

DROIT DE SUITE:
THE ARTIST'S RESALE ROYALTY

DECEMBER 1992

A REPORT OF THE
REGISTER OF COPYRIGHTS





Library of Congress
Department 17
Washington, D.C. 20540

The Register of Copyrights
of the
United States of America

December 1, 1992

(202) 707-8350

Dear Mr. Vice President:

I have the honor of sending you a copy of the Copyright Office's report on droit de suite, the resale royalty right for visual artists. As required by section 608(b) of the Visual Artists Rights Act of 1990, I have studied the feasibility of implementing such a royalty in the United States, considering the testimony, comments, and scholarly literature of various experts, as well as the experience of California, France, Germany, and Belgium with droit de suite.

I would be pleased to elaborate on any aspect of the report.

Sincerely,



Ralph Oman
Register of Copyrights

The Vice President
President of the Senate
United States Senate
S-212 The Capitol
Washington, D.C. 20510

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17 USC 106A
note.

SEC. 608. STUDIES BY COPYRIGHT OFFICE.

* * * * *

(b) STUDY ON RESALE ROYALTIES.—

(1) NATURE OF STUDY.—The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing—

(A) a requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

(B) other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

(2) GROUPS TO BE CONSULTED.—The study under paragraph (1) shall be conducted in consultation with other appropriate departments and agencies of the United States, foreign governments, and groups involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, collectors of fine art, and curators of art museums.

(3) REPORT TO CONGRESS.—Not later than 18 months after the date of the enactment of this Act, the Register of Copyrights shall submit to the Congress a report containing the results of the study conducted under this subsection.



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Ralph Oman
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The Honorable
Thomas S. Foley
Speaker of the House of
Representatives
Office of the Speaker
H-204 The Capitol
Washington, D.C. 20515

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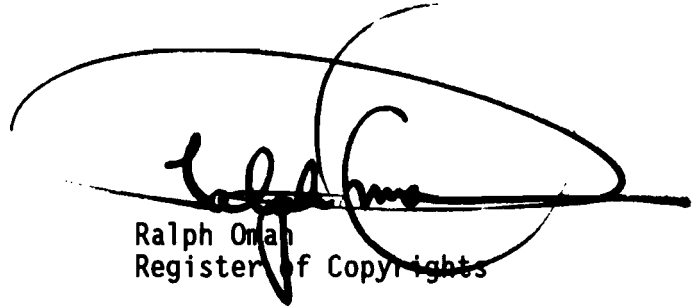
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Ralph Oman
Register of Copyrights

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**Droit De Suite:
The Artist's Resale Royalty**

EXECUTIVE SUMMARY

Introduction:

On December 1, 1990, President Bush signed into law the Visual Artists Rights Act of 1990 [VARA], which became generally effective on June 1, 1991, and grants to visual artists certain moral rights of attribution and integrity. Section 608(b) of that legislation requires the Register of Copyrights, in consultation with the Chair of the National Endowment of the Arts, to study the feasibility of implementing a resale royalty on the sale of works of visual art.

The Copyright Office consulted with the National Endowment of the Arts (NEA), and NEA provided the Office with suggested arts organizations that should be contacted in the course of this study. Subsequently, the Copyright Office issued a Notice of Inquiry requesting public comment on enactment of a federal resale royalty. In particular, the Office sought comment from artists, art dealers, auction houses, investment advisors, fine art collectors, and art museum curators. The Copyright Office also published a second Notice of Inquiry announcing that it would continue its investigation of resale royalties for artists by holding two public hearings, one in San Francisco, on January 23, 1992, and another in New York, on March 6, 1992. Both Notices of Inquiry focused principally on seven significant areas where adopting a federal resale royalty would affect U.S. law and the art community: the potential effect on creation of new works and the existing art market; the form of, beneficiaries of, and term of the right; enforcement and collection mechanisms; whether the right should be

waivable and alienable, and whether the California law should be preempted by federal law.

The Office's study has two parts. The Report itself sets out what the Office found in examining and assessing all of the available data on the issue of whether or not the benefit to visual artists from a royalty on the resale of their works will outweigh any increased cost and potential decreased purchases of works of contemporary art. The Appendix to the Report contains the transcripts of the two public hearings and the comment letters.

I. The Foreign Experience With Droit de Suite

Like Puccini's "La Boheme," which opened with an artist and a poet shivering in a Paris garret, the droit de suite grew from a European, particularly French, awareness of the state of affairs of struggling artists at the turn of the century.

Today, the droit de suite -- the right of an artist to collect a part of the price paid when a work is resold -- is based on the premise that visual artists are entitled to participate in an increase in the value of their works in ways that are not otherwise adequately addressed by copyright law.

The copyright law's rights of reproduction and distribution are better suited to exploitation of literary or musical works. A visual artist's expression is usually embodied in an end product, sold to a single purchaser. The artist's current work and reputation continue to affect the value of that earlier work. Many European countries, in the event of resale, allow artists to benefit from any increase in value in their works.

In 1920, France became the first country to recognize the droit de suite. Today, some 36 countries have the resale royalty, and several other countries are considering legislation to enact it. Roughly half of the countries

that now purport to have droit de suite, however, lack implementing legislation. The level of commitment and the characteristics of the national laws vary widely.

There have been efforts to standardize the resale royalty. Some observers argue that the droit de suite's survival depends on its internationalization. The Berne Convention for the Protection of Literary and Artistic Property contains statements of principle in favor of the droit de suite. The European Community has directed a study of the droit de suite that may lead to its harmonization.

Whether the droit de suite will make the transition from an idealistic notion to an international norm depends both on commitment to droit de suite and creation of practical means to implement the goal of allowing artists to share in the profit of their work once it has left their hands.

Those countries that have most successfully implemented the droit de suite share certain characteristics. In France, Germany, and Belgium, for instance, the royalty is collected on the total resale price of the work. Measuring the royalty by the resale price departs from the rationale of allowing artists to participate in an increase in value, but is considered simpler and more practical. The difficulty in administering a royalty based on the difference between the purchase price and resale price may explain the law's disuse in countries such as Italy and Czechoslovakia.

Auctions are the minimum field of application in all countries which have adopted the droit de suite, because auctions sales are easiest to monitor. Including dealer sales increases the administrative challenge and the risk of noncompliance. The French law originally applied only to sales at auction, and Belgium has preserved this limitation. In 1957, France extended its law to sales "through a dealer," but implementing rules never having been issued, the law

still applies in practice only to sales at auction. The French galleries do, however, make payments to an artist's social security. The German law requires a royalty on both auction and dealer sales, but in reality, Bild-Kunst collects a flat percentage of gallery revenue paid partly to artists qualifying for droit de suite, and partly to an artists social security fund.

Although the droit de suite is inalienable and non-waivable, in almost all effective systems it may be transferred for purposes of collection through an artists' collecting agency.

The collection of the droit de suite through authors' societies is considered essential to a successful resale royalty. Only those countries with active and efficient national authors' societies, such as SABAM in Belgium, Bild-Kunst in Germany, and SPADEM and ADAGP in France, have effectively implemented the droit de suite.

In addition to discussions within the European Community that may result in harmonization of droit de suite, there have been other recent studies and international conferences where droit de suite has been discussed as one way to improve the artist's economic status.

II. The U.S. Experience With the Artists' Resale Royalty

The concept of droit de suite was introduced in Paris in the 1920's, and there have been efforts to realize this European concept in the United States since as early as 1940. In the early 1960's, proposals were made to incorporate droit de suite into state or federal law in the United States. To date, only California's efforts have resulted in law. The proposals for a federal law have engendered a great deal of controversy. The European models have had varying

degrees of success, and Congress requested this study to determine the feasibility of implementing an effective resale royalty in the United States.

The first efforts to gain such a right in this country were made by individual artists, writers, or lawyers who pressed for a resale right through art unions, art journals, or private contracts for sales of art works. In 1940 artist Grant Woods attempted to get fifty percent of the appreciated value on resale via a contract after one of his earlier paintings quadrupled in value in a short period. Opinions differ as to whether such contracts can bind subsequent purchasers of art works without some sort of public registry.

These individual efforts were kicked into high gear in this country by a well-publicized auction at which collector Robert Scull sold for \$85,000 a Robert Rauschenberg painting he had purchased for less than \$1000 a decade or so earlier.

The State of California passed a resale royalty law in 1976. The law mandates a five percent royalty of the resale price to the artist when a work is resold in California or resold anywhere by a California resident. Several artists report significant financial gain under the law. However, the law is widely criticized as underused and underenforced, and a 1986 survey of California artists and dealers was inconclusive. Some commentators claim that the law places California's art market at a competitive disadvantage, but others say that it has had no effect on the California market.

Some commentators maintain that the law is preempted under the federal copyright law. The California law withstood a preemption challenge under the 1909 Copyright Act, but cases and commentary since then have suggested a different result under the 1976 Copyright Act. Any state resale royalty scheme may be preempted under section 301 of the 1976 Act because it inhibits the

section 106 distribution right as modified by the section 109 "first sale" doctrine (which allows the owner of a lawfully-made copy, including an original, to dispose of that copy as he or she pleases). Given potential problems of preemption, enforcement, and multiple application, any droit de suite that is enacted in the United States should be at the federal level.

Since the mid-1970's, several bills have been introduced in Congress regarding resale royalties and moral rights for visual artists. In 1978, Representative Henry Waxman introduced legislation calling for a five percent royalty of the gross sales price of works sold in interstate or foreign commerce for \$1000 or more. In 1986 and 1987, Senator Edward Kennedy and Representative Edward Markey sought a seven percent royalty of the appreciated value - the difference between the purchase and resale price. Instead of private artists' rights societies to collect royalties, both the Waxman and Kennedy-Markey proposals relied on government agencies to enforce the droit de suite. The Waxman bill would have created a National Commission of the Visual Arts to register works and collect royalties. The Kennedy-Markey proposal required artists and sellers to register with the Copyright Office. The Kennedy-Markey bills also would have granted limited moral rights of paternity and integrity.

After United States adherence to the Berne Convention, the Congress reexamined moral rights for authors and decided to address the issue of moral rights for visual artists separately. Under the Visual Artists Rights Act of 1990, certain moral rights were integrated into the copyright law. Proposals for droit de suite failed to garner consensus. Instead, the new law directed the Copyright Office to conduct a study on the feasibility of implementing an effective resale royalty in this country.

III. Analysis of Written Comments and Hearings

The Visual Artists Rights Act of 1990, signed into law by President Bush on December 1, 1990, grants to visual artists the moral rights of attribution and integrity. The law also requires that the Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, study the feasibility of implementing a resale royalty on the sale of works of visual art.

Pursuant to this mandate, the Copyright Office consulted with the NEA and published a Notice of Inquiry seeking public comment on significant questions posed by droit de suite. The Office also held two public hearings. However, the Office did not conduct an independent empirical study, and the administrative record contains insufficient empirical evidence comparing the respective remuneration of visual artists and other creators. Most commentators espoused the grant of resale royalties, maintaining that visual artists are treated differently than other creators under the copyright law. A vocal minority, including some artists, opposed the grant of resale royalty rights. Some of those who favored the resale royalty in principle made suggestions for improving the application of the California system.

Public comment was split on the question of whether royalties would provide an incentive for the creation of new works. Some argued that increased revenue would encourage further creation, while others maintained that artists create for other than financial reasons. Still others said that, in any event, royalties are too remote and uncertain to encourage creation.

There was similar disagreement on the anticipated effect of royalties on the marketplace. On the one hand, it was said that royalties would be like other costs associated with art transactions, and would have little or no effect

on the market. Others warned, though, that the application of royalties would damage an already depressed art market.

Commentators also disagreed on the relevant categories of works that should be covered by the royalty. They also varied considerably--from two hundred to five thousand dollars -- in the threshold amount suggested to trigger the royalty. But almost all commentators stated that the royalty should be applied regardless of whether a work increased in value.

With respect to the suggested recipients of the royalty and the international implications of granting the right, some commentators declared that royalties should be extended to foreign artists whose works are sold in the United States. Others maintained that either U.S. citizenship or residency should be required, whether or not the work was created here. Most agreed, however, that the royalty right should be coextensive with the term of copyright protection.

There was less unanimity about whether the right should be applied retroactively. Berne Convention reciprocity was the principle argument advanced in favor of retroactivity. But there was disagreement about whether royalties should apply to works in existence at the date of enactment of the legislation or to works protected in the country of origin at that time. Some opposed retroactivity generally.

Concerning the issue of administration and collection of the royalty right, commentators pointed to the California experience with private enforcement and recommended the European approach of collective administration of royalties. In California, artists were concerned with enforcing their rights, litigation expenses, and the fear of retribution after demanding royalties from sellers and galleries. In France, by contrast, the country most familiar with monitoring and

collecting the royalty, the right is handled by agreement between auction houses and artist collection societies.

Even though most believed that the right was best administered collectively, there was disagreement about the need for a registration requirement. Some 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.

Most agreed, in any event, that the royalty should not be applied to gift transactions, although some felt that a barter arrangement -- as opposed to an outright sale -- should trigger the royalty.

Except to enforce collection, there was strong opposition to making the royalty right either waivable or alienable, lest young artists be pressured into waiving their rights. Advocates of free alienability countered that a non-waivable right interfered with contractual freedom, and that such a right was necessary to encourage the risky purchase of works of young artists.

Finally, all commentators favored preempting California's law, if a national resale royalty law was passed. One suggested, however, that states should be free to provide greater levels of protection than the federal minima.

IV. Integration of the Resale Royalty into U.S. Law

Advocates of the resale royalty right point to the difference in the copyright law's treatment of fine visual artists, on the one hand, and authors and composers, on the other, to justify the payment of a royalty to the artist on the resale of his creations. The principle benefit of copyright, it is argued, is to authors who exploit multiple copies of works through either reproduction or performance. Fine visual artists cannot fully avail themselves

of these economic rights, since they create in unique or limited copies and their principal means of exploiting their intellectual property rights are through the sale of their works or public display. The former is usually a one-time right, while the latter is extinguished through the First Sale doctrine, or limited by the competing displays of owners of copies or, in the case of unique works, the physical reality that only one person can display the same work at one time.

Yet it is argued that the comparison between paintings and sculptures, for example, and books and sound recordings, is inapposite. Although authors who create numerous copies can reap the benefits of multiple exploitations of their works, they also have to sell a large number of copies because they make such a small royalty on each one. The value of works of art, on the other hand, is determined by scarcity and artists do not require the same level of demand to secure a living. It is also not clear that the substitution of one owner of a painting for another is an additional exploitation of the work, as is the case with the sale of another copy of a book or sound recording.

Because the Copyright Office lacks hard data and quantifiable experience to make such a comparison, however, it cannot compare the respective remuneration of artists and other creators with any empirical certainty. Instead, it must base its conclusions on anecdotal evidence and existing literature, with the attendant imprecision.

Some argue that, consistent with one of the constitutional purposes of copyright, the potential for increased remuneration is a potent incentive for creation. Yet there is evidence that resale royalties benefit only a very small percentage of artists and will depress prices for works in the primary market, possibly chilling rather than stimulating the incentive to create. When all is

said and done, though, the royalty may be absorbed, like other costs associated with art transactions, without causing a ripple in the art market.

Even assuming that the U.S. Copyright Act does discriminate against fine visual artists, the resale royalty does not appear to be the best way to level the playing field. The United States is a member of the Berne Convention and provides moral rights to visual artists, but the notion of an encumbrance attaching to an object that has been freely purchased is antithetical to our tradition of free alienability of property.

Moreover, the royalty also raises significant privacy concerns with art transactions, since artists would need to obtain information about sales prices and ownership that sellers, purchasers and others may not want to disclose.

And though the point is subject to disagreement, there is some evidence that the royalty has had an adverse effect on the art markets of several countries and the State of California. Most significantly, the effectiveness of the royalty depends on the frequency of resales within the designated period, and there is no clear evidence that these occur with any regularity.

Indeed, even in the countries that support royalties and have had experience applying them, the administration of the right has been fraught with problems. In France, the birthplace of the concept, the royalty is applied to the total sales price of works of art, departing from the principled rationale of permitting artists to participate in the increased value of their works, and introducing an additional note of unfairness, since artists share only in increases and not losses in the value of their works. Moreover, the droit de suite is applied only to auction houses, even though one estimate is that as many

as four times the number of sales occur through galleries and private transactions.

The German approach to resale rights reasons that the increased value of a work was always latent in it and is due to the artist's continuing work. Market forces, rather than any metaphysical concept, drive the price and terms of an exchange and determine value. In a free market, there is arguably no latent value of an object, rather it is only as valuable as the price a willing buyer will pay a willing seller at a given time. There are also factors other than the continuing efforts of the artist that raise the value of a work. In addition, even though the application of the royalty to increases in the value of works, rather than the total sales prices, is much fairer, the complexity of calculations make a royalty based on appreciation difficult to implement.

The Belgian approach, based on the contract principles of changed circumstances and unjust enrichment, shares many of the same shortcomings. The putative enrichment is based on a contract between a willing seller and buyer that was legitimate at the time of the transaction. It is only later when the work increases in value that the price becomes insufficient. And for unjust enrichment to be two-sided and truly equitable, the seller would have to be permitted to deduct the costs of resale and ownership.

Moreover, even aside from the inherent problems of the resale royalty, some argue that it does not fit within our economic system. The royalty may encumber future sales and depress the art market. And to the extent that works of visual art can be substituted readily by another commodity, patterns of demand are altered and prices and sales volume are reduced. It also may be argued that artists do not take full advantage of their reproduction rights. And because almost all works of living artists decline in value, and purchasers are

not permitted to deduct these losses on their taxes -- even though any gains are fully taxable -- an additional levy on the resale of art works may be viewed as a deterrent to, rather than an incentive for, the collection of modern art.

V. Conclusions and Recommendations

In Europe, author's rights have evolved around the recognition that intellectual creations, particularly in art, deserve special protection. Droit de suite, which developed in Europe, derives from the moral right of paternity, connecting authors with their creative progeny, even after alienation of the works. From this perspective, artists benefit as a matter of equity, not welfare, from increases in the value of their fine art. Such increases, it is believed, are based on the artist's continued work, and purchasers should not be unjustly enriched through the artist's continued evolution.

In the United States, on the other hand, copyright legislation is grounded in the constitutional clause, which motivates creativity, while encouraging the broad public dissemination of works. In U.S. copyright law, works created in numerous copies are commercially exploited by the indirect communication of a copy to the public, through either reproduction or performance. A critical value of fine art lies in its uniqueness. Visual artists are paid only for the initial sale of their works and have limited markets for the exploitation of their reproduction rights. Some argue that the U.S. copyright law, which is driven typically by economic exploitation of many copies, has failed to provide economic incentives for fine visual artists who create works in unique or limited copies. Because of the First Sale doctrine, artists also lose their potentially most remunerative right -- that of public display -- once they sell their creations. Reasoning that other authors have an easier time exploiting their works through copyright, advocates justify the

resale royalty as the artist's compensation for the lack of a marketable reproduction right.

Although authors who do not create unique works can produce numerous copies or license numerous performances and reap the benefits of continued royalties, the value of works of fine art is determined in part by scarcity and the art does not require the same level of demand to secure a living for the artist. Indeed, in this respect, even though fine artists cannot avail themselves optimally of reproduction rights, it may be argued nevertheless that the copyright scheme favors such artists who have fewer works to market. Moreover, successful artists -- who typically will garner more income from droit de suite -- secure ever increasing prices as their reputations grow and they sell successive works.

Undoubtedly, the enhanced reputation of a creator has a positive effect on future sale prices for every kind of authorship. Some other countries try to even out disparities when an artistic work appreciates a great deal after the initial sale, but it is not clear how successful these efforts have been.

Although several European authorities maintain that the royalty has not adversely affected their art markets, others maintain that the presence of the royalty has hindered several European art markets. It is not clear what conclusions can be drawn from the California experience. Evidence is inconsistent about the extent to which the resale has affected sale of contemporary art in California, and the number of sham sales which have been shifted to other jurisdictions. On the other hand, it is clear that the California resale right has not been fully realized.

The argument is also made that the royalty benefits only successful, well-established artists, and that most artists, who lack a resale market, will

suffer in the primary market as prices are depressed, anticipating the future royalty payment.

The usefulness of the royalty depends, as well, on the creation of the type of art that Congress wants to encourage. To be effective the droit de suite must be an incentive to produce works that will be resold -- ideally, easel paintings and traditional sculpture, where conception is embodied in a single object, or a very few copies.

Implementation of the royalty would require the qualification of the First Sale doctrine. 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 his 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.

Based on its analysis of the foreign and California experience with droit de suite, the administrative record, and independent research, the Copyright Office is not persuaded that sufficient economic and copyright policy justification exists to establish droit de suite in the United States. Neither the administrative hearing process nor independent research supplied the Office with sufficient current empirical data. Therefore, the Office could not accurately compare the respective remuneration of authors who create in many, and artists who create in limited, or unique, copies. Any conclusions that we could make about the number of artists who would benefit from the resale royalty would be based on anecdotal evidence and limited sample size. Most significantly, there is no clear evidence indicating the frequency of resale of works of fine

art. Thus, even if Congress determines that the Copyright Act does treat fine visual artists in a manner less favorable than authors or composers, it is not clear that the resale royalty right is the best means to offset this disadvantage, particularly if it is not triggered with any frequency within the copyright term.

The international community is now focusing on improving artists' rights, including the possibility of harmonization of droit de suite within the European Community. Should the European Community succeed in harmonizing 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.

Many countries currently offer alternative solutions to improve artists rights that the United States might want to consider. Although the Copyright Office does not necessarily endorse any alternative solution, Congress might want to consider these alternatives:

1. **Broader Public Display Right**

Assuming that fine visual artists cannot exploit their intellectual property rights adequately under the existing copyright law, some form of a broadened public display right might be an alternative to the droit de suite. Rather than depending on frequent resales within the specified royalty term, a considerable problem of the droit de suite, the display right would be triggered by the typical manner of exploitation of works of fine art -- public display. Museums and public art galleries might pay a fee to display works of art publicly.

In theory, section 106(5) of the Copyright Act already provides creators of pictorial, graphic and sculptural works with a public display right.

However, the right is cut off by the First Sale doctrine in section 109(c), that permits the owner of a copy to display his or her work publicly to viewers present at the place where the copy is located. Thus, with the sale of a unique work, the copyright owner is left with nothing to display, and with works created in limited copies the creator and object owner may mount competing displays.

2. Commercial Rental Right.

Under existing law, if a work of art is alienated solely by rental, the artist retains the exclusive distribution right. However, very few artists have the market power to structure the art transactions so that works are rented and ownership of the copy of the work does not pass to the purchaser.

Even with works that are sold, the Copyright Act could be amended to allow the distribution right to survive with respect to commercial rental. The owner of the copy would receive the object, while the artist would retain the right to exploit the work by commercial rental. Thus, the owner of the copy would pay the artist a royalty for any commercial rental of the purchased work.

3. Compulsory Licensing.

Another way to balance the interests of artists and collectors would be through some form of compulsory licensing and modification of section 109. Upon payment to an artist of the purchase price for a work and a licensing fee for public display, the owner of a copy would be free to display the work without having to negotiate terms with the artist.

4. Federal Grants and Art in Federal Buildings.

Congress could also encourage artists by increasing federal grants or by increasing funding for purchase of artworks for federal buildings.

C. MODEL DROIT DE SUITE SYSTEM

Should Congress determine that federal droit de suite legislation is the best way to help artists, the Copyright Office suggests consideration for the following model system.

1. Oversight of the Droit de Suite: Collection and Enforcement

The droit de suite has been effectively implemented only in those countries with active and efficient national authors' societies, such as SPADEM in France and Bild-Kunst in Germany.

Therefore, the Copyright Office suggests the Congress consider collective management of the droit de suite through a private authors' rights collecting society. The collection of art resale royalties would be handled on a direct or contractual basis, similar to collection of musical performance royalties by ASCAP and BMI.

The Office could serve a record-keeping function similar to the arts registry proposed in the Kennedy-Markey bills. Copyright Office records would be available to the artists' rights societies for purposes of collection, enforcement, and distribution. If a resale royalty were adopted in the United States, and particularly if it were extended to include dealer sales, the Office anticipates that a collection system with elements similar to the French or German systems would have the best chance of success.

2. Types of Sales

The Copyright Office suggests that, if a resale royalty is enacted in the United States, it should apply initially only to public auction sales. Auction sales are easiest to monitor. Including dealer sales -- or private sales, as proposed in the Waxman and Kennedy-Markey bills -- increases the administrative and enforcement challenge.

3. Measuring the Royalty

Based on the California and European experiences, a flat royalty of between three and five percent on the total gross sales price of the work seems most appropriate. There would be no need initially to set a threshold price to trigger the royalty mechanism if the royalty were applied initially only to auction sales, because auction sales usually deal in works with a minimum floor price. Similarly, there may be no practical need to legislate a floor price for dealer sales: Although one arts organization recommended a threshold resale price of as high as \$5000 to trigger the droit de suite, and Kennedy-Markey called for a threshold of \$1000, other groups called for figures as low as \$250 or \$500. Again, most art dealers trade only in works of at least that value, particularly in the resale market.

In those countries that have most successfully implemented the droit de suite, including France, Germany and Belgium, the resale royalty is measured on the total resale price. Measuring the royalty by the resale price departs from the rationale of allowing artists to participate in an increase in value, but is considered simpler and more practical. The difficulty in administering a royalty based on the difference between the purchase price and resale price may explain the law's disuse in countries such as Italy and Czechoslovakia.

Any resale royalty legislation could contain a rebuttable presumption that a work 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 had not appreciated in value and that a royalty was not due.

4. Term

A term for the droit de suite coextensive with copyright seems appropriate. Under the current copyright law, this is life of the author plus

50 years. Should the European Community adopt a term for the droit de suite of life plus 70 years, there would be justification for similarly extending the term here.

The droit de suite would be descendible in a manner analogous to copyright.

5. Foreign Artists

The resale royalty would be applied to foreign artists on the basis of reciprocity. This is consistent with the Berne Convention and the general consensus.

6. Alienability

The Berne Convention recognizes an inalienable right to the resale royalty. The Office concludes that if a resale royalty is enacted in the United States it should be inalienable, but transferrable for purposes of assigning collection rights. The Office also suggest that the droit de suite be non-waivable. However, this latter suggestion may be subject to the ultimate resolution of the waivability of moral rights in the United States.

7. Types of Works

The Copyright Office suggests that any droit de suite legislation apply to works of visual art as defined in 17 U.S.C. §101 and in the Visual Artists Rights Act of 1990, with the following exception: For works in limited edition, the Copyright Office would suggest that the statute should fix the number of copies to which the resale royalty would apply at 10 or fewer.

8. Retroactivity

The Office suggests that, if Congress adopts a droit de suite, it should make the law prospective only, i.e., effective only as to the resale of eligible works created on or after the date the law becomes effective.

INTRODUCTION

The idea of a resale royalty for visual artists owes its origin to developments in Europe, primarily in France. This idea, almost universally referred to as the droit de suite, is the right of artists to participate in the proceeds of resales of their works. Since the French enacted the droit de suite in 1920, thirty-six other countries and the State of California have adopted the resale royalty, although only a handful of those countries have fully implemented it.

The U.S. Constitution authorizes Congress to enact federal copyright laws to encourage creativity, but it also requires Congress to balance the artist's incentive to create against the public's interest in widespread dissemination of works. After the United States joined the Berne Convention, Congress began to reexamine the question of whether or not it should provide moral rights for visual artists in the Copyright Act. In so doing it also reexamined the question of whether or not there should be a resale royalty for artists.

On December 1, 1990, President Bush signed into law the Visual Artists Rights Act of 1990 [VARA], which became generally effective on June 1, 1991, and grants to visual artists certain moral rights of attribution and integrity. Section 608(b) of that legislation requires the Register of Copyrights, in consultation with the Chair of the National Endowment of the Arts,

to study the feasibility of implementing a resale royalty on the sale of works of visual art.

The Copyright Office consulted with the National Endowment of the Arts (NEA), and NEA provided the Office with suggested arts organizations that should be contacted in the course of this study. Subsequently, the Copyright Office issued a Notice of Inquiry requesting public comment on enactment of a federal resale royalty for visual artists. Particularly, the Office sought comment from artists, art dealers, auction houses, investment advisors, fine art collectors, and art museum curators. The Copyright Office also published a second Notice of Inquiry announcing that it would continue its investigation of resale royalties for artists by holding two public hearings, one in San Francisco, on January 23, 1992, and another in New York, on March 6, 1992. Both Notices of Inquiries focused principally on seven significant areas where adopting a federal resale royalty would affect U.S. law and the art community: the potential effect on the creation of new works and the existing art market; the form of, beneficiaries of, and term of the right; enforcement and collection mechanisms; whether the right should be waivable and alienable, and whether the California law should be preempted by federal law.

Initial public comments were due on June 1, 1991. The first hearing was held in California and focused primarily on the experience under the California law which went into effect in 1977. The second hearing held in New York expanded the universe to consider what the international experience had been with droit de suite and also to investigate the potential effect of such a law

on the entire American art community, including both artists and those associated with use of their works.

Most commentators, in both the public comment period and the hearings, supported a resale royalty and maintained that visual artists should not be disadvantaged relative to other creators who do receive royalties. A vocal minority, including some artists, opposed the grant of resale royalties.

In addition to reviewing the material contained in the two hearings and the public comments, the Office explored the international experience with droit de suite through consultation with representatives who had direct experience with the system and review of available printed materials discussing what the foreign experience had been. The Office reviewed provisions in both the Berne Convention and the Tunis Model Law that permit but do not require droit de suite, and specifically sought information on the status of the European Community's plan to harmonize droit de suite in member countries--seven of the EC countries already provide such a right. The Office also looked at a number of international or national studies on droit de suite and other legal or economic analyses of the resale royalty right. Finally, the Office contacted witnesses and pertinent organizations, as necessary, to supplement the administrative record. The record, however, does not contain sufficient empirical evidence comparing the respective remuneration of visual artists and other creators to help determine whether visual artists actually are disadvantaged under current copyright law.

The Office's study, Droit de Suite: The Artists Resale Royalty, has two parts. The Report itself sets out what the Copyright Office found in examining and assessing all of the available data on the issue of whether or not the benefits to visual artists from a resale royalty would outweigh any increased costs and possible decreased purchases of works of contemporary art. The Appendix to the Report contains the transcripts of the two public hearings and the comment letters.

I. THE FOREIGN EXPERIENCE WITH DROIT DE SUITE

A. OVERVIEW OF THE HISTORICAL DEVELOPMENT OF DROIT DE SUITE IN EUROPE

Droit de suite is the right of an artist to "follow" or participate in the proceeds realized from the resale of the tangible embodiment of his or her work. ¹

Like Puccini's "La Boheme," which opened with an artist and a poet shivering in a Paris garret, the droit de suite grew from a European, particularly French, awareness of the penurious condition of struggling artists at the turn of the last century.

Today, the right of an author of a work of visual art to share a part of the proceeds paid when the work is resold ² is based on the premise that visual artists are entitled to participate in an increase in the value of their works in ways that are not otherwise addressed by copyright law.

Traditional copyright law seems to discriminate against visual artists. The rights of reproduction and distribution are better suited to exploitation of literary or musical works. A visual artist's expression is usually embodied in an end product, sold to a single purchaser. The artist's current work and reputation continue to affect the value of that earlier work. Many European countries have adopted the principle that, in the event of resale, the artist should benefit from any increase in value. ³

¹ 2 M. Nimmer, Nimmer on Copyright 8-374 (1991).

² Robert Plaisant, The French Law on Proceeds Right: Analysis and Critique in Legal Protection for the Artist IV, IV-1 (M. Nimmer ed. 1971) [hereinafter Plaisant].

³ See Lillian de Pierredon-Fawcett, The Droit de Suite in Literary and Artistic Property 11-12 (1991).

Although the impetus of the droit de suite was largely economic -- to remedy the perceived unfair condition of the artist -- the right depends on this idea of moral entitlement to justify a limitation on the purchaser's absolute ownership of the tangible embodiment of the work.⁴ An artist is entitled to participate in the increased value of earlier work as a matter of equity, not as a matter of welfare, because the increase results from the artist's continued work; otherwise, the original purchaser is unjustly enriched from the artist's continued evolution. The proceeds right has evolved around an awareness that intellectual creation deserves special protection.⁵

In 1910 the French legislature introduced the first recognition of the distinction between ownership of an object in which a work is embodied and rights retained by the author even after transfer of the work.⁶ The Law of April 9, 1910, overturned a 1842 decision of all divisions of the Cour de Cassation that the sale of a painting gave the "purchaser full. . . ownership of the object sold with all its appurtenances."⁷

One commentator characterizes the development of the proceeds right within the evolution of copyright law: "The evolution of the law of artistic and literary property shows a gradual extension of these limitations at the expense of the owner of the work of art and for the benefit of the artist who created it.

⁴ Id. at 5, 30. See also Max-Planck-Institut für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht, The Droit de Suite in German Law in Legal Protection for the Artist VI, VI-35 (M. Nimmer ed. 1971) [hereinafter Max Planck Study].

⁵ Fawcett, supra note 3, at 17. See also id. at 26-27 (noting tendency to refer to a painting as "a Matisse," "a Picasso" or "a Bonnard").

⁶ Id. at 8.

⁷ Id. at 151 (citing 1842 Recueil Dalloz, Périodique et critique [D.P.] I 304; 1842 Recueil Sirey, Jurisprudence [S. Jur.] I 396).

In this evolution, the droit de suite was a new limitation on the right of the owner of artistic works in favor of the artist." ⁸

Droit de suite is a French export. The phrase comes from French real property law, where it implies a retention of rights despite changes in ownership. ⁹ In French real property law, droit de suite enables the rights holder to seize property in the hands of a third party. ¹⁰ An owner of real property may pursue the realty even in the hands of a bona fide taker. ¹¹ A French lawyer introduced the concept of droit de suite for visual artists on February 25, 1893, in an article in the *Chronique de Paris*. ¹² Since then, its popularity on other shores has risen and fallen with fashion.

In 1920, France became the first country to recognize the droit de suite in law. ¹³ Other countries followed France's lead, but with little uniformity. A patchwork of countries have stitched together the varied patterns of droit de suite from a few references in the Berne Convention ¹⁴ and the Tunis Law, ¹⁵ a model for the smaller, developing countries.

⁸ Fawcett, supra note 3, at 9.

⁹ Id. at 3.

¹⁰ Id.

¹¹ Id.

¹² Id. at 2.

¹³ Plaisant, supra note 2, at IV-1.

¹⁴ Berne Convention for the Protection of Literary and Artistic Works (1886), revised at Brussels (1948) and Paris (1971), Art. 14, reprinted in Fawcett, supra note 3, at 200. Statements of principle in favor of the droit de suite were incorporated into the Berne Convention during the Brussels Conference of 1948.

¹⁵ Model Law of Tunis, Adopted March 2, 1976 at Tunis, reprinted in Fawcett, supra note 3, at 201.

Presently thirty-six countries are identified as having a resale royalty right.¹⁶ In those countries that have adopted the droit de suite, there are significant differences. Some of these distinctions concern how the proceeds right is measured; the types of work whose sale is subject to the droit de suite; and the level of enforcement or commitment the country has given to the concept.

For example:

- **Measuring the proceeds right:** Belgium modeled its 1921 law after France's, measuring the right by the total resale price,¹⁷ while the yardstick of Czechoslovakia's 1926 law gave artists a percent of a "disproportionally large" profit obtained on resale.¹⁸
- **Types of works:** Most countries apply the law only to original works of visual art, but the Uruguayan and Czechoslovakian laws apply to alienation of any literary or artistic work.¹⁹

¹⁶ The countries include: Algeria, Belgium, Benin, Brazil, Burkina Faso, Cameroon, Central Africa, Chile, Congo, Costa Rica, Czechoslovakia, Equador, France, Germany, Guinea, Hungary, Holy See, Italy, Iraq, Ivory Coast, Loas, Luxembourg, Madagascar, Mali, Monaco, Morocco, Peru, Philippines, Portugal, Rwanda, Senegal, Spain, Tunisia, Turkey, Uruguay, and the former Yugoslavia. Poland rescinded its artists' royalty legislation in 1952. The State of California in the United States also has resale royalty legislation.

¹⁷ Belgian Law of June 25, 1921, Imposing, in the Case of Works of Art, Sold at Public Auctions, a Levy in Favor of the Artists of the Works Sold, reprinted in Fawcett, supra note 3, at 204 [hereinafter Belgian Law].

¹⁸ See infra notes 185-95 and accompanying text (discussing Czechoslovakian law).

¹⁹ See infra notes 184-92 and accompanying text (discussing laws of Uruguay and Czechoslovakia).

- **Level of Commitment:** Poland enacted a resale royalty law in 1935,²⁰ but rescinded it in 1952.²¹ Italy passed a complex droit de suite statute in 1941,²² but the royalty right in that country is virtually ignored in practice.²³ Of the 36 countries identified as having resale royalty legislation at least 17 lack implementing legislation or procedures for collecting the royalty.²⁴ Practically speaking, in these countries, the droit de suite is recognized in name only.

The Copyright Office examined the provisions in all of the foreign countries that claim they have droit de suite, but this chapter will focus on selected representative countries and the development of multinational expressions of the right.

²⁰ Polish Law of May 22, 1935, art. 29, reprinted in Fawcett, supra note 3, at 248.

²¹ Resale Royalty-- A New Right For Artists 69 Australian Copyright Council 4 (1989).

²² Italian Law of Apr. 22, 1941, art. 144-55, reprinted in Fawcett, supra note 3, at 235-37.

²³ As early as 1950 the application of the Italian droit de suite legislation "came to a standstill." See Vittorio M. DeSanctis and Mario Fabiani, The Right on the Increase in Value of the Works of Fine Arts in the Italian Copyright Law, in Legal Protection for the Artist at V, V-39 (M. Nimmer ed. 1971) [hereinafter DeSanctis].

²⁴ Australian Copyright Council, supra note 21, at 4. See also Fawcett, supra note 3, at 133 (droit de suite "has remained virtually a dead letter in twenty-four" of the jurisdictions that have adopted it).

B. FRANCE

1. Development of the Law

France was the birthplace of the droit de suite, and has been called "the best testimony of its validity and equity."²⁵ The drafted idea emerged in France towards the end of the nineteenth century. Legislators drafted the first specific proposals for a French law in 1903.²⁶ The development of the French law and the treatment of its constituent elements -- length of term, types of works, measurement of the royalty, inalienability -- have had an impact on the law in other countries that have followed France's lead.

The first proposals were premised on the creation of an official registry, which would maintain a directory of works of art. Under this proposal, which did not succeed, artists would have received part of the resale price in exchange for certifying their work's authenticity.²⁷

The Societe des Amis du Luxembourg, founded in 1903 in part to promote recognition of droit de suite, sought an artists' royalty of one or two percent of the price obtained at public auction.²⁸

Champions of droit de suite initiated a public relations campaign in 1905. The French press widely published a drawing by Forain depicting two ragged children watching their father's painting sell at auction for 100,000 francs.

²⁵ New York Hearing on Artists Resale Royalties (Mar. 6, 1992) [hereinafter New York Hearing] (statement of Jean-Marc Gutton, General Manager of the Societe des Auteurs dans les Arts Graphiques et Plastiques), App. Part III at 6.

²⁶ Fawcett, supra note 3, at 3.

²⁷ Id. An 1881 amendment to the Chambre des Deputes to create an office charged with setting up and maintaining a directory of works of art was rejected. Id. at 149 n. 11.

²⁸ Id. at 3 and 150 n. 13.

This campaign is credited with alerting the French public to the economic plight of artists.²⁹ Next, in 1909, artists formed two artists' rights societies to push for a resale royalty, and in 1914 and 1918 bills intended to give artists two percent of the auction sales price of their works were submitted to the legislature.³⁰

a. The 1920 Law. In 1920, France formally recognized the droit de suite. The Law of May 20, 1920, granted artists an inalienable right to a percentage of the sales price of their works sold at public auction.³¹ The law applied to public sale of works such as paintings and sculpture, if the works were original and represented a personal creation of the artist.³² The right belonged to the artists' heirs and successors in title "for a period equivalent to the duration of artistic property" (i.e., for the duration of the copyright).³³

Rules for administering the law were issued in a 1920 decree that provided for a registry for works of art.³⁴ Under the decree, the artist (or heirs or successors) had to make a declaration in the Journal Officiel (the French equivalent of the Federal Register), or request within 24 hours after the sale that public officials effect the levy. The artist was to mail

²⁹ Id. at 3 and 150 n. 14; Australian Copyright Council, supra note 21, at 3.

³⁰ Fawcett, supra note 3, at 3-4.

³¹ Law of May 20, 1920, reprinted in Fawcett, supra note 3, at 218.

³² Id.

³³ Id.

³⁴ Decree of December 17, 1920, Relating to the Application of the Law of May 20, 1920, reprinted in Fawcett, supra note 3, at 218.

simultaneously a copy of the statement to the arts ministry.³⁵ It was expected that this would build up a public register for works of art. The registry did not succeed, however, and royalties are now collected by the artists' societies.³⁶

2. Measuring the Proceeds Right

Originally the droit de suite was based on a one percent levy for a resale price of 1,000 to 10,000 francs; 1.5 percent from 10,000 to 20,000 francs; two percent from 20,000 to 50,000 francs; and three percent for resales of more than 50,000 francs.³⁷ The rate of the levy is now uniformly fixed at a flat rate of three percent of the resale price on a sales price of more than 100 francs.³⁸

The droit de suite is collected on the total sales price of each work, whether there is an appreciation in value or not. This aspect of the French law has been followed by Germany and Belgium, but is criticized because it departs from the rationale of allowing artists to participate in an increase in the value of their works. Critics also attack this approach because a

³⁵ Id.

³⁶ See infra notes 87-101 and accompanying text (discussing artists' societies). The decree of Dec. 17, 1920, provided for representation by artists' societies in art. 3.

³⁷ Law of May 20, 1920, art. 2, reprinted in Fawcett, supra note 3, at 218.

³⁸ Comment of Société des Auteurs des Arts Visuels submitted by Martin Dauvergne, Director Girant, and Pascal Aubion at 46 illustrated by Jean Christophe Ienne [hereinafter Comment 10 (SPADEM)], App. Part I.

collector has to pay a piece of the resale price even if he or she has suffered a net loss, i.e., if the work has decreased in value. ³⁹

In France, Germany, and most other countries with a droit de suite, this method of measuring the proceeds right has become accepted as a matter of expediency. Measuring the resale royalty by the sales price is considered simplest and most practical since it is "not necessary to keep a record of the previous sales prices, the percentage being based only on the present sales prices." ⁴⁰ Germany adopted this method for its droit de suite, both for facility and to protect the privacy interests of art collectors and sellers. ⁴¹

3. Foreign Authors

The 1920 decree provided that artists of foreign nationality were to benefit from the droit de suite in the same manner and under the same conditions as French artists if their national laws extended the same right to French artists. ⁴²

The 1956 decree, however, more explicitly singled out artists who "have participated in French artistic life and maintained a residence in France for five years, not necessarily consecutively." These artists may "on condition

³⁹ See, e.g., New York Hearing at 232-33 (statement of Gilbert Edelson, Art Dealers Association of America) ("That the collector, in essence, would go out, take a chance on the artist, support the artist, pay the money, lose money, and then pay something in addition. I don't quite understand why that is fair.")

⁴⁰ Fawcett, supra note 3, at 5.

⁴¹ See infra notes 155-58 and accompanying text (discussing German method of measuring proceeds right).

⁴² Decree of December 17, 1920, supra note 34.

of reciprocity," benefit from the droit de suite.⁴³ A January 1957 order created a commission to rule upon applications by foreign artists.⁴⁴

4. Term

In 1957, France undertook a major revision of its artists' rights law. It repealed the 1920 law and rules and made droit de suite part of the French law relating to copyright and exploitation of economic rights of authors.⁴⁵ Accordingly, the proceeds right now subsists for the author's life plus fifty years.⁴⁶ This revision has raised the question of whether or not the resale royalty should be regarded as part of copyright law. Some in France have argued that it should not, since the right pertains to resale of the tangible work, not the rights protecting the creation embodied in the material.⁴⁷ Others argue that the royalty does pertain to the creation embodied in the material, and is a recognition of visual art's unique ties to the tangible embodiment of the expression. They assert that the French copyright laws and others are premised on an author being entitled to share in money realized from a work of art; the proceeds right is "a natural part of copyright, and. . . a particular application

⁴³ Decree of September 15, 1956, reprinted in Fawcett, supra note 3, at 224.

⁴⁴ Order of January 21, 1957, Concerning the Exercise of Droit de Suite by Artists of Foreign Nationality, reprinted in Fawcett, supra note 3, at 224.

⁴⁵ Plaisant, supra note 2, at IV-1; Fawcett, supra note 3, at 45.

⁴⁶ Plaisant, supra note 2, at IV-1; The 50 year term may soon be expanded to 70 years. Comment 10 at 46 (SPADEN) (Appended Documents), App. Part I.

⁴⁷ "According to French law, artistic and literary property applies to the reproduction or representation of the literary or artistic work and is not concerned with the tangible work itself"
Plaisant, supra note 2, at IV-5.

of the copyright principle to works which cannot substantially exploit reproduction or performance rights." ⁴⁸

These commentators maintain that the distinction between copyright and the right in the tangible work itself is not absolute. There are precedents in France for limits on property rights in the tangible object. For example, the author of a visual artwork in France can require the owner to give him possession for a short time in order to exercise the right of reproduction. Also, the purchaser of a phonorecord cannot use that record for public performance. ⁴⁹

5. Works Covered

Under the 1920 law, the droit de suite applied to pictures, sculptures, and drawings which are original or embody a personal creation of the author. ⁵⁰ Under the 1957 law, the droit de suite applies to "graphic and plastic works."

The authors' societies have concluded agreements with the auctioneers for the purpose of defining works to be covered by the droit de suite. ⁵¹ Whenever a work is to be made in more than one copy, such as sculptures, engravings, tapestries, or photos, the artists' representatives and the auctioneers' societies have very specific agreements as to the number of copies to which the royalty will apply. ⁵² For example, for sculpture the droit de suite will apply to eight copies, which must be numbered (1/8, 2/8,...8/8) and

⁴⁸ Id. at VI-26 and 27.

⁴⁹ Id. at IV-5 and 7.

⁵⁰ Law of May 20, 1920, art. 1, reprinted in Fawcett, supra note 3, at 218.

⁵¹ Plaisant, supra note 2, at IV-25 and 26.

⁵² Comment 10 at 45 (SPADEN), App. Part I.

signed by the author. These copies must be executed by the artist or controlled by him (e.g., the casting of a sculpture). Up to eight original copies may be cast after the author's death.⁵³ Droit de suite will apply to up to 100 copies of an engraving, as long as those copies are numbered and signed by the artist.⁵⁴ It will cover up to six copies of the same work of a tapestry, as long as those copies are supervised by the artist, numbered and signed by him.⁵⁵

Whether or not the term "graphic work" encompasses literary or musical manuscripts is a subject of debate. Auctioneers and most law professors exclude manuscripts from the scope of droit de suite, but the matter has not been settled by the courts.⁵⁶ Royalties are paid, however, on the binding of a book when it is original.⁵⁷

With regard to furniture and design works, a recent decision of the Cour d'appel de Paris has limited the scope of the droit de suite, by narrowly construing the term "graphic and plastic work" in Article 42 of the 1957 author's right law. The court denied the status of original work to pieces of furniture created by Jean Dunand, a well-known "art deco" furniture artist, because he had

⁵³ Id. (citing The Rodin case, Judgment of March 18, 1986, Cour de Cassation, 1st Civ. 129 Revue Internationale du Droit d'Auteur 138 (July 1986)).

⁵⁴ Id. (citing Agreement of November 28, 1957, between Authors and Auctioneers).

⁵⁵ Id. (citing Agreement of January 15, 1958, between Authors and Auctioneers).

⁵⁶ Id. See also note 217 and accompanying text (discussing treatment of manuscripts under Tunis Model law and in WIPO-UNESCO Draft Guidelines).

⁵⁷ Plaisant, supra note 2, at IV-15.

"created" them only intellectually, not with his own hands.⁵⁸ Similarly, the French courts refused to apply the droit de suite to "design" works.⁵⁹

6. Inalienability

An eligible artist cannot waive droit de suite in France.⁶⁰ The inalienability of the proceeds right has been referred to as an exception to its economic character, and a testament to its qualities as a personal or moral right.⁶¹ The right cannot be transferred during the artist's lifetime, and generally cannot be seized by creditors; creditors can seize only a sum paid after a specific sale.⁶²

After the artist's death, the droit de suite may benefit only the artist's heirs, with legatees and assigns being generally excluded.⁶³ Article 42 of the 1957 law provides that "after the author's death, this droit de suite shall subsist to the benefit of the heirs and, for the usufruct provided by Article 24, to the benefit of the spouse, but excluding all legatees and transferees."⁶⁴ The right cannot be alienated by a will in France. If the author leaves nothing to his heirs, Professor Plaisant suggests that either 1) the heirs keep the proceeds right in spite of the author's will; or 2) the right

⁵⁸ Judgment of Jan. 28, 1991, 4 em chambre, R.I.D.A. No. 130 October 1991. See also New York Hearing at 38 (statement of Jean-Marc Gutton) (droit de suite applies to "furniture, but only if it is an original work and not a series").

⁵⁹ Comment 10 at 51 (SPADEM), App. Part I.

⁶⁰ Plaisant, supra note 2, at IV-8.

⁶¹ Fawcett, supra note 3, at 38.

⁶² Plaisant, supra note 2, at IV-9.

⁶³ Fawcett, supra note 3, at 43.

⁶⁴ (Emphasis added.)

disappears. He also asserts that it is "neither reasonable, nor in accordance with the purpose of the proceeds right," to give a reserve right to distant relatives, including brothers, sisters, or cousins. ⁶⁵

French courts have held that the proceeds right passes to the heirs of the heir and not to another relative of the author. ⁶⁶ Although the law does not direct how the royalty should be divided among several heirs, at least one commentator suggests that the money be divided "according to the general rules of the Civil Code. . . ." ⁶⁷

At least three cases involving celebrated artists have examined whether, after the artist's death, the droit de suite would follow the normal rules of succession.

a. The Monet case. The impressionist painter Claude Monet died in 1926; his only heir was his son Michel Monet. The son died in 1966; he had named the Mormottan Museum as his general legatee. One of Monet's paintings sold at auction that year, but the museum was not eligible for the droit de suite due to the Article 42 prohibition. ⁶⁸ The painter's niece claimed the droit de suite; the auctioneer denied her claim, and the dispute went to litigation.

Interpreting the term "heir" in Article 42, the Cour d'appel de Paris decided on January 7, 1970, that the droit de suite is extinguished on the death of the artist's heir if there are no other heirs who share in the estate of the deceased artist. The Cour de cassation vacated that judgment, however, ruling

⁶⁵ Plaisant, supra note 2, at IV-9.

⁶⁶ Id. at IV-11 (citing Trib. Civ. Seine 5 Feb. 5th 1937. D.P. 1937 II. 41 note Escarra, Gazette Palais 437, I. 351. Conclusions du procureur Jodelet).

⁶⁷ Id. at IV-23.

⁶⁸ See supra text accompanying note 64 (discussing art. 42 reference to "legatees and transferees.").

that the droit de suite may be transferred to the author's heirs and thereafter to their heirs. ⁶⁹

On remand the Cour d'appel of Orleans affirmed the Cour de cassation ruling, deciding that the proceeds right may be exercised "not only by the immediate heirs of the work's author but also, more generally, by his heirs-at-law in the regular order of succession, whether they are themselves named to succeed to his estate or qualify indirectly." ⁷⁰ Thereafter, the droit de suite was governed in France by the ordinary rules of succession. ⁷¹

b. The Utrillo case. In a second case, the painter Utrillo, who died in 1955, had designated his wife as general legatee. She died in 1965, leaving as her heir her daughter from a previous marriage. On May 26, 1975, the Cour d'Appel de Paris denied the daughter the benefit of the droit de suite because the daughter was not "in any degree related" to the artist. The decision of the appeals court was affirmed by the Cour de cassation, meaning that the droit de suite would be granted only to those who have a blood relationship with the artist. ⁷²

c. The Braque case. A third case involved the artist Braque, who died in 1963. He was survived by his wife, who died a few months later, and his nephew. The nephew died in 1972, and he was survived by his wife.

After a 1982 auction sale of Braque's paintings, three distant cousins of Braque claimed royalties in the sale. Applying the holding in the

⁶⁹ See Fawcett, supra note 3, at 44, 300 (discussing and citing in full Monet case).

⁷⁰ Id.

⁷¹ Id.

⁷² See Fawcett, supra note 3, at 44, 300 (discussing and citing in full Utrillo decision).

Utrillo case, the Cour d'appel de Paris held that the nephew's widow could not claim the droit de suite because she had no blood ties with Braque.⁷³ Further, it held that the three cousins could not claim the droit de suite, because they were not the nephew's heirs. Their claim was superseded by the nephew's wife, even though she could not claim the right. The case then went to the Cour de cassation, which made clear that article 42 meant there could be no distinction between the author's heirs and the subsequent heirs (i.e., the heir's heirs).⁷⁴ The effect of this holding upon the requirement of blood ties is not clear, but while the droit de suite cannot be alienated by way of sale, it appears that the proceeds right is otherwise descendible in order of the legal devolution provided for by the French civil code.

Commentators who argue that the droit de suite should be treated as an author's right, subject to the ordinary legal rules applicable to other economic rights of authors, have criticized the approach taken by the French court in the Utrillo case.⁷⁵ Ms. Fawcett argues that, like the performance and reproduction rights, the droit de suite allows the author to share in the exploitation of the work and to derive a financial benefit from it, and thus should take its place among author's economic rights, and not be limited to blood relatives. She also asserts that the element of inalienability should be renounced:

The legislature, wishing to protect the artist and his family against themselves, allowed itself to be led

⁷³ Judgment of October 15, 1986, R.I.D.A. No. 136, April 1988, p. 1hh.

⁷⁴ Id.

⁷⁵ Fawcett, supra note 3, at 45. But see Plaisant, supra note 2, at IV-8 ("We think that such a limitation is good...the equitable grounds upon which the right is based do not warrant giving this privilege to people who do not have a close connection with the author").

into a path which departs from the usual legal rules and has created, as between the legal arrangements made for artists and those made for other authors, a distortion that does not seem to be justified by any convincing argument...The ambiguity can only be resolved by renouncing the element of inalienability.⁷⁶

7. Auction Sales and Dealer Sales

a. Auction sales. Originally, the French law applied only to sales at auction. Auctions are the minimum field of application for the droit de suite in all countries which have adopted this principle. In fact auction sales were a major stimulant for the droit de suite, since the high prices reached by some works at auction made the public aware of the problem. Public auctions are also easier to monitor than dealer sales because of the careful record keeping involved and the advertising of works put up for sale.⁷⁷

Auction sales were the subject of an early case interpreting the French droit de suite. Sellers at auction sales commonly set a reserve price below which there can be no sale. If bids stop below that price, the seller sometimes withdraws the offer for sale, or the auctioneer makes the next highest bid, and the item is returned to the seller. An issue arose as to whether the droit de suite should be collected for artists when the work has been put up for bids but "withdrawn," that is where the purchaser is also the seller.⁷⁸

In a January 21, 1931 decision, the Tribunal de la Seine decided that there had been an auction sale in such a case.⁷⁹ Where the minimum price set by the seller had not been disclosed before the sale in such a way that it was

⁷⁶ Fawcett, supra note 3, at 47.

⁷⁷ Id. at 78-81.

⁷⁸ See id. at 79.

⁷⁹ Id. at 299 (citing Judgment of January 21, 1931, Tribunal de la Seine, 1931 G.P. 1301. 1936 Rev. Trim. Dr. Civ., comment of Wahl.).

impliedly accepted by the bidders, the right of withdrawal could not be invoked against a third party. The court apparently saw a danger of an art owner stepping up bids to create an artificial price which would enable him later to obtain a higher price in a private transaction, thereby avoiding payment of the droit de suite.⁸⁰

b. Dealer sales. Under the 1957 law, the French droit de suite was extended to include sales "through a dealer," as well as public auctions.⁸¹ Implementing rules were never issued, however, and the existing rules do not apply to private sales.⁸² Consequently, the French law still applies in practice only to auction sales. It is estimated that the value of the art market including gallery and dealer sales is four times as large as the auction market.⁸³

Why has the French law never been applied in practice to dealer sales? Like measuring the royalty by the resale price (rather than the increase in value), the application of the droit de suite to auction sales (rather than all sales including dealer and private sales) is a departure from the law's

⁸⁰ Id. at 80. Critics of this decision complain that where the seller exercises the option of withdrawal, ownership is not actually transferred. See Fawcett, supra note 3, at 81 (citing A. Wahl, Le Droit des Artistes sur les oeuvres retirees d'une vente publique ou adjugees au profit du vendeur, 35 Revue Trimestrielle de Droit Civil [Rev. trim. civ.] 613, 623.). Fawcett advocates limiting the exercise of withdrawal to the fixing of a reserve price. "This seems to us to protect the seller's interests sufficiently while assuring that the option to withdraw cannot be diverted from its purpose and used for speculative ends since the price would be set before the sale in agreement with the auctioneer." Id.

⁸¹ Copyright Statute: Law Number 57-298 of March 11, 1957, as amended by Law Number 85-660 of July 3, 1985, reprinted in Fawcett, supra note 3, at 225.

⁸² Plaisant, supra note 2, at IV-1.

⁸³ Letter from Gérard Champin, President, Chambre Nationale des Commissaires Priseurs (Sept. 30, 1992).

rationale justified by expediency. Including dealer sales, which are difficult to monitor, increases the administrative challenge and the risk of noncompliance.⁸⁴

It has also been asserted that the French executive opposes extension to dealer sales, and therefore refuses to issue regulations, while the parliament favors authors and will not abrogate the extension.⁸⁵

Perhaps the most reasonable explanation is given by Jean-Marc Gutton, Director General of the French artists' collecting society ADAGP. He observes that, after the 1957 bill was signed into law -- but before any implementing decrees occurred-- the artists' societies reached agreements with the auctioneers and the art galleries, by which the galleries would pay an employer's "social security subscription" to the artist's branch of the social security, even though artists are not employees of galleries. The "subscription" paid by galleries does not depend upon the sale of works qualifying for the resale right; instead, it is a percentage of the galleries' gross incomes.⁸⁶ This agreement

⁸⁴ See New York Hearing at 120 (statement of Robert Panzer of Visual Artists and Galleries Association) (asserting that royalty should apply only to sales by auction houses, because including dealers "would be extremely difficult both definitionally and from the standpoint of enforcement"). Accord, John H. Merryman and Albert Elsen, Law, Ethics and the Visual Arts 214 (1987). But see Plaisant, supra note 2, at IV-28 (writing "There is no reason not to do so. If it is done, since policing is difficult, fraud will be frequent. However, authors' societies are able to adequately police the use of musical works. Authors' societies which collect the proceeds right could reach an agreement with merchant associations, or, at least, with the most important merchants."); New York Hearing at 42-43 (statement of William Patry, United States Copyright Office) (noting that German law applies to galleries and asking whether U.S. should look to German model as "better source" than French model).

⁸⁵ Merryman, supra note 84, at 214; Plaisant, supra note 2, at IV-21.

⁸⁶ Telephone interview with Jean-Marc Gutton, Director General of ADAGP (July 30, 1992).

apparently diffused some of the momentum to collect the droit de suite from dealers.

The French law provides social security for artists. Gutton cautions, however, against confusing author's rights and social security. He argues that the ground for droit de suite is not as a welfare measure, but as a means for enabling artists to obtain their rightful share in the proceeds of resale.⁸⁷

8. Collection of the Droit de Suite: the Artists' Societies

Two private authors' societies, Societe de la Propriete Artistique et des Dessins et Models (SPADEM) and the Association pour la Diffusion des Arts Graphiques et Plastiques (ADAGP), dominate the collection process in France. These authors' societies are similar to ASCAP or BMI for composers in the United States.⁸⁸

Artists in France join SPADEM or ADAGP and assign the power to collect their proceeds right to the society. The auctioneers must pay the royalty either to an author's society, which will give it back to the artist less management costs (usually 15 percent); or directly to the author or his or her

⁸⁷ Id. This same argument is made to counter assertions that the droit de suite will help mainly the most successful artists rather than the struggling unknowns: if the proceeds share is their rightful entitlement, the argument goes, then the wealth or poverty of the artist is irrelevant. See, e.g., New York Hearing at 13 (statement of Jean-Marc Gutton) ("Droit de suite should not be considered as a capital gains tax, but as an artist's right which it is normal for them to receive.>").

⁸⁸ There are also artist rights societies in the United States that collect royalties for reproduction and other rights. See *infra* Ch. III, notes 109-10 and accompanying text (discussing VAGA and Artists' Rights Society).

heirs, who must demand the royalty payment not later than three days after the sale has occurred.⁸⁹

Under the decree of December 17, 1920, authors can claim the droit de suite in two ways: by specific declaration or general declaration.⁹⁰ Under a specific declaration, which is rarely used, the author has 24 hours after the sale to demand the royalty from the auctioneer or other public official. Under a general declaration, the author declares and publishes in the Journal Officiel a notice that he or she will invoke the proceeds right for his or her works, and also delivers a copy to the ministry of fine arts.⁹¹ Alternatively, the author joins an authors' society which will represent the artist and make a collective declaration for its members.

Whether a general or specific declaration is made, the auctioneer must give notice to the beneficiary within three days of the sale, and the beneficiary must prove his identity and right to the royalty. If the money is not paid within three days, the auctioneer must notify the beneficiaries again the following month. If after three months the beneficiary has not claimed the payment, the auctioneer pays the money to the seller. Where there are conflicting claims to the money, the auctioneer deposits the money at the Caisse des depot et Consignation.⁹²

⁸⁹ Comment 10, at 46 (SPADEN), App. Part I. Originally, the French law had required artists to register claims to resale royalties in the Journal Officiel, and send a copy of the registration statement to the ministry of fine arts. The goal was to build up a fine art registry for purposes of authentication, but the system did not work. See supra notes 34-36 and accompanying text (discussing registry).

⁹⁰ Plaisant, supra note 2, at IV-22.

⁹¹ Id. See also notes 34-36 and accompanying text (discussing procedures under 1920 decree).

⁹² Plaisant, supra note 2, at IV-23 and 24.

The most common method of general declaration involves the authors' societies. ⁹³ Although there is no legal obligation to join an author's society, very few authors act as individuals. Authors' societies file collective declarations with an alphabetical list of authors, for whose works the royalty is to be paid. The national union of auctioneers and SPADEM concluded agreements and issued a general declaration relating to droit de suite in July of 1956. ⁹⁴

Both of the French artists' rights societies are associations; they charge a 15 percent fee for their work, intended to cover administrative expenses, not to earn a profit. Both societies were organized to help authors exercise their rights, to protect author's interests, and generally to promote culture. ⁹⁵

Mr. Gutton asserted a common view that authors' societies are the best vehicle for collection of droit de suite proceeds because they are best equipped to follow the art market and cope with the auctioneer's lobby. ⁹⁶ The societies monitor auction house catalogues published before sales of importance, acquire information from auction houses about upcoming sales, and have access to the auctioneers' registers. Auctioneers must keep a register recording each sale. These registers are open to authors and their heirs or representatives, including the authors' societies. ⁹⁷

⁹³ Id. at IV-24 (citing Arrêté of February 21, 1921). The societies act as representatives of the artists. The law provides for this representation. Id. at IV-25 (citing Decree of Dec. 17, 1920, art. 3).

⁹⁴ Id. at IV-21 - IV-24.

⁹⁵ Id. at IV-24 and 25.

⁹⁶ Comment 16 (ADAGP), App. Part I.

⁹⁷ Plaisant, supra note 2, at IV-24 and 25.

After each sale, the society sends the auctioneer a schedule with the author's name, catalogue number, title of the work, and selling price.

According to ADAGP, 70 percent of all money distributed by that organization came from droit de suite, as compared to 30 percent from account representation and reproduction rights.⁹⁸ ADAGP also reported that as the art market in France expands, so do droit de suite proceeds, from a reported 13 million francs (2.35 million U.S. dollars) in 1988, to 52 million francs (9.4 million U.S. dollars) in 1990.⁹⁹

Mr. Gutton has reported the figures in a slightly different manner in accounting for an art market downturn in 1991. According to Gutton, in 1990, ADAGP collected resale royalties for 1,650 of its 2,500 members (85 percent of whom are living artists) of more than \$10.5 million, distributed in the following proportions: 1100 members received between \$20 and \$2,000; 400 members received between \$2,000 and \$20,000; 100 members received between \$20,000 and \$40,000; and 50 members received more than \$40,000. In 1991, after the market decrease, ADAGP distributed \$7 million to its members. He also testified that SPADEM, ADAGP's counterpart, collected \$7 million in 1990 and \$4 million in 1991.¹⁰⁰

Each payment of droit de suite to an artist is accompanied by a detailed statement of all transactions concerned, allowing an artist "to remain perfectly well-informed about the destiny of his artworks on the art market."¹⁰¹

⁹⁸ Comment 16 (ADAGP), App. Part I.

⁹⁹ Id.

¹⁰⁰ New York Hearing at 15-16 (statement of Jean-Marc Gutton), App. Part III.

¹⁰¹ Id. at 14.

The French collection societies claim to be reducing their administrative costs. Mr. Gutton, the Managing Director of ADAGP, terms the administrative burden "light," and reports that for every \$20 collected more than \$16 are distributed.¹⁰² SPADEM maintains that French artists are unanimously in favor of droit de suite, and that it does not serve as an impediment to either their artistic careers or the art market.¹⁰³

9. **The Effect of the Resale Royalty on the French Art Market**

Mr. Gutton insists that, "[F]ar from ruining the art market in the countries where droit de suite is applied, it brings those countries a level of stability for which they are envied by countries where the right is not applied."¹⁰⁴ He asserts that "from 1980 to 1990, the progression of modern art sales in France vied successfully with progression in the United States," a country without the droit de suite.¹⁰⁵ This suffices, he says, "to prove that droit de suite does not depress the market."¹⁰⁶

¹⁰² Id.

¹⁰³ Comment 10, at 47 (SPADEM), App. Part I.

¹⁰⁴ New York Hearing at 11 (statement of Jean-Marc Gutton), App. Part III.

¹⁰⁵ Id. at 11-12. In France, between 1980 and 1987, sales of purely contemporary art multiplied by 10. In the United States, during the same period, sales of art multiplied by 17, but these included sales of Impressionist Art. In fact, says Gutton, the Parisian art market suffered less from the market collapse of 1991 than did the United States or London markets, because it was less involved with speculation in works of extremely high value (such as Impressionist works): the annual figures of 1991 as compared with 1990 show a drop of nearly 55 percent for Sotheby's, 49 percent for Christies, and only 37 percent for Drouot. Id. at 12.

¹⁰⁶ Id. at 12-13. Furthermore, he claims, "all serious surveys have shown that there is no greater tendency towards underground business activities in countries where droit de suite is applied than elsewhere." Id. But see New York Hearing at 220-24 (statement of Stephen Weil, Hirshhorn Museum, Washington, D.C.) (predicting depressive effect on market and removal of art transactions to other
(continued...))

In contrast, Gerard Champin, President of the Chambre Nationale des Commissaires Priseurs, ¹⁰⁷ writes that the French market is "disadvantaged compared to the other European center for modern art sales, which is London. Indeed we must remember that the transportation cost is very small compared to the cost of 'droit de suite'. The vendors won't hesitate to move their goods several hundred miles to save three percent." ¹⁰⁸ The Chambre Nationale des Commissaires-Priseurs plays a role in the administration of the droit de suite, overseeing the validity of the requests and, after verification, authorizing or not the payment by the Commissaires-Priseurs. Champin claims that the introduction of the droit de suite into United States law "should not have a negative repercussion on the art market provided its rate is reasonable, one percent for example." ¹⁰⁹

C. BELGIUM

1. Development of the Law

Belgium quickly became the first country to follow France's lead in recognizing the droit de suite. On June, 25, 1921, it passed a resale royalty law modeled after France's. ¹¹⁰

¹⁰⁶(...continued)
jurisdictions); see also Bolch, Damon, & Hinshaw, An Economic Analysis of the California Art Royalty Statute, 10 Conn. L. Rev. 689 (1978) (presenting through economic analysis thesis that royalty will depress prices collectors will pay in primary market and will disadvantage whole in order to benefit few).

¹⁰⁷ This group is comprised of public officers, auctioneers.

¹⁰⁸ Letter from Gérard Champain, President, Chambre Nationale des Commissaires Priseurs, to Ralph Oman, Register of Copyrights (Sept. 30, 1992).

¹⁰⁹ Id.

¹¹⁰ Belgian Law, supra note 17.

Commentators have noted that the early resale royalty laws were passed because of a humanistic or romantic view of the artist. Fawcett observes that:

[T]his legal recognition, both in France and Belgium, came about because of the social and cultural setting in which the reform was taking place rather than because it represented the culmination of a judicial evolution. After the initial euphoria, the droit de suite was to become an object of disputes among commentators, disputes which were later exploited by auctioneers and art dealers in order to resist practical implementation of the right." ¹¹¹

2. Measuring the Proceeds Right

As in France, the droit de suite in Belgium is based on the total resale price. ¹¹² Article 2 of the Belgian law provides that the levy "shall be withheld from the selling price of each work." ¹¹³ Unlike France, however, the tariff of the droit de suite in Belgium varies according to the sales price of the work: two percent of sums from 1,000 to 10,000 francs; three percent of sums from 10,000 to 20,000 francs; four percent of sums from 20,000 to 50,000 francs; and six percent of sums in excess of 50,000 francs. ¹¹⁴

As in France, the Belgian method of measuring the royalty-- based on the total sales price, whether there is an increase in value or not-- represents a departure from the law's rationale, which is to allow artists to benefit from an appreciation in the value of their work.

¹¹¹ Fawcett, supra note 3, at 4.

¹¹² Sherman, Incorporation of the Droit de Suite into United States Copyright Law, 18 Copyright L. Symp. (ASCAP) 50, 54 (1968). See Table 1 for a comparison of basis of determination in selected countries.

¹¹³ Belgian Law, supra note 17 at art. 2.

¹¹⁴ Id.

The droit de suite in Belgium is said to be founded on the civil law concept of "enrichment sans cause," or unjust enrichment. As the artist's growing fame and reputation increases the value of the earlier work, the purchaser benefits; if the purchaser benefits to the exclusion of the artist, this is seen as unjust enrichment. ¹¹⁵

Related to the idea of "enrichissement sans cause" is the concept of "imprevision," or hardship due to changed circumstances. Where continuation of a contract would result in a hardship to one of the parties, the civil law would permit a revision of its terms. ¹¹⁶

These ideas are woven into the rationale for the Belgian droit de suite. Wauvermans, rapporteur of the Belgian law, wrote:

Agreements may be voided on the grounds of "imprevision" (hardship due to unforeseeable circumstances) and when we turn to the heartbreaking stories of great artists dying in destitution, they must surely move us to extend the scope of the principle. From another angle, it is surely proper to constitute a permanent association between the artist and the person who acquires his work, and to reserve to the creator a share in the profits resulting from later appreciation.¹¹⁷

3. Foreign Authors

Under the Belgian Law of 1921, the benefit of the droit de suite applies to nationals of countries granting equivalent rights to Belgian nationals. ¹¹⁸ By a 1923 regulation, French artists whose works were sold at

¹¹⁵ Sherman, supra note 112, at 59.

¹¹⁶ Id.

¹¹⁷ Pierre Recht, Has the "Droit de Suite" a Place in Copyright?, 3 Unesco Copyright Bulletin 51, 55 (1950) (quoting Wauvermans).

¹¹⁸ Belgian Law, supra note 17, at art. 4.

auction in Belgium were granted the droit de suite in Belgium, thereby reciprocating the extension of such rights in France to Belgian artists. ¹¹⁹

4. Term

Although Belgium is unique in that its droit de suite is recognized in a separate law, while other countries have incorporated the requirement into their authors' rights laws, the duration of the right in Belgium is the same as for the copyright law or other economic rights of authors. ¹²⁰

5. Works

The droit de suite in Belgium is granted to artists in respect of their works which are sold at public auctions, provided the works, "such as paintings, sculpture, drawings and engravings, are original and represent personal creations of their authors." ¹²¹

6. Inalienability

Beneficiaries after death include heirs and successors. ¹²² Succession to the droit de suite is covered by the ordinary legal rules on succession. ¹²³ On April 25, 1945, deciding whether the principle of inalienability of the droit de suite also applied to transmission by reason of death, the Judge de paix of the 2nd Canton of Brussels decided that the droit de

¹¹⁹ Regulation of September 5, 1923, reprinted in Fawcett, supra note 3, at 207.

¹²⁰ The Belgian Law, art. 1, par. 2, provides that the right shall exist "for a period equal to the duration of copyright according to the laws in force."

¹²¹ Id. at art. 1, par. 1.

¹²² Art. 1, par. 2 of the Belgian law provides that "[t]he same right shall belong to the heirs and successors in title of artists as designated by the Law of March 22, 1886..."

¹²³ Fawcett, supra note 3, at 42.

suite could be the object of a legacy, and that legatees could be beneficiaries of the droit de suite.¹²⁴ On June 26, 1967, the Tribunal de premiere instance of Ghent, upholding as valid a contractual arrangement that included the droit de suite, confirmed that "the droit de suite is as a rule inalienable but this does not apply to transmission at death."¹²⁵

7. Auction Sales and Dealer Sales

The law's reference to "public sales" means sales made through an auctioneer.¹²⁶ Belgium has preserved the limitation of the droit de suite to auction sales, while many other countries have extended the law, at least on paper, to cover some private sales as well.¹²⁷

8. Collection of the Droit de Suite

In Belgium, the seller, and buyer, organizer or director of the public sale are jointly liable for the payment of the royalty. Article 3 of the Belgian Law provides: "The vendor, purchaser, and the public official conducting the sale shall be jointly answerable to the artist or his successors in title in respect of the levy provided for by this Law."¹²⁸ They may free themselves from that liability by collecting the droit de suite at the time of the sale.¹²⁹

¹²⁴ Id. at 41, 163 n. 221 (citing 1945 Journal des Tribunaux [J.T.] 367, Belg.).

¹²⁵ Fawcett, supra note 3, at 42.

¹²⁶ Id. at 78.

¹²⁷ Id. at 82. See Table 1 for a comparison of types of sale covered.

¹²⁸ See also Royal Decree of September 23, 1921, Regulating the Application of the Law of June 25, 1921, art. 1 [hereinafter Belgian Decree of 1921], reprinted in Fawcett, supra note 3, at 205.

¹²⁹ Id. at art. 2.

The law provides for a registry to be kept at Brussels, in the Department of Public Instruction. This registry records deposits and payments with regard to the droit de suite.¹³⁰ The royalty must be deposited with the official charged with keeping the official register by at least eight days after the sale, accompanied by a form declaring the date and place of the sale, the title of the works sold, name of the author, sales price, royalty collected, and other information.¹³¹

The royalty is paid to the artists or their successors, or to an association designated as their agent by the agent charged with collection of the droit de suite, upon proof of their identity.¹³² Twice a year, the Moniteur Belge publishes a list of artists who have given power of attorney to an association, such as SABAM, to collect in their name the droit de suite.¹³³ The government agent charged with collecting the royalty does not have to verify that the sum presented to him is in accordance with the rate of levy required by law; he or she merely pays the sum received to the artist or agent, "and any dispute should be decided between the parties concerned, amiably [sic] or by legal proceedings."¹³⁴

¹³⁰ Id. at art. 3.

¹³¹ Id. at art. 4.

¹³² Id. at art. 5.

¹³³ Id. at art. 6.

¹³⁴ Id. at art. 7.

D. GERMANY

The Federal Republic of Germany incorporated droit de suite into article 26 of the copyright law in 1965.¹³⁵ In Germany the resale proceeds right is known as Folgerecht,¹³⁶ but the term droit de suite is often used.¹³⁷ Under German law, the droit de suite is defined as the right of an author of an artistic work to an interest in the sale price of the original of the work after a primary sale or other alienation by the artist, limited to the duration of the copyright protection of the work.¹³⁸

Although Germany was one of the first countries to consider droit de suite, it did not pass a law until the concept had been thoroughly studied and debated for more than fifty years.

1. Development of the Law

It is reported that the first legislative proposal for a German droit de suite was introduced as early as 1910.¹³⁹ Two years later, in 1912, a member of the Bavarian Parliament called for introduction of the droit de suite. The minister of cultural affairs "pointed out the anticipated difficulties of the

¹³⁵ German Copyright Act of 1965 [BGBl.I 1273], §26, reprinted in Friedrich-Karl Beier and Gerhard Schrickler, German Industrial Property, Copyright and Antitrust Laws, 6 IIC Studies in Industrial Property and Copyright Law 121 (1983) [hereinafter German Law].

¹³⁶ Max Planck Study, supra note 4, at VI-2 and 3.

¹³⁷ Id. at VI-3. The term droit de suite also refers in German copyright law to participation of the author of literary or musical works in increases of value which occur after a grant of the copyright license. Predominantly, however, the term Folgerecht is reserved for the right of an artist to participate in the price received on further resale of his or her work. Id.

¹³⁸ Id. at VI-2.

¹³⁹ Ferdinand Avenarius, Urheberschutz und Urheberschutz, Flugschriften des Durerbundes 65, Flugschrift zur Ausdruckskultur 22 (1910), cited in Max Planck Study, supra note 4, at VI-13 n. 21.

practical realization and promised to have this considerable idea further evaluated." ¹⁴⁰ The idea was proposed in more detail in 1913 ¹⁴¹ calling for the artist to get between 20 and 25 percent of the difference between the purchase price and the selling price.

Other proposals followed. ¹⁴² The idea of a German droit de suite was strengthened by the introduction of laws in France and Czechoslovakia, and by attention the idea received internationally at the congresses of the Association Littéraire et Artistique Internationale and the League of Nations in the mid-1920s, and the Rome Conference of the Berne Convention in 1928. ¹⁴³ In 1929, a complete study was made of the introduction of the droit de suite into German law. ¹⁴⁴

In 1932, the Reich Ministry of Justice published, in cooperation with the Austrian government, an official draft for a reform of the German and Austrian Copyright Laws, which included a droit de suite. The draft called for three percent of the sales price to be paid to the author or his heirs where the sales price was higher than 500,-RM, and the sale took place before expiration of the copyright. The obligation did not apply, however, if the price received

¹⁴⁰ Max Planck Study, supra note 4, at VI-14 (citing Minister for cultural affairs von Knilling, and Member of parliament Hubsch, Verhandlungen der Kammer der Abgeordneten des Bayerischen Landtags, 36. Landtagsversammlung, 1. Session in 1912, stenographische Berichte, vol. 4, p. 291 et seq.).

¹⁴¹ Max Planck Study, supra note 4, at VI-14 and 15 (citing Otto Opet, Der Wertzuwachsanspruch des bildenden "Künstlers", Annalen des Deutschen Reichs 368-85 (1913).

¹⁴² See Max Planck Study, supra note 4, at VI-15.

¹⁴³ Id. at VI-16.

¹⁴⁴ Id. (citing Justus Koch, Über die Einführung des "Droit de suite" in Deutschland, UFITA II 1929, p. 279-99).

after subtraction of the droit de suite was not higher than the price paid, i.e., if there were no increase in value. ¹⁴⁵

The proposal to incorporate the droit de suite into German law was met with intense criticism. There was heavy opposition from the German art trade. Commentators Georg Klauer, Hans Otto de Boor, and Willy Hoffman favored removing the droit de suite from the legislative draft, calling instead for further observation of how the proceeds right would function in foreign countries. ¹⁴⁶ Several well-known artists, including Paul Klee, Emil Nolde, and Ernst-Ludwig Kirchner, even signed a petition asking the Reich Ministry of Justice not to include the droit de suite in the law. ¹⁴⁷

On the basis of that development, the Ministry of Justice decided not to introduce the droit de suite into the draft of 1933. There seemed no way to implement the droit de suite effectively, or with benefits that would outweigh the burdens. The reform of German copyright law was abandoned until after World War II. ¹⁴⁸

Following the Brussels Conference for the Revision of the Berne Convention in 1948, where the droit de suite was introduced into article 14bis of the Berne Convention, efforts to revise German copyright law resumed. However, the Federal Ministry of Justice in Germany published a non-official draft in 1954 expressly rejecting the droit de suite. ¹⁴⁹

¹⁴⁵ Id. at VI-18 and 19.

¹⁴⁶ Id. at VI-19 and 20.

¹⁴⁷ Id. at VI-20 (citing Wilhelm F. Arntz, "Gewinnbeteiligung fur Kunstler" Das Schonste, No. 11, 1960, p. 11; Hans Wicher, "Folgerecht und Versteigerungsrecht", UFITA 31, 1960, p. 207 (219)).

¹⁴⁸ Id. at VI-20 - VI-22.

¹⁴⁹ Id. at VI-22.

Following the 1954 draft, the constituency in favor of droit de suite began to verbalize its views to the Federal Ministry of Justice. These groups included the Professional Association of the Artists of Berlin, the Federation of German State Associations of Artists, the Academy of Sciences and Literature, and the German Association for Industrial Property and Copyright. In contrast, the Professional Association of German Auctioneers opposed the idea. ¹⁵⁰

In a meeting held on January 17, 1955, the Federal Ministry and the professional associations decided that the droit de suite was feasible. A 1959 reform draft again included the proceeds right. ¹⁵¹ In 1962, the German government published an official draft of the Copyright reform bill, incorporating the droit de suite in article 26.

The legislative history reveals that the reasons for this movement in Germany on the issue included: the disadvantages under traditional copyright law for visual artists as compared to literary authors and composers; the fact that the droit de suite had been introduced in France, Belgium, Italy, and in art. 14bis of the Berne Convention; and the basic moral justifications for the droit de suite. ¹⁵² One German study from this period indicated that works of art of recognized value generally increase in price proportionally to their age, i.e., roughly 10 times in 10 years, 20 times in 20 years. ¹⁵³

¹⁵⁰ Id. at VI-23.

¹⁵¹ Id. at VI-24 – VI-26. Again, the proposal received negative reaction from various auctioneers associations.

¹⁵² Id. at VI-26.

¹⁵³ Id. at VI-5 (citing Comment of the Bund deutscher Landesberufsverbände bildender Lanstler, Munchen, on arts. 26, 36 of the draft of a copyright act and an act of related rights (Copyright Act), 1964, encl. 1, p. 2).

On September 9, 1965, the new German Copyright Law was proclaimed in the Federal Gazette. Most of its articles, including art. 26 on droit de suite, became effective on January 1, 1966. ¹⁵⁴

2. Measuring the Proceeds Right

For the sake of simplicity and privacy, the German draft followed the French and Belgian lead in disregarding the increase in value, and basing the droit de suite on the total resale price. ¹⁵⁵ It was felt that 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." ¹⁵⁶

As the Germans had carefully studied droit de suite for many years, they were aware of another strong reason to base the right on the resale price: ease of administration. One study noted:

...one points to the French and Belgian examples. In France as well as in Belgium the droit de suite is formulated as a pure participation in the sale price. There the droit de suite brings considerable results -- 1959 in France about 200,000,-German Marks-, and in Belgium about 20,000,-German Marks-- while in Italy the droit de suite which there is given in form of a participation in the increase in value until now has not brought any income. ¹⁵⁷

Nonetheless, the proposal was heavily debated after its referral to the Federal Council, and some were particularly critical that the statute had abandoned the basic concept that an artist should participate in an increase in

¹⁵⁴ Id. at VI-34.

¹⁵⁵ Id. at VI-27. See Table 1.

¹⁵⁶ Id. See also id. at VI-44.

¹⁵⁷ Id. at VI-56 - VI-57.

value of works. As in France and Belgium, however, this finally was seen as a necessary compromise.

Originally the German law set the proceeds at one percent, but now the right is set at a flat rate of five percent of the sale price. There is no obligation to pay the Folgerecht if the sale price is less than 100 German marks.¹⁵⁸

3. Foreign Authors

Under Article 121(5) of the copyright law, the droit de suite is available to foreign nationals if the state of which they are nationals grants to German nationals an analogous right, according to a notice made by the Federal Minister for Justice in the Official Bulletin of Federal laws.¹⁵⁹

4. Term

In Germany, as in France and Belgium, the duration of the right is the same as for other economic rights an author enjoys: The life of the author, plus fifty years.¹⁶⁰ The claims of the author to the right, however, would expire after ten years.¹⁶¹ The reason for this limitation is that German dealers are required to keep their records and books for ten years.

5. Works

The law applies to resales of originals of artistic work. The Folgerecht does not apply to architectural works and works of applied art.¹⁶²

¹⁵⁸ German Law, supra note 135, at §26(1).

¹⁵⁹ Benvenuto Samson, The New Regulation of the "Droit de Suite" in the Federal Republic of Germany, 77 *Revue Internationale du Droit D'Auteur* 38, 56 (1973).

¹⁶⁰ Fawcett, supra note 3, at 286. See Table 1.

¹⁶¹ German Law, supra note 135, at §26(7).

¹⁶² Id. at §26(8).

6. Inalienability

The artist may not in advance waive his or her right to the participation.¹⁶³ The expectancy may not be the subject of a judicial execution, and any disposition of the expectancy is without legal effect.¹⁶⁴

7. Auction Sales and Dealer Sales

The German law applies to resales involving art dealers and auctioneers. Unlike France, which amended its law in 1956 to apply to dealers but never developed implementing rules to do so, the German law applied to galleries from the start. Article 26 states that the droit de suite will be collected if an art dealer participated in the transaction "as purchaser, vendor, or agent."¹⁶⁵

Its practical application, however, was proven impossible due to the refusal of art dealers-- and auctioneers-- to supply any information concerning the sale of works, proceeds from the sale, or the identify of the seller. The law contained no provision concerning the obligation to provide information.¹⁶⁶

Amendments to the law, effective Jan. 1, 1973, provided the artist with the right to obtain information from a dealer or auctioneer through whom a specific work of art had been sold.¹⁶⁷

¹⁶³ Id. at §26(2).

¹⁶⁴ Id.

¹⁶⁵ Id. at §26.

¹⁶⁶ See generally Wilhelm Nordemann, Ten Years of "Droit de Suite" in Federal Germany, 91 *Revue Internationale Du Droit d'Auteur* 76 (1977).

¹⁶⁷ The amendments to the law were partly a result of the Judgment of June 7, 1971, Federal Supreme Court, Germany, holding that auctioneers or dealers who were bound by an obligation of professional confidentiality could refuse to reveal the name, capacity, or address of the seller, but only if they paid the droit de suite themselves. See Fawcett, supra note 3, at 130.

As late as 1977, however, four years after the amended provisions went into effect on January 1, 1973, the droit de suite in Germany still had not been put into practical effect, and dealers still had not paid a resale royalty under the law.¹⁶⁸ Art dealers associations announced, in fact, that their dealer-members would boycott artists who joined Bild-Kunst (the German art collecting society) or who raised a claim under the droit de suite.

Finally, in the early 1980s, German artists began receiving payments from art dealers and auctioneers. This was achieved not only through the development of Bild-Kunst, but also through agreements struck between Bild-Kunst and organizations representing German art dealers and auctioneers.

8. Collection of the Droit de Suite: The Artists' Societies

Collection of the Folgerecht in Germany is handled by Bild-Kunst, an artists' rights licensing and collection organization similar to and associated with SPADEM, the French artists' rights society.¹⁶⁹ Bild-Kunst was founded in 1978, in response to pressure from the Bundesverband Bildender Kunstler (Federal Association of Visual Artists) and the Deutscher Kunstlerbund (German Artists Association).¹⁷⁰ The purpose of Bild-Kunst is to assert copyright-based exploitation rights on behalf of artists, which means collecting the money and passing it on to the artists. Bild-Kunst originally was founded to assert the subsequent exploitation resale royalty rights, and now handles reproduction rights and broadcasting or re-broadcasting rights, as well.¹⁷¹ The

¹⁶⁸ Nordemann, supra note 166, at 86.

¹⁶⁹ Merryman, supra note 84, at 214.

¹⁷⁰ German Commission for UNESCO, "Survey on the Economic Situation and Social Status of the Artist in Germany" 1 (1992).

¹⁷¹ Id. at 2.

organization consists of artists, designers, and photographers who bring their rights into Bild-Kunst.

The German law requires certain claims to be asserted through a collecting society such as Bild-Kunst. Through a collecting society, the author may request information from a dealer or auctioneer as to what originals of the author's works have been resold during the last calendar year, and also request information on the seller's name and address and the sale price, so long as this information is strictly necessary for the author's claim to be made. The dealer or auctioneer may refuse to reveal the seller's name and address if the seller pays the participation due to the author. If there is reasonable doubt that the information provided by the dealer or auctioneer is accurate or complete, the collecting society may demand access to account books or other documents.¹⁷²

Notwithstanding the threat of dealers and auctioneers to boycott artists who joined Bild-Kunst, by 1977, Bild-Kunst had nearly 1,000 members.¹⁷³

In spite of its growing membership, Bild-Kunst had a hard time getting started with enforcement because it had not collected enough receipts to initiate legal action.

In the late-1970s, however, Bild-Kunst began to receive revenue from other sources that could be used for enforcing the droit de suite in test cases. The organization also grew stronger after 1975, with the influx of French artists who could claim the droit de suite in Germany through Bild-Kunst, following the reciprocity agreement between France and Germany.¹⁷⁴

¹⁷² German Law, supra note 135, at §§26(3)-(6).

¹⁷³ Nordemann, supra note 166, at 86.

¹⁷⁴ Id. at 88.

In the mid-1970s Bild-Kunst began to arrange with art dealers for the payment of a lump sum to cover claims under the droit de suite rather than individual distribution based on individual sales. ¹⁷⁶

On September 29, 1980, an agreement was reached between Bild-Kunst and the art trade organizations, including the German Art Dealers Association (which includes auctioneers). ¹⁷⁶ The agreement covers both droit de suite and the art trade's contributions to Social Security. ¹⁷⁷ A 1980 statute, effective on January 1, 1983, extended the German Social Security system to artists, who previously had been ineligible to collect from it. ¹⁷⁸

Under the 1980 agreement, dealers and auctioneers pay one percent of sales of twentieth century art to Bild-Kunst, and Bild-Kunst distributes the monies to artists for proceeds rights. Fifty percent of the money so collected is paid, as the art trade's contribution, into a special social security fund for artists, the Artists' Social Security Fund in the Federal Republic of Germany. Fifty percent is distributed to artists able to claim the droit de suite. ¹⁷⁹ In 1989, Bild-Kunst collected approximately DM 2.9m for resale proceeds rights.

In Germany today, the five percent resale royalty under the law has to a large extent been replaced by this operating agreement between the

¹⁷⁶ Id.

¹⁷⁶ Fawcett, supra note 3, at 133 (citing CISAC Document CIAGP/80/882 (1980)).

¹⁷⁷ Id. at 132.

¹⁷⁸ Id.

¹⁷⁹ German Commission for UNESCO, supra note 170, at 2.

professional association of German art dealers and Bild-Kunst mandating a one percent override charged on all sales of contemporary art in Germany. ¹⁸⁰

Bild-Kunst uses this one percent partly to pay royalties and partly to fund an artists' welfare or social security fund. Bild-Kunst Managing Director, Gerhard Pfenning, confirms this. Mentioning that the contractual arrangement reached a decade ago is the arrangement most art dealers choose, Pfenning also writes that the German law's provision granting artists access to information is an instrument whose "existence" is "necessary," but which hasn't actually been used since most information now is given voluntarily. "Even in our contract with galleries that organizes a special way of collecting droit de suite payments," writes Pfenning, "all the necessary information is given by the tax accountants of the galleries and double-checking has not been necessary." ¹⁸¹

Bild-Kunst estimates that in Germany 50 percent of resales qualifying for the Folgerecht are auction sales and 50 percent are dealer sales (40 percent gallery sales and ten percent "art agent" sales). ¹⁸²

Bild-Kunst retains ten percent of collected resale royalties to cover administrative costs, and another ten percent either for a social fund or to support young creative artists. It distributes sixty-six percent of Folgerecht income to German artists, and another one-third to foreigners, mainly French artists. Of the money distributed to German artists about 30 percent goes to

¹⁸⁰ Fawcett, supra note 3, at 132. Fawcett reports that over 300 galleries and auctioneers choose the contractual solution. Id.

¹⁸¹ Letter from Gerhard Pfenning, Managing Director, Bild-Kunst, to Ralph Oman, Register of Copyrights (Aug. 27, 1992) (emphasis added).

¹⁸² Id.

artists' estates, 20 percent to living artists of "great reputation," and the remainder to other artists. ¹⁸³

E. URUGUAY, CZECHOSLOVAKIA AND ITALY

Uruguay and Czechoslovakia are unique in that their statutes apply to all categories of intellectual works, without distinction. Uruguay applies the droit de suite to "any alienation" of literary or artistic property. ¹⁸⁴ Czechoslovakia's law applies to any "transfer of a work." ¹⁸⁵ In most countries, droit de suite applies only to a specific category of works, such as

¹⁸³ Pfenning adds:

The remaining money is distributed among a great number of living artists who face the situation of the art market, i.e. a contemporary artist normally has a limited period of high creativity; the production of this period is sold at high prices. After this period which might last five to ten years the art market loses interest in his new productions and starts resaling [sic] his creative period works. Through droit de suite a large number of this kind of artists benefit from resales of their works out of earlier periods which allows them to maintain a certain standard of living...

Id.

¹⁸⁴ Uruguay's law provides:

Article 9. In any alienation, there shall be understood to be reserved, for the benefit of the author making the alienation, the right to participate in any increase in the value of the work reflected in the profits obtained by the subsequent acquirers of the work. Any agreement to the contrary shall be null and void. The percentage of participation in each case shall be twenty-five percent. In the case of collaboration of a plurality of authors, the said percentage shall, in the absence of agreement to the contrary, be divided in equal parts between the persons concerned.

Upon the death of the author, his heirs or legatees shall retain the same right until such time as the work passes into the public domain.

Uruguay Law Number 9739 Concerning Literary and Artistic Copyright of December 15-17, 1937, amended February 15-25, 1938, reprinted in Fawcett, supra note 3, at 256 (citing CLTW, Supplement 1984-86).

¹⁸⁵ As amended by the Law of December 22, 1953, the Czechoslovakian Law of November 24, 1926, cited in Fawcett, supra note 3, at 215-16.

