1992 portant modification du régime des brevets d'invention, <i>translated as</i> Law of 18 Apr. 2004 modifying the Law of 18 Apr. 2001 on Copyright, Related Rights and Databases and the amended Law of 20 July 1992 on Patents, art. 30 (unofficial translation).
Madagascar	Loi No. 94-036 du 18 sept. 1995 portant sur la Propriété littéraire et artistique, <i>translated as</i> Law No. 94-036 of 18 Sept. 1995 on Literary and Artistic Property, art. 40, 141 (unofficial translation).

Country or Jurisdiction	Laws or Provisions on Resale Royalties
Mali	Loi No. 08 - 024 / du 23 juillet 2008 fixant le régime de la propriété littéraire et artistique en République du Mali, <i>translated as</i> Law No. 08-024 of July 23, 2008 laying down the Regime of Literary and Artistic Property in the Republic of Mali, art. 19 (unofficial translation).
Malta	A.L. 174 ta' l-2006 Att Dwar ID-Drittijiet, Regolamenti ta' l-2006 dwar id-Dritt ta' Bejj (KAP. 415), <i>translated as</i> L.N. 174 of 2006 Copyright Act (Cap. 415) Artists' Resale Right Regulations (unofficial translation).
Mauritius	Copyright Act 1997, art. 4(2)(a).
Mexico	Ley Federal de Derechos de Autor [LFDA] [Authors' Rights Law] of 1996, as amended, art. 92bis, Diario Oficial de la Federación [DO], 1 de Enero de 2012; and Reglamento de la Ley Federal de Derecho de Autor [Regulations under the Federal Copyright Law], as amended, art. 31bis, 31ter, 31quater. Diario Oficial de la Federación [DO], 14 de Sept. 2005.
Monaco	Loi n° 491 du 24/11/1948 sur la protection des oeuvres littéraires et artistiques [Law No. 491 of 24 Nov. 1948 on the Protection of Literary and Artistic Property], as amended by Law No. 1035 of June 26, 1981, art. 11-1.
Montenegro	Zakon O Autorskom [Law on Copyright and Related Rights], <i>translated as</i> Law No. 07-1/11-1/15 of July 12, 2011, on Copyright and Related Rights, promulgated by Decree No. 01-933/2 of July 25, 2011, art. 34-35.
Netherlands	Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht (Wet Copyright 1912, zoals laatstelijk gewijzigd in 2008) [Act of Sept. 23, 1912, containing new rules of copyright (Copyright Act 1912, as amended in 2008)], art. 43, 43a-g.
Nicaragua	Ley No. 312, 6 July 1999, Ley de Derecho de Autor y Derechos Conexos [Law on Copyright and Related Rights], art. 26, LA GACETA, DIARIO OFICIAL [L.G.], 31 Aug. 1999, as amended by Law No. 577 of Mar. 24, 2006.
Nigeria	Copyright Act (2004), Cap. (28), §13.
Norway	Lov om opphavsrett til åndsverk m.v. (åndsverkloven) 12 mai 1961 nr. 02 [Copyright Act], as amended May 31, 2013, in force July 1, 2013, § 38c.
Panama	Ley No. 64 de 10 de Octubre de 2012, Sobre Derecho de Autor y Derechos Conexos [Law on Copyright and Related Rights], art. 36.
Paraguay	Ley No. 1328/98 de Derecho de Autor y Derechos Conexos, <i>translated as</i> Law No. 1328/98 on Copyright and Related Rights, Oct. 20, 1998, art. 77 (unofficial translation).
Peru	Ley sobre el Derecho de Autor (Decreto Legislativo No. 822 del 23 de abril de 1996), <i>translated as</i> Copyright Law (Legislative Decree No. 822 of April 23, 1996) as amended by Law No. 28571 of July 6, 2005, art. 82-84 (unofficial translation).
Philippines	Intellectual Property Code of the Philippines, Rep. Act No. 8293, (Jan. 1, 1998), as amended July 23, 2012, §§ 200-201.
Poland	Prawie autorskim i prawach pokrewnych (1994 r. DZ. U. nr. 83, poz. 3 art. 18-19.5), <i>translated as</i> Law No. 83 of Feb. 4, 1994 on Copyright and Neighboring Rights, as amended Oct. 21, 2010, art. 18-19.5 (unofficial translation).
Portugal	Código do Direito de Autor e dos Direitos Conexos, <i>translated as</i> Code of Copyright and Related Rights, enacted Sept. 17, 1985, as amended by Law No. 16/2008 of Apr. 1, 2008, art. 54 (unofficial translation)
Romania	Lege nr. 8 din 14 martie 1996 privind dreptul de autor si drepturile conexe, <i>translated as</i> Law No. 8 of Mar. 14, 1996 on Copyright and Neighboring Rights, as amended by Law No. 329/2006 of Mar. 29, 2006, art. 21 (unofficial translation).
Russian Federation	Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code], 51-FZ of Nov. 30, 1994, 14-FZ of Jan. 26, 1996, 146-FZ of Nov. 26, 2001 and 230-FZ of Dec. 18, 2006, as amended Dec. 8, 2011, art. 1293.