"works of art," "figurative arts," or "visual arts." ¹⁸⁶ Manuscripts of literary and musical works are sometimes included in other countries; architectural works and works of applied art are almost always excluded. ¹⁸⁷

Czechoslovakia's law is also unique in that it applies where the buyer who transfers the work realizes a "socially unjustified profit" in selling the work. As amended December 22, 1953, the law allowed the artist to "exact an equitable indemnity from the buyer if...the latter realizes an excessive profit in selling the work." A 1965 amendment allows the author to "claim a fair share from any transferee if the latter obtains a socially unjustified profit from" a transfer of ownership of the work. ¹⁸⁸ The 1926 law gave the "author of a work of figurative art, with the exception of an architectural work...a right to a portion of any disproportionately large net profit obtained by the owner..." The tribunal judging by that standard could take "the financial situations of the two parties; it may award to the petitioner up to twenty percent of the profit obtained...." This right of action was available for three years counting from the day on which the claimant first knew of the sale giving rise to his right. ¹⁸⁹

¹⁸⁶ World Intellectual Property Organization and United Nations Educational, Scientific and Cultural Organization, "Study on Guiding Principles Concerning the Operation of 'Droit de Suite'" at 5 (1985) [hereinafter WIPO-UNESCO Study].

¹⁸⁷ Id.

¹⁸⁸ Czechoslovakian Copyright Law Concerning Literary, Scientific and Artistic Work, Number 35, of March 25, 1965 (emphasis added), reprinted in Fawcett, supra note 3, at 216.

¹⁸⁹ Law of November 24, 1926 (emphasis added), reprinted in Fawcett, supra note 3, at 215.

The Uruguayan formula of applying the right to any work, according to some, is "excessively broad."¹⁹⁰ Further, applying a rate of 25 percent to the increase in value has been called "excessive"¹⁹¹ and "exorbitant."¹⁹²

Czechoslovakia and Italy attempt to give the artist a percentage of the difference between the seller's purchase price and the resale price. Some commentators observe that such a yardstick perfectly harmonizes the rationale of the law with its practical implementation.¹⁹³ Commentators suggest that the difficulty in administering and enforcing the droit de suite in such a way "may help explain its disuse" in countries such as Italy.¹⁹⁴ They report that systems such as Czechoslovakia's were "doomed to failure because the practical implementation required tracking the works of art in the hands of all successive

¹⁹⁰ Fawcett, supra note 3, at 53, 166 n. 273 (citing J. Antuna, La loi uruguayenne de protection des droits d'auteur, 9 Il Diritto de Autore 570, 576 (1938)).

¹⁹¹ Id. at 112 ("[I]t is indeed excessive to deduct one quarter of the profit made by the seller. The droit de suite must not have the effect of discouraging potential investors; the first to suffer from this would be those the law has sought to protect.").

¹⁹² See id. (quoting Dr. José Antuna).

¹⁹³ Id. at 5; Merryman, supra note 84, at 216.

¹⁹⁴ See DeSanctis, supra note 23.

See also New York Hearing at 19 (statement of Jean-Marc Gutton) (calculation of droit de suite should be on total resale price, not capital gains); Id. at 101-02 (statement of Ted Feder of Artists' Rights Society) (not necessary to base royalty on percentage of profits from current sale as compared to price received from previous one, since "It is often very difficult, if not impossible, to trace the sale records of works of art" and the "experience of Italy, Portugal, Uruguay, Czechoslovakia, and California, of computing the royalty on the increase in value over the preceding sale, has not been successful"); Id. at 137 (statement of Daniel Mayer of Volunteer Lawyers for the Arts) (royalty should be assessed on "total gross price of each sale regardless of whether the work has increased in value since its last sale").

purchasers so as to permit comparison of the present sales price with the previous sales price." ¹⁹⁵

F. SUMMARY OF DROIT DE SUITE IN OTHER COUNTRIES

Although a number of countries claim to have droit de suite, examination of their legal systems ¹⁹⁶ reveals that for many the principle is never carried out. Such countries include, but are not limited to, Italy, Czechoslovakia, Uruguay, and Yugoslavia. ¹⁹⁷

The majority of countries have simply not adopted the right, but several, including the United Kingdom, and Switzerland, have recently considered or reconsidered droit de suite. Other countries, including Australia and the United States, continue to study and debate the right. Still other countries, such as Spain, ¹⁹⁸ have either enacted new laws or are revising existing ones.

On November 11, 1987, Spain passed a law recognizing a resale royalty right. The Spanish law applied a 2 percent royalty on works of art that resold for a minimum of approximately \$2,000. As first enacted the right was not descendible. Also at first the Spanish collecting society, Entidad de Gestión de Artistas Plásticos (VISUAL) only collected the royalty from auction houses. ¹⁹⁹

¹⁹⁵ Fawcett, supra note 3, at 5.

¹⁹⁶ See generally WIPO-UNESCO Study, supra note 186; Legal Protection for the Artist (M. Nimmer ed. 1971); Fawcett, supra note 3; Australian Copyright Council, supra note 21; Merryman, supra note 84.

¹⁹⁷ See Table 1.

¹⁹⁸ See Comment 6 (Javie Gutiérrez Vicer, Executive Director Visual Entidad de Gestión de artistas Plásticas [hereinafter VISUAL]), App. Part I.

¹⁹⁹ Gutiérrez Comment 6 at 25-6 (statement of Javier Vicer, Executive Director of Entidad [hereinafter VISUAL]), App. Part I.

The Spanish law was recently revised and since July 7, 1992, VISUAL collects 3 percent for a minimum of \$3,000. The right has been extended to inheritors and the term is life of the author plus 60 years.

The Spanish law stipulates that the resale royalty is to be collected in both galleries and auction houses, and VISUAL is now negotiating an agreement with the 5 Galleries Association in Spain to collect an agreed upon amount each year. It is expected that this agreement will be signed in 1993.²⁰⁰

Mr. Vicer reports that VISUAL collected \$50,666 in U.S. dollars in 1991 and expects to collect four times that much this year.²⁰¹

G. EFFORTS TO IMPLEMENT THE DROIT DE SUITE INTERNATIONALLY

The rules governing the droit de suite vary from nation to nation. Hopes for an international standardization of the droit de suite led to efforts to incorporate the right into an international convention, such as the Berne or Universal Copyright Conventions.²⁰² There is still the belief that, "[L]eaving aside the differences, certain factors common to all the national legislations concerned can be singled out which, by revealing the same trend, can serve as a basis for the internationalization of 'droit de suite' and for drawing national laws on the subject closer to one another."²⁰³ The right did not

²⁰⁰ Letter from Javier Gutiérrez Vicer, Managing Director VISUAL to Marilyn J. Kretsinger, Assistant General Counsel, U.S. Copyright Office (November 17, 1992).

²⁰¹ Id.

²⁰² Fawcett, supra note 3, at 50.

²⁰³ WIPO-UNESCO Study, supra note 186, at 3.

achieve recognition in the UCC,²⁰⁴ however, and there are only statements of principle in the Berne Convention. Part of the difficulty of incorporating the right into Berne lay in establishing a principle for treatment of foreign authors when the character of the droit de suite varies so widely from country to country.

1. Berne Convention

In 1928, at the Rome Conference on revision of the Berne Convention, the French, Belgian, and Italian delegations proposed that the droit de suite be incorporated into the Convention.²⁰⁵ Subsequently, at the Brussels Conference, the Belgian administration proposed including the droit de suite in Berne and promoting it to the rank of rights accorded by the Convention.²⁰⁶

Under the Belgian proposal, all member countries would undertake to recognize the droit de suite in their statutes in their own manner, and the right would be extended to foreign authors on the basis of national treatment.²⁰⁷ National treatment was not unanimously favored, however, due to the limited number of countries that had incorporated the droit de suite into their own statutes.²⁰⁸ Under an Austrian proposal, the droit de suite would have been recognized on the basis of reciprocity.

²⁰⁴ The Universal Copyright Convention, to which the United States belongs effective September 16, 1955, contains no resale royalty provision. Under the UCC, therefore, regulation of the right is left up to each signatory nation's legislation.

²⁰⁶ Recommendation No. 3 of the Rome International Conference for revision of the Berne Convention, cited in Fawcett, supra note 3, at 93 n. 518.

²⁰⁸ Fawcett, supra note 3, at 94 (citing La Protection Internationale des droits voisins du droit d'auteur (pt.3), 53 Droit d'Auteur 133, 136-38 (1940)).

²⁰⁷ Fawcett, supra note 3, at 94.

²⁰⁸ Id.

Given these differences, a committee of experts meeting in Samaden proposed in 1939 to incorporate the droit de suite into a related convention, rather than Berne itself. The related convention would abide by the principle of assimilation; member countries in which a sale took place would accord the droit de suite to nationals of other member countries, while in the country of origin of the author, only the national law could apply. The Samaden draft, which contained only a simple recognition of the principle of droit de suite, was abandoned when war broke out. ²⁰⁹

The 1948 Brussels Conference provided explicit recognition of droit de suite in the Berne countries for the first time in Article 14bis. ²¹⁰ Article 14bis allows for reservations in national laws and subjects the droit de suite to the principle of reciprocity: Berne members may introduce the droit de suite into their own laws, and if they do so, a foreign artist can benefit from it if his national laws grant such protection, but only "to the extent permitted by the country where [the] protection is claimed." One commentator has noted that states vary in determination of the scope of the reciprocity requirement; some feel that mere recognition of the principle of Article 14bis, paragraph 2

²⁰⁹ Id. at 95.

²¹⁰ The Stockholm conference later modified the numbering of the Berne Convention without modifying the text, and article 14bis became article 14ter. Article 14ter provides:

(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.

Art. 14ter, para. 2, reprinted in Fawcett, supra note 3, at 200.

is sufficient. Others require a tangible expression of reciprocity.²¹¹ For example, on December 19, 1962, the Committee on the Droit de Suite for Foreigners in France decided that a state "even if its legislation is adequate in theory, cannot be considered as protecting the droit de suite if the legal arrangements it has established have not been properly applied."²¹²

Berne leaves to the national legislatures the task of providing for administrative procedures and percentages to be collected.²¹³

Even with its limited statements of principle, the Berne Convention is the only international instrument governing implementation of the droit de suite in relations between signatory nations.²¹⁴

If each nation can impose special rules for extending the droit de suite to foreigners, such rules cannot be applied in relations between signatories to the Brussels (or later) text of Berne, once reciprocity is established.²¹⁵ Such national rules can apply only between nations not party to any international convention or which have signed only the UCC, or pre-Brussels revision.²¹⁶ Without specific rules for the droit de suite, the

²¹¹ Fawcett, supra note 3, at 73. See also WIPO-UNESCO Study, supra note 186, at 57.

²¹² Fawcett, supra note 3, at 99. See also id. at 98-99 (discussing whether art. 14 creates special rule which denies droit de suite to artists who are granted other prerogatives of authors' rights under the Convention and whether art. 14 constitutes obligation to grant national treatment if effective protection is granted in country of origin).

²¹³ Id. at 95.

²¹⁴ Id. at 102.

²¹⁵ Id.

²¹⁶ Id. at 103. See WIPO-UNESCO Study, supra note 186, at 57 ("For countries bound by an instrument predating the Brussels Act, such as the Rome Act of 1928, the principle of the assimilation of members of the Union to nationals (continued...)

operation of the right will be governed by the rules set out in each nation's law regarding treatment of foreign authors.²¹⁷ France, Belgium, and Germany have adopted specific texts on application of the droit de suite to foreigners.²¹⁸

There has been further discussion of the extent of droit de suite and some discussions about extending the right. In 1983, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO), which administer the UCC and Berne Conventions, respectively, conducted a joint survey of countries with an art resale royalty right. In 1985, WIPO and UNESCO conducted a second study, "Draft Guiding Principles on the Operation of Droit de Suite." In 1986, at a Paris meeting of a Committee of Governmental Experts on Works of Visual Art convened by UNESCO and WIPO, several delegates favored introducing the right as one of the basic rights of artists. However, the prevailing consensus was that there needed to be further study of the problems of implementation and the question of the effect on the art market.²¹⁹

2. Model Law of Tunis

In 1976, a Committee of Governmental Experts charged with developing a model law on copyright for the use of developing countries drafted the Model Law of Tunis. The law was adopted on March 2, 1976.

²¹⁶(...continued)
could not apply to 'droit de suite,' since that right was not an author's right under the terms of the Rome Act. It was only with the Brussels Act that it came to be recognized as an ingredient of copyright.").

²¹⁷ Fawcett, supra note 3, at 103.

²¹⁸ Id. See supra notes 42-44 and accompanying text (discussing French law); notes 118-19 and accompanying text (discussing Belgian law); note 159 and accompanying text (discussing German law).

²¹⁹ Australian Copyright Council, supra note 21, at 5.

Article 4bis of the Tunis Law provides that authors of graphic and plastic works (and manuscripts) ²²⁰ have an inalienable right, notwithstanding any transfer of the original work, to share in the proceeds of every sale of the work or manuscript made at public auction or through a dealer. ²²¹ The model law does not apply to architectural works or works of applied art. ²²²

Although a number of the developing countries have adopted droit de suite and have passed regulations based to some extent on the Tunis Model Law, ²²³ it is questionable whether any of these laws have been enforced.

3. European Community Council Directive

The European Community has taken several steps toward harmonization of the varied resale royalty laws among its Member States. These efforts, which began in the early-1970s, have culminated in a proposed EC Council Directive supporting the droit de suite. ²²⁴

²²⁰ Some argue that because the Tunis Model Law mentions manuscripts "only incidentally, being added to graphic and three-dimensional works, it is to be inferred that, in the minds of those who drafted the text, manuscripts do not come into the category of graphic and three-dimensional works." WIPO-UNESCO study, supra note 186, at 23. The WIPO-UNESCO Draft Guidelines do not support extension of the droit de suite to manuscripts, as being "no more than material support for the work," having a "sentimental" or historical value, but having "no more intrinsic literary or musical value than a copy of the published work or of the printed score." Id. at 23-24.

²²¹ Model Law of Tunis, supra note 15.

²²² Id.

²²³ WIPO-UNESCO Study, supra note 186, at 72.

²²⁴ See EEC Treaty, Arts. 100 and 189(3) (concerning Council Directives). For a good discussion of copyright law in the European Community, see Theodore M. Shapiro, Droit de Suite: An Author's Right in the Copyright Law of the European Community, 4 Ent. L. Rev. 118 (1992).

In 1972, the Intergovernmental Conference on cultural policies in Europe met in Helsinki, and the delegates of some 30 European countries recommended to Member States that they accord to artists the droit de suite on public sales.²²⁵ On May 13, 1974, the European Parliament passed a resolution requesting the Commission to propose measures to harmonize the domestic law concerning the protection of cultured objects, as well as copyright and "neighboring or related" rights.²²⁶

In 1975, the Council of Europe sponsored a seminar for the encouragement of artistic creations. The rapporteur found that the diversity of the existing droit de suite systems results in distortions that undermine the competitive forces of the free market in Europe, and urged harmonizations of the resale right.²²⁷ In 1977 and 1982, the Commission tabled draft proposals on EEC action in the "cultural sector" which recommended general application of the droit de suite. It was felt that the inequity between artists in various EC countries with and without the resale right distorts competition within the meaning of Article 101 of the EC Treaty, and is inadmissible for the functioning of a common market.²²⁸

The Commission held a hearing on droit de suite on November 21, 1991, in Brussels. A majority of those present saw harmonization of the droit de suite

²²⁵ Wladimir Duchemin, Resale Right Situation, Particularly in Europe, 192 Interauteurs 94, (1981).

²²⁶ 10 OJ No. C62 of May 30, 1974. See also 5 Bull. of Eur. Comm. point 2406 (1974).

²²⁷ Duchemin, supra note 222, at 94.

²²⁸ See Bull. of Eur. Com. (June Supplement) (1977); Bull. of Eur. Comm. (June Supplement) (1982). See also Adolf Dietz, The Harmonization of Copyright in the European Community, 16 IIC 379 (1985); Gerhard Schricker, Harmonization of Copyright in the European Economic Community, 20 IIC 466 (1989).

at a Community level as a necessary step. A minority, which emphasized the right's optional character in the Berne Convention, took the view that if certain Member States had introduced the droit de suite and now felt that it caused distortion of competition, it was up to those Member States to end the distortion.²²⁹

In a proposed EC Commission Council Directive, the EC advocates inclusion of certain elements of a droit de suite system as "the minimum needed to assure the reconciliation of the statutes of member states regarding the droit de suite."²³⁰ In its proposal, the EC opts for a royalty of five percent of the sales price, that would "not be payable if the seller is able to prove that he acquired the work at a price higher than, or equal to, the sales price."²³¹ The right would apply to auction sales, sales through dealers, and sales between private parties, and would continue for fifty years after the author's death.²³² This EC proposed directive contains a significant provision to ensure that the art market would not shift to other countries as a result of the application of droit de suite within the Community. Where original art is exported to a third country, the directive "would require payment of the droit

²²⁹ Facsimile from Directorate General for Internal Market and Industrial Affairs to the Delegation of the Commission of the European Communities, Washington D.C. (unpublished) (Sep. 7, 1992).

²³⁰ Commission of the European Communities, Proposed Council Directive, reprinted in Fawcett, supra note 3, at 259.

²³¹ Id.

²³² Id.

de suite on the same terms as in the interior of the Community, the amount being calculated on the basis of the value declared for customs." ²³³

A majority of those present at the 1991 Commission hearing on droit de suite expressed hope that the Community would work toward greater international harmonization of the resale right, particularly in the United States and Japan. ²³⁴

H. RECENT INTERNATIONAL INTEREST IN ARTISTS RIGHTS

A great deal of interest has arisen during the last few years in improving the economic and social rights of artists. Participating in this international colloquy on artists' rights have been individuals, countries, and many international organizations. Several important studies have emerged, ²³⁵ and a number of international conferences have been held, including one in Madrid and one in Helsinki during 1992.

The Madrid Conference reported on rights of artists and the circulation of art. ²³⁶ The more recent conference in Helsinki surveyed the economic and social status of artists in European Countries. In attendance at the Helsinki Conference were representatives from 30 countries and 12 international organizations, including the Council of Europe, the European

²³³ Id. at 260. See also generally E.C. Copyright Harmonization: Discussion of Authors' Resale Rights, 11 Int'l Rev. Indus. Prop. & Copyright L. 706 (1980), cited in Fawcett, supra note 3, at 115.

²³⁴ Proposed Council Directive, supra note 224.

²³⁵ See, e.g., German Commission for UNESCO, "Survey on the Economic Situation and Social Status of the Artist in Germany" (1992); Resale Royalty--A New Right for Artists 69 Australian Copyright Council 4 (1989).

²³⁶ Fourth Symposium on Legal Aspects of International Trade in Art, Institute of International Business Law and Practice, International Chamber of Commerce (forthcoming from ICC Publishing, 1993). For a brief discussion of the U.S. Report, see infra Ch. III, text accompanying note 33.

Community, UNESCO, the International Secretariat for Arts, and International PEN. Representatives from a number of artists groups from within Finland were also present. ²³⁷

The Helsinki Conference participants discussed the economic and social conditions of artists in their respective countries. They noted ways in which the government currently was helping or intending to help artists. These participants noted that when compared with members of the general population with relative education and job tenure, artists do not enjoy the same economic rights unless they work in heavily subsidized areas.

Droit de suite was not part of each presentation at the Helsinki Conference. A number of representatives did propose a change in copyright law to allow artists to participate in a resale royalty. Others reported on what is being done in other areas to support artists economically and to encourage their creativity. These efforts include social security programs, tax relief, government purchase of art, and substantial government grants.

Most of the countries represented at the Helsinki Conference do not observe the droit de suite at present. There was, however, almost universal agreement that the resale royalty would be a welcome amendment to their laws. If the European Community establishes droit de suite as a harmonization issue for its membership, many countries are likely to include a resale royalty in their systems.

A review of these international studies and conference materials clearly reveals that there is international concern about the relative economic well-being of artists world-wide. The perception, if not the reality, is that

²³⁷ This Study cannot summarize the general conclusions of the Helsinki Conference. The final report is unavailable until 1993.

artists suffer economically when compared with the rest of the work force. Reports on several international conferences, including the Helsinki and Madrid Conferences, have explored artists' rights and made suggestions for improving the economic status of artists. A number of countries also have examined generally artists' rights and specifically the question of whether or not the droit de suite should be adopted. The European Community also is considering whether it should harmonize the droit de suite in its member states.

It is evident in the spirit of these discussions that the participants believe that artists are a valuable national resource and should be encouraged by their governments. A picture also emerges that, in terms of government policy, many of these countries already do more to encourage the social and economic well-being of artists than the United States currently is doing.

II. THE U.S. EXPERIENCE WITH ARTISTS' RESALE ROYALTIES

A. OVERVIEW OF THE U.S. EXPERIENCE WITH DROIT DE SUITE

Since the concept of droit de suite was first introduced in Paris in the 1920's, there have been efforts to incorporate this European concept into state or federal law in the United States.¹ To date, only California's efforts have resulted in law.² The proposal's controversial nature is due not only to opposition from dealers, museums, and others, including some artists, but also to the difficulties inherent in structuring a workable, effective, and cost-effective resale royalty scheme. The European models have had varying degrees of success. Many fear resale royalty laws would be counter-productive to artists' interests and to the well-being of the United States art market as a whole.

1. Individual Efforts

The first efforts in this country were from individual artists, writers, or lawyers who pressed for a resale royalty right through art unions, art journals, or private contracts for sales of art works.

Grant Wood generally is credited as the first major American artist to suggest that artists should profit from the increased value of their works.³

¹ See generally, Monroe E. Price, Government Policy and Economic Security for Artists: The Case of the Droit de Suite, 77 Yale L. J. 1333 (1968); Gordon P. Katz, Copyright Preemption Under the Copyright Act of 1976: The Case of Droit de Suite, 47 Geo. Wash. L. Rev. 200 (1978); Roy Bongartz, Writers, Composers, and Actors Collect Royalties -- Why Not Artists?, N.Y. Times, Feb. 2, 1975, §2, at 25, col. 2; Carl R. Baldwin, Art & Money: The Artist's Royalty Problem, 21 Art in America 20 (March-April, 1974).

² CAL. CIV. CODE §986 (West Supp. 1992).

³ Katz, supra note 1, at 203-04; Baldwin, supra note 1, at 20-23.

In 1940, after his work "Daughters of Revolution" quadrupled in value within a short period, Wood announced that his "Parson Weems' Fable" would be sold by his dealer with the stipulation that resales would bring him fifty percent of the appreciated value. ⁴

These efforts, and the European example, attracted attention from academicians in the 1960's. In a 1962 article, international law scholar Rita E. Hauser suggested including a droit de suite in U.S. copyright law. ⁵ Attorney Diane B. Schulder made a similar proposal in a 1966 article. ⁶

In the 1970's, the idea of resale royalties for visual artists in the United States started gaining real ground. The Art Workers Coalition adopted a position that included calling for a percentage of resale to revert to the artist or his or her heirs. ⁷

2. The Projansky Agreement

In 1971, attorney Robert Projansky and art dealer Seth Siegelau developed and published a sample contract, "The Artist's Reserved Rights Transfer

⁴ Katz, supra note 1, at 204; Baldwin, supra note 1, at 20-23. See also Sylvia Hochfeld, Artists' Rights: Pros and Cons, 23 ARTnews 20 (May 1975).

⁵ Rita E. Hauser, The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law, 11 ASCAP Copy. L. Symp. 1 (1962).

⁶ Diane B. Schulder, Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States, 61 Nw. U.L. Rev. 19 (1966). In Schulder's Art Proceeds Act, the resale royalty is levied upon auction or dealer sales. It is applicable only to an original work of art defined as "unique," such as painting, sculpture, drawing or illustrated manuscript. Id. at 44.

⁷ See Studio International 71-72 (Nov.-Dec. 1976) (stating position adopted by Art Worker's Coalition as summarized by Lucey Lippard). See also Baldwin, supra note 1, at 20-23.

and Sale Agreement enabling artists to collect proceeds from resales." ⁸ This contract, to be signed by artist and dealer, or artist and first purchaser, specified that the artist would receive 15 percent of the appreciated value each time a work was resold, donated, exchanged or otherwise transferred. ⁹ The Projansky form contract was promoted and distributed in the 1970's by artists' rights activists.

Today, the Projansky Agreement is not widely used. ¹⁰ Opinions differ as to whether such private contracts can legally bind subsequent owners of art works. ¹¹ Professor of Law John Merryman and Art Historian Albert Elsen argue that they cannot. ¹² "The artist can, by contract," they write, "bind only the person with whom he directly deals."

⁸ Reprinted in A Guide to the California Resale Royalties Act 23 (M. Price & H. Sandison eds. 1976) [hereinafter Projansky contract]. Projansky and Siegelau claimed to have consulted more than 500 artists, dealers, lawyers, and others before drafting this contract. Solomon and Gill, Federal and State Resale Royalty Legislation: "What Hath Art Wrought?", 26 UCLA L. Rev. 322, 327 n. 27 (1978).

⁹ Projansky contract, supra note 8, at art. 4.

¹⁰ See John H. Merryman and Albert Elsen, Law Ethics and Visual Arts 230 (1987); New York Hearing Artists on the Resale Royalties at 74, 80. (Part III of App.) (statement of art dealer John Weber) (stating that "In the early 1970's it was somewhat a fashion... to use this contract, and many artists [were]," but that "As time goes on...it became difficult for some artists just physically to keep track of where their works were. And...the gallery or the artist has to take care that the auction house understands that there is a contract, and so forth. That became somewhat awkward for some people.") Only two of Weber's 38 artists use a resale royalty contract. Id. at 74.

¹¹ At the New York Hearings, Register of Copyrights Ralph Oman asked New York art dealer John Weber, who sometimes uses the Projansky contract, whether the contract "lasts just for the second sale. It wouldn't bind a third party for a subsequent sale?" Mr. Weber answered, "No, it's binding ad infinitum. We have had third generation, and in some cases, fourth generation payments." New York Hearing at 81 (statements of Ralph Oman and John Weber). App. Part III.

¹² Merryman, supra note 10, at 230. See also Solomon and Gill, supra note 8, at 330 (enforcement of contract depends on goodwill of buyer).

Under the Projansky contract, the buyer agreed not to alienate the work without first obtaining the transferee's agreement to be bound by the terms of the original contract.¹³ In return for rights received under the contract, the artist agreed to maintain a record of each transfer.¹⁴

3. The Rauschenberg–Scull Exchange

Although interest in droit de suite was aroused among intellectuals in the early '70's, it took a well-publicized incident to kick individual efforts into legislative action in the United States, first on a state and later at the federal level.

It is the colorful Rauschenberg–Scull exchange which is credited as focusing attention in this country on the artist's often disadvantageous position in the art market.¹⁵ A collection of works owned by Robert and Ethel Scull was sold at a contemporary art auction in New York city in 1973. One 1958 painting by Robert Rauschenberg entitled "Thaw," which the Sculls had purchased years earlier for under \$1000, sold for \$85,000. After the auction, Rauschenberg reportedly said to Scull, "I've been working my ass off just for you to make that profit...,"¹⁶ and then told the Wall Street Journal, "From now on, I want a royalty on the resales and I am going to get it."¹⁷ The auction was the

¹³ Projansky contract, supra note 8, at art. 5. The agreement was binding on the parties and their successors in interest for the lives of the artist and his or her spouse plus twenty-one years. Id. at art. 16.

¹⁴ Id. at art. 6.

¹⁵ But see Solomon and Gill, supra note 8, at 356 n. 222 (writing that "Some commentators have incorrectly attributed the droit de suite movement in the United States to this incident...").

¹⁶ Merryman, supra note 10, at 217.

¹⁷ Solomon and Gill, supra note 8, at 356 n. 222.

subject of a widely distributed documentary, ¹⁸ and Rauschenberg's subsequent efforts to secure a resale royalty received a great deal of media attention. ¹⁹

B. THE CALIFORNIA LAW

Reacting in part to the highly publicized sale of the Rauschenberg painting, a California State Assemblyman, Alan Sieroty, drafted a bill that included a resale proceeds right. Passage of the bill was as emotionally charged as the sale of "Thaw." ²⁰ Some assert that Sieroty pushed it through the legislature without gathering much acceptance in the art or legal communities. Dealers, collectors and museums claimed not to have been consulted or informed

¹⁸ "America's Pop Collector: Robert Scull -- Contemporary Art at Auction," excerpted in The MacNeil/Lehrer Report, Artist's Royalties, Library #334 Show # 2089 (Air date Jan. 6, 1977), cited in Solomon and Gill, supra note 8, at 356 n. 222.

¹⁹ Id. See Scull's Art Brings Record \$2 Million, N.Y. Times, Oct. 19, 1973, at 57, col. 1; "Artists Decide They Should Share Profits on Resale of Paintings," Wall St. J., Feb. 11, 1974, at 1., col. 4. See also Kirschenbaum, The Scull Auction and the Scull Film, 39 Art Journal 50 (Fall 1979).

²⁰ See Merryman, supra note 10, at 232 (California law opposed by "outraged" museums, collectors, and dealers and vehemently defended by artists and artist-support organizations such as Bay Area Lawyers for the Arts, Artists' Equity, and Artists for Economic Action) (citing Hochfeld, Legislating Royalties for Artists, ARTnews, Dec. 10, 1976, at 52; Bates, Royalties for Artists: California Becomes the Testing Ground, N.Y. Times Arts and Leisure Section, Aug. 14, 1977, at 1; and Gay Weaver, Controversy Stirred up over Artists' Resale Payments, Palo Alto Times, Nov. 11, 12, and 13, 1976, at 14, 15, and 16, respectively).

about the bill.²¹ Others respond that the bill was publicized and hundreds of artists were involved.²²

The Governor of California signed the Artists' Resale Royalties Act into law in September 1976.²³ The Act, effective January 1, 1977, became the first American statute to incorporate droit de suite.

1. Analysis of the Law

The California law mandates a five percent royalty of the resale price to be paid to the artist when a work is resold in California, or resold anywhere by a California resident.²⁴ The Act is applicable only if at the time of resale the artist is either a citizen of the United States or a resident of

²¹ See, e.g., Merryman, supra note 10, at 231 (stating that bill was enacted "without consulting the art community beyond artists and enthusiasts who helped draft the bill and supported it") (citing Francione, The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act, 31 Copyright L. Symp. (ASCAP) 105 (1984)); Letter from California legislative counsel George H. Murphy to Assemblyman Alan Sieroty (Aug. 30, 1976) (opining that law as drafted would be constitutional only as applied to sales occurring in California); Hochfeld, supra note 20, at 52-54 (reporting that California Department of Finance recommended to governor that bill be vetoed as too expensive to administer and that some California dealers claimed to have learned of the bill in September 1976 after its signature by the Governor).

²² See Solomon and Gill, supra note 8, at 334 n. 82 ("With a total of seven amendments by both houses of the California legislature, at least three press releases sent out by Assemblyman Sieroty, sponsor of the legislation, the consequent monitoring of the bill by the press, and the prior knowledge and involvement of hundreds of artists, it is mystifying that the bill 'sneaked by' the art establishment in California").

²³ CAL. CIV. CODE §986 (West Supp. 1992).

²⁴ The subsection provides in part:
§ 986. Work of fine art; sale...
(a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale.
CAL. CIV. CODE §986(a) (West Supp. 1992).

the State of California for a minimum of two years.²⁵ The right to the five percent resale royalty is waivable only by written contract for an amount in excess of five percent.²⁶ Artists can therefore contract for a higher percentage of the resale price, but not a lower one.²⁷ An artist may assign the right to collect the royalty payment to another individual or entity, but the assignment will not have the effect of creating a waiver.²⁸ In 1982, in anticipation of establishment of an artists' collecting society, such as those that exist in Europe, the California legislature amended the Resale Royalty Act, modifying the prohibition of a waiver of the right. A transfer for the purpose of facilitating collection through such a society now lawfully could be done.²⁹

²⁵ Id. at §986(c)(1) (as amended effective July 1, 1983).

²⁶ Section 986(a), as amended effective July 1, 1983, provides in part:

"The right of the artist to receive an amount equal to 5 percent of the amount of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale."

²⁷ Legislators feared that waivers would otherwise be required as a matter of course.

²⁸ Nimmer suggests this means the seller obligated to pay the royalty may not also be assignee of the artists' royalty right. "Does it also prohibit the buyer from being such an assignee?" asks Nimmer. "If the waiver limitation is to be meaningful, it is submitted that an assignment of the artist's royalty rights to either the buyer or the seller, or to any entity which either controls, should be held invalid." 2 M. Nimmer, Nimmer on Copyright 8-379 (1991).

²⁹ San Francisco Hearing at 8-9 (statement of Professor Thomas Goetzl). App, Part II. Professor Goetzl endorses a private system of collection with ASCAP-like societies "to take a transfer of the rights from the artist for the purpose of collecting royalties." Id. at 8. [The official transcript of the San Francisco Hearing on Artists' Resale Royalties is reprinted in Part II of the Appendix to this Report. All future references to that Hearing will be App. Part II.]

The California law applies only to resales of "fine art" ³⁰ occurring during the lifetime of the artist or until 20 years after his or her death, ³¹ where the gross sales price equals or exceeds \$1000, and equals or exceeds the prior purchase price paid by the seller. ³² A resale by an art dealer to a purchaser within ten years of the initial sale of the work by the artist to an art dealer will not be subject to the royalty requirement, provided all intervening resales are between art dealers. ³³

The seller must locate and pay the royalty to the artist. ³⁴ If the seller is unable to locate the artist within 90 days, the royalty must be transferred to the California Arts Council, ³⁵ where it is held in the artist's name for seven years. ³⁶

Failure to comply subjects the seller to an action for damages "within three years after the date of sale or one year after the discovery of the sale, whichever is longer." ³⁷

³⁰ Fine art is defined in the Act as "original painting, sculpture, or drawing or an original work of art in glass." Id. at §986(c)(2).

³¹ Id. at §986 (a)(7) and (b)(3).

³² Id. at §986 (b)(2) and (4).

³³ Id. at §986 (b)(6).

³⁴ Id. at §986 (a)(1).

³⁵ Id. at §986 (a)(2).

³⁶ Id. at §986 (a)(4) and (5).

³⁷ Id. at §986 (a)(3). This aspect represents a major difference between the French and the California droit de suite laws: in France, the Union of Artistic Property (SPADEM), a private organization whose members are the majority of French artists, collects payments due artists through use of public auction registers and catalogs, while in California, the burden is on the individual artist to bring suit. See Solomon and Gill, supra note 8, at 326, 335.
(continued...)

2. Impact of the California Law

a. The BALA Study. During the summer of 1986, the California Bay Area Lawyers for the Arts conducted a study of the impact on the California art market of California Civil Code Section 986.³⁸ Surveying visual artists, galleries and auction houses with written questionnaires, BALA sought to find out: whether artists have received royalties under the act; the level of voluntary cooperation on the part of dealers; the effect on the relationship between artists and dealers; whether dealers feel the act has had an impact on the California art market; and whether artists perceive a need for third party enforcement.³⁹ A total of 81 questionnaires were sent to San Francisco Bay Area galleries and auction houses (referred to as "dealers"), and 208 to visual artists.⁴⁰

Out of the 36 individual artists responding, 30 thought the resale royalty was "basically a good idea." Of the 15 dealers responding, 11 agreed.

³⁷(...continued)

Nimmer writes that "the annotated California Code reveals only a trickle of cases under this section." 2 M. Nimmer, Nimmer on Copyright 8-376 n. 9. See Solomon and Gill supra note 8, at 335-36 (suggesting individual artists are reluctant to sue dealer, supportive collector, friend or relative for fear of jeopardizing a continuing relationship).

³⁸ Alma Robinson, BALA Surveys Artists and Galleries on Resale Royalties, 4 BALA-GRAM 1 (Nov.-Dec. 1986), reprinted in 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., 1st Sess. 119 (1987). BALA is now California Lawyers for the Arts.

³⁹ Id.

⁴⁰ Id. at 2. Less than 20 percent of those surveyed responded to the questionnaires. This included only 36 visual artists. Of the 21 who answered a question about what percentage of their income is derived from art sales, four said they derive 95 to 100 percent of their income from art, one indicated between 50 to 100 percent, six indicated 25 to 60 percent, and 10 indicated 10 percent or less. Id.

There was general agreement, however, that qualifying resales are rare. Only three of the artists responding had received royalties under the Act. Four art galleries reported handling 22 resale royalties since 1977. ⁴¹

One of the 15 responding art dealers thought the law should be repealed outright, while two thought it should be made applicable nationally. None said it had a significant effect on their sales, but two felt it had a significant effect on the California art market. ⁴²

One dealer raised privacy issues associated with the required record-keeping, ⁴³ while another thought there should be a "central" registration system. ⁴⁴ Artists mentioned problems with enforcement and obtaining information about sales and buyers as their main concerns, and five feared that enforcing their rights would be harmful to their careers. ⁴⁵ Four artists had dealt with galleries or individual owners who were reluctant to comply with the Act, and 11 reported galleries had refused to give them information about the sale of their work, "including buyer's names, addresses and resale prices." Twenty-two artists said they would allow a private agency to enforce their rights. ⁴⁶

⁴¹ Id.

⁴² Id.

⁴³ Id. (stating that "a lot of patrons don't want their names given out for security reasons, etc. Most people don't want their names spread around...").

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id. Only 13, however, would use such an agency if it took a "substantial percentage" of the royalties as a fee. Id.

The BALA study also mentioned the role of the State Arts Council in receiving funds from sellers unable to locate artists. The study stated that, in its most recent report, \$13,435 had been deposited in a trust account on behalf of 14 artists.⁴⁷

At January 1992 hearings on Artists' Resale Royalties in San Francisco, at least two artists testified to positive experiences and significant financial gain from the California statute. Richard Mayer, sculptor and Vice President of National Artists Equity Association, reported receiving resale royalties of \$25,520 in the last eight years.⁴⁸ He reported that his experience was not unique. Ruth Asawa, a sculptor whose work has been commissioned for public places, testified to having received \$5,000 when Ghiradelli Square, including her fountain structure, was sold, and \$7,000 when the San Francisco Hyatt, including her fountain, was sold.⁴⁹

b. Criticism of the California Law. The California law has been the subject of substantial criticism. The law is criticized as being underused and underenforced, and therefore ineffective.⁵⁰

⁴⁷ Id.

⁴⁸ San Francisco Hearing at 44 (statement of Richard Mayer), App. Part II.

⁴⁹ Id. at 53-54 (statement of Ruth Asawa).

⁵⁰ One commentator summed it up as follows:

Despite the (1982) amendments, the Act is perhaps the State's most neglected and underused law. Many of those who could benefit are ignorant of the Act; others who are aware of the Act feel impotent to enforce it. Those whom the Act seeks to regulate do not comply with its provisions. The monitoring necessary for individual enforcement is an impossible bureaucratic nightmare attempted by no one. Apparent lack of effective means to collectively enforce the Act has made it virtually irrelevant. As a result, visual artists continue to be exploited and remain uncompensated for their residual interests in resold artwork.

(continued...)

One commentator notes several difficulties associated with private enforcement by individual artists. First is the inability of artists adequately to track resales where there is no affirmative, enforced obligation to report or notify. Second is the expense of pursuit, including sometimes litigation. Third, is the fear of being blackballed.⁵¹

Many of these problems might be solved by establishment of an artists' collecting society, such as SPADEM in France. "There is little hard statistical data on the effectiveness of this legislation. . .What has not yet happened, however, because the application of the law is still limited only to California, is the creation of an ASCAP-like enforcement organization," testified Professor Thomas Goetzl, who supports establishment of such an entity.⁵²

Others have argued that the resale royalty creates a disincentive for investment in contemporary art, and benefits older, established artists.⁵³ These commentators say the statute reduces the original bid prices for art works because buyers adjust to the resale royalty, and artists are forced to accept a lower current price in exchange for a promise of a portion of the future resale

⁵⁰(...continued)
McInerney, California Resale Royalties Act, Private Sector Enforcement, 19 Univ. of San. Fran. L. Rev. 1, 3 (1984).

⁵¹ San Francisco Hearing at 15-16 (statement of Jack Davis, Esq.), App. Part II.

⁵² Id. at 4 (statement of Thomas Goetzl).

⁵³ See Ben W. Bolch, William Damon, and C. Elton Hinshaw, An Economic Analysis of the California Art Royalty Statute, 10 Conn. L. Rev. 689, 696, 699 (1978) (writing that only "established artists are likely to benefit from the statute... Thus, if the statute benefits anyone, it benefits the select few who need protection the least...The net result will be to penalize the unknown, struggling artist").

price.⁵⁴ They argue that there is a windfall gain to artists whose works were sold at full market value before the market anticipated the resale royalty.⁵⁵ These commentators see the law as "a misguided attempt at paternalism."⁵⁶

Many fault the law for giving the artist a percentage of the gross resale price rather than a percentage of any profit on the resale;⁵⁷ and for treating the difference between the purchase price and the resale price as "profit" with no recognition of commissions, expenses, or inflation.⁵⁸

Commentators have identified various loopholes in the California law. At one time, for example, the law did not apply to resales after the artist's death. One commentator suggested art owners could dispose of art through long term leases with purchase options exercised after the artist's death.⁵⁹ The

⁵⁴ Id. at 696, 699; Stephen S. Ashley, A Critical Comment on California's Droit de Suite, Civil Code Section 986, 29 Hastings L. J. 249, 252 (1977). Both Ashley and Bolch/Damon argue that this forces artists to be "investors" in their own work. Ashley at 252-53; Bolch/Damon, supra note 53, at 695-96.

⁵⁵ Bolch and Damon, supra note 53, at 696, 699; Ashley, supra note 54, at 251.

⁵⁶ Bolch and Damon, supra note 53, at 699.

⁵⁷ Merryman, supra note 10, at 233. But see supra, Ch. I, notes 39-41 and accompanying text (discussing method of measuring proceeds right in France by resale price as matter of expediency).

⁵⁸ Merryman, supra note 10, at 233. See also San Francisco Hearing at 26 (statement of Jack Davis) ("Once you begin to try and calculate what a profit is, you very quickly and not inappropriately get into questions of whether one includes indirect as well as direct costs," such as rent, lights and transportation). App. Part II.

⁵⁹ Ashley, supra note 54, at 257. By a 1982 amendment, however, the royalty requirement now applies until the 20th anniversary of the artist's death. CAL. CIV. CODE §986(a)(7)(West Supp.).

California law is also criticized for its purported application to sales outside of California.⁶⁰

Parts of the critique apply to droit de suite legislation in general.⁶¹ Because California is the sole jurisdiction in the United States with such legislation, however, the law is particularly criticized as placing the California art marketplace "at a competitive disadvantage in relation to the markets in other states," and potentially disrupting relationships among artists and dealers.⁶² As Representative Waxman observed, "Part of the failing of the California law is that it's only in California."⁶³

Critics assert that it is easy to escape the California law by setting up sham sells to a corporation outside California and then consummating the actual sale outside California.⁶⁴ Critics also charge that California's

⁶⁰ See supra note 21 and accompanying text (discussing opinion of California legislative counsel George Murphy that law is unconstitutional as applied to sales outside state) and infra note 93 and accompanying text (noting Morseburg court's discussion of potential problems raised by multiple application of resale royalty laws by states).

⁶¹ See Ashley, supra note 54, at 256 ("California's droit de suite legislation is subject to the criticism that can be leveled against all legislation of this kind").

⁶² Id. at 256. Ashley writes, "The legislature, by limiting section 986 to sales that take place in California or that are made by a California resident, has effectively mandated a choice of law provision that will have uniquely undesirable consequences." Id. at 259. But see San Francisco Hearing at 22 (statement of BALA's Alma Robinson) (no evidence that law has driven art market out of state).

⁶³ L.A. Times, Sept. 8, 1977, §4, at 1, col. 2, cited in Solomon and Gill, supra note 8, at 323 n. 5.

⁶⁴ Ashley, supra note 54, at 258. See also Solomon and Gill, supra note 8, at 352 ("The California experience demonstrates that a state statute which only regulates sales within that state and sales by residents of that state is easily circumvented").

art market has suffered.⁶⁵ This conclusion has been questioned by others.⁶⁶

Droit de suite legislation has been introduced in Connecticut, Florida, Illinois, Iowa, Maine, Michigan, Nebraska, New York, Ohio, Rhode Island, and Texas.⁶⁷ To date, none has become state law.⁶⁸ Comments on the proposed New York legislation may indicate some of the problems other states fear:

⁶⁵ See Merryman, supra note 10, at 233 (reporting that Sotheby, Inc., in Los Angeles, then the largest art auctioneer in the state, "immediately" suspended contemporary art sales partially in response to the new law). Sotheby's General Counsel Marjorie Stone confirms that the new law was "a factor" in the decision of the company, which maintains the policy in its large Los Angeles office of not dealing in contemporary art sales. Telephone interview with Marjorie Stone, General Counsel, Sotheby, Inc. and Sotheby Holdings, Inc. (July 14, 1992).

⁶⁶ See 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., 1st Sess. 109-10 (1987) (statement of Henry Hopkins, Director, 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").

⁶⁷ See, e.g., L.A. Times, Sept. 8, 1977, §4, at 13, col. 1, cited in Solomon and Gill, supra note 8, at 323 n. 4. Clack, Artist's Rights, The Cultural Post, March-April, 1977, at 10; Ohio House Bill 808, 112th General Assembly, Regular Sess., Sec. 3379.11(A), OHIO REV. CODE (1977). The Ohio bill, for example, introduced on July 6, 1977, provided that whenever a work of fine art is sold and the seller is an Ohio resident or the sale takes place in Ohio, the seller or his agent would be responsible for payment of five percent of the sales price to the artist. Id. The royalty would be due only if the resale were at a profit and the gross sales price were greater than five hundred dollars. Id.

⁶⁸ Like California, New York and Massachusetts have moral rights legislation that gives the artist the right to claim or, under some circumstances, disclaim authorship, and to prevent others from defacing the work or altering it so as to damage the artist's reputation. California Art Preservation Act, CAL. CIV. CODE §987 (West. Supp. 1992); New York Artists' Authorship Rights Act, N.Y. ARTS AND CULTURAL AFFAIRS LAW §§11.01, 14.03; Massachusetts Art Preservation Act, MASS. G.L. art. 231 §85S. Also, many states have laws relating to art consignment sales. These generally concern delivery of works of fine art for exhibition or sale, and state conditions and principles relating to the dealer's responsibility as artist's agent or trustee. See, e.g., ARK. STAT. ANN. §4-73-207 (1992); ARIZ. REV. STAT. §44-1773 (1991).

This bill is disapproved because...it has been presented without any investigation as to its potentially radical impact on the art market in the State of New York and the economic interests of the artists, dealers and collectors who may be affected by it. In addition, the bill as drafted presents a number of serious legal questions about its validity.⁶⁹

Because of the possible inability to enforce the law out-of-state, the potential problem of multiple applications of laws by different states, and the ultimate issue of federal preemption, some commentators argue that any solution to the resale proceeds dilemma must be within the framework of federal copyright law.⁷⁰

⁶⁹ 1977 Bulletin Comm. on State Legis. No. 6, at 711 (Ass'n of Bar of the City of N.Y.), cited in Solomon and Gill, supra note 8, at 2.

⁷⁰ See, e.g., 2 M. Nimmer, Nimmer on Copyright 8-383 (1991) ("Whether such a right should be enacted in the United States is something upon which reasonable persons may differ. It is submitted, however, that any such right, if enacted at all, must be on the federal level. A Balkanization of copyright protection that would follow from the preemption approach adopted by the court in Morseburg could ultimately unravel the unitary copyright system so carefully evolved over the years"); Weaver, Artists Resale Royalties Legislation: Ohio House Bill 808 and a Proposed Alternative, 9 Univ. of Toledo L. Rev. 366, 374 (1978); Damich, The New York Artists' Authorship Rights Act: A Comparative Critique, 84 Colum. L. Rev. 1733, 1756 (1984).

3. The Question of Federal Preemption

State resale royalty laws such as California's raise questions of federal preemption. The federal preemption doctrine concerns the relationship between the sovereign United States and the states as members of the Union. Its basis is in the federal system of government and in the supremacy clause of the U.S. Constitution, which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁷¹

Under preemption analysis, courts consider whether a federal legislative scheme necessarily preempts a state scheme or whether the two statutory schemes can operate concurrently. Applying preemption analysis, courts will ask whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁷²

The question of federal preemption and the California law is not a settled one. The law rode out a constitutional challenge in Morseburg v. Balyon,⁷³ which held that California's law was not preempted under the 1909 Copyright Act. Cases and commentary since then, however, have suggested a different result under the 1976 Act.

In the intellectual property area, the Court's approach to preemption has varied. Section 301 of the 1976 Copyright Act was enacted in part to clarify the law.

⁷¹ U.S. Const. art VI, cl. 2.

⁷² Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

⁷³ 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1980).

A line of cases in the late 1950's and early '60's took a firm stand in favor of federal power in the intellectual property area.⁷⁴ In the early 1970's, however, two Supreme Court cases seemed to shift some power back to the states: Goldstein v. California;⁷⁵ and Kewanee Oil Co. v. Bicron Corp.⁷⁶ In Goldstein, the Court held that the 1909 Act did not preempt a California statute making it a criminal offense to "pirate" recordings. The Court limited Sears-Compco to the patent field, and said that the Constitutional Clause granting Congress power to issue copyrights does not vest such powers exclusively in the Federal Government nor "expressly provide that such power shall not be exercised by the States."⁷⁷

In 1976, the situation was clarified by section 301 of the 1976 Copyright Act, which provides:

On or after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and

⁷⁴ See Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) (holding that state unfair competition law cannot enjoin copying of product whose patents are invalid for want of invention, because such use of state law conflicts with exclusive power of federal government to grant patents only to true inventions and only for limited time); Compco Corp. v. Day-Brite Lighting, 376 U.S. 234 (1964) (holding that injunction against copying unpatentable design is in conflict with federal patent laws); Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 667 (2d Cir. 1955) (holding that states cannot override constitutional purpose of granting only for 'limited Times' the untrammelled exploitation of author's 'Writings').

⁷⁵ 412 U.S. 546 (1973), reh. denied, 414 U.S. 883 (1973).

⁷⁶ 416 U.S. 470 (1974). See Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623 (1975), cited in Morseburg, 621 F.2d at 976.

⁷⁷ 412 U.S. at 553.

103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.⁷⁸

Section 301(b) delineates the non-preemptive categories, including: (1) noncopyrightable works, including works of authorship not fixed in any tangible medium of expression; and (2) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.⁷⁹

According to Professor Nimmer, the 1976 Copyright Act creates a federal preemption of state law when (1) the state law creates rights "equivalent" to rights granted in the Copyright Act, and (2) such rights under state law apply to "works of authorship" within the subject matter of the Copyright Act.⁸⁰ Applying this test, Nimmer finds California's resale royalty law to be preempted.⁸¹ First, works of fine art clearly are "works of authorship."⁸² Second, the California Act inhibits the distribution right under sec. 106 as modified by section 109(a). Sec. 109(a) codifies the first sale doctrine which allows copyright owner to control physical disposition of a lawfully made copy (including an original) only until the first authorized sale.⁸³ "[I]t may be said, "writes Nimmer," that the federal policy contained in the

⁷⁸ 17 U.S.C. §301(a).

⁷⁹ 17 U.S.C. §301(b) (emphasis added).

⁸⁰ 2 M. Nimmer, Nimmer on Copyright 8-380 (1991).

⁸¹ Id. at 8-381.

⁸² Id. at 8-380.

⁸³ Id. at 8-381.

'first sale' doctrine, which permits uninhibited resale of a work of art following its initial sale, may not be countered by a contrary state law, even though the state law's inhibition is by way of royalty rather than prohibition."⁸⁴

a. Morseburg v. Balyon. In Morseburg v. Balyon, an art dealer claimed that the California Act violated the Contracts Clause and was preempted by the 1909 Copyright Act, in effect when the art sales in question took place in 1977.⁸⁵ The U.S. District Court for the Central District of California rejected these contentions, and the Ninth Circuit affirmed.⁸⁶

The art dealer asserted that the 1909 Copyright Act preempted the California Act in two ways. First, he claimed the law impaired the artist's ability under section 1 of the 1909 Act to vend a work of fine art.⁸⁷ Second,

⁸⁴ Id. at 8-381. Accord, W. Patry, Latman's The Copyright Law 89 n. 47 (1986) (arguing that California law is preempted: "Since the first sale of a lawful copy is considered to exhaust the copyright owner's §106(3) distribution right with respect to that copy[...], the droit de suite in effect grants an additional distribution-type right to the author"). See also Katz, supra note 1. See also Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., infra notes 98-111 and accompanying text (implying in dictum that California law may be preempted under 1976 Act); Merryman, supra note 10, at 233 (writing that preemption under 1976 Act would have been one of "the most promising grounds for attack" in Morseburg). But see 2 M. Nimmer, Nimmer on Copyright 8-383 n. 52 (1991) (writing that "given the lack of enforcement under this section, no litigant appears even on the horizon with an incentive to mount a preemption argument under the 1976 Act").

⁸⁵ The 1976 Copyright Act became effective January 1, 1978, after the sale of the two paintings. The court addressed its holding to the 1909 Act only, and did not consider the extent to which the 1976 Act (particularly section 301) might have preempted the California law. 621 F.2d 972, 975 (1980). The district court had noted in dictum, however, that "it appears that the Resale Royalties Act is not preempted by the Revision Act of 1976." Morseburg v. Balyon, 201 U.S.P.Q. (BNA) 518 (C.D. Cal. Mar. 23, 1978)(LEXIS, Genfed library, Dist. file).

⁸⁶ 621 F.2d at 975.

⁸⁷ Id.
Section 1 of the 1909 Copyright Act provides in relevant part:
(continued...)

he contended that the law conflicted with section 27 of the 1909 Copyright Act in that it "restricts the transfer" of a work of fine art when in the hands of one who purchased or obtained it lawfully from the artist.⁸⁸

The court held the 1909 Act did not preempt California's law.⁸⁹ Citing Goldstein v. California,⁹⁰ the Ninth Circuit said the United States Supreme Court had previously held that Congress had evidenced no intent under the 1909 Act to bar the states from exercising their power with respect to authors' rights, and as a consequence, the area was not fully occupied by the federal government.⁹¹ In addition, the Ninth Circuit noted, the California law does not prevent the author from "vending" his work; instead, the law affords "an additional right similar to the additional protection afforded by California's anti-pirating statute upheld in Goldstein":

[This would be] sophistry were it true that the right "to vend" provided by section 1 of the 1909 Act meant a right to transfer the works at all times and at all places free and clear of all claims of others. It is manifest that such is not its meaning. It merely

⁸⁷(...continued)

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (1) To print, reprint, publish, copy and vend the copyrighted work.

⁸⁸ 621 F.2d at 975.

Section 27 of the 1909 Act provides in relevant part:
[N]othing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

⁸⁹ 621 F.2d at 977.

⁹⁰ 412 U.S. 546 (1973), reh. denied 414 U.S. 883 (1973). See supra notes 75-77 (discussing Goldstein).

⁹¹ 621 F.2d at 978. "The crucial inquiry is not whether state law reaches matters also subject to federal regulation, but whether the two laws function harmoniously rather than discordantly." Id.

means that the artist has "the exclusive right to transfer that title for a consideration to others." See Bauer v. O'Donnell, 229 U.S. 1, 11 (1912). The California Act does not impair this right; it merely creates a right in personam against a seller of a "work of fine art."⁹²

The court saw how "resale royalty acts under certain circumstances could make transfer of the work of fine art a practical impossibility" if more than one state imposed a resale royalty law upon a single sale.⁹³ However, the court restricted its holding to its facts, saying, "Without regard to how the

⁹² 621 F.2d at 977. But see W. Patry, Latman's The Copyright Law 89 (1986) (arguing that "the statute adjudicated in Goldstein, however, concerned subject matter not protected (at that time) by the Copyright Act [phonorecordings], whereas the California droit de suite concerns both subject matter admittedly protected by copyright and an equivalent right concerning the disposition of that subject matter, a combination that mandates preemption."). Accord 2 M. Nimmer, Nimmer on Copyright 8-382 (1991) ("The [Morseburg] court thus equated for preemption purposes a state law (such as that in Goldstein) which extended protection to a category of work unprotected under the Copyright Act, and a state law which (contrary to the teachings of Sears and Compco, and contrary to the House Committee's definition of "equivalent" rights) enlarges rights with respect to a category of work which does fall within the subject matter covered by the Copyright Act. If the logic of this decision is followed it would mean that legislatures could as a matter of state law tinker with the Copyright Act in a variety of damaging ways.")

⁹³ 621 F.2d at 978 (emphasis added).

The court noted:

The California Act imposes its obligation when "a work of fine art is sold and the seller resides in California or the sale takes place in California." Cal. Civil Code §986(a). A similar statute enacted by another state could lead to a particular sale being construed as having been made in each state. Similar multiple application could occur if the statute of a state other than California imposed its obligation to protect resident artists whose works were sold within that state. A seller, who was a resident of California and who sold the work within the second state, would be confronted with the application of statutes of two states. Even if the second state adopted a statute identical to that of California, a sale by a California resident in the second state would result in multiple application.

Id. at 978 n. 3.

preemption argument should fare under those circumstances, we are not confronted with them here." ⁹⁴

The Morseburg court also found that the California law did not violate the Contracts Clause or the due process provisions of the U.S. Constitution. Not all impairments of contracts are improper, and the California law was not "severe, permanent, irrevocable and retroactive and [serving] no broad, generalized economic or social purpose" so as to violate the Contracts Clause. ⁹⁵ The law was an economic regulation with a rational basis, and therefore did not violate due process. ⁹⁶

b. Other Cases. Since Morseburg, courts and commentary have chipped away at the foundation under the California law. ⁹⁷

The California Court of Appeals has also suggested that the law may be preempted by the 1976 Copyright Act. In Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., ⁹⁸ the court denied recovery under the resale royalty law for an architect's plans, since the plans were not "fine art." ⁹⁹ The court cited Nimmer for the argument that the resale royalty was preempted by the 1976 Copyright Act, ¹⁰⁰ and quoted favorably from an article criticizing the droit

⁹⁴ Id. at 978.

⁹⁵ Id. at 979. "The obligation of the appellant created by the California Act serves a public purpose and is not severe." Id.

⁹⁶ Id. at 979-80.

⁹⁷ See notes 80-84 and 92 and accompanying text (discussing views of Nimmer and Patry).

⁹⁸ 159 Cal. App. 3d 637 (1984).

⁹⁹ Id. at 644.

¹⁰⁰ Id.

de suite for its romantic view of the artist.¹⁰¹ The court also refused to extend the scope of the droit de suite. Although the law requires a royalty on resales of "...an original painting, sculpture, or drawing, or an original work of art in glass," the court said, "In the absence of legislative expression to include architectural plans prepared in a commercial setting, we cannot find recovery for Jacobs here."¹⁰²

Finally, a Pennsylvania case, Associated Film Distributed Corp. v. Thornburgh,¹⁰³ reinforced the impression that any state codification of droit de suite would be preempted by the federal copyright scheme. In Thornburgh, the U.S. District Court for the Eastern District of Pennsylvania held that a state law regulating motion picture licensing was preempted under the 1976 Act,¹⁰⁴ and implied that Morseburg might have been decided differently under the 1976 Act, as well.

The Thornburgh court observed that Morseburg "rejected the argument that a state transfer tax on royalties should be preempted under the former Copyright Act,"¹⁰⁵ but had said that "when the 'area of occupation' is peculiarly federal, or nationwide in its concern, the Supreme Court has

¹⁰¹ Id. (quoting Price, Government Policy and Economic Security for Artists: The Case of the Droit de Suite, 77 Yale L. J. 1333, 1335 (1968)).

¹⁰² Id.

¹⁰³ 520 F. Supp. 971 (E.D. Pa. 1981).

¹⁰⁴ Where most state laws simply prevented film licensing without advance screening, the Pennsylvania statute also prohibited guarantees of minimum film rental when a license agreement provided for payment to the distributor based on a percentage of attendance or box office receipts, and prohibited advances of film rentals by exhibitors to distributors. Id. at 973, 975-76.

¹⁰⁵ 520 F. Supp. at 992 n. 36 (emphasis added).

emphasized the national interest and has found preemption." ¹⁰⁶ The Thornburgh court said:

[The] history, purposes and provisions of the 1976 Copyright Act demonstrate that, in this area, Congress has 'unmistakably ordained' that federal enactments are to govern. [Citations omitted.] To make these intentions enforceable, Congress enacted an explicit statutory preemption section in the 1976 Copyright Act, Section 301 (a), 17 U.S.C. §301(a).¹⁰⁷

Thornburgh held that, in its broad regulation of the copyright licensing process under which motion pictures are made available to theatre audiences, the Pennsylvania Act indisputably affects rights granted under the federal Copyright Act. ¹⁰⁸ While the Pennsylvania law did not prohibit grant of a copyright under federal law or establish a competing copyright system or equivalent right under state law, "which would obviously be preempted under Section 301," ¹⁰⁹ it did substantially restrict the conditions under which a copyright holder may distribute and license its work. ¹¹⁰

¹⁰⁶ Id.

¹⁰⁷ Id. at 992.

¹⁰⁸ Id. at 979. Therefore the law had to serve a "compelling" or "significant" purpose. Id. Assuming arguendo "that the purpose of correcting abuses due to 'economic disparity' were sufficiently compelling to justify... some limitation on a right granted by Federal copyright legislation," the Pennsylvania law was overbroad in that it absolutely eliminated certain provisions from license agreements, "regardless of the existence of any abuses or the existence of economic disparity between the parties or whether the practices were coerced or mutually sought." Id. at 979 (emphasis added).

¹⁰⁹ Id. at 993-94.

¹¹⁰ Id. at 994. Its regulation of conditions under which rental, lease and lending could take place interfered with the federally created rights granted by section 106 and with the copyright holder's "control over the sale or the commercial use..." of its work. Id. (citing Goldstein v. California, 412 U.S. 546 (1973), reh. denied 414 U.S. 883 (1973)). But see Warner Bros., Inc. v. Wilkinson, 533 F.Supp. 105 (1981). In that case, a motion picture production company brought suit seeking determination that a provision of the Utah Motion
(continued...)

The Thornburgh court's analysis together with the view of copyright experts firmly suggest that any state droit de suite provision would be preempted under the current Copyright Law. Given the potential problems of preemption, enforcement, and multiple application, any resale royalty law in the United States that is enacted should be at the federal level. ¹¹¹

C. FEDERAL PROPOSALS

Although the first droit de suite legislation in the United States sprang from a state legislature, there have been serious attempts to establish federal legislation. Some of these proposals would make the droit de suite a part of United States copyright law.

Since the mid-70's, several bills have been introduced in Congress regarding resale royalties and other moral rights for visual artists. While other legislation regarding moral rights has become federal law, ¹¹² federal proposals on droit de suite have failed to garner consensus.

¹¹⁰(...continued)

Picture Fair Bidding Act was unconstitutional and sought an injunction to prevent its enforcement. The District Court held constitutional a provision that if a motion picture exhibitor must pay the distributor a percentage of theater box office receipts, the distributor may not require a guarantee of a minimum payment or require the exhibitor to charge a minimum ticket price. The U.S. District Court for the Central District of D. Utah granted summary judgment for Warner Brothers.

¹¹¹ See, e.g., Solomon and Gill, supra note 8, at 352 ("Therefore, the effectiveness of art proceeds legislation in the United States depends upon federal legislation which applies to art transactions in interstate commerce").

¹¹² See infra notes 146-50 and accompanying text (discussing Visual Artists Rights Act of 1990) and notes 135-42 and accompanying text (discussing moral rights of paternity and integrity).

1. The Waxman Bill

In 1977, Rep. Henry Waxman prepared a resale royalty bill for introduction into the U.S. Congress.¹¹³ After informally gauging the reaction to his draft among interested persons and arts-related groups,¹¹⁴ Waxman introduced the Visual Artists' Residual Rights Act on March 8, 1978.¹¹⁵

The Waxman bill provided for a five percent resale royalty on the gross sales price to be paid by the seller of a work of visual art sold in interstate or foreign commerce for \$1,000 or more.¹¹⁶ It established a National Commission of the Visual Arts to oversee the droit de suite system, and a Visual Arts Fund in the Department of the Treasury. The right to enforce or collect the royalty lay in the Commission.

The bill required that the work to be registered with the Commission prior to the resale. The purpose of registration was authentication of the work.¹¹⁷ The seller was required to file with the Commission a statement describing the work sold and the amount of payment. As on the state level, the bill established civil penalties for failure to comply with the Act.¹¹⁸

Waxman's bill did not apply to: sale or resale of a work by the artist; resales occurring after the artist's life plus 50 years; resales for less

¹¹³ See Merryman, supra note 10, at 221.

¹¹⁴ Id.

¹¹⁵ H.R. 11403, 95th Cong., 2d Sess. (1978).

¹¹⁶ Id. at §4(a)(1).

¹¹⁷ Solomon and Gill, supra note 8, at 349.

¹¹⁸ H.R. 11403 at §4(d)(2). See Solomon and Gill, supra note 8, at 348 ("The proposed Act not only appears to eliminate the enforcement problems inherent in the California statute but also seems to come closer to striking the necessary balance between the economic needs of the parties").

than the purchase price plus an amount equal to five percent of such sales price; resales between dealers within two years of the initial sale; and to resales in connection with sale of a building. ¹¹⁹ Representative Waxman did not strenuously support the revised bill, and it died in Committee. ¹²⁰

2. The Kennedy-Markey Proposals

It was nearly another ten years before droit de suite legislation was reintroduced to the United States Congress. On September 9, 1986, Senator Edward Kennedy introduced the Visual Artists Rights Amendment of 1986. ¹²¹ The bill established for artists the limited moral rights of paternity and integrity, ¹²² and provided that, whenever a pictorial, graphic, and sculptural work was sold, the seller would pay to the artist a royalty of seven percent of the difference between the purchase price and the sale price.

The royalty requirement did not apply to resale of a work for less than \$500, nor for less than 140 percent of the price paid by the seller. ¹²³ The artist could not waive the right to collect the royalty under Senator Kennedy's bill, but could assign the right. If the artist was deceased at the time of the sale, and the sale occurred within fifty years after the death of the artist, the royalty was to be paid to the National Endowment for the Arts for use in the visual arts program. ¹²⁴

¹¹⁹ H.R. 11403, supra note 115, at §4(e)(1).

¹²⁰ Merryman, supra note 10, at 221.

¹²¹ S. 2796, 99th Cong., 2d Sess. (1986).

¹²² See infra notes 135-42 and accompanying text (discussing rights of paternity and integrity).

¹²³ S. 2796, supra note 121.

¹²⁴ Id.

The Copyright Office would have played a significant role under Senator Kennedy's proposal. Any artist seeking royalties for resale of a work had to register with the Copyright Office. All sales or transfers of pictorial, graphic or sculptural works by registered artists were to be registered by the seller or transferor with the Copyright Office. Failure of a seller or transferor to register transfer or sale of a work by a registered artist would have constituted copyright infringement.¹²⁶

At 1986 hearings held at Cooper Union, New York, Senator Kennedy said the legislation's purpose was to recognize the "intrinsic value of our national cultural heritage and the need to sustain an environment in America which encourages cultural diversity and artistic excellence."¹²⁶ An identical bill was introduced in the House of Representatives by Representative Markey on October 16, 1986.¹²⁷

A year later, on August 6, 1987, Senator Kennedy introduced a similar piece of legislation, S.1619, entitled the "Visual Artists Rights Act of 1987."¹²⁸

A companion identical bill, H.R. 3221, was introduced by Representative Markey on August 7, 1987.

Under the 1987 Kennedy-Markey proposal, the seven percent royalty would have applied to all pictorial, graphic, and sculptural works that resold for \$1000 or more. The royalty would not apply to resale of a work for less than

¹²⁶ Id.

¹²⁶ Visual Artists Rights Amendment of 1986: Hearings on S. 2796 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 1 (1986).

¹²⁷ H.R. 5722, 99th Cong., 2d Sess. (1986).

¹²⁸ S. 1619, 100th Cong., 1st Sess. (1987).

150 percent of the purchase price paid by the purchaser.¹²⁹ If the artist were deceased at the time of the sale, and the sale occurred within fifty years after the author's death, the royalty would be paid to the author's estate.¹³⁰

The 1987 Kennedy-Markey plan called for some careful record-keeping. In order to qualify for a resale royalty, the artist had to register on a one-time basis with the Copyright Office prior to resale.¹³¹ To avoid copyright infringement, the seller or other transferor had to register with the Office sales or transfers "by registered authors for which a royalty is due..." within 90 days. An infringing seller was subject to a penalty of triple the amount of the royalty owed.¹³²

At Senate hearings on S. 1619, Senator Kennedy said the legislative intent was to alleviate "the serious problem of economic exploitation of visual artists by permitting them to share in the appreciating commercial value of their work."¹³³ Rep. Markey, who sponsored the legislation in the House, stated:

[Visual artists...need the right to participate economically in the success of the work...A work of art is not a utilitarian object like a toaster. It is an intellectual work like a song, a novel or a poem. We should not pretend that all connection between the artist and his work is severed the first time the work is sold.¹³⁴

¹²⁹ Id. at §(d)(1) and (2).

¹³⁰ Id. at §3(d)(1).

¹³¹ Id. at §3(d)(2)(c) (emphasis added); see also 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., 1st Sess. 4 (1987) [hereinafter 1987 Hearings on S.1619] (statement of Sen. Kennedy).

¹³² S. 1619, supra note 128, at §3(f) and (g) (emphasis added).

¹³³ 1987 Hearings on S.1619, supra note 131, at 2 (statement of Sen. Kennedy).

¹³⁴ Id. at 15 (statement of Rep. Markey).

a. The Rights of Paternity and Integrity. Within the framework of federal copyright law, the Kennedy-Markey legislative proposal, S. 1619 and H.R. 3221, would have granted the author a limited right of paternity and integrity, and a limited right against destruction, as well as a resale royalty right or droit de suite. Senator Kennedy acknowledged that "resale royalties are the most controversial provisions in this legislation."¹³⁵ The proposed Visual Artists Rights Act of 1987 would have granted the author of a work of "recognized stature" a limited right of paternity, i.e., the right during his life to claim authorship of any of his works which were publicly displayed, or to disclaim authorship of any of his publicly displayed works due to distortion, mutilation, or other alteration.¹³⁶ The bill provided:

In determining whether a work is of recognized stature, a court of other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with creation, appreciation, history, or marketing of fine art.¹³⁷

Testifying on this aspect of the Kennedy bill, Register of Copyrights Ralph Oman observed that, "Traditionally, the U.S. copyright law has not given additional rights to a work based on its perceived quality... The copyright law

¹³⁵ Id. at 2 (statement of Sen. Kennedy) ("It is fair to say that resale royalties are the most controversial provisions in this legislation, but it is not a novel concept. It has long been applied for the benefit of other creative artists, and the visual artists deserve such protection too"); id. at 15 (statement of Rep. Markey) ("The resale royalty is perhaps the most contentious provision of the bill because it involves money. Let's be frank. There is a lot of money being made in the art world. The problem is that too little of it ever gets to the artist.")

¹³⁶ S. 1619, supra note 128, at §3.

¹³⁷ Id. at §2(3).

has traditionally relied on the marketplace to control the rewards earned by the artists." ¹³⁸

The right of integrity under the Act would have applied to all publicly displayed pictorial, graphic, or sculptural works. This right protects such works against "the significant or substantial distortion, mutilation, or other alteration... caused by an intentional act or by gross negligence..." ¹³⁹ Finally, the Kennedy-Markey proposal would have conferred upon artists of works of "recognized quality" a right against destruction by an intentional act or gross negligence. ¹⁴⁰

These rights did not cover works that could not "be removed from a building without distortion, mutilation, or other alteration... unless expressly reserved by an instrument in writing signed by the owner of such building and the author of the work of fine art and properly recorded in the applicable State real property registry for such building, prior to the installation of such work..." ¹⁴¹

Where a work of fine art constituted part of a building and could be removed "without substantial harm," the moral rights would have applied unless the building owner attempted to notify author according to requirements in the bill. ¹⁴²

¹³⁸ 1987 Hearings on S.1619, supra note 131, at 17.

¹³⁹ S. 1619, supra note 128, at §3(c)(1).

¹⁴⁰ Id. at §3(c)(2).

¹⁴¹ Id. at §4(d)(1).

¹⁴² Id. at §4(d)(2). For further discussion of the rights of paternity and integrity, see Martin A. Roeder, The Doctrine of Moral Rights: A Study in the Law of Artists, Authors and Creators, 53 Harv. L. Rev. 554 (1940); James M. Treece, American Law Analogues of the Author's 'Moral Right, 16 Am. J. Comp. L. 487 (1968); Comment, Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines, 60 Geo. L. J. 1539 (1972), cited in Solomon and Gill, supra note 8, at 324.

b. Hearings on the Kennedy-Markey Proposal. The Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks held hearings on S. 1619 on December 3, 1987. The Register of Copyrights reservedly endorsed the bill, withholding full support until hearing from "the experts."¹⁴³ However, the arguments from the experts proved inconclusive. The proponents advocated equity and fairness for the artist, citing the on-going economic interest an artist has in his or her work.¹⁴⁴ The opponents, on the other hand, used economic principles to discredit the legislation as "counter-productive." For example, Frederick Woolworth, gallery owner and president of Art Dealer's Association of America, Inc., saw S.1619 as a "forced profit sharing" and a sui generis tax "designed to make the rich richer at the expense of the poor [artists]." Woolworth argued:

While it will provide additional income to the very small group of already highly successful artists who have a secondary market, it is ultimately harmful to the interests of most artists. It is also unfair... and a disincentive to collectors of art by living artists who are willing to support those artists by taking the risks involved in buying their works.¹⁴⁵

¹⁴³ 1987 Hearings on S.1619, supra note 131, at 18, 20 (statement of Ralph Oman) ("We have no principled objection to the concept of resale royalty rights. We do, however, have some questions...I think we have to be very careful in reordering relationships in the art world").

¹⁴⁴ See, e.g., id. at 109 (statement of Henry T. Hopkins, Director, Frederick R. Weissman Foundation of Art, Los Angeles, California); id. at 297 (statement of Schuyler Chapin and Alberta Arthurs, Chairman and President of the Independent Committee on Arts Policy); id. at 64 (statement of Robert Mangold, Artists, Washingtonville, New York).

¹⁴⁵ Id. at 281 (statement of Frederick Woolworth).

3. The Visual Artists Rights Act of 1990

If the droit de suite provisions in the Visual Artists Rights Act of 1987 invited controversy, then the Visual Artists Rights Act of 1990 ducked it by the notable omission of such provisions. The Visual Artists Rights Act of 1990, which passed, was introduced by Representative Kastenmeier and did not include provisions on the issue of resale royalties for artists. ¹⁴⁶

The bills introduced by Kennedy and Markey in the 100th Congress had of course included a royalty provision, but that issue was put aside as part of a compromise designed to pass the legislation. ¹⁴⁷ According to Representative Carlos Moorhead, this omission represented a significant improvement over earlier versions of the legislation, in that the resale royalty issue had "clouded consideration of the moral rights aspect of the legislation." ¹⁴⁸ Instead, the new bill directed the Copyright Office to conduct two studies: the first on the extent to which the provision that allows an author to waive the moral rights by written agreement has been exercised, and the second on resale royalty rights and alternative solutions. ¹⁴⁹

¹⁴⁶ Visual Artists Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 17 (1989) [hereinafter 1989 Hearings]. In the Senate, Sen. Kennedy introduced a parallel bill, S.1198, on June 16, 1989. 135 Cong. Rec. S6811-S6813 (daily ed. June 16, 1989) (statement of Sen. Kennedy). Note that Congress stated explicitly that the Visual Artists Rights Act of 1990 as it amends the 1976 Copyright Act, does not preempt state resale royalty enactments. H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 21 (1990).

¹⁴⁷ Id. at 17-18. See also 1987 Hearings on S.1619, supra note 131, at 18-19 (statement of Register of Copyrights Ralph Oman) (suggesting the sponsors "sever the moral rights provision from the rest of the bill and rely instead on the Berne implementing legislation").

¹⁴⁸ H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 17 (1990).

¹⁴⁹ Id. at 28.

Part of the reason for sidestepping the controversial resale royalty issue was Congress' desire to address effectively the issue of moral rights for visual artists after United States adherence to the Berne Convention.

On March 1, 1989, the United States joined the Berne Convention for the Protection of Literary and Artistic Works. As a result, beginning March 1, 1989, copyright in the works of U.S. authors is protected automatically in all member nations of the Berne Union, and works of foreign authors who are nationals of a Berne Union country and works first published in a Berne Union country are automatically protected in the United States.

United States adherence to the Berne Convention did not specifically incorporate artists' moral rights, so the Visual Artists Rights Act was designed to establish moral rights for visual artists.¹⁵⁰ The Berne Convention also contains provisions on droit de suite.¹⁵¹

¹⁵⁰ 1989 Hearings, supra note 146, at 66. See also H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 10 (1990) (statement of Register of Copyrights Ralph Oman) ("H.R. 2690 brings U.S. law into greater harmony with laws of other Berne countries...Enactment of moral rights legislation serves another important Berne objective-- that of harmonizing national copyright laws."). In the hearings on S. 1619, Sen. Kennedy commented, "I agree with Senator Leahy that moral rights legislation is not necessary to bring the United States into compliance with the Berne Convention." 1987 Hearings on S.1619, supra note 131, at 3 (statement of Sen. Kennedy).

¹⁵¹ See Ch. I, notes 207-15 and accompanying text (discussing art. 14bis of Berne Convention). See also 2 M. Nimmer, Nimmer on Copyright 8-374 ("The Berne Convention, to which the United States has adhered since March 1, 1989...recognizes an 'inalienable right to an interest' in the resale of an original work of art and original manuscript "). Nimmer writes that, given the failure of U.S. federal and state laws other than California's to provide such provisions, this country arguably is failing to honor its Berne commitments under article 14ter(1). Id. "On the other hand," he writes, "notwithstanding the 'inalienable right' conveyed by Article 14ter(1), the very next paragraph provides that the droit de suite is recognized 'only if legislation in the country to which the author belongs so permits...'" Id. at 8-374 n. 4 (citing Berne Convention (Paris text), art. 14ter(2)). "The question remains whether a country may permit no recognition of the droit de suite and still comply with Berne." Id. at 8-374 n. 4.

III. ANALYSIS OF WRITTEN COMMENTS AND COPYRIGHT OFFICE HEARINGS

A. ADMINISTRATIVE RECORD

On December 1, 1990, President Bush signed into law the Visual Artists Rights Act of 1990, which was generally effective on June 1, 1991, and grants to visual artists certain moral rights of attribution and integrity.¹ Section 608(b) of the legislation requires the Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, to study the feasibility of implementing a resale royalty on the sale of works of visual art.² This royalty would allow authors to share monetarily in the enhanced value of their works.

¹ Pub. L. No. 101-650, 104 Stat. 5089, 5128 (1990) [hereinafter VARA].

² The legislation mandates that:

[1] [NATURE OF STUDY]--The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing--

(a) a requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

(b) other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

Id., 608(b). The legislative history states that Congress "should await the results of the Copyright Office study before deciding whether such provision is appropriate." H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 23 (1990).

To assist in the preparation of this study, the Copyright Office issued a Notice of Inquiry requesting public information, particularly from "groups or individuals involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, auction houses, investment advisors, collectors of fine art, and curators of art museums." ³ Eighteen individuals or representatives of organizations responded to the Office's Notice of Inquiry. ⁴

The Office also held two public hearings to gather more information on the viability of resale royalties for visual artists -- one in San Francisco, on January 23, 1992, and another in New York, on March 6, 1992. Most of the commentators and the witnesses at the two hearings focused principally on the seven issues addressed in the Office's Notice of Inquiry:

1. Would resale royalty legislation promote or discourage the creation of new works of art, and, if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?
2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and, if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured; by a percentage of the resaler's [sic] profit, the net sales differential, or some other measurement? Should the net sale [sic] differential be adjusted for inflation?

³ 56 Fed. Reg. 4110 (1991).

⁴ Initial comments were due on June 1, 1991; and reply comments by August 1, 1991.

3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications of such decisions? How is the issue handled in foreign countries and in California?
4. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work? Should the right be descendible? Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?
5. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? What are the experiences in foreign countries and in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?
6. Should the right be waivable or alienable?
7. Should the California law be preempted in the event of a federal law?⁶

⁶

Id.

B. SUMMARY AND ANALYSIS OF ADMINISTRATIVE RECORD

In addition to the eighteen comment letters,⁶ ten witnesses testified at the San Francisco hearing,⁷ and seventeen at the New York hearing.⁸ Most of the commentators supported a resale royalty right; artists, their rights associations, legal experts, and other advocates forcefully maintained that visual artists should be treated no differently from other creators who do receive royalties. A vocal minority, however, including some artists, representatives of museums, art galleries, auction houses, and legal experts argued against a resale royalty, calling it a tax that would have a deleterious effect on an already weak art market.

1. The Relationship of a Resale Royalty to Creation of New Works and its Effect on the Art Market

Public comment was split on whether resale royalties provide an incentive for the creation of new works. Some argued that increased revenue would certainly encourage an artist's productivity⁹ -- particularly because of

⁶ These comments are reprinted in Part I of the Appendix to this Report. All references to specific comments are cited to App. Part I. Page numbers given relate to pagination within Part I, not to pagination in the individual comment letters.

⁷ The official transcript of the San Francisco Hearing is reprinted in Part II of the Appendix to this Report. All references to this Hearing are cited to App. Part II.

⁸ The official transcript of the New York Hearing is reprinted in Part III of the Appendix to this Report. All references to this Hearing are cited to App. Part III.

⁹ Comment 2, at 2 (Yanich Lapuh, Painter); Comment 7, at 29 (National Artists Equity Association); Comment 8, at 33 (Artists Rights Society, Inc. [hereafter (ARS)]); Comment 13, at 86 (American Society of Magazine Photographers [hereinafter (ASMP)]); Comment 17, at 197 (Submitted by Mr. Gerhard Pfennig, Managing Director of Bild-Kunst [hereinafter Bild-Kunst]), App. Part I.

the increasing costs of producing art continuously.¹⁰ Alma Robinson, the Executive Director of California Lawyers for the Arts, testified that for younger and beginning artists "the possibility of a resale royalty provides an important incentive to continue their work."¹¹ Others maintained that resale royalties would have no effect on creativity,¹² since artists create for other than financial reasons.¹³ Some commentators expressed the view that resale royalties are too remote and uncertain to provide an incentive to create.¹⁴ This was countered by those who asserted that the promise of a participation in future value could not reasonably be seen as a disincentive to creativity.¹⁵

Supporters of a resale royalty right urged that the difference in payment for unique works causes artists to suffer.¹⁶ Several commentators

¹⁰ San Francisco Hearing at 48 (statement of Eleanor Dickinson, Vice President of Artists Equity; Vice President of California Lawyers for the Arts), App. Part II. See New York Hearing at 161-62 (statement of Sanford Hirsch) (artists bear cost of development and many of dealer's overhead costs for crating, transportation, framing and advertising, yet dealer and artist split proceeds in half on sale), App. Part III.

¹¹ San Francisco Hearing at 21, App. Part II.

¹² Comment 15, at 120-21 (Professor Goetzl), App. Part I.

¹³ Comment 9, at 39 (The New York Patent, Trademark and Copyright Law Association, Inc.), App. Part I; Comment 16, at 189 (Soci te des Auteurs dan les Arts Graphiques et Plastiques [hereinafter ADAGP]) submitted by Jean-Marc Gutton, Managing Director), App. Part I. See also New York Hearing at 32 (statement of Jean-Marc Gutton), App. Part III.

¹⁴ New York Hearing at 199 (statement of John Koegel, Chairman, Art Law Section of New York Bar), App. Part III.

¹⁵ See Comment 14, at 120-21 (Volunteer Lawyers for the Arts [hereafter VLA]), App. Part I. See also New York Hearing at 167-68, (statement of Sanford Hirsch) (resale royalty not disincentive even if only benefits established artists), App. Part III; See Comment 7, at 28-9 (National Artists Equity Association), App. Part I.

¹⁶ Letter from Shira Perlmutter, Assistant Professor Columbus School of Law, Catholic University, to Ralph Oman, Register of Copyrights (November 10, (continued...))

provided some statistical information as proof of the economic plight of artists vis-a-vis all other workers; however, they offered little or no information comparing the respective remuneration of visual artists and other creators. Consequently, the record does not contain sufficient empirical evidence to make a determination about differences in payment for creative works.

Although our examination of neither the administrative record nor the other pertinent material revealed sufficient data for us to conclude definitively that participation in a resale right encourages creativity, there was a great deal of testimony from artists that they should be able to participate in any appreciation of a work's value. ¹⁷ Some artists oppose a resale royalty primarily because they feel it favors already successful artists and imposes administrative burdens. ¹⁸ Most artists who testified in support of a resale royalty did so from the perspective that such a right was merely economic justice. One artist reasoned that since artists are forced to sell the work initially for "a pittance in order to survive and to continue to create their work. The increased value of the art they sold for literally pennies is due, in

¹⁶(...continued)
1992). Professor Perlmutter notes that "Financial success...depends on the price a single member of the public is willing to pay to possess the sole physical embodiment of the work of art, rather than the number of people willing to pay a fixed price to possess one of multiple copies." Id. at page 2.

¹⁷ All artists who testified were in favor of such a right; however, several organizations presented responses from artists who opposed such a right. See, e.g. New York Hearing at 235-38 (statement of Gilbert Edelson, Administrative Vice President of Art Dealer's Association of America), App. Part III. But see Comment 7, at 28 (National Artists Equity Association)(only a handful of artists organized by art dealers do not support a resale royalty), App. Part I.

¹⁸ Survey conducted by Visual Artists and Galleries Association, Inc., [hereinafter VAGA) prior to the New York Hearing.

large part, from the artist's continued persistence to produce work under adverse conditions." ¹⁹

There was similar disagreement among the commentators on the effect of implementing a resale royalty on the art market. On one side, advocates urged that resale royalties would have little or no effect, since they are comparable to other costs of art transactions, ²⁰ and opponents of the right are not complaining about the effect of the sales tax or dealer commissions. ²¹ They also noted that existing markets affording royalties have been successful. ²² Some commentators declared that the remote potential for a future royalty is too tenuous to affect the original sales price. ²³

On the other side, opponents warned that resale royalties would decimate an already depressed art market. Commentators with this point of view asserted that: most contemporary artists lack a broad initial market for their

¹⁹ Response of artist Richard Anuszkiewicz to survey. See also San Francisco Hearing at 67 (statement of Professor Goetzl)(suggesting that royalties like wage and child welfare laws may not be competitive, but Congress would be doing the right thing), App. Part II.

²⁰ The royalty would have less impact on a potential buyer than a sales tax. See Comment 2, at 1 (Yanick Lapuh), App. Part I. Comment 7, at 30 (National Artists Equity Association), App. Part I. Comment 13, at 88 (ASMP)(increase in price is incremental), App. Part I.

²¹ Comment 7, at 30 (National Artists Equity Association), App. Part I. See also Comment 14 at 100, (Volunteer Lawyers for the Arts)(royalties would not hurt market which is used to incurring charges on sales of art work, and a number of collectors are art lovers, who purchase for more than commercial gain), App. Part I.

²² Comment 15, at 118 (Professor Goetzl)(despite five percent royalty California art market is thriving. Seller will sell where demand for work is greatest), App. Part I.

²³ New York Hearing at 203 (statement of John Koegel), App. Part III.

works; ²⁴ royalties would increase the complexity of transactions and possibly diminish the initial value of works; ²⁵ a "tax" on visual arts, which can be readily substituted by another commodity, would alter the pattern of demand and reduce prices and sales volume; ²⁶ few works of living artists appreciate in value, and losses from the risky purchases are not tax deductible, discouraging collectors from acquiring contemporary art; ²⁷ and the art market will be pushed underground or overseas. ²⁸

Both Professor Merryman and Mr. Weil emphasized that the artist may really suffer from a resale royalty since most artists will not have a secondary market, and the implementation of a resale will further depress the price of the primary market. ²⁹ Professor Merryman pointed to a survey by Tom Camp reporting

²⁴ San Francisco Hearing at 31 (statement of Professor Merryman), App. Part II; New York Hearing at 48-49 (statement of Christiane Ramonbordes)(artists will accept less in primary market because of anticipated royalty on resale), App. Part III.

²⁵ Comment 9, at 39 (The New York Patent Trademark and Copyright Law Association), App. Part I.

²⁶ Comment 11, at 69 (Art Dealer's Association of America (hereinafter ADAA), App. Part I. Additionally, a two or three percent difference in commission or quote may be enough to lose business to another auction house. And since major works of art are highly portable, a seller will take the work to a place where transaction costs are smallest. New York Hearing at 243 (statement of Mitchell Zuckerman, President of Sotheby's Financial Services Incorporated), App. Part III.

²⁷ Comment 11, at 70 (ADAA), App. Part I. Cf. New York Hearing at 28 (statement of Stefan Andersson of the Federation Internationale de Diffuseurs D'Art Originales [hereinafter FIDOA0]) and President of the Swedish Gallery Association)(resale royalties are punishment for not keeping art work), App. Part III.

²⁸ New York Hearing at 200 (statement of John Koegel), App. Part III.

²⁹ New York Hearing at 223 (statement of Stephen E. Weil, Deputy Director of the Hirshorn Museum and Sculpture Garden)(Vanderbilt University study in 1978 found that royalties depressed prices in the primary market and that most artists never made up the initial loss), App. Part III; San Francisco Hearing
(continued...)

on a period between 1972-1977 which indicated that only about 150 out of 200,000 living artists had any resale market. ³⁰

A more recent survey undertaken in 1986 by the Bay Area Lawyers for the Arts (BALA) reported that only three out of the thirty-six visual artists responding to the questionnaire ³¹ had received royalties under the California statute. Only four of the fifteen art dealers responding ³² indicated that they had handled resale royalties for a total of twenty-two such sales since 1977. ³³

²⁹(...continued)
at 31 (statement of Professor Merryman) (99.9 percent of artists have no resale market and will suffer from royalties because of the depressive effect on the primary market), App. Part II.

³⁰ This survey conducted by Tom Camp, between the years 1972 and 1977, suggested that the figures today are not much better: 300 out of about 400,000. San Francisco Hearing at 33, App. Part II. The survey is based on original or unique works created by an American artist and resold at one auction house for over \$500.00 during the life of the artist or within five years of the artists' death. Records were kept for a five year period, but records were also kept for 1977 auctions of the works of living and recently dead foreign artists' works resold for over \$1000. The surveyor also interviewed representatives of eight art galleries to get information on their art resales. See Tom Camp, Art Resale Rights and the Art Resale Market: An Empirical Study, 28 Bull. Copyright Society of the U.S. 146-83 (1980).

As some indication of this sporadic resale market, one artist James Rosenquist stated that during his 31 year career the highest frequency of resale of his work "has been maybe four times a picture. Sometimes only once." New York Hearing at 155.

During the 1990-91 season at Sotheby's and Christies, only 219 living American artists met the threshold standard for resale, of works valued at \$10,000 or more. New York Hearing at 213 (statement of Steven Weil), App. Part III. Of course, these numbers account only for auction sales at two houses.

³¹ This survey was sent to 208 visual artists in the San Francisco area.

³² This survey was sent to eighty-one galleries and auction houses in the San Francisco area.

³³ Several witnesses referred to this survey at the San Francisco Hearing. See e.g., San Francisco Hearing at 21 (statement of Alma Robinson), App. Part II. A more detailed discussion of this survey can be found in Chapter II, supra at text accompanying 38-47.

Neither the Camp nor the BALA survey is based on complete data; however, the BALA survey also suggests that not many artists currently enjoy a resale market. As attorney Peter H. Karlen emphasized at a recent international meeting on artists rights, the California statute has had little impact on the art market in California. Karlen observed:

Artists typically don't collect these royalties because (1) they are not too concerned about collecting them, (2) they do not know where all their works are located nor who the owners are, so they are not able to collect them anyway, and (3) when they do know of a sale, they are often reluctant to demand the royalty for fear of offending an important dealer or collector. Collectors and dealers don't usually pay these royalties simply because they (1) feel they can get away with not paying, (2) still resent paying these royalties based on the notion that, because they paid for the work of art, they should own it unencumbered by the artist's claims, and (3) know the artist is unaware that the work is being sold by them.³⁴

Other witnesses at the San Francisco Hearing confirm what Mr. Karlen has reported. Both sculptor Richard Mayer, Vice President of National Artists Equity,³⁵ and Eleanor Dickinson, Vice President of Artists Equity Association, and Vice President of California Lawyers for the Art note that some artists benefitted from the California law. But they also point out that many artists

³⁴ See Peter H. Karlen, U.S. NATIONAL REPORT ON RIGHTS OF ARTISTS AND THE CIRCULATION OF WORKS OF ART, report for the Fourth Symposium on Legal Aspects of International Trade in Art, Institute of International Business Law and Practice, International Chamber of Commerce at 15 (forthcoming from ICC Publishing, 1993).

³⁵ Robert Arnison received \$25,520 in resale royalties during an eight year period; Painter Mel Ramos reported earning about \$20,000 between 1988 and 1991. San Francisco Hearing at 44-45 (statement of Richard Mayer), App. Part II. See also San Francisco Hearing at 51 (statement of Eleanor Dickinson), App. Part II.

do not collect either because the system is underenforced ³⁶ or they can get more money through their own contracts with buyers. ³⁷

Several commentators urged that adopting a resale right had already diminished the sale of contemporary art in California. As evidence, they claimed that Sotheby's had basically stopped selling contemporary art in California after the resale royalty law went into effect. ³⁸

Moreover, because art is easily transportable, opponents argue that enacting a royalty right in the United States will weaken the U.S. market in favor of England and Switzerland, countries that do not have the right. ³⁹

Even Professor Merryman admits that the California experience is not a good place to look for empirical evidence. ⁴⁰ It is too early to determine what effect, if any, the resale royalty has had on the California art market since it is apparently underenforced. Comparing art transactions in countries that have a resale royalty with countries that do not have one, should produce a clearer understanding of whether or not long term application of droit de suite has shifted the European art market to countries without a resale royalty.

³⁶ See generally discussion in Chapter II, supra at text accompanying notes 50-60.

³⁷ See generally discussion of Projansky agreement in Chapter II, supra at text accompanying notes 8-14.

³⁸ San Francisco Hearing at 33-34 (statement of Professor Merryman), App. Part II. There is considerable debate about the significance of Sotheby's closing its operation in California. See notes 64 and 65 supra, in Chapter II.

³⁹ Mr. Zuckerman stated that those countries which have droit de suite do not have any significant contemporary art market. New York Hearing at 243, App. Part III.

⁴⁰ San Francisco Hearing at 37 (statement of Professor Merryman), App. Part II.

There again we received mixed reports. Both of the French collecting societies ADAGP and SPADEM asserted that the droit de suite had not harmed the French art market. Moreover, in his written comments Mr. Gutton asserted: "The most important auction houses in the United Kingdom, Switzerland and the Netherlands, where this law does not exist, do not obtain a turnover very much higher in this field than France or Germany." ⁴¹ Mr. Gutton also emphasized that auction sales have tripled in France in the last few years. ⁴² In fact ADAGP reported a dramatic increase in royalties collected on the French art market subject to droit de suite from \$2.35 million U.S. in 1988 to \$9.4 million U.S. in 1990. ⁴³ SPADEM also asserted that droit de suite "does not serve as an impediment to either [an artist's] artistic career or the art market." ⁴⁴

The German collecting society Bild-Kunst reported collecting 7.5 million Deutsche marks on resale royalties in 1990, ⁴⁵ and it also reported that there was no evidence that the German art market lost sales to nations that have no Folgerecht (resale royalty). ⁴⁶

⁴¹ Comment 17 at 189, (ADAGP), App. Part I.

⁴² Id.

⁴³ In a telephone call, Mr. Gutton, the Managing Director of ADAGP, reemphasized that the economic data he had submitted earlier revealed that the French art market was as successful as other important places in Europe or the United States.

⁴⁴ Comment 10, at 47 (Société Des Auteurs Des Arts Visuels [hereinafter SPADEM]), App. Part III. Translated by Jean Christophe Ienne.

⁴⁵ Comment 17, at 197 (Bild-Kunst), App. Part I at 197.

⁴⁶ Letter from Mr. Gerhard Pfennig, the Managing Director of Bild-Kunst, to Mr. Ralph Oman, Register of Copyrights (October 14, 1992). Mr. Pfennig reports that there have not been any complaints about the loss of sales to other countries since Bild-Kunst and the organizations of the German art market came to a general agreement on the payments of droit de suite in 1981. He notes that there may be Germans who sell their work in England or Switzerland for others reasons such as property taxes. Id.

Mr. Pfennig, the Managing Director of Bild-Kunst, submitted a report on a survey of EC countries with droit de suite. Experiences in these countries confirmed "that art trade stays in traditional locations and environments." ⁴⁷ This same survey reports that both France and Germany collect significant droit de suite royalties implying that both have important contemporary art markets. ⁴⁸

In opposition to statements by the collecting societies that there has been little or no effect on the art market, Mr. Champin, President of the Chambre Nationale des Commissaires Priseurs, (organization of French auction houses) asserted that the French Market is disadvantaged compared to London, the other European center for modern art sales. He observed that the transportation costs seemed reasonable when compared with the 3% royalty. ⁴⁹

We do not have any economic data on contemporary art sales in countries without such a royalty. In order to evaluate the significance of the contemporary art market in those countries with droit de suite versus those without, we would need more concrete information on sales made, sales transferred, and any other factors that might cause a seller to choose a particular art market.

⁴⁷ See Attachment No. 2, "EVA: Answers to the Questionnaire on Droit de Suite in the European Community," App. Part I at 211. EVA (European Visual Artists) is a lobby group working in the European Community.

⁴⁸ Id. at 208.

⁴⁹ Letter of Gérard Champin, President Chambre Nationale des Commissaires Priseurs, to Mr. Ralph Oman, Register of Copyrights, September 30, 1992. Bild-Kunst has brought a law suit against a German national who sold art in London. This suit could settle the issue of whether a national of a droit de suite country is exempt from a payment if he or she sells a work in a non-droit de suite country. Comment 17, Att. No. 1, statement of International Confederation of Societies of Authors and Composers (CISAC) concerning Resale Royalties (Droit de Suite) at 202-203, (Bild-Kunst), App. Part I.

2. Suggested Form of Resale Royalty

Commentators also disagreed on the kinds of works to which a royalty should apply. Four referenced the VARA in their responses, but despite this common thread, their interpretations differed.⁵⁰ Others suggested limiting royalties to a broadened definition of paintings and sculptures;⁵¹ graphic and plastic works made in single or a small number of copies;⁵² paintings, drawings, collages, assemblages, sculptures and monoprints, as well as prints and fine art photographs in limited editions;⁵³ and all photos and works of graphic and plastic arts, including works made in several copies, if the art market considers them original works.⁵⁴ One commentator even suggested that instead of defining art, Congress should use the Internal Revenue Service standard to define artists.⁵⁵

As noted in our earlier discussion of the application of droit de suite in other countries, works defined as covered in those countries range from

⁵⁰ New York Hearing at 138 (statement of Daniel Mayer)(royalty should apply to original works of visual art receiving moral rights protection under VARA), App. Part III. See also Comment 5, at 22 (Committee for America's Copyright Community [hereinafter CACC])(include items "parallel to" those in VARA, but limit application to original embodiment); Comment 13, at 84-85 (American Society of Magazine Photographers [hereinafter ASMP])(extend royalty beyond works covered under VARA to include photographs not produced for exhibition purposes); Comment 14, at 102 (VLA)(include all works under VARA plus illustrated manuscripts and works of art in glass), App. Part I.

⁵¹ Comment 8, at 33 (ARS), App. Part I.

⁵² Comment 10, at 45 (SPADEM), App. Part I.

⁵³ Comment 15, at 122 (Professor Goetzl), App. Part I.

⁵⁴ Comment 16, at 189 (ADAGP), App. Part I.

⁵⁵ San Francisco Hearing at 52 (statement of Eleanor Dickinson), App. Part II. IRS gives ten standards on how to determine a professional artists. Id.

"paintings, sculptures, drawings, and engravings" ⁵⁶ to "graphic and plastic arts" ⁵⁷ to "all works." ⁵⁸ Those countries maintaining that droit de suite applies to all works have not really enforced the right. ⁵⁹ The current California provision applies the royalty to paintings, sculptures, drawings, and works of art in glass.

It makes more sense to tie any U.S. system to works already covered under the VARA. Any implementation of the right will require some consideration of what kind of limitation to place on the number of unique works that may be considered original. As discussed earlier, the French law contains very specific limitations. ⁶⁰

Commentators also disagreed about the proper threshold amount that should be set for application of a resale royalty. Suggested amounts triggering the royalty ran the gamut from two hundred to five thousand dollars. ⁶¹ It is,

⁵⁶ Belgium law. See Table 1.

⁵⁷ French law, Table 1. Under French Law, creators of items like original furniture, which are not protected under U.S. copyright law, still receive resale royalties. Should Congress decide to grant resale royalties for works of visual art not subject to copyright, one commentator has suggested that such rights could be grounded in the Commerce Clause, rather than the Copyright Clause. See San Francisco Hearing at 62 (Professor John Merryman), App. Part II.

⁵⁸ See Table 1.

⁵⁹ Id.

⁶⁰ See discussion in Chapter I of this Report. See also Comment 5, at 22 (Committee for America's Copyright Community [hereinafter CACC])(limit application to original embodiment and not any duplication or copies), App. Part I.

⁶¹ Comment 16, at 189 (ADAGP)(\$200); Comment 13 at 90 (ASMP)(\$250); Comment 8 at 33 (ARS)(\$500 plus or minus \$250). Two commentators supported a \$750 threshold, see Comment 14 at 105 (VLA); New York Hearing at 138 (statement of Daniel Mayer). Two others indicated that it should be \$1000, see Comment 9 at 40 (VLA); San Francisco Hearing at 50 (statement of Eleanor Dickinson. One commentator suggested the amount should perhaps be as high as \$2000, Comment 15 (continued...)

of course, clear from the testimony that the higher the amount before a royalty is triggered, the fewer artists will participate in proceeds from sales. Ms. Robinson observed that establishing a \$500 threshold instead of the \$1000 mandated in California law would at least triple the amount of artists eligible to participate in resales.⁶²

On the other hand, the lower the amount set to trigger the resale right, the greater the administrative burden will be; and at some point, that burden will outweigh any value given to artists.⁶³

Commentators also differed as to the appropriate percentage of the sales price that should be assessed as the artist's participation royalty. Amounts suggested were as little as one percent⁶⁴ and as high as fifteen percent of the profits.⁶⁵ Most of the commentators suggested an amount between three and five percent.⁶⁶ Several commentators indicated that the 7 percent suggested in the Kennedy-Markey bill was too high, especially if applied to the

⁶¹(...continued)
at 122 (Professor Goetzl), and another \$2000 in combination with a two percent royalty, Comment 6 at 25 (VISUAL). A \$5,000 threshold was suggested by a representative of New York Artists Equity, New York Hearing at 145 and by an attorney, Comment 18 (Richard Covel, Esq.).

⁶² San Francisco Hearing at 22 (statement of Alma Robinson), App. Part II. See also Comment 8, at 33 (ARS), App. Part I.

⁶³ See Comment 8, at 33 (ARS); Comment 17 at 189 (ADAGP), App. Part I.

⁶⁴ San Francisco Hearing at 38 (statement of Professor Merryman) (one percent override used for welfare of artists), App. Part II.

⁶⁵ See New York Hearing at 158 (statement of James Rosenquist); see also discussion of Projansky contract, New York Hearing at 74 (statement of John Weber), App. Part III;

⁶⁶ See generally Comment 14, at 102-106 (VLA), App. Part I. See also New York Hearing at 101 (statement of ARS), App. Part III.

total sales price instead of the appreciated value.⁶⁷ Countries where droit de suite has been successfully administered have generally based the right on three to five percent of the total sales price.⁶⁸

All of the commentators addressing the issue except two,⁶⁹ stated that the royalty should be applied regardless of whether or not a work increases in value,⁷⁰ and that there should be no adjustment for inflation.⁷¹ Again the successful European systems have applied the droit de suite or Folgerecht on the total sales price, primarily for ease of administration. As discussed earlier, those countries which have tried to apply a resale right on the increased value of the work, if any, have had problems in implementing the right.⁷²

⁶⁷ Apparently as first drafted, this bill meant the resale royalty to apply to the appreciated value of a work. See San Francisco Hearing at 11 (statement of Professor Goetzl), App. Part II.

⁶⁸ See Table 1.

⁶⁹ Comment 12, at 81 (Lawyers for the Creative Arts) (royalty should be calculated based on added value); Comment 9, at 40 (New York Patent, Trademark and Copyright Law Assoc.) (royalty should not apply unless work increases in value by a certain value such as 25%), App. Part I.

⁷⁰ San Francisco Hearing at 17 (statement of Professor Goetzl) (should be royalty even if loss because sale provides next audience for work); id. at 35 (statement of Alma Robinson) (system easier to administer if royalty applied to every sale); id. at 78 (statement of Eleanor Dickinson) (apply royalty even if loss because purchaser took risk with purchase and had enjoyment of work over time).

The royalty should be based on total resale price. See New York Hearing, at 19, 36 (statement of Jean-Marc Gutton); at 101 (statement of Ted Feder); at 121-22 (statement of Robert Panzer); at 137 (statement of Daniel Mayer), App. Part II. See also Comment 8, at 33 (ARS); Comment 13, at 90-9 (ASMP); Comment 14, at 105-6 (VLA); Comment 15, at 122 (Goetzl); Comment 16, at 190 (ADAGP); Comment 17, at 197-98 (Bild-Kunst), App. Part I.

⁷¹ Comment 9, at 40 (New York Patent, Trademark and Copyright Law Assoc.); see Comment 14, at 105-6 (VLA) (if royalty paid on gross sales price, no need to adjust for inflation because the royalty is paid in inflated dollars), App. Part I.

⁷² See Table 1.

3. Recipients of Royalties and International Implications

The European Community has resale royalties on its agenda for harmonization and may put pressure on non-royalty countries, like the United Kingdom, to conform.⁷³ Several commentators noted that the United States' recognition of such rights would support the current European efforts at collaboration.⁷⁴ Others declared that royalties should be extended to foreign artists whose works are sold in the United States;⁷⁵ to do otherwise, they stated, would violate Article 14~~ter~~ of the Berne Convention, and U.S. artists would be excluded from royalties if the United States did not have a law granting such rights.⁷⁶ Still others suggested that either U.S. citizenship or residency, be required to entitle an author to payment,⁷⁷ whether or not the work is created here.⁷⁸ Those who suggest citizenship, however, note that the

⁷³ See discussion on the European Community, Chapter I, supra at notes 221-229 and accompanying text.

⁷⁴ See Comment 14, at 102 (VLA), App. Part I; New York Hearing at 138 (statement of Daniel Mayer), App. Part III.

⁷⁵ New York Hearing at 103 (statement of Ted Feder) (ARS), App. Part III. Comment 6, at 29 (VISUAL); Comment 14, at 102 (VLA); Comment 16, at 190 (ADAGP). See Comment 17, at 190 (Bild-Kunst)(extend royalty to all Berne members), App. Part I.

⁷⁶ New York Hearing at 103-04 (statement of Ted Feder), App. Part III. Comment 6, at 29 (VISUAL); Comment 16, at 190 (ADAGP), App. Part I.

⁷⁷ New York Hearing at 138 (statement of Daniel Mayer), App. Part III; Comment 9, at 40 (New York Patent Trademark and Copyright Law Assoc.); Comment 13, at 91 (ASMP); Comment 14 at 107 (VLA); and Comment 15, at 123 (Goetzl), App. Part I.

⁷⁸ Compare Comment 9, at 40 (New York Patent Trademark and Copyright Law Assoc.)(require creation in United States) with Comment 13, at 91 (ASMP)(grant royalty regardless of where created), App. Part I.

right to resale royalty payments could be expanded in the United States if droit de suite became part of an international convention. ⁷⁹

a. **Reciprocity.** As discussed earlier, the Berne recognition of droit de suite permits reciprocity, and countries now providing such a resale right generally grant the right to foreign artists on the basis of recognition of their artists in the other country.

Since 1956, France has been granting resale royalties to foreign artists who have lived at least five years -- not even consecutively -- in that country. ⁸⁰ The Federal Republic of Germany currently extends royalties only to artists of countries that have similar legislation, ⁸¹ but the Managing Director of Bild-Kunst believes that following the principles of the Berne Convention, the resale right should be extended to all Berne creators, even where resale royalty legislation does not exist in the other country. ⁸² It was even suggested that U.S. artists could claim royalties in Germany retroactively, as soon as the United States passes such legislation. ⁸³

b. **Retroactivity.** This leads to the question of whether the royalty should be applied retroactively. The principle argument advanced in favor of retroactivity is that it would give U.S. artists the right to royalties in other countries. However, one major problem with retroactivity is that newer and older works have different standards of protection. Copyright vests in most

⁷⁹ See Comment 9, at 40 (New York Patent Trademark & Copyright Law Assoc.); Comment 14 at 91 (ASMP), App. Part I.

⁸⁰ Comment 16, at 189 (ADAGP); Comment 10, at 46 (SPADEM), App. Part I.

⁸¹ See Comment 17, at 198 (Bild-Kunst), App. Part I.

⁸² Id.

⁸³ Id. This would, of course, depend on whether U.S. legislation was retroactive or prospective only.

European works automatically and without any formalities at the moment of creation. However, if the creators did not meet U.S. formalities before March 1, 1989 -- the effective date of U.S. adherence to Berne -- their works may have passed into our public domain.

Commentators disagreed about whether royalties should apply to works in existence at the date of enactment of the legislation,⁸⁴ or to works protected in the country of origin at that time.⁸⁵ At the New York Hearing, Mr. Feder made the following distinction:

The terms retroactive and prospective should be employed in their proper context here, (as understood by our Berne partners), namely that the date of the secondary sale and not the date of the work's creation be the determining factor. Consequently there would be no retroactive application of the resale royalty in the sense that the royalty could never apply to auction sales which took place prior to the effective date of the law.⁸⁶

Mr. Feder also maintained that the failure to apply Berne to existing European works in this context, would violate Article 18(1) of the Berne Convention.⁸⁷

Several other commentators agreed with Mr. Feder that the resale royalty right should apply to prospective sales even on works created before the

⁸⁴ Comment 14, at 109 (VLA), App. Part I.

⁸⁵ Comment 16, at 190 (ADAGP), App. Part I.

⁸⁶ New York Hearing at 107 (statement of Ted Feder) App. Part III (emphasis added).

⁸⁷ New York Hearing at 104-07 (statement of Ted Feder), App. Part II; Comment 8, at 3 (ARS), App. Part I. See also New York Hearing at 20 (statement of Jean-Marc Gutton)(apply resale royalty retroactively to living artists and those who died less than 50 years ago, to allow U.S. artists to benefit in European Community countries where reciprocity is required), App. Part II.

effective date of enactment of a resale royalty.⁸⁸ They felt that future transactions on such works would not disrupt settled expectations. In support of this position, one organization urged that "application of the resale royalty requirement to existing works would have tremendous beneficial effects for American artists who presently do not share in profits from resale of thousands of existing works of art."⁸⁹

Other commentators simply opposed retroactivity without clarifying how they interpreted the term.⁹⁰

4. Nature of Resale Royalty Right

California law provides royalties for the life of the artist, with a descendible additional term of 20 years.⁹¹ In the foreign countries examined, droit de suite is keyed to the copyright term for authors. In France, the right endures for the life of the artist plus 50 years.⁹² In Germany, the right exists for the life of the artist plus 70 years.⁹³ Even in Belgium, where the right is not part of the copyright act, the term is still tied to the other rights that an author enjoys.⁹⁴ Except for one recommendation that the

⁸⁸ See Comment 13, at 92 (ASMP). See also Comment 15, at 122 (Professor Goetzl), App. Part I.

⁸⁹ See Comment 13, at 92-93 (ASMP), App. Part I.

⁹⁰ Comment 9, at 44 (New York Patent & Trademark Copyright Law Assoc.), App. Part I. James Rosenquist, an artist, stated that he was for a 15 percent royalty but not a retroactive law. New York Hearing at 158, App. Part III.

⁹¹ San Francisco Hearing at 33 (statement of Alma Robinson), App. Part II.

⁹² New York Hearing at 38 (statement of Jean-Marc Gutton), App. Part III. Comment 10, at 44 (SPADEM), App. Part I.

⁹³ Comment 17, at 190 (Bild-Kunst), App. Part I.

⁹⁴ See Table 1.

royalty term should be life plus a period not to exceed 75 years,⁹⁶ there was uniform recommendation of a descendible copyright term of life plus 50 years.⁹⁶

5. Administration and Collection of Resale Royalty

The California resale royalty system relies on private royalty enforcement, and that state's experience has been fraught with problems.⁹⁷ Key among them is the fact that artists are not always aware of sales of their works, and that even when they are, they fear retribution after demanding royalties from sellers or galleries.⁹⁸ Artists are also concerned with the expense of litigation in enforcing their rights.⁹⁹ There was, consequently, almost uniform endorsement of collection societies, instead of private enforcement of rights.¹⁰⁰

⁹⁶ New York Hearing at 146 (statement of Jeffrey Homan), App. Part III.

⁹⁶ New York Hearing at 20 (statement of Jean-Marc Gutton); *Id.* at 102 (statement of Ted Feder); *Id.* at 138-39 (statement of Daniel Mayer), App. Part III; See also Comment 8, at 34 (ARS); Comment 9, at 41 (New York Patent Trademark & Copyright Law Assoc.); Comment 13, at 91 (ASMP); Comment 14, at 108 (VLA); Comment 15, at 123 (Goetzl); Comment 16, at 190 (ADAGP), App. Part II. But see New York Hearing at 121-22 (statement of Robert Panzer)(if heirs not known, royalties should go to artists who need the money), App. Part III.

⁹⁷ See Karlen, supra note 34 and accompanying text.

⁹⁸ San Francisco Hearing at 7-8 (statement of Professor Goetzl), App. Part II. See New York Hearing at 93 (statement of Hans Haacke)(artists would not fear retribution if uniform federal legislation), App. Part III. Comment 15, at 124-5 (Goetzl), App. Part I.

⁹⁹ See San Francisco Hearing at 26 (statement of Jack Davis); (suggests dispute resolution mechanisms because litigation too expensive); *Id.* (statement of Jack Davis)(suggests right to attorney's fees for court or alternative dispute resolution, otherwise cost is deterrent to enforcing rights), App. Part II.

¹⁰⁰ San Francisco Hearing at 7-9 (statement of Professor Goetzl); *Id.* at 58 (statement of Jerome Carlin); App. Part II. New York Hearing at 139 (statement of Daniel Mayer), App. Part III; Comment 8, at 36 (ARS); Comment 13, at 93 (ASMP); Comment 14, at 111-12 (VLA); Comment 16, at 190-91 (ADAGP); Comment 17, at 199 (Bild-Kunst), App. Part I; See also San Francisco Hearing at 16 (continued...)

a. **Collecting societies.** Commentators generally agreed with the conclusion noted in the WIPO-UNESCO study, that collection of droit de suite must be done through authors' societies. ¹⁰¹ Only those countries with active and efficient national authors' societies, such as SABAM in Belgium, Bild-Kunst in Germany, and SPADEM and ADAGP in France, have effectively implemented the droit de suite. ¹⁰² Those liable to pay the droit de suite have a single, centralized system to which they provide the basic information (the work and the sale price) and pay a percentage of their turnover; artists, through their society, take charge of the material and financial arrangements involved. ¹⁰³

It is said that the right is most efficiently administered collectively in France, a country long familiar with monitoring and collecting the resale royalty. ¹⁰⁴ There, by agreement, auction houses send sales

¹⁰⁰(...continued)
(statement of Jack Davis)(use Internal Revenue Service or other agency audit as part of enforcement of royalty obligation), App. Part II; Comment 12, at 81 (Lawyers for the Creative Arts)(use Copyright Royalty Tribunal), App. Part I. But see Comment 2, at 2 (Yanick Lapuh)(proposing system where dealers involved in resale should collect royalty; or seller, if no dealer); Comment 4, at 13 (statement of Michael L. Ainslie, CEO of Sotheby's Holdings, Inc., at 1987 Hearing on S. 1613)(costs and administrative burdens of collection greatly exceeded revenue collected in West Germany; compliance virtually nonexistent in California); Comment 11, at 73 (ADAA's statement in opposition to H.R. 3321)(artist free to include provision in original sales contract to get resale royalty), App. Part I.

¹⁰¹ See World Intellectual Property Organization and United Nations Educational, Scientific and Cultural Organization "Study on Guiding Principles Concerning the Operation of 'Droit de Suite'," (1985) (WIPO-UNESCO study), at 69 ("All the administrative work of checking, collecting and apportioning the sums received...can only be carried out by a joint body for the administration of rights.").

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ There, \$16 of every \$20 collected goes to artists. New York Hearing, at 14 (statement of Jean-Marc Gutton). With more than 400 auctioneers in the
(continued...)

catalogues to the collection societies, ADAGP or SPADEM, before each sale. After a sale, the houses send statements to the collecting society with sales prices, amounts of resale royalties, and other information. After resolution of administrative commissions and costs, the collecting society pays its members. The payment is accompanied by a statement containing, among other information, the name of the work involved, the name of the auction house, the place of the sale, the sales price and the applicable resale royalty.¹⁰⁵ Eighty-five percent of ADAGP's royalties are distributed to its membership of living artists, with the remaining 15 percent going to members' heirs.¹⁰⁶

An international network of societies which manage artists' reproduction rights in 26 countries already exists. These are societies that manage the rights of artists, or authors and artists.¹⁰⁷ They are grouped in

¹⁰⁴(...continued)
country, Mr. Gutton explained, it is difficult for individual artists to enforce their rights without the benefit of a collective society. *Id.* at 40, App. Part III.

¹⁰⁵ New York Hearing at 40 (statement of Jean-Marc Gutton), App. Part III.

¹⁰⁶ *Id.* at 33 (statement of Jean-Marc Gutton), App. Part III. See Chapter I of this Report for a discussion of the social security payment made in France by gallery owners. The German collection society, Bild-Kunst, also has a social security fund for artists. New York Hearing at 43, App. Part III. And although Sweden's law does not contain a resale royalty, its artists have suggested that a ten percent fee from each resale should go into an artists' fund for social security. *Id.* at 50 (statement of Stefan Andersson), App. Part III.

¹⁰⁷ Lillian de Pierredon-Fawcett, The Droit de Suite in Literary and Artistic Property, 133 (1991). She cites: V.B.K. (Austria), Artists Rights Society and VAGA (United States), SPADEM and ADAGP (France), Bild-Kunst (Germany), Beeldrecht (Netherlands), KRO (Sweden), DACS (United Kingdom), ONDA (Algeria), SABAM (Belgium), Jus Autor (Bulgaria), SOCADRA (Cameroon), SAYCO (Colombia), LITA and DILIA (Czechoslovakia, one for the Slovak Socialist Republic and one for the Czech Socialist Republic), BURIDA (Ivory Coast), SGAE (Spain), BGDA (Guinea), Artisjus (Hungary), SIAE (Italy), BMDA (Morocco), ZAIKS (Poland), SPA (Portugal), BSDA (Senegal), Proliteris (Switzerland), SODACT (Tunisia), VAAP (USSR), JAA (Yugoslavia), SONECA (Zaire). *Id.*

the Confederation Internationale des Societes d'Auteurs et Compositeurs (C.I.S.A.C.), within the Conseil International des Auteurs des Arts Graphiques et Plastiques et des Photographes, established in 1978. ¹⁰⁸

In the United States, the Artists' Rights Society ¹⁰⁹ or the Visual Artists and Galleries Association, Inc., (VAGA) ¹¹⁰ would be equipped to handle the practical collection of the droit de suite, since these organizations already have an effective distribution system for reproduction rights.

b. Registry of art. Commentators did not agree about the need for a registration requirement in a resale royalty law. Those supporting the need for registration proposed several alternative schemes: creating a national registry of art; ¹¹¹ limiting the royalty right to auction houses, and requiring them to retain royalties in a trust account to be paid over to artists or a collecting agency; ¹¹² requiring sellers to notify and pay artists for resale, but alternatively notifying the Copyright Office when an artist cannot be

¹⁰⁸ Id. at 133.

¹⁰⁹ Artists' Rights Society is an organization which represents the rights and permissions interests in the United States of a number of the European rights societies, notably ADAGP and SPADEM of France and Bild-Kunst of Germany. ARS also acts on behalf of American artists. New York Hearing at 96-97 (statement of Ted Feder of Artists' Rights Society), App. Part III.

¹¹⁰ VAGA is a New York corporation and membership society for American artists and galleries representing American artists. VAGA's functions include protecting artists' copyrights and handling art licensing, reproduction rights clearance, and royalties collection for artists. Founded in 1976, VAGA is a membership association which distributes to its members all income after deducting expenses. VAGA, "Ten Brief Functions of VAGA" (1992). See also New York Hearing at 111 (statement of Robert Panzer of VAGA), App. Part III.

¹¹¹ San Francisco Hearing at 66 (statement of Professor Goetzl), App. Part II.

¹¹² New York Hearing at 122 (statement of Robert Panzer), App. Part III.

located; and recording sales in the Copyright Office, with constructive notice given to the record. ¹¹³

One commentator proposed the establishment of a national registry administered by the Register of Copyrights. Each work would be given a registration number and the artist would pay the registration fee. The artist would then receive a document, which would be transferred to the buyer at the time of sale. Possession of the document would indicate clear title for a subsequent reseller. The buyer would transmit a five percent royalty to the Register, for the Copyright Office to disburse to artists. ¹¹⁴

Another proposal would require sellers of art to report transactions to the Register of Copyrights. The information would include the identity of the seller, the date of the sale, the selling price, and the amount of the royalty. The initial sales price would be reported by the artist or his representative. As an enforcement mechanism, the seller would have to pay the artist three times the amount of the royalty for failure to record the sale. ¹¹⁵

Finally, a third commentator suggested that using the already existing Copyright Royalty Tribunal might be a more efficient means of collecting and distributing royalties than starting a new artists rights society. In this

¹¹³ Comment 9, at 41 (New York Patent, Trademark & Copyright Law Assoc.), App. Part I.

¹¹⁴ New York Hearing at 144-45 (statement of Dan Homan), App. Part III.

¹¹⁵ Comment 13, at 93 (ASMP); See also Comment 14, at 112 (VLA); See Comment 18, at 212 (Covel)(civil fines and double royalty payments); Comment 9, at 41 (New York Patent, Trademark and Copyright Law Assoc.)(if reseller did not give notice to artist of sale, statute of limitations on collecting royalty would not run until artist received actual notice); New York Hearing at 81-82 (statement of John Weber)(certificate of authenticity tied to paying royalty), App. Part III.

model, artists would register their works, with their names and addresses, in a central registry as a precondition to making royalty claims. ¹¹⁶

Those who opposed registration invoked the privacy interests of parties to art transactions in not having their purchases and sales prices made public. ¹¹⁷ The technology presently exists to track at least auction sales, but, as registration opponents maintain, significant privacy issues will be raised. One expert has developed systems, used primarily to locate stolen works of art, that are capable of retrieving images of art works. The systems record and transmit images by telephone transmission or through optical media. One system, called Art Lost Register, compares registered works against works registered for auction or police inquiries. Another system, monitoring worldwide art sales, consists of a series of stations that scan the art catalogues of various auction house. Information is placed on optical disks, and an access charge is based on a combination of yearly subscription rate and an each time user fee. ¹¹⁸ Artists could use these systems to monitor their works -- if dealers and galleries also supplied sales information -- but the information would have to be made available publicly, or at least to the scanning systems. ¹¹⁹

¹¹⁶ Comment 12, at 81 (Lawyers for the Creative Arts), App. Part I.

¹¹⁷ New York Hearing at 198-99 (statement of John Koegel); Id. at 233 (statement of Gilbert Edelson), App. Part III.

¹¹⁸ New York Hearing at 186-88 (statement of Thomas Dackow), App. Part III.

¹¹⁹ Id. at 192-95.

Finally, commentators agreed that there should be no royalty for gift transactions.¹²⁰ However, there was disagreement on whether a sale should be required for the royalty to kick in, or whether a barter arrangement would be enough to trigger obligation for a royalty payment.¹²¹

6. Waiver and Alienation of Royalty

Commentators favoring free alienability argued that a non-waivable right would interfere with the ability to contract¹²² and that waiver is necessary to encourage the risky purchase of works of young artists,¹²³ to satisfy debts,¹²⁴ and for assignment to societies for collection and enforcement.¹²⁵ Except to enforce collection,¹²⁶ however, the remainder opposed making the right waivable or alienable,¹²⁷ lest young artists be pressured into waiving their rights.¹²⁸

¹²⁰ New York Hearing at 109 (statement of Ted Feder), App. Part II. Comment 13, at 94 (ASMP), App. Part I.

¹²¹ Compare New York Hearing at 109 (statement of Ted Feder)(sale required for royalty) with Comment 9, at 91 (ASMP)(royalty if barter transaction worth more than \$1,000), Comment 13, at 94-95 (ASMP)(royalty if barter value of \$250 or more) and Comment 14, at 114 (VLA)(royalty if barter value exceeds undesignated threshold amount), App. Part I.

¹²² New York Hearing at 199 (statement of John Koegel), App. Part III.

¹²³ See Comment 11, at 6 (ADAA), App. Part I.

¹²⁴ Comment 12, at 81 (Lawyers for the Creative Arts), App. Part I.

¹²⁵ Comment 13, at 94 (ASMP), App. Part I.

¹²⁶ San Francisco Hearing at 14 (statement of Professor Goetzl); Comment 14, at 18.

¹²⁷ Comment 2, at 2 (Yanick Lapuh), App. Part I. New York Hearing, at 102-03, 110 (statement of Ted Feder); Id. at 146 (statement of Jeffrey Homan), Part III.

¹²⁸ New York Hearing, at 90, 92 (statement of Hans Haacke), App. Part III; Comment 8, at 36 (ARS); Comment 14, at 114-15 (VLA), App. Part I.

7. Preemption of California Law

As discussed earlier in this report, the California law has already been challenged in judicial proceedings as being preempted by copyright law. It survived a challenge under the 1909 Copyright Act, but several commentators and legal experts believe it is preempted by the 1976 Copyright Act.¹²⁹

All commentators addressing the issue favored preempting California's law if a national resale royalty law were passed.¹³⁰ One suggested, though, that states should be free to provide greater levels of protection than the federal minima.¹³¹ Mr. Gutton of France noted that the California law was very restrictive and urged that the "scope of federal legislation should be more widely protective."¹³²

¹²⁹ See discussion in Chapter II of this Report.

¹³⁰ Comment 15, at 126 (Goetzl); Comment 14, at 114 (VLA), App. Part I.

¹³¹ Comment 15, at 126 (Goetzl), App. Part I.

¹³² Comment 16, at 191 (ADAGP), App. Part I.

IV: INTEGRATION OF THE RESALE ROYALTY INTO U.S. LAW

Author's rights have evolved in Europe around the recognition that intellectual creations, particularly in art, deserve special protection.¹ Unlike authors and composers, who are able to distribute identical copies of their works, each having the same value, artists create unique or a limited number of objects. Artists are also different from other authors in that they cannot generally rely on repeated use of copies of their works. And since some argue that works of fine art are exploited with each sale,² whether or not there is a profit, resale royalties rest on the desire to encourage artistic production by guaranteeing creators compensation, as with other economic rights.³

¹ Lillian de Pierredon-Fawcett, The Droit de Suite in Literary and Artistic Property, 17 (1991).

² Paul Katzenberger, The Droit de Suite in Copyright Law, 4 IIC, Int'l Rev. of Indus. Prop. and Copyright L. 361, 367-68 (1973). See San Francisco Hearing at 11-12 (statement of Professor Thomas M. Goetzl) (sale provides another audience for work), App. Part II. Indeed, Professor Goetzl justifies the payment of a royalty, even if there is a loss, on the fact that the sale provides the next audience for a work. The situation is no different, he argues, than a playwright being paid a royalty by a theater company if a play flops, or an author getting to keep an advance for an unsuccessful book. Id. Fawcett also argues that the transfer of ownership of an original work is an exploitation of the work. Like Goetzl, she contends that the transfer allows a new group of users to enjoy the work in its most perfect expression, supra note 1, at 28.

It has also been maintained, however, that unique works and those that can be produced in numerous copies are not analogous since the triggering event for the former is the substitution of one owner for another, rather than the distribution of another example of the original work. Stephen E. Weil, Resale Royalties: Nobody Benefits, ARTnews 2 (March 1978). In this view, the resales of the original are not exploitations, since no additional work is created.

³ Fawcett, supra note 1, at 18-20. It has been argued as an economic matter, though, that records, sheet music, books and reproducible art -- which all may be expanded by additional production -- are not analogous to unique art, which cannot be. Thus, there is no justification for extending a royalty to fine art, which is different in kind and not just degree. See Ben W. Bolch, William W. Damon and C. Elton Hinshaw, An Economic Analysis of the California Art Royalty Statute, 10 Conn. L.Rev. 689, 691 n.9. (1978).

The droit de suite is most frequently justified as compensation for the lack of a marketable reproduction right for works of fine art. With other works, reproduction rights are commercially exploited by the indirect communication of a copy of the work to the public. Droit de suite rewards exploitation by direct communication of the very object.⁴ Only the original, it is believed, can provide complete artistic enjoyment; and transfer of only the original provides a new circle of users with this perfect enjoyment.⁵

Some also argue that the U.S. copyright law has failed to provide economic incentives for visual artists comparable with those granted to authors and composers.⁶ Unlike other creators who can produce and market endless copies of their works, the artist creates one or a very limited number of works--and a critical value of the work is its uniqueness. Authors and composers receive royalties through reproduction and performance rights for all the copies of their works that are exploited.⁷ Visual artists, on the other hand, are paid for the initial sale of their works, have a minimal market for exploiting

⁴ Fawcett, supra note 1, at 54-55.

⁵ Katzenberger, supra note 2, at 368.

⁶ See, e.g., Thomas M. Goetzl and Steuart A. Sutton, Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis, 9 Colum. J. Art & Law 15, 16 (1984).

⁷ See 17 U.S.C. §§ 106(1), (4). In this way, authors who create in many copies maintain a continuing connection with their works. Authors' royalties, however, are subject to their market power at the time of their contract negotiations. If authors are not well-established at this time, they will not have the power to exact large royalties.

their reproduction rights,⁸ and lose their most remunerative right -- that of public display⁹ -- once they sell their creations.¹⁰

Copyright legislation in the United States owes its origin to the constitutional clause providing that Congress shall have the power

[t]o promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.¹¹

Copyright motivates creativity, while encouraging the broad public dissemination of works to the public.¹² Thus, in contemplating changes to the copyright law

⁸ See San Francisco Hearing at 5 (statement of Professor Thomas M. Goetzl)(reproduction not primary market for works of visual art), App. Part II; New York Hearing at 179 (statement of James Rosenquist)(this noted artist paid only \$3,000 in 31 year career for reproduction rights), App. Part III.

⁹ The Canadian government, for example, presently compensates artists for works owned in the government's art bank. San Francisco Hearing at 5 (statement of Professor Thomas M. Goetzl), App. Part II.

¹⁰ Even though the copyright law recognizes a distinction between a work and the material object in which it is embodied, 17 U.S.C. §202, this separation largely disappears where the work is created in only one or an extremely limited number of copies: once a collector has purchased an original painting, for example, the artist no longer possesses either the work or the object to display. Moreover, even if the artist has retained copyright, the First Sale doctrine effectively cuts off his public display right. *Id.*, § 109(c)(owner of copy entitled to display copy publicly). Works may be leased or otherwise alienated without title passing, although this is, no doubt, and unrealistic alternative if purchasers want ownership of paintings, sculptures and other works of fine art that they acquire in the art market.

For all of these reasons many commentators, including Professor Perlmutter, argue that the artist is at an economic disadvantage. Letter from Shira Perlmutter, Assistant Professor Columbus School of Law, Catholic University, to Ralph Oman, Register of Copyrights (November 10, 1992). Professor Perlmutter asserts that "Given the realities of the market for fine art, copyright is often a nearly valueless entitlement for the artist." *Id.* at page 2.

¹¹ U.S. Const., Art. 1, Sec. 8, Cl. 8.

¹² See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984). This is also the purpose of the Visual Artists Rights Act of 1990. H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 5 (1990).

-- whether resale royalties constitute authors' rights or are more in the nature of moral rights -- ¹³ this constitutional framework serves as a logical matrix for balancing creator and user rights.

One can argue that the potential for increased remuneration is a potent incentive for further creation. It is not clear, though, whether the royalty is too far removed from the act of creation to be an incentive. ¹⁴ On the other hand, the decreased prices for works of visual art in the primary market -- the consequence of the later royalty payment ¹⁵ -- will not help a

¹³ Because the droit de suite is inalienable, Berne Convention Article 14ter (1), some have concluded that the right is more akin to a moral, than an economic, right. But there is disagreement. One theory is that a work embodies a property interest attached to its creator, and the work sold is the creation, not the art object. The resale royalty has no autonomous existence under this approach, it is merely a consequence of the moral right of paternity. Another perspective is that moral rights and economic rights coexist: the creative personality is protected by moral rights, while the creation which is the fruit of it is protected by economic rights. Fawcett, supra note 1, at 32. Still another view is that the resale royalty is more closely allied with the reproduction right as a pecuniary right and is, thus, part of the author's copyright. Diane B. Schulder, Art Proceeds Act: A Study Of The Droit De Suite And A Proposed Enactment For The United States, 61 Nw. U.L. Rev. 19, 22 (1966). See also Rita E. Hauser, The French Droit De Suite: The Problem Of Protection For The Underprivileged Artist Under The Copyright Law, 6 Bull. Copyright Soc. 94, 110 (1959)(droit de suite is author's right because it protects artist in exploitation of his work).

¹⁴ See, e.g., Comment 15, at 120 (Goetzl)(royalty alone unlikely to either encourage or discourage creation of new works); Comment 16, at 189 (ADAGP)(royalties have no effect because creation is generally independent of economic criteria), App. Part I.

¹⁵ Bolch, Damon & Hinshaw, supra note 3, at 693. In addition to reducing original bid prices, the royalty also forces artists to invest in their own work, sometimes contrary to their best interests. Id. at 695. Moreover, except for well-established artists, who might ultimately benefit from royalties despite the initial price decrease, most artists' works do not increase substantially in value and the resale royalty will not make up for the initial deficiency. Stephen E. Weil, Resale Royalties: Nobody Benefits, ARTnews 5 (March 1978). Weil also contends that the worst problem facing contemporary artists is the lack of a broad initial market for their works, not abuses in the resale market. And what would benefit them most is an increase in the funds available to purchase art in the primary market. Id.

damaged contemporary art market. And with increased sales charges, institutional collectors, such as museums, will be discouraged from taking risks on portfolios of contemporary art.¹⁶ Yet the royalty cost may be absorbed like other costs associated with art transactions, without causing a ripple in the art market.¹⁷ The essence of the resale royalty is the disparity between the initial sales price and the price for which a work is later sold.¹⁸ This concept fits easily within the Continental systems that recognize a continuing relationship between an artist and his work, even after it has been sold.¹⁹ Consistent with this view, possession of art is not like owning a widget, even after a work is sold it remains under the influence of its creator.²⁰

The United States, however, follows the more traditional view of property rights -- that the purchaser of an item for a freely negotiated price

¹⁶ Bolch, Damon and Hinshaw, supra note 3, at 695.

¹⁷ See Comment 14, at 100 (participants in art market accustomed to incurring charges on sale of art, and a number of collectors are art lovers who purchase for more than economic gain).

¹⁸ Paul Sherman, Incorporation of the Droit de Suite into United States Copyright Law, 18 Copyright L. Symp. (ASCAP) 51 (1968).

¹⁹ However, even under French property and contract law, the alienation of chattel without any reservation results in a complete and total divestment of all the seller's interests. Thus, if an artist sold a work without reserving any rights, but for moral rights, he would be stripped of any claims to it. Through moral rights, however, a creator may control and even suppress the use of his product, even though he no longer owns it. The principle is in complete derogation of the concept of exclusive ownership, and, in fact, in France, exclusive and total ownership of intellectual property, other than by the creator, is not possible. Hauser, supra note 13, at 103.

²⁰ See Fawcett, supra note 1, at 16-17. Although, at least one artist implicitly conceded, in the context of arguing that artists should not have to share any loss if they receive the benefit of the resale royalty, that art is like a commodity -- a stock or an automobile, for example -- and that one should not expect to be reimbursed for a depreciation in value. New York Hearing at 76-77 (statement of Hans Haacke). The analogy is perhaps not apt since an art owner possesses his work subject to the potential to pay a royalty someday, yet the stock or automobile owner has no such encumbrance.

is the absolute owner -- and is less receptive generally to restraints on free alienability. And, indeed, the lack of alienability in the droit de suite is the most substantial restriction of the owner's rights: the transferee may receive and assign any or all of the author's exclusive rights that he has acquired in a work, but he is barred from obtaining the resale royalty.²¹

The royalty also raises significant privacy concerns in that artists would need to obtain certain information about sales prices and ownership that sellers, purchasers, and other owners may not want to disclose.²²

Moreover, the comparison of the relative protection and remuneration of artists and other creators is extremely difficult to establish. Although authors who do not create unique works are rewarded by royalties and can produce numerous copies and reap the benefits, the value of works of art is determined by scarcity and works of fine art do not require the same level of demand to secure a living for the artist.²³ In this way, even though some fine artists cannot avail themselves of reproduction rights,²⁴ it may be argued nevertheless that the copyright scheme, in fact, favors these artists.²⁵

²¹ See Berne Convention, Article 14^{ter} (1); see generally Fawcett, supra note 1, at 34.

²² New York Hearing at 198-199 (statement of John Koegel), App. Part III.

²³ Weil, supra note 2, at 2.

²⁴ A major economic argument for the resale royalty is the relative inability of fine artists to exploit the reproduction right. Artists may not be using all available media for the exploitation of their works, e.g. posters, cards, prints, shirts, rugs, art books.

²⁵ See id. Authors also receive their royalties over time, while artists get a lump sum that can be invested and receive interest. Monroe E. Price, Government Policy and Economic Security for Artists: The Case of the Droit de Suite, 77 Yale L.J. 1333, 1346 (1968). Moreover, having more recognizable objects to manipulate, artists are favored under the tax code, since they are
(continued...)

Additionally, successful artists -- and those are the primary ones that copyright and droit de suite ²⁶ reward -- secure ever increasing prices as their reputations grow and they sell successive works. ²⁷ In this way, in fact, they continue to maintain a connection with their body of work, even after sale, undercutting one of the primary arguments supporting the resale royalty.

Most importantly, it is not clear that the analogy holds between the sale of works subject to continuing royalties and the sale of works of visual art. First, the former are sold in thousands of copies to large groups of customers, and until the last copy is sold, the author, entitled to remuneration for all copies, does not know the total revenue from the work; works of fine arts, on the other hand, are sold to one or a limited number of customers and the creator can control the distribution of his works and has all, or virtually all, of this information at the time of sale. ²⁸ Second, the triggering event for

²⁶(...continued)

better able to arrange expenses and charitable deductions to minimize income taxes. Id. at 1347.

Although the copyright law is technically a statutory recognition of proprietary rights in intellectual property, it also reflects the economic realities of how works are exploited in the market. Given a painter or sculptor, and an author or composer of comparable stature, the former will receive greater remuneration for each original or limited edition painting or sculpture that they sell than will the latter for each book or sound recording sold. Authors and composers must therefore sell more copies of their works than painters and sculptors to receive equal remuneration. Thus, 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.

²⁶ New York Hearing at 201-02 (statement of John Koegel)(resale royalties, like copyright, reward only successful creativity), App. Part III.

²⁷ Lewis D. Solomon and Linda V. Gill, Federal and State Resale Royalty Legislation: "What Hath Art Wrought?", 26 U.C.L.A. L.Rev. 322, 331 (1978); Comment 11, at 11. For a comparison between artist social security, which provides financial assistance to young creators generally, and droit de suite, which by its terms is a personal right of visual artists and benefits only successful creators, see Katzenberger, supra note 2, at 370-71.

²⁸ Comment 11, at 7-8.

the resale royalty is the substitution of one owner for another, rather than the distribution of another example of the original work, as is the case with works created in many copies.²⁹ A more apt comparison perhaps would be the resale of a first-edition book, for which authors are not paid a royalty.³⁰

Assuming that the Copyright Act has a detrimental impact on fine artists as compared to other creators, it is not clear that the use of resale royalties is the best means by which to level the playing field. Arguments have been made that the presence of resale royalties has had an adverse effect on the primary markets for contemporary art in California and France, although there is strong disagreement about this point.³¹

The droit de suite also depends on frequent resale, making the right less valuable to the artist if his or her art does not change hands within a relatively short period.³² Moreover, an artist whose work is resold frequently may gain more than one whose work has appreciated more but is only resold once.³³

²⁹ Weil, supra note 2, at 2.

³⁰ See New York Hearing at 24-25 (statement of Stefan Andersson)(authors are not paid for resale of first edition books). However, the Berne Convention contemplates that writers and composers will receive resale royalties for original manuscripts. Article 14ter (1), App. Part III.

³¹ Comment 11, at 13-14 (ADAA); The president of the Art Dealers Association of America also maintains that England, not having as strong an economy as France -- but also lacking the resale royalty -- has a healthy art market. Id. at 14. But see Comment 15, at 4 (Goetzl)(California art market thriving despite royalty); Comment 14, at 5 (VLA)(French art market has thrived). Cf. Comment 16, at 1 (ADAGP)(auction houses in countries without a royalty -- England, Switzerland and Netherlands -- do not have higher turnover than France or Germany, where right exists), App. Part I.

³² Bild-Kunst, the artist's rights collection society in the Federal Republic of Germany, acknowledges, in fact, that it is doubtful that the royalty will help most living artists, since their works will not be resold during their lives. Comment 17, at 1.

³³ New York Hearing at 220 (statement of Steven Weil), App. Part III.

Moreover, since most artists do not have a resale market, they may suffer if purchasers pay less in the primary market, factoring in the future royalty.³⁴ Additionally, the right is best administered when applied to public sales, like auctions, and most works are not sold in this manner.³⁵ And even when the right is applied to dealer and private sales, it is difficult to administer and the costs may outweigh the benefits of the system.³⁶ Finally, galleries spend equal amounts promoting their artists, experienced or not. But the works of young artists are not immediately profitable and need to be subsidized by more successful, established artists. For smaller galleries particularly, the resale royalty could reduce the number of unprofitable exhibitions of inexperienced artists.³⁷

As a matter of policy, does Congress want to help struggling artists or provide an economic right that may simply reward only commercially successful creators whose work is frequently resold? A considerable body of literature concludes that the royalty favors those who are already established and does not aid the plight of those without a market for their works.³⁸ And are the

³⁴ See San Francisco Hearing at 31 (statement of Professor John H. Merryman).

³⁵ See 69 Australian Copyright Council (1989).

³⁶ Id. at 13.

³⁷ Comment 11, at 72 (ADAA), App. Part I. See San Francisco Hearing at 31-32 (statement of Professor John H. Merryman)(dealers will be forced to have fewer shows of unrecognized artists and purchase and resell works of only famous artists), App. Part II.

³⁸ See, e.g., Fawcett, supra note 1, at 144; New York Hearing, at 198 (statement of John Koegel), App. Part III; Weil, supra note 2, at 5; Bolch, Damon and Hinshaw, supra note 3, at 692, 695. Cf. Tom R. Camp, Art Resale Rights and the Art Resale Market: An Empirical Study, 28 Bull. Copyright Soc. 146, 158-59 (1980)(resale right would have deleterious effect for purchasers for which price is important factor).

benefits of the resale royalty worth the concomitant costs: for example, that Congress would have to make inherent value judgments about why people should buy art -- whether for consumption or investment -- and reward the true connoisseur who does not contemplate reselling his work? ³⁹

The resale royalty also encourages the creation of particular types of art. ⁴⁰ To be truly effective the droit de suite must be an incentive to produce works that are resold frequently: ⁴¹ easel paintings and traditional sculpture, for example, where conception is embodied in a single object. ⁴²

Finally, does Congress want to eliminate, or even qualify, the First Sale doctrine, and abandon well-settled principles of free alienability in Anglo-American property jurisprudence? ⁴³

Several arguments, largely equitable, are advanced in support of the droit de suite. Since the original buyer, possessing artistic taste and courage, gambles his money on a work without market value, he should benefit from any

³⁹ In value-neutral economic terms, people buy art either as a pure consumption good, with no resale foreseen, to enjoy the nonmonetary benefits from ownership; or, they buy at least partly for investment.

Indeed, contemporary art may be a bad financial investment. Unlike stock, which has tax deductible losses and costs of ownership, and a sales commission of only one percent, the costs of selling a piece of art are often 15 to 25 percent of the purchase price, plus the intermediate costs of insurance, conservation and shipping -- none of which are deductible. The disparity is particularly great where royalties are calculated based on gross proceeds, since tax is keyed to profit alone. S. Weil, supra note 2, at 4.

⁴⁰ Price, supra note 24, at 1338.

⁴¹ Id. at n. 15.

⁴² Id. at 1339 n.16.

⁴³ See New York Hearing at 7 (statement of Jean-Marc Gutton)(contrasts resale royalty with notion of copyright as pecuniary right over commercial product for which artist retains no right), App. Part III; Schulder, supra note 13, at 28 (concept of individual purchaser having to share ownership with other inconsistent with U.S. property law).

increased value. But when a later purchaser is a businessman without any artistic taste who wants a good business deal by buying an article with recognized high value, it is fairer to give any increase to the artist or his heirs. ⁴⁴

In France, the seller pays for the privilege of having enjoyed a work of art during the time he had it. Much like the author who receives royalties, the artist participates in the continuing exploitation of his works. Under French law, the artist shares in the total sales price of a work. ⁴⁵

This approach, however, does not account for the low profit margin on art sales, and the seller's costs and dealer commission. ⁴⁶ There is something inherently unjust, as well, in permitting an artist to benefit from increases, without also having to share the risk of loss. ⁴⁷

In Germany, the artist's royalty is premised on the belief that the increased value of a work was always latent in it, and due to the artist's continuing work. The increase in value is what the artist should have received

⁴⁴ François Hepp, Royalties From Works Of The Fine Arts: Origin Of The Concept Of Droit De Suite In Copyright Law, 6. Bull. Copyright Soc. 91, 92-93 (1959). A shortcoming of this theory, however, is that it is the seller (the original purchaser of taste and courage) and not the new purchaser who pays the resale royalty.

⁴⁵ Supra note 35, at 11.

⁴⁶ Solomon and Gill, supra note 26, at 341. Stephen Weil estimates, for example, that a \$10,000 painting would require 20 percent average expense for maintenance. If the gross sales proceeds are coupled with a five percent resale royalty, the break even point for the sale would be at 133 percent of the purchase price. Weil, supra note 2, at 4. Thus, royalties encourage the retention of works for long periods -- or at least long enough to amortize the costs of ownership and sale -- rather than the injection of new money into the contemporary art market.

⁴⁷ Fawcett, supra note 1, at 11.

originally.⁴⁸ From the German perspective, artists are exploited because the true value of art is not realized until many years after the original sale, and the creators do not share in any appreciation in value. Since art is often in the avant-garde,⁴⁹ artists should not be punished for their prescience.

In pure economic terms, however, the value of an object is what a willing buyer will pay a willing seller at a given time.⁵⁰ Thus, when a young artist without a recognized market sells a work to a collector -- who assumes the considerable risk that the work may decline in value -- market forces dictate the price and terms of the exchange. And consistent with our concepts of property rights, the collector receives the interests he negotiated in the work as a quid pro quo for his gamble.

There are other flaws, as well, with the intrinsic value supposition. First, there is nothing inherent in the concept of art which furnishes artists with particular privileges. The relationship between the artist and his work is largely driven by cultural interests, and whether a work is valued, in itself,

⁴⁸ Id. Cf. San Francisco Hearing at 47 (statement of Richard Mayer)(worth implicit in work of art lies in artist's development over years of production, not with object sold). This concept is a variation on the economic doctrine of "just price," that things have an objective, intrinsic value, in and of themselves, App. Part II. Bolch, Damon, and Hinshaw, supra note 3, at 690.

⁴⁹ As one author noted:

Works of the fine arts have an economic value which varies considerably, according to the tastes of the public, fashion, and the evolution of artistic views. The greatest masterpieces of art have generally not been recognized at the time they were created.

Hepp, supra note 43, at 92. See also New York Hearing at 161 (statement of Sanford Hirsch)(fashion is key factor in art market), App. Part II.

⁵⁰ New York Hearing at 215 (statement of Stephen Weil), App. Part III.

is a matter that varies from time to time and society to society. ⁵¹

Second, factors other than the continuing efforts of the artist raise the value of a work. These include the premature death of the artist, his failure to live up to earlier promise, and any reduction in supply of an artist's work or inclusion in a well-known collection, as well as inflation in the art market generally. ⁵² The price of art, like other commodities, varies with supply and demand, and the artist is only one of the many factors that impact price. ⁵³

Third, it is an economic reality that most art depreciates in value, so a royalty based on profit will not benefit most artists. ⁵⁴ And as a matter of fairness, it is difficult to ignore devaluation of currencies and conservation costs.

Fourth, the intrinsic value concept relies on the attenuated connection between artists and subsequent and unknown sellers, so that purchasers end up with a share of the artist's fame, and not a piece of art. ⁵⁵

⁵¹ Price, supra note 41, at 1336 n.13.

⁵² One royalty advocate, acknowledged, in fact, that if royalties are paid on the gross sales price, there is no need to adjust for inflation because the royalty will have been paid in inflated currency. Comment 14, at 105-106.

⁵³ New York Hearing at 209-10 (statement of Stephen Weil), App. Part III. Indeed, Weil maintains that even if the artist's continuing efforts are the principal basis for the increased value, the artist still should not be entitled to a share of the increase. If a house's sales price increases because a developer builds a golf course nearby or the architect later becomes famous, Weil argues, neither the developer nor the architect is entitled to a share of the proceeds. Id. at 210.

⁵⁴ Solomon and Gill, supra note 26, at 341.

⁵⁵ Fawcett, supra note 1, at 16, n. 70.

Finally, the complexity of calculations make a royalty based on appreciation difficult to implement.⁵⁶

In Belgium, the contract principles of changed circumstances and unjust enrichment underlie the royalty right. There is a continuing relationship between the artist and those who purchase his work, and, it is believed, a seller should not benefit unjustly from any increased value in an artist's work.⁵⁷ This approach presupposes that value increases are not the result of any specific activity or ability of the owner of a work, so that he should not benefit at the creator's expense.⁵⁸

The Belgian and intrinsic value theories, however, share many of the same problems. Initially, the putative enrichment is based on a contract between a willing seller and buyer that was legitimate at the time of the transaction. No injury has been caused when the purchaser pays the artist a modest sum to buy a work; it is only later when the work increases in value -- whether through the artist's additional efforts or not -- that the price becomes insufficient.⁵⁹

⁵⁶ Id. at 13. See New York Hearing at 101-02 (statement of Ted Feder)(experience not successful in Italy, Portugal, Uruguay, Czechoslovakia and California, where royalty applied to increase in value over preceding sale), App. Part III; Comment 13, at 91 (gross revenue calculation avoids confusion from trying to base percentage on seller's profit), App. Part I. But see New York Hearing, at 220 (statement of Stephen Weil)(easier to track royalty based on appreciation because necessary information must be reported for income tax purposes), App. Part III.

⁵⁷ Supra note 1, at 14.

⁵⁸ Id. at 13.

⁵⁹ Id. at 14-15.

And for unjust enrichment to be truly equitable, the seller would be permitted to deduct the cost of resale and the expenses of ownership.⁶⁰

Regardless of whether the resale royalty is based on the entire sales price or merely the increase in value of the art work, there are consequences to the integration of the royalty into the free market system. Some argue that the royalty encumbers future sales and depresses the art market. And to the extent that works of visual art can be substituted readily by another commodity, patterns of demand are altered and prices and sales volume are reduced.⁶¹

Further, art that is easily reproducible, ephemeral or of monumental scale, will probably not be resold within the life plus fifty year period.⁶²

Moreover, although almost all works of living artists decline in value, purchasers may not deduct these losses on their taxes, even though any profit is fully taxable.⁶³ Seen in these terms, the royalty is a deterrent and not an incentive for the collection of modern art, and the money for

⁶⁰ Collectors pay for framing, conservation, storage, time-use of capital and absorb any loss on resale. Under this scenario, it is argued, the only plausible economic basis for a resale royalty would be if there were no ownership costs and art always increased in value. New York Hearing at 217 (statement of Stephen Weil), App. Part III. Moreover, contemporary art is the most difficult to sell, and in addition to all the costs of conservation and maintenance, the seller must also pay a 15-20 percent dealer commission, and capital gains tax. New York Hearing at 256, 261-62 (statement of Gilbert Edelson), App. Part III. For auction sales in England and the United States, transaction costs are split between the seller and buyer, 10 percent each. New York Hearing at 260-61 (statement of Mitchell Zuckerman).

⁶¹ Comment 11, at 69.

⁶² Price, supra note 24, at 1341-42. But see Katzenberger, supra note 2, at 371-72 (inapplicability of droit de suite in certain circumstances does not invalidate right since it is only one of several exploitation rights which in totality protect author).

⁶³ New York Hearing at 229 (statement of Gilbert Edelson), App. Part III. One commentator suggested that royalties should be deductible from capital gains or losses at resale, and be considered ordinary income to the artist. Comment 18, at 212.

administration of the right may come from collectors who would otherwise have used the money to acquire art. ⁶⁴

Finally, society's perception of the role of artists is also crucial to the integration of a resale royalty into our economic and legal systems. The notion of starving artists being exploited by wealthy, savvy investors does not do justice to reality. Rather, it might be that, as Monroe Price argued forcefully a quarter of a century ago, droit de suite is based on romantic nostalgia. ⁶⁵ Price warned that the starving artist perception can have perverse effects as the basis for public policy, if the government concentrates on the perceived inequity of the lag time between artistic creation and market acceptance, and droit de suite becomes the penance that society does. ⁶⁶

Some convincing arguments were made that artists earn no less than other workers of similar training and personal characteristics. ⁶⁷ Like participants in a lottery, some individuals are attracted to high-risk careers

⁶⁴ New York Hearing at 231-32 (statement of Gilbert Edelson), App. Part III.

⁶⁵ Price wrote:

The droit de suite springs from a nostalgic recollection of the late nineteenth century. It is a case, not unusual, of legislation passed or posed to correct a situation that no longer exists with the intensity that provoked reform.

Price, supra note 24, at 1335.

⁶⁶ Id. at 1336.

⁶⁷ Randall K. Filer, The "Starving Artist" - Myth or Reality? Earnings of Artists in the United States, 94 J. of Pol. Econ. 56 (1986). However, the vice president of National Artists Equity stated at the New York hearing, that artists work less in their professions than do accountants, for example, and that accountants will make more money. New York Hearing at 169-70 (statement of George Koch), App. Part III.

in the arts for the possibility of an eventual large payoff or the significant nonmonetary rewards of creation, and are willing to sacrifice consumer goods for other advantages. ⁶⁸ Additionally, fewer artists leave their professions than do workers in other occupations. ⁶⁹

And just as artists voluntarily enter their profession, it may be argued that they are similarly not exploited when they enter into a transaction with a wealthy buyer. ⁷⁰ The artist is faced with a choice of whether to sell his work today, or to hold the art as an investment for a certain time period. A sale will take place if the artist has a greater present need for consumption than the buyer. And although both the artist and the buyer agree on the future price of a work, they differ in their preference for present relative to future consumption. ⁷¹

⁶⁸ Id. at 57. For example, artists work a substantially lower average number of hours, id. at 61, and have more rapid earnings growth than other workers, id. at 72, and, over the age of 40, earn more than nonartists. Id. at 63.

⁶⁹ Id. at 59.

⁷⁰ Bolch, Damon and Hinshaw, supra note , at 693.

⁷¹ Id. at 692-93. As a practical matter, though, an artist needs money for food and shelter, as well as the costs associated with the preparation of his work, and may not have any choice about selling his work for present consumption. See San Francisco Hearing at 48 (statement of Eleanor Dickinson)(producing art is very expensive and present income is needed to continue production), App. Part II; New York Hearing at 161-62 (statement of Sanford Hirsch)(artists bear cost of development and many of dealer's overhead costs for crating, transportation, framing and advertising), App. Part III.

However, Willem de Kooning's perspective, that collectors who benefitted from increases in the value of his works helped him to continue painting by paying for art materials, food and rent, is probably a more realistic appraisal of the choice of entering the art profession. See New York Hearing at 237-38 (statement of Gilbert Edelson), App. Part III.

V. CONCLUSIONS AND RECOMMENDATIONS

A. PRINCIPAL CONCLUSIONS

Copyright legislation in the United States is grounded in the constitutional clause, which motivates creativity, while encouraging the broad public dissemination of works. Thus, whether resale royalties are moral or author's rights, the constitutional framework provides a logical matrix for balancing creator and user interests. Consistent with the constitutional purpose of encouraging creativity, it may be argued that the potential for increased remuneration is a potent incentive for further creation. Yet it is equally plausible that the royalty may be too far removed from the action of creation to provide any motivation. Any increase in creativity, however, must be balanced against the possible real-life economic consequences of decreased art prices in the primary market -- the possible direct consequence of the later royalty payment -- which will not help an already damaged contemporary art market. Further, increased sales charges will arguably discourage collectors from risking the purchase of contemporary art, inhibiting its dissemination. Yet when all is said and done, the art market may absorb royalty costs, like other costs associated with art transactions, without a ripple.

The European concept of droit de suite derives from the moral right of paternity, connecting authors with their creative progeny, even after alienation of the works. From this perspective, artists benefit as a matter of equity, not welfare, from increases in the value of their fine art. Such increases, it is believed, are based on the artist's continued work, and purchasers should not be unjustly enriched through the artist's continued evolution.

Works created in numerous copies are commercially exploited by the indirect communication of a copy to the public, through either reproduction or performance. A critical value of fine art lies in its uniqueness. Thus, some argue that the U.S. copyright law, which is driven typically by economic exploitation of many copies, has failed to provide economic incentives for fine visual artists who create works in unique or limited copies. Visual artists are paid only for the initial sale of their works and have limited markets for the exploitation of their reproduction rights. Because of the First Sale doctrine, they also lose their potentially most remunerative right -- that of public display -- once they sell their creations. Reasoning that other authors have an easier time exploiting their works through copyright, advocates justify the resale royalty as the artist's compensation for the lack of a marketable reproduction right, rewarding exploitation by the direct communication of the very object.

Based on our examination of the written comments and the hearing record, and our independent research, the Copyright Office is not persuaded that there are legitimate economic interests of visual artists that would be helped by a resale royalty. Although authors who do not create unique works can produce numerous copies or license numerous performances and reap the benefits of continued royalties, the value of works of fine art is determined by scarcity. Visual art works do not require the same level of demand as printed works, for example, to secure a living for the artist. Indeed, in this respect, even though fine artists cannot avail themselves optimally of reproduction rights, it may be argued nevertheless that the copyright scheme favors such artists who have fewer works to market.

Moreover, successful artists -- who will typically garner more income from droit de suite -- secure ever increasing prices as their reputations grow and they sell successive works. Thus, they do continue to maintain a connection with their body of work, albeit not the specific work resold, even after sale, undercutting one of the primary arguments supporting the royalty.

It is not clear that the copyright analogy holds between the sale of works subject to continuing royalties and the sale of works of visual art. A book, for example, is sold in thousands of copies to large groups of customers and the creator cannot control the distribution and acquire all the information about the work's revenue until the last copy is sold. A sculpture, on the other hand, is sold to one or a limited number of customers and the creator can control the distribution of the work and has all, or virtually all, this information at the time of the sale. Moreover, the triggering event for the resale royalty is the substitution of one owner for another, rather than the distribution of another example of the original work, as is the case with works created in many copies. While the event of resale is a convenient touchstone for triggering payment to the artist, it is not clear that it is actually a new exploitation of the work. A more apt comparison between books and sculptures would be the resale of a first-edition book, for which authors are typically not paid a royalty.

Undoubtedly the enhanced reputation of a creator has a positive effect on future sale prices for every kind of authorship. While there has been some legal effort through droit de suite and consideration of "best seller" reformation of contract provisions in a few countries, to even out disparities when a work appreciates a great deal after the initial sale, it is not clear how successful these efforts have been.

Because the Copyright Office lacks sufficient current empirical data about several important facts, which the administrative hearing process and scholarly research have not supplied, we cannot accurately compare the respective remuneration of authors who create in many, and artists who create in limited, or unique, copies. Any conclusions that we could make about the number of artists who would benefit from the resale royalty must be based, therefore, on anecdotal evidence and limited sample size. Most significantly, there is no clear evidence indicating the frequency of resale of works of fine art. Thus, even if Congress determines that the Copyright Act does treat fine visual artists in a manner less favorable than authors or composers, it is not clear that the resale royalty right is the best means to offset this disadvantage, particularly if it is not triggered with any frequency within the copyright term. There is evidence that as few as one percent of artists will qualify for the royalty.

Lacking hard numbers and quantifiable experience to determine empirically that the royalty is a viable option for U.S. artists, it is helpful to look to existing royalty systems in other countries as a frame of reference. In France, for example, where the concept originated and the country has had three-quarters of a century to iron out difficulties in the administration of the right, application of the droit de suite has led to some criticism. The royalty is applied to the total sales price of a work of art, departing from the rationale of permitting artists to participate in increases in the value of their creations. Applying the royalty to the total sales price of a work is particularly unfair when the work decreases in value, since in addition to the collector's loss on the transaction, he or she must also pay the associated costs of art ownership.

The droit de suite in France has been applied only to auction houses -- presumably because they are easier to monitor -- even though, in theory, the right is equally applicable to dealer and private sales. Dealer sales are, in fact, covered by the 1957 law, but no implementing rules have ever been issued. Estimates for the percentage of sales in galleries as compared to those in auction houses ranged from 60% art dealers to 40% auction to an estimate that there are four times as many sales through galleries and private transactions as through the auction market. Thus, a large number of resales of contemporary art are not subject to the droit de suite. Both France and Germany have established agreements with art galleries to make social security payments for artists even though artists are not employees of art galleries.

That there are more sales through dealers and private parties than auction houses is probably also the case in the United States. At large houses like Christies and Sotheby's there is a sales minimum that may vary depending on the kind of work involved. Combined with a large sales commission, this would tend to restrict auction sales to valuable works. If the right is applied to dealer and private sales, it is difficult to administer and the costs may outweigh the benefits of the system, particularly if, as in California, the artist must enforce his own royalty rights.

The German approach to the resale royalty reasons that the increased value of a work was always latent in it and is due to the artist's continuing work. When a new artist sells a work to a collector -- who assumes the considerable risk that the work may decline in value -- market forces, however, dictate the price and terms of the exchange. In a free market, there is arguably no latent value of an object, rather it is only as valuable as the price a willing buyer will pay a willing seller at a given time. Additionally, there are

factors other than the continuing efforts of the artist that raise the value of a work. These include the premature death of the artist, his or her failure to live up to earlier promise, any reduction in the supply of his or her work or the inclusion in a well-known collection, or inflation in the art market generally. On the other hand, since most art depreciates in value, a royalty based on profit will benefit few artists.

Purchasers may not ordinarily deduct any losses on their taxes, even though all profit is fully taxable. In this way, the royalty discourages, rather than encourages, the collection of modern art. Some of the European countries do offer tax incentives including reduction of the (VAT) value added tax.

While basing the resale royalty on the gross resale price may seem less equitable, the complexity of calculations make a royalty based on appreciation difficult to implement. Countries such as Italy that base the royalty on appreciation have encountered enforcement problems.

The Belgian approach, based on the contract principles of changed circumstances and unjust enrichment, and the intrinsic value theory shares many of the same shortcomings as the French or German approaches. The putative enrichment is based on a contract between a willing seller and buyer that was legitimate at the time of the transaction. No injury was caused when the purchaser paid a modest sum to buy a work, it is only later when the work increases in value that the price becomes insufficient. For unjust enrichment to be truly equitable, the seller would have to be permitted to deduct the costs of resale and ownership.

Additionally, the resale royalty concept fits awkwardly within a free market economy. Although several European authorities maintain that the royalty has not adversely affected their art markets, others maintain that the presence

of the royalty has hindered several European art markets. It is not clear what conclusions can be drawn from the California experience. Again evidence is inconsistent about the extent to which the resale royalty right has affected sale of contemporary art in California, and the number of sham sales that have shifted to other jurisdictions. On the other hand, it is clear that the California resale right has not been fully realized.

The argument is also made that the royalty benefits only successful, well-established artists, and that most artists, who lack a resale market, will suffer in the primary market as prices are depressed, anticipating the future royalty payment.

The usefulness of the royalty depends, as well, on the creation of the type of art that Congress wants to encourage. To be effective the droit de suite must be an incentive to produce works that will be resold -- ideally, easel paintings and traditional sculpture, where conception is embodied in a single object, or a very few copies.

Implementation of the royalty would require qualification of the First Sale doctrine. 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.

Finally, the resale royalty raises significant privacy concerns since artists would need to obtain information about sales prices and ownership that sellers, purchasers and other owners may not want to disclose.

In summary, based on its analysis of the foreign and California experience with droit de suite, the administrative record of the hearings and written comments, and independent research, the Copyright Office is not persuaded that sufficient economic and copyright policy justification exists to establish droit de suite in the United States. The international community is now focusing on improving artists' rights, including the possibility of harmonization of droit de suite within the European Community. Should 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.

Many countries offer alternative solutions that the United States might want to consider. Although the Copyright Office does not necessarily endorse alternative solutions, in the next section of our Conclusions and Recommendations we briefly consider possible alternatives to droit de suite. In the event Congress should determine that the time is ripe for introduction of droit de suite in the United States, the Copyright Office has prepared a possible model of a droit de suite system. This model should facilitate establishment of a system with a better chance of achieving the objective of assistance to artists without significant damage to the art market.

B. SUGGESTED ALTERNATIVES

1. Broader Public Display Right

Assuming that fine visual artists cannot exploit their intellectual property rights adequately under the existing copyright law, some form of a broadened public display right might be an alternative. Rather than depending on frequent resales within the specified royalty term, a considerable problem of the droit de suite, the display right would be triggered by the typical manner

of exploitation of works of fine art -- public display. Museums and public art galleries might pay a fee to display works of art publicly.

In theory, section 106(5) of the Copyright Act already provides creators of pictorial, graphic, and sculptural works with a public display right. However, the right is cut off by the First Sale doctrine in section 109(c), that permits the owner of a copy to display his or her work publicly to viewers present at the place where the copy is located. Thus, with the sale of a unique work, the copyright owner is left with nothing to display, and with works created in limited copies the creator and object owner may mount competing displays.

2. Commercial Rental Right

Under existing law, if a work of art is alienated, solely by rental, the artist retains the exclusive distribution right. However, very few artists have the market power to structure the art transactions so that works are rented and ownership of the copy of the work does not pass to the purchaser.

Even with works that are sold, the Copyright Act could be amended to allow the distribution right to survive with respect to commercial rental. The owner of the copy would receive the object, while the artist would retain the right to exploit the work by commercial rental. Thus, the owner of the copy would pay the artist a royalty for any commercial rental of the purchased work.

3. Compulsory Licensing

Another way to balance the interests of artists and collectors would be through some form of compulsory licensing and modification of section 109. On the payment to an artist of the purchase price for a work and a licensing fee for public display, the owner of a copy would be free to display the work without having to negotiate terms with the artist.

4. Federal Grants and Art in Federal Buildings

Congress could also encourage artists by increasing federal grants or by increased funding for the purchase of artworks for federal buildings.

C. MODEL DROIT DE SUITE SYSTEM

Should Congress determine that federal droit de suite legislation is the best way to help artists, the Copyright Office suggests consideration for the following model system.

1. Oversight of the Droit de Suite: Collection and Enforcement

The Copyright Office suggests the Congress consider collective management of the droit de suite through a private authors' rights collecting society. The collection of art resale royalties would be handled on a direct or contractual basis, similar to collection of musical performance royalties by ASCAP and BMI.

The droit de suite has been effectively implemented only in those countries with active and efficient national authors' societies, such as SPADEM in France and Bild-Kunst in Germany. In the United States, the Artists' Rights Society (ARS) or the Visual Artists and Galleries Association, Inc. (VAGA), would be equipped to handle the practical collection of the droit de suite, since these organizations already have an effective collection and distribution system for reproduction rights. The royalty is collected by the society, which takes a percentage for administrative costs and distributes the remainder to the artist.

Individual management, as seen in California, places a nearly insurmountable burden on the artist to obtain information and to assert claims, often against valued clients or gallery owners. Likewise, the bureaucratic approach has proven far less successful than collective, private management.

The Office could serve a record-keeping function similar to the arts registry proposed in the Kennedy-Markey bills. Copyright Office records would be available to the artists' rights societies for purposes of collection, enforcement, and distribution. If a resale royalty were adopted in the United States, and particularly if it were extended to include dealer sales, the Office anticipates that a collection system with elements similar to the French or German systems would have the best chance of success.

2. Types of Sales

The Copyright Office suggests that, if a resale royalty is enacted in the United States, it should apply initially only to public auction sales. Auction sales are easiest to monitor. Including dealer sales -- or even private sales, as proposed in the Waxman and Kennedy-Markey bills -- increases the administrative and enforcement challenge.

The resale royalty could apply initially to auction houses and then in about five years, Congress could determine whether it should be extended.

The French law originally applied only to sales at auction, and Belgium has preserved this limitation. In 1957, France extended its law to sales "through a dealer" but implementing rules were never issued and the law still applies in practice only to auction. The French galleries do, however, make payments to an artists' social security. The German law requires a royalty on both auction and dealer sales, but in reality, Bild-Kunst collects a flat percentage of gallery revenue paid partly to artists qualifying for droit de suite and partly to an artists' social security fund.

As the collection mechanism matures, the artists' societies such as VAGA and ARS could develop a system to collect art resale royalties from galleries in this country that might be similar to the collection of performance

royalties from radio stations by ASCAP, BMI and SESAC. Further, 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.

3. Measuring the Royalty

Based on the California and European experiences, a flat royalty of between three and five percent on the total gross sales price of the work seems more appropriate. There would be no need initially to set a threshold price to trigger the royalty mechanism if the royalty were applied initially only to auction sales, because auction sales usually deal in works with a minimum floor price. Similarly, there may be no practical need to legislate a floor price for dealer sales: Although one arts organization recommended a threshold resale price of as high as \$5000 to trigger the droit de suite, and Kennedy-Markey called for a threshold of \$1000, other groups called for figures as low as \$250 or \$500. Again, most art dealers trade only in works of at least that value, particularly in the resale market.

In those countries that have most successfully implemented the droit de suite, including France, Germany and Belgium, the resale royalty is measured on the total resale price. Measuring the royalty by the resale price departs from the rationale of allowing artists to participate in an increase in value, but is considered simpler and more practical. The difficulty in administering a royalty based on the difference between the purchase price and resale price may explain the law's disuse in countries such as Italy and Czechoslovakia.

Any resale royalty legislation could contain a rebuttable presumption that a work 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.

4. Term

A term for the droit de suite coextensive with copyright seems appropriate. Under the current copyright law, this is life of the author plus 50 years. Should the European Community adopt a term for the droit de suite of life plus 70 years, there would be justification for similarly extending the term here.

The droit de suite would be descendible in a manner analogous to copyright.

5. Foreign Artists

The resale royalty would be applied to foreign artists on the basis of reciprocity. This is consistent with the Berne Convention and the general consensus.

6. Alienability

The Berne Convention recognizes an inalienable right to the resale royalty. The Office concludes that if a resale royalty is enacted in the United States it should be inalienable, but transferrable for purposes of assigning collection rights. The Office also suggests that the droit de suite be non-waivable. However, this latter suggestion may be subject to the ultimate resolution of the waivability of moral rights in the United States.

7. Types of Works

The Copyright Office suggests that any droit de suite legislation apply to works of visual art as defined in 17 U.S.C. §101 and in the Visual Artists Rights Act of 1990, with the following exception: For works in limited edition, the Copyright Office would suggest that the statute should fix the

number of copies to which the resale royalty would apply at 10 or fewer. In France, for example, the royalty applies to eight copies of a limited edition sculptural work, which must be numbered, signed, and executed or controlled (e.g., cast) by the artist.

8. Retroactivity

The Office suggests that, if Congress adopts a droit de suite, it should make the law prospective only, i.e., effective only as to the resale of eligible works created on or after the date the law becomes effective.

TABLE 1

COUNTRY	WORKS	DURATION	BENEFICIARIES AFTER DEATH	TYPES OF SALE	BASIS FOR DETERMINATION	PERCENTAGE	MINIMUM	TOTAL COLLECTION
FRANCE	Graphic and plastic work	Same as for other economic rights of authors	Spouse for the usufruct, heirs, excluding legatees or transferees	Sales at auction or by a dealer	Sales price	3%	100 FF (1963 "new" francs)	Approximately \$14.5 million US in 1990
GERMANY, FEDERAL REPUBLIC OF	Works of (figurative) art	Same as for other economic rights of authors	Heirs and legatees	Sales at auction or by a dealer	Sales price	5%	100 DM	Approximately \$3.6 million US in 11990
BELGIUM	Works such as paintings, sculpture, drawings, engravings	Same as for other economic rights of authors	Heirs and assignees	Sales at auction	Sales price	2-6%	1,000BF	Approximately \$144,000 US in 1990
ITALY	Works of (figurative) art in the form of paintings, sculpture, drawings, prints and manuscripts	Same as for other economic rights of authors	Legatees, Absent Testamentary provisions, spouse and legal heirs to the 3rd degree	Public sales at auctions, exhibitions and by court order	Increase in value	1-10% for public sales and 10% or 5% for nonpublic sales	Varies with type of work and type of sale	Not collected
CALIFORNIA	Paintings, Sculpture, Drawings and works of art in glass	20 years after death	Heirs, Legatees and personal representatives	Sales at auction or by a gallery, dealer, broker, museum, or agent	Sales price	5%	\$1,000	Collected intermittently
CZECHOSLOVAKIA	All works	Same as for other economic rights of authors	Spouse and children, then parents	All sales	Increase in value	To be fixed by later law	None	Not collected
URUGUAY	All works	Same as for other economic rights authors	Heirs and legatees	All sales	Increase in value	25%	None	Not collected
YUGOSLAVA	Works of figurative art and manuscripts	Same as for other economic rights of authors	Heirs and legatees	All sales	Sales price	To be determined by self administered agreement	None	Not collected

* All of these laws are inalienable. Based on preliminary survey in Fawcett and material provided by ADAGP and Bild-Kunst.



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DROIT DE SUITE:
THE ARTIST'S RESALE ROYALTY

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DECEMBER 1992

A REPORT OF THE
REGISTER OF COPYRIGHTS



APPENDIX

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Docket
RM 91-1

***DROIT DE SUITE: THE
ARTIST'S RESALE ROYALTY***

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Request for Information; Study on Resale Royalties for Works of Art
(ML - 418)

PART I - Comment Letters

Public Hearings: Artist's Resale Royalties
(ML - 441)

PART II - Transcript of San Francisco Hearing

PART III - Transcript of New York Hearing

DECEMBER 1992



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF INQUIRY

REQUEST FOR INFORMATION; STUDY ON RESELL ROYALTIES FOR WORKS OF ART

The following excerpt is taken from Volume 56, Number 22 of the Federal Register for Friday, February 1, 1991 (p. 4110)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. RM 91-1]

Request for Information; Study on Resale Royalties for Works of Art

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of inquiry.

SUMMARY: This Notice of Inquiry advises the public that the Copyright Office is conducting a study on the feasibility of legislation requiring purchasers of works of art to pay to the artist a percentage of the resale price of the art work. This notice invites comments and information that will assist the Office in understanding the issues involved in such a requirement. The Office particularly invites comment from groups or individuals involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, auction houses, investment advisors, collectors of fine art, and curators of art museums.

DATES: Initial comments should be received by June 1, 1991. Reply comments should be received by August 1, 1991.

ADDRESSES: Interested persons should submit ten copies of their written comments to Office of the Register of Copyrights, Copyright Office, James Madison Building, room 403, First and Independence Avenue, SE., Washington, DC 20559.

FOR FURTHER INFORMATION CONTACT: William Patry, Policy Planning Advisor to the Register of Copyrights, Copyrights Office, Library of Congress, Washington, DC 20559. Telephone: (202) 707-8350.

SUPPLEMENTARY INFORMATION: On December 1, 1990, President Bush signed into law Public Law 101-650. Title VI of this legislation contained provisions according certain rights of attribution and integrity to works of the visual arts. The title is generally effective on June 1, 1991. Section 606(b) of the legislation also mandated that

(1) The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing—

(A) A requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

(B) Other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

The report is to be presented to Congress 18 months after the date of enactment (June 1, 1992). The present notice is designed to assist the Copyright Office in fulfilling this mandate.

Droit De Suite

Resale royalty rights, commonly called *droit de suite*, were developed in Europe as a method of permitting artists to share in the increased value of their works. The Berne Convention permits member countries to extend *droit de suite*, but does not require them to do so. Article 14^{ter}. Few countries have *droit de suite* regimes. In the United States, federal copyright law does not provide a resale royalty right, and among the states, only California has enacted a *droit de suite* provision. There are a number of different approaches to *droit de suite*, taking into account factors such as the type of work, the sales price, who is selling the work, and whether the sale is public or private. The

effectiveness of the laws in achieving their desired goals has been the subject of dispute.

During the 100th Congress, hearings were held on H.R. 3221 and S. 1619, predecessors of Public Law 101-650. Section 3 of the bills contained a *droit de suite* provision. Due to opposition to the provision, it was dropped from subsequent bills with the understanding that the present study would be undertaken.

In order to assist it in completing the study, the Copyright Office seeks comments on the following questions:

1. Would resale royalty legislation promote or discourage the creation of new works of art, and if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?

2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and, if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured: by a percentage of the resaler's profit, the net sales differential, or some other measurement? Should the net sale differential be adjusted for inflation?

3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications

of such decisions? How is the issue handled in foreign countries and in California?

4. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work? Should the right be descendible? Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?

5. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? What are the experiences in foreign countries and

in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?

6. Should the right be waivable or alienable?

7. Should the California law be preempted in the event of a federal law?

Interested parties are free to comment on other issues not raised in these questions.

Copies of all comments received will be available for public inspection and copying between the hours of 8:30 a.m. and 4 p.m., Monday through Friday, in room 401, James Madison Memorial Building, Library of Congress, First and Independence Avenue, SE., Washington, DC 20559.

Dated: January 24, 1991.

Ralph Oman,

Register of Copyrights.

[FR Doc. 91-2419 Filed 1-31-91; 8:45 am]

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17	R. A. Gerhard Pfennig, Managing Director of Bild - Kunst, Germany	197
	ATTACHMENTS: 1) STATEMENT OF INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS (CISAC) CONCERNING RESALE ROYALTIES (DROIT DE SUITE)); 2) EVA ANSWERS TO THE QUESTIONNAIRE ON DROIT DE SUITE IN THE EUROPEAN COMMUNITY	
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WALTER L. BAUMANN
2757 SOUTH IVES STREET
ARLINGTON, VIRGINIA 22202

March 17, 1991

Copyrights Office
Library of Congress
Washington, D.C. 20559

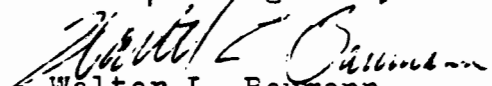
Attention: William Patry (202)707-8350

Gentlemen:

I am writing to record my strong objection to providing royalties to artists for the profitable resale of their work. There are many things wrong with that concept, but to mention a few:

- The increased value may be due to inflation.
- The increased value may be due to who has owned the work rather than who created it.
- The artist would share in the increased value arising from the risk that the purchaser took in buying the work, but not in the loss (which is the more usual scenario).

In other words, the concept is grossly unfair.


Walter L. Baumann

Comment Letter
RM 91-1
No.1.....

107 Clark Road
Brookline, MA 02146

May 27, 1991

Office of the Register of Copyrights
James Madison Building, Room 403
First and Independence Avenues, SE
Washington, DC 20559

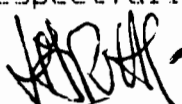
MAY 30 1991

As a visual artist, I have the following comments on legislation requiring purchasers of works of art to pay resale royalties:

- Artists should receive resale royalties, regardless of who pays them.
- Resale royalties would benefit me financially and, if they did so significantly, I would be able to create more works than if I did not have those resources.
- I doubt if royalties would greatly affect the market for art works.
- Royalties should be collected by the professional dealers involved in the resale or, in case there is no dealer involved, the seller should be responsible.
- Enforcement should be based on the honor system but provisions in the law should levy stiff penalties for noncompliance. For example, leaving those not complying open to suit wherein damages are awarded.
- The right to resale royalties should not be waivable as artists may come under undue pressure to do so.
- If legislation as previously proposed is unacceptable to dealers and collectors and others like them, a compromise should be struck. Artists should be entitled to resale royalties, especially on appreciated works, regardless of the form and terms of the legislation.

It is very hard to make a living as a visual artist in this country. With public sector funds drying up - and perhaps disappearing - our legislators must do something to support living American artists.

Respectfully submitted,


Yanick Lapuh, Painter

Comment Letter	
RM	91-1
No.	<u>2</u>

RECEIVED

JUN 6 1991

OFFICE OF REGISTER
OF COPYRIGHTS



SMITHSONIAN INSTITUTION

Washington, D.C. 20560
U.S.A.

May 31, 1991

Mr. William Patry
Policy Planning Advisor
Office of the Register of Copyrights
Copyright Office
James Madison Building - Room 403
First and Independence Avenue, S.E.
Washington, D. C. 20559

Dear Mr. Patry:

The Copyright Office's Notice of Inquiry requested comments concerning its study on the feasibility of legislation requiring purchasers of works of art to pay to the artist a percentage of the resale price of the art work.

I am writing at this time simply to convey information you may find useful in completing your study of the issues involved in such a requirement, rather than to address the seven questions presented in the February 1, 1991 Federal Register Notice. Enclosed are two articles authored by Stephen E. Weil, the Deputy Director of the Hirshhorn Museum and Sculpture Garden. One is a brief piece in this month's ARTnews (May, 1991) and the other an extended article written more than a dozen years ago in ARTnews (March, 1978). Mr. Weil's comments are thoughtful and important in understanding the scope of resale royalties issues, and I request that these comments be considered by the Copyright Office. As he notes at the close of his 1978 article, Mr. Weil does not speak for the Smithsonian Institution or the Hirshhorn.

Thank you for the opportunity to present this submission.

Sincerely,

Peter G. Powers

Peter G. Powers
General Counsel

cc: Stephen E. Weil

Comment Letter	
RM	91-1
No.	3

RESALE ROYALTIES: Nobody benefits

The proposed national resale royalties bill will do 'enormous harm' to the contemporary art market and adversely affect the economic well-being of most artists. There are better alternatives

by **STEPHEN E. WEIL**



D.P.A.—PICTORIAL



LONDON DAILY EXPRESS



LIONEL DURAND

Are visual artists really at a disadvantage? Who profited most from his art, asks the author: Mann, Stravinsky or Picasso?

That American artists should, through their own creative efforts, be able to sustain themselves—and to sustain themselves with greater dignity and more adequate means than many can do today—is not merely socially desirable. It is a national necessity. In an environment that increasingly stresses corporate accomplishment and technical skills, the importance of artists becomes correspondingly greater. They are among the last role models we have of free imagination, transcendent aspiration and—above all—individual effort and responsibility. Beside whatever contributions their work can make to our accumulated cultural heritage, artists in their own selves are more than ever vital to maintaining the balance of our national life.

Stephen E. Weil is a museum official, attorney and author who has specialized in the legal problems of contemporary art and artists for the past 15 years. With Franklin Feldman, he was the co-author of Legal and Business Problems of Artists, Art Galleries and Museums (1973) and Art Works: Law, Policy, Practice (1974). He was administrator of the Whitney Museum of American Art from 1967 to 1974 and is presently serving as deputy director of the Hirshhorn Museum and Sculpture Garden, Smithsonian Institution.

Recognizing that artists require a more adequate support system than American society now provides, legislators at both the state and the federal level have shown increasing interest in finding other means to help them. One proposal, strongly championed by a number of artists and by many artists' groups, would do so by the establishment of resale royalties.

To question, as I shall, both the principles underlying this proposal and, regardless of the soundness of these principles, the utility of any legislation that would establish such royalties is to risk being misunderstood as indifferent or even hostile to the well-being of artists. I hope that I am neither, and I would hesitate to raise such questions publicly were I not convinced so strongly, first, that the establishment of resale royalties, far from helping artists or having only a neutral impact, would in fact be positively harmful to their interests and, second, that it is critically important that those who wish to help artists take advantage of this current surge of legislative interest by concentrating their efforts on alternative measures that would do so by increasing—rather than, as resale royalties threaten to do, diminishing—the funds now available for the purchase of con-

Analogy and image. Underlying the proposal for artists resale royalties are an analogy and an image.

The analogy is to the means by which authors and composers have traditionally been compensated. Implicit is the suggestion that, by reason of their right to receive royalties, these other creative workers enjoy an advantage that visual artists are denied. This was clearly expressed in one of the seminal documents of the present campaign for resale royalties, the Art Proceeds Act proposed in 1966 by Diana B. Schulder in the *Northwestern University Law Review*. Section 2 provided: "Since a painter or a

sculptor who creates a unique work of art does not benefit from the fruits of his labors as does an author or composer who derives royalties from the reproduction or performance of the work, this act, by allowing an economic right upon re-transfer, is intended to ensure to artists a parallel benefit."

The image coupled with this analogy is that of a collector who, having purchased a work of art for relatively little, resells it for a great deal more, pocketing the entire profit and leaving the artist, whose effort first created the work and whose subsequent accomplishments may have contributed to its increase in value, with no part of such increase. It is the image of Robert Rauschenberg and Robert Scull in tense confrontation after the 1973 auction at which Scull resold for \$85,000 a work for which he had originally paid Rauschenberg less than \$1,000.

If the establishment of resale royalties is to be founded upon some sound principle, then, at the outset, two questions must be asked. Is this underlying analogy correct, and does this underlying image—unquestionably distressing in its suggestion of a collector unjustly enriched at an artist's expense—reflect some common situation or only an occasional, albeit highly visible,

Painters, poets and others. Would the want to visual artists of some continuing economic interest in their work, the realization of which would be dependent on the resale or successive resales of such work, in fact be a "parallel benefit" to the royalty rights now enjoyed by other creative workers? Clearly, it would not. The royalties that authors and composers receive are based on the multiple initial sales of their infinitely reproducible efforts. For each additional copy of a novel printed and sold, the author may receive additional compensation. So may the composer for each additional performance of a musical composition. For that matter, so too may the visual artist who elects to sell additional copies of an infinitely reproducible *image* of a work of art rather than the unique object in which the work itself is embodied.

This is not the case with a resale royalty. In the case of a resale royalty, no additional example of the original work is being brought into being nor is the work itself being put to any broader use. The event that would cause the proposed royalty to be paid would, instead, be the substitution of one owner for another. It would be as if Norman Mailer could claim some further payment for each copy of *The Naked and the Dead* resold in the secondhand book market above the \$4 price at which it was originally published in 1948 or as if an architect could claim some share of the proceeds when a house he designed was subsequently resold at a profit. No such right exists today.

What is proposed here, then, is the establishment of a *new* right—one very different from a royalty and one that does not extend naturally from existing concepts of property and ownership. Whether such a special right should be established for artists is a larger, open and arguable question, but not one that can be answered by a simple analogy to the royalties payable to authors and composers.

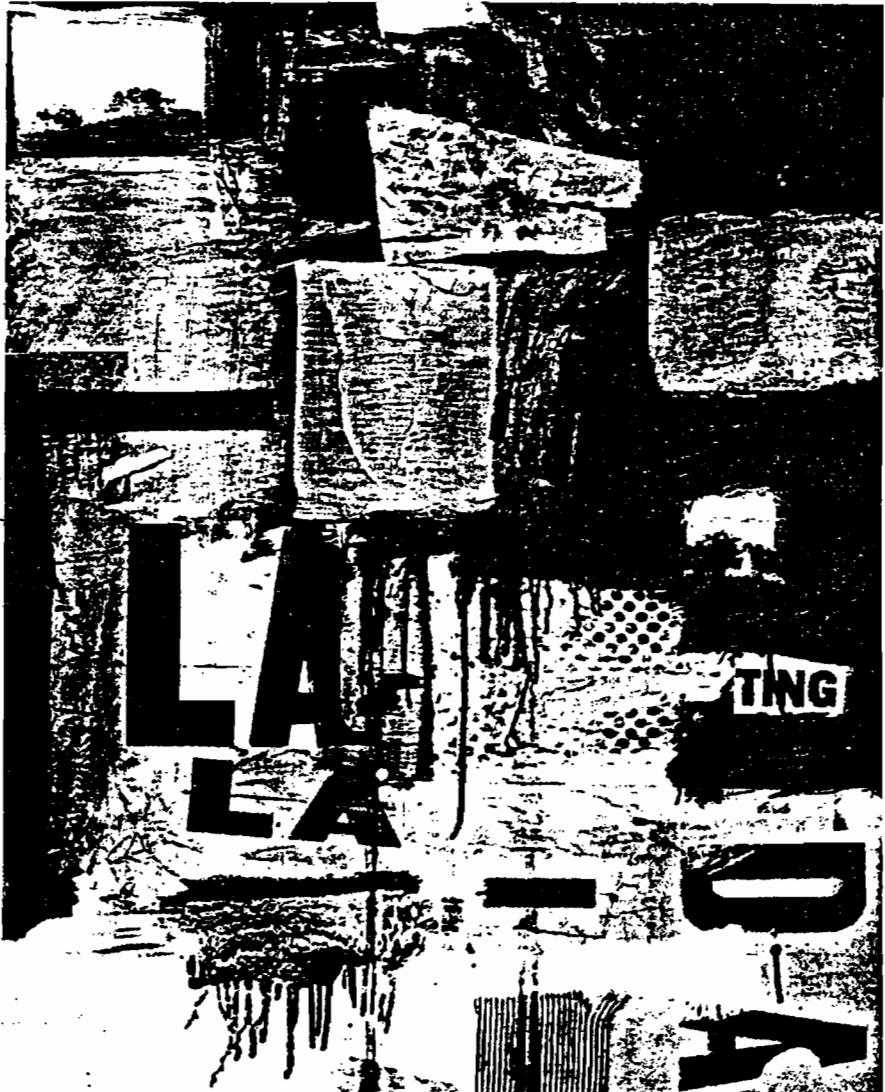
Might the establishment of this special right be justified, then, on the ground that the traditional method by which artists have been compensated places them at a disadvantage to other creative workers? It might, if this were so. It appears, however, not to be so. If we exclude such supplementary income-producing activities as teaching, lecturing or wholly unrelated employment—none of which relates to the question of royalties and some of which normally supplement the art-derived income of most creative individuals—and exclude as well the grotesquely inflated earnings of such mass-appeal entertainers as rock stars or gothic novelists, visual artists would seem to be consistently better compensated for their creative effort than their peers in the other arts.