Country or Jurisdiction	Laws or Provisions on Resale Royalties
Senegal	Loi No. 2008-09 du 25 janvier 2008 sur le droit d’auteur et les droits voisins, <i>translated as</i> Law No. 2008-09 of Jan. 25, 2008 on Copyright and Related Rights, Art. 47-50 (unofficial translation).
Serbia	Law on Copyright and Related Rights, enacted Dec. 11, 2009, as amended Dec. 17, 2012, sec. 4.3.2, art. 35, 36.
Slovakia	618/2003 Z.z. Zákon zo 4. decembra 2003 o autorskom práve a právach súvisiacich s autorským právom (autorský zákon), <i>translated as</i> Act No. 618/2003 on Copyright and Rights Related to Copyright, as amended Feb. 6, 2007, sec. 19 (unofficial translation).
Slovenia	Zakon o spremembah in dopolnitvah Zakona o avtorski in sorodnih pravicah, <i>translated as</i> Copyright and Related Rights Act of 30 Mar.1995, as amended on 15 Dec. 2006, art. 35 (unofficial translation).
Spain	Ley No. 3/2008, de 23 de diciembre, relativa al Derecho de Participación en Beneficio del Autor de una Obra de Arte Original [Law on the Resale Right for the Benefit of the Author of an Original Art Work].
Sweden	2a. ch. 26n, 26o, 26p §§ Lag om upphovsrätt till litterära och konstnärliga verk (1960:729), <i>translated as</i> Act on Copyright in Literary and Artistic Works, (as amended Apr. 1, 2011) art. 26n – p (unofficial translation).
The Former Yugoslav Republic of Macedonia	ЗАКОН ЗА АВТОРСКОТО ПРАВО И СРОДНИТЕ ПРАВА Сл. Весник на Р. Македонија, бр.115 од 31.08.2010 година [Law on Copyright and Related Rights, Official Gazette of the Republic of Macedonia br. 115 of Aug. 31, 2010], <i>translated as</i> Law on Copyrights and Related Rights, art. 41-44 (2010) (unofficial translation).
Togo	Loi n° 91-12 du 10 juin 1991 portant protection du droit d’auteur, du folklore et des droits voisins, <i>translated as</i> Law No. 91-12 of June 10, 1991 on the Protection of Copyright, Folklore and Related Rights, art. 47, 91.
Tunisia	Loi No. 94-36 du 24 février 1994, relative à la propriété littéraire et artistique, <i>translated as</i> Law No. 94-36 of Feb. 24, 1994, on Literary and Artistic Property, art. 25 (unofficial translation).
Turkey	5846 sayılı Fikir ve Sanat Eserleri Kanunu (son ile değiştirilen 23 Ocak 2008 Tarihli ve 5728 Sayılı Kanunla) <i>translated as</i> Law No. 5846 on Intellectual and Artistic Works, as amended by Law No. 5728 of Jan. 23, 2008, art. 45 (unofficial translation).
United Kingdom	The Artist’s Resale Right Regulations, 2006, S.I. 2006/346; The Artist’s Resale Right (Amendment) Regulations, 2009, S.I. 2009/2792; and The Artist’s Resale Right (Amendment) Regulations, 2011, S.I. 2011/ 2873.
Uruguay	Ley No. 9.739 de 17 de diciembre de 1937 sobre Derechos de Autor, <i>translated as</i> Law No. 9.739 of Dec. 17, 1937 Copyright Law, as amended by Law No. 17.616 of Jan. 10, 2003, art. 9 (unofficial translation).
Uzbekistan	Ўзбекистон Республикасининг Қонуни № 42, 20.07.06 Муаллифлик ҳуқуқи ва турдош ҳуқуқлар тўғрисида, <i>translated as</i> Law of the Republic of Uzbekistan No. 42 of July 20, 2006 on Copyright and Related Rights, art. 23 (unofficial translation).
Venezuela (Bolivarian Republic of)	Ley sobre el Derecho de Autor, enacted Aug. 14, 1993 <i>translated as</i> Law on Copyright, art. 54 (unofficial translation).

Notes:

- Citations to the 79 laws above are based on currently available public information.
- “*Translated as*” refers to a reprinted version of the original law in English. Where indicated, the Copyright Office has obtained an unofficial translation of the law, including text that may be posted on the World Intellectual Property Organization (WIPO) website at <http://www.wipo.int/portal/en/index.html>, as well as other sources.
- Text bracketed as “[]” refers to a translation of the title of the law, not the text of the law.