To make such comparisons is awkward. Real names must be used, and virtually no one will agree with particular comparisons. Nevertheless, if you compared the probable art-derived income of creative individuals of comparable seriousness, achievement and popularity, how well would visual artists fare? Consider Pablo Picasso in relation

to Igor Stravinsky or Thomas Mann; Marc Chagall to Vladimir Nabokov or Béla Bartók; Henry Moore to Benjamin Britten or W.H. Auden; the fifth best earner of the Castelli Gallery to the fifth best earner among the Yale Younger Poets. Make your own comparisons. If you do it fairly, I believe you will find that the earnings of visual artists—no matter how inadequate such earnings may be in themselves or how poorly they may compare with those of individuals outside the arts—are nevertheless consistently above the earnings of those of their peers who are compensated by royalties.

themselves, can provide the basis for a successful auction. A hard-core audience of 200 faithful collector-buyers might guarantee an artist's livelihood. By contrast, a poet or novelist—able, perhaps, to realize a \$2 royalty on the sale of each hardcover copy of a book—would require thousands, if not tens of thousands, of reader-buyers to earn any continuing support from the sale of his work.

If this is so—and if the difference in the way in which they have traditionally been compensated has been an advantage, rather than a disadvantage, to visual artists—then we must look elsewhere for some basis by



Robert Rauschenberg's *Thaw*, bought for \$900 in 1958 by Pop collector Robert Scull, resold in 1973 for \$85,000.

There are reasons why this should be so. That a work of visual art is traditionally embodied in a tangible, physical object rather than—as in the case of literature or music—expressed through such infinitely reproducible media as words or sounds has more than esthetic implications. Beyond the fact that their value is influenced—if not largely determined—by scarcity, works of art do not require the same level of demand as do works of literature or music to secure their creators a living. A painting needs no initial market larger than a single buyer in order to be sold. Two potential buyers, by

which the establishment of a resale royalty might be justified.

The argument of unjust enrichment. We know that there are collectors who, from time to time, have made a great deal of money from buying and reselling works of art. We know too that some artists whose work has been involved in these transactions feel that they have been "ripped off" as a result. What we do not know, however, is

whether this happens very often. That is only the tip of our ignorance. Confining our consideration to works of art by living American artists, we also do not know, for example:

- The annual dollar volume, number and price level of primary sales (sales from the artist or dealer to a first collector).
- The ratio these bear to the overall market for art, antiques, antiquities and other competing "collectibles."
- The number of those works sold in the primary market that are ever resold in the secondary market, and the interval between such sales.
- Of the works resold in the secondary market, the number that are sold at more and the number that are sold at less than their initial price and, in each case, the dollar volume involved.

Beyond this, we have only the haziest idea of how many American artists there are for whose work there even is a regular primary market, for what number of these there is also a secondary market, of how many buyers "collect" art in any significant way and of how many such buyers ever resell the works they buy.

We remain, thus, stalled at our original question: How common is the situation that provoked the Rauschenberg-Scull confrontation? Is it one that is constantly repeated across the country, with large numbers of collectors reaping "windfall" profits by reselling the work of a larger number of artists? Or is the resale market for contemporary art confined largely to the work of a relatively small group of well-known artists whose work is bought and sold chiefly by "blue-chip" collectors?

Certainly, if it proved that some substantial number of transactions were involved, and if there were general agreement that the ability of collectors to reap such windfall profits had within it an element of unfairness, there might be some warrant for adopting national legislation that would impose some additional tax—which need not necessarily be one payable to artists—beyond the state and federal income taxes to which such profits are already subject.

Even here, though, it would be difficult to know what, except in the most extreme cases, would be meant by a "windfall" or even—always a problem in calculating taxes—what would be meant by a "profit." If, between the time he bought and resold it, the net after-selling-cost value of a painting in a collector's hands increased by no more than the current rate of inflation, was he unjustly enriched? What if the increase just equaled the interest paid on funds that he might have borrowed to purchase the painting in the first place? What if the increase just equaled the expenses incurred during ownership for insurance and/or conservation? What if he bought and sold two paintings by the same artist, profiting as much on one as he lost on the other?

And what if all of these—inflation, interest cost, the expenses of ownership and offsetting gains and losses—occurred to-

gether? While something may be sensed as unfair in a collector buying a work of art for \$10,000 and selling it the next year for \$50,000, to what extent do we sense it unfair if a painting, or anything else with a secondhand value, is bought for \$10,000 and resold for \$15,000 some ten years later?

To justify a resale royalty on the basis that it would ameliorate some widespread injustice done by collectors to artists would require considerable information beyond what we now have. Moreover, to achieve acceptance as fair and reasonable, it would require a mechanism more sophisticated than those proposed thus far to determine when, and in what amount, such a royalty might be appropriate. If windfall profits from the sale of contemporary art are, in fact, a substantial problem, that problem should be addressed by some measured re-



CENTRAL PRESS

The royalties received by authors and composers are based on multiple sales of their infinitely reproducible efforts. But artists sell unique objects.

sponse and not by a dramatic gesture that, regardless of any immediate satisfaction it might give, could neither be justified to those it would affect nor be of benefit to those on whose behalf it was made. Frustration and anger, real as they may be, are not a sound basis for national legislation.

The one-way connection. A further argument made in support of resale royalties is that their establishment would give legal recognition to—as well as symbolize—a continuing connection between the artist and a work of art after it had once been sold. In so doing, it would move American law closer to those Continental systems that recognize a *droit de suite*, from which the concept of resale royalties was first derived, as

well as a *droit moral*. Their right to receive resale royalties would, in effect, be the "umbilical cord" through which artists would maintain an ongoing relationship with their work.

The justice of this argument fades, however, when we realize how one-sided this ongoing relationship would be. It would not require the artist to bear any part of a collector's ongoing expenses, such as those for insurance or conservation. Neither would it impose on the artist any greater liability than heretofore for the instability or failure of the materials or workmanship he might have employed in his work. Above all, the proposed umbilical cord would only carry gains, carefully filtering out any losses that collectors might incur on the resale of those works to which the artists would otherwise remain connected.

Certainly, no one seriously proposes that the artist—or the artist's heirs for 50 years after death—should be liable for a refund of five percent of the initial purchase price whenever a collector is unable to resell a work of art for the amount it originally cost. For many artists, the contingent liability might well exceed their total worth. At the same time, however, it is difficult to accept as just a proposed form of partnership in which one of the partners would bear all of the risks while the other enjoyed the luxury of sharing in profits only.

Art in a commodity market. To all of the foregoing, it may in some fairness be replied: so what? If resale royalties would, in reality, benefit artists generally, that fact alone, regardless of any infirmity in the supporting arguments, might be reason enough to consider their establishment. As I said at the outset, however, I have come to believe exactly the opposite: that resale royalties would be neither of any benefit nor even neutral in their impact but would in fact do enormous harm to the already not-very-well-being of contemporary artists.

Unpalatable as it may be to many, works of art—once out of an artist's hands—become commodities. They are articles of commerce. As such, the prices at which, and the numbers in which, they are bought and sold in both their initial and resale markets are influenced by those same considerations that affect the level of prices and sales of any commodity in any market.

No matter how else it may be characterized, a resale royalty would function as a tax. As a tax, it would—as we know from long experience with other taxes—impact heavily upon the behavior of those to whom it applied. If contemporary art were as much a necessity for collectors to buy as it is for artists to make, this might not matter. Unhappily, though, no matter how bravely we proclaim "ya gotta have art," nobody "gotta" have art, and especially contemporary American art.

If contemporary works of art are to be the subject of a discriminatory tax—one that would not be equally applicable to such alternative "collectibles" as 19th-century American art, 20th-century European art,

contemporary crafts, Ming vases, shares of IBM or condominiums in the Bahamas—there every reason to believe that some number collectors would choose alternative investments. Ironically, these would most likely be those very same collectors who most distress artists by considering works of art primarily for their investment possibilities rather than as a personal commitment. Without greater knowledge of the art market, we do not know what this number and their impact might be. What we do know is that to impose a greater tax on one commodity than on another that can readily be substituted for it is to alter the pattern of demand and that, in any market, a reduction in demand must inevitably be followed by a reduction in either or both the level of prices and the volume of sales.

As it is, contemporary works of art are,

security that increases in value by 20 percent can, on resale, yield its owner a profit. A work of art that increases by only the same amount will more likely yield its owner a loss. And, unlike a security, neither such loss nor any intermediate cost of ownership is generally deductible for tax purposes.

Into this already fragile situation, the resale royalty would introduce a further disincentive. Its impact—if calculated on the basis of gross proceeds rather than, as in the case of an income tax, on profit alone—would be far greater than the generally proposed figure of five percent at first suggests.

Assuming an average expense of 20 percent, a collector cannot—even before any resale royalty—resell a work of art for less than 125 percent of its original purchase price without incurring a net loss. By adding

son to other taxes. Thus, if the same painting were resold for \$14,000, the resale royalty—\$700, to be paid out of the net profit of \$1,200 remaining to the collector after expenses—would equal an income tax of 58 percent. If the painting were resold for \$20,000, the royalty of \$1,000 would—after deducting expenses of \$4,000—still equal a tax on his profit of more than 15 percent. Even with a three-times appreciation—the original \$10,000 painting resold for \$30,000—the royalty, calculated on gross proceeds, would equal a tax of more than 10 percent of the net profit remaining after the cost of sale. Beyond this, the collector would still, of course, be required to pay state and federal income taxes on whatever remained.

To make contemporary American art so disfavored an investment can only affect the



for the most part, poor investments already. While some may increase in value, the greater number can never again be resold for what they initially cost. Those that do increase in value must increase substantially before any significant return can be realized. Unlike securities, for example—which a stockbroker's commission may be less than one percent—the expense of reselling a work of art through a dealer or at auction will often be 15 to 25 percent. To this, before a profit can be realized, must be added any intermediate costs of ownership: insurance, conservation and shipping. A se-

resale royalty of five percent of gross proceeds, the minimum breakeven point would rise to 133 percent. In the case of a painting bought for \$10,000 and resold for \$13,000, leaving a net of \$10,400 after the payment of expenses, the collector—his remaining profit having been already wiped out—would have to pay a substantial portion of the \$650 resale royalty directly from his own pocket.

As resale prices began to exceed 133 percent of the original purchase price, the impact of the royalty, while no longer confiscatory, would still remain high in compari-

An auction at Sotheby Parke Bernet. On stage, *Indiana's Love*. Against the wall, works by Don Judd and Morris Louis.

level of demand in its primary and secondary markets. While diminished demand might initially affect volume, it would sooner or later be reflected in prices as well. If the prices and sales of well-established artists were the first to weaken, then those of almost-as-well-established artists would inevitably follow. The process would continue until it affected the sales and prices of the least established of all.

Less now, more later? Acknowledging that the market might be thus affected, some proponents of resale royalties have argued that artists would nevertheless make up, and ultimately surpass, any initial depression in their primary selling prices by the resale royalties they would earn in later years. Surely, there are some who might: the well-established artists, those with regular resale markets and, for the most part, substantial primary markets as well.

For the greater number, though—the 90 or 99 out of every 100 whose work never increases substantially in value, who may have no resale market at all and who might far better be the focus of legislation intended to benefit artists—no subsequent royalties would make up for this initial deficiency. In the end, what the establishment of a resale royalty would do is what most regressive legislation does: the rich might—or might not—get richer, but the poor would certainly get poorer. As Monroe and Aimée Price concluded in their 1968 *Yale Law Journal* article analyzing the distribution of benefits under the comparable *droit de suite* legislation in France: “to those who have shall more be given.”

When gross sales proceeds are used as the basis for computing royalties, this balance is tilted still further—to those who have the most shall the most be given. Artist A, young and unknown, sells a painting for \$1,500. Several years later, primarily as a result of A’s steadily growing accomplishments and reputation, the painting is resold for \$15,000, a tenfold increase. At five percent, Artist A will receive a royalty of \$750 to add to the \$1,500 he received on the original sale. Artist B, mature and well established, also sells a painting. The price is \$18,000. After the same several years, it too is resold. The price is \$20,000, a moderate increase reasonably attributable to the intervening inflation. Artist B will receive a royalty of \$1,000 to add to the \$18,000 that he received on his original sale.

Results such as these are inherent in the gross proceeds formula. They make an awkward fit with the argument that justifies the establishment of resale royalties as rectifying an injustice done to artists when collectors sell their work at very large profits. In fact, the artists who already have the strongest primary markets, and generally the strongest secondary markets as well, would be those likely to benefit the most from this formula. For them, only a moderate percentage increase on resale would be necessary to trigger a substantial royalty. For newly established artists, a many-fold increase might not bring them nearly as much.

Alternatives. The most serious economic problem facing most contemporary artists is the lack of any broad initial market for their work—not such abuses as may occur in the resale market. What would benefit these artists most is an increase in the funds available to purchase works of art. This is the basic flaw in the resale royalty. It does not seek to increase these funds but, at best,

would merely redistribute—ostensibly from collectors to artists but, as a side effect, also from the less-established to the better-established artists—some portion of the inadequate funds already in the market. At worst, by imposing a discriminatory tax on contemporary art, it would reduce such funds.

In Europe, where it originated, the resale royalty has not produced any substantial returns for the great mass of artists. In some countries it has been rejected, in others it is unenforced and, at its best, it favors only a few. In California, the resale royalty established last year has thus far served only as a divisive element within the art community and has produced virtually no tangible benefits for artists.

Given the limited, and possibly transient, attention that Congress can focus on this problem, it would be far bolder and more productive if artists and those who would help them channeled their energies behind legislation that would have an effect exactly opposite to that to be expected from royalties—that would increase, rather than diminish, the potential funds available for the purchase of contemporary art.

Most effective would be legislation that, instead of making art a less favored form of investment, would do just the contrary and give it a special and favored status. That is a route that other special-interest groups have taken with advantage. There might, for example, be a provision parallel to the present Section 1034 of the Internal Revenue Code which defers to a later time any capital gains tax otherwise payable on the sale of a taxpayer’s residence provided that the proceeds realized are used to purchase a new residence. By giving collectors an incentive to use the entire proceeds from the resale of a work of art—both their initial investment and any profit realized—to purchase additional works of art, substantial additional monies could be brought into and kept in the market for contemporary art.

Such a provision could include many refinements. It might limit qualifying new purchases to the work of living American artists. It might require that all such purchases be made directly from artists and not in the secondary market. To benefit a broader group of artists, it might require that no single purchase could exceed some particular price or some particular portion of the amount to be reinvested. Whatever the formula, the object would be to provide an incentive for recycling back into the market—and thus back to artists—100 percent of the funds invested in every kind of art, ancient and modern, domestic and foreign—and not merely five percent of the resale proceeds from contemporary art.

Another alternative that has been suggested is the establishment of an art bank similar to that which now exists in Canada. Should an art bank be considered desirable, there is no reason why it need be, as some have suggested, connected with—or financed through—resale royalties. While no one has yet estimated what level of funding

would be necessary to establish, supervise and enforce a nationwide resale royalty, it must be considerable. Instead of using these funds to provide more jobs in Washington, why could the same funds not be used as the initial capital for an art bank? Its benefits could flow to artists immediately—not in five or ten years hence, as would be the case if resale royalties were to be used for its financing. Moreover, such funds would be “new money” in the market—not, as would be the case if an art bank were financed through royalties, simply a redistribution of the funds already there.

“Percent for art” legislation has only recently begun to receive the stronger backing that it deserves. Where it does not yet exist, it can be brought into being. Where it already exists, there may be the possibility of seeking higher percentages. At the federal level, Representative Gladys Spellman of Maryland has taken this course with the introduction this past summer of H.R. 7988, which would require the General Services Administration to double to one percent the percentage of construction funds to be used to commission or purchase works of art.

One enormous advantage of “percent for art” legislation is that it can coexist at the federal, state, county and municipal levels. In some local jurisdictions, substantial percentages have been achieved. San Francisco has established a two percent rate, Miami Beach has a one and one-half percent rate, and a one percent rate will become effective in Colorado this coming July. Above all, legislation of this kind at the local level offers the broadest group of artists not only the possibility of improving their livelihood through the sale of their work but, beyond that, the opportunity to see their work woven into the public fabric of the communities in which they live.

Whether these or other devices, alone or in combination, represent the best possible approach, what they share is the purpose of increasing the demand for contemporary works of art by injecting into the market new funds that could be channeled toward their purchase. Rather than serving to divide, such measures could enlist the enthusiastic support of all elements within the art community and, in the most practical way, offer what artists presumably want most from any legislation passed on their behalf: an increased opportunity to earn dignified livelihoods through their own creative efforts.

In the end, we would all be the beneficiaries. ■

This article is adapted from a statement submitted by the author at the request of the office of Rep. Henry Waxman of California, who is planning to introduce into Congress a bill that would establish a national system of resale royalties. The views expressed are entirely those of the author and in no way represent the views of the Smithsonian Institution or the Hirshhorn Museum and Sculpture Garden.

SOTHEBY'S

FOUNDED 1711

**Statement of Michael L. Ainslie
President and Chief Executive Officer of Sotheby's Holdings, Inc.
before the Senate Judiciary Subcommittee
on Patents, Copyrights and Trademarks
Hearings on S.1619
December 3, 1987**

Mr. Chairman, my name is Michael Ainslie, and I am President and Chief Executive Officer of Sotheby's Holdings, Inc. Sotheby's is the world's largest auctioneer of works of art. Our sales for the 12 months ended August 31, 1987 were \$1.3 billion and consisted of over 200,000 separate sales of works of art.

We accept works of art on consignment, promote their sale to the world market and earn a commission based on the hammer price at auction. Our principal sales rooms are in New York and London, and we have other auction centers and representative offices in twenty-five countries around the world.

Over the last decade, the U.S. has caught up with London as one of the two preeminent centers of the world art market. While New York City is the center of the art business in this country,

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No. <u>4</u>

there are thriving auction houses and dealers in many of our major cities, including Washington.

We estimate that sales of important works of art by auction houses and art dealers are approximately \$2 billion annually in New York alone. Sellers and buyers come not only from this country but from around the world to participate in the free market here, and this activity in turn generates hundreds of millions of dollars of sales and income tax revenue as well as revenue for airlines, hotels and restaurants.

All of this is to put my remarks in context. There are abundant reasons why a 7% resale royalty will be harmful to the interests of artists and the art market in this country. Others are perhaps better qualified to testify as to the negative impact such a gains tax will have on collectors' willingness to invest in recently created works of art; to the fact that a resale royalty will tend to benefit established, already successful

SOTHEBY'S

FOUNDED 1744

artists and the heirs of long-deceased artists at the expense of younger artists attempting to establish themselves; to the impracticality and unenforceability of such a tax; to the fact that the tax is not really necessary, since as artists mature and become successful, resales by subsequent owners of the artists' earlier art -- particularly public sales at auction -- establish higher prices for artists' unsold inventory and future original works sold by the artist; and to the lack of fairness and reciprocity in a royalty which artists do not have to pay to collectors whose purchases diminish in value.

The point that I as the head of the leading auction house particularly wish to emphasize is that art is portable and the art market is global in scope and intensely competitive. Time and again, we have seen prospective sellers select a sale location based on tax or commission differences of 7% or 8% or less. I can tell you unequivocally that collectors who have a

choice of selling in a jurisdiction without a resale royalty will elect to do so, other things being equal.

Droit de suite legislation was first passed by France in 1920 and has since been enacted by Algeria, Brazil, Chile, Luxembourg, Norway, Portugal, Tunisia, Turkey, Belgium, Czechoslovakia, Poland, Uruguay, Italy, West Germany and Morocco. None of these countries is today known for its thriving contemporary art market.

A special committee of the House of Commons in England chaired by Justice Whitford in 1977 undertook a review of copyright laws around the world, including droit de suite legislation in order to make a recommendation as to whether a provision similar to the one in S.1619 should be adopted. I would like to read you its conclusion regarding droit de suite:

"Having considered all the [relevant] matters . . . we find ourselves unable to recommend the introduction of droit

de suite in this country. Our view is that it is not necessarily fair or logical and that the main lesson to be drawn from the experience abroad is that droit de suite is just not practical either from the point of view of administration or as a source of income to individual artists and their heirs."

My colleagues in Europe also report that the practical experience of West Germany with their droit de suite law is that the cost and administrative burdens of collection greatly exceed the revenue collected. The administrative burden on collectors, museums, dealers and auction houses will be substantial as well. We also understand that the relevant authorities in Italy, Germany and Belgium are recommending the abolition of droit de suite legislation in those countries.

We know from California's experience with a 5% resale royalty introduced a decade ago that compliance is virtually nonexistent. The agency in charge of collecting royalty payments

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when sellers are unable to locate artists has stated that it has collected only about \$15,000 since the royalty went into effect.

Our views do , of course, reflect our commercial self-interest as market-makers. No business welcomes the notion of an additional tax, let alone a unique gains tax applicable solely to that business, and a tax which does not exist in principal competing jurisdictions.

Quite apart from our commercial concern, however, we believe that as well-intentioned as the resale royalty may be, it simply will not achieve its stated purpose of helping and rewarding artists. The compelling empirical evidence of other jurisdictions' experience tells us that the royalty is uncollectable, drives business underground or abroad, and invites non-compliance or fraud. Common sense and economic analysis tell us that a resale royalty will depress the market for works of art. As a firm which depends on the continuing creation of

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FOUNDED 1711

contemporary art to provide paintings, prints and sculpture for a major area of our business, we strongly favor measures that will stimulate artistic production. Our sales of contemporary art in the U.S. have grown from \$2,900,000 in 1980 to \$52,000,000 this year. Accordingly, we will always support a national policy that encourages the creation of art and benefits visual artists.

The problem with the resale royalty is that it produces exactly the opposite effect by depressing the market for art. To quote from a leading authority on droit de suite legislation, "The most serious economic problem facing most contemporary artists is the lack of any broad initial market for their work . . . What would benefit these artists most is an increase in the funds available to purchase works of art. This is the basic flaw in the resale royalty. It does not seek to increase the funds [but] by imposing a discriminatory tax on contemporary art, it would reduce such funds." [Stephen E. Weil, "Resale Royalties:

Nobody Benefits", 1978] There are already ample costs and taxes built into collecting art. For a seller in New York City, the proposed 7½ gains tax would be in addition to the dealer's or auction house's commission and expenses, the costs of having insured (and perhaps having conserved) the art, and state and local income tax on the gain in value.

There exist other legislative possibilities that will better serve the valid purposes of S.1619. These include permitting artists who donate works of art to qualified charities to take a fair market value income tax deduction, and permitting collectors to roll over the gain on a sale of art if they use the proceeds to purchase additional art, much as we are now permitted to do when we sell our principal residence. Such provision might well encourage collectors to explore new and untested artists, thereby having precisely the effect that proponents of S.1619 advocate.

I would like to close by quoting from a statement made by

Representative Henry Waxman in 1978, when he introduced a 5% resale royalty bill: "The benefits to be gained by visual artists by Congressional recognition and enactment of royalties for them may be outweighed by the harm done the art market by virtue of their implementation."

It is simple logic that what harms the art market is not helpful to artists. Representative Waxman's concern is shared by all of us in the market, and I would urge all of you to give serious consideration to both the adverse and counterproductive consequences of a national resale royalty and to legislative alternatives which will benefit the entire art community -- artists, collectors, dealers and auctioneers.

Mr. Chairman, I understand that the record will be held open for another two weeks, and I therefore request that we be permitted to submit within that period supporting documents and correspondence from interested parties.

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August 1, 1991

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* ADMITTED VA ONLY

VIA HAND DELIVERY

William Patry, Esq.
Policy Planning Advisor to the
Register of Copyrights
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559

Re: Docket No. RM 91-1
Study on Resale Royalties
for Works of Art

Dear Mr. Patry:

Transmitted herewith, on behalf of the Committee for America's Copyright Community ("CACC"), are an original and ten copies of CACC's Reply Comments in response to the Copyright Office's Request for Information in the above-referenced docket.

Should you have any questions, please contact me.

Very truly yours,



John B. Glicksman

JBG/kkj

Comment Letter
RM 91-1
No. 5

Before the
United States Copyright Office
LIBRARY OF CONGRESS

Request for Information;)
Study on Resale Royalties for)
Works of Art) Docket No. RM 91-1

REPLY COMMENTS OF
THE COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY

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Its Attorneys

DATED: August 1, 1991

Before the
United States Copyright Office
Library of Congress

Request for Information;)
Study on Resale Royalties for) Docket No. RM 91-1
Works of Art)

**REPLY COMMENTS OF
THE COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY**

The Committee for America's Copyright Community ("CACC")^{1/} respectfully submits the following reply comments concerning the Copyright Office's "Request for Information" published at 56 Fed. Reg. 4410 (February 1, 1991), concerning the feasibility of federal resale royalty legislation.

CACC is composed of representatives of a variety of America's copyright creators and users. Its members include the creators and producers of newspapers, books, magazines, newsletters, computer software and databases, information services, motion pictures and other video and film products, educational testing and training materials, information services, sound recordings, and commercial broadcasters.

CACC submits these comments in light of its on-going concern with legislative efforts that could threaten the constitutional goals of promoting the production and dissemination of copyrighted works and the traditional practices and relationships that are fundamental to the daily operation of copyright-intensive industries in the U.S.

At the outset, CACC stresses that those who propose to amend federal law to incorporate resale royalty rights bear a heavy burden. The concept of resale royalty rights, or droit de suite, is generally foreign to the United States; laws that grant such rights have developed overseas, in nations with economic, political and legal systems that are significantly different from our own. Thus, CACC believes not only that the proponents of such rights must demonstrate the necessity for such rights and the ability of such rights to fit within the existing U.S. framework; in addition, they must prove that such rights will not affect our highly successful copyright system.

As the Copyright Office notes at the outset of its Request for Information, it is undertaking its study on the feasibility of resale royalty legislation pursuant to the

^{1/} See Attachment A hereto for a list of the members of CACC.

provisions of the Visual Artists Rights Act of 1990 ("VARA").^{2/} Taking VARA as a reference point, certain commenters have suggested that resale royalty legislation should cover all "works of visual art," as defined in VARA,^{3/} and broad categories of additional works as well.^{4/} These commenters would have resale royalty legislation cover, for example, all photographic images and illustrated manuscripts.^{5/}

In these comments, CACC focuses solely on this issue of the categories of works that might be covered under any federal resale royalty legislation. Despite the limited focus of these comments, however, it should be clear that CACC does not in any way advocate the enactment of resale royalty rights, and that CACC and/or its individual members may have concerns, reaching well beyond those that are addressed here, with any

^{2/} Act of Dec. 1, 1990, Pub. L. 101-650, 104 Stat. 5089, Sec. 601 (short title); see Request for Information at 4410.

^{3/} A "work of visual art" is defined as:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies of 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 of fewer that are signed and consecutively numbered by the author.

17 U.S.C.A. § 101 (West 1977 and Supp. 1991).

^{4/} See, e.g., Comments of the American Society of Magazine Photographers at 5-7 and Comments of Volunteer Lawyers for the Arts at 7-8.

^{5/} Id.

forthcoming specific legislative attempt to enact resale royalty requirements.

CACC respectfully submits that the above-referenced commenters have lost sight of the underlying purposes of any resale royalty legislation, and of VARA as well. CACC believes that, when these purposes are considered, it is clear that, rather than covering a category of works broader than the category covered under VARA, resale royalty legislation should cover items parallel to those encompassed by VARA, except that it should reach only the original embodiment of a work and not any copies or duplicates.

The purpose of resale royalty legislation is to attempt to compensate a qualifying artist for the increase, over time, in the value of an original embodiment of a work of art. This purpose is evident in the only resale royalty statute existing in the U.S., California's Resale Royalty Act.^{6/} That statute requires royalty payments to an artist upon the sale of "an original painting, sculpture, or drawing or an original work of art in glass,"^{7/} and appears to exclude duplicates of the originally executed work.^{8/} Likewise, the purpose of VARA generally is to preserve and protect original works of visual art and limited edition copies, the loss of which deprives the public of unique creative endeavors, and to do so without adversely affecting the business activities of America's copyright industries.^{9/}

Therefore, any federal resale royalty legislation should cover items parallel to those included within VARA's definition of "work of visual art," except that it should cover only the original embodiment of a work and not any copies or duplicates of the work. Covering originals addresses the goal of compensating an artist for the increase in the value of an original work. At the same time, covering only items parallel to those encompassed by VARA is consistent with Congress' determination that covering such items promotes the dissemination of copyrighted works without disrupting the

^{6/} Cal. Civ. Code § 986 (Deering 1990).

^{7/} Cal. Civ. Code § 986(a) (Deering 1990) (emphasis added).

^{8/} 2 M. Nimmer and D. Nimmer, Nimmer on Copyright, § 8.22[A] at 8-376 (1991).

^{9/} See H.R. Rep. No. 514, 101st Cong., 2d Sess. at 12 (1990).

operation of America's copyright industries. Indeed, excluding copies and duplicates is necessary to avoid the confusion, administrative burdens and delay, and legal wrangling that could result from legislation that would mandate that an artist be repeatedly compensated upon each sale of each of potentially 200 copies of an original work.

By the same token, the goal of compensating artists and protecting original works of art while still promoting the dissemination of such works also dictates that resale royalty legislation incorporate certain other provisions parallel to those in VARA. Such provisions include those that (1) specifically exclude certain works from coverage,^{10/} (2) render inapplicable the statutory rights in specified situations,^{11/} and (3) permit waiver of the statutory rights under appropriate circumstances.^{12/} Again, Congress carefully crafted these provisions in VARA to ensure that VARA would not adversely affect the business activities of America's successful copyright industries and the constitutional goals of promoting the production and dissemination of copyrighted works.^{13/} This effort would be undermined if similar protections were not made a part of any resale royalty legislation.

Respectfully submitted,

THE COMMITTEE FOR AMERICA'S
COPYRIGHT COMMUNITY

By:


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August 1, 1991

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^{10/} See 17 U.S.C.A. § 101 (West 1977 and Supp. 1991) (exclusions from definition of "works of visual art").

^{11/} See 17 U.S.C.A. § 106A(c) (West 1977 and Supp. 1991) (exceptions to applicability of rights of attribution and integrity).

^{12/} See 17 U.S.C.A. § 106A(e).

^{13/} See H.R. Rep. No. 514, 101st Cong. 2d Sess. at 17-18 (1990).

Members Of The
COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY

1991

The American Film Marketing Association
Association of American Publishers
Association of Independent Television Stations, Inc.
Association of National Advertisers
The Dun & Bradstreet Corporation
Harcourt Brace Jovanovich, Inc.
Information Industry Association
International Communications Industries Association
Magazine Publishers of America
McGraw-Hill, Inc.
Meredith Corporation
Motion Picture Association of America, Inc.
National Association of Broadcasters
Paramount Communications, Inc.
The Reader's Digest Association
Recording Industry Association of America, Inc.
Time Warner, Inc.
Times Mirror Co.
Training Media Association
Turner Broadcasting System, Inc.

V I S U A L

Entidad de Gestión de Artistas Plásticos

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Policy Planning Advisor to
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28040 MADRID
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Fax. 549 28 41

Madrid, August 20th 1991

Dear Mr. Patry,

Through my colleague Monsieur Gutton I have been informed of your recent visit to Paris collecting information about the european legislation and the state of the market in relation with the "Droit de Suite" or Resale Royalty.

I will be glad to inform you of the spanish legislation on this materia as well as on the situation of the market and the coming legal reformation on this question.

As you probably know Resale Royalty is recognized in Spain as such since 1987 through the Intellectual Property Law of November 11th 1987.

The percentage that is applicated is of 2 % on the price of the resale of the work of art, with independance to the price reached beforehand, and from a minimum of aprox. \$ 2.000. For the moment the royalty cannot be transmitted to inheritors. However, soon this situation will change with the presentation of a Proyect of Law to the Parliament which increases the percentage to 3 % and extending it to being transmissible to inheritors.

Comment Letter	
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Since its creation, our society is collecting with regularity this royalty from the Auction Houses and proximately (coming November) we will sign a contract with the principle Associations of Galleries in order to collect the royalty in transactions made by them.

It would be a pleasure for me to amplify this information therefore I put myself at your entire disposal for anything you might find to be of utility for you.

Yours sincerely,



Javier Gutiérrez Vicén
Executive Director

CF G-79/467353

cc: Mrs. Catherine Auth / Artist Equity Association Inc.
Mr. Theodore Feder / A.R.S. Artist Rights Society
M. Jean-Marc Gutton / A.D.A.G.P.



Comments on Copyright Office's Request for Information;
Study on Resale Royalties for Works of Art

by National Artists Equity Association
June 1, 1991

National Artists Equity Association is the only trade association of visual artists in the United States today and has played a major role over the last fifteen years in the area of advocacy for artists' rights. We have a special interest in the topic of resale royalties for a number of reasons. First, it was members of Artists Equity in California who successfully promoted the passage of the California Resale Royalty law in 1977. Second, we were the most active promoter of the Visual Artists Rights Act of 1990. Our views in support of Senator Edward Kennedy's first two versions, which contained resale royalty provisions, were made public at the Senate subcommittee hearing on November 18, 1986 and the House subcommittee hearing on June 9, 1988. Finally, while everyone else seems to know what is best for artists, it is critical that artists be given the opportunity to speak for themselves through their own organization.

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We believe that should resale royalties become a federal law, the mechanisms required for enforcement would be created. We would certainly want a role in the creation of such an enforcement agency. The mechanics of implementation are much simpler to address if a consensus on the intention of resale royalties can be reached. The opposition to this concept have, in the past, made the claim that the most serious reason for not implementing resale royalties is that it will actually harm artists. We appreciate this concern, but question if this is really the opposition is sincere. National Artists Equity is most concerned about clarifying the intent of resale royalties and we will focus our comments primarily on its debated effect on the creators of works of art.

Aside from a handful of artists who were organized in 1988 by art dealers, the overwhelming majority of artists in the U.S. favor the establishment of resale royalties. The largest group of these are not the most successful of artists. They are artists struggling for success and recognize that they are prone by necessity to sell their work for prices that do not actually reflect their work's potential value. Every artist has to start at this same point. They create works of art, not because they are a commodity but because they are a means of communication. Financial rewards come to many artists over a lifetime and a few become genuinely wealthy. One artist's success is not, however, the reason for another artists's failure. Artists should be successful in a healthy society. They shouldn't have to apologize just because they have chosen a

profession in which it may be more difficult to succeed than in banking or law. And like success in any field, the financial rewards encourage one to continue the pursuit of the activity. Economic rewards for creators is the very purpose of Copyright Law. Resale royalties is one more way to encourage the creation art.

The fact that resale royalties would benefit successful artists more than others is no argument against it. The intention of resale royalties has never been to establish a welfare program for less successful artists, as much as we can make serious arguments in favor of such a program. If art dealers were so concerned about less successful artists they would establish such a program out of their own profits. When a work is resold for a profit the artist deserves to share in what has resulted from their lifetime of work, reputation and success.

Who, also, can predict that once successful through primary sales an artist will always be successful. It is not uncommon for the fashion-oriented contemporary art market to ignore the new works of a particular artist in favor of the works from a particular "period" of the artist's career. We know of several established and respected artists, who have sold work in the five figure range, but don't currently have a dealer because their work is not "in style". What happens to these artists if they don't have another source of income? This is a case where a royalty from a resale would make an enormous difference.

Resale royalties would not be a tax, as some have claimed, any more than royalties to song writers and authors of other published works are a tax. They claim it would discourage sales and therefore hurt artists. To accept this idea, one has to assume that, regardless of the motivation for considering the purchase of a work of art, the decision to buy will be negatively affected. The possibility that a small percentage of the appreciated value (in a value added system) shared with the creator would cause a deterrence to the sale is highly unlikely.

The best evidence to support the non-deterrence position exists in Europe, where resale royalty systems have not killed the primary or secondary market and artist organized enforcement agencies monitor sales and collect royalties. California is another example. In spite of the fact that artists lack an enforcement agency, many artists have collected royalties and the market has not suffered. Collectors have to share 40-60% of the proceeds of a consignment sale with the art dealer, which is just what artists do when they sell the work through the dealer. This, however, hasn't caused the market to suffer.

Resale royalties would have less of an impact on the potential buyer than a sales tax, which must be paid upon purchase. Those who claim that resale royalties would discourage sales don't seem to be complaining about the effect of sales tax and dealer commissions. One opponent even went so far as to say recently that the near

elimination of income tax benefits, which collectors once enjoyed, has already harmed their motivation to buy art. Resale royalties might be the final blow needed to stop collectors from buying art altogether - making artists the principal losers. Why have we not heard that these collectors are breaking down the doors of Congress to restore their tax breaks because they are concerned about the artists who are suffering? This is just one more case of a non-artist using the "artist's interests" against the interests of artists.

ARS

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ADAGP
SPADEM
Service photographique de la Caisse Nationale des
Monuments Historiques et des Sites
Photothèque des Musées de la Ville de Paris

May 29, 1991

Mr. William Patry
Policy Planning Advisor
to the Registrar of Copyrights
Office of the Registration of Copyright
Copyright Office
James Madison Building, Room 403
Independence Avenue, S.E.
Washington, DC 20559

Comment Letter

RM 91-1

No. 8

Dear Mr. Patry:

I am writing in response to the "Request for Information, Study in Resale Royalties for Works of Art."

I am the head of Artists Rights Society (ARS), an organization which represents the rights and permissions interests in the United States of a number of the major European rights societies including ADAGP and SPADEM of France. These two organizations represent the estates of virtually every artist active in France in this century, from Monet through Picasso, Chagall, Miro, and Giacometti.

ADAGP and SPADEM operate under the legislative sanction of the French government, which has a long and honored history, dating back to the French Revolution, of promulgating measures to protect the economic and moral rights of artists and authors. ARS' role on their behalf is to protect the rights and interests of these artists within the U.S.

Another principal objective of ARS is to act on behalf of American artists as well as of European ones. Our American members include among others Jackson Pollock and Lee Krasner (through the Pollock-Krasner Foundation), Milton Avery (through the Milton Avery Trust), Robert Mangold, Sol LeWitt, Mark Rothko, Georgia O'Keeffe (through the Estate of Georgia O'Keeffe), Frank Stella, Andy Warhol (through the Estate and Foundation of Andy Warhol), and Willem de Kooning (through the Conservatorship of Willem de Kooning). A partial list of our members is attached.

All the rights societies are grouped under an international organization called CISAC (Confederation International des Societes d'Auteurs et Compositeurs). CISAC's activities are directed towards the accomplishment of four principal aims:

- 1) To ensure the safeguard, respect, and protection of the moral and professional interests stemming from any literary or artistic production.
- 2) To Watch over and contribute to respect for the economic and legal interests attaching to the said productions, both at the international level and that of national legislation.
- 3) To coordinate technical activities between Societies of authors, artists, and composers and ensure their collaboration in this field, subject to the

understanding that each Society remains master of its own internal organization.

4) To constitute an international center of study and information.

I will submit answers to the questions raised in the "Request for Information" in the numbered sequence in which they appear in the Federal Registry.

1. The resale royalty would not in the opinion of ARS discourage the creation of new works of art. If anything, it would encourage them. In so far as artists are ever motivated by financial return, it is bound to heighten such motivation, since in the event of secondary sales it would ensure a return to the artist, his family, or heirs.

The movement to grant resale rights to artists originated in France prior to World War I. It was set in motion by a general concern for the welfare of the artist and his heirs, stimulated in part by a widely published cartoon of Jean-Louis Forain showing two children dressed in tatters outside the doors of a posh auction salesroom. "Look," one of the ragamuffins says to the other, "they're selling one of daddy's pictures."

The resale right, better known as the *Droit de Suite*, was codified in France in 1920, and has passed into law in 28 countries. Some claim that the right would drive down the first or subsequent sale price of original works of art, causing hardship to the creators. However, in no country with the resale right has this been known to happen, and informed American artists seem not unwilling to run this risk.

2. The law should cover creations which may be described as either works of painting or sculpture, in the somewhat broadened definition of these terms as consensually accepted in the art world. These enlarged categories are sometimes subsumed within the term "graphic or plastic works."

It would not be a bad idea for a threshold value to be triggered before a work of art could qualify for the *Droit de Suite*. However, to meaningfully benefit the maximum number of artists, this figure should not be too high or too low. A threshold of \$500.00 plus or minus \$250.00 is probably adequate. Below, the royalty which would accrue to the creator would be very small indeed. If set too high, the number of beneficiaries would be unduly diminished.

It should not be necessary to base the royalty on a percentage of profits from the current sale as compared to the price received from the previous one. It is often very difficult, if not impossible, to trace the sale records of works of art.

Rather than seven percent of profits, as once suggested, 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. This is the practice in France, Belgium, and Germany, where the law is easily administered without the need of bureaucratic intervention. On the other hand, the experience of Italy, Portugal, Uruguay, Czechoslovakia (and California) of computing the royalty on the increase in value over the preceding sale, has not been successful.

Returning to the percentage of the resale royalty, the present French law promulgated in 1957, fixes the rate at 3%. The German law, which applies to both galleries and auction houses, mandates 5%. In our estimation, one of the drawbacks of the well-meaning Kennedy proposals of 1987 is that it suggested a rate which was unusually high, namely 7%, and provoked undue opposition. Although we are none too certain that the hard core opponents of the resale royalty would be more amenable to a reduced figure, it is our view that 3% to 4% would be adequate.

3. and 4. The term of eligibility for the resale royalty should be the life of the artist plus fifty years. This is also the applicable term in France and Germany. It should be descendable.

It is not coextensive with the copyright in the work, except by coincidence, nor should it be dependent on the copyright. In France the copyright term is life plus 64 years, 203 days (calculated from the 1st of January immediately following the artist's death), and in Germany, life plus 70 years. While it is very rare for a European artist to alienate his or her copyright, it can be done; by contrast, the *Droit de Suite* is considered to be and should remain inalienable.

The right should not be limited to works created in the United States, and should clearly include works of foreign origin sold in the United States. Article 14ter of the Berne Convention calls for an author or artist to "enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work," providing the member country has passed resale royalty legislation. Berne member states which have adopted the *Droit de Suite* automatically bestow reciprocal rights on other member states possessing the right. Were the U.S. to exclude foreign works, U.S. works in turn would be excluded from resale benefits in foreign member states.

Another aspect of this same issue concerns the so-called question of retroactivity. As presently employed, the term often serves to deprive foreign artists of their rights. For example, U.S. adhesion to Berne (which took effect on March 1, 1989) is said to apply to existing works of art which have previously fulfilled the formal requirements of the U.S. copyright law (notice and registration), or to new works created after the date of adhesion. Previous U.S. copyright law had often served to deprive European artists of copyright protection on the principle that their works were not formally registered or copyrighted in the U.S. Such works are said to have passed into the Public Domain in the U.S.

This principle ignores the fact that most European works were automatically copyrighted at the moment of creation, under Berne and the national legislation in the country of origin, and consequently required no formalities for protection.

A failure to apply Berne to existing European works contradicts Article 28 of the Convention: "This Convention shall apply to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin through expiry of the term of protection."

The Berne provision also runs counter to Article VII of the Universal Copyright Convention, to which the U.S. has been a long time adherent. That provision states, "This Convention shall not apply to works... which are permanently in the public domain in the said contracting state."

In conflicts between the U.C.C. and Berne, the so-called "Berne Safeguard Clause" of the U.C.C. provides that Berne, and not the U.C.C., prevails in relationships between Berne members. (Viz. Article XVII, and the Appendix Declaration, Item b of the U.C.C.)

"This convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that convention."
(U.C.C., Article XVII [1])

"The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union insofar as it relates to the protection of works having as their country of origin, within the meaning of Berne Convention, a country of the International Union created by the said convention."
(U.C.C., Appendix Declaration relating to Article XVII [b])

Thus to apply a resale royalty under the theorem of prospectivity only would serve to strip the right from all existing U.S. and foreign works, even though the latter enjoy the right in nations having the *Droit de Suite*. The terms retroactivity and prospectivity should be employed in their proper context here, (as understood by our Berne partners), namely that the date of the secondary sale, and not the date of the work's creation, be the determining factor. Consequently there would be no retroactive application of the resale royalty in the sense that it could never apply to auction sales which took place prior to the effective date of the law. It would apply prospectively, that is to all auction sales of eligible works which occur after the effective date of the law. Eligibility, therefore, would be determined under the existing rule of life plus 50 years, and within the reciprocal norms of the Berne Convention.

5. A system similar to that which operates in France would seem to be the simplest and most direct form of administering the right. There it functions in the following manner.

A few days prior to a given auction, the auction house receives a list from the rights society (ADAGP or SPADEM) informing it of the titles of the works and the names of the artists for which the *Droit de Suite* is to be collected. Such lists are formulated by the rights societies from the sales catalogues it receives in advance of the auctions. After the sale has been completed, the auctioneer fills out and returns the list with information on the sales price and the amount due for the *Droit de Suite*. This is accompanied by a payment which the society distributes to the artists involved.

The landmark French artists rights law of 1957, which fixed the current rate at 3%, extended the resale royalty right to galleries. However, the law has never actively been applied to galleries, though there is some current effort in

France to do so. By contrast, galleries as well as auction houses are effectively covered under the German law.

As the right is designed to apply to sales of a work of art, there is no basis of application in cases where the object is presented as a gift or exchange, and we would not attempt to assign a value in such cases. Therefore, no royalty would be collected in these instances.

As we strongly recommend against basing the right on the profit differential between the present and previous sale, there would be no need to maintain a costly and time-consuming registry of sales prices.

The right is commonly administered by the national artists rights societies and ARS is prepared to perform this function for its very many European adherents as well as its American ones. We would in fact be willing to do so for all potential beneficiaries.

6. The right should not be waivable or alienable, lest a collector, gallery, or museum demand such a waiver as a condition of its offer to acquire a work.

7. The California law should definitely be preempted in the event of a federal law. The California Resale Royalty Act (Cal. Civ. Code SS.986; 1977, amended in 1983) has failed on two main grounds: 1) It has proved impossible to determine the previous sales price of a work, which is needed to calculate the sum due the artist, namely 5% of the profit realized by the sale. 2) There is no central registry which would disclose whether an artist is a resident of California, a requirement under the law. Finally, it is very difficult to enforce the law when it applies to one state only.

Please feel free to be in contact with our society about this important issue. In the interim, kindly accept my very best wishes.

Sincerely,



Dr. Theodore H. Feder
President

encl.

ARS

ARTISTS RIGHTS SOCIETY, INC.

65 Bleecker Street

New York, N.Y. 10012

Tel: (212) 420-9160 tlx 237053 Fax: (212) 420-9286

ADAGP

SPADEM

Service photographique de la Caisse Nationale des
Monuments Historiques et des Sites

Photothèque des Musées de la Ville de Paris

THE FOLLOWING IS A LIST OF THE MORE PROMINENT ARTISTS REPRESENTED BY ARS; PLEASE
NOTE THAT THERE ARE MANY OTHERS. FOR MORE INFORMATION CALL (212)420-9160.

AGAM, Yaacov
ALECHINSKY, Pierre
ARMAN
ARP, Hans
ARROYO, Eduardo-Jean
ARTSCHWAGER, Richard
ATGET, Eugene
AUBERJONIS, Rene
AVERY, Milton
BAKST, Leon
BALET, Jan
BALTHUS
BAUCHANT, Andre
BAZAINE, Jean
BECAT, Paule-Emile
BELLMER, Hans
BEOTHY, Etienne
BERARD, Christian
BERAUD, Jean
BERNARD, Emile
BESNARD, Albert
BIGOT, Georges
BISSIER, Julius
BLANCHE, Jacques-Emile
BLELL, Diane
BOMBOIS, Camille
BONNARD, Pierre
BONNAT, Leon
BRANCUSI, Constantin
BRAQUE, Georges
BRASILIER, Andre
BRAUNER, Victor
BRAYER, Yves
BUFFET, Bernard
CAISSE NATIONALE (CNMHS)
CALDER, Alexander
CAMOIN, Charles
CAPIELLO, Leonetto
CARRINGTON, Leonora
CASSATT, Mary
CESAR
CHAGALL, Marc
CHERET, Jules
CLAUDEL, Camille
COCTEAU, Jean

DALI, Salvador
DAPHNIS, Nassos
DE KOONING, Willem
DE STAEL, Nicholas
DELAUNAY, Robert
DELAUNAY, Sonia
DENIS, Maurice
DERAIN, Andre
DIBBETS, Jan
DUBUFFET, Jean
DUCHAMP, Marcel
DUCHAMP, Suzanne
DUFOR, Bernard
DUFRESNE, Charles
DUFY, Raoul
DUMOYER DE SEGONZAC
ENSOR, James
ERNST, Max
FAUTRIER, Jean
FLAVIN, Dan
FORAIN, Jean-Louis
FORISSIER, Roger
FOUJITA
FRANCIS, Sam
FREISZ, Otto
GIACOMETTI, Alberto
GIACOMETTI, Diego
GIACOMETTI, Giovanni
GLEIZES, Albert
GONTCHAROVA, Natalia
GONZALEZ, Julio
GRIS, Juan
GROMAIRE, Marcel
GROOMS, Red
GUILLAUMIN, Armand
HARTUNG, Hans
HAYDEN, Henry
HELION, Jean
HELLEU, Paul
HERBIN, Auguste
HUEBLER, Douglas
HUNT, Bryan
ICART, Louis
ITTEN, Johannes
JAWLENSKY, Alexj von

JAWLENSKY, Andreas
KANDINSKY, Wassily
KISLING, Moise
KLEE, Paul
KLEIN, Yves
KOKOSCHKA, Oskar
KOSUTH, Joseph
KRASNER, Lee
KUPKA, Franz
L'HOTE, Andre
LA FRESNAYE, Roger Andre de
LABISSE, Felix
LALIQUE, Rene
LAM, Wilfredo
LARIONOV, Mikhail
LAURENCIN, Marie
LAURENS, Henri
LE CORBUSIER
LECKWYCK, Edith van
LEGER, Fernand
LEMPICKA, Tamara de
LEWITT, Sol
LUCE, Maximilien
LURCAT
MAGNELLI, Alberto
MAGRITTE, Rene
MAILLOL, Aristide
MALLET-STEVENS, Robert
MAN RAY
MANGOLD, Robert
MANGUIN, Henri
MARCOUSSIS
MARQUET, Albert
MASSON, Andre
MATISSE, Henri
MATTA ECHAURREN, Roberto
METZINGER, Jean
MICHAUX, Henri
MIRO, Joan
MOILLIET, Louis
MONET, Claude
MUCHA, Alphonse
MUELLER, Otto
NADAR, Paul
NAUMAN, Bruce
OZENFAT, Amedee
PASCIN, Jules
PERRET, Auguste
PERRIAND, Charlotte
PICABIA, Francis
PICASSO, Pablo
POLIAKOFF, Serge
POLLOCK, Jackson
RAFAELLI, Jean-Francois
RAYSSE, Martial
RICHER, Germaine

RICHTER, Hans
RIEMERSCHMID, Richard
RIGOT, Gerard
RIOPELLE, Jean-Paul
ROCKBURNE, Dorothea
RODIN, Auguste
ROHNER, Georges
ROTHKO, Mark
ROUAULT, Georges
SAINT PHALLE, Niki de
SAURA, Antonio
SCHMIDT-ROTTLUFF, Karl
SCHUFFENECKER, Claude-Emil
SCHWITTERS, Kurt
SEGOVIA, Andre
SERRA, Richard
SERUSIER, Paul
SERVAES, Albert
SEUPHOR, Michel
SEVERINI, Gino
SIGNAC, Paul
SIMMONDS, Charles
SOTO-RODRIGUEZ, Jose
SOULAGES, Pierre
SOUTINE, Chaim-Ichte
STEINLIN, Theophile Alexandre
STELLA, Frank
STOECKLIN, Niklaus
SUTHERLAND, Graham
TAEUBER-ARP, Sophie
TALCOAT, Pierre
TANGUY, Yves
TANNING, Dorothea
TAPIES, Antoni
THERRIEN, Robert
TOBEY, Mark
TOBIASSE
UTRILLO, Maurice
VALADON, Suzanne
VALAT, Louis
VAN DONGEN, Kees
VAN VELDE, Bram
VASARELY, Victor
VILLON, Jacques
VLAMINCK, Maurice de
VUILLARD, Edouard
WACHTER, Emil
WALDMAN, Paul
WARHOL, Andy
WEINER, Lawrence
WOLS
XENAKIS, Constantin
ZADKINE, Ossip
ZULOAGA, Ignacio

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May 31, 1991

FEDERAL EXPRESS

Office of the Register of Copyrights
Copyright Office
James Madison Building
First and Independence Avenue, SE
Washington, D. C. 20559

Comment Letter

RM 91-1

No. 9

Re: Docket No. RM 91-1, Study On Resale
Royalties For Works Of Art

Sirs:

The New York Patent, Trademark and Copyright Law Association is pleased to submit its comments in response to the questions posed in the Notice Of Inquiry published in the Federal Register for February 1, 1991.

Our Association is, in general, opposed to any legislation embodying the resale royalty concept. The following comments are in response to the questions posed and are not to be considered as an approval of the concept.

1. Would resale royalty legislation promote or discourage the creation of new works of art, and if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?
 - A. Presumably the resale royalty legislation would promote creation of new works of art since the artist's reward is increased. It may, however, have no affect because important works of art are created in large part to satisfy the artist's urge to create. In either event, the marketplace would be affected due to the increase in complexity of art sales, and the possible diminishment of initial value of the art due to the obligation to pay the artist upon a future resale of the work.

THE NEW YORK PATENT, TRADEMARK
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Office of the Register of Copyrights
May 31, 1991
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2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and, if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured; by a percentage of the resaler's profit, the net sales differential, or some other measurement? Should the net sale differential be adjusted for inflation?
 - A. Although resale royalty legislation is not favored, if there is such legislation, it should be applied to all works. The threshold value of one thousand dollars (\$1000.00) in the California statute appears reasonable. The resale royalty provisions should not apply unless the work of art increases in value by a certain amount, such as 25%. A 5% royalty as in the California statute seems reasonable. For simplicity, any resale royalty should be based on the gross sales price differential with no adjustment for inflation.
3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications of such decisions? How is the issue handled in foreign countries and in California?
 - A. Artists who are citizens, or at least resident in the U.S., and who have created the work in the U.S. should benefit from any such legislation. If this provision were included in an international convention, it could be expanded or changed as appropriate. No unusual implications/complications are foreseen.

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4. What should the terms of any resale requirement be? Should it be coextensive with the copyright in the work? Should the right be descendible? Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?

A. **The term should be coextensive with copyright and the right should be descendible. The right should not apply retroactively.**

5. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? What are the experiences in foreign countries and in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?

A. **One approach is to have the reseller notify the artist when a work has been resold along with an accounting. If notice is not given, any statute of limitations respecting actions to be taken by the artist should not start to run until the artist has actual notice of the resale. Another approach may be to have sales recorded in the Copyright Office, with attendant constructive notice. The resale royalty concept should not be applied to gifts or charitable contributions, but it should apply to a bartered transaction having a value greater than \$1000.00.**

6. Should the right be waivable or alienable?

A. **The right should be both waivable and alienable.**

7. Should the California law be preempted in the event of a federal law?

A. **State law should be preempted.**

The NYPTCLA is the nation's largest regional intellectual property law group with over 1,000 members. We have long taken an active role in the

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Office of the Register of Copyrights

May 31, 1991

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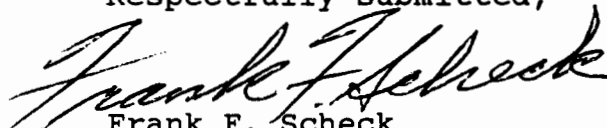
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drafting of legislation and treaties within our fields of expertise. Over the past several years, our representatives have been active participants in meetings of the World Intellectual Property Organization's meetings on patent and trademark law harmonization, and other intellectual property law topics.

Our Association stands ready to assist you in connection with intellectual property law matters and would appreciate the opportunity to meet with a member of your staff regarding the resale royalty matter.

Respectfully submitted,



Frank F. Scheck

c: Officers and Directors
Roger Smith, Esq.

S P A D E M

SOCIÉTÉ DES AUTEURS DES ARTS VISUELS

N/Ref. PA/CD

Office of the Registration of
Copyright - Copyright Office
Attn. Mr William Patry
Policy Planning Advisor of the
Registrar of Copyright
James Madison Building, Room 403
Independence Avenue, S.E.
Washington DC 20559, U.S.A.

Paris, May 28, 1991

Dear Mr Patry,

We are very pleased to send you this statement to the Congress of
the United States in support of the droit de suite.

If you need more informations, we are of course entirely at your
disposal.

Yours sincerely,



Martine DAUVERGNE

Directeur Gérant



Pascal AUBOIN

Responsible for Legal
and International Affairs

P.J.

Comment Letter
RM 91-1
No.10

Siège social : 15, rue Saint-Nicolas — 75012 PARIS

Tél. : (1) 43.42.58.58 — Fax : 43.44.84.54

43

Société civile à capital variable créée en application de la loi du 3 juillet 1985

R.C.S. PARIS D 338 420 581

R.I.B. : code banque 30004 - code guichet 00822 - N° de compte 00021802068 - clé RIB 66 - domiciliation BNP PARIS TRINITE

DROIT DE SUITE IN FRANCE

[Translation of SPADEM Comment Letter No. 10]

Droit de suite has been introduced in France in 1920 (law of May 20, 1920, modified by a law of October 27, 1922 and related décrets and arrêtés) and restated in the author's right law of March 17, 1957.

It can be defined as the right for the author and after his death for his heirs (then for a 50 years term) to participate in the proceeds of the auction or dealer sale of a work of art.

The goal of droit de suite is to make up for an unfair situation: often an artist sells his work at a low price. Getting to be known, the same work can be resold at a much higher price, but only the owner of the tangible embodiments of the work gains from the increase of value.

It seemed just fair that the artist should have a share, although modest, of this appreciation.

I. Nature of droit de suite

It is an economic right. But different from representation and reproduction rights in the extent that the artist has no right to control the subsequent sales of his works; yet it comprises an exclusive right giving birth to royalties on each sale.

As an economic right enabling the artist to participate in the resale's proceeds of his work, it exists from the day of the

creation of the work in the artist's patrimony and consequently must be descendible.

Droit de suite can't be assignable. the artist can't sell it nor give it up.

II. Field covered

1. Works.

Droit de suite applies to graphic and plastic works. Whenever a work is to be made in more than one copy (sculptures, engravings, tapestries, photos), it is agreed upon between artists' representatives and auctioneers' societies that droit de suite shall apply to a small number of copies said to be created by the artist himself.

2. Sales.

The 1957 law (Art 42) states that droit de suite arises from auction sales and sales made by dealers.

3. Beneficiaries.

- a) The author: during his life the author alone is entitled to droit de suite.
- b) Heirs and surviving spouse: droit de suite is descendible in accordance with the Civil Code, if estate is accepted.

The surviving spouse against whom there exists no final judgment of separation or divorce is entitled to usufruct under droit de suite.

- c) Foreign authors: foreign artists can benefit from droit de suite when one of their works is sold in

France only on a reciprocity basis - (Art 7 of the Berne Convention).

But a decree of September 17, 1956, allows foreign artists who lived in France for more than 5 years and then took part in the French artistic life to claim droit de suite royalties.

4. Duration.

Life of the artist plus 50 years.

III. Mode of enforcement.

1. Basis of assessment.

The basis for droit de suite is the gross amount of the sale's price for each subsequent sale. If several items are sold at the same time, the total price must be distributed among the works.

2. Rate.

Art. 42 has settled for a 3% rate applied whenever the price is over 100 frs. (\$20).

3. Collection.

Seller must pay the royalty:

- either to an author's society which will give it back to the author minus management costs;
- or to the author himself or heirs, they must demand royalty payment not later than 3 days after the sale has occurred.

Actually the following two author's societies are collecting the royalties:

- SPADEM (visual artists' society)
75 rue Saint Nicholas 75012 PARIS
Tel. 43 42 5858
- ADAGP (graphic and plastic artists' society)
11 rue Berryer 75008 PARIS
Tel. 45 61 0387

IV. Artists' point of view on droit de suite.

French artists are unanimously in favor of droit de suite. It does not serve as an impediment to either their artistic career or the art market.

Along with a fair remuneration, droit de suite makes it possible for the artists to know which of their works are in circulation and at what price.

Translation of Appended Documents to SPADEM Comments

The appended documents specify the scope of droit de suite in the case of works that are created in more than one copy.

1. Sculptures.

Art. 79 - 30 de l' annexe III du code général des impôts (code of fiscal provisions) specify what an authentic (original) work of art in the field of bronze cast sculpture is in regard with sale's tax.

So a fiscal provision is applied to the droit de suite in order to construe it.

This fiscal provision is used by authors and auctioneers to determine how many copies of a work of art can generate droit de suite royalties.

The figure is 8 copies which must be numbered (1/8, 2/8, ... 8/8) and signed by the author. These copies must be executed by the artist or controlled by him (casting of a sculpture). Although original copies (up to 8) can be cast after the author's death (ruling of the cours de cassation in a Rodin case, March 18, 1986).

2. Engravings - Agreement between Authors/Auctioneers (11/28/57).

The parties agreed that concerning engravings, royalties are paid for the sale of up to 100 copies as long as those copies are numbered and signed by the artist.

3. Tapestries - Agreement between authors/auctioneers
(01/15/58).

The parties agreed, concerning tapestries, that royalties are paid for the sale of up to 6 copies of the same work as long as those copies are supervised by the artist, numbered and signed by him.

The basis in this case is a third of the sales' price.

COMMENTS

1. The French law is incomplete. Art. 42 of the March 17, 1957 law needs a décret to be enforced. It has never been issued. So French law relies on an old decree (November 17, 1920) in order to implement the droit de suite provisions of the 1957 law.

Consequences:

- It is questionable whether this decree is still valid. Arguably it has been abrogated by Article 73 of the 1957 law . . . or has not.
- The said decree only deals with auction sales (state of the 1920 law), so part of the 1957 law pertaining to sales made by dealers is not enforceable.

2. Construction of "graphic work": a debate exist whether the word graphic encompasses literary or musical manuscript. The matter has not been settled by courts. Auctioneers' society excludes that from droit de suite, so do most of the law professors.

3. See 1.1 above.

4. 50 years term should be soon expanded to 70 years.

5. Procedure set up by the 1920 law: See Nimmer "legal protection for the artist", Chap. IV French law on proceeds right analyses and critique - No. 45 by Prof. Plaisant - photocopy attached.

6. EEC law: In the following to the "green paper" dealing with copyright and new technologies (June 1988) issued early in 1991, the EEC Commission has scheduled a study on droit de suite, this study could be a prelude to harmonization. It does not seem that the study will be published on time (before December 31, 1992).

CASE LAW

Cours d'appel de Paris - 4 èm chambre 28 January 1991 (RIDA No. 130 October 1991 - p. 141).

The cours d'appel de Paris, limits the scope of droit de suite (works generating droit de suite royalties) by construing the works "graphic and plastic work" (Art 42 of the 1957 author's right law).

The court states that Art. 42 must be construed in a narrow way because it is a particular rule departing from the general rule.

It denies the status of original work to pieces of furniture created by a well known "art déco" artists (Jean Dunand), because:

- he only intellectually created them;

- he didn't create them with his own hands, actually make them.

The court keeps out of the scope of Art 42 every single "design" work, in doing so it seems that it is violating Art 2, 1957 (no discrimination whatsoever between the works).

It seems that the court would have had another view if the same pieces of furniture have been involved in a reproduction right litigation.

It is arguable to say that the "cours de cassation" (French highest court) could reverse this decision on several grounds.

<p style="text-align: center;">LE DROIT DE SUITE EN FRANCE</p>

Introduit à l'origine par la loi du 20 Mai 1920, complétée par la loi du 27 Octobre 1922 et différents décrets et arrêtés, le droit de suite prévu par l'article 42 de la loi du 11 Mars 1957 sur la propriété littéraire et artistique peut être défini comme le droit pour l'auteur et, après le décès de celui-ci, pour ses héritiers - pendant 50 ans - de percevoir un droit égal à un pourcentage du prix d'une oeuvre d'art payé en cas de vente publique ou par un commerçant.

Le droit de suite a pour but de réparer une injustice : un artiste a souvent vendu ses oeuvres à bas prix ; la notoriété venue, ses oeuvres sont parfois revendues à de hauts cours et ce sont les cessionnaires successifs qui bénéficient de plus-values énormes.

Il a paru équitable que l'artiste recueille une part, d'ailleurs modeste, de ces augmentations de prix.

I NATURE DU DROIT DE SUITE

Le droit de suite est un **droit patrimonial**.

Comportant des prérogatives différentes de celles attachées au droit de reproduction et de représentation, l'artiste n'ayant pas qualité pour soumettre à son consentement les aliénations successives de l'oeuvre, il contient cependant comme eux une exclusivité qui a pour point d'application un prélèvement sur le prix de vente, au lieu de la reproduction ou de la présentation publique.

C'est un droit d'essence frugifère qui permet de percevoir une redevance au fur et à mesure des aliénations. Ce droit patrimonial existe en tant que virtualité dès la création de l'oeuvre ; il est donc normal de l'incorporer au patrimoine, et en conséquence d'en admettre la transmission héréditaire.

Le droit de suite est un **droit inaliénable**.
L'artiste ne peut le céder ou y renoncer.

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II DOMAINE D'APPLICATION

1. Les oeuvres

Le droit de suite s'applique aux oeuvres graphiques et plastiques.

En ce qui concerne les oeuvres pour lesquelles plusieurs exemplaires seront vendus (sculptures, gravures, tapisseries, photographies), des conventions entre les représentants des artistes et les commissaires priseurs font jouer le droit de suite sur un petit nombre d'exemplaires, considérés comme émanant de la main de l'artiste lui-même.

2. Les ventes

De par la loi du 11 Mars 1957 sur la propriété littéraire et artistique, le droit de suite est perçu sur toutes les ventes aux enchères publiques, ainsi que celles faites par l'intermédiaire d'un commerçant.

3. Les bénéficiaires

- a) L'auteur : de son vivant, seul l'artiste jouit du droit de suite.
- b) Les héritiers et le conjoint survivant : Le droit de suite se transmet aux seuls héritiers légaux dans l'ordre de la dévolution successorale qui ont accepté la succession.

Le conjoint survivant contre lequel n'existe pas un jugement passé en force de chose jugée de séparation de corps ou de divorce bénéficie du droit de suite, mais pour l'usufruit seulement et compte-tenu des droits des héritiers réservataires, s'il en existe.

- c) Les artistes étrangers : la perception du droit de suite par les artistes étrangers pour leurs oeuvres vendues en France est soumise à la réserve de réciprocité prévue par l'article 14ter du texte de Paris de la Convention de Berne sur la propriété littéraire et artistique, selon lequel la protection n'est exigible dans chaque pays parties à la Convention que si la législation nationale de l'auteur admet cette protection, et dans la mesure où le permet la législation du pays où cette protection est réclamée.

Le décret du 15 Septembre 1956 maintient cette règle en y ajoutant une exception à la réciprocité pour les artistes étrangers qui ont vécu au moins cinq ans sur le territoire de la France et y ont participé à la vie de l'art.

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4. Durée

Après le décès de l'auteur, le droit subsiste pendant l'année civile en cours et les cinquante années suivantes.

III MODALITES D'APPLICATION

1. L'assiette servant de base

Le droit de suite est exercé sous la forme d'un prélèvement sur le prix de vente et à chacune des différentes ventes successives de l'oeuvre. En cas de vente de plusieurs oeuvres du même artiste, le droit de suite est déterminé oeuvre par oeuvre, et non globalement.

2. Le taux

L'article 42 de la loi du 11 Mars 1957 a fixé un taux uniforme de 3 p 100 applicable lorsque le prix de vente est supérieur à 100 Francs.

3. La perception

C'est le vendeur qui a la charge du droit de suite. Ce droit est réservé :

soit par une Société de perception et de répartition de droits d'auteurs qui le reverse à l'auteur y adhérant après déduction de frais de gestion,

soit directement par l'auteur ou ses ayants-droit ; ceux-ci doivent faire valoir leur droit auprès du commissaire priseur au plus tard trois jours après la vente.

Dans la pratique, la perception est faite le plus souvent par l'intermédiaire de :

- . la SPADEM (Société des Auteurs Visuels)
15, Rue Saint Nicolas 75012 PARIS, Tel. 4342 58 58
- . l'ADAGP (Société des Auteurs dans les Arts Graphiques et Plastiques) 11, Rue Berryer 75008 PARIS, Tel. 45 61 03 87

IV POINT DE VUE GENERAL DES ARTISTES ET DE LEURS AYANTS-DROIT VIS A VIS DU DROIT DE SUITE

Les artistes français et leurs ayants-droit approuvent unanimement la perception de ce droit qui ne nuit aucunement à leur carrière artistique, pas plus qu'au marché de l'art.

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Si toutefois les artistes eux-mêmes mettent en vente une ou plusieurs de leurs oeuvres, la perception du droit de suite est alors inopérante.

Ce droit revenant à l'artiste ne lui procure pas seulement une juste rémunération, il lui apporte également une information précieuse sur la circulation de ses oeuvres en France - et dans les pays où le droit de suite est reconnu - à laquelle s'ajoute celle de la connaissance de l'évolution de sa cote, puisque sur les bordereaux qui accompagnent le règlement aux auteurs figurent le lieu de la vente, l'heure, le titre et les dimensions de l'oeuvre ainsi que son prix de vente.

Annexe 1 : Lois et Réglementations

Annexe 2 : Interprétation de l'article 42 de la loi du 11 Mars 1957 par la Chambre Nationale des Commissaires Priseurs

Annexe 3 : Conventions entre les représentants des artistes et les Commissaires Priseurs.

LOIS ET RÉGLEMENTATIONS

MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION

Décret n° 81-255 du 3 mars 1981 sur la répression des fraudes en matière de transaction d'œuvres d'art et d'objets de collection

Le Premier ministre.

Sur le rapport du garde des sceaux, ministre de la justice, du ministre de l'agriculture et du ministre de la culture et de la communication.

Vu le code civil, et notamment ses articles 1109, 1110, 1116, 1131 et 1641 ;

Vu le code général des impôts, et notamment son annexe III (art. 71) ;

Vu le code pénal, et notamment son article R.25, complété par le décret n° 80-567 du 18 juillet 1980 ;

Vu la loi du 9 février 1895 sur les fraudes en matière artistique ;

Vu la loi du 1^{er} août 1905 sur les fraudes et falsifications en matière de produits et de services et notamment son article 11, ensemble les textes qui l'ont modifiée, notamment la loi n° 78-23 du 10 janvier 1978 ;

Vu le décret modifié du 22 janvier 1919 pris pour l'application de la loi du 1^{er} août 1905 susvisée ;

Vu le décret n° 50-813 du 29 juin 1950 relatif au commerce du meuble, modifié par le décret n° 66-178 du 24 mars 1966 ;

Vu le décret n° 56-1181 du 21 novembre 1956 modifiant le tarif des commissaires-priseurs ;

Vu le décret n° 68-786 du 29 août 1968 relatif à la police du commerce de revendeurs d'objets mobiliers ;

Le Conseil d'Etat (section de l'intérieur) entendu.

Décrète :

Art. 1^{er}. - Les vendeurs habituels ou occasionnels d'œuvres d'art ou d'objets de collection ou leurs mandataires, ainsi que les officiers publics ou ministériels procédant à une vente publique aux enchères doivent, si l'acquéreur le demande, lui délivrer une facture, quittance, bordereau de vente ou extrait du procès-verbal de la vente publique contenant les spécifications qu'ils auront avancées quant à la nature, la composition, l'origine et l'ancienneté de la chose vendue.

Art. 2. - La dénomination d'une œuvre ou d'un objet lorsqu'elle est uniquement et immédiatement suivie de la référence à une période historique, un siècle ou une époque, garantit l'acheteur que cette œuvre ou objet a été effectivement produit au cours de la période de référence.

Lorsqu'une ou plusieurs parties de l'œuvre ou objet sont de fabrication postérieure, l'acquéreur doit en être informé.

Art. 3. - A moins qu'elle ne soit accompagnée d'une réserve expresse sur l'authenticité, l'indication qu'une œuvre ou un objet porte la signature ou l'estampille d'un artiste entraîne la garantie que l'artiste mentionné en est effectivement l'auteur.

Le même effet s'attache à l'emploi du terme « par » ou « de » suivi de la désignation de l'auteur.

Il en va de même lorsque le nom de l'artiste est immédiatement suivi de la désignation ou du titre de l'œuvre.

Art. 4. - L'emploi du terme « attribué à » suivi d'un nom d'artiste garantit que l'œuvre ou l'objet a été exécuté pendant la période de production de l'artiste mentionné et que des présomptions sérieuses désignent celui-ci comme l'auteur vraisemblable.

Art. 5. - L'emploi des termes « atelier de » suivis d'un nom d'artiste garantit que l'œuvre a été exécutée dans l'atelier du maître cité ou sous sa direction.

La mention d'un atelier est obligatoirement suivie d'une indication d'époque dans le cas d'un atelier familial ayant conservé le même nom sur plusieurs générations.

Art. 6. - L'emploi des termes « école de » suivis d'un nom d'artiste entraîne la garantie que l'auteur de l'œuvre a été l'élève du maître cité, a notoirement subi son influence ou bénéficié de sa technique. Ces termes ne peuvent s'appliquer qu'à une œuvre exécutée du vivant de l'artiste ou dans un délai inférieur à cinquante ans après sa mort.

Lorsqu'il se réfère à un lieu précis, l'emploi du terme « école de » garantit que l'œuvre a été exécutée pendant la durée d'existence du mouvement artistique désigné, dont l'époque doit être précisée et par un artiste ayant participé à ce mouvement.

Art. 7 - Les expressions « dans le goût de », « style », « manière de », « genre de », « d'après », « façon de », ne confèrent aucune garantie particulière d'identité d'artiste, date de l'œuvre, ou d'école.

Art. 8 - Tout fac-similé, surmoulage, copie ou autre reproduction d'une œuvre d'art ou d'un objet de collection doit être désigné comme tel.

Art. 9 - Tout fac-similé, surmoulage, copie ou autre reproduction d'une œuvre d'art originale au sens de l'article 71 de l'annexe III du code général des impôts, exécuté postérieurement à la date d'entrée en vigueur du présent décret, doit porter de manière visible et indélébile la mention « Reproduction ».

Art. 10 - Quiconque aura contrevenu aux dispositions des articles 1^{er} et 9 du présent décret sera passible des amendes prévues pour les contraventions de la cinquième classe.

Art. 11. - Le garde des sceaux, ministre de la justice, le ministre de l'agriculture et le ministre de la culture et de la communication sont chargés, chacun en ce qui le concerne, de l'exécution du présent décret, qui sera publié au *Journal Officiel* de la République française.

Fait à Paris, le 3 mars 1981.

RAYMOND BARRE.

Par le Premier ministre :

*Le ministre de la culture
et de la communication.*

JEAN-PHILIPPE LECAT.

*Le garde des sceaux,
ministre de la justice.*
ALAIN PEYREFITTE.

Le ministre de l'agriculture.
PIERRE MÉHAIGNERIE.

Section 3
Productions originales
de l'art statuaire de la sculpture
et assemblages artistiques

1. L'article 71-3° de l'annexe III au CGI considère comme œuvres d'art originales, les productions en toutes manières de l'art statuaire ou de la sculpture et assemblages, à l'exception des articles de bijouterie, d'orfèvrerie et de joaillerie, dès lors que ces productions et assemblages sont entièrement exécutés de la main de l'artiste. Le même article précise que sont également considérées comme œuvres d'art originales, les fontes de sculpture à tirage limité à huit exemplaires et contrôlé par l'artiste ou ses ayants droit.

Ces productions sont parfois obtenues par taille directe dans des matières dures. Lorsque l'artiste réalise des modèles en matière molle (maquette, projet, modèle plâtre) destinés soit à être durcis au feu, soit à être reproduits en matières dures, soit à confectionner des moules pour la fonte de métal ou d'autres matières, ces maquettes, projets, modèles plâtre sont réputés également œuvres d'art originales.

2. Par assemblages artistiques considérés comme œuvres d'art originales, il convient d'entendre les éléments montés en vue de constituer un exemplaire unique d'œuvre d'art entièrement exécuté à la main par un sculpteur ou un statuaire (RM, n° 24933, M. de Broglie, député. J.O., déb. AN, n° 11 du 13 mars 1976, p. 1012).

Sont également considérées comme œuvres d'art originales les fontes de sculpture exécutées à partir d'un moulage de la première œuvre, sous réserve que leur tirage soit contrôlé par l'artiste ou ses ayants droit et limité à huit exemplaires numérotés. Les tirages dits «d'artiste» portant des mentions spéciales sont admis au même régime dans la limite de quatre exemplaires.

La condition du numérotage n'est exigée que pour les fontes exécutées depuis le 1^{er} janvier 1968.

4. En revanche, la qualité d'œuvre d'art originale doit être refusée :

- aux moules pour les fontes de sculpture ;
- aux productions artisanales ou de série ainsi qu'aux œuvres exécutées par des moyens mécaniques, photomécaniques ou chimiques ; il en est ainsi notamment des articles de bijouterie, d'orfèvrerie et de joaillerie.

Exemplaire d'artiste signé Zadkine



Les exemplaires originaux ou authentiques

Le terme «Œuvre d'art originale» n'est possible à décerner à une statue en bronze que si son tirage n'excède pas huit exemplaires ~~de~~ quatre hors du commerce. Les quatre exemplaires hors du commerce portent les lettres E.A. ce qui signifie «Exemplaire d'artiste». Au-delà de huit exemplaires il s'agit d'œuvres pouvant être considérées comme bronze d'art, de série ou d'édition mais pas comme «Œuvre d'art originale».

Il est à noter que la totalité des exemplaires peut être coulée en une seule campagne de fonte ou bien s'échelonner sur plusieurs années. Les héritiers et ayants droit continuent aujourd'hui à reproduire en bronze des œuvres de Germaine Richier, Auguste Renoir ou Maillol tant que le tirage maximum n'a pas été atteint (8/8).

Il n'est pas fixé de minimum au tirage des exemplaires numérotés et un sculpteur peut fort bien décider de faire fondre un nombre d'exemplaires inférieur à huit. Son œuvre n'en aura que plus de valeur.

En résumé on distingue :

- 1°) les œuvres uniques (1/1),
- 2°) les œuvres d'art originales (1/8 jusqu'à 8/8),
- 3°) les œuvres d'art (pas de limite à la numérotation. Exemple : 1/15 jusqu'à 15/15 ou plus),
- 4°) le bronze d'édition (pas de numérotation et un très grand nombre d'exemplaires sont réalisés. Exemple : 100 - 500 - 1 000 ou plus).

Le bronze d'édition

Le bronze d'édition est un bronze dont le *modèle original* a été *vendu* par l'artiste ou ses ayants droit à un *fondeur* ou à un *éditeur d'art*. Le fondeur peut donc en faire fondre un nombre *illimité*. Généralement le nom du fondeur et du sculpteur figure sur le bronze réalisé. Il ne faut pas confondre le bronze d'édition avec les œuvres numérotées ou l'artiste décide de faire fondre une petite série de la même œuvre. Dans ce cas les exemplaires doivent être numérotés dans le bronze lui-même. Exemple : 1/8, 2,8, 3/6, etc.



Bronze d'édition. Statue d'appartement

Œuvre d'art authentique 4/5 signé Zadkine



**Commentaire et résumé
sur la législation des œuvres d'art
dans la statuaire en bronze**

Ne peuvent être considérés comme œuvres d'art que des exemplaires dont le tirage n'excede pas huit exemplaires numérotés de 1/8 jusqu'à 8/8.

On peut tirer en plus de ces huit exemplaires 4 exemplaires d'artiste non commercialisables et portant une mention spéciale. Exemple : les lettres E.A ce qui signifie «exemplaire d'artiste» suivies de la numérotation 1/4 jusqu'à 4/4.
L'application de cette loi est obligatoire pour les fontes exécutées à partir du 1^{er} janvier 1968.

Le législateur n'a rien prévu concernant les agrandissements ou les réductions des modèles. Ce point de détail permet donc, lorsque le tirage maximum d'une œuvre a été atteint. (Ex. 8/8) de faire varier l'échelle du modèle et de recommencer une série de huit exemplaires dans une nouvelle échelle. Dans ce cas les nouveaux exemplaires réalisés seront considérés comme Œuvres d'art mais non plus comme Œuvres d'art originales.

L'échelle des modèles en réduction ou en agrandissement est illimitée. Exemple : agrandissement 1,2 ou 1,3 ou 1,4 jusqu'à 10 ou 15 fois l'original. On comprend donc qu'un tirage presque illimité d'une Œuvre d'art peut être réalisé dans des échelles différentes certes, mais parfois peu perceptibles à l'œil.

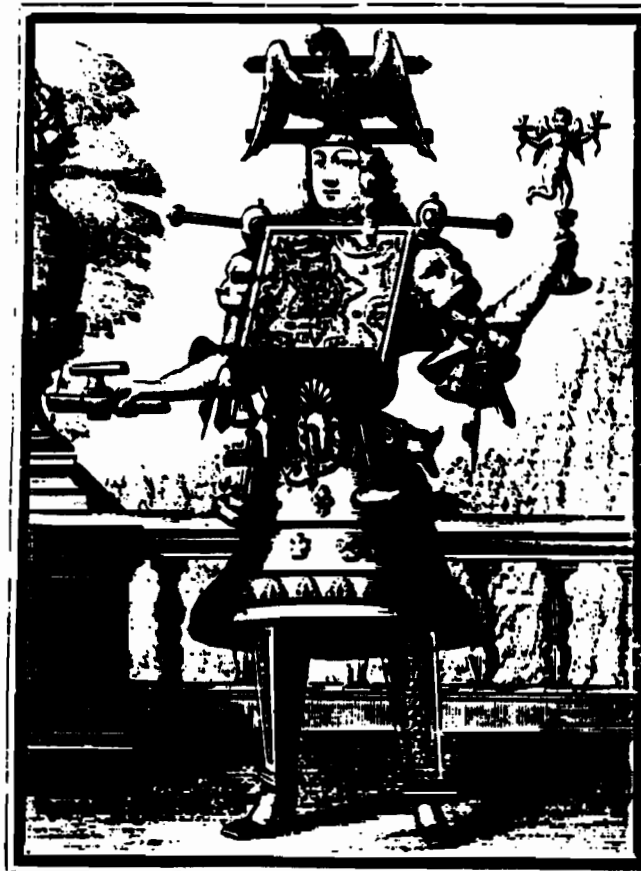
Les exemplaires numérotés doivent donc être considérés comme «Œuvres d'art originales» jusqu'à concurrence de huit exemplaires mais dans une échelle donnée (celle de l'artiste).

Parfois, une petite lettre (c.d.e.) est apposée à côté de la numérotation de l'œuvre. Cette lettre est un code qui renvoie à l'échelle dans laquelle la série des huit exemplaires numérotés a été fabriquée. Il est donc bien difficile de savoir le tirage exact réalisé d'une Œuvre d'art numérotée si le sculpteur ou les ayants droit ont décidé d'agrandir ou de réduire un modèle donné et cela peut s'échelonner ne l'oublions pas, sur plusieurs années.

La protection et la législation des «Œuvres d'art originales» est donc valable pour une série de 8 mais dans une échelle donnée (c'est-à-dire celle voulue par l'artiste).



Fonte monumentale en bronze. Ensemble animalier (jardin des Tuileries, Paris).



Habit de Fondeur

Costume emblématique des fondeurs avec les attributs de fabrication courante. Bronze d'ameublement : cloche, statues, objets religieux et militaires, robinetteries, chandeliers, bougeoirs, etc.

V. - APPENDICE. INTERPRETATION PAR LA CHAMBRE NATIONALE DES COMMISSAIRES-PRISEURS

25. - Interprétation de l'article 42 par la Chambre nationale des commissaires-priseurs (*Gaz. Pal. 18 juill. 1958*) :

1° Le droit de suite inaliénable est dû aux auteurs d'œuvres graphiques et plastiques pendant leur vie et après leur décès, pendant l'année en cours et les cinquante années suivantes (augmentées des années de guerre), à ceux de leurs successeurs désignés sous le paragraphe 7 ci-après, à la condition que le ou les bénéficiaires manifestent leur volonté de le percevoir.

Le décret fixant les conditions dans lesquelles cette manifestation de volonté devra s'exprimer n'ayant pas encore paru, le droit commun s'applique pour cette manifestation de volonté aux commissaires-priseurs ou officiers vendeurs :

2° L'expression œuvres graphiques et plastiques comprend : les peintures, les dessins, les sculptures et les reliures originales dans tous les cas, les gravures et les tapisseries lorsqu'elles ont le caractère d'œuvre originale dans les conditions fixées par des accords intervenus entre la Chambre nationale des commissaires-priseurs et les représentants des groupements d'auteurs intéressés :

3° Les textes originaux des œuvres littéraires et musicales ne sont pas des œuvres graphiques et ne donnent jamais naissance au droit de suite :

4° Les livres, même contenant des gravures, ne donnent naissance au droit de suite que pour la reliure originale qui les habille, ou pour les dessins originaux qui peuvent y être insérés :

5° Le droit de suite n'est perçu que sur la vente des œuvres dont le prix d'adjudication est égal ou supérieur à 100 francs et il est perçu sur la totalité du prix.

S'il s'agit d'une reliure ou d'un dessin inséré dans un livre, le droit de suite, n'est perçu que si la portion de prix afférente à la reliure ou au dessin, d'après l'estimation du commissaire-priseur, est égale ou supérieure à 100 francs :

6° Le taux uniforme du droit de suite, perçu sur la totalité du prix ou de la portion de prix, est de 3 % :

7° Après le décès de l'auteur, ses successeurs, habilités par la loi à percevoir le droit de suite qui subsiste à leur profit pendant un temps qui ne peut excéder le délai ci-dessus fixé, sont les suivants :

a) Ses héritiers réservataires même si l'auteur a institué un légataire ou un donataire universel ;

b) Ses héritiers *ab intestat*, non réservataires (venus à la succession à défaut de légataire ou donataire universel ou comme étant l'un de ces derniers) ;

c) Le conjoint survivant, mais pour l'usufruit seulement, compte tenu des droits des héritiers réservataires, s'il en existe (cet usufruit cesse en cas de remariage du conjoint).

En conséquence, à défaut de conjoint survivant et d'héritiers réservataires, et si l'auteur a institué un légataire ou donataire universel, ou si la succession est dévolue à un successeur irrégulier, qui n'est pas un héritier, le droit de suite cesse d'être perçu :

8° Après le décès d'un héritier de l'auteur bénéficiaire du droit de suite, ce droit ne subsiste, pour sa part, que s'il laisse lui-même des héritiers réservataires, et ainsi de suite.

A défaut d'héritier réservataire, la part de l'héritier décédé accroît celle des héritiers survivants s'il en existe ; s'il n'en existe pas, le droit de suite cesse d'être perçu :

9° Aucun ayant cause de l'auteur autre que ses successeurs ci-dessus désignés, aucun ayant cause d'un héritier de l'auteur autre que les héritiers réservataires ne peuvent prétendre à la perception du droit de suite.

Pour l'application pratique de la loi nouvelle, tous renseignements peuvent être demandés par les commissaires-priseurs et les officiers ministériels vendeurs au secrétariat de la Chambre nationale des commissaires-priseurs, 6, rue Rossini, à Paris.

On note que, sans prendre parti de manière explicite, la chambre paraît adopter l'interprétation donnée par la Cour de cassation (1^{re} ch.) dans son arrêt du 19 octobre 1977, Utrillo, en réservant le bénéfice du droit de suite aux héritiers appartenant à la « famille » de l'auteur.

PROCES - VERBAL

de la Réunion du 28 Novembre 1957, tenue à 10 H. 30

au siège de la Chambre des Commissaires-Priseurs

sous la Présidence de M. Philippe COUTURIER

Président de la Chambre des Commissaires-Priseurs de la Seine

Étaient présents :

- M. ADER - Président de la Chambre Nationale des Commissaires-Priseurs 6, rue Rossini
- GIARD - Commissaire-Priseur, Président d'Honneur des Chambres Nationale et de la Seine, 6, rue Rossini
- GUIOT - Président de la Chambre Syndicale de l'Estampe et du Dessin, 4, rue Volney
- MONTAGNAC - Président de la S.D.A.A. 12, rue Honoré
- PARTURIER - Président de l'A.D.A.G.P. 11, rue Berryer
- GROVAIRE - Artiste-Peintre et graveur, 47, rue Sarrette
- GUASTALLA - Artiste - Peintre et graveur 16, rue Massenet
- MENDES-FRANCE - Artiste-Peintre et graveur, 58 bis, rue Ramey
- MOULARD - Secrétaire Général de l'A.D.A.G.P. 11, rue Berryer, faisant fonction de Secrétaire de Séance.

Les soussignés déclarent s'être réunis en vue d'établir, en ce qui concerne l'estampe une interprétation conventionnelle et un accord d'application des textes de la loi accordant à l'auteur d'oeuvres graphiques " nonobstant toute cession de l'oeuvre originale, un droit de suite sur toute vente de cette oeuvre faite aux enchères publiques ou par l'intermédiaire d'un commerçant" (Art. 42 de la loi du 11 mars 1957).

Cette interprétation leur a paru nécessaire, en raison du caractère particulier de l'estampe, dont le tirage à plusieurs exemplaires aurait pu avoir pour effet de faire refuser à son auteur toute perception de droit de suite, suivant le principe, sujet d'ailleurs à controverse, qu'une oeuvre originale est nécessairement unique.

Ils estiment, en effet, qu'un accord d'interprétation de la loi établi entre les représentants des Commissaires-Priseurs, des commerçants en estampes et des deux Sociétés de perception (S.P.A.D.E.M. et A.D.A.G.P.) en présence de trois graveurs, est susceptible d'éviter tout litige dans l'application de la loi sur le droit de suite dont la grande concision pourrait donner lieu, à défaut d'accord, à des recours fréquents à l'intervention des Tribunaux.

Ne pouvant toutefois affirmer que l'éventualité d'un recours au Tribunal puisse être évitée dans l'avenir, et n'ayant pas qualité pour y renoncer, les soussignés conviennent que le présent accord sera considéré par eux, jusqu'à jurisprudence contraire, comme engageant d'une part les commissaires-priseurs ou les commerçants en estampe, et d'autre part, les 2 Sociétés de perception et leurs adhérents.

N. M. H. I.P. M. M. P. 60 .../...

MAINTIEN DE LA DEFINITION ADMINISTRATIVE DE L'ESTAMPE ORIGINALE -

Préalablement à l'accord spécial concernant le droit de suite au profit des artistes graveurs, les soussignés déclarent bien connaître la définition de "l'estampe originale" telle qu'elle a été admise par l'Administration française depuis l'année 1933 et qui est la suivante :

- " Sont considérées comme gravures, estampes et lithographies originales, les épreuves tirées directement en noir ou en couleurs, d'une ou plusieurs planches entières exécutées à la main par l'artiste, quelle que soit la technique ou la matière employée, à l'exclusion de tous procédés mécaniques ou photo-mécaniques".

Et ils déclarent ne vouloir apporter aucune modification de forme ou de fond à cette définition administrative.

ACCORD PARTICULIER POUR LA PERCEPTION DU DROIT DE SUITE -

Mais pour la perception du droit de suite seulement, les soussignés établissent conventions suivantes, dans le cadre des considérations exprimées ci-dessus :

1°) Les estampes originales de premier tirage, composées et gravées de la main de l'artiste, ainsi que les épreuves d'essai ou d'état préalables au premier tirage, sont seules considérées comme ayant le caractère d'oeuvre graphique originale dont la vente donne lieu à perception du droit de suite.

2°) Ce droit est calculé sur la totalité du prix de vente des estampes définies dans le paragraphe précédent, si elles sont signées de l'artiste, numérotées et tirées à un nombre maximum de 75 exemplaires; les épreuves d'essai ou d'état de ces estampes supportent également le droit de suite sur la totalité du prix de vente, si elles sont signées de l'artiste et numérotées, et si leur nombre ne dépasse pas 25 au total

3°) Ce droit est calculé sur la moitié seulement du prix de vente, si les estampes définies dans le § 1° ne remplissent pas les trois conditions déterminées dans le § 2° (signature, numérotage, tirage à 75 exemplaires maximum), les épreuves d'essai ou d'état de ces estampes, ainsi que celles des estampes définies dans le paragraphe 2° si leur nombre dépasse 25 supportent également le droit de suite sur la moitié seulement du prix de vente.

Cette distinction est motivée par le fait que cette dernière catégorie d'estampes perd partiellement son caractère d'oeuvre graphique originale, et qu'il s'y substitue un caractère d'édition originale qui ne donnerait pas naissance au droit de suite.

Les soussignés déclarent reconnaître le caractère conventionnel du présent accord, qu'ils estiment être conforme à l'esprit du législateur, qui n'a pu ni vouloir refuser à l'artiste-graveur tout droit de suite sur son oeuvre, ni vouloir étendre ce droit dans sa totalité à des tirages multiples se plaçant davantage dans le cadre de la reproduction que dans celui de l'oeuvre graphique originale.

Les présentes conventions sont applicables à compter du 1er janvier 1953.

Fait à Paris le 15^{ème} janvier 1953 en 2 exemplaires et signé pour accord par tous les participants.

Montagna
Arnell Arturic
André...
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]



ART DEALERS ASSOCIATION OF AMERICA, INC.
575 MADISON AVENUE, NEW YORK, N.Y. 10022
Phone: (212) 940-8590

Comment Letter

RM 91-1

No. 11

ARGUMENTS AGAINST THE RESALE ROYALTY

1. The resale royalty is not a royalty. A royalty is a negotiated payment for the license of a copyrighted or patented article. The "resale royalty" is really a tax imposed on the seller by the government for the benefit of the artist; it is forced profit sharing.
2. There is a secondary market for the work of only a tiny percentage of all living artists and those artists who have died within the past 50 years. The resale royalty, therefore, will benefit only a tiny percentage of artists -- those which are most successful. It will also inhibit the sale of those works which are the most difficult to sell -- those of younger and less successful artists. The royalty amounts to a reverse Robin Hood; it takes from the poor to give to the rich.
3. When an artist's work is resold at a high price, the works which the artist has retained and has not sold become more valuable. In addition, the artist's prices for new work will rise. The artist, therefore, does share in the appreciated value of his or her work. The number of artists who are exceptions to this rule are few, and they will receive relatively little compensation from the resale royalty.
4. More than 99% of all works of art created in a given year do not appreciate in value; they decline, if they can be sold at all. Is it fair that artists share in the rare profit when they are not asked to share in the usual loss,
5. If the basic principle behind the resale royalty is correct, why is it limited to visual artists? Why not apply it across the board to designers, architects, craftspersons, etc.?
6. The resale royalty is unfair to collectors who take considerable risks in supporting younger artists. Although most of that work declines in value, the collectors are not indemnified by artists and cannot take a tax deduction because collecting is a "hobby" under the tax laws. With respect to the relatively small percentage of works which appreciate, however, the seller must pay federal and state income taxes, as well as an additional 7% tax to the artist. Collectors must also place the transaction on the public record by registering in Washington.

7. The 7% additional tax coupled with the registration requirement will have a chilling effect on the art market, particularly the market for those works which are normally the most difficult to sell, those of younger artists.

a) The commercial self-interest of dealers is in selling the works of their artists. In this respect, the interests of dealers and artists are tied together. If sales are inhibited by the resale royalty, dealers and artists both suffer.

b) Dealers, by virtue of their knowledge and experience are in the best position to understand the art market and clearly have a better knowledge of the market than the law professors and artists who claim that the additional 7% tax and the registration of sales will do no harm. All economic studies by disinterested economists support the position that the additional 7% tax will damage the market.

c) The resale royalty may inhibit purchases by those who buy only for social status or for investment. But the motives of buyers are not always clear. Although it is easy to talk about shaking out a few "undesirable" collectors, the loss of a few sales can mean a great deal for a young artist who sells relatively few works.

d) The resale royalty has not worked in California, where it is widely ignored. The resale royalty is based upon the French droit de suite. But the existence of this law has inhibited the development of the healthy art market which artists need in the small number of countries which have adopted it. Overregulation of the French art market has caused its decline. At the same time, England, which has a less vibrant general economy than that of France but which does not have the French system of art market regulation, has developed a very healthy art market.

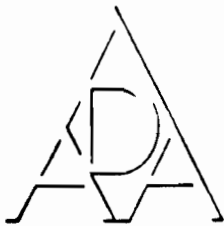
8. It is argued that the New York art market has flourished notwithstanding the high (8-1/4%) sales tax and that the imposition of a 10% buyers premium has not hurt auction sales. But these arguments miss the point.

a) The 8-1/4% sales tax is applicable only to works sold and delivered to New York residents. The relative number of such sales has actually declined in the past decade. The New York art market has flourished because of sales to non-New Yorkers.

b) The buyers premium is not like the resale royalty. It is really an allocation of the price which the buyer is willing to pay, partly to the auction house and partly to the seller. It is in effect in every major auction house throughout the world.

9. From our experience with the California statute and the New York sales tax, we are fearful that pressure will be brought to evade payment and that a black market in works of art will develop.

ART
DEALERS
ASSOCIATION
OF
AMERICA,
INC.



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Testimony of R. Frederick Woolworth
in opposition to H.R. 3221

Introduction

I am the President of the Art Dealers Association of America, Inc. ("ADAA"), an association of the nation's leading dealers in works of fine art. I appreciate the opportunity to appear today to testify in opposition to the Visual Artists Rights Act, H.R. 3221.

We are opposed to the so-called resale royalty and sales registration requirements in H.R. 3221. While we agree with the intent of the moral rights provisions, there are a number of substantive problems which are raised by the bill as presently drafted.

I have been an art dealer since 1969 when I became the principal owner of the Coe Kerr Gallery in New York City which specializes in 19th and 20th century American works of art. The gallery is active in the primary market, representing living American artists in the exhibition and sale of their work. We also are active in the secondary market, which involves the resale of works of art after they have been sold by the artist. I have

worked for many years on behalf of the artists who we represent. I have sold and bought many works of art and I have advised many collectors. My knowledge of the art market, like that of my colleagues, is not theoretical and is not academic. It comes, rather, from long experience in the field.

The Resale "Royalty" and Sales Registration:

The proposed resale royalty would require the owner of a work of art to pay the artist 7% of any profit resulting from the resale of that work, providing the resale price was more than \$1,000 and more than 150% of the original purchase price, and the artist has registered with the United States Copyright Office. The bill extends this right to the artist's heirs for 50 years after his death. It prohibits the artist from exercising his right to waive payment once the artist has registered. It mandates the public disclosure through registration in the Copyright Office of the details of sales of works of art subject to the bill.

The theory behind the proposed resale royalty is that visual artists should have a continuing economic interest in their work, the realization of which would depend upon resale or successive

resales of their unique creations. The proposal in this bill, however, is really a mandatory profit sharing arrangement or "resale proceed right," a term which may be closer to the French term droit de suite. Indeed, the concept of the droit de suite comes directly from French law.

The goal of enthusiasts for the droit de suite is honorable. After all, the argument that an artist deserves to share in the profits from his creations has seductive appeal. But, anyone who knows the dynamics of the art market realizes that this proposal will have a negative effect on the contemporary art market in the United States, and consequently, on contemporary American artists, particularly young artists who have yet to establish a real market for their work.

The fact is that, contrary to a widely held belief, the works of only a very small percentage of artists appreciate in value; perhaps 300 of approximately 200,000 working artists, have a secondary market for their work. As a consequence, the proposed resale profit sharing scheme would benefit only that very small group, which is comprised largely of already successful artists. Of course, no one can or should object to a

proposal which will benefit even a small group of artists unless there are countervailing considerations. In this case, the countervailing consideration is the damage which this scheme will do to the vast majority of other artists - - those who are less successful than the small number of artists who will benefit from the bill.

Mandatory profit sharing and sales registration, if adopted, will damage the market for works by living artists for a number of reasons:

First, mandatory profit sharing encumbers future sales, thereby depressing the art market. No matter how it is characterized, the effect of this provision is to impose an additional tax on a seller of a work of art, payable to the artist or to the artist's heirs. We have learned through our experience with other taxes that to impose a greater tax on one commodity, which can be readily substituted by another commodity, is to alter the pattern of demand. In any market, a reduction in demand inevitably will be followed by a reduction in the level of prices and the volume of sales.

According to Stephen E. Weil, Deputy Director of the Hirshhorn Museum and author of "Resale

Royalties: Nobody Benefits" (1978), "The most serious economic problem facing most contemporary artists is the lack of any broad initial market for their work ... What would benefit these artists most is an increase in the funds available to purchase works of art. This is the basic flaw of the resale royalty. It does not seek to increase these funds [but] ... by imposing a discriminatory tax on contemporary art, it would reduce such funds."

Moreover, collectors know that the acquisition of works by living artists is financially risky because so few of those works appreciate in value. When a collector suffers a loss, it is not even tax deductible. In the relatively few cases where there is a profit, the effect of mandatory profit sharing would be to impose an additional tax on top of the federal and state taxes. As a consequence, there would be a considerable financial inducement for collectors to concentrate on areas other than contemporary art where there are fewer risks and where no mandatory profit sharing is compelled. In fact, we have been told by collectors that they would move away from collecting contemporary art should the "resale royalty" be enacted.

The situation is exacerbated by the prohibition in the bill against a waiver by the artist of the right to share in the collector's profit on the resale of the work. Because of the financial risk involved, a collector might well request such a waiver when considering the purchase of a work by a young artist. But the bill prohibits the artist from making an informed choice; the government decides what is in the best interest of the artist. The inability of the artist to waive, even where a waiver would be helpful, will make sales more difficult and works against the interest of artists.

Collectors are further discouraged by the provision for public registration of sales. No one likes to put the details of his or her private purchases or sales on the public record. This is a plain invasion of the right of privacy. No one can reasonably deny that this distasteful provision will have an adverse effect on the art market.

The effect of the mandatory profit sharing provision is also to make it more difficult for dealers to handle the works of less established artists.

In representing an artist, the gallery makes every effort to promote and advance the artist's work and the artist's career. The Coe Kerr Gallery treats all artists alike. We spend approximately \$50,000 for each exhibition of one of our artists. But most of our exhibitions of works by living American artists are not profitable. Our commissions on sales of the work of promising, but unknown, artists generally are not sufficient to pay the costs of the exhibition. Those exhibitions are subsidized, in effect, by our ability to deal profitably in works of more successful artists. To the extent that a dealer's profit is reduced by the adverse effect on sales resulting from mandatory profit sharing, the more difficult it becomes to subsidize exhibitions of younger artists. In the case of smaller galleries, this could well mean a reduction in the number of unprofitable exhibitions of younger artists.

Proponents of mandatory profit sharing incorrectly compare it to the royalties paid to authors and composers. They note that novelists and composers collect royalties from their creations. Consequently, it is argued, painters and sculptors should receive "royalties" as well

when their works are successful. But this argument is inaccurate because novelists and composers receive royalties on infinite reproductions of their works. The so-called resale royalty provision really is a profit sharing arrangement on the sale of the original work. It is like requiring a percentage of the profit on the resale of a first edition to be paid to the author of the book.

The analogous argument would be that visual artists should receive royalties from each reproduction of the "image" of their work (e.g., pictures, post cards, posters, etc.). But artists and sculptors presently can, and in fact do, garner royalties from such reproductions.

An artist who wishes to receive a share of any profit gained upon resale of his works is free to incorporate such a provision in an original sales contract, as some artists now do. Some argue that only successful artists have the leverage to enter into such contractual arrangements. But this is the same limited group of established artists who would be the beneficiaries of the mandatory profit sharing provision. It is unnecessary to legislate such a provision and depress the art market when

these artists are already free to make such a contractual arrangement privately. In essence, the mandatory profit sharing provision imposes such an agreement whether or not the artist believes it desirable in a particular situation.

Artists can effectively "waive" their right to resale royalties only if they do not register with the Copyright Office. In that event none of their works would be subject to mandatory profit sharing. In essence, the proposal creates an all or nothing trap for artists and dealers alike. Once an artist registers the artist loses economic flexibility. Moreover, registration may make it more difficult for some artists to find dealers willing to handle their work. Some dealers may prefer to handle works of artists who are not registered because there are fewer problems in making sales.

It is also argued by the proponents of mandatory profit sharing that it is unfair to deny an artist a continuing economic interest in the artists work, and that it is further unfair to deny artists a share in profits which accrue because of their creative efforts. There are two theoretical and one practical economic responses to this

argument:

First, it should be noted that the proposal for a "continuing economic interest" in the work applies only when the work appreciates in value. No one urges such an interest in the more usual situation of a decline in value of a contemporary work of art.

Second, it is not unusual in our society for the purchaser of the product of the creative efforts of another to profit from those efforts. For example, architects, designers, doctors and lawyers all provide creative services from which their clients profit. If the mandatory profit sharing principal is valid for artists, why is it not valid for everybody throughout the society.

There is, additionally, a practical answer to the so-called fairness argument, and that is that in most cases artists do share in the appreciation in value of their work.

One of the responsibilities of a good art dealer is to provide advice to an artist about the proper management of his or her body of work. Generally, a dealer will advise an artist to hold back or "invest in" the artist's works, in the hope that the value of the works already in the market

will increase. Many artists hold back from selling either as a deliberate choice or because their work does not sell. When the market value of one of the artist's works increases, the value of the remaining body of works in the artist's possession also increases. Moreover, as a general rule the artist is further rewarded when resale prices increase; the artist receives higher prices for the work which the artist currently creates. In sum, virtually all artists benefit economically from an increase in the resale prices of their work even though they do not share directly in profits.

To understand how the art market functions, we need only look at the much publicized sale of artist Robert Rauschenberg's painting "Thaw" in 1973. I imagine you all are familiar with this incident, as it is, after all, the watershed case for all advocates of the resale royalty right.

In 1973, collector Robert Scull sold Robert Rauschenberg's painting "Thaw" for \$85,000 at auction. Mr. Scull had purchased the art work several years earlier for less than \$1,000; a price Mr. Rauschenberg's dealer, Leo Castelli, had established as the "fair market value" at that time. Mr. Rauschenberg reportedly confronted Mr.

Scull after the 1973 auction and exclaimed that he "had been working his ass off" for Scull to make that profit.

But, that landmark sale immeasurably helped Robert Rauschenberg's career. The market value of the art works he held in his studio or the dealer's gallery increased sharply the next day. The sale also established a new price level for the artist's subsequent work. As someone reportedly remarked, Scull made Rauschenberg a millionaire!

Art dealers in the United States today are extremely effective at marketing the works of contemporary artists. Without any government assistance, dealers have played a key role in making the United States the world's most important center for the exhibition and sale of works by living artists with resulting benefits to artists, dealers and many others. It has resulted in increased revenue to the government through additional taxes. Now we say to the government: You haven't helped us; please don't hurt us, and please don't hurt artists.

The advocates of mandatory profit sharing are ideologically committed to an abstract principle to the point that I fear that they are unwilling to

face the adverse consequences. Those of us who are experienced in the art market and who are equally dedicated -- if not more so -- to the well-being of artists know that the price to be paid for the abstract principle of mandatory profit sharing will be destructive to the art market and, consequently to the interests of the vast number of artists.

A cynic might claim that art dealers argue against mandatory profit sharing solely for reasons of their own self-interest. If this is true, then the self-interest involved is a fear of the loss of business, i.e. of sales of works by the artists we represent. And if our fears are justified -- as our experience tells us they are -- then the artists suffer even more than the dealers.

The droit de suite has had an adverse effect on the art market wherever it has been adopted. Paris, once the center of the world art market, is no longer a major center for contemporary art. The adoption of the law in California resulted in a dramatic set-back to what had been a growing art market. For example, Sotheby's, one of our two major auction houses, closed its Los Angeles branch when consignments of works of artists covered by the law dropped dramatically. The gallery

business and sales of works by contemporary artists in California also declined. The recent revival of the California market, mainly in the Los Angeles area, is directly related to the fact that reality has set in and the mandatory profit sharing law is now widely ignored.

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May 31, 1991

BY EXPRESS MAIL

Office of the Register of Copyrights
Copyright Office
James Madison Building
Room 403
First and Independence Avenue, S.E.
Washington, D.C. 20559

Comment Letter
RM 91-1
No. 12

Re: Notice of Inquiry on Resale Royalty Royalties for Works of Art (Docket No. RM 91-1, 56 F.R. 4110)

Dear Sir:

I am an attorney practicing in the field of copyright law at the firm of Sidley & Austin in Chicago, Illinois. I am also Vice President of Lawyers for the Creative Arts, a not-for-profit organization that provides pro bono legal services to needy artists. I have reviewed the "Comments on Copyright Office's Request for Information; Study on Resale Royalties for Works of Art" by Volunteer Lawyers for the Arts.* Subject to my comments below, I agree with these Comments.

The statement in Section 2 that the resale royalties for an artist are parallel to the royalty a writer receives when the public makes use of his or her book is not really accurate. As far as I am aware, under the "first sale doctrine" in the United States, after the first sale of a book, an author does not receive a royalty when that copy of the book is resold at later date.

I disagree with calculating the resale royalty rate according to the gross sales price of the artist's work, as described in Section 2. The overriding purpose of the resale

* The latest version of the VLA's Comments that I reviewed was labelled "second draft." My comments are based upon that draft and my references are to that draft. To the extent that my comments differ from the VLA's Comments as finally submitted to the Copyright Office, please disregard them.

Office of the Register of Copyrights
May 31, 1991
Page 2

royalty is to compensate an artist for the higher resale prices commanded by the artist's work in later sales (see paragraph 2 on page 1). It does not serve this purpose, nor does it make sense, for the artist to receive a royalty if, for instance, the artist's work is resold at a price that is the same or less than the price for which it was originally bought. This seems to me to be a windfall profit for the artist. Therefore, I believe that the resale royalty rate should be calculated according to the added value of the work, as described in footnote (6).

With regard to the issue of an administrative agency for the resale royalty system discussed in Section 5, the existing Copyright Royalty Tribunal may be an alternative to forming a new private artists' rights society. Although substantial administrative changes would be required for the CRT to assume such responsibility, it may be more efficient than starting a new enforcement society.

Also with regard to the administration of the royalty system, I believe that in order to make a royalty claim for a work, the artist should be required to register the work and the artist's name and address in a central registry. Such a registration system would provide a desirable degree of certainty as to whether a particular work is subject to the royalty and, if so, it could provide information as to how and where to locate the artist.

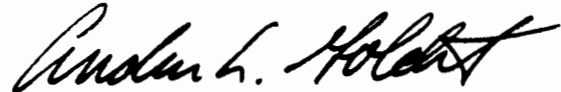
With respect to the assignability of the right to collect and enforce the resale royalty rights, addressed at the end of Section 5, I believe that an artist should be able to assign the right to his or her creditors. This could benefit an artist to the extent that the artist can use the present value of the resale royalty right to satisfy his or her debts.

Likewise, I disagree with the statement in Section 6 that the resale royalty rights cannot be attached by creditors. If the resale royalty is income for the artist, I see no justification to treat it differently from other forms of income or property, such as the work of art itself or the income the artist is entitled to receive from the original sale of the work.

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Page 3

As I stated above, other than for the foregoing comments, I support and agree with the "Comments on Copyright Office's Request for Information; Study on Resale Royalties for Works of Art" by Volunteer Lawyers for the Arts.

Respectfully Submitted,



Andrew L. Goldstein

cc: Lawyers for the Creative Arts
Volunteer Lawyers for the Arts

COMMENTS OF THE
AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS
ON COPYRIGHT OFFICE STUDY
ON RESALE ROYALTIES FOR WORKS OF ART

Richard Weisgrau
Executive Director
American Society of
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May 31, 1991

Charles D. Ossola
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Counsel for American Society
of Magazine Photographers

Comment Letter
RM 91-1
No. <u>13</u>

**COMMENTS OF THE
AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS
ON COPYRIGHT OFFICE STUDY
ON RESALE ROYALTIES FOR WORKS OF ART**

The American Society of Magazine Photographers (ASMP) is the nation's largest organization representing the interests of freelance professional photographers working in the fields of editorial, corporate, fashion and advertising photography. ASMP's 5,000 members reside throughout the United States and must meet exacting professional standards before qualifying for membership in the organization. Through its 35 chapters in 24 states, its headquarters in New York and its activities in Washington, ASMP has established a national presence on issues of concern to freelance photographers.

Many of these issues arise under the copyright laws, for they provide the legal basis by which photographers control and benefit from reproduction and distribution of their images. Over the last few years, ASMP has sought to preserve the copyright rights of its members through the courts and the Congress. ASMP vigorously supported the position of James Earl Reid in CCNV v. Reid, 490 U.S. 730 (1989), and testified in support of proposed legislation (S. 1253) to confine the work made for hire doctrine to the narrow limits intended by Congress in enacting the 1976 Copyright Act.

During Congress' consideration last year of the Visual Artists Rights Act of 1990, ASMP urged that photography not be excluded from the definition of a "work of visual art." ASMP

argued that photographers, no less than painters and sculptors, were every bit as deserving of the protection afforded by the new rights of attribution and integrity. This position was influenced by three principal considerations. First, photography is a means of creative expression that reflects the unique artistic perspective and skill of the photographer. Second, no basis in the copyright law or the arts exists to justify discriminating against photographers as authors and artists. Third, since photography is entitled to the full range of protection afforded by the 1976 Copyright Act, any amendment to that statute to provide for so-called "moral rights" should be consistent with the approach of the 1976 law.

When the Visual Artists Rights Act of 1990 was enacted, the definition of a "work of visual art" included a limited class of photography. Section 101(2) of the Act defines a "work of visual art" as "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."

Now that the Copyright Office is studying the feasibility of resale royalty legislation, ASMP's position is premised on the same considerations mentioned above with respect to the Visual Artists Rights Act. ASMP strongly supports the enactment of resale royalty legislation, and even more strongly urges the Copyright Office to include photography as a work of art for which resale royalties must be paid in the event a favorable

recommendation on such legislation is made to Congress. The basis for ASMP's position, together with its responses to the questions posed in the Copyright Office's Notice of Inquiry, are set forth below.

A. Impact of Resale Royalty Legislation

1. Would resale royalty legislation promote or discourage the creation of new works of art, and if so, how?

Based on its experience in the photography market over the last 50 years, ASMP believes that the enactment of resale royalty legislation would promote the creation of new works of art, and of new photographic images in particular. An established market presently exists for the purchase and resale of single or limited edition prints of photographic images, although the prices that such images command usually do not rise to the level achieved in the resale market for paintings. There are instances, however, in which the renown of the photographer makes his or her images highly sought-after in the resale market. For example, limited edition prints of Ansel Adams photographs such as "Moonrise over Sand" have sold in the \$80,000 range. Recently a record was set when a photograph of Charles Sheeler sold for \$160,000. The images of other photographers such as Man Ray, Walker Evans, Diane Arbus, Robert Ketchum, Winston Link, and Irving Penn are in great demand in the resale market.

Most artists, photographers included, suffer from a fundamental problem, which serves to illustrate why a resale royalty provision would be beneficial. At the time most

photographic images are created and sold, the photographer is generally unknown. As a result, the prices that the images command are usually low -- indeed are often in the \$100-300 range. Like painters, photographers achieve recognition in the marketplace, if at all, after many years of effort. If commercial success is finally achieved, the resale prices for the photographer's images created in the past dramatically increase. But again like painters, photographers do not directly benefit from the rise in resale prices. If they (and their heirs) were able to do so by means of a resale royalty right, a powerful incentive to create new photographic images would be established.

The copyright laws currently provide one set of incentives, but they exist only with respect to the reproduction and distribution of original and derivative images. Resale of tangible works of art is beyond the purview of the present copyright laws, and it is this gap which a resale royalty provision should fill. The promise of securing some benefit from a heightened market appetite for resale of single or limited edition prints would provide another incentive for photographers, many of whom struggle throughout their careers to keep working.

The ultimate beneficiary of a resale royalty scheme would be the public, especially in the case of photographic images. Photography is the one form of art to which virtually the entire public is exposed on a daily basis. The power of the photographic image to convey emotion, evoke a mood or generate a visceral response is well documented in publishing, advertising

and historical contexts. The public's appreciation for that power is, of course, enhanced by the widespread availability and use of cameras, which enable all persons to be photographers of one sort or another. Given this familiarity and appreciation for the photographic image, a public policy that offered additional incentives to professional photographers to create new works would well serve the public interest underlying the copyright laws.

2. How would the legislation affect the marketplace for works of art subject to such a requirement?

Resale royalty legislation would not adversely affect the marketplace for photographic images subject to such a requirement. There is simply no basis for presuming that the existence of a resale royalty would significantly inflate prices set by sellers of photographs, or would in any way discourage prospective buyers from purchasing photographs. To the extent that sellers responded to the resale royalty requirement by increasing prices of single or limited edition photographs, any such increase is likely to be incremental, and in any event would not have any appreciable effect on the market.

B. Scope of Resale Royalty Legislation

1. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover?

Resale royalty legislation should apply at a minimum to all categories of works covered by the Visual Artists Rights Act.

Of particular concern to ASMP is that photography be included in the categories of works covered by resale royalty legislation. If the fundamental purpose of such legislation is to enable the artist to share in the economic growth of his or her own work (growth attributable to the artist's reputation achieved through skill and hard work over an extended period of time), then photographers are no different from painters, sculptors or other fine artists who work in other media. Photographers, like these other artists, are unable to profit from the appreciation in the value of their own work -- which under current law is an opportunity reserved to the seller, through no talent or effort of his own. Since the increase in the value of a single photographic print or limited edition print over time is attributable only to the market's appreciation for the photographer's work, it is equitable to permit the photographer at least to share in the profits earned from that increase in value.

At a minimum, the class of photography covered by the Visual Artists Rights Act should be subject to the resale royalty requirement. But the Copyright Office should consider expanding the category of photographic images eligible for resale royalty benefits beyond the narrow confines of the limits prescribed by that law. There is no reason, for example, to restrict resale royalties to photographic images produced for exhibition purposes only. Many single or limited edition photographic prints on the resale market were not taken for exhibition purposes only, and

thus would not be eligible for resale royalties if the Visual Artists Rights Act definition is adopted. Given the purpose of the resale royalty provision -- to allow the artist to benefit from the increase in market value of his work -- it should make no difference whether the photograph was taken for exhibition purposes only, for a variety of purposes one of which was exhibition, or exclusively for some other purpose.

2. Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be?

ASMP believes that a threshold value is appropriate simply for ease of administration. Based on its knowledge of the photographic market, ASMP suggests that \$250 be adopted for threshold resale prices for photographic images. While this figure may not be appropriate for paintings, the market varies significantly depending upon the type of work of art involved, and photographs as a rule simply do not command the prices that paintings do in the resale market.

3. What should the amount of the resale royalty be and how should it be measured -- by a percentage of the reseller's profit, the net sales differential, or some other measurement?

ASMP believes that a reasonable royalty percentage should be 5%, calculated on the basis of the gross sales price as provided under California law. Ca. Civil Code § 986(a). The 5% figure would allow the photographer to secure a fair share of the

increase in value of the work. Calculation of the amount due on the basis of gross revenues is the only way to avoid the complexity and confusion that would inevitably be associated with any attempt to base the royalty on a percentage of the seller's profit. If the artist's royalties were tied to a percentage of the seller's profits, disputes over the amount and method of calculating those profits would be invited, and the system simply would not work.

C. Beneficiaries

1. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States?

The principal beneficiaries of the resale royalty requirement should be American artists. Irrespective of where a work is created, any artist who is a citizen of or resides in the United States should be eligible for resale royalties as long as his work is either sold in the United States or is sold abroad by a seller who resides in the United States. As for works created by foreign artists, it is fair to afford them resale royalty rights only if their countries grant reciprocal rights to American artists.

D. Term, Descendability and Retroactivity

1. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work?

The resale royalty requirement should be coextensive with the copyright in the work. Adoption of the copyright term is preferable to the limitation to the life of the author of the rights conferred by the Visual Artists Rights Act. Both resale royalties and copyright rights are intended in part to establish incentives that result in economic rewards appropriate to encourage creativity. Given this consistency of economic purpose, both resale royalty and copyright terms should be the same.

Similarly, just as copyright rights are descendible, so too should the resale royalty rights be passed to heirs, legatees or personal representatives.

2. Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?

ASMP believes that the resale royalty rights should apply to works created before the effective date. While any retroactive effect on past transactions involving existing works would be unlikely to pass constitutional muster, simply imposing the resale royalty requirement on future transactions involving existing works would not cause disruption of settled expectations. At worst sellers may respond by raising prices of existing works above the level they may have anticipated prior to enactment of resale royalty legislation. Conversely, application of the resale royalty requirement to existing works would have tremendous beneficial effects for American artists who presently

do not share in profits from resale of thousands of existing works of art.

E. Enforcement, Collection, Registration

1. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? Who should record the initial and subsequent sales price?

As a means of ensuring compliance with the resale royalty requirement, sellers of works of art should be required to report all transactions to the Register of Copyrights. The identity of the seller, the date of the sale, the amount of the selling price, and the amount of the royalty should be disclosed in the seller's filing in the Copyright Office. The initial sales price should be reported by the artist or his representative. Precedent for such a recordation system exists under section 113(d)(3) of the Copyright Act (section 604 of the Visual Artists Rights Act), which provides for the recordation of information related to a work of visual art incorporated into a building.

To be effective, the reporting obligation must have teeth. Accordingly, any resale royalty legislation should include a penalty provision requiring a seller to pay to the artist at least three times the amount of the royalty for failure to record a sale. The legislation should expressly authorize the artist to collect "treble royalties" from the seller in an action in federal court.

ASMP believes that central collecting societies would play a crucial role in a successful resale royalties scheme. Whether this function is performed by a single new collection society acting on behalf of all artists, or by various existing organizations representing the interests of artists, it is clear that individual artists cannot reasonably be expected to administer and collect resale royalties.

The collecting societies must be authorized to enforce the resale royalty rights of individual artists. The legislation should permit artists to assign the right to collect and enforce their resale royalty rights to private collection societies, and should authorize those societies to bring enforcement suits on behalf of their members.

2. How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?

An artist should not receive a resale royalty in circumstances in which a work of art is transferred by gift. While the recipient of the gift is "profiting" from the transaction in the sense that no compensation is paid, the seller is receiving at most a tax deduction as a result of the transaction. Under these circumstances, where no funds are actually changing hands, it would be unworkable to require the seller to pay a resale royalty.

The same result should not obtain in a barter transaction where the owner of the work of art is receiving

property in exchange for that work. As long as the value of that property meets the threshold \$250 level for photography, the owner of the work of art should be required to pay a resale royalty.

F. Waiver and Alienability

1. Should the right be waivable or alienable?

The resale royalty right should not be waivable by the artist if it is to effectively ensure his or her participation in the increase in economic value of a work over time. Most artists, including photographers, have little bargaining power, especially in the early stages of their careers. If the resale royalty right were waivable, the initial purchaser of a work of art would insist upon waiver of the right as a condition of the sale, especially if he or she planned to sell the work in the future.

For similar reasons, the resale royalty right should not be alienable. If it were, speculators would be encouraged to buy up resale royalty rights of promising artists, and the ultimate beneficiaries of the right would be investors rather than artists.

G. Preemption

1. Should the California law be preempted in the event of a federal law?

One of the advantages of a federal resale royalty system would be nationwide uniformity and applicability. If that advantage is to be realized, federal resale royalty legislation

should preempt the California law at least as to works that are covered by both legislative schemes.



**VOLUNTEER LAWYERS
FOR THE ARTS**

**Comments on Copyright Office's
Request for Information;
Study on Resale Royalties for Works of Art
by Volunteer Lawyers for the Arts**

**For additional information,
please contact: Nancy Adelson,
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Comment Letter	
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Comments on Copyright Office's Request for Information;
Study on Resale Royalties for Works of Art
by Volunteer Lawyers for the Arts

Volunteer Lawyers for the Arts ("VLA") is a New York not for profit organization which provides free art-related legal assistance and education to artists and arts organizations in all creative fields otherwise unable to afford such services. VLA's clients include visual artists working in all media, as well as some of their representative organizations. As will be discussed below, VLA supports the enactment of legislation which would permit artists to share in the proceeds generated by subsequent sales, or "resales", of their works. VLA's comments are endorsed by the following not-for-profit organizations which assist artists and art organizations in their geographical regions: The Connecticut Volunteer Lawyers for the Arts; Connecticut Advocates for the Arts; Cleveland Volunteer Lawyers for the Arts; Lawyers for the Crea-

tive Arts; Resources and Counseling for the Arts; St. Louis Volunteer Lawyers and Accountants for the Arts; Washington Area Lawyers for the Arts. (See Appendix for additional information with respect to these organizations).

As an artist gains public recognition, his or her work can generally command higher resale prices. Although profits realized on the resale of a work are due in large part to the artist's reputation, under current law the visual artist does not share in the economic benefit. This inequity can be redressed in part by the enactment of resale royalty legislation. Resale royalties are intended to provide an economic benefit for visual artists analogous to the royalty rights currently enjoyed by composers and writers.

VLA will address in turn the questions raised in the Copyright Office's notice dated February 1, 1991:

1. Would resale royalty legislation promote or discourage the creation of new works of art and if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?

VLA believes that the adoption of a national resale royalty policy would encourage the creation of

new works of art by recognizing that visual artists, like writers and composers, have an ongoing relationship with the fruits of their creativity and should share in the proceeds these works generate. Resale royalties should not hurt the American art market. The art market is already accustomed to incurring certain charges on the sale of artwork, e.g., commissions from consigners and buyer's premiums to auction houses. Moreover, a substantial number of collectors are art lovers who purchase art for more than anticipated economic gain - many enjoy the aesthetics of the artwork and wish to encourage the art world. VLA believes that the American art market can easily accommodate a modest resale royalty for the artists.

Resale royalty legislation should be uniform and on a federal level rather than on a state-by-state basis, so that sellers of artworks cannot circumvent the legislation by selling in a state which does not recognize resale royalties.

Moreover, if resale royalties were imposed on a state by state basis, it is possible that an artist in a resale royalty jurisdiction would have to discount his original offering price to remain competitive with non-resale royalty jurisdictions. If imposed at a

national level so that all sales were affected uniformly, resale royalties should not be viewed as a negotiable term which would result in decreased sales prices.

In light of the fact that many countries now recognize resale royalties, it is less likely that the imposition of a federal resale royalty would move the American art market outside of the U.S. Currently 28 jurisdictions recognize resale royalties, including: France, Germany, Italy, Belgium, Brazil, Spain, Chile, Hungary, Peru, Czechoslovakia, Turkey, The Phillipines, Uruguay, Portugal, Luxembourg, Monaco, The Congo, The Ivory Coast, Senegal and the State of California.(1)

In France, for example, studies have shown that droit de suite has been successful, and that the French art market has continued to thrive. According to data supplied by Adagp (Societe des auteurs dans les arts graphiques et plastiques), a private organization representing the interests of graphic and plastic artists in France, substantial resale royalties were

(1) The resale royalty right is currently applied systematically in France, Germany, Belgium and Hungary. Unpublished work by Liliane de Pierredon-Fawcett (Center for Law and the Arts, Columbia University School of Law), herein referred to as Fawcett.

collected in France from 1987 through 1990:

(FF in millions)			
1987	1988	1989	1990
11	26	51	80
(\$1.9 million)	(\$4.5 million)	(\$8.8 million)	(\$13.8 million)

The European Community has placed resale royalty rights legislation on its agenda and is likely to put increasing pressure on the United Kingdom and other non-resale royalty rights countries to conform and recognize these rights. VLA believes that U.S. recognition of resale royalty rights is appropriate and that such recognition will support the current collaborative European efforts.

2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and, if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured; by a percentage of the resaler's profit, the net sales differential, or some other measurement? Should the net sale differential be adjusted for inflation?

VLA believes that resale royalty legislation should be modeled on the French droit de suite, which assesses a percentage of the total gross price of each

sale, regardless of whether the work has increased in value since its last sale. Just as a dealer is paid a commission on the sale of a painting regardless of whether the painting sells for a higher or lower price than the previous sale, so, too, the artist should be paid a resale royalty on resale, regardless of whether the artwork is sold at a profit. A resale royalty right structured in this manner is clear, practical and easy to administer.

The underlying rationale is that the resale royalty payable to the artist is the artist's share of the economic exploitation of his or her work. The French droit de suite is parallel to the royalty that a writer receives when the public makes use of his or her book. Other analogies include mechanical royalty payments to composers for sound recordings and rental royalty payments to the authors of sound recordings and computer software.

The resale royalty right should apply to all original works of visual art which are afforded moral rights protection under the Visual Artists Rights Act of 1990. These include: paintings, drawings, limited edition sculptures, limited edition prints and limited edition photographs. In addition, the resale royalty

right should extend to illustrated manuscripts and works of art in glass (not affixed to real property). The royalty right should not extend to jewelry and the work of architects, where the materials have value independent from the artist's work.

California, which is the only state which has enacted resale royalty legislation, provides the artist with a 5% resale royalty on gross resale proceeds. French law provides a royalty of 3%. The vast majority of countries that have adopted a collection system based on a percentage of sales price have fixed the rate at 5% of the proceeds from the sale of the work.(2) VLA believes that a resale royalty rate of 5% of gross resale proceeds would adequately protect the economic rights of artists, without unduly affecting the art market.(3)

(2) Fawcett

(3) Another approach to be considered is that of "intrinsic value", or "valued added." The underlying rationale is that the increased value which is later recognized in a work has always been there and is due solely to the artist's creative labor. In order to compensate the artist adequately and to avoid unjust enrichment of the investor, the artist should share in the increased value. Countries which have adopted the value added approach vary widely on the percentage assessed, and generally have not been successful in implementing collection of resale royalties. Because of the complexities involved in this approach, VLA

For purposes of administration, it is advisable to have a threshold resale price before works will be subject to resale royalty provisions. Examples of existing thresholds (with resale royalties assessed against gross proceeds) follow:(4)

- (i) The California Resale Royalty Act - \$1,000
- (ii) The French droit de suite right - FF 100 (approximately \$17)
- (iii) The German droit de suite right - DM 100 (approximately \$60)

In their "droit de suite legislation harmonization project," the European Community provides for a minimum of \$250 EUA (about FF 1,500, or \$260).(5) VLA believes that \$750 is a reasonable threshold resale price. Payment of a resale royalty on works which sell for less than \$750 would impose an undue hardship on the administration of the resale royalty system without providing a sufficient benefit to the artist.

If resale royalties are paid on the gross sales price rather than on the increase in value, there

believes such a system should not be adopted in the U.S.

(4) Fawcett

(5) Fawcett

is little reason to adjust for inflation; the resale royalty would also be paid in inflated dollars.(6)

The resale royalty right should apply to all resales and exchanges, whether at auction or through dealers, galleries or museums.(7) Although difficult to monitor, private resales should also be covered.

In order to encourage dealers to promote sales and help build an artist's reputation, a provision similar to the California provision exempting intra-dealer sales within the first ten years of the initial sale (Ca. Civ. Code §986(b)(7)) is worthy of serious consideration.

3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications of such decisions? How is the issue handled in foreign countries and in California?

(6) If, however, the legislation were to provide resale royalties on added value, the depreciated value of the dollar at the time of resale should be factored in so that the true added value could be ascertained, which would complicate administration of the right. It should be noted that although the German droit de suite is based on the "intrinsic value" theory, in practice the resale royalty is a flat percentage of gross sales proceeds.

(7) However, dealer practices should be taken into account so that certain dealers and galleries are not penalized. If, for example, a dealer purchases a work from an artist rather than taking the work on consignment, the dealer's first sale should not be treated as a resale for purposes of resale royalties.

VLA believes that resale royalty legislation should be enacted to protect the American artist and to encourage and support art as a vital part of American culture. The resale royalty right should apply to visual artists who are either citizens or residents of the United States whose works are either (i) sold in the United States or (ii) sold outside of the United States by a seller who either resides in or is domiciled in the United States. The work need not have been created in the United States. Resale royalty rights should also be granted to those foreign visual artists whose countries provide reciprocal rights to American visual artists.

The French law extends droit de suite protection (i) to those foreigners whose countries give the reciprocal right to French artists and (ii) to foreign artists, although there is no reciprocity, who have participated in the life of French art and have been domiciled in France for at least five years (whether or not consecutive).

The California law protects an artist who, at the time of resale, is either a U.S. citizen or a resident of California who has resided in California for a minimum of two years, and applies only to sales

which take place in California or sales which take place out of California provided the seller resides in California.

4. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work? Should the right be descendible? Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?

For ease of administration and uniformity, VLA believes it would be fair for the duration of the resale royalty right to be coextensive with the copyright in the work. The Federal copyright duration under the Copyright Act of 1976 is the life of the author and fifty years after the author's death.

In France, the duration of the droit de suite is the life of the artist plus fifty years, which is the equivalent of the copyright duration. The California law creates the resale royalty right for the life of an artist and confers the right to the artist's heirs, legatees or personal representatives for an additional twenty years.

Although the right should be inalienable, except as discussed in Section 6 below, the right should be descendible in a manner analogous to copyrights.

VLA believes that the resale royalty right can and should be applied retroactively to works in existence at the date of enactment of legislation. Such a retroactive application would not unconstitutionally impair contracts or violate due process.(8) The public interest would be served by retroactive legislation by improving the welfare of artists who have already created works of art. Furthermore, given the volatility of the art market and the fact that art is generally purchased for its aesthetic qualities as well as for investment, it is unlikely that retroactive application of resale royalties would substantially disrupt the purchaser's expectations or would have altered the purchaser's decision to purchase the work of art. Retroactive application of the legislation would be consistent with the legislation's goal -- to encourage and support artistic endeavors as a vital

(8) See Morseburg v. Balyon, 201 U.S.P.Q. (BNA) 518 (C.D. Cal., Mar. 23, 1978). (The Ninth Circuit upheld the constitutionality of the California Resale Royalties Act which retroactively applies the obligation to pay royalties pursuant to contracts executed before the effective date of the Act.); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). (The Supreme Court upheld a Federal statute against a Fifth Amendment challenge that the statute retroactively required employers to pay compensation to workers who contracted black lung disease, although no such compensation was required by contract.)

part of American culture.

5. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? What are the experiences in foreign countries and in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?

VLA believes that it is essential to monitor and implement the collection of resale royalties through private artists' rights societies. These societies would play the same essential role in the art world as organizations such as A.S.C.A.P. and B.M.I. play in the music world. The French law is generally regarded as successful in large part because of existence of central private organizations, known as SPADEM and Adagp.(9) SPADEM and Adagp represent virtually all French artists, monitor most auction sales and collect royalties for their members.

In France, the private artists' societies entered into negotiations with The National Chamber of Auctioneers to establish rules for monitoring and collecting the droit de suite. In practice, every new membership in an artists' society is reported to The

(9) J.E. McInerney III, California Resale Royalties Act: Private Sector Enforcement, 19 U. of S.F. Law Rev. 1,4 (1984-85).

National Chamber of Auctioneers, which then informs its members. The artists' societies currently receive all sales catalogues and trade journals which enable the societies to monitor resales. Monitoring of the rare uncatalogued sale is conducted by sworn agents present at the sale.

When a members' work is sold, the private society completes a "memorandum of account," which contains the name of the artist, the title of the work sold and the date of sale. The memorandum is then sent to the auctioneer, who completes the form by filling in the sales price and returns the form, along with the payment, to the artist's society.(10)

Galleries, auction houses and dealers in the United States generally maintain accurate records, so that a system similar to the French collection system could easily be implemented here. There are already artists' rights societies in existence in the U.S. In addition, new organizations could be formed which could assume the responsibilities of monitoring and collecting resale royalties. These private organizations should be compensated for their essential role in

(10) Fawcett. A procedure still needs to be implemented in France for sales made through a dealer.

protecting the individual artist's rights by charging an administrative fee, to be paid directly from the resale royalties collected. The commissions charged by private collection societies generally do not exceed 15% of the resale royalties collected.(11)

VLA believes that the formation of private artists' societies to enforce the individual artist's rights will enable artists to have meaningful rights which would otherwise be hollow if the artists were required to monitor sales themselves. In addition, artists would be further empowered by the existence of a strong organization or organizations which would serve as a collective voice for artists who, individually, might not be heard.

To enable the private artists' rights societies to monitor sales of art works effectively, VLA believes that the legislation should contain a mandatory disclosure provision. The seller's failure to disclose sales information should be subject to a penalty -- perhaps three times the royalty owing (analogous to treble damages in antitrust actions).

Laws which do not contain a disclosure

(11) Fawcett

obligation generally have not been successful. The German resale law, for example, originally did not require the public disclosure of the seller's identity, so that the artist had no effective way to monitor the resales of his or her art. However, subsequent legislation in 1972 granted the author, through a collecting society, the right to demand disclosure of the name and address of the seller as well as the sales price. (The auctioneer or dealer may still refuse to release this information by paying the droit de suite).(12)

Similarly, the California law does not require public disclosure of a sale. In an effort to address the enforcement problems inherent in the statute, the California law was amended in 1982. The statute, as amended, allows the artist to assign the right to collect his or her resale royalties to another individual or entity.

Artists must be able to make limited assign-

(12) Legislation in 1983 has extended the German social security system to artists, requiring dealers to pay to social security 5% of the amounts they paid each year to living artists to cover the employer's share. Bild Kurst, the collection society which represents the majority of German artists, has entered into a contractual joint settlement with the art dealer organization requiring an annual lump-sum payment that covers the social security assessment and the droit de suite.
Fawcett

ments (not waivers) of the right to collect and enforce their resale royalty rights to the private enforcement and collection agencies. The formation of private agencies to enforce collection should be able to overcome one of the primary weaknesses of the California Act -- that is, the inability or unwillingness of individual artists to bring suit to enforce their rights.

In keeping with the theory that an artist is being compensated with a resale royalty for the economic exploitation of his or her work, the artist should not receive a resale royalty if a work of art is presented as a gift. However, if a work of art is exchanged in a barter transaction, the artist should receive a resale royalty if the fair market value of the property received in exchange for the artwork exceeds the threshold amount.

6. Should the right be waivable or alienable?

The right should not be waivable or alienable (except for enforcement and collection purposes discussed in Section 5, infra), since the right is designed to confer benefits to the artist upon the economic exploitation of his or her work over a period of time. The artist is generally in a poor bargaining

position on the initial sale. If the resale right were waivable, VLA believes that artists would consistently be pressured into waiving the right, thereby rendering the legislation ineffective.

The artist should also be protected from subsequently transferring his or her future interests for an unfair price due to the generally poor bargaining stance of artists. In addition, if the right is not transferrable, it cannot be attached by creditors.

7. Should the California law be preempted in the event of a federal law?

In the event of the adoption of federal resale royalties legislation conferring benefits to the artist equal to or greater than those currently provided by the California law, the California law would no longer be needed. Accordingly, the California law should be preempted upon the enactment of federal resale royalty legislation.

NOTE: Volunteer Lawyers for the Arts gratefully acknowledges the contribution of Debra R. Anisman, Esq., associated with the law firm of Davis Polk & Wardwell, New York, New York, in preparing this submission. These comments represent the viewpoint of Volunteer Lawyers for the Arts. They do not necessarily represent the position of any individual associated with that organization.

Appendix

1. The Connecticut Volunteer Lawyers for the Arts is a program supported by The Connecticut Bar Association's Committee on Arts and the Law and The Connecticut Commission on the Arts. (Address: 227 Lawrence Street, Hartford, CT 07106)

2. The Connecticut Advocates for the Arts is a non-profit lobbying organization dedicated to enhancing support for artists and the arts.

3. Cleveland Volunteer Lawyers for the Arts is a section of the Cleveland Bar Association of Ohio that provides volunteer legal services to qualified artists and arts organizations as well as speakers on arts-related subjects. (Address: c/o Cleveland Bar Association, 113 St. Clair Avenue, Cleveland, OH 44114-1253)

4. Lawyers for the Creative Arts is a not-for-profit organization which provides free arts-related legal assistance and education to artists and art organizations throughout Illinois. (Address: 213 West Institute Place, Suite 411, Chicago, IL 60610)

5. Resources and Counseling for the Arts is a non-profit organization based in St. Paul, Minnesota. Its mission is to assist Upper Midwest independent artists and non-profit arts organizations by helping them gain access to materials and resources that will improve their professional and business management skills. (Address: 416 Landmark Center, 75 West 5th Street, St. Paul, MN 55102)

6. St. Louis Volunteer Lawyers and Accountants for the Arts offers free legal and accounting assistance to income-eligible artists and small arts organizations. It also offers related educational programs in art law and business. (Address: 3540 Washington, St. Louis, MO 63103)

7. Washington Area Lawyers for the Arts (WALA) is a non-profit organization providing free legal services for low-income artists and arts organizations in the greater Washington area. More than 250 attorneys volunteer through WALA to provide counsel for arts related legal matters to artists of all creative disciplines. (Address: 1325 G Street, N.W., Lower Level, Washington, D.C. 20005)



May 22, 1991

Office of the Register of Copyrights
Copyright Office
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First and Independence Avenue, SE
Washington, DC 20559

Comment Letter	
RM	91-1
No.	15

Dear Sir/Madam:

This letter is in response to the solicitation of comments on the feasibility of implementing a resale royalty, which appeared in the Federal Register, Feb. 1, 1991. I am Professor of Law at Golden Gate University School of Law and have worked on arts legislation for more than sixteen years. In that connection, I wrote the original drafts of the bill which became the California Art Preservation Act, California Civil Code §987. That statute, together with those of the ten states which subsequently enacted their own moral rights legislation, ultimately provided the working model for the Visual Artists Rights Act of 1990.

I also am a member of the Board of Directors of California Lawyers for the Arts, a California non-profit organization devoted to providing legal services and information to artists and art organizations since 1974. California Lawyers for the Arts has strongly supported the California Resale Royalty Act, California Civil Code §986, and endorses the enactment of federal legislation which would guarantee visual artists a right to share in the proceeds from resales of their works of art.

By vote of the Board of Directors, at our last board meeting, May 4, 1991, I have been authorized to submit these comments on behalf of California Lawyers for the Arts.

GENERAL COMMENTS

First, while clearly the enactment of some form of resale royalty right would be an important step in the right direction, more is needed to place visual artists on a level playing field with other "authors" under the Copyright Act. Precisely because visual art is understood to have its primary appeal in its unique, original form, the limited market for reproductions of even popular images seldom generates any significant revenue for their authors. And, of course, visual art cannot be "performed". Rather, it is through their display that works of visual art find their audience and are enjoyed. Ultimately, it is this display, the exhibition of visual art, which ought to provide their creators with a royalty. Consider, Note, "Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite," 76 Cornell L.Rev. 510 (1991).

And, precisely because not all art will be displayed publicly, the resale royalty can serve an important function by supplying both a quasi-public opportunity as well as a convenient measure for a royalty to be paid to the artist on the occasion of such works of art moving from one private display to another. See, Goetzl and Sutton, "Copyright and the Visual Artists Display

Right: A New Doctrinal Analysis", 9 Colum. J.L. & the Arts 15 (1984).

Second, it should be pointed out that criticisms of the resale royalty have invariably been founded on a false supposition of the goals of such legislation. By what ever name, the Droit de Suite, the art proceeds right, or the resale royalty, is not intended to serve as welfare for the starving artist. Indeed, nothing in the whole of the Copyright Act is so intended. On the contrary, the resale royalty is intended to provide an incentive to create by assuring appropriate rewards for successful creators.

Thus, visual artists deserve the opportunity to gain economically from the use of their intellectual property on a par with writers, composers, and all other "authors". Note, no one has been heard to object to copyright royalties (or patent royalties, for that matter) on the ground that, almost by definition, they are inevitably paid to the most successful and, hence, wealthy authors.

COMMENTS IN RESPONSE TO SPECIFIC QUESTIONS

1. Would resale royalty legislation promote or discourage the creation of new works of art and if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?

A resale royalty alone is unlikely either to promote or to discourage the creation of new works of art. Although, to some

extent, it could be argued that its promise of future rewards might stimulate some artists to sell works early in their careers at lower prices than they might otherwise hope to receive, most likely the impact of a resale royalty would be de minimis. There is certainly no reason why the promise of a share of future value would deter any artist from creating new art works.

With respect to the effect such a resale royalty might have upon the marketplace for works, two issues are raised. First, it was argued in connection with the California Resale Royalty Act (California Civil Code §986) that imposing a resale royalty in one state would incline the market to leave that state. No evidence whatsoever has been adduced to support that. The art market in California seems to be thriving. A five percent royalty is not likely to affect a seller's choice of venue where that seller is already looking at auction commissions of twenty percent and upwards. That seller will look for the market where the demand for the particular artist's work is greatest.

Similarly, a prospective buyer of art is not likely to be much influenced in deciding upon an art purchase by the possibility that a resale of that work may require payment of a small royalty. Since such a small proportion of art works actually appreciate in value, the rational collector-investor is grateful for any increase. Note that when the major auction houses imposed an additional ten percent buyers premium, hardly a murmur of objection was heard from collectors.

2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and, if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured: by a percentage of the resaler's profit, the net sales differential, or some other measurement? Should the net sale differential be adjusted for inflation?

If a resale royalty right were to be implemented, it might take a variety of forms. Ideally, it would form part of a comprehensive display right. See, Goetzl and Sutton, Supra. However, at a minimum, it should apply to paintings, drawings, and other unique works of art including collages, assemblages, sculptures and monoprints. It could also be more broadly applied to sculptures, prints, and fine art photographs produced in limited edition multiples.

In theory, it could be asserted that a resale royalty should apply to any resale. Nevertheless, in response to obvious practical considerations, it is recommended that resales below a threshold dollar amount, perhaps as high as \$2,000, should be exempt. While some nations with a resale royalty assess a larger percent against only the appreciation in value, California applies a smaller percent (5%) against the entire resale proceeds. Although, California requires the resale price to exceed the price previously paid by the seller before a resale royalty becomes due, it is recommended that a five percent royalty be due whether the resale price exceeds the seller's purchase price or not. Not only would this formula make it far

easier to determine when a royalty is due, but it would also acknowledge that the mere fact there is any interest at all in a new display of the work of art, that is, a resale market, is a credit to the artist. In fact, whenever a work of art is resold, that work of art is simply moving from display to one group of people to a new display before another circle of viewers.

3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications of such decisions? How is the issue handled in foreign countries and in California?

While it is tempting to confine the benefit from such a resale royalty to United States citizens, it would be fairer to extend its benefits to U.S. citizens wherever they may be living and to aliens who have been residents of the United States for, perhaps, two years. See, e.g., California Civil Code §986(c)(1). Perhaps, sometime in the future, the benefit of the resale royalty could be extended to artists who are citizens of other nations in exchange for reciprocal rights in those countries being extended to our citizens under their laws.

4. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work? Should it be descendible? Should or can the right to be applied retroactively to works in existence at the date of enactment of any legislation?

There is no reason why the term of any resale requirement should not be coextensive with the duration of copyright.

Certainly, any right to royalties should become an asset of a deceased artist's estate. It is in the years after artists' deaths that the needs of their decendants are likely to be the greatest. That is also the time most likely to witness an appreciation in prices for those artists' works since no more can ever be created.

The resale royalty can be and should be made to apply to any prospective resales of works of art irrespective of when they were created or first sold. This will not deprive any collector of property without due process of law. See, Morsburg vs. Balyon, 621 F.2d 972 (9th Cir. 1980) cert. denied, 449 U.S. 983 (1980). There can be no vested property right in a rule of law. See also, In re Catherwood's Trust, 405 Pa. 61, 173 A.2d 86 (1961).

5. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? What are the experiences in foreign countries and in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?

The California Resale Royalty Act essentially leaves it to artists to enforce their rights to a royalty. This requires artists to keep abreast of sales of their works, a formidable task, made more difficult by the widespread reluctance of galleries to disclose to artists the identity of the collectors who bought their works. There is no systematic way for an artist to learn of a particular resale. By granting artists the right

to recover attorneys' fees, some additional incentive is offered them to monitor such resales and enforce their rights.

Another deterrent to the enforcement of the resale royalty right in the California experience has been artists' persistent fear of retribution by galleries when artists would be so bold as to seek to enforce their rights. Although this fear may not often be justified, it has proved difficult to overcome for too many artists.

Perhaps the most effective enforcement mechanism would be the formation of a private society modeled after the American Society of Composers, Authors, and Publishers or Broadcast Music, Inc. In such a case, an artist would transfer his or her rights to receive any resale royalties to that society, which would then undertake to monitor resales, collect royalties due, and then distribute such proceeds, after a modest deduction to cover its operating costs, to the artist.

6. Should the right be waivable or alienable?

This right to a resale royalty must be made non-waivable. Were it otherwise, artists would inevitably be compelled by the marketplace to waive these rights. When California amended its Resale Royalty Act in 1982, this precise question was addressed again with the result that the right remains non-waivable although a transfer for the purpose of collection (see paragraph 5 above) is now authorized. Note, artists are free to refrain

from enforcing their rights after such rights have accrued. However, artists should not be placed in a position where they can be pressured to relinquish these rights in advance.

7. Should the California law be preempted in the event of a federal law?

If a resale royalty right would become part of federal law, presumably through amendment to the Copyright Act, the California Resale Royalty Act should be preempted. However, to the extent that such a federal right provided less protection to artists than the California law, I would hope that the California statute would survive. That is, states should be free to choose to provide artists with greater protection than the minimum provided by federal law.

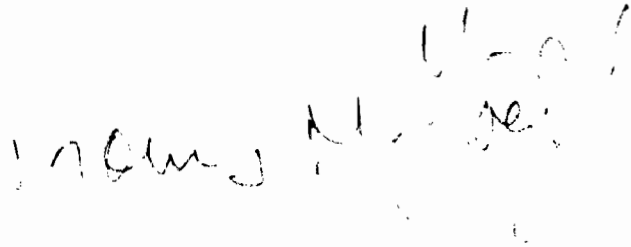
CONCLUSION

I am attaching herewith copies of (1) Goetzl and Sutton, "Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis", 9 Colum. J.L. & Arts 15 (1984), (2) H.R. 4366 (99th Congress, and (3) Goetzl, "The Kennedy Proposal to Amend the Copyright Law: In Support of the Resale Royalty" 7 Cardozo A & E L J 249 (1989). As explained in these articles, the resale royalty is not intended as a subsidy for impecunious artists. For its opponents to argue that a resale royalty only benefits successful artists misses the point. On the contrary, the resale royalty is conceived to provide a measure of parity for the creators of visual art vis-a-vis authors of other copyrightable

works who derive continuing economic reward from the sale of copies or the performance of their works.

On behalf of California Lawyers for the Arts, I urge that the Copyright Office recommend to the Congress that some form of resale royalty right be provided to visual artists. If I can be of any further service, please advise me. I shall be happy to assist in any way I can.

Sincerely,



Thomas M. Goetzl
Professor of Law
Member, Board of Directors of the
California Lawyers for the Arts

TMG:thk

Attachments: Goetzl and Sutton, "Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis"; H.R. 4366; Goetzl, "The Kennedy Proposal to Amend the Copyright Law: In Support of the Resale Royalty"

cc: Alma Robinson, Executive Director, California Lawyers for the Arts

Catherine Auth, Executive Director, National Artists Equity Association, Inc.

ART & THE LAW

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<i>Thomas M. Goetzl and Stuart A. Sutton</i>	

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Copyright and The Visual Artist's Display Right: A New Doctrinal Analysis

By THOMAS M. GOETZL and
STUART A. SUTTON*

I. INTRODUCTION

Under Article I, section 8, clause 8 of the United States Constitution, Congress is granted the power "[t]o 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."¹ Following the traditions of our English copyright heritage, Congress tailored the statutory law of copyright to function in a free enterprise system.² By granting an author³ the exclusive right⁴ to control disclosure⁵ and certain uses⁶ of his or her creations, the author

* Thomas M. Goetzl, Professor of Law, Golden Gate University School of Law; A.B. 1965 U. of California, Berkeley; J.D. 1969 U. of California, Berkeley, Boalt Hall. Professor Goetzl worked closely with California State Senator Allan Sieroty on drafting the California Art Preservation Acts (Civil Code §§ 987 and 989) and on drafting the recent amendment to California Resale Royalty Act (Civil Code § 986). Stuart A. Sutton, J.D. 1981 Golden Gate University School of Law; LL.M. 1982. U. of California, Berkeley, Boalt Hall.

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1. U.S. Const. art. I, § 8 cl. 8.

2. For a discussion of our reliance on English tradition and precedents, see *infra* text accompanying notes 24-57.

3. The term "author" will be used throughout this article in its constitutional sense meaning all creators of intellectual property which fall within the subject matter of copyright; the term "artist" will be used to denote visual artists—a sub-category of authors.

4. While the constitutional mandate speaks in terms of exclusive rights, the rights granted by statute have never been "exclusive" in the usual sense of the word. As a result of the "fair use" doctrine and through compulsory licensing of certain classes of copyrighted works, the author does not have "exclusive" control over even those uses of a work that fall within the ambit of statutory rights.

5. The right of "first divulgence" is the most important right provided the author under federal law. Justice Brandeis noted that the question of whether or not a creation of the intellect will be disclosed to the public by its author is deeply rooted in the right of privacy "as a part of the more general right of immunity of the person." S. Warren & L. Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 205 (1890-91). As such, an author's creation forms an intrinsic part of what Justice Brandeis termed the "inviolable personality." The core of the pivotal right of first divulgence stems from the society's moral obligation to protect what is nothing less than an extension of the author's personality. Thus, while statutory control of the right of first divulgence provides the author with needed leverage in the market place, the right has an even more important role as a cultural moral imperative.

6. Just as control over any specific use may not be exclusive as a result of "fair use" and compulsory licensing, the constitutional mandate has never been interpreted to include exclusive

is provided with bargaining leverage when he or she deals with the enterprises that bring the work to the public. By enhancing the artist's bargaining power, the law of copyright promotes the author's well-being, and, ultimately, the public welfare.⁷ Thus, giving the author control over specific events of economic value that he or she would otherwise lack the ability to control renders those events compensable and, presumably, encourages the creation of new works.

Under this marketplace model, copyright law has failed to provide most visual artists with economic incentives equal to those of artists working in the literary and performing arts.⁸ Few visual artists bother to copyright their creations.⁹ Instead, they benefit only from the initial sale of a single copy.

Most works of visual art cannot be exploited financially under existing American copyright law as effectively as works capable of performance or multiple reproduction. In order to correct this inequity, the artist's right to control the use of the expression embodied in his or her tangible works must be accepted and the visual artist granted both public and private rights of display.

Recognition of new exclusive rights in the use of the expression embodied in the tangible object is not unknown to American copyright law. The public performance of a work of dramatic literature has been a compensable event for the playwright under United States copyright law since 1856.¹⁰ Similarly, composers have enjoyed the economic benefits of controlling the public performance of music since 1897.¹¹ These grants of rights in public performance result from congressional recognition of the artist's right to exploit economically

control over all uses of a creative work. The law of copyright has been defined from its very beginning as a "bundle of rights" that grant the author control over an enumerated list of uses that the law wishes to render compensable; e.g., while the copying of a protected work for economic gain by an owner of a copy has been turned into a compensable event, the public display of that same work has not been made compensable under copyright.

7. It has been said that copyright's role in benefiting the author is secondary to its role in benefiting the public. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 78 L. Ed. 574, 104 S. Ct. 774 (1984).

8. See *infra* text accompanying notes 41-57.

9. See generally Sheehan, *Why Don't Fine Artists Use Statutory Copyright?*, 22 *Bull. Copyright Soc'y* 242 (1974-75). While the artist may retain all rights under copyright upon sale of the material object, 17 U.S.C. § 202 (1982), the right to reproduce copies is not very valuable without a statutory right of access to the work after it is sold. Millinger, *Copyright and the Fine Artist*, 48 *Geo. Wash. L. Rev.* 354, 363 (1980). Additionally, such rights can be rendered valueless through the right of an owner of a copy (even a unique original) to destroy that work at will—destroying rights in copyright as well. See *infra* text accompanying notes 18-23 for a brief discussion of an author's moral rights in the United States.

10. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856).

11. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897).

the aesthetic use of the expression embodied in a work even in the absence of multiple reproduction and vending of copies to the public.¹²

Even though works of dramatic literature were capable of reproduction in multiple copies in the same manner as the novel, the economic gain to be received from the right to control the printing and vending of the work was minimal when compared to the gain derived from controlling public performance.¹³ In order to avoid the inequity of limiting the author to an inappropriate measure while others freely exploited public performance, the playwright was granted the right to control the reproduction, vending and aesthetic use of the expression embodied in the copy.

The visual artist today faces problems similar to but more pronounced than those which historically faced the playwright. Yet Congress has failed to respond to the artist's plight by extending him or her an effective right to control the public, aesthetic use of the expression embodied in his or her works: a right of public display. The 1976 Copyright Act granted the visual artist a right of public display for the first time.¹⁴ However, that right is exhausted upon the first sale of the copy.¹⁵ It is an empty right for the visual artist. The artist, like any other property owner, already controlled public display of his work prior to sale as a part of the traditional incidents of property ownership. This incident of property ownership, like the right granted under the 1976 Copyright Act, also ceased upon sale of the copy. If the new grant of a public display right is to provide the visual artist with financial reward, it must create a right of public display which extends beyond the first sale. Such an extension should be structured as a compulsory license thus allowing the owner of the art work to exercise his or her traditional right of control over the copy and at the same time grant the artist a right to exploit his or her art work.

Furthermore, the visual artist should be granted a right of private display under federal copyright law. The right of private display would compensate the artist for the aesthetic use and enjoyment of his art work by the owner's family and acquaintances. While a right of private display would be new to the law of copyright, it is by no means new to the economic exploitation of intellectual property. Private display has played a major economic role where a copyright proprietor has had the bargaining strength in negotiations but lacked

12. See *infra* text accompanying notes 41-50.

13. See *infra* text accompanying notes 52-57.

14. 17 U.S.C. § 106(5) (1982).

15. *Id.* § 109(b).

a statutory private display right.¹⁶ As suggested for the right of public display, the interests of the private owner of the copy and the visual artist would be best accommodated through the use of a compulsory license.

The fact that private display exists in the marketplace but not under federal copyright is not to say that it lacks statutory precedent either here or abroad. Such a right of private display presently exists (in rudimentary form) in the European and California *droit de suite*—what is known in France as a “follow up right” and in this country as a resale royalty.¹⁷

In order to establish firmly a comprehensive doctrinal basis for these new rights, it is necessary to trace their historic roots. Such an historical excursion is more than an academic indulgence. In the four centuries of its development copyright law has been structured around two distinct models. Failure to recognize this has resulted in confusion in the academic literature which criticises the *droit de suite* and the doctrinal inconsistencies of the new federal right of public display.

The first model of Anglo-American law will be referred to as the Gutenberg Model. Its primary referent is the printing press (and analogous technologies). The purpose of the Gutenberg Model was to render compensable the printing and vending of aesthetically equivalent copies. The second model, the Follow Up Model, is completely divorced from the economics of the vending of copies, and instead protects the use of the expression embodied in the work. It renders display and performance compensable.

Distinct collateral bodies of law have evolved for each model as a result of the differing requirements, functions, and policy considerations of the two models. When these collateral principles are removed from the context of one model and are applied to the other model, disastrous consequences result. The most unfortunate results in light of the present thesis are:

- (1) The application of the exhaustion principle developed under the Gutenberg Model to the new federal right of public display (a right doctrinally consistent with the Follow Up Model) resulting in a right that serves little or no economic function at all for the visual artist; and
- (2) Failure to recognize that the compensable event of the *droit de suite* is the private display of a work of visual art (a function of the Follow Up Model) and not the resale of the copy (a function of the Gutenberg Model) resulting in the assertion by opponents

16. See *infra* text accompanying notes 142-44.

17. See *infra* note 81.

that the exhaustion principle forecloses such a right under federal law.

The following is a brief summary of *droit moral* and *droit de suite*, followed by an overview of the historical development of the Gutenberg and Follow-Up Models, their functions and collateral bodies of law. Many civil law countries of Europe recognize the artist's *droit moral*. Usually classified as a right of personality, moral rights are entirely distinct from patrimonial or property rights.

Copyright, for example, which is available to artists in civil law countries as well as in the United States and other common law countries, is a patrimonial or property right which protects the artist's pecuniary interest in the work of art. The moral right, on the contrary, is one of a small group of rights intended to recognize and protect the individual's personality. Rights of personality include the rights to one's identity, to a name, to one's reputation, one's occupation or profession, to the integrity of one's person, and to privacy.¹⁸

In countries which have embraced the artist's *droit moral*, economic rights under copyright function as an adjunct of the artist's broader moral right to control the use of what is in essence an extension of his or her personality.¹⁹ The artist's economic rights, in those nations which recognize the moral obligation of society to the creator of intellectual property, arise out of his or her right to control the use of the expression embodied in the art work he or she has created. The

18. Merryman, *The Refrigerator of Bernard Buffet*, 27 *Hastings L.J.* 1023, 1025 (1976).

19. *Id.* See also, Brandeis, *supra* note 5. While United States copyright law has focused on the author's right to control a limited bundle of uses, it has failed directly to address the equally significant area of the author's need to have protection against the misuse of the work. With the exception of minimal protections in limited contexts, see, e.g., *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976), an author's moral right to protect the integrity of a work after its alienation has not been recognized in the United States. *Id.* at 24; see also *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949). Thus, an owner of a copy of a work of visual art may distort, mutilate and even destroy the work at will—*jus utendi et abutendi*. Cf. Cal. Civ. Code § 987 (West Supp. 1983) (California Art Preservation Act makes actionable the defacement, mutilation, alteration, or destruction of a work of fine art).

This American (and English) reluctance to embrace the principle that artists' rights in their creations stem from the fact that those works are an inalienable aspect of the artists' personalities is most likely the result of the singular Lockean focus, under both statute and common-law, on copyright as a form of intellectual property. Although France and Germany have not escaped John Locke's conception of property as a result of labor in their copyright laws, they have tempered its influence to varying degrees with the Kantian perception of artistic creations as part of the artist's personality. F. Case, *Copyright Thought In Continental Europe: Its Development, Legal Theories and Philosophy—A Selected and Annotated Bibliography* 12 (1967).

Just as the right of first divulcation is rooted in that branch of the right of privacy granting protection from intrusion into the private aspects of one's life, see Brandeis *supra* note 5, the author's right to protect the integrity of the work after dedication to the public stems from the second branch of the right of privacy—the right not to have one's personality placed in a false

artist's moral right takes precedence over property interests of the art object's owner. In countries which observe the artist's moral right, the owner of a work of art may not alter it or in any way demean the work's integrity.²⁰ Similarly, under the principle of the *droit de suite*, the artist retains an interest in the work even after its sale and receives compensation on resale for the "new use" of the work whether by private parties or the general public.²¹

Courts in America have consistently refused to accept the principle of an artist's moral rights in his or her creations.²² As a result of the rejection of this basic principle, the United States has experienced a rudderless development of moral rights law. Such development has been shaped only by the prevailing economic realities of the marketplace, the developing technologies of reproduction of multiple copies,²³ and vague perceptions of the public good.

The failure to perceive the distinctiveness of the public and private rights of display has allowed opponents of the *droit de suite* to assert that the exhaustion principle forecloses such a right under federal law.

II. THE HISTORICAL DEVELOPMENT OF THE GUTENBERG AND FOLLOW UP MODELS OF COPYRIGHT LAW

Traditional scholarship has viewed copyright as a balancing of the tension between the author's property interest and the public's right of

light through the distortion of one's artistic creations. See Prosser, *Privacy*, 48 Cal. L. Rev. 383, 398-401 (1960).

The French moral rights protect only against the mutilation or alteration of a work and not against its destruction since only an existing work that has been distorted is capable of placing the author's reputation in a false light. *LaCasse et Welcome c. Abbe Quenard*, 1934 D. Jur. 385, [1934] Gaz. Pal. 11165 (Cour d'Appel. Paris). The California Art Preservation Act, Cal. Civ. Code § 987 (West Supp. 1983), prevents destruction as well as distortion of a work of fine art. Section (a) of the Act reveals, however, that the right is based not only on the traditional concept of protecting the artist's reputation (Prosser's second branch of the right of privacy) but also on the declaration that there is "a public interest in preserving the integrity of cultural and artistic creations." This public interest, independent of the artist's reputation, would justify a cause of action for the destruction of the work. Thus, while mutilation invades the privacy interest of the artist, destruction invades the society's right to have its culture and heritage protected. Under the new Cal. Civ. Code § 989, a cause of action may now be brought by select organizations on behalf of the public in California for the destruction of a work of art.

Representative Barney Frank of Massachusetts has introduced a moral rights bill in the United States House of Representatives. See H.R. 1521, 98th Cong., 1st Sess. (1983), 2 Copyright L. Rep. (CCH) ¶ 20,216.

20. See, e.g., *Buffet v. Fersing*, 1962 Recueil Dalloz [D. Jur.] 570 (Cour d'Appel, Paris).

21. For a general discussion of the *droit de suite*, see the secondary materials cited *infra* note 82.

22. *Granz v. Harris*, 198 F.2d 585, 588-89 (2d Cir. 1952); *Gilliam v. Am. Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976); See generally 2 Nimmer on Copyright § 8.21 [A] (1982).

23. See *infra* text accompanying notes 24-31.

access. This view is adequate when analyzing "fair use"²⁴ and the "idea/expression dichotomy,"²⁵ but proves unsatisfactory when attempting to reconcile an intrinsic sense that the author's property or other interest flows from the act of creation with a legal and political commitment to the free flow of ideas and a professed distaste for monopolies of any sort.

Much of the inability to affect the reconciliation stems from the failure to recognize that the history of copyright has been shaped not by two but by three interests: those of the author, the publisher, and the public.²⁶ Our perceptions of the equities and dangers of copyright monopoly shift depending upon whose interest is being examined. It is impossible to do justice to the author under copyright when the hidden source of our response might well be shaped by the problems presented by the publisher's interest and the common-law and statutory rules that have evolved to meet those considerations.

A. *The Gutenberg Model: The Publisher's Right to Reproduce and Vend*

1. The Nature of Copyright Under the Gutenberg Model

From its formal inception under the charter of the Stationers' Company in 1557²⁷ until 1856 in the United States, when Congress granted

24. For the statutory embodiment of "fair use", see 17 U.S.C. § 107 (1982).

25. 17 U.S.C. § 102(b) states:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, or embodied in such work.

26. Particular focus has been brought to the nature and the historical consequences of the relationship among these interests by Professor Lyman Patterson in his book, *Copyright In Historical Perspective* (1968).

27. "Copyright appears to have been first recognized as a species of private property in England in 1558." Warren & Brandeis, *supra* note 5, at 195 n.1. For a comprehensive history of the Stationers' Company, see C. Blagden, *The Stationers' Company: A History, 1403-1959* (1960); Patterson, *supra* note 26, at 1-179; A. Pollard, *Shakespeare's Fight With the Pirates and the Problems of the Transmission of His Text*, 1-25 (2d ed. 1920).

The incorporation of the Stationers' Company, while beginning the formal history, did not mark the first actual use of copyright in England. Richard Pynson was granted the first printing "privilege" by the Crown in 1518. R. Bowker, *Copyright: Its History and Its Law*, 19 (1912). "[F]rom 1518 onward came a stream of royal grants of privileges and patents for the exclusive printing of particular books or books of stated kinds." B. Kaplan, *An Unhurried View of Copyright*, 3 (1967).

playwrights a right of public performance,²⁸ the nature of copyright was exclusively a publisher's right to print and vend.

It was originally designed as a mechanism for the stabilization of the English book trade and remained a statutory scheme for regulating unfair competition between competitors in the printing and vending of copies.²⁹ The basic thrust of copyright through its first three centuries was to guard against misappropriation of the publisher's interest in the "copy"—an interest resulting from the publisher's investment in the purchase of the author's manuscript and its preparation for reproduction on the press.

Even after copyright was first recognized as an author's right in 1710,³⁰ the *character* of the right remained unchanged. The author, like the publisher, was granted nothing more than the right to print and vend the copy.

The major force in the expansion of protections under the Gutenberg Model was an advancing technology that increased the classes of subject matter appropriately within the ambit of the Model. The evolution of photographic and photomechanical processes in the latter half of the nineteenth century as well as the development of sound and video recording technologies in the twentieth century have made application of the model more difficult.³¹ Nevertheless these techno-

28. In 1856 Congress granted performance protection to dramatic works in the Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856).

29. See generally, Patterson, *supra* note 26.

30. 8 Anne, c. 19 (1710). It was not until the second half of the eighteenth century that the House of Lords established the doctrine "that authors had always possessed a natural right to the fruits of their labor." A. Pollard, *supra* note 27, at 4; see Millar v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (1769); Forrester v. Waller, 4 Burr. 2331, 98 Eng. Rep. 216 (1741); Pope v. Curl, 2 Atk. 342, 26 Eng. Rep. 608 (1741). It was to be several centuries before the conception of an author's personal, inchoate rights began to evolve into *les droits moreaux* in the European civil law countries.

31. The difficulties presented under the Gutenberg Model by technological evolution is best illustrated by examining *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1908). The Supreme Court held in *White-Smith* that the manufacture of songs on player piano rolls did not constitute copies within the meaning of the copyright laws because the music was not eye readable. Even though Congress quickly rectified the basic inequity presented in *White-Smith* by giving the author the right to control the incident of mechanical recording in the 1909 revision, Rev. Stat. ch. 320, 35 Stat. 1075 (1909), it did not say that a reproduction can be a copy even though not eye readable. As a result, the Court's Gutenbergian definition of a copy remained to plague the courts until the 1976 revision. The problems were most pronounced in the broadcast and recording industries where phonograph records, videotape, and fixed radio broadcasts could not qualify for copyright protection because they were not eye readable and therefore not acceptable for registration. B. Kaplan & R. Brown, *Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Work* 10-11 (3d ed. 1978). Protec-

logical changes have not appreciably altered the basic nature of the Gutenberg Model as a publisher's right aimed at preventing the copyrighted work's misappropriation by a competitor in the manufacture and vending of copies.

2. The Scope of Rights Under the Gutenberg Model

The scope of the right to print and vend under the Gutenberg Model was shaped by the market interest of the publisher. That interest extended no further than the vending of aesthetically equivalent copies of the author's underlying work. Thus the Model offered limited rights and protections. For example, for more than the first three centuries of the Model's history, an alteration of the form of the work either through abridgment or translation into another language was not considered an infringement of copyright³² because such a use did not jeopardize the publisher's interest in the sale of copies printed unabridged or in the original language. Protection of the publisher from unfair competition did not require granting rights in the content of the work but only in its specific form.³³

Furthermore, since the function of the right was to protect the vending of the publisher's printed copies from unfair competition by a

tion was gradually extended to these new uses of the author's expression, e.g., protection was extended to sound recordings in the Sound Recording Amendment of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391. Congress effectively overruled *White-Smith* in the 1976 revision by defining copies as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (1982).

32. For a brief discussion of early English cases that refused to extend protection to abridgments and translations, see Comment, *Derivative Works and the Protection of Ideas*, 14 *Geo. L. Rev.* 794, 796 (1980); see also Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 *Vand. L. Rev.* 1161, 1188 (1975).

33. "In deciding infringement cases, the arrangement of words on a page was of more importance to courts than the meaning of the words. A change in the form thus produced a different work even though the content was substantially the same." Comment *supra* note 26, at 796. This basic tenet of the Gutenberg Model is aptly illustrated by the words of Justice Aston in *Millar v. Taylor*, *supra* note 24, 4 *Burr.* at 2348, 98 *Eng. Rep.* at 226:

. . . I am of the opinion that the publication of a composition does not give away the property in the words; but the right of copy still remains in the author; and that no more passes to the public, from the free will and consent of the author, than an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it; oppose its sentiments; but he buys no right to publish the *identical work*. (emphasis added). See also 4 *Burr.* at 2310, 98 *Eng. Rep.* 205 (remarks of Justice Willes). Thus abridgments and translations of a copyrighted work did not constitute infringement, the publisher (and later the author) was protected only from direct piracy.

competitor, the printing (copying) of a work was not originally considered an infringement absent a vending.³⁴ Private copying for private use was not actionable prior to 1909 unless that copy entered commerce through a vending.³⁵

Finally, since the publisher's copyright interest in a particular copy was secured through the protection of its sale, his interest in that specific copy naturally terminated with its vending. After the sale, the purchaser of the copy was free to use the copy as he or she pleased, destroying it at will, selling it, or, (prior to 1909) copying it for his or her private use.³⁶ Control over the vending of the work past its first sale could not be justified under a law rooted in misappropriation. Such extended control would protect a copyright owner from much more than the danger of unfair competition and would infringe economic freedoms too greatly.

Exhausting the publisher's interest in the vending of a particular copy with its first sale guaranteed that the right would not conflict with the copy purchaser's traditional incidents of property ownership. Had the publisher's interest not terminated, it would have been impossible to reconcile coextensive rights to vend the copy in both the publisher and the owner of the copy. As Professor Nimmer has stated, "[A]t this point the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and restraints on alienation."³⁷

The first sale doctrine (the exhaustion principle), as shaped by the publisher's interest under the Gutenberg Model, was judicially incorporated into federal copyright by the United States Supreme Court in 1908.³⁸ The Copyright Act of 1909 statutorily integrated the exhaus-

34. Patterson, *supra* note 32, at 1187-88.

35. *Id.* The writers do not intend to imply that since 1909 copying without a vending is necessarily actionable. See *Sony Corp. of Am. v. Universal City Studios, (U.S.)* 78 L. Ed. 574, 104 S. Ct. 774; reh'g denied 80 L. Ed. 2d 148, 104 S. Ct. 1619 (1984).

36. *Id.*

37. 2 Nimmer on Copyright § 8.12[A] (1980).

38. The lower federal courts had ruled on the right of a copyright proprietor to control the resale of a work that had passed out of his or her possession as early as 1894. See, e.g., *Harrison v. Maynard, Merrill & Co.*, 61 F. 689 (2d Cir. 1894); *Henry Bill Publishing Co. v. Smythe*, 27 F. 914 (C.A.S.D. Ohio 1886). The issue was not addressed by the Supreme Court until *Bobbs-Merrill Co. v. Strauss*, 210 U.S. 339 (1908).

In *Bobbs-Merrill*, the copyright proprietors (Bobbs-Merrill) had printed the following legend on the title page of the novel *The Castaway*: "The price of this book at retail is one dollar net. No dealer is licensed to sell at a less [sic] price, and a sale at a less [sic] price will be treated as an infringement of the copyright." *Id.* at 341. Bobbs-Merrill argued that the copyright proprietor,

tion principle as an appropriate restriction on the right to vend.³⁹ Section 109(a) of the 1976 copyright revision continues this restriction.⁴⁰

B. *The Follow Up Model: Evolution of Rights in Performance and Display*

1. Failure of the Gutenberg Model

From its very inception, the Gutenberg Model ill-served the theatrical and visual arts. The Model's focus on the compensable event as the

in strict analogy to the rights of a patentee, had the right to control the retail price of the copies that had been sold to a retailer under the author's right to "vend" granted by Section 4952 of the Act of 1873.

Rejecting the *Bobbs-Merrill* patent analogy due to the inherent difficulty in applying patent precedents to copyright issues, the Court construed the statute as exhausting the author's right to vend a specific copy upon its first sale. *Id.* at 349-51. The Court did not preclude the copyright proprietor's right to secure such a restriction under contract. *Id.* at 350.

39. In the congressional hearings on the 1909 revision of the Copyright Act, the basic issue of *Bobbs-Merrill* was a matter of great concern to librarians and the second hand book sellers. Early legislative proposals did not expressly embody the Supreme Court's *Bobbs-Merrill* limitation. See, e.g., Bills to Amend and Consolidate the Acts Respecting Copyright: Arguments Before the Committee on Patents of the Senate and House of Representatives, Conjointly on the Bills S. 6330 and H.R. 19853, 59th Cong., 2d Sess. 16 (1906). Thus, there was concern that the new legislation would be interpreted as granting the author a total right to control the disposition of copies as they occurred seriatim. The opponents feared that such a grant would give the author the power to prevent extending library lending rights and to prevent second hand sales. See, e.g., *id.* at 68-69 (statement of H.C. Wellman); *id.* at 75-77 (statement of William C. Cutter); *id.* at 85 (memorandum of R.R. Bowker); *id.* at 90-91 (statement of Robert U. Johnson); *id.* at 114 (statement of H.N. Low); *id.* at 148 (statement of Ansley Wilcox); *id.* at 158-60 (statement of Arthur Steuart); *id.* at 190-91 (statement of George H. Putnam); *id.* at 404 (memorandum of the Committee on Copyright and Trademark of the Association of the Bar of the City of New York).

The fears of the librarians and book sellers were allayed by the addition to the Act of 1909 of the clause that "nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained." Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1075 (1909). The lower federal courts have adhered to the holding of *Bobbs-Merrill* thus firmly establishing the "first sale doctrine." See, e.g., *United States v. Atherton*, 561 F.2d 747, 750 (9th Cir. 1977); cf. *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1980), discussed *infra* at note 141. It has come to be viewed as an adjunct to the common-law aversion to restraints on alienation. 1 *Nimmer on Copyright* § 103.3 (1976); see, e.g., *C.M. Paula Co. v. Logan*, 355 F. Supp. 189, 191 (N.D. Tex. 1973); *Blazon v. Delux Game Corp.*, 268 F. Supp. 416, 434 (1965).

40. 17 U.S.C. § 109(a) (1982). For a general discussion of the first sale doctrine, see 2 *Nimmer on Copyright*, § 8.12 (1982); N. Boorstyn, *Copyright Law* § 4.4 (1981); see also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 79-80, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5693-94 [hereinafter cited as House Report].

The scope of the exhaustion principle embodied in § 27 of the Act of 1909 was not expanded in § 109(a) of the Act of 1976. According to the House Report, "[s]ection 109(a) restates and confirms the principle" as established under § 27 of the Act of 1909, and states that "the outright

vending of numerous aesthetically equivalent copies, while particularly suited to the literary arts, (and to a lesser extent the musical arts) proved either useless or of minimal value to those art forms whose economic potential lay in performance, or display or which adapt poorly to multiple reproduction.

The Theatrical Arts

When a sixteenth century English playwright wrote a play, it was generally purchased outright by an acting company and became its exclusive property.⁴¹ Publication of the play in multiple copies for distribution to the public was considered "bad box office" by the companies and therefore an event to be avoided unless the players were in financial distress.⁴² Therefore, while the acting companies frequently registered their plays with the Stationers' Company, it was not to enable them to vend copies but rather to prevent others from obtaining and distributing pirated publications that would adversely affect ticket sales.⁴³

sales of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition." House Report at 79. This last phrase should not be read as an expansion of the meaning of § 27 or § 109(a) past the parameters of *Bobbs-Merrill* to which it refers.

41. H. Gibson, *The Shakespeare Claimants* 265 (1962). A playwright could expect to be paid approximately six pounds for the manuscript of a new play. M. Marchette, *Shakespeare of London* 118 (1949).

42. G. Harrison, *Introduction to Shakespeare* 205-06 (1939). This is not to imply that the acting companies were totally indifferent to the money to be earned from the sale of a manuscript to a printer. In fact, Alfred Pollard suggests that such a sale might have been one way of recouping the initial cost of the manuscript. A. Pollard, *supra* note 27, at 36-37. Even though there is surely some validity to Pollard's observation, it must be tempered by the fact that only fourteen plays from the entire Shakespeare canon were published during Shakespeare's lifetime. Harrison, at 193.

43. In addition to registering a work with the Stationer's Company to prevent piratical publications, the acting companies were also able to appeal to the aid of their patrons. Pollard, *supra* note 27, at 35. The same political and religious strife that prompted Crown censorship and the chartering of the Stationer's Company resulted in the censoring and control of the acting companies and the playwrights.

Elizabeth dealt with the nuisance by an Act declaring all players of interludes to be rogues and vagabonds and liable to the unpleasant penalties provided those poor folk, unless formed into companies under the protection of a Privy Councillor, who would be answerable for their good behaviour. . . .

[O]ne company of players was under the protection of the Lord High Admiral, and another of the Lord Chamberlain, and . . . these were two of the most important members of the Privy Council, which . . . exercised supreme authority over printers and printing. . . .

Id.

On August 18, 1856, Congress granted "to the author or proprietor of any dramatic composition, designed or suited for public representation . . . the sole right . . . to act, perform, or represent the same" ⁴⁴ This Act was in response to such economic factors as those that had shaped the English theater. ⁴⁵

While the playwright maintained the right to "print and publish the said [dramatic] composition" under the Gutenberg Model, ⁴⁶ the public performance right was the first statutory provision protecting the right to exploit the aesthetic use of the expression embodied in a work absent the manufacture of multiple copies or the transfer of material property.

Though the performance right marked a new direction for copyright, it was influenced by three centuries of experience under the Gutenberg Model. The basic premise that the function of copyright was to protect against unfair competition was expressed in the public performance limitation placed on the right. Private performance of a dramatic work did not fall within the ambit of the new performance right because it was not regarded as a use of the expression that was

44. Act. of Aug. 18, 1856, ch. 169, 11 Stat. 138.

45. Not much had changed in the manner of exploiting the use of the expressions of a playwright between Shakespeare's time and the revision of the United States Copyright Act in 1909:

There has been a good deal of discussion regarding subsection 9(d) of Section 1 [Act of 1909]. This Section is intended to give adequate protection to the proprietor of a dramatic work. It is usual for the author of a dramatic work to refrain from reproducing copies of the work. He does not usually publish his work in the ordinary acceptance of the term, and hence in such cases never receives any royalties on copies sold. . . . If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law.

H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909). Congressional sensitivity to the nature of dramatic art was again evinced when it did not include dramatic performances within the "for profit" restrictions of the Copyright Act of 1909, ch. 320 § 1(d), 35 Stat. 1075 (1909). "The law considers that persons attending a performance of a dramatic work will not ordinarily attend a second performance of the same work and therefore unauthorized performance, though gratuitous, will cause the author monetary loss, by depriving him of a potential audience." S. Ladas, *The International Protection of Literary and Artistic Property* (1938), cited in Study Prepared for the Senate Committee of the Judiciary, Subcomm. on Patents, Trademarks, and Copyrights, 86th Cong., 1st Sess. (1960), Study 16, at 83.

This particular awareness of the needs of the playwright's art is further illustrated by the care with which the 94th Congress approached the delimitation of limits on the exclusive right of performance in 17 U.S.C. § 110 (1982). While nondramatic and musical works are exempt throughout the section, only face-to-face classroom instruction without the use of actors, id. § 110(1), a single transmission to a blind audience of a work published ten years earlier, id. § 110(9), and communication of a dramatic performance over a receiver of the kind normally used in the home where no direct charge is made for the viewing, id. § 110(5), are exempt where the material used is dramatic.

46. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.

either in direct competition with authorized public performances or likely to reduce demand for public performance of the work. Nonetheless, there was and remains, no "for profit" limitation in the Act. It was assumed that demand for public performances of dramatic works, unlike musical compositions, would be reduced by any public performance whether or not for profit.⁴⁷

When a performance right was finally granted to musical compositions in 1897,⁴⁸ the right was similarly limited to public performances. A "for profit" limitation was added to the right of public performance of music in the Act of 1909.⁴⁹

Under present copyright law, the characterization of an event as either private or public is qualitative and not quantitative—the number of people experiencing the event is generally irrelevant. A performance before one hundred close acquaintances at a social gathering listening to an orchestra play a copyrighted song would be considered a private performance under Section 101. A similar performance before a single couple in a restaurant would be considered a public performance.⁵⁰

From its beginning, the new follow-up right had one aspect that marked a total departure from the Gutenberg Model. The first sale doctrine was not applicable. The new right to exploit the use of the expression embodied in a specific copy of a work survived the sale of the copy.⁵¹ Thus, the economic value of the aesthetic use of the expression was effectively separated from the economic value of an individual copy in which that expression was embodied.

The Visual Arts

It has long been recognized that most works of visual art are not protected under the Gutenberg Model:

[C]onventional copyright protection though meaningful to writers, may be irrelevant to painters and other creators in the graphic arts. The prime (though not the only) protection afforded by copyright is the right to control reproductions of a given work. Since economic exploitation of the written word is mainly realized through repro-

47. See *supra* note 45.

48. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

49. Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075.

50. See, e.g., *Herbert v. Shanley Co.*, 242 U.S. 591 (1917).

51. The exhaustion principle embodied in § 27 of the Act of 1909 applied only to the right to vend the particular copy while all other rights survived the vending.

duction, the right to control the making of copies constitutes the writer's key to the economic fruits of his creative efforts. Not so with the artist. Reproductions of works of art have not in the past, and probably still do not to any great extent, represent a meaningful source of income for most artists.⁵²

The primary reason for this failure of the Gutenberg Model to provide economic incentive is that most works of art are incapable of reproduction in aesthetically equivalent copies.

As a result, the right to distribute copies of a work granted under section 106(3) of the Copyright Act of 1976 rings hollow. The right to distribute the single original is secured through traditional common-law concepts of property. Copyright protection as economic incentive under the Gutenberg Model adds virtually nothing of value to the artist.

Unlike the right of public performance, there was no right of public display prior to the copyright revision of 1976.⁵³ Any power to exploit economically the display of a work was derived from ownership of the copy.

The Copyright Act of 1976 included control of the incident of public display as one of the enumerated rights.⁵⁴ With the exception of

52. 2 Nimmer on Copyright § 8.22[A] (1980).

53. 17 U.S.C. § 106(5) (1982).

54. Section 106(5) grants the author the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display that copyrighted work publicly."

Spain is the only nation in the foreign community to have a display royalty as part of its copyright law. Article 9, *Ley de la Propiedad Intelectual* (Jan. 10, 1879) states: "In the absence of an agreement to the contrary, alienation of the work of art shall not imply alienation of the right of reproduction, nor the right of public exhibition of the said work."

Of course, it cannot escape notice that the new English Public Lending Right Act, 1979, c. 10, would be classified as a private display right under United States copyright law. The English act "provides for a right to be conferred on authors, by virtue of which payments will be made in respect of loans of their books from public libraries." *Id.* (Preliminary Note). 17 U.S.C. § 101 states: "To 'display' a work means to show a copy of it . . ."; therefore, the reading experience is a "display" of the material read, and the taxing of a surcharge on the library experience is nothing less than a compulsory license based on a limited right of private display.

Such a library lending right is analogous to a right of private display for visual artists measured by a resale royalty. In other words, the experiential event, the reading of the book, is the compensable event for the writer, and that event is measured by the act of lending. The experiential event of private display of a work of visual art is similarly measured by a more public event, the resale of the copy.

Similar lending acts have been passed in Denmark (*Law of March, 1946*), Sweden (*Royal Decree of 17 June, 1955, modified to June 1961*), Norway (*Law of 10 December, 1947*), and West Germany (*Copyright Statute, Law of 9 September, 1965*).

granting additional protections to the copyright proprietor against utilizations of multiple images through the use of electronic media,⁵⁵ section 109(b) of the 1976 Act terminates the right of public display upon alienation of the copy.⁵⁶ The House Report on the 1976 Act states: "The . . . intention is to preserve the traditional privilege of the owner of copy to display it directly, but [sic] to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected."⁵⁷

A close examination of the section 109(b) exemption and the above quoted text from the House Report reveals a deep doctrinal inconsistency. While the right of public display is an analogue of the right of public performance in that both rights render compensable the aesthetic use of the expression embodied in the copy, the public display right is not granted for the purpose of advancing the inherent right of the artist to benefit economically from aesthetic use. Rather its express design appears to be to protect the copyright proprietor where the market for multiple copies has been placed in jeopardy through expansive display by a legitimate owner of a copy. For example, textbook publishers feared electronic display of text which would destroy the market for their books. Thus, the new right is inappropriately structured around the requirements of the Gutenberg Model. For example, the right terminates upon sale of the copy and thus closely parallels the first sale doctrine. Furthermore, the right merely augments the Gutenberg Model and does not institute any radical change.

55. 17 U.S.C. § 109(b) states:

Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

56. Section 109(b) adopts the general principle that the lawful owner of a copy of a work should be able to put his or her copy on public display without the consent of the copyright owner. As in the cases arising under § 109(a), this does not mean that contractual restrictions on display between a buyer and a seller would be unenforceable as a matter of contract law.

The exclusive right of public display granted by section 106(5) would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or a display case, or indirectly, as through an opaque projector. Where the copy itself is intended for projection, as in the case of a photographic slide, negative, or transparency, the public projection of a single image would be permitted as long as the views [sic] are "present at the place where the copy is located."

House Report supra note 40, at 79-80.

57. *Id.* at 80.

The inevitable consequence of this doctrinal confusion is that precisely those works of visual art which cannot be exploited as multiple originals in the first instance cannot benefit from the new right of public display based on the Gutenberg Model. Thus, even with the new right of public display, copyright continues to fail as economic incentive to the visual artist working in unique originals. If the congressional purpose was to extend the copyright proprietor's right to control display beyond the sale of the copy where such display adversely affects exploitation under the Gutenberg Model, then it is paradoxical that such an extension should not be considered even more appropriate where the Gutenberg Model does not function in the first instance.

As the next sections of this commentary will demonstrate, both equity and justice require that the new right of public display be structured in a manner consistent with its kindred right of public performance. Such a structuring will require modification of the inappropriate exhaustion principle embodied in section 109(b) of the Copyright Act of 1976 thus allowing the new follow up right to survive the first sale of the copy.

III. EXPANSION OF THE DISPLAY RIGHT UNDER FEDERAL LAW

The congressional grant of control over display extends only to public uses.⁵⁸ The statute defines a public display as one that occurs in "a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . ."⁵⁹ Conversely, where the display takes place within a family context or at a place closed to the public, it is deemed private and hence not compensable under existing federal law.

Such a distinction between public and private aesthetic use of the expression embodied in a copy cannot be supported doctrinally. While appropriate measures of private use may be required by practical considerations to be substantially different from those developed to measure public use, the nature of the right of private display remains qualitatively unchanged from the right of public display. Thus, the answer to whether the public display right should be extended beyond the sale of the copy and whether there should be a federal right of

58. 17 U.S.C. § 106(5) (1982).

59. *Id.* § 101.

private display depend on two interrelated questions: (1) Can such extensions be justified as a matter of public policy; and (2) Can meaningful measures of the compensable event be developed that will accommodate the artist's interest and other societal values.

A. *Public Display*

One need only know the number of attendees at the recent Pablo Picasso exhibit in New York City at the Museum of Modern Art⁶⁰ or the Edward Hopper retrospective which toured the United States to grasp the economic significance of the artist's right to participate in public display. Without this right, the education and aesthetic indulgence of the public is being subsidized by the artist or the artist's estate. Monroe Price, in his seminal article on the *droit de suite*, observed: "In actual fact, a substantial part of the costs of the exhibition may be borne by the artist, not the dealer or museum."⁶¹

At a gallery exhibition the artist often pays for publicity, framing, hanging and opening night festivities. He may be charged a percentage of the rent. At museum exhibits, in particular feature exhibitions, the artist absorbs the cost of creating the work precisely for the exhibition. Proceeds from catalogue sales and special entrance fees go to the museum only.

Not only is the artist being denied a public display compensation fee in the context of art galleries and museums, but recently amassed corporate collections, many of which number thousands of pieces and amount to millions of dollars,⁶² are events calling for compensation of

60. It is estimated that between 1.2 and 1.5 million people saw the Picasso exhibit at the Museum of Modern Art, New York, N.Y., "[a] crowd 25 times the size of Napoleon's Army." Kramer, *Now That The Show is Over*, New York Times, Oct. 12, 1980 § 2 (Arts & Leisure) at 41, col. 1.

61. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 Yale L.J. 1333, 1353 (1968). In answer to the claim that such exhibits increase the value of the painter's later works, Price states:

Lawyers, architects, aerospace companies, all furnish some "free" services for promotional purposes. But the artists and sculptors, the institutionalization of the process of uncompensated exhibition has deprived them of the choice as to whether a show of his works should be income producing or not—and if so, the way in which he should modify his demand for payment.

Id. at 1355 n.57.

62. BankAmerica "began seriously to amass" its corporate collection in 1979; a collection that grew to a magnitude of 3,200 pieces in a period of three years. "BankAmerica found that collecting art seriously would combine asset management with an improvement of the working

the artist.⁶³ Through their art collections, the corporations combine asset management with improved working conditions and enhanced public image.⁶⁴ These works are often on display in public and communal areas and not just in the executive suite.⁶⁵ Nonetheless, where these works are displayed is unimportant because analysis of the federal definition of copyright reveals that the corporate use is public. The displays are either in areas open to the public or are beyond the "normal circle of the family."⁶⁶

The trend in corporate acquisitions is to be encouraged; however, such encouragement need not be at the expense of a public display right for the artist.

Extending the right of public display past the vending of the copy would make the right doctrinally consistent with the follow up right of public performance. Nonetheless, such an extension must be carefully balanced against the owner of a copy's traditional incidents of ownership and the public interest in access to the work.

Balancing Interests: Incorporeal, Tangible and Public

The tangible interests of the owner of a copy have traditionally been subject to the author's incorporeal copyright interest.⁶⁷ The ex-

environment and at the same time would enhance the organization's public image." The BankAmerica collection is dwarfed by the massive 7,000 works in the pioneering collection of the Chase Manhattan Bank. The value of the Chase Manhattan collection has nearly doubled to \$7.5 million. Brooks, *Confessions of the Corporate Art Hunters*, ARTnews, Summer 1982, at 108-09.

63. See Price *supra* note 61, at 1342; Brooks, *supra* note 62, at 108.

64. See Brooks, *supra* note 62, at 109.

65. *Id.* at 110. The 6,000 art objects in the Security Pacific Collection are on display in public and communal areas.

66. 17 U.S.C. § 101 (1982).

67. 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. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object. . . . 17 U.S.C. § 202 (1982). It should be noted that prior to the 1976 revision of the Copyright Act, the courts presumed that the sale of the original work included all of the author's copyright interests in the absence of an express reservation (or at least proof of a clear intention to reserve) those rights. See *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), cert. denied, 309 U.S. 686 (1940); *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E.2d 863 (1949); *Parton v. Prang*, 18 F. Cas. 1273 (C.C. Mass. 1872) (No. 10,784); *Pushman v. N.Y. Graphic Soc'y, Inc.*, 287 N.Y. 302, 39 N.E. 249 (1942).

This judicial position, in the framework of the Gutenberg Model, illustrates the strength of the exhaustion principle and its relation to copyright as a printer's right—a financial interest in the

tent of an author's copyright can be either exclusive or subject to compulsory licensing.⁶⁸

The follow up right of public performance is exclusively under the control of the copyright proprietor.⁶⁹ For example, the owner of a copy of Arthur Miller's *Death of a Salesman* must seek a performance license before he or she can present a theatrical production of the play. Similarly, the owner of a copy of sheet music or a sound recording must obtain the permission of the copyright proprietor in the underlying music before it can be performed publicly. Of course, inherent in exclusivity is the power to deny altogether use of the work under the right.⁷⁰

Under compulsory licensing, the intangible interests of the copyright proprietor are not exclusive because he or she cannot deny anyone access to the work. Along with the fair use doctrine⁷¹ and the idea/expression dichotomy,⁷² compulsory licensing is a principal weapon in the congressional arsenal protecting the public interest in access to artistic works.⁷³ Through the device of compulsory licensing, the public may have access to the work in apparent derogation of the

particular copy of a work that was exhausted upon sale. See *supra* text accompanying notes 32-40.

68. Under the 1976 revision of the Copyright Act, the following compulsory licenses were created or carried over from the 1909 Act: (a) 17 U.S.C. § 115 (1982) (nondramatic musical works), (b) *id.* § 116 (jukeboxes), (c) *id.* § 118 (noncommercial broadcasting), (d) *id.* § 111 (secondary transmissions).

69. With the exception of totally exempting certain public performances (*i.e.* non-profit, educational, religious) under 17 U.S.C. § 110 (1982), all public performances are exclusively within the control of the copyright proprietor under § 106(4).

70. It is this total ability to deny access that provides the author with economic leverage in the market place.

71. The "fair use" doctrine is embodied in 17 U.S.C. § 107 (1982).

72. See 17 U.S.C. § 102(b)(1982).

73. The first compulsory license was the mechanical recording license. Before its enactment, a congressional report stated:

It was at first thought by the committee that the copyright proprietors of musical compositions should be given the exclusive right to do what they pleased with the rights it was proposed to give them to control and dispose of all rights of mechanical reproduction, but the hearings disclosed that the probable effect of this would be the establishment of a mechanical-musical trust. It became evident that there would be serious danger that if the grant of right was made too broad, the progress of science and useful arts would not be promoted, but rather hindered, and that powerful and dangerous monopolies might be fostered which would be prejudicial to the public interests. This danger lies in the possibility that some one company might secure, by purchase or otherwise, a large number of copyrights of the most popular music, and by controlling these copyrights monopolize the business of manufacturing the [*sic*] selling music-producing machines, otherwise free to the world.

H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909). The company feared was the Aeolian. Study Prepared for the Committee on the Judiciary (Senate), Subcomm. on Patents, Trademarks, and

author's right to control access. As slight recompense the user must pay the author for the use.

In structuring an expanded public display right, a balancing of interests between artist and proprietor could be achieved through the use of compulsory licensing fees established by statute.⁷⁴ Through the device of compulsory licensing, the owner of the copy would be able to display publicly a copyrighted work at will. In return the owner would be required to pay the artist a statutorily established licensing fee. This fee might, in appropriate instances, be passed on to the public.

The right of public display coupled with use of a compulsory license would not limit public access to the work in any way. In fact, under such a scheme, access could be denied only by the owner's exercise of his property rights and not by the artist's exercise of copyright. Furthermore, just as the artist could not prohibit a public display, neither could he or she require it.

Thus, through elimination of the doctrinally inappropriate first sale doctrine embodied in section 109(a) of the Copyright Act of 1976,⁷⁵

Copyrights, 86th Cong., 1st Sess. (1960), Study 5, at 11 [hereinafter cited as Senate Study]. Thus, once the copyright proprietor of a song made a sound recording, anyone else could make a recording under § 1(e)(a) of the 1909 Act upon payment of a set licensing fee.

It should not escape notice that this first compulsory licensing provision was designed to combat enterprise monopoly (i.e. the aggregation of many copyrights). It has since been criticized as unnecessary in light of the Sherman and Clayton Antitrust Acts. Senate Study, *id.*, Study 6, at 113.

74. The writers acknowledge that compulsory licenses, while solving some basic issues in accommodating the interests of the author with first amendment values, are not without problems of their own. For example, compulsory licenses tend to distort the free enterprise system by dictating the author's initial bargaining position. See Senate Study, *supra* note 73, Study 6, at 106-07; see also Note, Moral Rights and the Compulsory License for Phonorecords, 46 Brooklyn L. Rev. 67, 80-81 (1979-80).

Professor Paul Goldstein suggests that an extension of compulsory licenses to all rights under copyright could have dire consequences. Goldstein, Preempted State Doctrines. Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright, 24 U.C.L.A. L. Rev. 1107, 1136 (1977). Where compulsory licenses are allowed for the manufacture of copies (as with the mechanical recording license) product development is influenced resulting in a reduction of "the range of differentiation among work products." *Id.* at 1135, 1136 n.118. This flattening effect diserves the constitutional purpose to promote the progress of the arts. *Id.* This influence over product development is greatly reduced where the license is for a follow up right such as the performance of copyrighted works by cable systems; exclusivity of rights still operates in the development of the work's content and the manufacture of copies. *Id.* The same would be obviously true of a display right.

For a discussion of the constitutionality of compulsory licenses in terms of the author's exclusivity under the constitutional mandate, see Shaffer, Are the Compulsory License Provisions of the Copyright Law Unconstitutional? 2 Com. & L. 1 (1980).

75. 17 U.S.C. § 109(a) (1982).

the disparity in economic incentives between the visual artist and his or her colleagues in the performing arts would be significantly reduced.⁷⁶

Under an expanded public display right, an equitable measurement of aesthetic use of works of visual art by public entities must be based, like the public performance right, on a measurement of demand and availability. Once the right has been granted, enforcement intermediaries—perhaps along the lines of the performance rights societies such as BMI and ASCAP⁷⁷—could develop proper measures.⁷⁸

The artist should not be required to support the education of the public out of his or her pocket. The means of developing financial mechanisms to accommodate the visual artist's incorporeal interest in public display and the tangible interest of the public institutional

76. As was observed *supra* note 54, the reading experience is also a private display. It would have to be determined whether a right of private display subject to compulsory licensing would be limited to works of visual art or be extended to the literary arts thus creating a library lending right.

77. ASCAP came into being after the granting of a performance right in music. Sherman, *Incorporating of the Droit de Suite into United States Copyright Law*, 18 *Copyright L. Symp.* (ASCAP) 50, 66 (1970).

78. This article will not propose any specific mechanism or measure for a new right of public display; however, it is necessary to note that the structure of the measures will undoubtedly be complex because of the varied situations in which works of visual art are displayed. The complexity of the problem should not be allowed to negate the justice of the right.

As a possible means of approaching the complex issue of appropriate measures, the writers suggest that a flexible format for establishing licensing fees be utilized. For example, in the present Congress, a bill has been proposed that will place private audio and video recording under compulsory licensing by taxing recording machines and tape. H.R. 1030, 98th Cong., 1st Sess. (1983), 2 *Copyright L. Rep.* (CCH) ¶ 20,214 (companion bill S. 31, 98th Cong., 1st Sess. (1983), 2 *Copyright L. Rep.* (CCH) ¶ 20,206). Under § 119(c)(2)(A), (c)(3)(A) of the proposed bill, appropriate royalty fees are determined in two ways, through voluntary negotiation between a group of negotiators representing copyright proprietors and video tape and machine manufacturers, and through compulsory arbitration binding all those that did not elect to participate in the voluntary negotiations.

Under a flexible negotiating and arbitration scheme, representatives of major displayers (corporations and public museums etc.) could be segregated according to use for negotiations and arbitrations that reflect the particular realities of the various entities.

Although designed for a different purpose, a workable public exhibition fee schedule has been successfully used in Canada since 1968, and in Great Britain since 1979. Under this schedule, the fees are set as a function of the type of exhibition (e.g., regional, national or international; juried or nonjuried; touring or nontouring), the number of artists involved, and the duration of the exhibition. CARFAC, *Recommended Minimum Exhibition Fee Schedule*. Canadian Artists' Representation *Le Front Des Artistes Canadiens*, 1980 rev. 1982 (pamphlet). It has been confirmed that this schedule is successful in collecting fees from exhibition. Interview with Pat Durr, National Representative, CARFAC (Feb. 1984).

owner⁷⁹ of copy are uncertain. The granting of an expanded display royalty for works of visual art would require modification of the economic structure of our public museums and galleries. While imposing rights in public display would increase the burden on public institutions already faltering under financial strain, this fact cannot be allowed to silence the basic inquiry: who should pay the piper? If the public museums and galleries are in financial difficulty, the blame surely does not fall on the artists whose works are exploited. Since the birth of the public institutions of aesthetic consumption, the artist has been their primary benefactor. For a solution to the economic problems of these institutions, society should look elsewhere. Achieving financial stability for these public institutions will require a careful balancing of financial responsibility among actual users, government, and private sector sources.⁸⁰

B. *Private Display*

Because of the inability of the Gutenberg Model to serve as economic incentive to visual artists, various civil law countries of Europe as well as countries in Africa and South America and, most recently, the State of California have enacted some form of *droit de suite*. *Droit de suite* has become known in this country as the visual artist's "resale royalty."⁸¹ Under this right, the visual artists share in the proceeds from the resale of their works.⁸²

79. Development of financial mechanisms for paying new copyright fees is of greater concern with the public museums and non-commercial galleries than it is with corporate displayers. While it is easier to accept a corporate surcharge where the presence of works of visual art enhance the working environment and thus promote productivity as well as corporate image, the problem is more sensitive where publicly supported institutions, already in financial difficulty, are concerned.

80. Performers have never been required to provide free support for the public education: the performing artists' contribution of their talents to the culture has been considered sufficient. When additional funds for operation have been needed, performing arts management have turned to private sector contributions, government grants, and increased box office revenues before reducing the performers' salaries or asking them to perform free.

Whether there is a correlation between the nature of economics in the performing and visual arts and the fact that the performing arts escaped nineteenth century structuring as educational institutions is purely a matter of conjecture.

81. The writers will use the terms *droit de suite* and resale royalty interchangeably. "Royalty legislation, in one form or another, is in effect in France, West Germany, Italy, Belgium, Portugal, Czechoslovakia, Yugoslavia, Turkey, Tunisia, Morocco, Algeria, Luxembourg, Chile and Uruguay." Duffy, *Royalties for Visual Artists*, 11 J. Beverly Hills B. 27, 28 (Jan./Feb. 1977).

82. See generally, Boyers, *Protection for the Artist: The Alternatives*, 21 Copyright L. Symp. (ASCAP) 124 (1975); Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law*, 6 Bull. Copyright Soc'y 94 (Dec. 1958).

Some commentators and at least one litigant⁸³ have argued that federal law forbids extending such a right under state law to American artists. Both the proponents of these arguments, and their opponents have implicitly assumed that the *droit de suite* must be tested against the Gutenberg Model. This false assumption is the result of historical failure to appreciate another complementary model, the Follow-Up Model. The Follow-up Model (recall from earlier discussion how this model created the right of public performance for playwrights) explains and justifies the *droit de suite*.

The following section of this article will discuss the *droit de suite* as a right of private display under the Follow-Up Model rather than as an extension of the right to vend under the Gutenberg Model.

1. The Equitable Position of a Right of Private Display Under Federal Law

The *droit de suite* assures artists a more complete ability to enjoy the rewards of their creations. It is based on the premise that visual artists should have the same right as other authors to exploit fully the popularity of their creations.⁸⁴

[T]he *droit de suite* would protect the right of the artist to exploit the most valuable process of the perception of his work—viewing. The *droit de suite* achieves this end by providing that, before another may be enabled to make use of the work for his own pleasure, the artist shall receive a reasonable compensation.⁸⁵

Recognition of the *droit de suite* began in France in 1920 and spread to other countries.⁸⁶ The California Resale Royalties Act⁸⁷ is

reprinted in 11 Copyright L. Symp. (ASCAP) (1962); Price, *supra* note 61 at 1333; Schulder, Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States, 61 Nw. U. L. Rev. 19, (1966-67); Sherman, *supra* note 77; Soloman & Gill, Federal and State Resale Royalty Legislation: What Hath Art Wrought?, 26 U.C.L.A. L. Rev. 322 (1978); Comment, The Applicability of the Droit de Suite In the United States, 3 B.C. Int'l & Comp. L. Rev. 433 (1979-80) [hereinafter cited as Applicability of Droit de Suite]; Comment, The Droit de Suite Has Arrived: Can it Thrive In California As it Has In Calais?, 11 Creighton L. Rev. 529 (1978) [hereinafter cited as In Calais].

83. *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980), cert. den. 449 U.S. 983 (1980).

84. Hauser, *supra* note 82, at 98.

85. Sherman, *supra* note 77, at 83.

86. See Duffy, *supra* note 81, at 28 n.3; see also, Applicability of Droit de Suite, *supra* note 82, at 437 n.13.

87. Cal. Civ. Code § 986 (West Supp. 1983). For a near complete legislative history of the California Resale Royalties Act, see In Calais, *supra* note 82, at 529-30 n.4.

the only example of the *droit de suite* in the United States. The precise statutory form given the right varies considerably from country to country. The controlling pattern established two distinct, general approaches that base the right either on a percentage of the full sale price, or a percentage of the appreciated value of the work at the time of resale.⁸⁸ The doctrinal bases for the statutory form given the right in Europe also vary considerably.⁸⁹

While these foreign examples as well as the California Resale Royalties Act create the backdrop against which any discussion of the *droit de suite* must be cast, the history and the problems inherent in each statutory formulation have been discussed thoroughly by numerous commentators and need not be repeated here.⁹⁰ Instead, this commentary will focus on those general criticisms that reverberate through most of the essays. While these criticisms take different forms, they can be reduced to variations on four themes—the *droit de suite* is unnecessary, ineffective, unfair, and damaging to the art market.

a. Necessity—The Right Under Contract and Incidents of Multiple Reproduction

A statutory *droit de suite* is claimed to be unnecessary because the artist is able to provide for similar benefits through covenants in the sales contract for the copy. Thus for example, "The Artist's Reserved

88. France, Belgium, Morocco, West Germany and Tunisia impose a "uniform tax upon the total sale price" of the work. Boyers, *supra* note 82, at 132 n.16. Portugal, Italy, Poland and Czechoslovakia base their royalty on the increased value of the work. *Id.*

The California Resale Royalties Act is a hybrid of the two monistic European systems. The royalty is not applied until there has been an increase in the value of the work. Cal. Civ. Code § 986(b)(4) (West Supp. 1983). However, if there has been an increase of even one cent, the 5% surcharge on the transaction applies to the full resale price.

89. For example, Germany bases the right on the assumption that works of art have an inherent and unrealized aesthetic value that later becomes recognized with a resulting increase in market value. Since the true value was present from the beginning, the artist should be able to participate in the increased value of the later resales. Another school of thought bases the artist's right to participate on the fact that the appreciated value of the work upon resale is the result of the artist's continuing work. In other words, as the artist matures and continues to produce, the increased value of the later works drives up the value of the earlier ones. Since the appreciated value of the early works is the result of the artist's continuing efforts, he or she should be able to participate in this increased value upon resale. See Schulder, *supra* note 82, at 30-32.

90. See generally, Kunststadt, *Can Copyright Law Effectively Promote Progress in the Visual Arts?*, 23 Bull. Copyright Soc'y 233, (1976); Ashley, *A Critical Comment on California's Droit de Suite*, Civil Code Section 986, 29 Hastings L. J. 249 (1977-78); and the commentators cited *supra* note 82.

Rights, Transfer and Sale Agreement," a form contract, drafted by Robert Projansky in 1971 includes a provision for a resale royalty.⁹¹

In 1968, Professor Monroe Price discussed the potential for achieving a *droit de suite* by contract within the context of the "theology" that artists lack the bargaining power to demand such rights through contract, noting that "[t]he prophecy of powerlessness is self-fulfilling."⁹² By 1977, Professor Price's thinking on the subject had become "enriched . . . — . . . economic benefits and royalty rights [had not] come through contracts in the marketplace."⁹³ One commentator has observed:

[B]ecause of lack of bargaining leverage, artists have found it quite difficult to utilize the artists' royalty reservation agreement. Is not surprising that when an artist is faced with either foregoing the contract or losing a sale, the artist will usually forego the birds in the bush (along with the principles they represent) for the one in the hand.⁹⁴

Even for the popular artist with the bargaining ability to demand such a contract, enforcement of its covenants is fraught with difficulties.⁹⁵ "Covenants run no more gracefully with works of art than with most chattels."⁹⁶ Therefore, although the advantages of a *droit de suite* are theoretically achievable through careful use of contract, this private alternative has so rarely been used as to fail utterly to vitiate the need for a statutorily enacted follow up right.

Critics similarly argue that visual artists are adequately protected through control of the incident of multiple reproduction. "To the extent that an artist can create and sell a large number of multiples . . . the need for a residual interest in any particular work is reduced."⁹⁷ Inherent in this criticism is the failure to recognize that many forms of art are not capable of reproduction in multiples. In addition, many artists simply do not desire to produce multiple images.

91. The Artist's Reserved Rights Transfer and Sale Agreement, reprinted in *A Guide to the California Resale Royalties Act 23* (M. Price & H. Sandison ed. 1976). Samples of the Projansky contract also appear in appendices 24 and 27: L. DuBoff, *The Deskbook of Art Law*, 1131-33, 1138-39 (1977); Projanski & Siegelau, *The Artist's Reserved Rights Transfer and Sale Agreement*, in *Art Works: Law, Policy, Practice* 81 (F. Feldman & S. Weil ed. 1974) [hereinafter cited as *Law, Policy, Practice*]; *Artist's Agreement*, 181 *Studio Int'l* 186 (April 1971).

92. Price, *supra* note 61, at 1358.

93. Clack, *Artists' Rights*, *The Cultural Post*, Mar./April 1977, at 11.

94. Duffy, *supra* note 81, at 36.

95. *Id.* at 34-35.

96. *Law, Policy, Practice*, *supra* note 91, at 97.

97. Duffy, *supra* note 81, at 32-33.

The *droit de suite* applies to the private display of the unique original by multiple private owners through the sequential ownership of a single copy. The exploitation of multiple derivatives is irrelevant when considering the right of the creator of the unique original to exploit the direct experience of the work. Just as the right of the novelist to exploit the film rights of his literary works exists independently of the right to control the production and distribution of multiple originals of the manuscript, the right of the visual artist to control the experiencing of the expression provided by the unique original exists independently of the right to control the manufacture and vending of derivatives of it.

b. Effectiveness—Right Vs. Welfare and the Low Incidence of Resale

At the crux of the debate, however, is the view of the *droit de suite* as welfare. The seeds of this perception in the United States were aptly illustrated (if not sown) in Monroe Price's seminal article on the French *droit de suite* where he characterized the "fervor" for the right as a "deep-seated romantic view of art"⁹⁸ and of the artist starving in his garret. The result of this "nostalgic recollection of the late nineteenth century"⁹⁹ is that the commentators are led to the conclusion that the *droit de suite* fails because, instead of benefiting the starving artist, the right has "benefited only the more successful, and hence wealthier, class of artists."¹⁰⁰

The argument misses the mark, however. The *droit de suite* cannot be understood as "welfare legislation." On the contrary, it should operate within the copyright scheme in exactly the same manner as the presently recognized rights in the statute do.

The first prerequisite of copyright as economic doctrine is the existence of a market force—experiential demand. Copyright is designed

98. Price, *supra* note 61, at 1334. "The *droit de suite* is *La Boheme* and *Lust for Life* reduced to statutory form." *Id.* at 1335.

In almost every discussion of this subject the story of the sale of Millet's *Angelus* for 1,000,000 francs while his granddaughter sold flowers in the streets is recounted. The drawing of Forain, depicting two children in rags observing the sale of a painting for 100,000 francs and saying: 'Look, one of papa's paintings,' is constantly described. Sherman, *supra* note 77, at 56. In the only empirical study on resale of works of art in the United States, the problem of artist selling their works for nearly nothing only to have them resold later at fabulous prices is exaggerated. Camp, *Art Resale Rights and the Art Resale Market*, 28 *Bull. Copyright Soc'y* 146, 151 (1980).

99. Price, *supra* note 61, at 1335.

100. Duffy, *supra* note 81, at 32.

to allow the author to share in the economic exploitation of his or her successful works. The exclusive rights to reproduce, prepare derivative works, and, in fact, the right to vend are only of value to the author whose works are in demand. While the author maintains the right to control the potential measuring incidents of the experiential event, the need for protection lies dormant until the marketplace triggers those incidents. No unsuccessful author realizes economic gain under existing copyright.¹⁰¹

When the critic of the *droit de suite* claims that the right will be ineffective because it benefits the successful artist, inherent in the criticism is the assumption that the constitutional mandate "[t]o promote the progress of science and useful arts" is fulfilled at the level of satisfying needs. Thus, adding to the coffers of the already successful (and possibly wealthy) is deemed to run counter to the mandate. Recently, critics of the proposal to extend a performance right to proprietors of copyright in sound recordings claimed such a grant to be unconstitutional in the absence of proof of need. The House of Representatives Committee on the Judiciary resoundingly rejected such a proposition:

In the first instance, . . . it is virtually unheard of to suggest that a copyright owner should be restricted to receiving compensation from one or more forms of exploitation of his work, if, in someone's (let alone a user's) judgment, such compensation is considered "adequate." Beyond this, no evidence has been offered which would reasonably lead to the conclusion that, at any time during the history of copyright law in the United States, an affirmative, definitive showing of economic "need" is required to invest Congress with the authority to extend protection to a particular form of exploitation of an already copyrightable work of authorship. Similarly, no support is offered for the proposition that historically, it must be proved that the quantity of copyrightable works will actually increase before Congress is empowered to enact legislation to "promote the progress of science and the useful arts." While these arguments may be admired for their creativity, they do not withstand scrutiny.¹⁰²

The Committee went on to respond to the National Association of Broadcasters' contention that the proposed performance royalty

101. However, one should pause to observe that the *droit de suite* furnishes artists who sell works early in their careers cheaply some security that they may derive some economic benefit later from the successive enjoyment of the work.

102. House of Representatives Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 95th Cong., 2d Sess., Serial 83, Performance Rights in Sound Recordings 157 (Comm. Print 1978) [hereinafter cited as Performing Rights in Sound Recordings].

would exceed congressional authority because it would be ineffective by noting the United States Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.*:¹⁰³

The Court . . . made no finding that protection would in fact cause the human cannonball to soar to even greater heights, nor that "little Zacchinis" would enter the human cannonball business, nor were any such findings necessary . . . The Court did find . . . that the intention of such laws is, "to grant valuable, enforceable rights in order to afford greater encouragement to the production of works of benefit to the public." *In other words, the rights themselves, by their very existence are designed to provide an environment where there is incentive to create works ultimately enuring to the public benefit.*¹⁰⁴ (emphasis added).

In addition to arguing that the resale royalty is ineffective as welfare legislation, the critics claim it is ineffective because of the low incidence of resale. In response to this Solomon and Gill say "[I]f the [royalty] is viewed as a matter of right, the number of artists who actually receive the benefit should be irrelevant"¹⁰⁵ The proportion of paperback novels being made into films is absolutely miniscule, yet no one would dare suggest that, because of this, the right to control derivative works under section 106(2) should be dropped as a meaningful incident to measure that particular use of the work.

Furthermore, the assertion that the number of resales is small bears examination. Commentators have estimated that artists in the United States who would benefit by the resale royalty number between fifty living artists who have a "secondary or resale market for their work,"¹⁰⁶ and thirty-four percent of the artists whose works are sold in any given year¹⁰⁷ (a number which could be in excess of several thousand.) No statistics exist on the total art resale market, but inferences as to its magnitude can be drawn. In a 1978 empirical study by Tom R. Camp confined to art auctions at Sotheby Parke Bernet for the four year period between 1973 and 1977, 152 living artists had resales of works that would have qualified for payment under a *droit de suite* applying to works valued at \$1,000 or more on resale.¹⁰⁸

103. 433 U.S. 562 (1977).

104. Performing Rights in Sound Recordings. *supra* note 102. at 158-59.

105. Solomon & Gill, *supra* note 82. at 341.

106. *Id.*

107. Price, *supra* note 61. at 1349.

108. Camp. *supra* note 95. at 151.

Mr. Camp's study had only marginal statistics for nonliving artists who would be covered were the royalty for works reselling for \$1,000 or more extended to life plus fifty years. Eleven American artists who died within five years of the four year study period had resales.¹⁰⁹ A reasonable projection could yield a figure of approximately 110 non-living artists whose families would benefit from the royalty.

Therefore, the royalty for works selling at Sotheby Parke Bernet alone for \$1,000 or more by artists under a life plus fifty years statute would benefit approximately 262 artists or their families. When we consider that art sales and resales in the United States, unlike France, do not take place primarily at public auction,¹¹⁰ the number of resales may in fact be quite significant.

In a 1980 newspaper interview, Sotheby Parke Bernet President, Peter McCoy, estimated that their Los Angeles auction house had paid resale royalties to between fifty and 100 artists, and Melvyn Nefsky, a Los Angeles accountant and business manager for several artists and dealers, said he personally had seen at least fifty resale royalty checks.¹¹¹ Calvin Goodman, a Los Angeles management consultant who specializes in the art market, estimated that about \$750,000 was due in 1980 artists' royalties "if everybody were playing straight up."¹¹² This three-quarter of a million dollar projection is only for resales taking place in or by the residents of one single state!

c. Fairness—The Owner of the Copy

Coupled with the myopic view of the *droit de suite* as welfare and the purported low incidence of resale is the belief that the royalty is somehow unfair to the owner of the copy. As a "major theoretical criticism," the royalty is seen to run "counter to our notions of property ownership Why should works of art be treated differently from other chattel?"¹¹³ One commentator has forcefully answered this question with a twofold response:

First, art works must be considered to be different from other property because of the contribution they make to our cultural heritage. This is a point that most Europeans, and many Americans, are

109. *Id.*

110. Ashley, *supra* note 90, at 255, 258.

111. Isenberg, *The Art Royalties Act: The 5% Evasion*, L.A. Times, Dec. 21, 1980 (Magazine) at 6, col. 3.

112. *Id.* at 6, col. 2.

113. Schulder, *supra* note 82, at 28.

coming to accept without question. Secondly, the art proceeds right can be justified as a property right that persists after alienation of the physical object. To begin with, the United States Constitution has taken a special view of artistic and scientific works. The Constitution gives Congress the power to give exclusive rights to artists to their work (for a limited period of time) so as to promote the progress of the arts. The divisibility of the copyright is accepted and is expressly set forth in the Copyright Revision: "The ownership of a copy is recognized distinct from ownership of the material object." Artists may sell their work and, yet, retain their copyright.¹¹⁴

Because the *droit de suite*, as a right under copyright, would not attach to the material manifestation of the work but rather to the aesthetic use of the expression, the right of the owner to dispose of the copy at will would not be affected by the right. The Court of Appeals for the Ninth Circuit in *Morseburg v. Baylon*¹¹⁵ rejected the appellant's argument that the owner of the copy had lost a fundamental property right. The court denied "that the [California] Resale Royalties Act affects the very heart of the relationship between buyers and sellers of art; and that there is no public interest whatsoever to support such meddling."¹¹⁶ The court found the Act to be "neither arbitrary nor capricious" but supported by a rational basis.¹¹⁷ Viewing the legislation as a reasonable means of adjusting burdens and benefits of economic life, the court held that "[i]n its present form [the Act] does not affect fundamental rights."¹¹⁸

1.) *The Art Investor*

However, the unfairness criticism appears to gather particular force when the owner of the copy is an art investor:

Since the collector's money is at risk, is it equitable that a collector must pay the artist if the work appreciates, yet bear the loss if the work depreciates in value? Isn't it logical, given such a situation, that the artist reimburse the collector if the value of the work decreases? The situation is aggravated if the royalty is payable even if there is no profit on resale¹¹⁹

114. *Id.* at 28-29.

115. 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1981).

116. *Id.* at 979.

117. *Id.*

118. *Id.*

119. Duffy, *supra* note 81, at 32; see also Schulder, *supra* note 82, at 29-31.

This criticism focuses heavily on the highly speculative¹²⁰ and very limited¹²¹ art investment market. It fails to recognize "that most purchasers do not buy predominantly for investment purposes."¹²² More importantly, it approaches the investment use of art works in an experiential vacuum. One recent commentator reduced works of art to the level of securities.¹²³ But painters do not paint fungible securities, they produce unique works with individual aesthetic values.

What these economists preoccupied with numbers fail to consider is what Professor DuBoff has identified as the "psychic dividend."¹²⁴ This psychic dividend evolves from the investor's aesthetic use of the work's expression—it is the result of private display. To avoid this psychic dividend, the investor would have to place the work beyond experience. However, risking hyperbole, if all of the "valuable" works

120. DuBoff, *supra* note 91, at 365-66.

121. Price, *supra* note 61, at 1351.

122. *Id.*

123. Bolch, Damon, & Hinshaw, *An Economic Analysis of the California Resale Royalty Statute*, 10 Conn. L. Rev. 689 (1978).

124. DuBoff, *supra* note 91, at 364.

When the capital value of a stock increases and the dividend remains constant, the percentage return has fallen. In this situation, investment counselors usually advise clients to sell and reinvest in a stock paying a higher dividend. In other words, a wise investor always tries to maintain a constant percentage return vis-a-vis his portfolio value. An art investor could theoretically follow this same practice—albeit on an *aesthetic* rather than an *economic* level. Thus, when a creation is purchased, the collector should receive a certain psychic dividend from the piece. If this periodic return from mere enjoyment declines, the art investor, like his stock purchasing counterpart, should re-examine his portfolio and determine whether to sell and reinvest in a piece which brings an aesthetic dividend more accurately reflecting the creation's cost. Similarly, if a work of art appreciated in economic value, the investor should determine whether the psychic dividend is such as to be worth retaining this investment.

Id.

The existence of a "psychic dividend" can be costly, however, under the Internal Revenue Code. In *Wrightsmen v. United States*, 428 F.2d 1316 (Ct. Cl. 1970), the Court of Claims drew a distinction between an art "investor" and an art "collector" in determining whether the costs of acquiring and maintaining a collection (insurance, travel, cleaning) were deductible under I.R.C. § 212. While the court rejected the Internal Revenue Service's claim that deduction was possible only "by showing a physical segregation of the works of art which precludes personal pleasure," 428 F.2d at 1319, it held the existence of *an* investment purpose was insufficient to claim deductions where "personal pleasure or satisfaction" is primary. *Id.* at 1322. As Robert Duffy points out, proof that investment and not pleasure is of first importance is a nearly impossible burden for the collector to carry under *Wrightsmen*. R. Duffy, *Art Law: Representing Artists, Dealers, and Collectors* 420 (1977). For an extensive discussion of *Wrightsmen*, see DuBoff, *supra* note 91, at 581-90. See also, Notreb, *The Art Collector vs. the Tax Collector*, *Financial World*, May 1, 1982, at 42. Compare *George F. Taylor*, 6 T.C.M. (CCH) 275 (1947) (deduction allowed where stamp collector derived no pleasure from his collection).

of art were so secured, their investment value would vanish. It is precisely the aesthetic use of a work's expression that creates the investment value. Therefore, speculating in works of art in an experiential vacuum would make as much sense as speculating in the securities issued by a corporation that has neither assets nor productive activities.

Regardless of the market price on resale, the artist's right to participate economically in the work's aesthetic use should be unaffected. An investor would readily recognize the validity of transaction costs¹²⁵ imposed in connection with a sale, regardless of the market conditions at that time. So too, this levy on the aesthetic use is conceptually appropriate irrespective of the market price of the work upon resale. Thus, the artist's right to participate should continue so long as demand propels the work from one owner to the next. The surcharge should be applied even when a successive owner values the viewing experience less than previous ones.¹²⁶ When the *droit de suite* is viewed as a surcharge levied upon display by private parties as they occur seriatim, it becomes clear that it is not, in fact, the seller-owner who ought to pay but the buyer-owner.¹²⁷

2.) *The Art Dealer*

Art dealers have been the primary interest group resisting application of the California resale royalty. Levying the royalty against dealers is inappropriate and a disservice to the art market. For example "[d]ealers sometimes agree among themselves to display the works of artists represented by other dealers. These agreements usually provide that the dealer who displays the work of an artist outside his fold will buy some of the paintings from the artist's sponsoring dealer if he cannot sell a certain minimum. Lending agreements of this kind expose the artist's work to a wider audience and increase his chances for success."¹²⁸ If there were no such dealer exemption, such transactions, while increasing the artist's chance for success, would be subject to the resale royalty.

In general, the dealer's use of a work is aesthetically neutral and, therefore, comes as close as is possible to an experiential vacuum (pure

125. Transaction costs would include such items as the dealer's or auctioneer's commission as well as costs of shipping and insurance.

126. See Schulder, *supra* note 82, at 30.

127. Only where the *droit de suite* is viewed as the right to participate in the investment use of the work is the levy made against the seller, i.e., against the person making the profit.

128. Ashley, *supra* note 90, at 257.

investment use). Display, by definition, involves aesthetic use of the expression embodied in the work. In the absence of such use no royalty should be exacted.¹²⁹

California State Senator Alan Sieroty, author of the California Resale Royalties Act, recognized the problem in levying the royalty directly upon art dealers and introduced legislation in 1982 to exempt art dealers partially.¹³⁰ Thus the 1982 amendment to the California Resale Royalty Act exempts "the resale of a work of fine art by an art dealer to a purchaser within ten years of the initial sale of the work of fine art by the artist to an art dealer, provided all intervening resales are between art dealers."¹³¹

d. Damage to the Art Market—Problems Inherent In Regional Protection

Critics of the California Resale Royalty Act claim that the right will have an adverse effect on the art market because it tends to: (1) induce participants in art sales to consummate their transactions in jurisdictions without similar legislation, (2) drive collectors from the art market to other forms of investment, and (3) generally diminish the market for contemporary works. Whatever merit these criticisms might otherwise have, federalizing the California law would eliminate them.

In France, where the *droit de suite* operates nationally, fears that the total volume of art sales would be diminished by the right have proved groundless.¹³² Nonetheless, some commentators believe, even though the total volume of French art sales has not diminished, France's position in international markets has been reduced as a result of some portion of the market shifting to nations without legislation.¹³³ There may be some validity to this criticism since the French

129. Under the 1982 revision of the California resale royalty, the ten year limitation on exempting dealer transactions is a legislative finding that any work held for more than ten years by a dealer is presumed to be held for aesthetic purposes and is within the ambit of the royalty.

130. Cal. Civ. Code § 986(b)(6) (West Supp. 1983).

131. *Id.* Dealer transactions were exempt in the only proposed federal legislation. H.R. 11403, 95th Cong., 2d Sess. (1978). It is most likely that if all dealer transactions were exempt, criticism would not be so vocal if it existed at all. Solomon & Gill, *supra* note 82, at 334 n.80; see also Camp, *supra* note 98, at 159-60.

132. *Id.* Applicability of Droit de Suite, *supra* note 82, at 440 nn.37-39.

133. Price, *supra* note 61, at 1334 n.7; Applicability of Droit de Suite, *supra* note 82, at 452 n.135 (citing Price), 459 n.182 (citing Note, Artists' Resale Royalties Legislation: Ohio Bill 808

legislation only reaches French resales. This problem could be avoided in the United States if federal jurisdiction were based on both sales in the United States and United States citizenship of either the artist or the seller. Consummation of the sale in a non-*droit de suite* jurisdiction would be pointless since the American artist would be entitled by United States law to collect the royalty fee regardless of where or to whom the work was sold.

Criticism that the *droit de suite* will adversely affect the art market is unfounded primarily because it assumes that acquisitions, occur in what was discussed earlier as an "experiential vacuum." It assumes that the buyer views comparably positioned works as fungibles without particular "aesthetic dividends" flowing from a specific work. Furthermore it assumes the number of investors who consider works of art fungible is sufficient to have an impact on any market. Since the number of individuals who collect art purely for investment reasons is small in comparison to the total number of participants in the market,¹³⁴ this assumption cannot be justified.

The assertion that collectors will switch from works of art to other forms of investment or from contemporary forms to older works not covered by the right must yield to the same reasoning. Such an assertion ignores the psychic dividend which comes to the collector by experiencing work indigenous to his or her own cultural milieu. In other words, it assumes that the art investment takes place in an experiential vacuum. The Camp study revealed that due to the subjective nature of placing economic value on works of art, the five percent royalty under the California legislation is not likely to have an appreciable effect on collector choices.¹³⁵ While collectors are "aware of prices and somewhat sensitive to them," Camp's impression was that other factors such as confidence in the dealer were more important to the collector than the sale price.¹³⁶

2. Private Display As a Compensable Event for the Visual Artist Under Law

All statutory rights under copyright are statements of events the law has rendered compensable. While the compensable events are both

and a proposed Alternative, 9 Toledo L. Rev. 366, 392 (1978) [hereinafter cited as House Bill 808]. See generally Note, A Proposal for National Uniform Art-Proceeds Legislation, 53 Ind. L.J. 129, 132 (1977-78).

134. See *supra* text accompanying notes 120-21.

135. Camp. *supra* note 98, at 158.

136. *Id.* at 159.

doctrinally constant and explicitly stated in the copyright act (e.g., vending copies, displaying, and performing), the measures that have developed to provide practical means of quantifying the author's economic return from those events are not doctrinally constant but vary as technology alters and adds to the means of accessing the compensable event.

Once the copyright had been granted, the development of the collection method for compensation has been left, in large part, to the forces of the marketplace. The market has not been allowed to shape the nature of the compensation in those instances where events are subject to statutory compulsory licensing. The compulsory license removes the copyright proprietor's only bargaining tool, the right to deny access to the compensable event and in return assures him or her a guaranteed statutorily set fee.

The development of compensation schemes has varied greatly with the different subject matter of copyright.¹³⁷ Nonetheless all these measures are basically means of estimating price or value from demand and supply, the traditional determinants in a capitalist economy.

Because the compensable event is at the very core of all rights under copyright and the measures are potentially fleeting and of little lasting consequence to its scheme, the measure of the compensable event must be viewed as analytically distinct. A well reasoned development of copyright law requires that the event being measured not be confused with the measure itself.

It is the thesis of this commentary that just such a confusion has developed with the *droit de suite*. While the *droit de suite* is phrased in terms of the resale of the material copy, it is, in actuality, the private display of the work to a new purchaser, his or her family, and social acquaintances that is the compensable event. The resale is merely a convenient measure of that event. As such, it both signals when a new private display has begun and quantifies the value of that new experiential event.

Thus, under the *droit de suite*, the purchase of a work of visual art obtains two interests in the work: (1) absolute possession of the material object, and (2) a license for its private display. At the first sale, the

137. For example, the copyright proprietor of nondramatic music generally does not individually negotiate for performance fees but allows the performance societies (ASCAP & BMI) to establish rates and collect and distribute fees to the appropriate proprietors. Compare that to proprietors of literary property who still individually negotiate with the enterprises which bring literary works to the public.

license can be thought of as "implied" since the licensing fee is included in the purchase price. At the time of subsequent transfers, renewal of the display license fee becomes due. Such a formulation of a right of private display is not beyond practical, or at least scholarly, contemplation. Professor Melville Nimmer advanced a similar proposal concerning a private performance license for purchasers of video discs for home use. "If a [private] performing rights license were thought to be necessary, the original purchaser of a video cassette or disc might be thought to be an implied licensee, but this would not necessarily be true of a purchaser upon re-sale from the original buyer."¹³⁸ Thus subsequent purchasers would have to pay a license fee to the owner of video cassette's or disc's copyright owner.

Unlike the right of public performance or the right of public display, a compensation for private use based on a measurement of actual use necessarily threatens the user's countervailing right of privacy. Resale of the copy represents the least intrusive and the most public incident that may attach to a privately owned copy. As such, it is the most appropriate indicator that a work has moved from one private display context to the next.

Resale may be an imprecise gauge of private display. Transfers by gift or inheritance, while perhaps representing new, and, in the purest sense, doctrinally compensable private displays, would not show up as resales. To the extent such transfers could be feasibly monitored,¹³⁹ it would then be appropriate to treat them as "sales" at fair market value and accordingly levy the resale royalty.

When the event which triggers the royalty payment is the resale of the copy instead of its display, the doctrinal justification of the display right and royalty fee becomes confused with the body of law that has shaped the parameters of property interests in the material object. Unfortunately the measure (resale) has been confused with the compensable event (private display). If the compensable event is the resale itself, then the principles of the Gutenberg Model must apply with all of its underlying implications, including the first sale doctrine. This was the position taken by the opponents of the *droit de suite* when they unsuccessfully challenged the constitutionality of the California

138. 2 Nimmer on Copyright § 8.14[C] n.47 (1982).

139. Of course, if the United States were to establish a national art registry, the monitoring of the shift of a work of art from one private user to the next would be possible regardless of the nature of the transfer.

resale royalty in *Morseburg v. Balyon*.¹⁴⁰ However, if the compensable event is the private display of the work under the Follow Up Model in which the resale of the copy simply operates as a measure of both the occurrence and value placed on the experiential event, then the first sale doctrine is inapplicable.

Under the *droit de suite* the right of the owner of the copy to aesthetic use of the art object remains subject to the artist's inchoate interest in private display. When the material copy is transferred by one purchaser to another for private enjoyment and use, a new license for private display arises.¹⁴¹

Private display already plays a significant role in the economics of intangible property. Newspaper and magazine advertising rates are not based on the number of copies sold but rather on the number of readers the advertiser expects to reach. This evidences the conceded value of private display. However, in this publishing context, the publisher-copyright proprietor's control over private display is a func-

140. 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1980). In *Morseburg*, the Court of Appeals held California's legislation creating a resale royalty constitutional.

The action, brought by Howard E. Morseburg, President of Morseburg Galleries in Los Angeles, was a challenge based on federal preemption of the California legislation under the Copyright Act of 1909. While specifically limiting judgment of the preemption issue to the Act of 1909 thus leaving the question open under § 301 of the 1976 Act, the court held:

The Copyright Clause does not prevent the enactment by California of the Resale Royalties Act. Nor has the Copyright Act of 1909 explicitly forbidden the enactment of such an act by a state. A bar by implication cannot be found in the word "vend" in section 1 of the 1909 Act.

621 F.2d at 977.

In addition to preemption, *Morseburg* also sought relief on the bases of (1) impairment of contract under the Contract Clause of the Constitution, and (2) violation of due process arising from the retroactive nature of the statute. Finding not all impairments of contract by operation of state law were improper, the court determined that any present impairment was of insufficient magnitude to trigger the Contracts Clause. *Id.* at 978-79. The court dismissed the due process argument by finding that the retroactive effects of the California Act were also of insufficient magnitude to merit consideration. *Id.* at 979-80.

In examining the § 27 prohibition against "restricting" sale under 1909 Act, the *Morseburg* court found that: "[t]echnically speaking such acts in no way restrict the transfer of art works. No lien to secure the royalty is attached to the work itself, nor is the buyer made secondarily liable for the royalty." *Id.* at 977-78. The court did acknowledge that the royalty might influence the length of time an owner might hold a work as well as having other consequences. *Id.* at 978. In essence, the court found that *some restrictive influences* on the resale of a copy were permissible under § 27 of the 1909 Act.

It was the opinion of the court in *Morseburg* that the state created resale royalty was an "additional right" that is distinct from the author's right to vend the copy. *Id.* at 977. The court took no pains to delineate the nature of this "additional right."

141. On occasion, however, a privately owned work will be transferred to a public institution. Such a transfer should not be subject to a resale royalty but should become subject to the artist's expanded right of public display.

tion of his or her economic power and not a legislatively granted right. The economic interdependence of the parties (the publisher-copyright proprietor and the advertiser) provides the copyright owner the leverage needed to render private display compensable.

If the visual artist possessed the same negotiating power over private display as the newspaper or magazine publisher, a statutory right of private display would perhaps be unnecessary. Such power, however, simply does not exist.¹⁴² There is no economic interdependence between the visual artist and the purchaser of the copy.

As a matter of power as opposed to right, the artist's only presently existing opportunity to exploit those future private displays is through contractual arrangements with the first purchaser. As was noted earlier,¹⁴³ such contractual arrangements have not proven successful both because of the difficulties in their enforcement and because requiring such provisions upon sale assumes bargaining power in the first instance. Therefore, the granting of a statutory right of private display for the visual artist would echo copyright's most basic function—the granting of a right where power fails and doctrine requires it.

3. Private Display As a Compulsory License

Appropriate respect for the constitutionally protected rights of privacy of the owner of the copy requires structuring a rough measure of private use around as public an event as possible. Great care should be given to maximizing the owner's control of private display while at the same time providing the artist with compensation for the work's aesthetic use. As with the proposed extension of the right of public display,¹⁴⁴ this balancing of the interests of the artist and the owner would be best achieved through a system of compulsory licensing.¹⁴⁵

Under a compulsory private display license, the value of the experiential event could be approximated as a function of the resale price of the copy. Questions of when, how, and even whether a copy would be resold would be answered only by the owner of the copy—the artist's interest extending no further than the right to be paid for use by any new private purchaser.¹⁴⁶

142. Unlike the relationship between the proprietors of literary property and magazine advertisers where economic needs are intertwined, there is no economic interdependence or ongoing economic relationship between the visual artist and the purchaser of a work of art.

143. See *supra* text accompanying notes 91-96.

144. See *supra* text accompanying notes 60-80.

145. In this respect, the California resale royalty functions as a compulsory license.

146. The statutory formulation of an exact method of payment is doctrinally irrelevant. Even though the purchaser upon resale is doctrinally responsible for the fee, the law is not without

Enactment of a federal *droit de suite* would not require modifying any elements in the present statutory scheme. As a right of private as opposed to public display, the *droit de suite* would have no impact on the section 109(a) embodiment of the first sale doctrine.¹⁴⁷ It does, of course, raise basic policy issues as to what is the proper subject matter of the new right. A right of private display that is not limited to works of visual art would extend to literary works since "display" is at the root of the reading experience as well. In the future, cable, satellite, and computer technologies will most likely shift the primary means of accessing the content of literary works from the vending of copies to ephemeral images on a cathode ray tube. In fact it was this very possibility that prompted the inclusion of the new right of public display and section 109(b) exemptions.¹⁴⁸ Regardless of the scope of the subject matter to which a *droit de suite* might be applied, the principles that govern its development must be those that have evolved from the Follow Up and not the Gutenberg Model.

IV. CONCLUSION

Copyright law has failed to provide the visual artist with economic incentives fully equivalent to those of authors working in the literary and performing arts. As a result, few visual artists avail themselves of copyright. To correct this inequity, this Article has proposed that the

precedent for placing the obligation for collecting the fee upon the seller for later distribution to the artist. Thus, the seller's role is much the same as the merchant who is required to collect sales tax from the buyer.

Although the proposed doctrinal basis would suggest the royalty should be paid by the buyer, it may, in fact, prove more workable to impose the liability for it on the seller. It is the seller whose identity is more readily ascertainable by the artist, and, after all, the seller's sale price should net out the same either way.

147. 17 U.S.C. § 109(a) (1982).

148. *Id.* § 109(b). Section 109(b) was primarily lobbied by the textbook manufacturers who feared that once educational institutions purchased a copy, they would "display" to numerous classes and many students through the use of electronic media thus destroying the market for texts.

With the growing use of projection equipment, closed and/open circuit television and computers for displaying images of textual and graphic material to 'audiences' or 'readers' this right is certain to assume great importance to copyright owners. A recognition of this potentiality is reflected in the proposal of book publishers and producers of audio-visual works which in effect would equate 'display' with 'reproduction' where the showing is for 'use in lieu of a copy.' The committee is aware that in the future electronic images may take the place of printed copies in some situations and has dealt with the problem by amendments in sections 109 and 110 . . . House Committee on Judiciary, Copyright Law Revision, House Rep. Report # 4347, 89th Cong., 2d Sess. (1966).

visual artist be granted both public and private display rights in his or her works.

Like their colleagues in the performing arts, visual artists must be granted a meaningful right to exploit economically the public use of the expression embodied in their works of art. Such a right is possible only if Congress recognizes that the present right of public display embodied in section 106(5) of the Copyright Act of 1976 is not based on a recognition of artists' natural right to exploit the aesthetic use of their works under the Follow Up Model but rather in an attempt to preserve traditional rights and ineffective incentives for the visual artist under the Gutenberg Model.

Accompanying the right of the artist to exploit economically aesthetic use of works of visual art by public institutions, federal copyright should incorporate a right of private display. The structure of such a right already exists in the form of the persistently misunderstood *droit de suite* where the compensable event of private display can be valued by the price at which a work of art is resold. The logic, and, indeed propriety of economic control over private display has long been recognized in the marketplace in those instances where economic interdependence of the negotiating parties provides the copyright proprietor with the power to render private display compensable. A private display right for the visual artist simply provides similar economic advantages where similar power is lacking.

In order best to reconcile both the artist's right to exploit economically the aesthetic use of his or her work of art with the owners' traditional property rights, the private and public display rights should be structured as compulsory licenses. The owner of the copy would maintain the right to determine when, where, and whether a copy will be displayed subject only to the copyright proprietor's right to a statutorily determined fee.

The authors recognize the assertion that artists' have an inherent right to control the expression embodied in their works renews the ancient debate as to the source of rights under copyright addressed in *Millar v. Taylor*,¹⁴⁹ *Donaldson v. Becket*,¹⁵⁰ and *Wheaton v. Peters*.¹⁵¹ While many may consider the substance of that debate long settled,

149. 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

150. 4 Burr. 2408, 98 Eng. Rep. 257, 2 Bro. P.C. 129, 1 Eng. Rep. 837 (H.L. 1774).

151. 33 U.S. (8 Pet.) 591 (1834).

the writers suggest that the time is ripe to heed the words of Justice Oliver Wendell Holmes:

[T]he social end which is aimed at by a rule of law is obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being re-shaped as a whole, with conscious articulate reference to the end in view.¹⁵²

152. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

99TH CONGRESS
2^D SESSION

H. R. 4366

To amend title 17 of the United States Code to secure the rights of authors of pictorial, graphic, and sculptural works to the display of their works, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 11, 1986

Mr. DOWNEY of New York introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 17 of the United States Code to secure the rights of authors of pictorial, graphic, and sculptural works to the display of their works, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EXCLUSIVE RIGHTS TO COPYRIGHTED WORKS.**

4 Section 106 of title 17, United States Code, is
5 amended—

6 (1) by striking out "and" at the end of paragraph
7 (4), by inserting "and" before "pantomimes" and by
8 striking out "and pictorial, graphic, or sculptural
9 works." in paragraph (5) and by striking out the period

1 at the end of paragraph (5) and inserting in lieu thereof
2 “; and”; and

3 (2) by inserting at the end thereof the following
4 new paragraph:

5 “(6) in the case of pictorial, graphic, or sculptural
6 works, to display the copyrighted work.”.

7 **SEC. 2. SCOPE OF EXCLUSIVE RIGHTS.**

8 Section 113 of title 17, United States Code, is amended
9 by inserting at the end thereof the following new subsections:

10 “(d)(1) Subject to the provisions of paragraphs (2) and
11 (3), the exclusive right to display pictorial, graphic, or sculp-
12 tural works under section 106(6) shall include both public and
13 private display.

14 “(2) In the case of a pictorial, graphic, or sculptural
15 work, the owner of a copyright work may display it publicly
16 provided such display is in connection with a bona fide at-
17 tempt to sell that copyrighted work.

18 “(3) In the case of a pictorial, graphic, or sculptural
19 work, the owner of a copyrighted work may display it pri-
20 vately provided such owner complies with subsection (e).

21 “(e)(1) Whenever a pictorial, graphic, or sculptural work
22 is sold, the seller shall pay to the author of such work or to
23 the author's agent a royalty. Such royalty shall be equal to 5
24 percent of the sale price or of the fair market value of any
25 property received in exchange. The right of the author to

1 receive this royalty may be waived only by a contract in
2 writing providing for an amount in excess of this royalty. An
3 author may assign the right to collect this royalty payment
4 provided, however, such assignment shall not have the effect
5 of creating a waiver prohibited by this subsection. If a seller
6 fails to pay an author the royalty, the author may bring an
7 action to recover the royalty within three years after the date
8 of the sale or one year after the discovery of the sale, which-
9 ever is longer. The court may award a reasonable attorney's
10 fee to the prevailing party.

11 “(2) Paragraph (1) shall not apply to any of the
12 following:

13 “(A) The initial sale of a work where legal title to
14 such work at the time of such initial sale is vested in
15 the author thereof.

16 “(B) The resale of a work for a gross sales price
17 of less than \$1,000, or in exchange for property with a
18 fair market value less than \$1,000.

19 “(C) The resale of a work for a gross sales price
20 less than the purchase price paid by the seller.

21 “(D) The resale of a work by an art dealer to a
22 purchaser within 10 years of the initial sale of the
23 work by the author to an art dealer, provided all inter-
24 vening resales are between art dealers. For the pur-
25 pose of this subsection, an art dealer means a person

1 who is actively and principally engaged in or conduct-
2 ing the business of selling pictorial, graphic, or sculp-
3 tural works.

4 SEC. 3. ENFORCEMENT.

5 Except for an action brought under section 113(e)(1) of
6 title 17 of the United States Code, no action may be brought
7 to enforce any right under section 106(6) of such title until
8 either ten years after the date of enactment of this Act or
9 until an organization or organizations have come into exist-
10 ence and been certified by any Federal District Court to rep-
11 resent at least 25 percent of all living authors whose pictori-
12 al, graphic, or sculptural works are on display in museums
13 with annual operating budgets in excess of \$1,000,000,
14 whichever occurs first. Such organization or organizations
15 must be open for membership to any author of pictorial,
16 graphic, or sculptural works which are on display under any
17 circumstance. The term "represent" means, with respect to
18 authors, to have taken from such authors assignments of their
19 rights under section 106(6) of such title for the purpose of
20 negotiating and enforcing those rights. Such organization or
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**ARTISTS' RIGHTS: THE KENNEDY PROPOSAL TO
AMEND THE COPYRIGHT LAW**

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III. IN SUPPORT OF THE RESALE ROYALTY

THOMAS M. GOETZL****

My objectives in this discussion are two-fold: first, to add some anecdotal color and detail to Professor Leaffer's analysis based on my work on the California Art Preservation Act¹⁴² and on the Kennedy Bill;¹⁴³ and second, as an unrepentant, un-

¹³⁹ 17 U.S.C. § 116 (1982 & Supp. V 1987).

¹⁴⁰ 17 U.S.C. § 119 (1982 & Supp. V 1987).

¹⁴¹ See *supra* note 16.

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¹⁴² California Art Preservation Act, CAL. CIV. CODE § 987 (West 1982 & Supp. 1989).

¹⁴³ Visual Artists Rights Act, *supra* note 2. This bill with minor exceptions is identical to S. 2796, 99th Cong., 2d Sess. (1986). "The Visual Artists Rights Amendment of 1986." These are not the first attempts to introduce legislation in Congress providing for payment of a royalty on the resale of their works. In 1978, Congressman H. Waxman of California introduced H.R. 11403, 95th Cong., 2d Sess. (1978). This writer was an invited conferee at the discussion conference called by Congressman Waxman.

abashed supporter of the resale royalty, to present some arguments in its defense which may persuade some of you to join me in its advocacy.

I was privileged to testify at the first Kennedy Bill hearing in November, 1986, at the Cooper Union in New York City.¹⁴⁴ Among the other witnesses who testified was Alfred Crimi. All of us who have taught Law and the Arts have had occasion to read *Crimi v. Rutgers Presbyterian Church*.¹⁴⁵ Crimi's 800 square foot fresco, which was commissioned for the chancel of the Rutgers Presbyterian Church in Manhattan, had been printed in 1938. Its destruction eight years later stunned the artist, provoking his lawsuit.¹⁴⁶ Alfred Crimi, now an elderly man, fairly shook with anger as his testimony caused him to recall the trauma he suffered at that time. Whenever I reread that opinion, I envision a Daumier caricature of a judge peering down from on high at Crimi, who is a rather diminutive man, shaking his finger and scolding him. Because Crimi, a Sicilian emigrant, had looked to Continental law for examples of moral rights to support his case. I imagine the judge admonishing Crimi to go back where he came from if he didn't like our laws. And on the other hand, I hear the judge lecturing Crimi that had he been so concerned about protecting his art work, he should have so provided in his contract with the church.¹⁴⁷ It was apparent from his testimony at the Kennedy Bill hearing that Crimi enthusiastically supports both the California Act and the Kennedy Bill.

In addition to Crimi's eloquent and emotional testimony, other witnesses testified regarding both the moral rights¹⁴⁸ and the copyright notice¹⁴⁹ provisions of the Kennedy Bill. I was the only witness to present testimony directed to the resale royalty right¹⁵⁰ provisions. The 99th Congress closed with no action having been taken on the Kennedy Bill.

The Kennedy Bill was reintroduced in the 100th Congress, and in December of 1987 another hearing was held in Washington, D.C.¹⁵¹ Due primarily to the distance and resulting expense.

¹⁴⁴ Visual Artists Rights Act of 1986: *Hearing on S. 2796 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Judiciary Comm., 99th Cong., 2d Sess. (1986)*[hereinafter *1986 Hearing*].

¹⁴⁵ 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949). See *supra* notes 54-62 and accompanying text.

¹⁴⁶ A. CRIMI, *A LOOK BACK — A STEP FORWARD: MY LIFE STORY* 138-166 (1988).

¹⁴⁷ *Id.* at 576-77, 89 N.Y.S.2d at 819.

¹⁴⁸ Visual Artists Rights Act, *supra* note 2, § 3.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See generally *Hearings on S. 1619, supra* note 6.

both the 1986 New York Hearing and the 1987 Washington, D.C. Hearing included very few witnesses from the West.¹⁵² This is despite the fact that California alone has experience under the resale royalty law,¹⁵³ and pioneered the art preservation law¹⁵⁴ protecting the moral rights of artists. If the subcommittee had really wanted an accurate picture of the operation of these laws, it should have heard more from the arts community which is affected by and directly benefiting from them.

Professor Leaffer referred to the impact of the recently enacted Berne Convention Implementation Act of 1988¹⁵⁵ upon the copyright notice provision of the Kennedy Bill.¹⁵⁶ Although the Berne Act is more a response to the commercial needs of the communication/information industry than to the wishes of the artistic community, I think it safe to conclude that the Berne Act,¹⁵⁷ as a practical matter, has removed the incentive to retain the copyright notice provision of the Kennedy Bill.¹⁵⁸

I would like to add a couple of background anecdotes with respect to the moral rights provisions.¹⁵⁹ The California Art Preservation Act makes special provision for works of art which cannot be removed from a building without alteration or destruction.¹⁶⁰ The original drafts of the bill for that Act had included no

¹⁵² In fact, at the 1986 Congressional Hearings, the author was the only witness from west of Washington, D.C. *1986 Hearing, supra* note 144. The 1987 Hearings included only two witnesses from California. *Hearings on S. 1619, supra* note 6.

¹⁵³ CAL. CIV. CODE § 986 (West 1982 & Supp. 1989).

¹⁵⁴ *Id.* §§ 987, 989.

¹⁵⁵ Berne Implementation Act, *supra* note 37.

¹⁵⁶ Kennedy Bill, *supra* note 34, § 2.

¹⁵⁷ Berne Convention, Paris Act, *supra* note 84, § 2.

¹⁵⁸ Kennedy Bill, *supra* note 34. During the last Congress, Rep. Kastenmeier began to circulate a draft substitute for H.R. 3221 (the House counterpart to S. 1619) in which the copyright notice provision had been eliminated. *Id.*

¹⁵⁹ *Id.* at § 3.

¹⁶⁰ The California Art Preservation Act reads in part:

(h) *Removal from building; waiver.* (1) If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of such work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, shall be deemed waived. Such instrument, if properly recorded, shall be binding on subsequent owners of such building.

(2) If the owner of a building wishes to remove a work of fine art which is a part of such building but which can be removed from the building without substantial harm to such fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties created under this section shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his heir, legatee, or personal representative, in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If such work is removed at the

such provision.¹⁶¹ Those of us working with California State Senator Alan Sieroty, the bill's sponsor, speculated about who its opponents might be: perhaps collectors whose traditional property rights would be compromised, or dealers acting on behalf of those collectors. We were surprised to learn that there would be opposition from the very powerful real estate industry.

Meetings with industry representatives quickly disclosed their concerns. If there were an absolute prohibition on the destruction of works of art, then an owner or buyer of real estate with artwork attached to it would be precluded from demolishing or remodeling that building unless the artist had waived his rights.¹⁶² To address these objections, negotiations were conducted which resulted in the adoption of language to accommodate this concern.¹⁶³ Similar language is included in the Kennedy bill.¹⁶⁴

Interestingly, the California statute makes it clear that only *constructive* notice will suffice.¹⁶⁵ If the instrument has not been recorded, then neither actual notice or inquiry notice will work. Again, the Kennedy Bill has retained this feature.¹⁶⁶

Professor Leaffer also referred to the fact that the California Art Preservation Act and the Kennedy Bill require protected art to be of "recognized quality"¹⁶⁷ and "recognized stature,"¹⁶⁸ respectively. Presumably, the intended meaning is the same. This

expense of the artist, his heir, legatee, or personal representative, title to such fine art shall pass to that person. CAL. CIV. CODE § 987(h) (West 1987 & Supp. 1989).

¹⁶¹ See California Bill SB 2143, one of the forerunners to CAL. CIV. CODE § 987 (West 1982 & Supp. 1989).

¹⁶² See CAL. CIV. CODE § 987 (g)(3) (West 1982 & Supp. 1989), which reads in relevant part, "[T]he rights and duties created under this section . . . [e]xcept as provided in paragraph (1) of subdivision (h), may not be waived except by an instrument in writing expressly so providing which is signed by the artist."

¹⁶³ SB 2143 (1978) section 1 (e)(4)-(5) and SB 668 (1979) section 1(h), provide essentially that the artist's right of integrity is deemed waived unless the owner of the building to which it is attached signs and records an agreement preserving that right. Interestingly, the California statute makes it quite clear that it is only *constructive notice* that will suffice. CAL. CIV. CODE § 987(h)(1) (West 1982 & Supp. 1989). "[R]ights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, shall be deemed waived." *Id.*

¹⁶⁴ Kennedy Bill, *supra* note 34, § 4.

¹⁶⁵ California Art Preservation Act. CAL. CIV. CODE § 987(h)(1) (West 1982 & Supp. 1989) (" . . . unless . . . properly recorded, shall be deemed waived").

¹⁶⁶ Kennedy Bill, *supra* note 34, § 4.

¹⁶⁷ CAL. CIV. CODE §§ 987(b)(2), 987(f) (West 1982 & Supp. 1989).

(b)(2) "Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.

(f) *Determination of recognized quality.* In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of

qualifying language was added in response to critics who expressed concern that frivolous claims might be brought regarding art work that did not merit protection. At the California State Senate Committee Hearing in the summer of 1978, which was prior to the adoption of the "recognized quality" language, one committee member objected to the Bill, expressing concern that a kindergarten teacher might tear up a child's finger painting and then be sued for the destruction of that work of art.¹⁶⁹

In response, it was pointed out that in no other context is a plaintiff required to establish that damaged property was of any particular "quality" or "stature" in order to state a cause of action.¹⁷⁰ Furthermore, practical economics assure that frivolous lawsuits are not often pursued.¹⁷¹ Accordingly, I would urge that that language be omitted from the Kennedy Bill since it unnecessarily increases the plaintiff-artist's burden and invites a subjective determination of what constitutes "recognized stature."¹⁷²

One thorough examination of current moral rights case law concludes that adequate protection for an artists right of integrity would evolve even without statutes.¹⁷³ In contrast, Peter Karlen, a well known attorney in the area of moral rights disputes,¹⁷⁴ suggests that while common law theories may suffice for the academician, he attributes his success in this area to the existence of the California Art Preservation Act. By simply writing to the offending collector, which is often a governmental entity or a corporation,¹⁷⁵ and pointing to the relevant language of the Act which prohibits a particular practice, Karlen generally gets imme-

artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art. *Id.*

¹⁶⁸ Kennedy Bill, *supra* note 34, § 2. *See supra* note 115.

¹⁶⁹ Richard Mayer, Vice President of Artists Equity Association, Inc. and a prominent art activist, who testified at the Hearing, related this debate to the author. The California Legislature retains no official transcript of the Hearings.

¹⁷⁰ *Id.*

¹⁷¹ Victims who suffer only insignificant harms are seldom willing to incur litigation expenses. Moreover, lawyers are not likely to accept such cases on a contingent fee basis.

¹⁷² Plaintiff must secure testimony of experts to establish the work of art involved was of "recognized stature." *See supra* note 115, at 166-67. In California, it is possible that plaintiff could recover those expert witness fees. *See CAL. CIV. CODE* § 987(e)(4) (West 1982 & Supp. 1989).

¹⁷³ Damich, *The Right of Personality: A Basis for the Protection of the Moral Rights of Authors Common Law*, 23 GA. L. REV. 1 (1988).

¹⁷⁴ *See, e.g.*, Karlen, *Moral Rights in California*, 19 SAN DIEGO L. REV. 675 (1982).

¹⁷⁵ These are the owners most likely to mutilate or destroy art. Individual collectors are far more likely to protect their own self-interest and refrain from such vandalism. Recall, for example, the fate of Crimi's fresco, *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S. 2d 813 (Sup. Ct. 1949), as well as Alexander Calder's mobile, mutilated by the Allegheny County Airport Commission, ARTNEWS, Jan. 1978, at 39, Richard Serra's Tilted Arc, threatened by the G.S.A., and Isamu Noguchi's sculpture,

mediate results. Indeed, the very dearth of reported cases echoes the success of this statute. Even in cases where the harm has already occurred, all that remains is to negotiate a settlement of the artist's claim for damages to his reputation.

The immediate issue is what form the Kennedy Bill will take in the upcoming 101st Congress. Clearly, the moral rights provisions will continue to be the heart of the Bill. Although the writer is still committed to supporting the Bill, he does not feel the same urgency about the moral rights provisions as about the resale royalty provisions. Nine states,¹⁷⁶ plus California, have now enacted moral rights legislation. Together with California, these states are home to one-third of the nation's population and the majority of the nation's important art markets. Nevertheless, there are compelling reasons to welcome federal legislation on the subject. First, federal legislation would afford artists protection in the remaining forty states. Second, it would provide a minimum level of uniformity throughout the country.¹⁷⁷ Finally, this legislation would reduce potentially troublesome choice-of-law/conflict-of-law issues.¹⁷⁸

I would like to turn the focus to the resale royalty right provisions of the Kennedy Bill. As Professor Leaffer previously indicated, the version which was conditionally voted out of the Subcommittee on Patents, Copyrights and Trademarks on August 10, 1988, deleted the resale royalty right altogether.¹⁷⁹ In its place was a requirement that the National Endowment for the Arts, in cooperation with the Copyright Office of the Library of Congress, conduct a study to analyze the feasibility of enabling artists to participate in the economic exploitation of their work even after it has been sold.¹⁸⁰ A report is to be submitted to the Congress within twelve months of the effective date of this legislation.

I am eager to restore the resale royalty right provisions to the Kennedy Bill—and not just in reaction to the recent, highly

destroyed by the Bank of Tokyo in New York. ARTNEWS, May 1988, at 143. See generally *supra* notes 58-67 and accompanying text.

¹⁷⁶ See *supra* note 16.

¹⁷⁷ See § 9 of the Discussion Draft containing an Amendment in the nature of a substitute to S. 1619 providing there would *not* be preemption of state laws to the extent such provided the same or additional rights and protection. This very important provision was insisted upon by Artists Equity Association, Inc. to insure that no gains won in particular states would be forfeited in the effort to federalize the *droit moral*.

¹⁷⁸ *Id.*

¹⁷⁹ Kennedy Bill, *supra* note 34.

¹⁸⁰ *Id.* at § 8(a).

publicized resale of a Jasper Johns painting for \$17.1 million.¹⁸¹ Rather, it is because fundamental fairness requires Congress to treat visual artists on a par with other creative persons.¹⁸²

Ever since the California Resale Royalty Act went into effect twelve years ago,¹⁸³ it has generated enormous challenge, controversy and criticism.¹⁸⁴ Interestingly, there is persistent controversy about whether or not the California statute works. It is consistently referred to in the literature as being neglected, underused, even moribund.¹⁸⁵ There is, however, no reliable official source of information on the frequency or amount of art being resold.¹⁸⁶ Opponents and supporters must therefore rely upon anecdotal evidence of whether resale royalties have been paid. Opponents will occasionally refer to instances in which resale royalties were not paid, but requests for documentation inevitably go unanswered. On the other hand, in my capacity as an arts advocate and as a longtime board member of the California Lawyers for the Arts, I hear of countless royalties paid to many artists. Although some lawsuits have been filed to collect resale royalties, there are no reported opinions.¹⁸⁷ The law is clear

¹⁸¹ Wall St. J., Nov. 28, 1988, at 1, col. 6. The original sale of this work (perhaps aptly titled "False Start") earned Johns less than \$2,000. In the same month, five other paintings by contemporary American artists resold at prices in excess of four million dollars each. *Id.* It is no longer the long dead artists whose works resale for astronomical prices. A Picasso just sold at auction in New York for 47.85 million dollars. N.Y. Times, May 10, 1989, at C21, col. 1.

¹⁸² Whether the resale royalty should be measured by five percent of the gross resale price, as it is in California, or by seven percent of the appreciation, as it was in the 1987 version of the Kennedy Bill, is beyond the scope of this discussion. See CAL. CIV. CODE § 986(a) (West 1982 & Supp. 1989). Visual Artists Rights Act, *supra* note 2, § 3(d).

¹⁸³ California Preservation Act, CAL. CIV. CODE § 987 (West 1982 & Supp. 1989).

¹⁸⁴ To no avail this challenge assumed constitutional proportions in *Morseberg v. Balyon*, 621 F.2d 972 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980) (unsuccessful constitutional challenge under the copyright clause, U.S. CONST. art. 1, § 8, cl. 8, the contract clause, U.S. CONST. art. 1, § 10, cl. 1, and the due process clause, U.S. CONST. amends. V. XIV). Although the preemption issue was tested under the 1909 Copyright Act, the absence of subsequent constitutional challenges on this ground suggests concession that the same outcome would probably still be reached under the 1976 Copyright Revision Act.

¹⁸⁵ See, e.g., McNerney, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1, 3 (1984); Siegel, *The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory*, 93 DICK. L. REV. 1, 3 (1988) [hereinafter Siegel].

¹⁸⁶ One survey, conducted in December 1986 by the Bay Area Lawyers for the Arts ("BALA"), was based upon a very small return confined to the San Francisco area. While it disclosed some knowledge, use, and general approval of the resale royalty, the survey itself was based on too small a sampling to be definitive. See Robinson, *BALA Survey Artists and Galleries on Resale Royalties*, BALA GRAM, Nov./Dec. 1986, at 1, reprinted in *Hearings on S. 1619*, *supra* note 6 at 119.

¹⁸⁷ A number of documented settlements exists in the author's files. Such cases are generally heard in small claims court or promptly settled.

enough.¹⁸⁸ That some may fail to comply with the law hardly proves the law is ineffective, as some critics have charged; it merely shows that it cannot be perfectly enforced. However, few, if any, laws can be.

A recent article characterizes supporters of the resale royalty as holding a romantic view of the artist.¹⁸⁹ That is not accurate.¹⁹⁰ Advocates of the resale royalty simply want equity for artists vis-a-vis other creators. It is an appeal to fairness.¹⁹¹ Recall, if you will, that copyright law began with books and copies. Gradually, new subject matter has been added to the copyright law.¹⁹² And, over the course of time, in response to lobbying efforts, new exclusive rights have been added.¹⁹³ The common theme seems to be a desire by Congress, pursuant to Constitutional authorization,¹⁹⁴ to assure that those who have created intellectual property can benefit economically from the use of their creations for the term allowed.¹⁹⁵ Songwriters and lyricists, for example are entitled to royalties whenever their compositions are broadcast on the radio¹⁹⁶ or, now, played on a jukebox.¹⁹⁷ And

¹⁸⁸ All an artist need do is establish that there was a resale and that the threshold requirements were met. See CAL. CIV. CODE § 986 (West 1982 & Supp. 1989).

¹⁸⁹ Siegel, *supra* note 185, at 4.

¹⁹⁰ The French justify their *droit de suite* on the rationale that where there has been a major increase in the value of a work of art, it must be primarily attributable to the continuing efforts of the artist who created it to enhance his artistic talent and reputation. Goetzl & Sutton, *Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis*, 9 COLUM. J.L. & ARTS 15, 39 n.89 (1984). The German rationale (perhaps it is a bit romantic) is that the true value of the art was always inherent in the work. At the time of the first sale, the public lagged far behind in its taste and understanding because it failed to appreciate the full value of the work. Only later, when the public taste has matured and the art work has attained its true value, must the artist be allowed to share in that higher resale price. *Id.*

¹⁹¹ See *id.* at 48-51 and accompanying text for a detailed exposition of this view.

¹⁹² See 17 U.S.C. §§ 101-02 (1982 & Supp. V 1987). A definition for "computer program" was added in 1980. *Id.* § 101. In 1976, Congress explained the works of authorship list in section 102. *Id.* § 102.

¹⁹³ See, e.g., 17 U.S.C. §§ 106-18 (1982 & Supp. V 1987). Sections 107 through 118 are exceptions, limitations, and the scope that Congress has placed on the copyright owners' exclusive rights granted in section 106. *Id.*

¹⁹⁴ U.S. CONST. art. I, § 8. "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." *Id.*

¹⁹⁵ See generally 17 U.S.C. §§ 302-05 (1982 & Supp. V 1987), which define the duration of the copyright for works created before and after January 1, 1978, as well as the terminal date applicable to all terms of copyright.

¹⁹⁶ 17 U.S.C. § 106(4) (1982 & Supp. V 1987). See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

¹⁹⁷ 17 U.S.C. §§ 106(4), 116 (1982 & Supp. IV 1986). Section 106(4) gives the copyright owner "exclusive rights" over any public performance of the copyrighted work. *Id.* Section 116 limits the liability section of § 106(4) in the case of "nondramatic musical work embodied in a phonorecord," when the work is in a coin-operated phonorecord player. *Id.* at § 116(a). See, e.g., *Broadcast Music, Inc. v. Xanthas, Inc.*, 674 F. Supp. 553 (E.D. La. 1987), *modified*, 855 F.2d 233 (5th Cir. 1988) (summary judgment against juke-

that entitlement exists in addition to any royalties to which they may be entitled from the sale of sheet music and records.¹⁹⁸ Authors are entitled to royalties not only from sales of copies of their books,¹⁹⁹ but also from the sale of film rights.²⁰⁰ And the film rights belong to the author even though it is rare that a book will be made into a film. So to criticize the resale royalty by pointing out that only a small percentage of art work will ever be resold at a higher price misses the point. The resale royalty is an economic right and artists whose works sell in a secondary market ought to benefit from that sale.

Some have charged that it is simply unnecessary to have a statute granting a resale royalty right. They argue that an artist who wishes to have such a right should simply include it in the original sales contract. That is what Crimi was told.²⁰¹ Few artists, however, anticipate this need and, fewer yet have the bargaining power to meet it. The Projansky Contract²⁰² has been around for two decades. Although it is well drafted, few artists have successfully persuaded collectors to sign it. Critics describe the non-waivability²⁰³ of the resale royalty right as unnecessarily patronizing. However, legislation which seeks to protect a class of people who generally lack proportionate negotiating power often provides non-waivable rights.²⁰⁴

box owner/operator for multiple violations of Copyright Act, damages equal to three times the amount of unpaid registration fees).

¹⁹⁸ 17 U.S.C. § 106(1), (3)(1982 & Supp. V 1987). *See, e.g.*, *Interstate Hotel Co. of Nebraska v. Remick Music Corp.*, 157 F.2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809 (1947)(copyright holders awarded injunction and damages for defendant's public performance of compositions without license or consent despite defendant's public purchase of sheet music).

¹⁹⁹ *See, e.g.*, *Shapiro, Bernstein & Co. v. Blecker*, 224 F. Supp. 595 (S.D. Cal. 1963) (plaintiff has burden to show actual damage suffered or defendant's profits resulting from book published with 1,000 separate righthand melodies, twelve of which belonged to plaintiff).

²⁰⁰ 17 U.S.C. § 106(2)(1982) (allows owners of copyright to "prepare derivative works based upon the copyrighted work"). *See, e.g.*, *National Business List v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill. 1982)(unauthorized use of credit bureau's mailing list constituted copyright infringement).

²⁰¹ *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949), discussed *supra* notes 58-63 and accompanying text.

²⁰² ART LAW, *supra* note 12, app. 24, at 1131.

²⁰³ *See* CAL. CIV. CODE § 986(a)(West 1982). "The right of the artist to receive an amount equal to 5 percent of the amount of such sale is not transferable and may be waived only by a contract in writing providing for an amount in excess of 5 percent." *Id.*

²⁰⁴ Consider, for example, statutes providing rights for such diverse classes as tenants, consumers, patients and, mobile home buyers. *See, e.g.*, CAL. CIV. CODE §§ 1942.1, 3097 (West 1982 & Supp. 1989); CAL. HEALTH & SAFETY CODE §§ 1430, 1599.81, and 18039 (West 1982 & Supp. 1989), respectively. Section 18039 provides: "No agreement entered into pursuant to this chapter shall contain any provision by which the buyer waives his or her rights under this chapter, and any waiver shall be deemed contrary to public policy and shall be void and unenforceable." *Id.* at § 18039.

It is frequently alleged that the resale royalty has failed to accomplish its purpose of providing money for poor artists. Again, the argument is misdirected. The resale royalty was never intended as welfare legislation. No one has ever dared intimate that other rights granted by the copyright law are ineffective because they fail to provide royalties, for example, to poor street musicians or to poor, unpublished authors. Nor is patent law attacked for failing to assure royalties to inventors whose inventions never find a market. Visual artists should be treated like other creative people.

What the resale royalty right can do is assist undiscovered artists who, early in their careers, are required by economic exigencies to sell their works at prices which hardly recoup their out-of-pocket production costs. The resale royalty right offers such artists the prospect of making some money in the future from those works.

Critics also assail the resale royalty right for allegedly damaging the art market. They insist that fewer than one-tenth of one percent of art works ever find a secondary market. At the same time, however, they claim that a dealer's ability to subsidize young undiscovered artists occurs through the backroom resales of works by established artists.²⁰⁵

One scenario, which I would find more entertaining had it not been so seriously proposed, had would-be collectors using complicated equations to calculate prices at which they would purchase art.²⁰⁶ These "investment-minded collectors" would attempt to discount the price quoted in order to compensate for the amount potentially owed under the resale royalty provision. That is not, however, what happens in the real world.²⁰⁷ A resale royalty that has only a remote possibility of becoming payable at some later date is hardly likely to affect the purchase price.

Such investment-minded collectors would most probably be

²⁰⁵ Bolch, Damon & Hinshaw, *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L. REV. 689, 696 (1978) [hereinafter Bolch, Damon & Hinshaw]. A 1980 study suggested that the resales of works by just five artists—Robert Rauschenberg, Jasper Johns, Frank Stella, William de Kooning, and Alexander Calder—accounted for over one third of the dollar volume of all resales. Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 BULL. COPYRIGHT SOC'Y. 146, 153 (1980).

²⁰⁶ Bolch, Damon & Hinshaw, *supra* note 205, at 697.

²⁰⁷ Art generally changes hands at prices stated in round numbers. Furthermore, the equations they would have to apply must properly include several variables, only one of which—the resale royalty percentage—can be predicted. Other variables which should be taken into account might include the amount of a dealer's commission on a resale, the rate at which income taxes might be assessed on any gains, the rate of inflation, and (especially) whether the work will have a secondary market at all at an appreciated price, and under circumstances where a resale royalty statute will apply to the transaction.

holly unwilling to buy the art of *any* artist without an established resale market. Indeed, such an analysis totally ignores what Professor DuBoff has aptly identified as the "psychic dividend"²⁰⁸ or the pleasure of owning a work of art.

A resale royalty right is not going to drive collectors away from the purchase of contemporary art, as has often been charged. At the turn of the century, when Congress was considering legislation to grant composers a public performance for profit right, the infant radio industries protested. They claimed that an obligation to pay a royalty every time they played contemporary copyrighted music would compel them to confine their repertoire to classical music already in the public domain. Well, spin the dial on the radio; that is not what is happening. There has always been a market for contemporary music. There will always be a market for contemporary art. The resale royalty right will not affect that.

Finally, I want to respond to the "unfairness" argument. It is said by some that, for example, it would be unnecessarily avaricious for Jasper Johns²⁰⁹ to seek a royalty upon the resale of his \$17.1 million painting (\$850,000 at 5%). Rather, he should be grateful because now Leo Castelli, his dealer, can, and has announced that he will,²¹⁰ raise the prices on Jasper Johns' new works. Why should artists be the only socialists in this capitalist society? If they are successful, why shouldn't they get richer just like anyone else? Imagine calling up Irving Berlin after having broadcast an hour-long concert of his music, and telling him he should be grateful for the exposure. Now he'll sell more sheet music and records, and, after all, he has all the money a centenarian could possibly need. No, it is *his* music and he is entitled to be paid for the broadcasting of his music. And so too, why shouldn't a collector be required to pay the artist a royalty for the ongoing enjoyment of his work (the very existence of a secondary market in which to sell the work).

In summary, fundamental fairness and opportunity to harvest equal economic rewards from the variety of ways by which one's creativity is exploited under the authority of the Copyright

²⁰⁸ ART LAW, *supra* note 12, at 364. DuBoff analogizes the investment in art to investment in financial markets. Instead of receiving a dividend as a percentage return on invested capital, the investor receives what DuBoff terms a "psychic dividend," — the investor can measure the value of his investment in terms of its aesthetic appeal. If that dividend should begin to decrease, he may desire to sell the work and purchase another.

Id.

²⁰⁹ The author does not ascribe any particular position to Jasper Johns personally.

²¹⁰ Wall St. J., Nov. 28, 1988, at 1, col. 6. See *supra* note 181 and accompanying text.

Clause of the United States Constitution should compel Congress to provide visual artists with a right to resale royalty. I hope some of you will join me in the effort to persuade our elected representatives to restore the resale royalty provision to the Kennedy Bill when it is reintroduced in the 101st Congress this year.



Société des auteurs dans les arts graphiques et plastiques

11, RUE BERRYER 75008 PARIS

Tél. 45 61 03 87
43 59 09 79
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Tlx. 648273

President : Jean Feugereux

May 2nd, 1991

Mr. William PATRY
Policy Planning Advisor
to the Registrar of Copyrights
COPYRIGHT OFFICE
James Madison Building
(Room 403)
Independence Av., S.E.
WASHINGTON, D.C. 20559
U.S.A.

RE: Notice of Inquiry on Resale Royalty Rights

Comment Letter
RM 91-1
No. 16

Dear Mr. Patry,

Please find enclosed herewith ADAGP's report on the inquiry made about resale royalty right.

We are also enclosing some documentation concerning our society and our list of members (among them Alechinsky, Arman, Basquiat, Boltanski, Braque, James Brown, Buren, Chagall, Dali, Miro, Tàpies, Venet...).

Actually we are the first society in the world for the defence of authors'rights and especially for the collection of resale royalties as we collected 52.000.000 French francs (i.e. US\$ 8.600.000) in 1990.

We remain at your disposal for any futher information you may require. We are ready to meet with you in Washington, if need be, at your convenience.

Jean-Marc GUTTON
General Manager

Société des auteurs dans les arts graphiques et plastiques

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Study on Resale Royalties for Works of Art

Notice of Inquiry

1. Would resale royalty legislation promote or discourage the creation of new works of art, and if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?

According to ADAGP, the resale royalty legislation does not have any influence on the level of creation of new works of art as creation is generally independent of any economical criterion in the field of graphic and plastic arts.

It is obvious, however, that, since it represents a substantial income for the authors, the latter cannot fail to be encouraged by this law which allows them to benefit fairly from the increase of value on their works.

The marketplace for works of art subject to such a requirement is not much affected. The most important auction houses in United Kingdom, Switzerland or the Netherlands, where this law does not exist, do not obtain a turnover very much higher in this field than France or Germany. The art market in France which has thrived over the last few years has never been adversely affected by this law (tripled value of auction sales). The main point is that a marketplace should be a centre of creation which is the case of France and especially Paris.

2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured: by a percentage of the resaler's profit, the net sales differential, or some other measurement? Should the net sale differential be adjusted for inflation?

The works of art which should benefit from this legislation are all works of graphic and plastic arts and photographs including works made in several copies if the art market considers them as original works.

A threshold value should be provided in order to avoid too complicated administration for very small amounts.

This threshold could be about US\$200.

It is not desirable that a threshold increase in value exists for the application of the resale royalty as this would imply that the buying price would be known each time but this is not possible in most cases.

The resale royalty should be calculated on a percentage basis on the salesprice of the work without any deduction and should concern public and private sales (In Europe it fluctuates between 6% in Portugal and 2% in Spain).

3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications of such decisions? How is the issue handled in foreign countries and in California?

The requirement should benefit to all works, being created or not in the United States.

If not, the foreign artists would be unjustly penalized and the American artists could only benefit from this law for the works created in the countries which apply resale royalty.

That would be in contradiction with the provisions of the Bern Convention to which the US now belongs.

In France, French artists can benefit from the resale royalty in all countries which apply such a law, just as the foreign artists originating from these countries can benefit in France from the resale royalty without any formality.

For foreign artists who have lived for at least 5 years in France, even not consecutively, a specific demand for assimilation can be sent to the Ministry of Culture to allow these artists to benefit from this right.

4. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work? Should the right be descendible? Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?

The term of the resale requirement should be the same as for other authors' rights, i.e. 50 years after the death of the author and be descendible.

It should be applied to all works still protected in the country of origin at the date of enactment of the legislation.

5) Should there be any enforcement mechanisms, central collecting societies or registration requirements? What are the experiences in foreign countries and in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated or exchanged in a barter transaction?

This right should be administrated by an authors' society (in the US: ARS, Artists Rights Society in New York) as it is in all the countries where this right exists.

No registration would be necessary.

The law should provide however that the sellers (or their intermediaries: auctioneers, galleries, brokers...) should inform the authors' society before the sale in order to allow the society to claim resale royalty and after the sale they should inform the society of the salesprice. This entails very little management, and has functioned in our country for many years without causing any difficulties. Penalties should be provided for infringements.

6) Should the right be waivable or alienable?

This right should not be waivable or alienable in order to avoid pressure being put on the Artists by the sellers.

7) Should the California law be preempted in the event of a federal law?

The law of California is very restrictive for its beneficiaries. We hope that the scope of federal legislation would be more widely protective.

We would like to add some comments on the French situation:

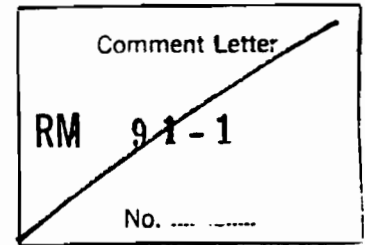
As you may know, the resale royalty requirement was already introduced in the law of 1920. Thus, we have a long experience in this field.

The royalty amounts to 3% of the salesprice of the auctioned works.

The amounts collected by ADAGP increased from FF 13.000.000 (US\$ 2.350.000) in 1988 to FF 52.000.000 (US\$ 9.400.000) in 1990, which shows that the art market was not penalized by the existence of this right.

Of the 2,500 artists directly represented by ADAGP, more than 1,600 received payments last year and this right represents an important source of income for many of them.

It is therefore a right which widely benefits unknown artists, even if the important sales concern only few of them.



**EVA: Answers to the Questionnaire
on Droit de Suite in the European Community**

- 1. Does it seem to you necessary that the Member States' provisions on droit de suite be harmonized at the Community level?**

Answer:

For artists engaged in the fine arts droit de suite is one of the most important authors rights.

Unlike authors of other kinds of work who draw in many ways economic benefit from public performance and mechanical or other reproduction of their works, these artists can sell their original works only once. Droit de suite considers the special value the original work has on the art market and thus enables artists, too, to benefit from the increase in the value of their works.

The fact that droit de suite has not yet been introduced in all Member States of the Community affects the living conditions of artists living in those countries that do not recognize this right.

Artists engaged in fine arts are underprivileged compared to authors of literature and music, for example, because the authors rights of the latter exist in all Member States of the Community or because important exploitation rights benefitting those authors in particular are just being harmonized at Community level (c. private reproduction, cable and satellite networks).

The present situation also affects art dealers. It is true that droit de suite is only one factor that goes into the market price of a piece of art. Nevertheless, the fact that droit de suite does not exist in all Member States brings about distortions of markets and competition.

2. Please indicate, in respect of the last ten years, the amounts collected annually under droit de suite, broken down if possible according to the nature of the work and by beneficiary.

Answer:

The following table shows the 1981 - 1990 revenues from those countries of the Community that do recognize droit de suite.

- In 1.000 ECU* -

Year	F	D	B1)	DK2)	E3)
1981	338	182			
1982	347	404			
1983	674	427			
1984	657	365			
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1986	1.110	582			
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- 1) It is impossible to obtain any information on collection by the state. The only information available is on the copyright collecting society SABAM. The indications are therefore estimates.
- 2) Revenues from the second half of 1990, the first collection period after the introduction of the law.
- 3) For comparison: Revenues from the first half of 1991, the first collection period after the introduction of the law.

For technical reasons it is not possible to give details on the distribution of revenues by copyright collecting societies.

Beneficiaries of revenues, however, are not only living artists and their heirs. Certain percentages of the revenues are also used - in accordance with distribution plans of the copyright collecting societies - in many ways in the social field and to support young artists.

Any future EC directive should recommend such use of a part of the revenue to benefit the community of artists.

3. Which types of article are covered by droit de suite (fine arts of all descriptions, photographic works ...)? How should the term "original work" be defined in this context?

Answer:

Droit de suite should be applicable to all works of fine art - paintings, drawings, original prints, lithographs, sculptures and tapestries.

Photographs, if they are of relevance to the art market, should also be covered by droit de suite.

Works of applied art should be covered by droit de suite as far as they enjoy the protection of copyright legislation. The definition of the term original work should be left to national legislation and jurisdiction or to art dealers and copyright collecting societies to find an agreement as far as the art market is concerned. It will not be necessary to include any definition into the process of harmonization.

4. To which types of sale should the droit de suite apply?

Answer:

Droit de suite should apply to all cases where pieces of art are resold or bartered through art dealers or auctioneers acting as buyers, sellers or agents.

5. Please indicate what, in your opinion, should be the basis, the rate(s) and the minimum threshold of applicability of droit de suite.

Answer:

Droit de suite should be part of national copyright legislation.

Rates should be calculated on the resale price regardless of profit margins.

Rates should be paid by the seller.

The minimum threshold of applicability should be 150 ECU.

6. Should droit de suite be the subject of collective management?

Answer:

We join the WIPO in their recommendation. Only collective management through a copyright collecting society guarantees satisfactory management of droit de suite.

Experience shows that individual management is difficult just because it is difficult to obtain the necessary information and assert claims against parties unwilling to perform.

7. In your experience what are the aspects of droit de suite which present particular difficulties in respect of implementation? Please give reasons.

Answer:

Problems in implementing droit de suite arise especially when copyright collecting societies and holders of interests are refused the information they need to assert their claims.

Therefore, a directive should follow examples in various Member States and include the seller's obligation to transfer all necessary information on works of art he sells as well as selling prices to a copyright collecting society. Such a directive should also prescribe sanctions to help assert claims.

8. If droit de suite were to be introduced in the Community, would it be necessary for there to be measures aimed at preventing sales from being displaced to other countries which do not recognize such a right? At what rate of levy of the droit de suite do you think the risk of evasion will become significant?

Answer:

We do not think that any important changes will occur on the art market when droit de suite is introduced in all Member States.

The European economic space of art trade will be strong and attractive enough to support droit de suite. What is more, any displacement of markets would entail great expense.

In addition, as is well known, a couple of countries that are not members of the EC have plans to introduce droit de suite as well. Even the United States are considering this step. Under such conditions a displacement of markets would be useless.

Experience with the introduction of droit de suite in individual Member States confirms that art trade stays in its traditional locations and environments. As far as we know, neither Germany nor Denmark or Spain have seen displacements of any importance.

We therefore think that there will be no need for particular measures against displacement.

9. Which artists should benefit from the droit de suite (EC nationals, third country nationals living in the Community, others)? More generally, how should the reciprocity provision in Article 14ter of the Berne Convention be applied?

Answer:

All artists who are citizens or inhabitants of a Member State should most certainly benefit from droit de suite. Third country nations should benefit only on the basis of reciprocity in accordance with Article 14ter of the Berne Convention.

States should participate only under the condition of reciprocity in accordance with Article 14ter of the Berne Convention.

We are convinced that such regulations would encourage third countries to make droit de suite available to their artists as well.

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1. We have the impression that resale royalties encourage the creation of new works as living artists, who many times are out of the market because of changes of the public taste within short terms get support from the resale royalty in order to continue with their artistic work. In our country it had no negative effect on the creation of new works. The resale rights legislation did not affect the German market as our society came to a general agreement with the art dealers associations in 1980, which allowed them to pay an average amount of their gross income in order to cover all the resale royalty payments. By this agreement they have to pay an annual contribution of 1.3 % out of their gross income. The money collected on this basis by our society is then distributed to the single artist according to the German legislation which entitles the copyright owner to collect a fee of 5 % of the resale price in any resale case.

You will note that the basis of collecting the money is different from the way of distribution; anyway this method turned out to be a very harmonic way of collecting and distributing droit de suite without creating any conflicts between art dealers and artists.

The amount of money collected by our society in the year 1990 was about 7,5 million Deutsche Mark. There are continuous contacts with the art dealers association in order to take care that the system keeps working.

Besides the collecting through the above mentioned percentage out of the gross income there is a separate collection of the legal fee in those cases where galleries do not want to join the general agreement. Out of this individual collection we got 0,5 million Deutsche Mark in the past year.

2. All the experience in Europe showed that a resale royalty is only working if its attributed to the resale price. It's practically impossible

to attribute any royalties to any increase in value. The amount of the resale royalty in Europe varies between 2 % (Spain) and 6 % (Portugal). In France the fee is 3 %, in Germany and Denmark 5 %. In Denmark the copyright fee covers any resale, not only sales attributed to artists or estates of artists who are represented by collecting societies.

3. The european collecting societies handling the resale royalties are exchanging money among those countries who have a similar legislation. The german copyright law has a special provision which attributes the right to claim resale royalties only to artists of those countries who have a similar legislation. We are of the opinion that the entitlement to claim resale royalties must take into consideration the international relations of the art market and should not be attributed to native artists only. For this reason and following the principles of the Bern Convention we think the droit de suite should be extended to all the Bern states and consequently members of the Bern states should be entitled to claim their royalties.

As you know the Federal Republic accepts the participation of Bern authors in any other royalty like in the blank tape royalty even for american authors where similar legislation does not exist.

From our understanding of the mechanism of copyright law within the European states and within Bern convention states there would be no problem for american artists to claim resale royalties in Europe retroactively as soon as a respective legislation would have been taken by the United States.

4. In the german law only a collecting society has the right to ask for resales and only for those resales which took place in the past year. The claim of the resale royalty - in case the resale is known - can be asserted within ten years after the resale date.

The resale legislation in the whole and the right to ask for resale royalties is in line with the protection term of the authors rights, i.e. in Germany 70 years after the death of the author.

5. The technical requirements to execute a resale royalty collection from our experience are the right to ask for information about resale cases, which might be handled by a collecting society and should not be handled by the individual author.

We are sure that a resale royalty cannot be executed without the help of a collecting society as an individual claim brought up by an individual author against a gallery will immediately have the worst consequences for this artist like boycotts etc. Only a strong collecting society can organize a working system.

The example of the Federal Republic of Germany, where all organizations of the art market and the collecting societies established the collecting through our society, shows that it is quite easy to establish working conditions. The administrative fees for handling the resale royalty in our country are not higher than 10 %.

We are ready to give you any further information.

Yours sincerely,

- dictated by

Mr. Pfennig and signed

in his absence :


(Groening)

enclosure:

- statement of CISAC concerning resale royalties (droit de suite)

International Confederation of Societies of Authors and Composers
(CISAC)

European Copyright Days

Rome, 1. - 3. October 1990

Droit de suite

by Mr. G. Pfennig (Bild-Kunst - FRG)

1. Legal foundations

Article 14 ter of the revised Bern Convention grants the author an inalienable right to participate in the proceeds from sales of a visual arts work subsequent to the first transfer by the author. This protection can only be claimed in each country of the union in so far as the authors national legislation affords such protection and to the extent permitted by the legislative provisions of the country where this protection is claimed.

2. The idea of droit de suite

The idea of the droit de suite is based on the fact that - different from any other creators - the visual artists can sell originals of their work, including small editions of graphic works, only once; they are then excluded from the profit this work might gain when it is circulating in the art market.

Other authors like composers and writers have the possibility to permit the reproduction, public representation, television and radio broadcasting and other uses of their work and get their income on that basis. For the visual artist there exists just the possibility to grant reproduction rights but the economical proceeds from these rights cannot be compared to the income of the other authors.

In this situation the *droit de suite* allows the visual artist - and should allow the creator of photographic works - to benefit from the profits gained by sellers of art works circulating in the art market.

Practice shows that the cases are numerous where artists due to their very often weak economical situation sell works at a very low price which are later resold at incredible high prices in the art market. It is not necessary to cite Van Gogh; the most recent example is the German artist Joseph Beuys, whose works were sold during the lifetime of the artist at reasonable low prices and now reach the highest rates in the international auctions.

There is no doubt that the *droit de suite* remunerations contribute to a large extent to the living conditions of visual artists whose works are sold in the art market; as far as estates are concerned there is evidence that the income of this remuneration is used for the maintenance of foundations, archives and documentaries kept by the estates of wellknown artists and museums.

Following the fundamental idea of any copyright legislation to make the creator participate in the advantages others take from the use of his work *droit de suite* legislation has been enacted in many member-states of the Bern Convention.

3. Droit de suite in the European Community

As far as member-states of the European Community are concerned, the droit de suite has been introduced in Belgium, Denmark, Federal Republic of Germany, France, Italy, Portugal and Spain.

Opponents to the droit de suite have used the argument that a droit de suite legislation would complicate the relations between art dealers and artists themselves and there would be no way to execute practical administration.

The existing examples of different European countries prove that droit de suite can be handled sufficiently through copyright collecting societies.

Especially in France, where for the time being droit de suite is only administered in public auctions on an administrative basis which creates no problem at all, and in the Federal Republic of Germany, where the collecting society handles the perception on the basis of the general agreement on the basis of a contract with the National Board of Art Dealers Association is giving evidence that this right can be administered without technical problems.

The fact that the droit de suite legislation has not been introduced to all member-states of the European Community might lead to a distortion of the art market as vendors of works of art could try to escape this remuneration by selling their works in countries of the community where a droit de suite legislation does not exist.

There is doubt whether nationals of a droit de suite country are exempt of the payment if they sell in a non - droit de suite country; the collecting society Bild-Kunst of the Federal Republic of Germany has just enacted a model law suit against a German seller who sold

through the intermediary of an auction house based in London to claim droit de suite for this sale. Should the German court decide this sale is due to the German droit de suite legislation and should this jurisdiction be extended for example to France, this could be an extension of droit de suite to other countries without introducing a legislation there. But for the benefit of the art market all over Europe the artists in the European countries and the collecting societies are of the opinion that an extension of the droit de suite legislation to all member-states of the Community would be the most preferable solution.

4. CISACs droit de suite recommendation

On the occasion of its meeting from 17th and 18th September 1990 in Gstaad the EEC-committee of CISAC formulated a proposal of a model droit de suite directive of the European Community on the basis of a proposal of the working group "droit de suite" of the International Council of Authors of the Graphic and Plastic Arts and of Photographers.

These principles are the following:

1. Beneficiaries:
Artist, their heirs and holders of legacies should benefit from droit de suite legislation.

2. Exclusion of assignment
It should be excluded by law that the artist can waive his droit de suite during his lifetime.

Experience in droit de suite-countries shows that the art market would try to make the artist sign droit de suite

when selling the work of art if this would not be prevented by law.

3. Protection term

Like any other author's right droit de suite should be protected 70 years post mortem auctoris.

4. Protected works

All works of plastic and graphic art - drawings, paintings, prints, sculptures and tapestries - should be protected by droit de suite; multiplied works should also be included as far as the art market considers them as original works of art.

As far as photography is concerned, CISAC recommends to include works of photographic art in the droit de suite legislation if they are object of the art market.

An evidence is that during the last 10 years works of famous photographers such as Brassai, August Sander, Man Ray and Mapplethorpe raised high prices in special auctions and in specialized art galleries. Photography has been developed as an object of the art market as far as original prints are concerned. Due to this development there is no reason to exclude photographers from the benefits of droit de suite especially for the reason that many famous artists - like Man Ray and Andy Warhol - worked as well as sculptors, painters and photographers.

5. Sales subject to droit de suite

In all cases where the original of an artistic work is resold the vendor shall pay the droit de suite participation to the author if such a resale involves an art dealer or auctionaire as purchaser, vendor or agent.

6. Minimum price

Only resales above a minimum resale price of 150 ECU should entitle the author to claim droit de suite.

The definition of a minimum is necessary to avoid unprofitable administration of low price sales.

7. Definition of resale price

The basis for the droit de suite payment should be the resale price; a legislation connected to the surplus value does not seem practical.

Currently there are different droit de suite percentages in the european states; they thrive from 6 % (Portugal) to 2 % (Spain).

In the discussion about the introduction of droit de suite there is often heard the argument that the droit de suite remuneration cannot be connected to the resale price as not every resale leads to the augmentation of the value of the work of art. This idea might be right in single cases; on the other hand there cannot be any doubt that the majority of sales through the art market leads to higher rates than the first sales price. It is not only the result of simple economic logic but takes into consideration the continuous growing of prices for art works in the international art market.

8. Handling of droit de suite

The collective administration of the droit de suite can only be guaranteed if a collecting body is involved.

The collecting society should have the right to ask for information in any case of resale, to collect the money and to distribute the money to artists and estates.

The experience in France and the Federal Republic of Germany shows that without introduction of the right to ask for information for the collecting societies into the droit de suite legislation an effective realisation of this right is not possible especially towards the private art dealers. The position of the single artist against the art market is normally too weak to realize his droit de suite individually. Because of this reason the droit de suite can only be handled through the intermediary of a collective society. This has also the effect that the art market has just one partner who collects every information and the payments instead of dealing with a large number of single artists or estates.

**EVA: Answers to the Questionnaire
on Droit de Suite in the European Community**

- 1. Does it seem to you necessary that the Member States' provisions on droit de suite be harmonized at the Community level?**

Answer:

For artists engaged in the fine arts droit de suite is one of the most important authors rights.

Unlike authors of other kinds of work who draw in many ways economic benefit from public performance and mechanical or other reproduction of their works, these artists can sell their original works only once. Droit de suite considers the special value the original work has on the art market and thus enables artists, too, to benefit from the increase in the value of their works.

The fact that droit de suite has not yet been introduced in all Member States of the Community affects the living conditions of artists living in those countries that do not recognize this right.

Artists engaged in fine arts are underprivileged compared to authors of literature and music, for example, because the authors rights of the latter exist in all Member States of the Community or because important exploitation rights benefitting those authors in particular are just being harmonized at Community level (c. private reproduction, cable and satellite networks).

The present situation also affects art dealers. It is true that droit de suite is only one factor that goes into the market price of a piece of art. Nevertheless, the fact that droit de suite does not exist in all Member States brings about distortions of markets and competition.

2. Please indicate, in respect of the last ten years, the amounts collected annually under droit de suite, broken down if possible according to the nature of the work and by beneficiary.

Answer:

The following table shows the 1981 - 1990 revenues from those countries of the Community that do recognize droit de suite.

- In 1.000 ECU* -

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For technical reasons it is not possible to give details on the distribution of revenues by copyright collecting societies.

Beneficiaries of revenues, however, are not only living artists and their heirs. Certain percentages of the revenues are also used - in accordance with distribution plans of the copyright collecting societies - in many ways in the social field and to support young artists.

Any future EC directive should recommend such use of a part of the revenue to benefit the community of artists.

- 3. Which types of article are covered by droit de suite (fine arts of all descriptions, photographic works ...)? How should the term "original work" be defined in this context?**

Answer:

Droit de suite should be applicable to all works of fine art - paintings, drawings, original prints, lithographs, sculptures and tapestries.

Photographs, if they are of relevance to the art market, should also be covered by droit de suite.

Works of applied art should be covered by droit de suite as far as they enjoy the protection of copyright legislation. The definition of the term original work should be left to national legislation and jurisdiction or to art dealers and copyright collecting societies to find an agreement as far as the art market is concerned. It will not be necessary to include any definition into the process of harmonization.

- 4. To which types of sale should the droit de suite apply?**

Answer:

Droit de suite should apply to all cases where pieces of art are resold or bartered through art dealers or auctioneers acting as buyers, sellers or agents.

- 5. Please indicate what, in your opinion, should be the basis, the rate(s) and the minimum threshold of applicability of droit de suite.**

Answer:

Droit de suite should be part of national copyright legislation.

Rates should be calculated on the resale price regardless of profit margins.

Rates should be paid by the seller.

The minimum threshold of applicability should be 150 ECU.

6. Should droit de suite be the subject of collective management?

Answer:

We join the WIPO in their recommendation. Only collective management through a copyright collecting society guarantees satisfactory management of droit de suite.

Experience shows that individual management is difficult just because it is difficult to obtain the necessary information and assert claims against parties unwilling to perform.

7. In your experience what are the aspects of droit de suite which present particular difficulties in respect of implementation? Please give reasons.

Answer:

Problems in implementing droit de suite arise especially when copyright collecting societies and holders of interests are refused the information they need to assert their claims.

Therefore, a directive should follow examples in various Member States and include the seller's obligation to transfer all necessary information on works of art he sells as well as selling prices to a copyright collecting society. Such a directive should also prescribe sanctions to help assert claims.

8. If droit de suite were to be introduced in the Community, would it be necessary for there to be measures aimed at preventing sales from being displaced to other countries which do not recognize such a right? At what rate of levy of the droit de suite do you think the risk of evasion will become significant?

Answer:

We do not think that any important changes will occur on the art market when droit de suite is introduced in all Member States.

The European economic space of art trade will be strong and attractive enough to support droit de suite. What is more, any displacement of markets would entail great expense.

In addition, as is well known, a couple of countries that are not members of the EC have plans to introduce droit de suite as well. Even the United States are considering this step. Under such conditions a displacement of markets would be useless.

Experience with the introduction of droit de suite in individual Member States confirms that art trade stays in its traditional locations and environments. As far as we know, neither Germany nor Denmark or Spain have seen displacements of any importance.

We therefore think that there will be no need for particular measures against displacement.

- 9. Which artists should benefit from the droit de suite (EC nationals, third country nationals living in the Community, others)? More generally, how should the reciprocity provision in Article 14ter of the Berne Convention be applied?**

Answer:

All artists who are citizens or inhabitants of a Member State should most certainly benefit from droit de suite. Third country nations should benefit only on the basis of reciprocity in accordance with Article 14ter of the Berne Convention.

States should participate only under the condition of reciprocity in accordance with Article 14ter of the Berne Convention.

We are convinced that such regulations would encourage third countries to make droit de suite available to their artists as well.

143 Cross Street
Norwell, MA 02061
April 23, 1991

Office of the Registrar of Copyrights
Copyright Office
James Madison Bldg., Room 403
First and Independence Avenue, S.E.
Washington, DC 20559

Comment Letter	
RM	91-1
No.	18

Re: Comments on Resale Royalties for Works of Art

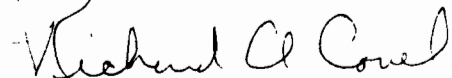
Gentlemen,

I offer the following limited comments on the concept of resale of art from the perspective of both the artists and the purchaser or repurchaser of art.

1. Resale Royalties regulations should only be applicable to sales or resales of art exceeding a certain value, i.e. \$5,000.00 U.S. or in kind value. Such a regulation would provide standing notice to purchasers of a level of value of art that a commission is due the artist.
2. The regulations should require that sellers of art notify and pay the artist for resales. The regulations should provide an alternate notification to the Copyright Office in cases where the artist cannot be located. Failure of an artist to claim a royalty within 5 years of a notice of resale in the Copyright Office should provide a defense for the seller to make such payment.
3. Failure of a Seller to comply with resale royalties notifications and payments should carry civil fines and double royalty payments. Purchasers of art may require an artist's acknowledgement of receipt of royalties from the Seller prior to the consummation of the resale.
4. Resale Royalties should be deductible from any capital losses or gains of the resale of art by the seller and should be considered ordinary income to the artist.
5. Enforcement of the resale regulations should be accomplished by a citizen suit in the Federal Courts.

Thank you for the opportunity to comment.

Very truly yours,



Richard A. Covell, Esq.
Intellectual Property Attorney



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF PUBLIC HEARINGS

PUBLIC HEARINGS: ARTISTS' RESALE ROYALTIES

The following excerpt is taken from Volume 57, Number 8 of the Federal Register for Monday, January 13, 1992 (p. 1281)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 91-1]

Public Hearings: Artists' Resale Royalties

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of public hearings.

SUMMARY: The Copyright Office issues this notice to inform the public that it will hold hearings in connection with a report to Congress on artists' resale royalties. The Office invites comment or participation in the public hearings from individuals or groups involved in the creation, exhibition, dissemination, and preservation of works of arts, including artists, artists' organizations, art dealers, auction houses, art galleries, art museums, collectors of fine art, and investment advisors.

DATES AND ADDRESSES: The public hearings will be held on January 23, 1992 in San Francisco, California at the Fort

Mason Center, Building F ("The Firehouse"), and on March 6, 1992 in New York City, New York at the United States Courthouse, Foley Square, on both dates from 9:30 a.m. to 6 p.m., depending on requests for participation. Anyone desiring to testify should contact William Patry, Policy Planning Advisor to the Register of Copyrights, Copyright Office, by telephone (202) 707-8350 or fax transmission (202) 707-8366. For the January 23, 1992 San Francisco hearing, such requests should be received no later than January 16, 1992. For the March 6, 1992 New York City hearing, such requests should be received no later than February 21, 1992. All requests to testify should clearly identify the individual or group desiring to testify.

FOR FURTHER INFORMATION CONTACT: William Patry, Policy Planning Advisor to the Register of Copyrights, Copyright Office, Library of Congress, Washington, DC 20559. Telephone (202) 707-8350.

SUPPLEMENTARY INFORMATION: On February 1, 1991 (56 FR 4110), the Copyright Office published in the Federal Register a Notice of Inquiry and

Request for Information, seeking information in connection with a report to Congress on the question of artists' resale royalties that the Copyright Office is statutorily required to submit on June 1, 1992. The Copyright Office received a number of responses to this Request for Information. However, in order to afford artists, galleries, art dealers, museums, and others involved in the art market who might not otherwise have an opportunity to present their views, the Copyright Office has scheduled the above-referenced hearings. Those testifying should respond, as relevant to their particular situation, to the questions posed in the February 1, 1991 Request for Information.

Dated: January 3, 1992.

Ralph Oman,

Register of Copyrights.

Approved by

James H. Billington,

The Librarian of Congress.

[FR Doc. 92-774 Filed 1-10-92; 8:45 am]

BILLING CODE 1410-07-M

PART II - Transcript of San Francisco Hearing

**THE LIBRARY OF CONGRESS
COPYRIGHT OFFICE**

**PUBLIC HEARING
ON THE FEDERAL VISUAL ARTISTS
RESALE ROYALTIES ACT**

BEFORE:

**WILLIAM F. PATRY
POLICY PLANNING ADVISOR
CHAIRMAN**

**THURSDAY, JANUARY 23, 1992
SAN FRANCISCO, CA**

WITNESSES

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Ruth Asawa	53 ff
Brenda Berlin	24 ff
Jerome Carlin	52 ff
Jack Davis	13 ff
Eleanor Dickinson	47 ff
Thomas M. Goetzl	3 ff
Richard Mayer	41 ff
John H. Merryman	29 ff
Alma Robinson	20 ff

MR. PATRY: Good morning. My name is William Patry. I'm a policy planning advisor to the Register of Copyrights in the Library of Congress. As our location implies, we are a legislative branch agency. We advise Congress on legislation. We assist them in drafting it. We testify before them on issues. When requested, we prepare reports for Congress on issues that are of concern to them.

The hearing today and its companion on March 6 in New York City is the result of legislation that was signed by the President on December 1, 1990. This was the Visual Artists' Rights Act of 1990. For the first time, this act gave to visual artists certain moral rights -- rights with respect to attribution and to prevent the mutilation or destruction or distortion of their works.

Earlier versions of that legislation contain provisions on resale royalty rights or droit de suite, as it has been known since its introduction in France in 1920. Resale royalties have been a part of California law since January 1, 1977.

During the hearings on the Visual Artists Rights' Act, there was discussion of having an artist's resale royalty rights law federally. Earlier bills were introduced by Representative Waxman by Representative Downey. Not surprisingly, there was testimony in opposition to the artist resale royalty provision by galleries, art dealers, and others.

As a result of this opposition and the fact that there was no opposition to the other visual artists' rights provisions, Congress decided to move ahead on the moral rights part of the bill, but requested the Copyright Office to do a study on the feasibility of a federal resale royalty provision.

The hearing today is a part of that study. The study is to be presented to Congress on June 1, 1992.

Since California is the only state that has an artist resale royalty provision, we will be able to gain information today about your experiences -- how it works; whether the California law should be a model for any federal legislation; whether the California law could be improved if we do have a federal law; how the California law has benefited artists and which artists; whether the California law has had a negative impact, if at all, on the art market in California. Finally, we are interested in finding out whether you think there should be a federal droit de suite provision.

We will have witnesses on both sides of the issue. Anyone is free to submit written comments to me at any time up to June 1. Of course, the earlier the better, because I'll have more of a chance to consider them.

The schedule will be as follows: We'll begin with Professor Goetzl, followed by a panel consisting of Mr. Davis and a number of artists. Then we will have testimony from Professor John Henry Merryman of Stanford University who, I think, takes a different view from the other witnesses. We will conclude with a panel of witnesses representing the artists' viewpoint.

I expect we'll probably conclude by lunchtime. If we go over, however long it takes, that's fine.

Professor Goetzl is a professor of law at Golden Gate University. He has worked on arts legislation for seventeen years, including works on the original drafts of the bill that became the California Art Preservation Act found in the California Civil Code, I believe, Section 987.

He is a member of the board of directors of California Lawyers for the Arts. On their behalf, he submitted comments to the Copyright Office in this

inquiry. He's the author or co-author of a number of articles in the field, including "Artists' Rights: The Kennedy Proposal to Amend the Copyright Law" and "Copyright and the Visual Artists' Display Right: A New Doctrinal Analysis."

Welcome, Professor Goetzl, and you may begin.

PROFESSOR GOETZL: Thank you, Mr. Patry. It's a pleasure to be here. I have a number of things that I want to say about this legislation. I am generally very much a supporter of resale rights for artists. Indeed, I view resale rights as part of a larger picture.

I think one of the deficiencies of the copyright law is that artists have not been treated on the same basis as have other authors, in particular, with respect to the right to display. As set forth in my article, "Copyright and the Visual Artists' Display Right: A New Doctrinal Analysis," it is my conviction that artists should be granted some compensation when their works are displayed. Within that framework, the resale royalty then becomes an opportunity to assess that display right when the art is in a private context rather than in a public context.

In attempting to think about and address the needs of this study that you're conducting, I gave some thought to what is meant by "feasibility," because it's a rather vague and general term. It seems to me that it has two components.

One component is the desirability of the legislation in the first instance. The second component, assuming such legislation were enacted, is what form would it take, in particular, how would this right be implemented and enforced.

I think it is clearly the case that if you are to recommend its enactment and if Congress is to enact some kind of royalty legislation, then Congress can surely come up with a method which will make it enforceable.

At this point, I find it very useful to recall the experience under the 1897 amendments to the copyright law and under the 1909 Copyright Act granting a right to a royalty for the public performance for profit of music. The right lay largely dormant for a number of years.

It was finally in 1917, that the U.S. Supreme Court in Herbert v. Shanley Hotel, upheld the right of Victor Herbert, the composer, to collect a royalty when his music was played in a hotel dining room. That gave impetus to the formation of ASCAP and later on to BMI. It was through those private agencies that meat was put on the bones of this right which otherwise was difficult to enforce.

Our experience in California for the fifteen years that we've had resale royalty legislation is there is considerable debate about how effective this legislation has been in its present form. You're going to hear a good deal of testimony about this from the panel.

I can suggest an overview; there is little hard statistical data on the effectiveness of this legislative. Most of our information is anecdotal. What has not yet happened, however, because the application of the law is still limited only to California, is the creation of an A.S.C.A.P.-like enforcement organization.

The other part of this question that has to be considered, is whether or not droit de suite is something that Congress will choose to enact, or something you are going to recommend. Obviously, if it's not recommended, if it's not enacted, then it doesn't matter how enforceable a scheme would be. Nothing will come of it.

I don't know how much it is necessary to say about desirability. I'm pleased to know that you are familiar -- and apparently very familiar -- with all

of the pertinent literature. So, you're aware of the philosophy offered for the resale royalty by, for example, the French law and the contrasting philosophy of the German law. You are also familiar with the justification I've offered up in my article, which boils down to, really, a matter of fundamental fairness.

Even as the exploitation of intellectual property, of products of the mind, has been expanded over the years, so too, Congress has in a very irregular and inconsistent way perhaps, but nevertheless persistently, enlarged the exclusive rights available to authors.

Those who have lagged behind, however, are visual artists. Artists, at present, derive protection under the copyright law in terms of gaining remuneration only when their works are reproduced. The occasions where artwork is reproduced -- is rendered in copies -- are few. That is not where the primary market for visual art lies. The primary use of visual art, of course, lies in its viewing, in its display.

It is interesting in that connection to observe that there have been tentative steps taken in other countries to begin to compensate artists for this display. Most notably, Canada now awards exhibition fees on a regular basis to artists whose works travel. It is limited to those works that the Canadian government owns in its art bank. When these works are exhibited, artists are compensated.

A parallel to that, and also interesting to note in this regard, is the recent enactment of lending royalties in Western Europe, primarily in Great Britain and the Scandinavian countries. While many books find their primary use through the sale of copies, generating royalties for their authors, other books do not sell in large numbers, although they still enjoy wide readership. That's

because those books find their primary audience in libraries where they are just loaned.

The countries of Western Europe have begun to recognize this and have determined since it is not the paper and ink that are the subject of copyright, but rather the intellectual content of the books, in fairness, these authors should be awarded a royalty when their books are checked out of the library. The question which is clearly left unanswered at this point is where would the revenues come from to pay for this. It's a fair question. But I think answers can be found at an appropriate time.

Suffice it to say, a parallel exists when we have works of art on display in museums, in corporate offices, or even in private homes. In all these cases, the work is being enjoyed by a significant audience. Yet, no ongoing compensation is being shared with the artist.

Note, that if we look at sports and entertainment in this country, we will observe that athletes and entertainers -- and I'm using that in a very broad sense -- tend to be very, very well compensated. Fans think nothing of paying \$25 or \$30 for a ticket to go to the ball game. Others do not hesitate to pay \$50 to \$100 for a seat at the opera or the theatre. Indeed, even movies today charge seven or eight dollars for admission.

In stark contrast, our museums, which hold enormous valuable collections of wonderful art, remain the "last cheap date." In most parts of the country, museums are still free. Those which have begun charging admission charge very reasonable admissions -- three, four, or perhaps five dollars. Indeed, many are even less expensive than that.

It seems to me that if you take the long view of this, what has happened is that visual artists who are not compensated when their works are

displayed, have been subsidizing the public's enjoyment of art. I'm pleased to read that attendance at museums remains very, very high, even after the modest admission charges were imposed. It still is higher than all professional sports put together.

So, there are parallels here which suggest that artists have been shortchanged by the copyright law throughout our history. The resale royalty, as it was enacted in California, represents a small step toward bridging that gap.

I came on the scene after this statute, California Civil Code Section 986, had first been enacted. So, I can't really, from my own experience, tell you what its genesis was. I did work a great deal with Senator Sieroty, its author, shortly after its enactment, in reviewing how it was working, and drafting the bill which embodied the amendments which took effect in 1982 and strengthened the law.

There are two main approaches to the enforcement of the resale royalty that can be taken: the first is what I would for convenience, refer to as a private enforcement mechanism. This is essentially what we have in California. The law provides that under certain circumstances, a royalty is due and payable. It is incumbent upon the artist to discover it is due, by whatever means, and then to make a demand for it and, if that fails, to bring suit against the seller or the seller's agent who has failed to pay it.

This presents challenges: artists don't always know when a sale has occurred. There isn't any public repository of that kind of information. In addition, many artists have reported anecdotally to me, to us at California Lawyers for the Arts, that they feel considerable inhibition in making demand upon sellers for this royalty. They fear that their galleries may decline to represent them in the future or that sellers will harbor bad feelings.

Realistically, precisely those artists whose works enjoy resales are the least likely to be dropped by galleries. Neither are collectors likely to harbor bad feelings for long. On the contrary, most collectors are eager to maintain good relations with the artist. Part of the caché of collecting art is the familiarity and friendship with the artists that one can then enjoy.

The second approach to the enforcement of the resale royalty involves a more public kind of mechanism. This is what was initially contemplated in HR 11403, Henry Waxman's seminal resale royalty bill, introduced in 1978. It provided for a federal registry where all sales would be registered, and where artists would have to register. It apparently was that model which was then incorporated into the initial proposal introduced by Senator Kennedy as S. 2796. This is a very different way to go about it.

As that bill was first introduced, it would have required artists who sought to collect a resale royalty to register their name and address with the Copyright Office. It would also have required that sellers register the occasion of the sale with the Copyright Office.

Given a choice between these two mechanisms, my personal recommendation would be to refrain from creating more government bureaucracies, with whatever expense they might entail. These above requirements would also impair the confidentiality of the transactions, the identity of the parties, and the sums involved.

I would prefer a private system very much following the example of what has been done in collecting the royalties occasioned by the public performance for profit of copyrighted music. Leave it to the formation of an "A.S.C.A.P." or "Broadcast Music, Inc." to take a transfer of the rights from the artist for the purpose of collecting royalties.

It was in specific anticipation of such collecting societies that the 1982 amendments to the California Resale Royalty Act modified the prohibition of a waiver of the right. The resale royalty right is non-waivable, both in California and as proposed in Senator Kennedy's original bill, with the exception that a transfer for the purpose of facilitating its collection, could be lawfully done.

It is going to take some time for such an organization to be formed. But such an organization would probably prove to be a more efficient and satisfactory way to bring about the enforcement of such a resale royalty.

MR. PATRY: Thank you very much. I have a few questions.

PROFESSOR GOETZL: Okay. Thank you.

MR. PATRY: There are a number of different justifications that one hears for droit de suite, one of which is that artists should benefit from the subsequent increase in the value of the work. The theory is that most of the increase is the result of the artist's original work and not particularly the work of gallery owners or dealers or auction houses, although they probably have a different viewpoint on that.

But theoretically, at least, that is one justification. But, in Europe, that's not the way, in fact, droit de suite is administered. As you know, it's done on any sale. So, there are at least a number of models that one could pick. California has picked one.

On the federal level, you could pick a model that, in fact, only kicks in droit de suite once there has been an increase in the sale amount. Another way would be to follow the European approach, which is to have it for any sale, even if that sale results in a loss.

In my reading on this, I came across a statement by you. The quote was -- and you can tell me whether it's accurate or not -- "artists are the only socialists in a capitalist system."

PROFESSOR GOETZL: That is accurate.

MR. PATRY: My question is this: If we were to give artists full-fledged status as capitalists, would not a logical corollary to that be for them to share in any losses. In other words, if you're going to give them capitalist status and say that they should benefit, why shouldn't they also share in losses?

PROFESSOR GOETZL: No. That does not follow at all. The quoted statement was in response to so many people criticizing the resale royalty concept on the grounds that it would only benefit wealthy artists. These critics characterize the resale royalty as welfare-type legislation and then criticize it for not benefitting poor artists.

In response to that, I said artists ought not to be the only socialists in a capitalist society. To be consistent with the way in which other authors are treated under the copyright law, successful, wealthy artists should continue to become even wealthier if their works enjoy continued popularity. Just as is the case for those who own valuable patents or those who own copyrights on popular books, popular songs, or popular dramatic works, they should also be entitled to get richer and richer and richer.

Now, I don't think this is the occasion to re-examine capitalism in that sense. My point is simply that artists ought to be treated on the same basis as other authors.

With respect to how the royalty would work, I think you're quite right. There are a number of choices that could be followed. I think we can break it down neatly into three such options.

One, a sort of middle system, is what California does. That is, whenever there is a resale which has been for a profit -- i.e., at a higher price than what was originally paid for the work, a royalty is due on the entire resale price irrespective of the possibility that it may generate a net loss to the collector. I notice parenthetically that the gallery which resells the work will take a commission even though that commission results in a loss to the seller.

What was included in Senator Kennedy's bill initially was the concept that while the royalty might be a more generous percentage, it should be applied only against the appreciation. This would, at least insofar as the royalty is concerned, assure the collector that he or she would not suffer a loss due to the resale royalty. That's at one extreme.

At the other extreme is the view that a royalty should be paid even if the work is sold at a loss. I speak only for myself at this point with respect to that. I would support that. My writings endorse that. I believe that the justification for a resale royalty lies not in the appreciation in value of the work as much as in the very existence of another audience for the work.

I note in that connection that if I'm a playwright and a theater company desires to present my copyrighted work, we will negotiate a royalty to be paid to me. Even if the presentation of that play proves a flop. That simply is a cost of doing business.

So too, if a movie producer wishes to buy the rights to make a film from my book, they pay me whether the film makes money or loses money. I think

it is appropriate to envision that kind of a parallel where a work of art is purchased and where it then is going to move on to another audience, as it were.

MR. PATRY: To use your analogy for literary works, if you're an author and you enter into a contract and you get an advance and you get a certain percent for the subsequent sales of your work and multiple copies, you don't have to give your advance back, usually, if your work turns out to be not successful.

The difference in the counter argument though -- and my question is this -- is that if you have a droit de suite where it's not triggered perhaps by an increase, to some extent it could be argued that it gives visual artists the best of both worlds. Why shouldn't they be treated just like authors? Shouldn't they negotiate just like authors do, and get whatever money they can?

Otherwise, they would have a situation then where they would benefit from the subsequent sales, take a cut in those sales, but not take any of the risk for any particular losses. So to that extent they would be treated a little bit better than literary artists. I'm well aware of the counter arguments -- and I'll ask Professor Merryman about his too -- that, of course, that's the way in which they're exploited, that it's rather different for visual artists, since their works are only exploited commercially, and they only make money from the sales of the originals.

Those are all the questions I have right now. As I mentioned earlier you are free to submit any written comments and perhaps we'll have other questions later. Thank you very much for your original submission as well, which was very helpful. All of it will go into the record.

PROFESSOR GOETZL: Good. Thank you very much.

MR. PATRY: Thank you very much.

Next up, we have Jack Davis, Alma Robinson, and Brenda Berlin.

You could join them as well. Do it together as a panel.

Alma, is Brenda going to join you as well?

MS. ROBINSON: She's here.

MS. BERLIN: Welcome to sunny California.

MR. PATRY: Yes. When I left Washington, there was a high of 28, and I was looking forward to this. We'll see.

On our next panel is Jack Davis, an attorney from San Francisco, a member of the board of California Lawyers for the Arts and one of the attorneys in the landmark Morseburg v. Balyon case testing the constitutionality of the California statute; Alma Robinson, executive director, California Lawyers for the Arts; and Brenda Berlin, chairperson of the San Francisco Arts Democratic Club. You can proceed any way you want.

MR. DAVIS: Good morning, sir, and welcome to warm, sunny California.

MR. PATRY: Having grown up here, I know Mark Twain has been quoted as saying the coldest winter he ever spent was one summer in San Francisco.

MR. DAVIS: It does get colder than this.

I was privileged, as you know, to represent Richard Mayer and another artist, Peter Alexander, as intervenors in the case of Morseburg versus Balyon which was then renamed Morseburg v. Balyon v. Mayer, the lawsuit in which the constitutionality of the California Artist Resale Royalties Act was challenged.

During the course of working on that case, I had occasion to talk at length with Dick and with other people working on the case about the nature of the resale royalty and some of the reasons for it. It finally occurred to me that the best way to explain the justification for a resale royalty act is to provide a reward to an artist, not just for each work he creates, but for the dedication of the artist to a life of work on his or her artwork.

The most ready example to consider is the work that Pablo Picasso did at the turn of the century. If he had made some of those wonderful drawings in 1905 and 1906 and then never made another work of art in his life, I think most of us would agree that that artwork would not have increased in value over the succeeding years. He would have been another artist who left the field and left some nice artwork, but perhaps not remarkable artwork and certainly not remarkably valuable artwork behind him.

What he did instead was continue to work, developing not only himself as a person, but as an artist. He also created a name for himself. In my representation of artists, I have found that another almost discrete area of the endeavor of being an artist is the creation of a name for oneself and that very difficult process of marketing oneself and making oneself and one's work known.

Picasso kept doing that. He did that throughout his life, and he created a worldwide reputation for himself. It was that, as well as the original creation of the artwork itself, that increased the value of his artwork as time passed.

I think that what the California Resale Royalties Act does, and what any droit de suite does is to reward that continuing effort and to give an artist a share in what his or her later work contributes to the increased value of an earlier work. I think that this is fair and equitable, not only a very reasonable way of recognizing art work and the dedication that artists give to their profession, but also a valuable way of encouraging artists to continue their work and to make the sacrifices that all artists do.

The other thing that struck me was that having a resale royalty right is an important piece of recognition, in and of itself, for artists, that provides encouragement. If art is an important cultural asset to any country or

to the world at large, certainly encouragement of the development of that piece of our culture is an important thing as well.

Those reasons apply not only in the state context, but in the federal context, and should help provide part of the motivation for establishing a resale royalty act, which I support.

I'd like to direct my other comments to some of the enforcement problems, which are very serious here in California. Although the State of California is a residual beneficiary of the Resale Royalties Act, and it has an escheat interest in the resale royalties which it collects when can't find the artist for payment of it, the state really never put forth has and certainly in these economic times can't be expected to mount a substantial enforcement effort. They haven't elected to do that even though we've asked them to on a number of occasions.

There are great difficulties in private enforcement by individual artists. First is the difficulty of finding out about resales. Artists just don't have the sorts of informational resources that are needed to find out about private transactions for which there is no real reporting requirement and no affirmative obligation to notify.

There is an affirmative obligation under the California law to pay, and thus you can imply an obligation to notify the artist of the resale. But it's just not done. That's something that's honored far more often in the breach than in the observance. It's very, very difficult to know when one's artwork is being resold.

Second is the expense of pursuit. Even though there's a provision in the Resale Royalty Act for recovering attorney's fees, the cost of mounting

a lawsuit is substantial. To many artists, if not most, it's going to be an enormous deterrent.

But perhaps the most serious impediment to enforcement is the fear of being blackballed. On more than one occasion, I've encountered instances of gross, wholesale violation of the Resale Royalty Act on a repeated basis by very reputable large galleries and auction houses.

I have discussed with the artists entitled to the royalties their right to pursue the royalties. Even though the violations seem clear and the right to recover royalties seems clear and even though it's a very broad ranging violation, the artists back off.

One very well established San Francisco Bay Area artist, several of whose works had been resold within the recently amended Resale Royalties Act by a very well respected -- I was going to say reputable, but I personally don't see that auction house as reputable -- would not pursue it even under pressure from his friends and peers to do so. There is an enormous fear of being blackballed, which is an enormous disincentive to enforce the right.

I think that what's needed in terms of enforcement is something that's as pervasive and yet as ordinary as tax enforcement. Perhaps resale royalty compliance could be one which the IRS audits, when it audits books generally, or perhaps in the course of some other governmental enforcement auditing practice, resale royalties could be part of the audit process. Perhaps it could be enforced that way.

I'm not sure that I know the right, specific mechanism, but it should be something that makes the payment of resale royalties something as mundane and regular as the payment of taxes, whether they be income tax or withholding taxes

or sales taxes, is really needed to make this a genuine right and one that's honored.

I would encourage you to encourage the Copyright Office to encourage Congress to find some mechanism of that sort. Thank you.

MR. PATRY: Thank you.

MS. ROBINSON: Shall I work on the heat for you?

MR. PATRY: That would be nice.

MS. ROBINSON: Excuse me one minute.

MR. PATRY: We had, I thought, turned it on when we first came in, but obviously not very efficiently.

While you're doing that, let me ask you a question. You said that one justification for droit de suite is encouraging the creation of art and culture. One of the arguments I've heard on the other side is that the real need is not necessarily for a secondary market, but that the real problem many artists face is the primary market, i.e., that the real need is for funding of money to encourage the initial sales.

One of the things I'd like to find out, is what is the difference between the primary market for the initial sale and the resale market? How large is the resale market? What does it consist of? Who gets their works resold more often than others? Whether, if one is going to have some sort of funds that are available to the artist, wherever they come from, whatever label you give them, however they're administered -- is the larger problem, the more immediate problem, helping artists get more initial sales. Is that a way to go rather than to set up a mechanism for resale?

Maybe they're not mutually exclusive. But I think it's a piece, at least, of empirical data that Congress should know. They should know how best to benefit artists. I'd be interested in what you think about that.

MR. DAVIS: I may not be the most qualified person to answer that because I'm not an expert in the art market. I don't know a great deal about it as a general matter, but my initial reaction is that artists need all the help they can get. They make a great many sacrifices to pursue their calling -- enormous sacrifices, which should be rewarded in any way we can find to reward them.

I would agree with what you said about the two not being mutually exclusive. I don't think they are mutually exclusive. I think we need to encourage and foster the initial creation of artwork. If that's what you mean by funding initial markets --

MR. PATRY: Yes.

MR. DAVIS: -- I think that supporting and perhaps even subsidizing artists is a very, very important cultural priority. I don't see any contradiction between helping artists with the initial creation of work and rewarding them for resales of their work, except in the sense that perhaps if you view the pot of money that there is as very finite, and necessitating making a choice between one and the other.

But I would note that what we're talking about in terms of establishing a resale royalty is not something that's going to be a great expense to taxpayers. The cost of moving a bill through Congress is something that I don't know about, but I don't think it is a material factor here. After that, I don't see the cost as being something substantial.

Certainly, Congress is not talking about paying the royalty out of public funds.

MR. PATRY: Right.

MR. DAVIS: It requires a private transaction. Really the only expense that I would see would be the enforcement expense which I think would be minimal if it were piggy-backed onto some other form of enforcement in the context of reviewing transactions like taxable events, like sales.

MR. PATRY: Yes. You could have a statute that had a mandatory disclosure requirement.

MR. DAVIS: I think there should be a mandatory disclosure requirement. I think it should have very, very severe sanctions for those who violate it. Because I think that in California, the problem has been that resellers feel no obligation to comply.

MR. PATRY: Would you agree with Professor Goetzl that there needs to be some sort of collecting society, which would take care of some of the problems of enforcement and remove an artist's fear of being blackballed, because the collecting society would enforce the right. Or maybe it wouldn't, because the society would still be collecting on behalf of the particular individual.

Collecting societies in France and Germany, thought this was essential to their system.

MR. DAVIS: Do you mean a monitoring society like ASCAP --

MR. PATRY: An ASCAP, BMI type of system, yes. These are organizations that do other things as well. ADAGP in Paris also licenses reproduction rights and does other things as well.

MR. DAVIS: I don't think that I know the mechanics of the market well enough to know whether a monitoring or collecting society would work. If

it's workable, certainly. Anything that they can do to help promote the effectuation of a federal Resale Royalty Act, so that it is not like the Resale Royalties Act has been in California.

MR. PATRY: How then would you get around the fear of being blackballed?

MR. DAVIS: By making the enforcement mechanism something extrinsic to the artist/reseller relationship. I mean that more in an artist/gallery situation than in the individual collectors situation.

But certainly, I think that some third party authority like the government should take responsibility for enforcement. It seems to me that there ought to be a way to figure that out without it's being terribly expensive.

MR. PATRY: Okay. Thank you.

MS. ROBINSON: Good morning. My name is Alma Robinson, and I'm the executive director of California Lawyers for the Arts. Thank you for the opportunity to testify on behalf of our 2,000 members who include artists and attorneys as well as arts administrators, teachers and other professionals throughout California.

Our organization, which was started as Bay Area Lawyers for the Arts in 1974, has now become statewide with offices in Los Angeles and Oakland, as well as San Francisco. California Lawyers for the Arts has historically supported resale royalties for visual artists because it makes economic and ethical sense to allow the creators of artwork to share in the benefits of their labor when the value of their work appreciates.

We are pleased to be a co-sponsor of the survey which the Artists Equity Association is now conducting to develop more information about the

effectiveness of the California Resale Royalty Law, Civil Code § 986. I have a copy of the survey for you, but you have obviously seen it.

MR. PATRY: Thank you.

MS. ROBINSON: The career of a visual artist requires long years of sacrifice in an often solitary endeavor, with minimal support. In order to spend years in research and development, many artists sacrifice the opportunity to live a normal professional life with steady incomes, health insurance, and retirement funds.

To award them a small share of the resale price is an acknowledgement of and reward for years of effort previously spent. This makes economic sense. For younger and beginning artists, the possibility of a resale royalty provides an important incentive to continue their work. If they do persevere in their careers, the likelihood that their work will enter the resale market is very slim.

It also makes moral sense. Surely collectors, dealers, museums, and auction houses should not be the only beneficiaries of an artist's continuing efforts. In California, the law provides royalties to the artist's estate for 20 years after the death of an artist. These royalties can provide an important source of support for surviving family members and heirs.

When the California act was passed in 1977, two concerns were expressed by some art dealers. One was that California would lose the art business to other states where buyers would go rather than pay a resale royalty. It appears that few art buyers are that shrewd. However, in our 1986 survey of art dealers and artists, some art dealers thought that a remedy for this would be a national law. I have previously submitted to you, a summary of the research that we compiled in 1986. (See attached).

MR. PATRY: Yes. Thank you.

MS. ROBINSON: In any case, there has been no evidence that the law has driven the art market out of the state. Rather, it appears that there are vibrant and healthy art markets in the Bay Area as well as Los Angeles, the effects of the last two years of recession notwithstanding.

Another concern often expressed was the fear that additional paperwork and research would be required. In fact, the resale royalty, according to dealers who have paid it in good faith, requires very little paperwork beyond computing the royalty and finding the artist.

One art dealer who is active in the resale market observed recently that the artists who were due royalties were generally well known and easy to locate. In her experience of the last two years, when she paid a total of 18 royalties, she had trouble tracking down only one artist, and he was eventually located through his gallery.

Furthermore, her enthusiasm about the letters of appreciation she received from artists, the referrals that were generated and the general good will she has experienced in the artists' community seemed to have more than compensated for any minor record-keeping she has had to undertake.

Three suggestions have emerged from our research and evaluation of this law. A lower threshold, such as a \$500 resale price rather than the \$1,000 minimum as required by the California statute would allow more artists to benefit from the royalty. We have conducted some analysis of the range of sales prices that artists generally experience, at least the ones who did respond to this survey. There was a modest range of sales prices. Probably the \$500 threshold would at least triple the amount of artists that were eligible.

Secondly, the requirement that the piece resell for more than the original sales price requires some research and record-keeping on the part of the seller and investigative research on the part of artists or their representatives, who are trying to collect outstanding royalties.

In France, the comparable droit de suite does not have this condition and seems much easier to enforce by the two principal agencies who are engaged in collecting the royalties. The French law applies to the resale of any original work of art resold for at least 100 francs.

Third, we hope that you will recommend an alternative dispute resolution mechanism such as mediation or arbitration in the event that mediation fails, which will require the parties to work out the dispute outside of court. We find that the litigation process is so expensive and clumsy that even the promise of recovering attorneys fees has not enabled artists to pursue their remedies in the state courts of California.

The right to sue in federal court, possibly on a copyright claim, would be even more burdensome. Because of the difficulty of prosecuting these claims in court and the possible harm to the plaintiff's reputation in a market as insular as the art world, many galleries and dealers know that artists are more likely to abandon their rights, therefore, they simply refuse to pay the royalties.

In conclusion, the countries entering the European economic community are now looking at the eight versions of the droit de suite enacted in various European countries, for possible ways to harmonize these statutes. At this time, the United States has an important opportunity to take an active leadership role in investigating all of the ways the royalty has been implemented and coming up with the best possible system.

We congratulate you for your efforts to date.

MR. PATRY: Thank you for coming, and I look forward to seeing the survey.

MS. BERLIN: Thank you. My name is Brenda Berlin, and I'm the president of San Francisco Arts Democratic Club which has a membership of over 300 democratic artists, administrators and individual art supporters. We're not a Republican club. It's a political club that we are. It's the first of its kind in the country. It has a model in Los Angeles, Chicago and New York as well.

The club is chartered by the California Democratic Party and is dedicated to electing pro-arts candidates to local, state and national office and to bringing issues of importance to our membership, to the public and to our representatives through our monthly forums.

What I'm going to speak about is just on a little broader basis from what you've heard previously. Our executive committee gives its unanimous support to the federal resale royalty proposal to be administered by the US Copyright Office. We will be bringing this before our full membership this coming Monday, January 27, for their approval.

This legislation is overdue nationwide. I want to talk about artists as productive and voting citizens, who are entitled to support and protection just as any other citizen or business in this country.

Artists and their related activities contribute dramatically to the economic and social well-being of our communities. In San Francisco alone, one in 11 jobs is arts-related according to a recent survey from our San Francisco Art Commission. This survey also showed that combined arts activities for both non-profit and for-profit arts, visual, performing, dance, medium, music,

contribute over \$1.5 billion annually into our economy here, making the arts in San Francisco the sixth largest industry.

However, support and incentives for individual artists are long overdue and are essential to the survival of this industry as a whole. As you well know, government funding for the arts is very limited and has become a political football in the last several years.

We are working very hard to educate our legislators about the economic benefits federal arts dollars have on our local communities. For every dollar that comes in, three dollars are generated locally. But there are few programs supported by the National Endowment for the Arts or state or local arts agencies that individual artists can apply for.

Where there are those monies, they are so limited and the demand is so much that individual artists really have a terrible time. Therefore, resale royalty revenues become an essential means of support, and we urge the continuation of this program here in California and nationwide.

MR. PATRY: Thank you very much. I'll leave the record open, of course, for any representatives of the other party who wish to comment.

The Copyright Office is a legislative branch agency, and we work both sides of the aisle; and, also for Mr. Sanders, who is an independent representing Vermont.

MS. BERLIN: Yes.

MR. PATRY: Mr. Davis.

MR. DAVIS: I have two more comments that I'd like to make very briefly. One is, in your questions to Professor Goetzl, you noted that the California Resale Royalties Act only operates on the overall resale price. You seem to pose a question as to why there rather than on the profit.

I spoke with the fellow who drafted, or one of the drafters of the original Resale Royalties Act, Hamish Sandison, and asked him that same question. He said that they had thought about that quite a bit before drafting the statute and decided to structure it that way because of the expense and encumbrance of trying to establish what actually was a true profit on one small transaction carried on by say, a gallery or an auction house that carries on a lot of transactions.

Once you begin to try and calculate what a profit is, you very quickly and not inappropriately get into questions of whether one includes indirect as well as direct costs of making the sale -- whether the cost of paying rent on the auction house and lights for it and transporting the art and insuring the art come into play. Once you get into that, you get into a very extended assessment for a very unextended transaction.

So, trying to keep the right as simple and uncomplicated as possible, they decided to apply a very small percentage to the gross resale price rather than a larger percentage to the profit.

On another point, with respect to alternative dispute resolution, I would urge Congress, if they enact a resale royalty right, to use an alternative dispute resolution scheme. If they do decide to create a cause of action, they should certainly include a right to recover attorney's fees, whether those are incurred in the alternative dispute resolution procedure or in court. This is because the cost of hiring a lawyer -- even if it's only \$100 or \$200, is going to be a deterrent to the enforcement of these rights.

MR. PATRY: Of course, the Copyright Act now has a provision on attorneys' fees, but it's a bit bifurcated. For the Visual Artists Rights Act, registration is not a prerequisite to getting attorneys' fees in cases initiated

pursuant to the Act for a number of reasons: one is that it's different from the economic rights that one registers, and it's conceivable that the owner of the economic rights who would register the work might not be the same as the original artist.

But certainly for the economic rights in Section 106, registration is a prerequisite to getting attorneys' fees. If the work is infringed before it's been registered, then you don't get them.

There was some discussion, I believe, by Professor Goetzl about having a registry system. Would you favor any sort of tying -- similar to what is now done for statutory damages, to encourage people registering their works with whatever applicable agency by pegging attorney's fees to that, or should it be a more liberal approach which is simply that you get attorney's fees because they are a necessity for enforcement?

MR. DAVIS: I think I would more readily agree with the latter point. This is because I don't think that most artists know the ins and outs of the copyright laws and what they need to do to protect their rights in the future, and frankly, don't spend a lot of time thinking about those problems as they're producing their art and going out into the world.

I think that the typical artist's relative unfamiliarity with the law and the requirements of business practice is something that ought to be kept in mind as you structure the set of rights you're going to create here.

MR. PATRY: Thank you very much. Any other comments from the panel?

MS. BERLIN: No. I just have one question. If you're thinking about setting up an agency to monitor, like an ASCAP kind of agency, who pays for that? Is it going to come out of the artist's royalty? I would hope, obviously, that it does not come from the artist's royalty.

MR. PATRY: There are problems, of course, in setting up any federal agency to do that. ASCAP, of course, is a private agency. It's also non-exclusive which is another difference.

In Europe, they don't have the same problems with antitrust laws that we do here. ASCAP and BMI have to have non-exclusive licenses, so that the copyright owners can both do it directly and indirectly. Certainly that is an issue that would have to be worked out.

I think ASCAP/BMI's overhead is surprisingly low compared to some charitable organizations. But I think it would be difficult to have a federal system of enforcing rights through a collecting society like ASCAP or BMI. But that obviously seems to be a critical issue of enforcement, and it's one that would have to be explored thoroughly. Presumably, you wouldn't want a situation where the cost of overhead swallows up the remuneration that you're trying to give to people.

Thank you.

MR. DAVIS: Thank you.

MR. PATRY: Our next witness is Professor John Henry Merryman, who I see in the audience. Professor Merryman is Sweitzer Professor of Law and Cooperating Professor of Art, Emeritus at Stanford University. Among other activities, he is President of the International Cultural Property Society and Chairman of the Board of Editors of the International Journal of Cultural Property. He is a very well-known author. His treatise, "Law, Ethics, and the Visual Arts," co-authored with Professor Elsen, is very well known.

His article in the Hastings Law Journal on the Refrigerator of Bernard Buffet is really a landmark in the field, and these are just the tip of the iceberg of his contributions.

Professor Merryman, it's an honor to have you here today. I appreciate your driving up from Palo Alto.

PROFESSOR MERRYMAN: It's an honor to be here today, Mr. Patry. Thank you very much. I would add, if I may, to the identification material that I am chairman of the visual arts division of the American Bar Association's Forum Committee on the Entertainment and Sports Industries.

MR. PATRY: Thank you.

PROFESSOR MERRYMAN: I have a prepared statement which I do not propose to read.

MR. PATRY: Thank you.

PROFESSOR MERRYMAN: Unless you insist.

MR. PATRY: No, I shan't.

PROFESSOR MERRYMAN: I'll be happy to give you copies.

MR. PATRY: Thank you. I appreciate that.

PROFESSOR MERRYMAN: How many would you like? You may have up to four.

MR. PATRY: If you have a copy, I'll be glad to put it as a part of the hearing transcript and the record, if you like.

PROFESSOR MERRYMAN: Is one enough?

MR. PATRY: One is fine. You're a well-practiced witness, I can see.

PROFESSOR MERRYMAN: No. Hardly. What I would propose to do is emphasize a few points and then try to respond to any questions.

MR. PATRY: Okay.

PROFESSOR MERRYMAN: The first point -- and most of this, by the way, I'm sure is already quite familiar to you. I apologize for stating the obvious, but sometimes it may be useful.

The resale proceeds right was first adopted, in France in 1920. Twenty other civil law nations almost immediately followed suit in enacting similar legislation. However, in most of those nations, it is a dead letter.

The resale proceeds right or droit de suite today really has no force or effect in any countries other than France, Germany, and Belgium. In France, the home of the resale proceeds right, it applies only to resales at public auction. It does not apply to resales by galleries, and it does not apply to private resales.

There's an interesting internal French complication about this because if you read the statute, it appears to apply to gallery sales and even possibly to private sales. But the necessary regulations have never been issued by the state because the state does not want to promulgate a law that it fears it cannot enforce. So, in France, it applies only to sales at public auction. None other.

In Germany it applies to sales at public auction and to dealer sales. It does not apply to private sales. Furthermore, in Germany, the statute, which provides for a five percent resale proceeds right, has actually been replaced by an operating agreement between the professional association of German art dealers and the professional association of German artists called Bild-Kunst.

Pursuant to that agreement, with which I see you are familiar, --

MR. PATRY: Yes.

PROFESSOR MERRYMAN: -- there's actually a one percent override charged by these dealers on all sales of contemporary art in Germany. That's paid over to Bild-Kunst. Bild-Kunst uses it in part to pay royalties to the artists themselves, and part of it goes into an artists' welfare fund, if I have been reliably informed.

Even in France and Germany, there's no attempt to regulate private sales outside the auction and the established dealer market. In France, there's no attempt to apply the right other than to public auction sales.

Another point I would make is one that is made -- at perhaps unnecessary length -- in the prepared statement I gave you. This basically criticizes the argument favoring the resale proceeds right. The position I take is that the resale proceeds right would harm the primary art market.

What we should be doing is trying to strengthen the primary art market for the great mass of worthy but unrecognized artists. Any realistic prospect of return from his or her work as an artist is in the primary market. Anything that can be done to strengthen that is something that all who are interested in the arts wish to support.

The resale proceeds right has a depressive effect on the primary art market. It reduces the strength of the primary art market, and this operates to the disadvantage of all but an extremely small number of already successful, recognized, wealthy artists.

Jasper Johns is a multimillionaire. Robert Rauschenberg is a millionaire. Picasso was a billionaire. Those people do not need resale proceeds. The 99.99 percent of living artists who have no resale market whatsoever and who have no prospect of ever getting a nickel out of a resale royalty will suffer if it is enacted because of the depressive effect on the primary market.

Let me give an example. Suppose that a dealer who has a gallery on Grant Street in San Francisco is an enthusiastic supporter of worthy but relatively unrecognized artists. He enjoys showing and promoting their work and trying to help them achieve success. Suppose this dealer has an exhibition of

the work of one of these artists in which twelve canvasses are hung. Suppose it's an unusually successful sale, and at the end of the month, all twelve canvasses have been sold.

Suppose that they have sold for prices in the area of \$5,000 each or \$4,000 or something of that sort. The dealer, glowing with the success of this operation, gets together with his accountant and adds up the proceeds for the month and discovers that he still lost money. Now, how does that dealer stay in business?

The way the dealer stays in business is by entering the secondary market. He buys a Rauschenberg drawing or a Jasper Johns fine print or a piece of sculpture by a well-known artist. He resells it to a museum or a collector or to another dealer for a substantial profit. The secondary market activity that this dealer engages in is what enables him, unless he is independently wealthy and using his private fortune for this purpose, to keep the front room of the gallery open and running.

To the extent that the resale proceeds right takes some measurable portion of the profit from the secondary market activity, it reduces the ability of the dealer to support the front room. As a result, he will have to have fewer shows of unrecognized artists. He will have to have less publicity. He will have to move to a location where the rent costs less. He will have to have less opulent openings.

He may actually decide just to go into the private art business and deal only in the secondary market rather than to continue to deal with the primary market. This is one homely example of the way this kind of thing can work.

You're familiar with the Tom Camp article that was published in your journal, the Bulletin of the Copyright Society, I believe.

MR. PATRY: Yes.

PROFESSOR MERRYMAN: That's the only empirical study I know that has attempted to identify, to find an answer to this question: what proportion of living professional artists have a resale market? The result of the Camp survey was that, during the period from 1972 to 1977 the number of living American artists who had any resale market, so far as one could judge from the records of the two major American auction houses, Christie's and Sotheby's, was under 150.

At that time, the number of persons who, in response to census questionnaires, identified themselves as professional artists was over 200,000. Today that number is over 400,000.

Perhaps there are 300 artists living today whose work has any significant resale market. That means for the remaining 400,000 artists, there is no immediate actual prospect of gaining anything from the resale proceeds right. At the same time, as I have perhaps stated too many times already, the right is depressing their prospects of success in the primary market.

It is not idle to point out that art is easily transportable and money is easily transportable. The enactment of a resale proceeds right in the United States will certainly weaken the United States art market, which is currently the strongest in the world. It will weaken the United States art market to the advantage of the art market in London and the art market in Switzerland. In neither of those nations do you have resale proceeds right laws. Neither is about to institute them.

Recall that in California, when the resale proceeds right law was enacted, Sotheby's, which at that time was regularly conducting sales of

contemporary art, immediately stopped those sales. It later, for a variety of reasons of which this may have been one, totally closed its operation in Southern California. But while it remained open after the enactment of the retail proceeds right, it terminated all sales of contemporary art.

Any national resale proceeds right is bound to have some repercussion in the art trade in the United States, a negative repercussion to the advantage of nations whose markets are not encumbered by the resale proceeds right.

At one time a group of concerned citizens of California consulted with then-Senator Alan Sirotti, the California legislator, in an attempt to get him to introduce amendments to the California resale proceeds rights statute. One of those amendments, if it had been introduced and enacted, would have provided that funds received under the statute would not be paid to individual artists, but instead be put into a welfare fund for artists.

Artists have a number of problems that other people don't ordinarily have. For example, how do they get health care? They don't have regular incomes. They don't work for corporations that have health plans and so forth. But they have a variety of other problems of the sort that beset people who do not have a safety net under them.

The idea was, if we're going to have some sort of an excise tax on art market transactions, which is what the resale proceeds right in California is, what would be the best way to use the proceeds from that right?

It was our feeling at that time that if you're going to have a proceeds right -- which we thought was not a good idea because of its impact on the market -- then it would be better to use the money that came from it for the benefit of all artists rather than just for the benefit of the few very, very

successful artists who really don't need it the way most other working artists do.

The sum of my presentation at this point -- and I'll be happy to respond to questions if you have any -- is first we ought to be concerned about strengthening the primary market, because that will do the most good for artists. Second, if we're going to have a resale proceeds right, I think the better way to use the proceeds is to make them available for the welfare of artists more generally rather than only for the already fortunate few who happen to have a resale market.

MR. PATRY: Thank you very much. The situation in Europe, I think, is an interesting one that way.

This summer, I spoke to the people for Bild-Kunst and ADAGP, the French collecting society, representatives of the art galleries and Madame MontLuc, who is the chief of the Bureau of Intellectual Property for the Ministry of Culture.

You're certainly correct that the French law, which I think everyone believes does, in fact apply to galleries, is not enforced, as you mentioned. One of the reasons I was given by Mr. Dauberville, who was the head of the French galleries, is that they contribute money to a sort of social security fund. In Germany, the collecting society, Bild-Kunst, also has a social security and health fund for artists which, in part, is paid out of droit de suite.

We would have to address this issue probably in the context outside of the Copyright Act, but it is something certainly to consider.

One of the things that we're trying to find out -- and your comment was very helpful this way -- is more about the nature of the art market, if it is indeed as portable or fungible as people say. You don't have the choice of

saying, I don't want to collect younger artists. I'll collect Monets or Cezannes. They're a bit more expensive though.

It will be helpful to have some sort of empirical data about what's happened in California since 1977. Other than the Sotheby's example, have sales gone to Nevada or have they gone to Switzerland or London? Or have people, simply stopped being dealers or gone entirely into the secondary market?

That's important, if Congress is going to legislate. They want to make sure that the benefits of any legislation outweigh any negative effects -- not only so that they insure that they're not going to harm one group of people, but also so that the benefits that they're going to give to another group are commensurate. It's difficult, I know, to define the empirical data.

The portability issue may be of less of a problem, at least for us than Europe because if you have only one state that has a resale law, then you run into arguments that, well, the market is going to go to New York or Nevada or wherever else. If you have a federal law, of course, then that's probably not a problem.

Then you go to the other considerations you mentioned, such as Switzerland, London, and other places that don't have droit de suite. The European community, of course, is looking into this. Many people believe the ultimate result will be there will be an EC directive mandating a droit de suite provision.

That gets to the principal point of this rambling comment of mine which is, does it really get down to money? Is it not so much whether to have a droit de suite, but how much it costs. How much of a problem is one percent? It is a little different from the seven percent provided in the original Kennedy

bill of course. Also is it one percent of profits or one percent of something else. What is the enforcement mechanism?

French gallery directors and auctioneers reported that as business people, they were less concerned about principle. Americans might think that the French are more concerned about the purity of the law than anything else. It was refreshing to talk to them and hear that as business people at least, they didn't care so much about the principle of droit de suite because they had a lot of other concerns.

For example, while I was there, there was a big controversy over a value-added tax that the government had instituted; it was much more important to them than the droit de suite percentage. What they cared about, again, was the amount of money and how the right is enforced.

If you did have a harmonized law, federally or throughout Europe, and a particular amount, would that have the depressing effect? In other words, it seems to me from what I've learned so far, the question is really whether droit de suite is a philosophical political problem or one that has to do with amount and making sure that everybody pays the same amount?

PROFESSOR MERRYMAN: Well, certainly, the California experience is not a very good place to look for empirical evidence on the kinds of questions you just raised, because the California statute has been largely ignored in practice. It is sporadically observed at best and sporadically enforced. It is for that reason alone -- the sort of thing that, as a technical lawyer interested in laws that work -- wishing to avoid laws that are interesting rhetoric but don't have any important social effect or at least not the effect you wanted -- that one objects to the California statute.

But that could be presumably fixed by approaching this thing in an entirely different way. If one can somehow think of a way of drawing from the art market some realistically modest flow of money and putting it to work in a way that will be of benefit to artists more generally than the artists who happen to have a resale market, then clearly there's no principled objection to that. That sounds like a wonderful idea.

It also sounds a little bit like a free lunch. Even if the royalty is relatively small in scale, it is still going to be, to some extent, an impediment to or a burden on the market. Then the question is as you've stated, is the gain worth the cost in that situation? That's a calculation that I'm certainly not qualified to make in the abstract.

I like the German system of an override on sales of contemporary art because we're really talking about only the contemporary art market here -- a flat override of one percent perhaps, which is currently, I think, what they're using in Germany, which goes into a fund that is for the welfare of artists. That would strike me as socially desirable and as placing a minimal burden on the art market and at the same time producing substantial funds.

In California, the contemporary art market is substantial. In the United States, it's very substantial. One percent of that a year could rather quickly produce a substantial fund. Then the question is, how do you administer that money? How do you administer that welfare system?

One way to do that is to set up or arrange for the setting up of some private non-governmental way of dealing with it. Another way is try to do it with a governmental agency. Both of them have advantages and disadvantages. I'm sure you've thought about this already.

MR. PATRY: I have a technical copyright question, because any time Congress legislates, you have to make sure that you have the authority to legislate and are fulfilling the purpose under which you're legislating. Congress can't just simply legislate because it wants to. It has to do it commensurate with some power it's been granted by the Constitution.

Copyright acts have been enacted based on Article I, Section 8, clause 8. It would seem to me that a droit de suite provision would be based on that section. It's at least logical that one consider it a copyright-like right.

The difficulty I have is this -- how would one define the protected subject matter? This is not a problem in Europe because they don't have our constitutional provision; they protect certain things under unfair competition. What I'm thinking of are things that may not be subject to copyright -- furniture, really good-looking toasters. Something that, perhaps, might not be protected under our federal system, but within the art market -- for the person who created it, the collector or the public -- it might be considered art.

One of the concerns, certainly, that people have in Washington, people outside of the Beltway too, is not getting Congress involved in defining what is "art." In Europe, at least I was told by the Germans and the French, they do protect things that might not be protected under a copyright here. What matters is that the market considers it to be art. That would be a problem for us.

PROFESSOR MERRYMAN: That's a problem that was also faced in developing the moral right legislation in California. You're familiar with the provision covering works of art of recognized quality.

MR. PATRY: Which we declined, respectfully, to adopt federally.

PROFESSOR MERRYMAN: Yes. I understand. There were a lot of good reasons for that. But it's a question that can be faced in a variety of ways. One of the ways to face it is to say whatever the art community considers art is art. Whatever artists make is art. Then you have the question, well, how do you tell whether he's an artist. Well, you say if he makes art, he's an artist, and it gets a little circular.

But somewhere in there is a realistic kind of easily operable procedure which is that, if in the art world this is considered art, then it's art for this purpose. If you have a dispute about whether the art world considers it art, then you have experts come in and you make a finding of fact.

MR. PATRY: Presumably, we could. So, you would protect things like furniture or things that might not be subject to copyright, some sort of useful article, in the technical copyright sense.

PROFESSOR MERRYMAN: Yes. I would say, depending on what your objective is, if your objective is to stay within the terms of the copyright statute, then I wouldn't do that.

MR. PATRY: Right.

PROFESSOR MERRYMAN: If your objective is to try to establish a measure that would apply generally in the art market, then I would take a different view.

MR. PATRY: Similar to Ven diagrams, where the areas overlap. But there might be areas where they don't, and presumably you can legislate them under the commerce clause.

PROFESSOR MERRYMAN: Well, of course. The commerce clause has been, up to now, infinitely elastic. Presumably, this could be done under the commerce clause.

MR. PATRY: Okay. Great. Thank you very much. I appreciate your coming. It was very, very helpful.

PROFESSOR MERRYMAN: Thank you for hearing me. I take it you're familiar with the Balch studies and all the articles in this field.

MR. PATRY: I don't think I've read all of them, but before June, I will.

PROFESSOR MERRYMAN: They're all cited in my submission.

MR. PATRY: Thank you very much. We have one final panel here which consists of Eleanor Dickinson, Richard Mayer, and Ruth Asawa, and Jerry Carlin, but first we'll take a short break for the court reporter.

[Short recess]

MR. PATRY: All right. You may proceed as you wish. As I mentioned at the beginning, everybody has the opportunity, if they wish to take it, to submit written comments later or any documentation you want.

MR. CARLIN: I'm sorry. I arrived late. And I don't know your name.

MR. PATRY: Oh, it's Bill, and it's "P" as in Paul, a-t-r-y.

MR. CARLIN: Thank you.

MR. PATRY: I grew up here, and I should have known it would be this cold.

MS. DICKINSON: It's just this room.

MR. PATRY: Proceed as you wish. Dick, if you want to go first, go ahead.

MR. MAYER: Thank you, Mr. Patry. My name is Richard Mayer. I'm a sculptor and vice president of National Artists Equity Association. I live in the Carmel Valley.

On September 22, 1976, a longtime dream of Artists Equity became reality when Governor Jerry Brown signed the California Resale Royalties Act, authored by then-Assemblyman Alan Sirotti. Thus, California became the first, and so far, the only state in the nation to enact resale royalty legislation for artists.

When Assemblyman Sirotti received his copy of the signed bill, he discovered that Governor Brown had written across the top "what hath art wrought." What art had wrought was a not-so-quiet revolution in the arts with more to come.

In May, 1977, I asked Golden Gate University Law School Professor Thomas Goetzl to develop a preliminary or discussion draft of a moral rights bill that would protect art works from intentional mutilation or destruction after they leave the artist's possession. The next month, on behalf of Artists Equity Association, I sent Professor Goetzl's draft to Alan Sirotti who had by then moved up to the state Senate.

Senator Sirotti soon introduced SB668, the California Art Preservation Act. After two years of strenuous lobbying by artists and other supporters of the bill, including Professor Merriman, I might note, Governor Brown signed the first moral rights bill into law on July 27, 1979.

While the Art Preservation Act received general approbation in the art world, the Resale Royalties Act generated unprecedented dust clouds of controversy, more than can be explained by economics alone. When the dust settled, it became evident that these two new laws had altered the landscape of relations among the elements that comprise the art world.

Artists had acquired in California a new legal umbilical to their work after it was sold. They were now able to preserve the integrity of their

work. Also they had acquired the means to move from their prior passive status and become active participants in art world economics.

From the beginning, it was Artists Equity's hope that the California legislation would stimulate the enactment of similar laws in other states -- which it has -- and that ultimately, federal legislation would be enacted which has also come to pass with the Visual Artists Rights Act.

Understanding that the copyright office is mandated under this legislation to study the feasibility of implementing a federal resale royalty law, it seems appropriate indeed that this first hearing be held in California. In California, we can demonstrate the feasibility of resale royalties. Despite the problems inherent in the state legislation, the California Resale Royalties Act does work for those artists with the will to implement it.

Of course, the benefits that accrue to artists from the California royalty law represent the smallest fraction in comparison to the potential of a national law. While many instances can be cited, such as the \$3,700 royalty forwarded to Frank Stella by the California Arts Council, or the Berggruen Galleries payment of a \$500 royalty to the painter Joan Brown when the gallery resold her painting "Marilyn SV" for \$10,000 -- I might add parenthetically, earlier she had received a \$300 royalty from the Hoover Gallery in San Francisco when they sold "Marilyn SV" to Berggruen. I also might mention a modest \$50 royalty that I received when the Mark Hopkins Hotel resold a sculpture of mine to Marshall Weissman.

I would particularly like to bring to your attention the experiences of two eminent California artists, the sculptor Robert Arnison and painter Mel Ramos. Each has written to me expressing regret at not being able to speak in

person at this hearing, and each has asked that I read his letter into the record.

MR. MAYER: Robert Arnison states -- this is a letter addressed to me as vice president of National Artists Equity.

"Dear Richard, I am pleased to hear the United States Copyright Office is holding a hearing to evaluate the possibility of artist royalties. I am sorry that I cannot speak at the hearing on January 23. Since I cannot attend in person, I would like to relate to you some of my experience as an artist benefiting from the California Resale Royalties Act.

"My sculpture, 'Assassination of a Famous Nut Artist,' 1972, was originally sold in '72 for \$1,200. In 1979, it was resold for \$7,000, and in 1980, it was resold again for \$14,000. The artist received a five percent royalty on each of these resales.

"Perhaps a more dramatic example, I originally sold my early sculpture, 'No Deposit, No Return,' in 1961 for \$25. Recently this same work was resold for \$34,000. This is by no means an exhaustive list of resales of my work. In the last eight years, I have received resale royalties amounting to \$25,520. My experience is not unique.

"I know of many other artists who have received similar recompense. If the principle of the California law were applied throughout the nation, it would be a great benefit to artists. Sincerely, Robert Arnison."

MR. PATRY: Thank you.

MR. MAYER: Mel Ramos states, again, writing to me as vice president of National Artists Equity, "I will be out of the country on January 23, and I regret that I am unable to attend your meeting. However, I would like to pass

along a brief description of my experience with the artists resale law, Section 986 of the California Civil Code.

"In 1988, I began to take the provisions of this law very seriously when, for the first time, a painting of mine from 1963 was sold at an auction house in New York for a considerable sum. Up to this point, my work was being auctioned for prices below what the galleries that represented me were selling it for.

"Since 1988, I have earned about \$20,000 in resale royalties. This was not done without effort on my part. When I realized that my work was coming up for auction at Christie's and Sotheby's with increasing regularity, I went to the local law library and obtained a copy of Civil Code 986 and studied it very carefully.

"Subsequently, when the auction houses publish their catalogs, I am informed of pending sales and I send letters via Christie's and Sotheby's to sellers of my work who reside in California, reminding them of their obligation under this law. The auction houses will not give addresses of California dealers, but they will forward mail.

"During the buying/selling frenzy that occurred in the late eighties, I had many works come up for auction. The vast majority of them were from foreign sellers and I have determined that if there had been a federal law similar to California's in place during the late eighties, I would have collected over \$100,000 in resale royalties."

This addresses a point that Professor Merriman made. "I know that one of the arguments against such a federal law is that it will hurt your career and alienate collectors. However, this argument does not affect me so much because of the limited audience for my work. I do not have such a broad and vast

audience that makes my tax situation require that I donate all resale royalties to charity."

If I may paraphrase the artist here, he's referring to the suggestion that royalties ought to go to some charitable fund to benefit poor artists. What he's saying here is that he needs the money.

I can't resist asking parenthetically also, do rich attorneys and law professors contribute to a welfare fund for poor lawyers? I don't know.

Continuing with the letter -- "I have found that most of the people who sell my work for more than they paid are quite fair about it. This is not to say that some ill-feelings were not provoked in a couple of occasions. But in these cases, it would have happened for some other reason.

"I am a collector of art, and I have no trouble paying an artist a resale royalty. The only reason that I would do such a thing, obviously, is because I made money on the deal. Sincerely, Mel Ramos."

These artists have found a way to make the California royalty law work for them. Another example is instructive to other artists. Public policy-makers can also learn from their experiences and the experience of other royalty recipients we will hear about today -- that artist resale royalties are feasible, both in theory and in practice.

Federal District Judge Robert Takasugi, in his judgment upholding the constitutionality of the California Resale Royalties Act declared, quote, not only does the California law not significantly impair any federal interest, but it is the very type of innovative lawmaking that our federalist system is designed to encourage.

The California legislature evidently felt that a need existed to offer further encouragement to and economic protection of artists. That is a

decision which the court shall not likely reverse. An important index of the moral and cultural strength of a people is their official attitude toward and nurturing of a free and vital community of artists. The California Resale Royalties Act may be a small positive step in such a direction, close quote.

Let us return to the event that triggered the movement for artists royalties in this country, the resale of Robert Rauschenberg's painting "Thaw," by Robert Skull -- that is the resale by Robert Skull -- for \$85,000 in 1973. Skull bought the painting in 1958 for \$900. What if Rauschenberg had stopped painting in 1960? Is it likely that Skull could have realized a profit of \$84,100 by selling "Thaw" 13 years later? No, not very likely.

It was Rauschenberg's commitment to productivity and growing excellence over the 13-year period that drove up "Thaw's" value. "Thaw's" value in 1973 was a function of Rauschenberg's history as an artist. The principle of artist royalties recognizes this simple truth. The worth implicit in a work of art resides not with the object, but with the artist who created the object.

As Judge Takasugi suggests, isn't it now time to build upon the small positive step taken in California and establish the principle of artist resale royalties in federal law? Thank you.

MR. PATRY: Thank you. Ms. Dickinson.

MS. DICKINSON: My name is Eleanor Dickinson, and I'm a visual artist. I'm vice president of Artists Equity Association nationally, and I'm vice president of California Lawyers for the Arts. I live in San Francisco, and I am a professor at the California College of Arts and Crafts in Oakland.

I have maintained a studio in San Francisco for many years. We moved to California in 1953, and I've been involved in artists' rights since then, since about 1957. I regularly teach gallery and museum management in addition

to drawing, so that I have a great deal of contact with galleries and with the economic situation of artists selling and so forth.

My prices for art have increased slowly over the years. The art works are created as an important need in my life, not primarily for profit. Nevertheless, art is very expensive -- art materials, travel, models and maintaining a studio, and so on. The increasing value and prices of my work are very necessary to continuing to produce the art.

There is a hope, in time, that the resale royalties may help in the support of making the art. I've worked very hard for many years to bring my art to this high level, like most artists. Like most artists, I work about 90 hours a week. I object to Professor Merryman's saying we want a free lunch. I don't know any bunch of people that work harder than artists and for fewer financial rewards. To say that we want a free lunch is snotty.

I'm not a millionaire artist. I'm not Rauschenberg. I'm not making a fortune off of art. I strongly support this Act. Long ago, through Artists Equity, artists asked for one percent of the profit from sales of art. The galleries and collectors laughed at us. By the time it's legislated, it's five percent of the entire amount.

When Professor Merryman suggests that one percent might be acceptable today, again, I find that almost patronizing. We have not been rapacious. We want something back for all those years of effort, for our hard work that has made the work go up to these astronomical prices.

It seems to be urged that only very well-off artists are going to benefit from this law. This is nonsense. \$1,000 for a work of art today is not an astronomical price. People are able to make time payments and pay on Mastercharge and Visa. Every magazine you open urges people to buy art. It is

the chic thing to do today. It is not a rare occurrence for someone to buy a work of art for \$1,000.

My prices range from \$50 for a signed-off set to \$12,000 for a major painting. Most of my sales are in the five-to-\$900 range at the moment. So, I can reasonably expect to collect royalties in the next few years. It's kind of like a farmer planting seed. Eventually, you expect to have a harvest. In that harvest, you will have seed for further growth. I don't consider this rapacious. I don't consider this a ridiculous thing. Although I'm not primarily thinking economically about my art, I have to be practical about it in order to support it.

It's been asked many times how one keeps track of sales of art. I don't find this as difficult as it might seem to be. Most people who buy your works of art on resale will call you. They always have an excuse, but they really want to know what your prices are now. They also want to know more about the work of art and how to take care of it. I get calls all the time. My impression is that there is heavy resale going on. One thing that has helped in that is, Artists Equity in California sent a letter out to every gallery pointing out to them that the California Criminal Code requires that when there's a sale of art, that the gallery or museum notify the artist of the name and address and price of that purchase, so that the artist is able to contact people who bought their work. We found so many galleries who were saying they never heard of Resale Royalties that we just mailed information to every gallery. I cannot conceive of a California gallery today saying they haven't heard of this law.

Another thing that I do -- and I brought copies of these for you -- is, on the back of every work of art that leaves my studio is one of these forms. It gives conservation information. It gives hanging recommendations. I give

some information, technically, about the work of art. But down at the bottom is a statement that "if this work is sold at a profit and for over \$1,000, a royalty of five percent may be due the artist from the seller. The increasing value of this work is due to the continuing efforts of the artist. The buyer is asked to report the sale to the artist at the address given for documentation, possible photography, and possible loan to exhibitions. The artist will then furnish a free appraisal of the work to the buyer for insurance purposes and consultation on its condition and framing." I find this a very reasonable exchange of services and one that will almost guarantee that when there's a sale of my work, people will contact me, though I suppose people could cheat. Here is an example -- recently, friends told me a work of mine was on display at a gallery in San Francisco. It vanished. Presumably, it was sold. So, I contacted the gallery owner. These are not hard things to come up with. I really think that the voluntary system has far more going for it than one would think.

A fear of blackballing has been mentioned a good bit. The California law allows people to use a third party. When I take my classes touring to different galleries, I am really quite surprised to find major gallery owners -- I have two of them on tape -- explaining that they do not pay the resale royalty to their artists because their artists don't want money. I can hardly believe it when I hear them saying this. In one case, I know that the artists from that particular gallery have been meeting for some time to try and figure a way to extract the money owed them from the gallery owner. But they are afraid of him. When you have a third party involved in the collection, it makes it a lot easier because then those artists can say, oh, we didn't know anything about it. But they will get paid.

One thing you get asked is will the artist pay the collector back if the price goes down, not up. Well, if the wine that you order is disappointing, does the vineyard pay you back? I mean, you do take a chance in any purchase. Most people who buy art buy it because it's prettier than stock on their wall. They've had the enjoyment of the art over the years. If they wish to sell it and the price has gone down, they, after all, have had value for it. In most cases, they could go back to the artist and most artists will allow a trade-in for another work of art. It is somewhat silly to ask about that. There are a great many economic transactions where there is a potential profit but not necessarily reimbursement, so, I don't know why the artist should be considered as different.

There was a question about how big the resale market is, and I'm really sorry that Clare Carlavero owner of the Art Exchange Gallery, was not able to come today. I believe she's sending you a statement. She started the first secondary market gallery here. She found, much to her surprise, she was in the black the first month. There is a heavy resale market -- a great deal of art being sold and resold. I think this Resale Royalty Act applies to a great many more artists than you think.

Another comment that I have heard is that the auction houses particularly objected to the five percent royalty payment in California, saying it would drive art sales out of California. I found that really quite surprising, when the next year they added five percent for their own account, and that was never mentioned. It used to be that they charged five percent to the seller. Then they just quietly started charging five percent to the buyers, so they now get ten percent. That was never mentioned. So, for a group that has been adamant that no one would support a five percent increase, that seemed to me pretty ridiculous.

You also were asking about how to define art. I would recommend that you not try to define art. Define artists, and use the IRS standard for it. You have one built into law. They have ten standards for how to determine a professional artist. You can just use the ones that are already in place. That might make it a little easier. I suppose an artist might create something that was not art, but you could always fall back on expert testimony.

On the proposal about Resale Royalty proceeds being put into a fund for artists, I'm not sure about that. It does seem to me that artists badly need health benefits and a number of other things, but I would prefer to see those addressed in other ways. I do think that this survey that we're doing will indicate to you that even the beginning artists, the ones who are selling for very modest prices, do have an expectation that this resale royalty is going to benefit them in time. I think that will make a very big difference in their attitude about it.

I think as much as anything, the idea that our culture values what they do and that there is an acknowledgement of the artist, and a continuing interest in their work, is of great importance. I'm sure that as you work it out, whether it's five percent or seven percent, how it is administered is less important than that we get this ad in place nationally, to respect and value our artists. Thank you.

MR. PATRY: Thank you.

MR. CARLIN: Yes. My name is Jerome Carlin. I'm a painter. Some years ago I was active in helping to set up the Bay Area Lawyers for the Arts and was the first chairman of the organization.

I'm here just to state briefly that I believe very strongly that all artists should have a right to a portion of the appreciated value of their work.

If my actress wife is in a film or a commercial, she gets a residual if the work is continued to be shown and further profit made. It may be easier to monitor these transactions, but that doesn't mean that we visual artists shouldn't try. I believe very strongly that it's going to be much easier if we have a national resale royalty law.

Just a brief comment on the impact of the California law on the art market. I found an argument that kept being repeated in a strange circular manner. On the one hand, it was said that this law had some very damaging effect on the art market, unsubstantiated by any significant evidence or facts. Then on the other hand, it was said that, well, it doesn't make any difference because nobody is enforcing the law.

I think the argument about its impact on the art market is spurious. Clearly, if it becomes a national law, I think that's largely irrelevant. But I do, as an artist, urge that the opportunity not be missed, after fifteen years, finally to bring this to fruition. Thank you.

MR. PATRY: Thank you.

MS. ASAWA: My name is Ruth Asawa. I'm a sculptor. I live in San Francisco. Most of my work has been commissioned for public places. When Ghiradelli Square was sold, I approached the owner, and he was willing to help me get royalties on that. Although he made a huge profit from the complex, my choice was to get an evaluator or an appraiser for the fountain itself.

At that time, we went to the foundry and asked the foundry what it would cost at that time to recast and make the fountain. At that time, we came to an appraisal of \$100,000. So, the owner paid me \$5,000 for it.

When the Hyatt fountain was first built, the construction of the building, the hotel cost \$34 million. Then, a few years later, it was sold for

\$72 million. I didn't know of this transaction. Then the last time it was sold, it was sold to an insurance company for \$123 million. I would not have know about that except that someone I knew was at an opening, and said, "Have you heard that the Hyatt Hotel sold?" I said, "No, I had no idea." So, he sent me an article from the "Chronicle" business section, and that's how I pursued it.

For that, I was paid \$7,000. But according to the sales record, I'm still owed one more sale, since it was sold twice. I'm not sure, I have to pursue that.

I have another commission where there were two partners, one partner sold his interest to the other owner. I have not pursued that; I don't know what I'm entitled to in that transaction. Also, I have not really pursued anything that was sold to a private collector. I have never had anything in that area. That's a very gray area for me because I have not really kept very good books on it, so I can't say very much about it.

Since everyone has spoken about everything else, I have nothing more to say.

MR. PATRY: From your experience, if they had benefited from the --

MS. ASAWA: If they had been under this, they would have. My husband is an architect and his fee is seven percent. His buildings have tripled in resale.

MR. PATRY: Does he get a --

MS. ASAWA: No

MR. PATRY: He doesn't.

MS. ASAWA: No. Architects do not get anything.

MR. PATRY: I've worked on the architecture bill, and the same day the Visual Artists Rights Act was passed, Congress passed a bill giving protection for the first time for built structures.

MS. ASAWA: Is that in place now?

MR. PATRY: Yes. As of December 1, 1990, we now protect architecture.

MS. ASAWA: Architects?

MR. PATRY: Not just the plans, the building.

MS. ASAWA: The building?

MR. PATRY: It is interesting, and it leads me into a question. The architecture bill, as originally drafted, would have given architects certain moral rights to prohibit certain alterations. But they didn't want that, so Congress took it out.

One of the things that interests me -- because I did testify with the Copyright Office on the Visual Artists Rights bill and on droit de suite -- is really the rather different reactions. I think you referred to this. My question is, why do you think there is this opposition to droit de suite from the same people who support droit moral?

MR. MAYER: This is really the first labor-management dispute in the art world.

MR. PATRY: Okay.

MR. MAYER: The resale right really has to do with redistributing the money flow within the market place. This happens all the time in our society. Our society is about redistributing the flow of money in the market place, depending on what factors are able to hold sway from time to time.

It seems to me that the argument that this will hurt the primary market, that this is really going to injure artists more than help them, is what I like to refer to as sort of the golden egg canard. That is, we're killing off the goose that lays the golden egg by seeking royalties.

If you look at the model of the labor movement in this country, that same argument was brought to bear against the workers who were trying to increase their share of the profits that were being realized as a function of their labors. The history of the economy in this country demonstrates that the workers did increase their share. As a matter of fact, it did not kill off the goose. We have a rather thriving economy in many respects, at least if you look at the stock market these days.

MR. PATRY: The other thing that interested me at the hearing was that some artists testified against it. Larry Rivers is one who testified against droit de suite, although originally he said he had supported it.

His argument was this: gallery owners and others took risks and supported these younger artists, and they should reap the advantages of it. The second part of it, though, which is one that you hear commonly, the second one was this -- at least for living artists, they do benefit because if something is resold at a higher price, presumably the works that this artist has not yet sold will increase in value. So, they should just simply be satisfied with that. That was Mr. Rivers argument, at least.

Now, that doesn't help you, of course, for the ones that you've already sold. It presumes that you have a stock of works that you have not sold yet. What would be your response to his comment?

MS. DICKINSON: If I could say something on that. The idea that artists should hold back their best work as they go along and then sell them as

their prices increase later -- I mean, it sounds good, maybe from a businessman's point of view. But most artists have a very hard time making the rent. To also pay storage and keep large stocks of older art -- most artists are not economically able to do this. If they have a buyer, they're going to sell. People are going to want to buy the best work now. You can't store your work for 20 or 30 or 40 years, air conditioning and all the rest of it in the hope that one day you'll be able to sell it.

MR. PATRY: That's your wine analogy, right?

MS. DICKINSON: Yes, right. Some times people will want your older work. I know Bruce Connor -- he'll have major shows. They want him to do all kinds of work fixing up these older works that have not been taken care of in the Museum of Modern Art in New York and so forth, and yet they may not buy the work that he's doing at the moment. But storing your best older work isn't really the way things operate for most artists. It may sound good, but it doesn't work. Regarding that testimony on the Visual Artist Rights Bill, the rumor is that galleries leaned on some of those artists to go down and testify against it. I'm very sorry they did. I think it is harmful to all artists to have that said.

MR. PATRY: Mr. Carlin, you mentioned that your wife gets residuals from advertising. That was presumably done contractually. But it's also probably a part of the labor agreement as well.

MR. CARLIN: That's right. It's the labor -- Artists Equity that helps to administer it. More accurately, Screen Actors Guild and AFTRA for TV and Radio.

MR. PATRY: One of the things that Congress has always --

MR. CARLIN: Actors Equity, I'm sorry.

MR. PATRY: Actors Equity. It had equity in there somewhere.

One of the things Congress is always interested in finding out about is whether things can be worked out without legislation. My father has this idea that before Congress can pass a new act, they have to repeal two others because he thinks there are too many laws.

So, one concern is the fact that you only pass laws when you need to pass them. That's not unreasonable. One of the things we're always interested in finding out is whether or not things can be worked out privately, whether through private contracts, or labor agreements, or stock forms. I certainly am aware of some of the counter-arguments.

But I'm just interested in finding out from you whether you think things can be done in the contracts that you have, or through some sort of collective bargaining or some sort of collective negotiations. Is that simply not feasible, that people don't have the strength, or --

MR. CARLIN: Well, one comment would be that I think we have had difficulty in enforcing and carrying this out in California. If we had some administrative system that could be worked out nationally along the lines of the system for the actors and performing artists -- that would make it simpler.

It is very hard to work this out on a private basis, as is shown by the evidence.

MS. DICKINSON: It is a very unequal bargaining situation. I've always felt bothered that many of our art laws have had to be Trust situations which status I understand is reserved for children and idiots. For me to feel that artists have to be in that category is sad. But it is a very difficult situation of unequal power.

I have very often seen an artist try to make a contract, even of the mildest kind, with a gallery and had the gallery cancel the show as a result.

Many galleries will not sign a contract. It means actually that the gallery is rather unbusinesslike because those contracts usually benefit both sides. But there are a lot of people in the gallery business for reasons other than business. They want to improve their drinking, their social climbing, their glamour, their sex life or whatever. I keep looking forward to the time when we have more businesslike galleries that will deal with contracts as labor and management. Because it benefits both sides to have no misunderstandings.

In my work in the college, I have done everything I could to try and get rid of the adversarial situation that exists by having student artists work in running galleries, seeing how difficult it is to do and how expensive. I think artists need to appreciate the galleries more. But many galleries also are unappreciative and think that they're the ones who create the value by selling the art. That isn't right either.

There is definitely an adversarial situation, and maybe we should all work on trying to change that.

MR. CARLIN: I would like to underline that. It's my experience that there's an uneasiness on the part of gallery people when you come in with a contract or when you say look, here is my contract that I use with my collectors on private sales. I would like these terms to be included in the gallery's sales contract.

They get very unhappy and uneasy. They say, why are you making such a fuss?

MS. DICKINSON: They call them Memos of Understanding when they feel better about contracts.

MR. CARLIN: Right.

MR. MAYER: My analogy of the labor-management model tends to break down to the extent that artists are not in a position to withhold their services for the economic leverage they might gain. For better or for worse, we have looked to government for representation in these areas.

We have, in addition to the Resale Royalties Act and the Art Preservation Act in this state, the Art and Public Buildings Program, the Artist-Dealer Relations Law, and the California Arts Council grant programs. Many of these focus on the concerns of early career artists, incidentally. We do look to government for a degree of representation that we can't effect otherwise.

Incidentally, I don't know if you've seen the film. One of the reasons that the Skull auction had such a dramatic effect, was because this auction was filmed. I don't know if you've seen this.

MR. PATRY: No, I haven't. That would be interesting.

MR. MAYER: Well, you might want to try to find a copy of it. If I recall correctly, at one point, one of the things that was remarkable was that Rauschenberg shoved Robert Skull. Bob Rauschenberg is almost your ultimate pacifist. He's one of the most gentle persons that one has ever seen. But when the sale took place -- and this was documented by the filmmaker -- Rauschenberg came up to Skull and said "Congratulations" -- shove -- "I work my tail off for fifteen years, and you make \$84,000."

Skull responded, saying, "Well, Bob, I've been working for you too. All of your prices are going to go up now."

MR. PATRY: That's the Larry Rivers article.

MR. MAYER: Exactly. With that, as I recall the film, Rauschenberg reached out and took Skull by the hand and said, come on, let's go to my studio

and you can buy a work that I've just finished, the same size as "Thaw." You can buy it for the same amount of money that you sold "Thaw" for. Of course, he backed off.

Incidentally, Rauschenberg commented to me once that there was a period when his works were in the resale market when he got interested in a conceptual art line that he was referring to as sort of art and science. These were not really commercially salable works, but they were certainly legitimate works under the rubric of visual art expression. He had to stop doing it because he had a family to support.

He said that if he'd been receiving royalties from the earlier works, he could have pursued that line. So, we don't know what's lost now because of that economic need that could be addressed by a resale royalty.

MR. PATRY: Thank you very much. Anyone else? Yes.

MS. ASAWA: Speaking for artists, when they get a commission, and they realize that work is going to cost twice as much as originally expected, they normally lose. For myself, I lost money making the Ghiradelli fountain, and I lost a huge amount making the Hyatt fountain. The resale has not paid me back what I lost.

I just wanted to let you know that. Because artists will spend everything in order to make the work right. Then when the Sieroty bill was passed, I had a commission, a very guaranteed commission. Then my contract -- I mean, I knew that I could be protected by the law because it was law -- I put the Sieroty five percent into my contract, and they backed out of a \$25,000 contract. I didn't have to do it because I already had the commission. When I made the agreement, they backed out.

MR. PATRY: Thank you very much.

Thank you very much for coming and sitting here freezing with the rest of us. I appreciate it very much.

What will happen is that we'll get a transcript. Then I will send you copies of it for you to edit and look at and correct and things like that.

Professor Goetzl, you wanted to make a brief summary here?

PROFESSOR GOETZL: If I may.

MR. PATRY: You may.

PROFESSOR GOETZL: Thank you.

MR. PATRY: Go ahead.

PROFESSOR GOETZL: It was an honor and a challenge to speak first. I appreciate the opportunity to speak again at the conclusion.

I wanted to add to my resume, that I am the chair-elect of the Association of American Law Schools, Art Law section.

MR. PATRY: Thank you.

PROFESSOR GOETZL: I also would like quickly to respond to a number of specific points, so there won't necessarily be any thread through this.

The characterization of this whole business as a labor-management dispute is interesting. I note that Richard Mayer has a background as a labor organizer, Jack Davis, the attorney from our board who represented the artists in Morseburg versus Balyon, is a labor lawyer. It's perhaps not coincidental that that's the case. As I stated earlier, the goal of artists in this legislation is to achieve parity with other authors, Where artists have been treated differently, it is perhaps primarily because artists, unlike other authors, have never been organized. Because their work product is especially unique, it is not fungible.

Moreover, it is unlikely that they will ever be organized. Aside from the appellation, there's very little parallel between Artists Equity and Actors Equity. The former is an association of visual artists working toward some common goals; the latter is a working union. It's never going to be any different.

That's why many of us, as advocates, have chosen to work on behalf of artists. Fortunately, Eleanor Dickinson's characterization of protective legislation as dealing with idiots and children is not entirely apt. We also have a lot of protective legislation for other groups which, due to their lesser bargaining power, are unable to protect themselves. For example, legislation frequently establishes non-waivable rights for tenants and consumers.

MR. PATRY: Well, there are also provisions in the Copyright Act.

PROFESSOR GOETZL: Absolutely.

MR. PATRY: We terminate transfers after 35 years.

PROFESSOR GOETZL: Absolutely, so that authors can get a second shot at it.

MR. PATRY: Yes.

PROFESSOR GOETZL: With respect to the blackballing -- I'll try to go through these things rather quickly. I think the blackballing will become less and less of an issue as paying the resale royalty becomes established as normative behavior. That is what is expected. This process should proceed more quickly if an intermediary is used. If we have an "ASCAP" or "BMI" type of organization, that would defuse some of that problem.

With respect to the point that Mr. Davis and Ms. Robinson raised about alternative dispute resolution, I concur it would be a good idea because it's hard to see the federal courts wanting to entertain a great number of

additional lawsuits. I think they're clearly overburdened as it is. We should, however, keep the availability of attorney's fees.

But most importantly, I wanted to address a number of points that Professor Merryman raised. It is with relevance to his remarks that, perhaps, you can better appreciate my quote about my desire that artists not be the only socialists in a capitalist society. Unfortunately, the people who oppose this legislation persist in characterizing it as welfare legislation.

Professor Merryman, again, says that he would prefer and would be willing to endure a resale royalty where the funds, more modest than what we would like to see, would go into a fund to improve the status of all artists. I think I can fairly represent on behalf of most of the working artists I've been in contact with, that that is insulting and it is patronizing.

No one has ever suggested that inventors should remit some of their patent royalties to benefit unsuccessful inventors or that the royalties should be seized from writers and composers, playwrights, and choreographers, and used to benefit emerging authors. Why should visual artists be asked to do this?

Artists need help in advancing their careers, but that is not what the copyright law is about. As you referred earlier to the constitutional grant of authority in Article I, Section 8, Clause 8, it's clear that that's not what this is about. This is to advance the arts by providing limited monopolies.

The experience in France, Germany, and Belgium, which he neglected to speak of, is really not very relevant. What is important is that the United States be internally consistent and that we lead the way in treating people fairly.

I'm sad to see that we, only belatedly, joined the Berne Convention, a century after most countries had joined it, and then only because we were

beginning to lose some important market advantages, particularly with computer software abroad. We should be leading the way. We should be the model for other countries.

With respect to the resale royalty causing a weakening in the U.S. market for art, again, I think this is a misunderstanding. Yes, art is mobile. So is money. But the buyers are not mobile.

People will resell a work of art in California today at auction at Butterfield and Butterfield, which is doing a very considerable business in the resale of contemporary art, rather than New York, in spite of our having a royalty and New York not having it, simply because they believe that the best market for that art is in California. Wise sellers will prefer to receive 95 percent of a larger price than 100 percent of a smaller price. If Bolivia were the only country in the world that didn't have a resale royalty, I hardly think that the art market would flock to Bolivia.

In any case, and what I find troubling is the implication of that kind of an argument. No doubt our competitive position in the world would be greatly improved if we would eliminate minimum wages, or if we would remove our child welfare laws. Yet, we adhere to those things because we try to do what is right. Even if there is some adverse impact in the world market, accept it. But there wouldn't be such in the case of art so long as the buyers are here.

In summary, what I would like to offer is that since the copyright law was first enacted in this country more than 200 years ago, a lot of changes have occurred. Of relevance is that we have much improved technology. Our ability to keep track of when a work is being sold and bought has been greatly improved. The opportunity for monitoring sales through an "ASCAP" or "BMI" type organization is present where once it would have been impossible.

There are other pressures at work that haven't been referred to that suggest that one of these days we will have some kind of a national registry of art works. I think some of these pressures are going to come from the insurance industry, which is dealing with growing problems of art theft, the difficulty in tracing the provenance of works of art, and the frauds and forgeries which can occur. All of this will be greatly reduced if we have figured out a way to "fingerprint," to stamp art.

There are ways being developed now to do this and track it with computer registries. In fact, as you're probably aware, this is being done on a private basis in a number of places. In due course, all of that will make it more feasible to have such a resale royalty.

In conclusion, I would like to remind you because I know that you know this, that the kinds of arguments which are being raised against the resale royalty today ring very familiar to the kinds of arguments that were raised in opposition to the public performance right which was enacted in 1909.

Then, it was argued, why should people who have copyrighted music or lyrics receive a royalty when their work is performed at a hotel dance floor. After all, when more people listen to it, they'll just go out and buy more sheet music and the authors can make their money then.

When the radio industry was in its infancy, the issue arose of composers and lyricists claiming a royalty for air play. Again, it was argued that if you're going to charge us a royalty for airplay, we won't play your music. We'll play public domain music.

Well, that was responded to by the market place. Not everyone wanted to listen to public domain, classical music. Many others wanted to listen to

contemporary music. The same will occur in the art area. In addition to classical or impressionist art, art lovers also wish to view contemporary art.

Happily, the royalty it prevailed in the music industry. All of this was confirmed to me in a conversation I had some years ago when Herman Finklestein, long-time general counsel for A.S.C.A.P., was a guest of in one of my classes. He said, there is a parallel between the history of A.S.C.A.P. and what you are trying to do for the visual arts.

Congress concluded, and it has borne fruit for everyone, that the authors -- in that case, the composer and the lyricist -- should be compensated for the performances of their work. The fact that they benefit on a continuing basis and may also profit in other ways, is simply not relevant.

I urge that favorable consideration be given to some kind of resale royalty rights for visual artists, and that a recommendation to that effect be incorporated in your report to the Congress. I thank you very much.

MR. PATRY: Thank you very much. Thank everyone for coming. Anyone can submit written comments -- you're certainly welcome to submit anything that you want in writing. Thank you.

[Whereupon, the hearing was adjourned at 12:25 o'clock p.m.]

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PART III - Transcript of New York Hearing

Witnesses for New York Hearing on Resale Royalties

STEFAN ANDERSSON , Representative of the Federation Internationale des Diffuseurs D'Art Originales and President of the Swedish Galleries Association	p. 23-ff
TOM DACKOW , Independent expert	p. 186-ff
GILBERT EDELSON , Administrative Vice President, Art Dealers Association of America	p. 226-ff
TED FEDER , Head, Artists' Rights Society	p. 96-ff
JEAN-MARC GUTTON , General Manager of the Societe des Auteurs dans les Arts Graphiques et Plastiques	p. 5-ff
HANS HAACKE , Artist	p. 67-ff
SANFORD HIRSCH , Artist, Executive Director of the Adolph & Esther Gottlieb Foundation	p. 159-ff
JEFFREY HOMAN , New York Artists Equity	p. 135-ff
GEORGE KOCH , Vice President of National Artists Equity	p. 168-ff
JOHN KOEGEL , Chairman of the Committee on Art Law of the Association of the Bar of the City of New York	p. 196-ff
DANIEL MAYER , Director, Volunteer Lawyers for the Arts, New York	p. 135-ff
ROBERT PANZER , Executive Director of Visual Artists & Galleries Association (VAGA)	p. 111-ff
CHRISTIANE RAMONBORDES , Representative of the Societe des Auteurs dans les Arts Graphiques et Plastiques	p. 48-ff
JAMES ROSENQUEST , Artist	p. 153-ff
JOHN WEBER , Art dealer	p. 72-ff
STEPHEN WEIL , Deputy Director of the Hirshhorn Museum, Washington, D.C.	p. 206-ff
MITCHELL ZUCKERMAN , President, Sotheby's Financial Services Incorporated	p. 242-ff

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UNITED STATES OF AMERICA
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In the Matter of:
ARTISTS' RESALE ROYALTIES

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March 6, 1992
40 Centre Street
New York, New York
9:30 a.m.

B e f o r e:

RALPH OMAN,
Register of Copyrights
and
WILLIAM PATRY,
Policy Planning Advisor to the
Register

NEWROCK/DeSIMONE-THE COURT REPORTERS
21 West 38th Street
New York, New York 10018
(212) 840-1891

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2

3

MR. OMAN: Good morning and
welcome.

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I am Ralph Oman, the Register of
Copyrights in the United States.

6

7

I am accompanied by one of my Policy
Planning Advisors, Mr. William Patry.

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As all of you know, today's hearing
is on the subject of artists'
resale royalty rights.

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We will hear from a
distinguished group of witnesses from the
United States and Europe.

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I thank each of the witnesses
for appearing today and for helping us
reach the right result.

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This is the second hearing held
by the Copyright Office in preparation for
a report we are required to submit to
Congress this year.

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Our first hearing held in
San Francisco on January 23rd
was chaired by Mr. Patry. That hearing
provided us with valuable information
about the California experience with the

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2 Artists' Resale Royalty Law.

3 Today's hearing will provide us
4 with information about how droit de suite,
5 to use the French term, is working in
6 Europe, especially in the country of its
7 birth, France. We will also hear from
8 American witnesses arguing both for and
9 against the adoption of droit de suite in
10 the United States.

11 Due to the large number of
12 witnesses, I hope to be able to run what
13 we call a tight ship so that each of the
14 witnesses is not cut short or slighted,
15 and so that we can conclude the hearing in
16 a timely fashion today. For this reason,
17 I regret that I cannot invite members of
18 the audience to make statements or ask
19 questions. Of course, everyone is free to
20 submit comments in writing; I
21 encourage you to do so, and I also assure
22 you that they will be fully considered.

23 We hope to take a lunch break
24 today from 1:00 o'clock to 2:00 o'clock,
25 and wind up the hearing by 4:00 or 4:30

1
2 this afternoon.

3 We will begin with a panel of
4 distinguished witnesses from France and Sweden.

5 Monsieur Jean-Marc Gutton and
6 Madame Christiane Ramonbordes represent
7 the Socièté des Auteurs dans les Arts
8 Graphiques et Plastiques, an association
9 that administers artists' rights,
10 including the droit de suite.

11 Monsieur Stefan Andersson
12 represents the Federation Internationale
13 des Diffuseurs D'Art Originales, an
14 association of art gallery owners from ten
15 European countries.

16 I wish to thank all three of you
17 for making the trip across the Atlantic
18 Ocean and for appearing before us today,
19 and also for your kindness in meeting with
20 Mr. Patry this summer.

21 I note that the birthplace of
22 the droit de suite is the birthplace of
23 many famous artists, and the French
24 experience can provide us with many
25 valuable lessons.

1

2 It is a great privilege to have
3 you here today.

4 Monsieur Gutton, if you could
5 begin I would be grateful.

6 MR. GUTTON: Thank you, Mr.
7 Chairman.

8 First of all, I want to thank
9 Mr. Patry for the invitation, and the
10 Copyright Office, to be so involved
11 regarding droit de suite, regarding this
12 matter, and the integral right.

13 I want to apologize for my
14 English, you will see it's not the best.
15 I will try to do my best in your language,
16 and I hope you will not tell me at the end
17 of my report that it would have been
18 really better if I had spoken in French.

19 My intention is not to speak in
20 general about droit de suite, but to be
21 particular and complete.

22 As an introduction, I want to
23 outline four points.

24 First, we must never forget that
25 without artists there would, obviously, be

1

2 no art market.

3 Second, droit de
4 suite has a legal existence in 29 nations,
5 throughout the world, in which 14
6 are European.

7 Third, since 1920, the
8 birth of droit de suite in France, the
9 ground covered by droit de suite will be
10 the best testimony of its validity and
11 equity.

12 Fourth, droit de suite, in my
13 experience, runs not only well, but very
14 well when you have simple concepts and
15 simple regulations, and to the best
16 satisfaction of artists.

17 It's naturally quite
18 unbelievable for people who don't know
19 anything about application of droit de
20 suite to imagine it. The lack of
21 information in a country such as yours, a great
22 country, is the main weakness regarding
23 that right. That is the reason I am here
24 and have prepared a study. And Mr. Patry
25 has a sample of it.

1

2 If anybody needs to have
3 one, it's absolutely possible to get it.
4 Anyway, if I have not enough, I will be
5 able to send it to anybody if I have the
6 address.

7 Regarding the content of my
8 study, in summary, the first part is a
9 response to criticism against droit de
10 suite and the second part concerns
11 administration of droit de suite in France.

12

13

14 First response to the criticism.

15 It is only natural that droit
16 de suite should be unacceptable for
17 countries with a tradition of Anglo-Saxon
18 law under which copyright is considered as
19 a pecuniary right, and a work of art
20 becomes a commercial product over which
21 the artist detains no rights.

22 It's natural that droit de suite
23 should be violently opposed by a certain
24 number, particularly commercial companies,
25 since it comes into direct conflict with

1
2 their interests.

3 This criticism was expressed
4 notably by several official personalities
5 involved in art.

6 Last July, I sent in my reply as
7 a testimony regarding the position of Mr.
8 Ainslie, President and Chief Executive
9 Officer of Sotheby's Holdings, Inc., and
10 Mr. Patry has it.

11 Similar criticism was taken up
12 recently by Ralph Lerner, Esq. in his
13 Report of the United States for the Fourth
14 Symposium on legal aspects of
15 international trade in art (ICC - Madrid,
16 a few weeks ago, it was a meeting, a
17 symposium, between the 12th and the 14th
18 of February), in the following terms: "In
19 my opinion, droit de suite is not
20 particularly important for artists and
21 tends only to be a benefit to artists who
22 are extremely successful and may not need
23 the additional income and protection. In
24 my opinion it inhibits the trade in art,
25 and would be a benefit to few artists,

1
2 difficult to enforce and costly to
3 regulate."

4 That was the position of Mr.
5 Ralph Lerner. And the ICC has received a
6 report from him.

7 I will be pleased to reply
8 regarding, first, the failure of the
9 Californian precedent; second, the effect
10 of droit de suite on the art market;
11 third, costs involved in the
12 administration of this right; and,
13 finally, the beneficiaries of droit de
14 suite (number of beneficiaries and
15 inequality of benefits).

16 The Californian precedent.

17 Although its underlying
18 principle and some of its articles are
19 sound, the California law of 1976 is
20 nevertheless inapplicable as it stands.
21 An isolated case, ignored by all parties
22 concerned, and far too complicated to
23 apply, it thus cannot be used as
24 reference. That is our opinion,

25 Isolated. Because the

1
2 Californian law is an isolated case, the
3 possibility of applying it arouses little
4 interest among artists. Furthermore, its
5 application gives rise to many
6 difficulties for the artist concerned and
7 upsets the balance of fair trading
8 vis-a-vis the other states.

9 Complicated. The requirements
10 of the law are far too exacting and
11 complicated to encourage an efficient
12 application of droit de suite. These
13 requirements include, as everybody knows,
14 the obligatory residence of the vendor,
15 obligatory citizenship of the artist,
16 complex limitations restricting the works
17 concerned by droit de suite.

18 Consequently, application of
19 this law in California is impossible on both
20 the individual and the collective
21 levels. An authors' society could not
22 effectively administer this right within
23 the existing legal framework.

24 We suggest that you refer on
25 this subject to the survey by Mr. Peter H.

1
2 Karlen (Cf. U.S. National Report on Rights
3 of Artists and the Circulation of Works of
4 Art, 1991) carried out for the ICC -
5 Madrid 1992 on the subject of the
6 "Californian Statute and its Effects."

7 Mr. Karlen practices art,
8 publishing, and intellectual property law
9 in La Jolla, California.

10 The second point is regarding
11 the effect of droit de suite on the art
12 market.

13 The fluctuations in the art
14 market over the past ten years are
15 particularly significant on this point.
16 They prove that, far from ruining the
17 market in the countries where droit de
18 suite is applied, it brings those countries a level
19 of stability for which they are envied by
20 countries where the right is not applied,
21 and which have been attracted by the false
22 market of financial speculation.

23 It should be pointed out that
24 from 1980 to 1990 the progression of
25 modern art sales in France vied

1
2 successfully with progression in the
3 United States of America.

4 In the United States sales were
5 multiplied by 17 in eight years, between
6 1980 and 1987. It seems probable however
7 that these figures include sales of
8 Impressionist Art.

9 In France, sales of purely
10 contemporary art (artists in copyright)
11 were multiplied by ten in eight years,
12 1980 to 1987, and by 41 in eleven years,
13 1980 to 1990.

14 In 1991, the year when the world
15 market collapsed, the annual figures of
16 auction sales as compared with 1990 show a
17 drop of almost 55 percent for Sotheby's,
18 49 percent for Christies, and only 37
19 percent for Drouot (France).

20 The Parisian market suffered
21 less because it was fortunately less
22 concerned by the sale of works of
23 extremely high value entailing
24 speculation.

25 Thus, serious analysis suffices

1
2 to prove that droit de suite does not
3 depress the market.

4 Droit de suite should not be
5 considered as a capital gains tax, but as
6 an artist's right which it is normal for
7 them to receive.

8 Competition between countries
9 should not depend upon selective criteria
10 applied to the disadvantage of certain
11 artists, but upon such criteria as:
12 facilities afford by the geographical
13 location; wealth and demography of a given
14 country; importance of a country's
15 creative and cultural activity; advantages
16 resulting from national taxation; and so
17 on.

18 Furthermore, all serious surveys
19 have shown that there is no greater
20 tendency towards underground business
21 activities in countries where droit de
22 suite is applied than elsewhere.

23 The third point concerns the
24 administrative expense of droit de suite.

25 In the interest of both the

1
2 artist and the vendor, droit de suite
3 should be administered collectively. The
4 utility and efficiency of such a form of
5 administration is underlined by WIPO
6 (Cf. "Collective Administration of
7 Author's Rights and Related Rights").

8 The administration of droit de
9 suite in all countries where it is applied
10 is only a light burden to both authors'
11 societies and auctioneers or vendors
12 entailing low management expenses. For
13 instance, in France, for \$20 collected
14 more than 16 are distributed.

15 Each payment of the right made
16 to an artist is accompanied by a complete
17 and detailed statement of all transactions
18 concerned. These statements contain as
19 much information about works which remain
20 unsold at auctions as those which are
21 sold, and this allows the artists to
22 remain perfectly well informed about the
23 destiny of his artworks on the art
24 market.

25 Further, the generalization of

1
2 droit de suite using simple rules of
3 application should automatically decrease
4 the administrative costs.

5 It must be underlined that only
6 an artists' rights society is in a
7 position to manage droit de suite in a
8 satisfactory manner. Headed by a board
9 composed of artists and heirs, such a
10 society, open at all times to examination,
11 can ensure that the administration of
12 droit de suite and the paying out of
13 amounts collected remain fully reliable.

14 Furthermore, only an artists'
15 rights society can successfully defend the
16 rights of the artist on both the national
17 and international levels.

18 First point, beneficiaries of
19 droit de suite.

20 Droit de suite does not benefit
21 only successful or established artists and
22 heirs.

23 In 1990 ADAGP collected resale
24 royalties for 1,650 of its 2,500 direct
25 members, (85 percent of whom are living

1
2 artists) (for a total amount of more than
3 \$10.5 million) in the following proportions:
4 1100 members received an amount between
5 \$20 to \$2,000; 400 members received \$2,000
6 to \$20,000; 100 members received \$20,000
7 to \$40,000; and 50 members received more
8 than \$40,000.

9 Following the decrease in the
10 market at the end of 1990 and in 1991
11 ADAGP distributed \$7 million to its
12 members in 1991.

13 For its part, SPADEM, the other
14 French artists' society involving visual
15 art, collected \$7 million in 1990 and \$4
16 million in 1991.

17 The rating of an artist in any
18 country is subject to upward or downward
19 fluctuations. The real issue is: Do
20 purchasers buy a work of art for the sake
21 of that work, or rather in order to resell
22 it for profit as soon as possible?

23 Thus, if droit de suite were
24 generalized in the United States, which is
25 an important center of creativity, it is

1
2 not excessive guesswork to state that
3 thousands of artists would stand to
4 benefit from droit de suite.

5 It is time to correct the false
6 idea that only the rich will benefit from
7 droit de suite. Even if this were
8 true in certain exceptional circumstances,
9 since when has the United States of
10 America, as a capitalist country promoting
11 free enterprise, decided to limit fortune
12 making to merchants only and to exclude
13 artists from reaping the benefits due to
14 the creative elite?

15 At the beginning of January
16 1992, one of the French television
17 channels broadcast a documentary program
18 on what has become of the heirs of Renoir,
19 Cezanne, Monet, and so on. The facts are
20 simple. Far from owning artworks or a
21 fortune derived from the works of their
22 grandfathers, they are modestly devoted to
23 the promulgation of those works.

24 Philippe Cezanne, for instance,
25 grandson of Paul, who owns one picture

1
2 only, earns his living as an art expert.

3 Claude Renoir, grandson of
4 Auguste, owns three pictures and acts as
5 guardian to the "temple."

6 Jean-Marie Toulgouat, a
7 descendant of Claude Monet, struggles to
8 keep alive the cult of his grandfather.

9 Furthermore, we are not lacking
10 in examples of living artists or heirs who
11 spend money from droit de suite to help
12 compile catalogues raisonnées, (an
13 extremely costly undertaking), to open
14 foundations to perpetuate the memory of
15 the artist, to organize exhibitions, or in
16 certain cases simply to meet their most
17 basic needs.

18 In conclusion, regarding these
19 criticisms: It's established that
20 traditional criticism of droit de suite is
21 unfounded.

22 It is established that, in the
23 countries where the right exists, its
24 effective and efficient application
25 depends very much upon the following

1

2 simple criteria:

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4 The first of them is
indefeasibility of droit de suite.

5

6 Second. Beneficiaries of droit
7 de suite should be artists and their
heirs.

8

9 Third. Application of droit de
10 suite should be limited to original works
for all resales.

11

12 Fourth. Calculation of droit de
13 suite on the total resale price (droit de
14 suite based on capital gains is
inapplicable and dissuasive).

15

16 Fifth. Application of a fixed
17 rate (a degressive rate goes against the
philosophy of droit de suite).

18

19 And, sixth. Obligatory
20 collective administration of droit de
suite through an artists' rights society.

21

22 Furthermore, far from depressing
23 the art market, the application of droit
24 de suite to all creators reflects
25 positively upon that market as an
equitable measure which establishes it on

1
2 a basis of fair competition for all
3 talent.

4 It would be to the honor of all
5 countries involved in the art market to
6 accept the same philosophy and reasoning
7 for all intellectual creators which, at
8 the same time, would afford an excellent
9 opportunity to work towards the
10 establishment of good relations on the
11 intellectual level rather than being
12 governed by the overwhelming obsession of
13 making a profit.

14 The final remark, an optimistic
15 one. In order to avoid any disparity
16 between artists, droit de suite would
17 necessarily have to be applied
18 retroactively to living artists, and those
19 who died less than 50 years ago, without
20 taking into account the status of the
21 individual works.

22 This would permit American
23 artists to benefit from droit de suite in
24 countries of the European Community where
25 the condition of reciprocity is applied.

1

2 I want to add, if it is
3 possible, a few remarks about the
4 administration of droit de suite.

5 First, information concerning
6 auction sales. In conformity with an
7 agreement, French auction houses send
8 ADAGP the sale catalogs and full
9 information before each auction sale.
10 After we receive it we put the information
11 into the computer about all the works
12 going on sale for the auction. Before the
13 sale ADAGP sends the auction house a
14 detailed statement of those works giving
15 full reference of the name of the artist,
16 naturally, the title of the work, size,
17 techniques, and so on. After the sale the
18 auction house sends the statement back to
19 ADAGP with the sale price, the amount of
20 droit de suite, and so on.

21 There are annexed to my report
22 two forms, the form we send to the
23 auctioneer and the form we receive back
24 from the auctioneer.

25 For the payment to members, upon

1
2 receipt of the statement from the auction
3 house, they enter the information into the
4 computer, and the amount of droit de suite
5 is immediately credited to the member's
6 account.

7 After resolution of its
8 administrative commission and costs ADAGP
9 then makes payment to members. Payment is
10 accompanied by a statement giving full
11 information about the work involved, name
12 of the auction house, place of the sale,
13 sale price, amount of droit de suite, and
14 so on.

15 Mr. Patry asked me to inform the
16 Court about the benefit of artists, and I
17 did that in the other part of my report.
18 I have nothing to add on that point, but
19 if there are any questions I will reply.

20 Thank you, gentlemen.

21 MR. OMAN: Thank you very much,
22 Monsieur Gutton.

23 Before asking specific
24 questions, I will ask Mr. Andersson to
25 make his presentation at this point.

1

2

Mr. Andersson.

3

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MR. ANDERSSON: Thank you, your Honor.

5

6

I am very honored to be invited here today.

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11

I would like to make a short presentation about myself. I come from Sweden. I am the President of the Swedish Galleries Association, and it is because of that I come today.

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The Swedish Galleries Association is a member of the FIDAO (Federation Internationale des Diffuseurs d'oeuvre d'art Originales) which is an organization, as Mr. Patry told us, for ten European countries. And altogether we organize about 2,000 art galleries in Europe. The countries are Germany, France, Italy, Spain, Great Britain, Denmark, Belgium, Holland, Greece, and Sweden.

Beside my situation as President of the Swedish Galleries Association, I also run an art gallery in a small town called Umea, it's situated 700 kilometers north of Stockholm. It's about 64 degrees

1
2 north. And you have to travel about 250
3 miles north from Anchorage, Alaska to come
4 to the same level.

5 MR. OMAN: There's a booming art
6 market up there, I imagine.

7 MR. ANDERSSON: Yes, there is.

8 You have heard Mr. Gutton from
9 France explain the argument for the
10 FIDOAO before, he is the President of the
11 French Gallery Association. And I think I
12 might have some new arguments because
13 Sweden does not have a system with a
14 copyright for visual artists. And it is,
15 for me, very difficult to understand why
16 you should have it. The whole idea of
17 advocating copyright or droit de suite on
18 visual artists is illogical and very
19 difficult to understand.

20 We have heard arguments where
21 artists are comparing their situation with
22 authors. I would say that this comparison
23 is not possible to make. Paintings and
24 books are not sold in equal ways. A
25 painting is unique and is sold in one

1
2 piece to one customer. A book -- and by
3 "a book" I mean the work that the author
4 has put into it -- a book is sold in
5 pieces, in thousands of copies, to a large
6 group of customers. You don't know the
7 total price of the book until you have
8 sold the last copy of it. As long as
9 the book is selling, the author,
10 naturally, should have his share because
11 even if the publisher prints new editions,
12 people are still asking for the
13 book. Each sale is still the first time a
14 particular copy of the book is sold.

15 It is a matter of security for
16 the author. There must be legal
17 regulations because the author has little
18 control over what is happening with his
19 manuscript unless he is his own publisher.
20 And that also goes with the meaning of the word
21 copyright, it is the right to the copies.

22 The artist doesn't have that
23 problem. Paintings are unique and are not
24 sold in thousands of copies, the artist
25 knows where the painting is, probably at

1
2 his gallery, and he can control when it is
3 sold, and he can control that he gets his
4 money.

5 What you are talking about is
6 getting money from the second market, the
7 second time the piece is sold. No
8 author gets anything from books that are
9 sold in secondhand book shops or a book
10 auctions. That is the big difference. I
11 mean, we are talking about putting a fee
12 on paintings that are sold the second time
13 and comparing it with the situation of
14 authors.

15 If visual artists would sell
16 prints, lithographs, et cetera, in
17 unlimited editions then we would have a
18 situation that would be comparable with
19 authors; but it is not likely that this
20 will happen because people don't want to
21 buy art that way.

22 Authors don't get anything from
23 the secondhand market like auctions, and
24 neither should visual artists because if
25 we let them have this what shall we do,

1
2 for example, with architects, should they
3 get a percentage when you sell real
4 estate?

5 I think that comparison is much
6 better than the comparison between authors
7 and visual artists.

8 I can understand the frustration
9 artists might have felt during the 1980's
10 when people could earn money just by
11 owning a painting or real estate for a
12 short while and then selling it with a
13 large profit; but it is still illogical to
14 try to get a piece of that profit because
15 if you do that you must also take a share
16 of the losses. Today people are
17 losing money on their so-called art
18 investments that they made during
19 the 1980's.

20 Will artists go into those
21 losses and share them with those who lost
22 money?

23 I don't think so.

24 And in the long run, and in
25 total, I don't believe that art is such a

1
2 good investment. If the value increases,
3 I would say that most of it is inflation.

4 I would also say that most artworks
5 cannot be sold with profit. Therefore,
6 it is even harder to understand why
7 there should be a copyright or selling
8 fee, it feels like it is a punishment for
9 not keeping the painting or the artwork.

10 In countries where droit de
11 suite exists we have learned that it does
12 not reach its goal. Experience shows that
13 only artists who have a good notoriety
14 take advantage of these rights. For
15 other artists, when the amount doesn't
16 reach a certain level, it is kept by
17 the registration society for its
18 registration fees.

19 So, we strongly recommend against
20 installing a system like this, it will only
21 feed bureaucrats and those who really need
22 financial support will not have it.

23 We have heard Mr. Gutton explain
24 how the situation has been on artists like
25 Matisse, Cezanne, and Monet, and I cannot

1
2 think that this is an important matter to
3 support those kinds of artists or their
4 relatives.

5 So, as a conclusion, the FIDOAO
6 is strongly against droit de suite or
7 copyright for visual artists, and we hope
8 that you do not install it. We also
9 hope that countries that already have it
10 installed try to reconsider again if the
11 system is right or wrong.

12 Of course, when you have had a
13 system for 33 years, as they have had in
14 France, you make it work and it will, of
15 course, function; but maybe you don't
16 think about other ways whether the system
17 is right or wrong. But we have seen
18 larger political systems being
19 reconsidered during the last years, and I
20 think this is the time to reconsider this
21 one as well.

22 Thank you.

23 MR. OMAN: Thank you very much,
24 Mr. Andersson.

25 Let me start with a few

1
2 questions for Monsieur Gutton.

3 I don't understand exactly how
4 your system works. And my question is,
5 does your society acquire exclusive rights
6 from the artists it represents or can the
7 artists still license their rights
8 directly, even though they are members of
9 your association?

10 MR. GUTTON: Well, the society
11 is not an association. We are a society,
12 a civil society. When artists ask to be
13 a member of the society, they keep their
14 freedom, and they can continue to manage
15 their right. But for droit de suite, for
16 instance, and especially when we know the
17 situation in France, it cannot
18 manage its own droit de suite alone. Why?
19 As you may know, there are
20 more than 400 auctioneers in France. If
21 an artist stays alone, no auctioneer will
22 give him information permitting him to
23 afford the situation. It is only
24 through an author's society that rights can
25 be managed.

1

2 MR. OMAN: I think that
3 clarifies the point.

4 How do you actually divide the
5 money between surviving heirs?

6 And suppose there are several
7 former husbands or wives, how is that
8 managed?

9 MR. GUTTON: Well, it's very
10 clear when the artist is alive. When the
11 artist dies we have, certainly, all the
12 information regarding the part of each
13 heir. And sometimes when the situation is
14 quite large, maybe sometime we have fifteen
15 heirs, and we apply accurately the part
16 for each person involved.

17 MR. OMAN: The wife who was the
18 wife at the time of the creation of the
19 painting doesn't get a larger share
20 because she inspired the painting?

21 MR. GUTTON: There are
22 sometimes difficulties; but, in fact, I
23 can say with my experience and 2,500
24 members, it's absolutely marginal. It's
25 normal in a way that the widow receives a

1
2 part, and it's absolutely normal for the
3 son, and so on.

4 MR. OMAN: Does droit de suite
5 in France encourage artists to produce
6 more art by allowing them to earn money to
7 feed their families and pay the rent or
8 does it just benefit the heirs in most
9 cases who really don't produce art?

10 MR. GUTTON: No, we cannot say
11 that droit de suite encourages the artists
12 to produce more. They don't care. An
13 artist is a free man, and maybe more free
14 than anybody else. He's fully
15 involved in his work, and he does not care if
16 he needs one year for one work or if he's
17 able to create several works per day.

18 MR. OMAN: But if he has to take
19 a job at the bank to earn money to buy
20 food, he wouldn't be able to spend his time
21 producing art, or she wouldn't be able to
22 spend her time producing art.

23 Has that had a direct impact on
24 the prosperity of artists in France?

25 MR. GUTTON: Yes, certainly,

1
2 because it is a basic revenue for men.
3 The droit de suite that is distributed is
4 to 85 percent of our members who are live
5 artists, and the heirs is only 15
6 percent. So, the main part of the droit
7 de suite is for live artists.

8 And I can add that when we send
9 them the droit de suite it's not only a
10 check, it's full information regarding
11 what is happening with their work, and
12 when it was sold, if it is not sold, and
13 so on. We know all our members are very
14 concerned and wish to have that
15 information.

16 MR. OMAN: Do you find artists
17 today are more concerned about money and
18 pensions in their old age than artists
19 were 100 years ago?

20 (Discussion held off the
21 record.)

22 MR. GUTTON: Well, I can reply,
23 it's exactly the same between this
24 generation and past generations. In the
25 beginning of the century the situation

1
2 was, as everybody knows, very difficult,
3 and now we are in a -- I do not know the
4 translation -- and, so, artists turn to
5 droit de suite money. When you
6 receive money, it's testimony that you are
7 not alone with your work, that your work
8 really is well-known, and you have a
9 position, and so on.

10 MR. OMAN: I have one final
11 question. I wonder if you think that
12 droit de suite in France encourages
13 artists to sell their paintings for a
14 lower price for the first sale knowing
15 that they will benefit if the work
16 increases in value, or do they still hold
17 out for a high price at the front end?

18 MR. GUTTON: Well, as you
19 imagine, I asked many persons involved in
20 the art market what was the good impact
21 and consequences of droit de suite and the
22 bad ones. I never heard anything in that
23 way regarding the market or an artists'
24 attitude. Never. So, I don't think in
25 France or in countries where they employ

1
2 droit de suite it's different than in
3 another place. It is the same for it.

4 MR. OMAN: Thank you.

5 I'll save my questions for Mr.
6 Andersson for just a moment and turn the
7 microphone over to Mr. Patry.

8 MR. PATRY: I will ask questions
9 of Mr. Gutton and then Mr. Oman can ask
10 questions of Mr. Andersson.

11 Monsieur Gutton, just to clarify
12 how droit de suite works in France, what
13 we are talking about here is a percent of
14 the sale price of a work of art; correct?

15 MR. GUTTON: Yes.

16 MR. PATRY: When a work of art
17 is sold in France a certain percent of
18 that sale price is paid by the seller to
19 the artist?

20 MR. GUTTON: Yes.

21 MR. PATRY: And that percent is
22 three percent; correct?

23 MR. GUTTON: Yes.

24 MR. PATRY: And that percent is
25 paid regardless of whether the painting

1
2 sold at a lower price than it originally
3 sold for. So, the dealer, let's say,
4 bought the work for 1,000 francs from the
5 artist, and then resells it for 750
6 francs, but the three percent royalty is
7 still paid; is that correct?

8 MR. GUTTON: Yes.

9 MR. PATRY: Yes.

10 It's not a percent of the
11 profit, it's simply a percent of any
12 resale of the work?

13 MR. GUTTON: That's right. Yes.

14 MR. PATRY: Now, when France
15 originally enacted droit de suite it was
16 on auctions only; is that correct?

17 MR. GUTTON: Absolutely correct.

18 MR. PATRY: That was 1920.

19 Then in 1957 --

20 MR. GUTTON: No, in 1920 it
21 was droit de suite for all public
22 auctions.

23 MR. PATRY: But in 1957 there
24 was a change.

25 MR. GUTTON: Which time?

1

2 MR. PATRY: In 1957 there was a
3 change.

4 MR. GUTTON: No, no. In 1957 it
5 was for the whole market.

6 MR. PATRY: All right.

7 MR. GUTTON: We didn't apply it
8 to galleries for reasons of social
9 security.

10 MR. PATRY: So, as the law is
11 written now, droit de suite applies both
12 to sales through auctions and to sales
13 through galleries, at least the law is
14 written that way; correct?

15 MR. GUTTON: Can you repeat
16 that, please?

17 MR. PATRY: Yes.

18 The law as it is written, if you
19 go to the French legal books, the
20 droit de suite law says that the payment
21 will be made on sales at auctions and on
22 sales through galleries; correct?

23 MR. GUTTON: Yes.

24 MR. PATRY: The law is written
25 that way?

1

2 MR. GUTTON: That's correct.

3 Yes.

4 MR. PATRY:5 And it lasts for the life
6 of the author plus fifty years, I believe;
7 is that correct?8 So the sale is triggered not only
9 when the artist is alive, but payments
10 are made for sales fifty years after
11 the author dies?12 MR. GUTTON: That's right. Yes.13 MR. PATRY:14 And it applies not just to
15 paintings, but it applies to other forms
16 of art like tapestry?17 MR. GUTTON: Absolutely.18 MR. PATRY: Furniture?19 MR. GUTTON: Well, furniture,
20 but only if it is an original work and not
21 a series.22 MR. PATRY: Basically, what the
23 art market considers art.24 If Picasso created a ceramic jug
25 and it was an original, of course droit de

1
2 suite would be paid on that?

3 MR. GUTTON: Yes.

4 MR. PATRY: If Picasso
5 created a really good looking chair and it
6 was sold at an auction, would a droit de
7 suite be paid on that?

8 MR. GUTTON: Can you repeat
9 that, please?

10 (Discussion held off the
11 record.)

12 MR. GUTTON: Yes, if it is an
13 original work. Yes.

14 MR. PATRY: Now, we just
15 mentioned --

16 MR. GUTTON: Only one piece --
17 you know.

18 MR. PATRY: Only one piece?

19 MR. GUTTON: Yes, that is very
20 important.

21 MR. PATRY: Yes.

22 Now, we just went over that the
23 law as written applies to
24 sales that are made through
25 galleries, however, that is not enforced;

1
2 is that correct?

3 MR. GUTTON: Yes. That's right.

4 MR. PATRY: Would you agree that
5 for living artists galleries probably
6 constitute the larger market, in
7 other words, more sales are made
8 to galleries?

9 MR. GUTTON: Certainly.

10 MR. PATRY: If droit de
11 suite is important for artists -- and
12 I assume you believe it is
13 important -- and if galleries
14 constitute the most important
15 market for living artists, why
16 isn't droit de suite enforced
17 for galleries?

18 Aren't artists really
19 giving up what is their most
20 important market?

21 MR. GUTTON: But in France we
22 have an agreement between the auctioneers,
23 galleries, and artists, too. And it was
24 with the full approval of the artists that
25 that decision has been made, but in

1
2 compensation they have to pay the social
3 security.

4 I want to make a remark. My
5 opinion is that in no case do galleries have
6 to pay a droit de suite for the first
7 sale, because many galleries provide great
8 help to the artists. And to share the
9 first work, that would be absolutely
10 stupid, to apply droit de suite for the
11 first resale.

12 MR. PATRY: I asked the
13 question for this reason: If the United
14 States Congress is to seriously consider
15 a droit de suite we, of course,
16 would look to France for your
17 experience, and the argument might be
18 something like this: Well, in France
19 they have a droit de suite that applies
20 to galleries, but there has
21 been an agreement entered into that the
22 galleries don't pay a droit de suite to
23 the artists, instead they pay into a
24 social security fund. So, what is really
25 needed is not a droit de suite

1
2 for artists, but what we need is some sort
3 of a change in our social security laws
4 for artists.

5 So, my question is this: How do
6 you respond to the argument that droit
7 de suite is not the most important and
8 that what is more important is a Social
9 Security fund for artists?

10 MR. GUTTON: It's absolutely a
11 different demand. Well, that was the
12 agreement in France, but it's not
13 automatically a good example. We must not
14 mix social security and authors' rights.
15 We cannot compare anything about it. If
16 we are studying authors' rights, we are not
17 studying social securities for me,
18 it is another study, it's another
19 reflection, it's another domain, it's
20 another mind and not the same beneficiaries.

21 MR. PATRY: In Germany,
22 as I understand, the law applies
23 to galleries as well. The droit de suite
24 in Germany, as in France, applies to
25 galleries. My understanding is that

1
2 it's collected in Germany, that
3 if there is a resale through a gallery in
4 Germany a payment is made to the German
5 Collection Society.

6 MR. GUTTON: Yes. That's
7 correct. Absolutely.

8 MR. PATRY: And my understanding
9 is they also have a social security
10 fund there as well, that artists who are
11 members of Bild-Kunst receive monies through
12 that society's social security fund. I
13 guess my question might be -- and this
14 might be an unfair one for you as a French
15 citizen -- if the United States were
16 to look at this would the German model be
17 a better source than the French model?

18 MR. GUTTON: No, for
19 reasons I mentioned before.

20 MR. PATRY: Now, ADAGP --

21 MR. GUTTON: Yes.

22 MR. PATRY: -- also licenses the
23 reproduction rights; is that correct?

24 MR. GUTTON: Yes.

25 MR. PATRY: So, in France you

1
2 have many different rights; you have
3 the right to reproduce your work, and you
4 have the right to receive a droit de suite
5 payment.

6 In terms of dollar amounts for
7 artists, in your experience, do artists
8 make more money through licensing the
9 reproduction right or do they make more
10 money through the droit de suite
11 payments?

12 MR. GUTTON: Well, my opinion
13 is, regarding those last years, that
14 they made a great deal more money
15 with droit de suite than with
16 reproduction rights, even when the
17 art market decreased.

18 MR. PATRY: When I visited with
19 you in the summer I believe you showed me
20 a form or told me about a form with a
21 waiver that artists can check. If
22 they want to waive their right to
23 reproduction royalties, they can do that?

24 MR. GUTTON: Yes, because, in
25 fact, sometimes an artist considers that

1
2 it's better to have the opportunity to promote
3 his work and for the knowledge of his work
4 to waive the fees.

5 MR. PATRY: So, is your testimony that --

6 MR. GUTTON: Well, I have people
7 here because sometimes I forget something.

8 MR. PATRY: Yes.

9 MR. GUTTON: I forgot something
10 important. I said 1700 something members
11 receive droit de suite. I can tell you
12 that only a few hundred, maybe 200,
13 receive reproduction rights. So, with
14 those figures you can see how droit de suite
15 is more important than reproduction rights.

16 MR. PATRY: If the droit de
17 suite were applied to galleries do you
18 have any guess about how much more
19 money that would bring in?

20 What I'm trying to figure out is
21 this: You have a situation where your law
22 applies to auctions and applies to
23 galleries, but it's not enforced, and
24 galleries constitute the largest market,
25 probably, for living artists. So, what I

1
2 want to figure out is how big that market
3 is, what is the difference?

4 And for living artists are
5 auctions maybe ten percent or is it 20
6 percent or --

7 MR. GUTTON: Well, it is
8 difficult to reply accurately; but,
9 really, with my experience I can reply
10 it's double. That is my opinion.

11 MR. GUTTON: Maybe it's
12 only 75 percent; maybe it is a
13 little more than double,
14 but something like that.

15 MR. PATRY: Do you think that
16 will change, that in the future the
17 French government might promulgate
18 regulations and enforce them against
19 galleries, or is that simply a decision
20 that was made by agreement with artists
21 and it will stay that way?

22 MR. GUTTON: It seems to me that there
23 may be a change, especially regarding the E.C.E.

24 MR. PATRY: If the European
25 Community adopts a droit de suite

1
2 directive, that would force a change in
3 France?

4 MR. GUTTON: Absolutely.

5 MR. PATRY: Do you have any
6 speculation about how likely it is that
7 the EC will adopt one?

8 MR. GUTTON: Well, the hearing
9 last November was very positive, that is my
10 impression. And when I say "my
11 impression," it's the impression of all
12 people who were present at the hearing
13 and who knew the issue.
14 Naturally, it was the impression of
15 some artists who were present, too.

16 MR. PATRY: Thank you.

17 MR. GUTTON: I'm sorry, but
18 Madame Ramonbordes told me that maybe I
19 didn't understand exactly your last
20 question, Mr. Chairman, because she told
21 me my reply was not a good one.

22 Is it possible for you to repeat
23 it?

24 MR. OMAN: Sure.

25 The question was whether or not

1
2 you think the droit de suite in France and
3 Germany encourages artists to sell their
4 paintings for a low price when they make
5 their first sale just to get them out in
6 front of the public knowing that they will
7 be able to share in any sales that
8 result in the future? Do they feel
9 that they don't have to get a high
10 price at the first sale because this is
11 not their only opportunity to get
12 reimbursed for their work?

13 (Discussion held off the
14 record.)

15 MR. GUTTON: Maybe she can reply
16 with your permission.

17 MS. RAMONBORDES: Thank you.

18 I'm sorry to take the floor; but
19 I think, really, the artists, if they know
20 they will have benefits from the droit de
21 suite for the successive resale, they can
22 accept a low price at the beginning
23 because they know that later they
24 could benefit from the increase of value
25 of their work. It is very

1
2 value, and it's normal that they will pay
3 the artists because they wanted to make a
4 profit with the work. It is good that
5 the artists would benefit from that, even
6 if the person bought the work for making a
7 profit.

8 Thank you, Mr. Chairman.

9 MR. OMAN: Thank you very much,
10 I am grateful for that clarification.

11 Now, let me ask Mr. Andersson
12 what his prediction will be. Will Finland
13 and Sweden adopt the droit de suite?

14 MR. ANDERSSON: Well, I don't
15 know. The item has come up from the
16 artists' organization in Sweden, but what
17 they want certainly is a form of social
18 security because they have suggested that
19 there should be a ten percent fee on each
20 resale to go into a fund controlled by the
21 artists' organization for them to spread
22 out where they think it might be needed.
23 They are not talking about a personal
24 system; they are talking about a kind of
25 social security, and I am not sure that

1
2 important for them to know that and to
3 know that when they sell the work the
4 first time they will not be deprived of
5 the benefit from the successive event.

6 I would add one thing, if you
7 allow me, to what Mr. Patry said
8 concerning the decrease of value.
9 When you speak about decrease of
10 value, you can say that droit de suite is
11 really crazy in this case. I would
12 say that when somebody buys a work without
13 any will to gain money with this work, I
14 think it would take a long time before the
15 work would be another time on the market.
16 In this case it's really impossible
17 that the value would have decreased,
18 if you keep a work 20 or 30 years.

19 When there is a decrease of
20 value, as it's happened nowadays, it's
21 because of people who bought the works one
22 or two years ago when the works were at
23 higher prices and they realized they
24 wanted to make a profit. So, I think it's
25 a good thing if they have a decrease of

1
2 they will succeed with that.

3 MR. OMAN: This preoccupation of
4 artists with their livelihood reminds me
5 of the old story that is told about Sam
6 Goldwyn, the Hollywood producer,
7 negotiating with George Bernard Shaw for
8 rights to one of Shaw's plays that Mr.
9 Goldwyn wanted to mount in a motion
10 picture. Mr. Goldwyn kept talking to
11 Mr. Shaw about the importance of the
12 artist making his works available for
13 posterity, by having his play embodied
14 forever in a motion picture so that future
15 generations will be able to appreciate his
16 great art. And George Bernard Shaw kept
17 insisting that Mr. Goldwyn pay him more
18 money for the rights to the play, which
19 Mr. Goldwyn was unwilling to do.
20 Finally, Shaw said, "The trouble is, Mr.
21 Goldwyn, you think only of art and I think
22 only of money."

23 So, we are in the middle of that
24 discussion today.

25 I do wonder what your

1
2 organization's position is on whether
3 or not the European Community should
4 adopt the droit de suite. Have you
5 made a formal recommendation? Have
6 you been asked to testify? Did
7 you submit views?

8 MR. ANDERSSON: Yes, we have
9 made our point very clear that we strongly
10 protest against applying droit de suite
11 for galleries because in certain countries
12 there is already installed a system of
13 droit de suite at auctions; but in total
14 the FIDOAO is against it.

15 MR. OMAN: I was wondering
16 whether or not the lack of harmony on
17 droit de suite in Europe distorts art
18 sales on the continent.

19 Do you find that
20 the art movement is moving
21 out of France into Geneva? Is
22 it moving out of England
23 to Sweden?

24 MR. ANDERSSON: No, I don't
25 think so.

1
2 I would like to make a comment
3 on the last question that my friends here
4 were answering, whether an artist would
5 sell at a lower price for the first time
6 because he would earn benefits when the
7 painting was sold the second time. I
8 think that you have to realize that most
9 of the artists that work as full-time
10 artists, their artworks will never come to
11 an auction. I mean, how many artists are
12 there working in New York City?

13 There must be thousands of
14 them. Most of those artists cannot
15 sell every piece they make. If you
16 go to artists' studios, they are
17 full of art pieces that they could not
18 sell because people are not asking for
19 their works.

20 The auction houses choose only
21 pieces that they think they can sell.
22 If you own an art piece and go to an
23 auction house, it is not sure that they
24 will take it. Most of it is turned down
25 because it is unsellable. I mean, we are

1
2 not talking about Rauschenberg and Stella,
3 and all these guys, but all the other ones
4 that fight for their living each day.
5 Auctions are not a reality for those guys,
6 and never would they sell something cheap
7 because they think that they can make
8 money on the resale at an auction. They
9 will try to get as much as possible to pay
10 their daily bills.

11 Because of this situation
12 that is a reality for me working
13 with living artists. This is not the
14 big question for us because selling things
15 in auctions is something that matters for
16 a few artists, and probably when they are
17 so old and so reputable that three percent
18 of something is not a big question for
19 them.

20 As the question is new
21 for me, I'm innocent enough to ask,
22 "why should it be like this." Can
23 anyone explain to me why we should pay a
24 fee when the painting is sold the next
25 time unless it is a sort of a social

1
2 security?

3 MR. OMAN: Monsieur Gutton, do
4 you want to jump back in?

5 MR. GUTTON: Thank you, Mr.
6 Chairman.

7 I want only to repeat that there
8 is nothing common between social security
9 and an artist's right. And it's clear in
10 the same way in the mind of the artists, I
11 know many of them.

12 I want to add that in France you
13 have more than 400 auctioneers, and all of
14 them prepare a catalog for each sale, and
15 you see in the catalogs works which are
16 offered at a very low price, for instance,
17 \$500, or \$1,000, and so on.

18 When you study the catalogs of
19 Christie's, and Sotheby's, and so on, you
20 have only works whose price is more than \$10,000
21 and nothing else; it is a speculative market.

22 MR. OMAN: I will turn the forum
23 over to Mr. Patry; maybe he can answer a
24 question that occurred to me after hearing
25 the panel discuss the issue.

1
2 Do artists in the
3 United States qualify
4 for social security or
5 payments made by people
6 on their behalf?

7 MR. PATRY: I don't know the
8 answer, but maybe Dr. Feder or some of the
9 artists who will be testifying from
10 Artists Equity will.

11 Maybe I could continue on the
12 questions that Mr. Oman asked and Mr.
13 Gutton just responded to, which is --
14 and this is for Mr. Andersson --
15 what factors go into a dealer's
16 decision of where to sell and
17 for how much.

18 One of the arguments that one
19 hears that you apparently don't
20 particularly agree with, is that if there
21 is a droit de suite in one area the sales
22 that were former in that area will go
23 someplace else.

24 My question is this: I am
25 a dealer, I have some art that

1
2 I am thinking of selling, what factors
3 will I consider? Price, value, taxes,
4 commissions, in certain places, what the
5 character of the market is?

6 Obviously, I want to get the
7 best price I can for anything that I
8 sell, but what factors does one consider?

9 MR. ANDERSSON: You're talking
10 about the situation with an art dealer
11 who is sitting on unique pieces wanted on
12 an international market. If I
13 had a unique Picasso, or Cezanne, or
14 whatever, of course, I would try to sell it
15 where I could get the best profit at the
16 least costs. But I mean, talking
17 about the situation for all
18 artists, this situation is not so
19 common for most of them.

20 MR. PATRY: Most of the art
21 market is local, in fact.

22 MR. ANDERSSON: Yes.

23 MR. PATRY: In terms of
24 whether or not to sell in that market
25 it's not whether a particular value added

1
2 tax or a particular droit de suite comes
3 in, you are just not going to pick up and
4 sell someplace else. You can't; either
5 that is your market or you don't do it.

6 MR. ANDERSSON: Yes, probably.
7 I mean, if I have things that I cannot
8 sell in my gallery, pieces that are so
9 difficult to sell that I need to give them
10 to an auction house, I know that I will
11 have some money for it; but I will not
12 gain a big profit if I'm talking about
13 local artists that are reputed enough so
14 that the auction houses will take them,
15 but they are not so well reputed that I
16 can go to an international market with
17 them.

18 MR. PATRY: Sweden, as you
19 mentioned, does not have a droit de
20 suite --

21 MR. ANDERSSON: No.

22 MR. PATRY: -- provision; but I
23 understand it does have taxes.

24 MR. ANDERSSON: Oh, yes.

25 MR. PATRY: My question is

1
2 this: What taxes do you as a gallery owner
3 or dealer pay and what percent are they?

4 In other words, when you sell a
5 work of art what sort of taxes and how
6 much do you pay on those?

7 MR. ANDERSSON: When a painting
8 is sold the first time we don't pay any
9 taxes directly on the sale. Of course, in
10 my company I pay taxes on a yearly basis,
11 but that is another thing. I pay taxes on
12 the company's profit; but we don't have
13 any VAT or something like that, when I
14 sell a painting for the first time.

15 The artist has to take
16 care of social security himself.
17 The artist is looked upon from a
18 physical point of view as a small
19 company. So the artist has to make
20 an income declaration at the end of the
21 year; he has to pay a certain percentage
22 to the social security system. He also
23 has to pay income tax if he earns that
24 much money that anything is left for him.

25 MR. PATRY: But you don't pay

1
2 any particular value added tax or the
3 buyer does perhaps?

4 MR. ANDERSSON: No.

5 MR. PATRY: If a work of art is
6 resold, no one pays any taxes on that?

7 MR. ANDERSSON: If it is sold a
8 second time it's in the VAT system, then I
9 pay twenty-five percent VAT. And that is
10 the same percentage that is on every
11 purchase in Sweden.

12 MR. PATRY: So you pay
13 twenty-five percent?

14 MR. ANDERSSON: Yes.

15 MR. PATRY: What about the
16 buyer?

17 MR. ANDERSSON: Nothing.

18 MR. PATRY: What is the average
19 commission?

20 You don't have to say what yours
21 is, but in your country.

22 MR. ANDERSSON: That's no
23
24
25

1
2 secret. I would say it's between
3 thirty-five and fifty percent.

4 MR. PATRY: So you have got
5 that commission, and you have
6 got twenty-five percent value
7 added tax for a resale?

8 MR. ANDERSSON: Yes.

9 MR. PATRY: My question is:
10 If, as in France, you have a three percent
11 droit de suite, why is droit de suite such
12 a big deal?

13 It seems like such a tiny
14 percent compared to both the
15 commission that is charged and the value
16 added tax.

17 MR. ANDERSSON: Yes, I agree
18 with that. The problem is for me to
19 understand why you should have it, why
20 should there be a certain fee when you
21 sell a painting the second time when you
22 have not the same thing if you sell a
23 house for the second time, or a car for
24 the second time, or whatever.

25 MR. PATRY: My purpose

1
2 here is to get information, and
3 ask questions, not to make either
4 side's arguments. Perhaps the
5 argument would be two-fold. One, it
6 does help artists, presumably any amount
7 of money that they have beyond what they
8 had before is a help to them and might
9 encourage them to create more works,
10 which might help you, too,
11 because you would have more to sell.

12 The other argument might be that
13 works of art are different from books
14 because a book is sold in multiples and
15 makes money that way, whereas with
16 paintings, as Mr. Gutton said, the
17 reproduction right is not a very large
18 amount of money and they make more from
19 resale. Those might be the
20 arguments.

21 MR. ANDERSSON: But -- excuse
22 me.

23 MR. PATRY: Yes.

24 MR. ANDERSSON: I mean, those
25 arguments -- the first argument is sort of

1
2 a social security argument.
3 Artists are low paid people; they need to
4 get money wherever they can get it.
5 If droit de suite is a way that has been
6 working in some countries for a long time,
7 of course, they want to keep it.
8 Everyone wants to have money wherever
9 they can have it.

10 MR. PATRY: If in the EC a
11 three percent droit de suite was
12 adopted, do you think that
13 would depress art sales, that
14 fewer works of art would be sold?

15 MR. ANDERSSON: Altogether it's
16 very difficult to sell art these
17 days, and everything that raises
18 the prices is negative.

19 MR. PATRY: But my question
20 is, do you think three percent --
21 assume that is the French experience --
22 is of such caliber that it
23 would reduce materially
24 the number of works of
25 are that are sold?

1

2 MR. ANDERSSON: Yes. It is the
3 same as the story about the man who
4 worked in the woods and had a horse that
5 was supposed to pull home the timber for
6 him. He said, if you take this one
7 then, you can take this one; and if you can
8 take that one, you can take this one.

9 It is always a
10 question of putting small fees on
11 everything. One of the fees that is
12 important is the total fees, the VAT, and
13 droit de suite, and administration costs,
14 and whatever.

15 MR. PATRY: In terms of the
16 European Community, I believe that England
17 is probably the largest country that
18 presently does not have a droit de suite,
19 at least in terms of the artwork;
20 correct?

21 MR. ANDERSSON: Probably, yes.

22 MR. PATRY: If the European
23 Community does adopt a droit de suite
24 would that be helpful in terms of
25 harmonizing things?

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Do you think that for international sales, if the EC did adopt droit de suite then sales would come to New York, perhaps?

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MR. ANDERSSON: I can't

find any way where it would be helpful to have droit de suite. The harmonization, as I see it, would be if everybody took it away.

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MR. PATRY: In terms of

Sweden, I understand the EFTA countries, Sweden, Finland, and some of the neutral countries, have an agreement with the European countries right now, a protocol that has provisions on intellectual property.

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Do you think it's likely that if the European Community adopts a droit de suite directive, EFTA countries would have one as well? So that you'd have a situation all throughout Europe where every country would have droit de suite, and it wouldn't be that big of a problem?

1

2 MR. ANDERSSON: I don't think
3 that this is a big question for the
4 agreement between EFTA and the EEC.
5 Norway has a sort of -- well, it is not
6 droit de suite -- it's a three percent fee
7 on everything that is sold that is
8 controlled by an organization. It is
9 not individual for the artists.

10 MR. PATRY: Thank you.

11 MR. OMAN: One follow-up
12 question for Mr. Gutton.

13 It wasn't clear in
14 my mind whether or not your
15 organization is limited to
16 French nationals or whether non-
17 French nationals can join your
18 organization.

19 MR. GUTTON: Well, ADAGP is managing
20 rights of its French and foreign members in
21 France, naturally, and throughout the world
22 in more than 30 countries with other author
23 societies located all over the country.
24 We have an assistant society in New York,
25 and Mr. Feder is the Chairman of the

1
2 society. They have to represent the
3 rights of members in each country as we
4 represent the rights of the members in our
5 own country.

6 MR. OMAN: I wanted to
7 clarify that point for the record and
8 have no further questions.

9 Thank you very much for your
10 very valuable contribution; we are very
11 grateful for it.

12 We will now excuse the current
13 panel.

14 (Panel was excused.)

15 MR. OMAN: The next panel will
16 be an artist and an art dealer. The
17 artist is Hans Haacke and the art dealer
18 is Mr. John Weber. Will they take the
19 table? If I were to guess
20 I would say the artist,
21 Mr. Haacke, is on my left
22 and the art dealer, Mr. Weber,
23 is on my right. Is that correct?

24 MR. HAACKE: Yes.

25 MR. OMAN: Could we start with

1
2 Mr. Haacke, please?

3 MR. HAACKE: I have not come
4 here with a prepared statement, so I will
5 speak impromptu.

6 I have been working and
7 exhibiting in New York since 1965. I have
8 my work in various museums around the
9 world. Since the 1980's I can say
10 there is a degree of public recognition
11 for my work which also has resulted in an
12 increase in the prices for which my work
13 is sold.

14 Early in the 1970's, around 1971
15 or 1972, here in New York, an attorney by
16 the name of Bob Projansky, together with a
17 friend of artists' promoter and
18 commentator, who was not a dealer, I might
19 add, developed a contract regarding
20 artists' rights which included a paragraph
21 or two on the topic that is under
22 discussion here, namely resale royalties
23 to artists if a work is sold for profit.

24 The contract as it was designed,
25 and which I have adopted personally since

1
2 1972, was published in international art
3 magazines. It was also published in the
4 catalog of the international art exhibition
5 document in Kassel, Germany, in 1972. The
6 percentage of the profit of a resale
7 provided for in this contract is 15 percent:
8 It goes to the artist, and it goes, if I
9 remember well, to the artist's heirs until
10 25 years after his or her death.

11 I have adopted this contract
12 because in my view it would be only fair,
13 it would be a moral right, and it would be
14 in tune with my sense of justice if an
15 artist participates in the profits that
16 are made from his or her work after it has
17 left his or her hands, after it has entered a
18 market over which the artist has no
19 control.

20 Most artists, with very few
21 exceptions, start with a very weak economic
22 footing. They are at the mercy of the prevailing
23 economic climate. Today we know that young
24 artists are losing even the small paying jobs
25 that used to be available. It's even difficult

1
2 for them to get cab driving jobs.

3 Perhaps different from other
4 college-educated people -- and most
5 artists today have a college education --
6 they are gambling with their life when they
7 decide to become independent artists.
8 They gamble! Like an investor they gamble,
9 with the difference, however, that an investor
10 doesn't do it with his own life, but with
11 his or, for that matter, somebody else's money.
12 I think it is only fair if the artist does
13 not gamble his or her life for the exclusive
14 profit of somebody else.

15 I value collectors; I value
16 museums that buy artists' work; but I
17 think artists should have a share in
18 the profit that is made from their work.

19 My experience with this contract
20 has been that in the 1980's -- that is to
21 say 10, 15 years after I started using it,
22 I began to benefit from my stubbornness
23 in insisting that any collector
24 who is interested in my work sign this
25 agreement with me.

1
2 Not too long ago a work that I
3 sold in about 1972, 1973 for \$5,000 was
4 resold to the French National Museum of
5 Modern Art at the Centre Georges Pompidou
6 in Paris for a figure in the six
7 digits. Had I not signed a contract
8 with the signature of that first collector,
9 I would have been totally without any
10 participation in the profit.

11 There have been two works
12 sold at auction here in New York, one
13 at Christies, one at Sotheby's. On both
14 occasions the contract was in force, and I
15 received royalty payments.

16 There was a somewhat
17 amusing occurrence at the first auction.
18 The auctioneer, of course, had
19 to announce the fact that there were
20 strings attached to the item for
21 sale. A rather well-known dealer
22 from London burst out in laughter
23 yelling for everybody to hear (until
24 then the auction had been stone silent):
25 "He must be kidding!"

1

2 MR. WEBER: No, he said, "Let
3 it pass."

4 MR. HAACKE: -- which
5 demonstrates to me, and perhaps also to
6 you, the mentality of some dealers.

7 I should add immediately
8 that there are exceptions to the rule,
9 among them my dealer here, John Weber, who
10 has always supported me in the application
11 of the contract.

12 The work was, in fact, sold
13 at a much higher price than any one
14 had expected.

15 I listened to the previous
16 testimony and I was puzzled by the
17 insistence of those who oppose resale
18 royalties on the "social security" aspect.
19 I am not aware of the fact that those who
20 promote this "social security" aspect have
21 gone out of their way to promote social
22 security for artists, that funds are set
23 aside by big collectors, big auction
24 houses for the support and for the
25 promotion of less known artists who do not

1
2 command high prices. Therefore, I find this a
3 somewhat disingenuous argument.

4 I think an artist should have a
5 right over his or her work beyond the
6 point of the initial sale. It should also
7 be part of the artist's right to then be
8 able to decide what to do with his or her
9 share of the resale profit; we are talking
10 about only 15 percent of the profits in my
11 case. What I hear from other proposals
12 amounts to much less than 15 percent.
13 The artist should have a say over what is
14 to be done with this small portion: Whether
15 he or she puts it into a fund to help other
16 artists, whether it goes into the college
17 education of the artist's children, or
18 wherever the artist may want to put it.

19 That is all I would like to say
20 for the moment.

21 Thank you.

22 MR. OMAN: Thank you very much.

23 We appreciate your testimony, and
24 we will save the questions for
25 the conclusion of the testimony of Mr.

1
2 Weber.

3 Mr. Weber.

4 MR. WEBER: Thank you very
5 much.

6 Mr. Haacke took most of my
7 message out of my mouth. I guess that is
8 the advantage of going first.

9 I have been an art dealer for 32
10 years. Prior to that time I had worked in
11 the museum field. I have a gallery in New
12 York, and I share with two other people an
13 international gallery in Madrid, Spain.

14 I am somewhat surprised,
15 although I understand the resistance of
16 many of my colleagues in the art gallery
17 field, although not all, to what I feel is
18 a very just and deserving situation that
19 is difficult.

20 I have been using a form of
21 artists' rights contract for many years,
22 not only in the case of Hans Haacke, but
23 also in the case of the French artist,
24 Daniel Buren, who is somebody whom I have
25 shown relatively successfully. Perhaps

1
2 he is one of the leading French artists at
3 this point of time in terms of reputation
4 for a period of some 17 years.

5 I am concerned about the
6 attitude of my fellow dealers. I know
7 that we are by nature, as are most
8 businessmen, conservative on the whole. I
9 know that we react very protectively to
10 any governmental control which might be
11 put upon our profession because we,
12 fortunately, or in some cases
13 unfortunately, are not under any close
14 scrutiny or under any supervision from any
15 legal standpoint. It's a profession where
16 people feel that, well, art really isn't a
17 serious endeavor, and, so, there is no
18 regulation of it. I think that we've
19 gotten used to this attitude, and we are
20 afraid that this will be the breaking of
21 the dike, so to speak.

22 We daily engage in illegal
23 activities, that were we regulated would
24 have to come to an end. There is
25 international price fixing, all kinds of

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2 procedures which are going on, have gone
3 on, are totally accepted, considered
4 normal. I think that the art dealers'
5 reaction to something, which I feel is
6 just, is because it's sort of a fear in
7 general that, as my colleague from Sweden
8 says, the dam will break, it's only a
9 beginning, so on, and so forth. I
10 disagree with that.

11 There were some issues brought
12 up which, when one thinks of the artists'
13 resale royalties, are somewhat
14 stereotypical. For instance, I have had
15 collectors on occasion say to me, "If I
16 have to pay for the up side of the
17 valuation, then why doesn't the artist pay
18 for the down side of the valuation?" That
19 was brought up today.

20 My answer to that would be that
21 the only way to generate money for artists
22 is to put the objects which are made by
23 the artists into the commercial
24 capitalistic society of commodities, that
25 generates money for the whole system, and

1

2 also, obviously, a major proportion of the
3 share to the creator.

4 However, in its dealing with the
5 capitalistic system we do not expect, with
6 the exception of Japan, that when a stock
7 people purchase goes down in value there
8 is a pay back on that, nor is there with
9 any other commodity in this consumer
10 international community. When a car
11 devalues we don't expect money to come
12 back because of that. It would seem
13 to me that that particular argument, the
14 artist don't pay it if it goes down in
15 value, is not valid one.

16 Also, I heard the argument today
17 only well-known artists benefit from a
18 resale clause and younger artists who are
19 not in the marketplace do not. I answer
20 that by saying this is not a static time
21 situation, younger artists become older
22 artists. At this time younger artists who
23 are totally unknown, who have no
24 reputation, who perhaps are not doing
25 valid work, do change, grow older. If

1
2 they are lucky their reputation is
3 increased and there would be value.
4 Wouldn't they feel rather silly as
5 Rauschenberg did years ago when something
6 he had sold for \$500 turned over for many
7 hundreds of thousands of dollars.

8 So that the argument that the
9 younger artists do not and never would
10 benefit from this kind of situation, I
11 don't feel is germane to the issue.

12 In closing, I would like to say
13 that Hans and I have been working
14 together, what, since 1973?

15 MR. HAACKE: Approximately.

16 MR. WEBER: And the same with
17 Daniel Buren.

18 Pragmatically speaking, I have
19 never lost one sale in some almost 20
20 years of time dealing with this contract
21 with either Hans Haacke or Daniel Buren.

22 Sometimes it's awkward when we
23 sell a piece to an institution like, say,
24 the Tate in London, who signs the
25 contract. There were situations that came

1
2 up like that, does the President, does the
3 Chairman of the Board, does the whole
4 Board, et cetera, et cetera. Those were
5 just mechanics.

6 I think that the gallery has
7 profitted from this experience. It makes
8 me feel better about myself; it makes me
9 feel that we are not taking it all. And I
10 think that the artists certainly will
11 benefit.

12 One other factor, some artists
13 as they get older lose their reputation;
14 they repeat themselves; they might become
15 ill, infirmed, senile. Why not have this
16 potential benefit for them to look forward
17 to as well?

18 Thank you.

19 MR. OMAN: Thank you very much,
20 Mr. Weber.

21 Just out of curiosity, when you
22 insist on this provision in the contract,
23 is that negotiated, and do they pay
24 you less money as a result of that
25 provision being in the contract?

1

2 MR. WEBER: Not at all. No,
3 that is not a factor.

4 MR. OMAN: What percentage
5 of artists that you
6 represent have contracts
7 similar to this?

8 MR. WEBER: In the early 1970's
9 it was somewhat a fashion to do this, to
10 use this contract, and many artists,
11 particularly many of the conceptual
12 artists were using it. So that I have
13 sold many works of Carl Andre with a
14 contract, et cetera, et cetera.

15 As time goes on, as the
16 production of work increases, it became
17 difficult for some artists just
18 physically to keep track of where their works
19 were. And it was self-controlled. I
20 mean, the gallery or the artist has to
21 take care that if a work comes up for
22 auction that the auction house understands
23 that there is a contract and so
24 forth. That became somewhat awkward
25 for some people.

1

2 As I said, I represent 14
3 artists in America and 24 artists in
4 Spain, but only two of them use
5 a contract.

6 MR. OMAN: It lasts
7 just for the second sale? It
8 wouldn't bind a third party
9 for a subsequent sale?

10 MR. WEBER: No, it's binding ad
11 infinitum. We have had third generation,
12 and in some cases fourth generation
13 payments.

14 MR. OMAN: Have there been any
15 jurisdictions where you have not been able
16 to enforce that contractual right?

17 MR. WEBER: No. Generally, in
18 the case of Hans, Hans does work which
19 usually has references to political or social
20 injustices, and the type of individual
21 that would identify with this work --
22 actually Hans is kind of the founder of
23 this whole situation, which is very much
24 popular now, particularly in America and
25 Europe, many, many thousands of artists

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2 are doing what is called political work.
3 We have never had, really, a problem with
4 it because we keep very good records as to
5 who was on first and who was on second,
6 where the works are.

7 Also, it's tied in -- I
8 am not so sure in your case, Hans -- but in
9 Daniel Buren's case the work ceases to
10 exist as a work of art if the terms of the
11 contract are not met. The contract
12 is a valid operating contract and has also
13 the certificate of authentication of the
14 work tied in. So, there's a little hook
15 there.

16 MR. OMAN: Do the rights under
17 the contract pass to heirs upon the death
18 of the principal or do they terminate at
19 that point?

20 MR. WEBER: They
21 pass onto heirs for, I
22 believe, a period of
23 25 years.

24 MR. WEBER: I don't think that I
25 finished one thought quite accurately. I

1
2 was talking about Hans being a political
3 artist. The type of individual, either
4 the profile of a museum or collector,
5 would be such that if they identify with
6 the work and recognize its input from an
7 aesthetic level, they also are
8 automatically sympathetic to the contract
9 because that means they are people who are
10 of, perhaps, more liberal leaning, to use
11 an old-fashioned term.

12 MR. OMAN: I won't touch that
13 one with a ten foot pole.

14 How do you explain the
15 opposition of some of your fellow art
16 dealers to droit de suite?

17 MR. WEBER: Well, I think that I
18 touched on that. I think it's just a fear
19 of governmental control. I don't feel
20 that revenues will be decreased in the
21 galleries or sales will be decreased
22 because of that, because it is the second
23 time around, it is the resale that we are
24 considering.

25 During the last panel I figured

1
2 out that in my gallery only about five
3 percent of our total annual sales are
4 resale because we are what is known as a
5 primary gallery, we represent artists. I
6 mean, our job is to represent artists, it
7 is not to sell paintings. For the most
8 part, the paintings, sculptures, or what
9 have you seem to sell themselves as
10 opposed to a secondary gallery where most
11 of the inventory might be thought of as
12 being resale. As I say, it doesn't really
13 come up that much, perhaps five percent of
14 the gross would be involved. So that I
15 can say economically, be it three percent
16 or five percent, it really isn't going to
17 effect any business that much. And I can
18 project with the primary dealers around
19 the world it will not affect their
20 business that much.

21 MR. OMAN: Well, I know that
22 Senator Kennedy, who had asked us to do
23 this study, would be very happy to hear
24 your report. He, most
25 people don't realize,

1

2 is an amateur artist himself.

3

4 Senator Kennedy mentioned several
5 months ago that his political friends urge him
6 to spend more time as an artist and some of
7 his artist friends urge him to spend more
8 time in politics. But he does have a
9 basic sympathy for the plight of the artist,
10 and I think that he and Mr. Markey, the
11 Congressman from Massachusetts,
12 will be very eager to
13 read our report.

13

14 Let me ask Mr. Patry to ask his
15 follow-up questions.

15

16 MR. PATRY: Do you
17 use the original Projansky
18 agreement?

18

19 I thought that there had been a
20 rescission and then maybe some alternates
21 of what other people use.

21

22 MR. HAACKE: I use the
23 original agreement with minor modifications
24 which do not pertain to the subject under
25 discussion here; they speak about exhibition
rights and the time for which I can

1
2 borrow the work for exhibitions.

3 MR. PATRY:

4 Ten days or something like
5 that?

6 MR. HAACKE: Yes. I have
7 modified that.

8 MR. PATRY: Mr. Oman had asked
9 about enforceability, and it's nice that
10 you haven't had those problems.

11 Who do you think the third
12 and fourth generation agreements
13 are enforceable against, if
14 you had a situation where
15 the third or fourth person
16 refused to sign it, or didn't
17 sign it? In terms of working
18 the system out, one of the
19 things that Congress might ask
20 is, well, we read your
21 testimony and it was very helpful;
22 maybe we don't need legislation,
23 maybe your situation is a good model.
24 Instead everybody should use the
25 Projansky agreement or something like that.

1

2

3 Is yours a good real model for
4 everybody?

5

6 Should we just encourage
7 people to use it or are you in a
8 unique situation so that you are
9 able to use it?

9

MR. HAACKE: Well, let me try to
10 answer that. In fact, I believe
11 there are several questions.

12

13 To begin with, since it is a
14 contract, as with all contracts, it would
15 potentially be legally enforceable.

15

16 Once it was necessary for me, in
17 Europe, to have an attorney write
18 a letter to a collector who sold a work of
19 mine and "forgot" that he had signed
20 the contract; but immediately
21 afterwards I was paid what was due.

21

22 As John Weber pointed out, there
23 is another aspect in my -- and probably
24 also Daniel Buren's contract, I don't know
25 which form he actually uses -- that is of
interest to both the collector who sells

1
2 and the collector who has an interest in
3 buying the work, the contract is the only
4 form of authentication. I do not sign my
5 work. Consequently, only with the contract
6 is a work recognizably a work that I made.

7 There was an instance, not too
8 long ago, when a work drawing of mine from a
9 collector in Germany who had died appeared
10 at an auction here at Sotheby's. When I
11 heard about it and I saw the reproduction
12 of this drawing in the auction catalog I
13 did not remember ever having made this work
14 drawing as a preparation for a
15 work. Had I been asked, "Is this really
16 yours?" Most likely I would have said: "No,
17 this is a fake!" But I looked in my files
18 and I discovered that, indeed, this collector
19 had signed the contract on his drawing way back
20 in 1972. Therefore, I could
21 ascertain -- and, presumably, a similar
22 form signed would be in the selling
23 party's files -- that, indeed, it was an
24 authentic work of mine. So, there's a
25 benefit for the collection as well.

1
2 As far as legislation is
3 concerned that would benefit artists who
4 do not use this contract, I do not propose
5 that every artist act as I do. I think I
6 am operating from a position of relative
7 strength, insofar as I have had a
8 teaching job since 1967, a full-time teaching
9 job with tenure; I can afford to say to a
10 potential buyer, "If you don't want to play
11 ball with me, your sole interest in
12 buying my work is to have
13 complete control over
14 everything in it, including
15 whatever profits could be
16 gained from it, and you
17 are not willing even to share a few
18 percent with me, I don't want to have
19 anything to do with you; I don't want you
20 to be the custodian of my work."

21 Most artists cannot afford
22 this. Most artists, particularly the
23 young ones who are trying to get a foot in
24 the door, are happy for every sale that
25 comes along, and it is normal that they

1
2 would waive anything of this nature if it
3 would impede a sale they are hoping
4 for. They have to pay their rent, they
5 have to pay for their kids, they have to
6 pay for materials, et cetera. They are desperate.

7 However, if there were legislation
8 they would not have to waive their rights
9 in order to improve their economic
10 position. In this they would be
11 supported by Congress; they would
12 be supported by the country. They would
13 have a sense of justice regarding the
14 division of profits made from their work.

15 MR. PATRY: That does raise a
16 question about any legislation.

17 Last year, effective June, a law
18 went into effect giving visual artists
19 certain moral rights. One of the issues
20 there was whether those rights should be
21 waivable.

22 There are two ways, of course,
23 it can work. One is can you transfer your
24 rights, sell your rights, so a
25 third party owns your rights, which we

1
2 consider to be alienation?
3 Moral rights and droit de suite
4 in Europe are not transferable,
5 are not alienable.

6 Another question, though, is
7 whether they should be waivable, whether
8 you can say for a particular sale, yes, I
9 have a right under a statute to this
10 artist resale royalty, but in your case I
11 am going to waive it. You could
12 draft legislation either way.

13 If one were to draft
14 legislation that would make the right
15 waivable would that gut the
16 provisions of the law because collectors
17 would require it to be waived in either
18 case?

19 The flip side of the question
20 is: If you say in the statute you can't
21 waive it are you somehow taking away
22 artists' freedom, and then they just go
23 ahead and waive it anyway?

24 You can't force people to take money.
25

1

2 What would be the best solution,
3 do you think?

4 MR. HAACKE: I think it's very
5 tricky. On the one hand, one could make a
6 good argument, I believe, for granting the
7 artists the right to waive it. We all are
8 sympathetic to freedom.

9 The fear, however, that I have
10 is that, particularly on artists who
11 don't have a standing, who don't have
12 clout yet, there will be pressure
13 by the dealer, by the collector, by
14 whoever has an interest in this, to waive
15 it. Then we would be back at the situation
16 where we are right now.

17 MR. PATRY: Do you think that
18 there would be a fear -- I heard in
19 California when I was out there
20 there was a fear among some artists
21 of being blacklisted; if you
22 had these rights and you
23 tried to enforce them it will
24 hurt your primary market, which
25 after all, for most art is

1
2 more important. Perhaps Congress
3 shouldn't be wasting its time on the
4 secondary market, but should be doing
5 things to try and increase the primary
6 market.

7 A collecting society is perhaps a
8 partial solution, but do you think that is a
9 reasonable fear, and if so is there any
10 way one could take care of that?

11 MR. HAACKE: I think if there
12 were legislation that was binding around
13 the country and if it were uniformly enforced
14 there is no reason for such fear.

15 I don't know whether the analogy
16 applies; if there were uniform legislation
17 on gun control, we probably would be
18 better off.

19 MR. PATRY: Yes. Living in the
20 District of Columbia, as we do, we have
21 the strictest gun control laws in the
22 country, but it doesn't do much good, you
23 can go across the river to Virginia and
24 buy guns.

25 I had one other question for you,

1

2 Mr. Haacke. Are you selling your works in
3 Europe, and if so do you get resale
4 royalty payments for sales in Europe?

5 MR. HAACKE: Yes, the contract
6 is a contract that I use all around the
7 world.

8 MR. PATRY: But you get them
9 only by virtue of the contract; you don't
10 get them by virtue of the fact that there
11 may be a law in France or Germany because
12 it doesn't apply to you as a United States
13 citizen?

14 MR. HAACKE: I believe if I were
15 to work with the German agency -- I don't
16 know about the French agency -- they would
17 also collect.

18 MR. PATRY: If it were true
19 that the only way you could collect would
20 be because of contract, that the French
21 and German societies would say, no, I'm
22 sorry, our law only applies if the United
23 States has a law, would you be losing
24 money there?

25 In other words, is it an

1
2 argument that we should adopt droit de
3 suite in the United States because there
4 is an appreciable number of American
5 artists who are not benefitting from
6 resales in Europe?

7 MR. HAACKE: I believe the
8 German system would cover me if I were to
9 make my interests known. I have spoken to
10 them at some point and that was the
11 impression I got.

12 MR. PATRY:
13 Thank you.

14 MR. OMAN: Thank both
15 of you very much. If you have
16 any further views you would
17 like to submit for the record,
18 we would be happy to
19 receive them.

20 We may have some follow-up
21 questions as well after we look over the
22 transcript, and we will send those to you,
23 if appropriate.

24 Again, thank you very much
25 for giving us the benefit of your views.

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2

(Panel was excused.)

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MR. OMAN: The next panel is characterized as the Artists Collective Rights Panel. We have Ted Feder from the Artists' Rights Society and Robert Panzer from the Visual Artists & Galleries Association.

Would you please identify yourself for the record?

MR. PANZER: I am Robert Panzer.

MR. FEDER: And I am Ted Feder.

MR. OMAN: Mr. Feder, you are listed first on the witness list, I would ask you to be the first to present your testimony.

MR. FEDER: Thank you very much.

I am the head of Artists' Rights Society, an organization which represents the rights and permissions interests in the United States of a number of the major European rights societies, among them ADAGP and SPADEM of France, Bild-Kunst of Germany, Pro Litteris of Switzerland, and

1
2 VISUAL of Spain. These organizations
3 represent the estates of the overwhelming
4 majority of living artists active in
5 Europe in this century. Thus, the foreign
6 artists represented by ARS in the United
7 States include, among others, Picasso,
8 Braque, Matisse, Chagall, Miro,
9 Giacometti, Magritte, Rouault, Beckmann,
10 Klee, and Kokoschka.

11 ARS also acts on behalf of
12 American artists. Our U.S. members
13 include, among others, Jackson Pollock,
14 and Lee Krasner (through the
15 Pollock-Krasner Foundation), Milton Avery
16 (through the Milton Avery Trust), Leonora
17 Carrington, Arshile Gorky, Robert Mangold,
18 Sol Lewitt, Mark Rothko, Georgia O'Keeffe
19 (through the Georgia O'Keeffe Foundation),
20 and Andy Warhol (through the Estate and
21 Foundation of Andy Warhol).

22 The 32 national artist rights
23 societies are grouped under an
24 international organization called CISAC
25 (Confederation International des Societes

1

2 d'Auteurs et Compositeurs).

3

4 CISAC's activities are directed
5 towards the accomplishment of four
6 principal aims:

7

8 First. To ensure the safeguard,
9 respect, and protection of the moral and
10 professional interests stemming from any
11 literary or artistic production.

12

13 Second. To watch over and
14 contribute to respect for the economic and
15 legal interests attaching to the said
16 productions, both at the international
17 level and that of national legislation.

18

19 Third. To coordinate technical
20 activities between societies of authors,
21 artists, and composers and ensure their
22 collaboration in this field.

23

24 And, finally, to constitute an
25 international center of study and
26 information.

27

28 The comments I am about to make
29 are made in response to the queries posed
30 in the Copyright Office's Notice of Inquiry
31 on the droit de suite.

1
2 Question one. The movement to grant
3 resale rights to artists originated in France
4 prior to World War I. It was set in
5 motion by a general concern for the
6 welfare of the artist and his heirs,
7 stimulated in part by a widely published
8 cartoon of Jean-Louis Forain showing two
9 children dressed in tatters outside the
10 doors of a posh auction salesroom.
11 "Look," one of the ragamuffins says to the
12 other, "they're selling one of daddy's
13 pictures."

14 The resale right, better known
15 in Europe as the droit de suite, was
16 codified in France on May 20, 1920, and
17 has passed into law in 29 countries. Some
18 claim that the right would drive down the
19 first or subsequent sales price of
20 original works of art, causing hardship to
21 the creators. However, in no country with
22 the resale right has this been known to
23 happen, and informed American artists seem
24 not unwilling to run this risk.

25 The resale royalty would not, in

1
2 our opinion, discourage the creation of
3 new works of art. If anything, it would
4 encourage them. Insofar as artists are
5 ever motivated by financial return, it is
6 bound to heighten such motivation, since
7 in the event of secondary sales it would
8 ensure a return to the artist, his family,
9 or heirs.

10 Question two. The law should cover
11 creations which may be described as works of Fine
12 Art, in the somewhat broadened definition
13 of this term a consensually accepted in
14 the art world. This enlarged category is
15 sometimes subsumed within the phrase
16 "graphic or plastic works".

17 It would not be a bad idea for a
18 threshold value to be triggered before a
19 work of art could qualify for the droit de
20 suite. However, to meaningfully benefit
21 the maximum number of artists, this figure
22 should not be too high or too low. A
23 threshold of \$500 plus or minus \$250 is
24 probably adequate. Below, the royalty
25 which would accrue to the creator would be

1
2 very small indeed. If set too high, the
3 number of beneficiaries would be unduly
4 diminished.

5 It should not be necessary to
6 base the royalty on a percentage of
7 profits from the current sale as compared
8 to the price received from the previous
9 one. It is often very difficult, if not
10 impossible, to trace the sale records of
11 works of art.

12 Rather than seven percent of
13 profits, as once proposed in the Senate,
14 ARS would readily accept a lower rate of
15 four or even three percent, provided the
16 royalty were applied across the board as a
17 flat percentage of the sale price, without
18 reference to previous sales. This is the
19 practice in France, Belgium, and Germany,
20 where the law is easily administered
21 without the need of bureaucratic
22 intervention. On the other hand, the
23 experience of Italy, Portugal, Uruguay
24 Czechoslovakia, and California, of
25 computing the royalty on the increase in

1
2 value over the preceding sale, has not
3 been successful.

4 Returning to the percentage of
5 the resale royalty, the present French law
6 promulgated in 1957, fixes the rate at
7 three percent. The German law, which
8 applies to both galleries and auction
9 houses, mandates five percent. In our
10 estimation, one of the drawbacks of the
11 well-meaning Kennedy proposal of 1987 is
12 that it suggested a rate which was
13 unusually high, namely seven percent, and
14 provoked undue opposition. Although we
15 are none too certain that the hard core
16 opponents of the resale royalty would be
17 more amenable to a reduced figure, it is
18 our view that three percent to four
19 percent would be adequate.

20 Questions three and four. The term of
21 eligibility for the resale royalty should
22 be the life of the artist plus fifty years.
23 This is also the applicable term in
24 France and Germany. It should be descendible.

25 It is not coextensive with the

1
2 copyright in the work, except by
3 coincidence, nor should it be dependent on
4 the copyright. In France the copyright
5 term is life plus 64 years, 203 days
6 (calculated from the 1st of January
7 immediately following the artist's death),
8 and in Germany, life plus 70 years. While
9 it is very rare for a European artist to
10 alienate his or her copyright, it can be
11 done; by contrast, the droit de suite is
12 considered to be and should remain
13 inalienable.

14 The right should not be limited
15 to works created in the United States, and
16 should clearly include works of foreign
17 origin sold in the United States. Article
18 14ter of the Berne Convention calls for an
19 author or artist to "enjoy the inalienable
20 right to an interest in any sale of the
21 work subsequent to the first transfer by
22 the author of the work," providing the
23 member country has passed resale royalty
24 legislation. Berne member states which
25 have adopted droit de suite automatically

1
2 bestow reciprocal rights on other member
3 states possessing the right. Were the
4 United States to exclude foreign works,
5 U.S. works in turn would be excluded from
6 resale benefits in foreign member states.

7 Another aspect of this same
8 issue concerns the so-called question of
9 retroactivity. As presently employed, the
10 term often serves to deprive foreign
11 artists of their rights. For example,
12 U.S. adhesion to Berne (which took effect
13 on March 1, 1989) is said by some to apply
14 to existing works of art which have
15 previously fulfilled the formal
16 requirements of the U.S. Copyright Law,
17 namely notice and administration, or to
18 new works created after the date of
19 adhesion. Such previous U.S. perceptions
20 of the copyright law have often served to
21 deprive European artists of copyright
22 protection on the alleged principle that
23 their works were not formally registered
24 or copyrighted in the United States.
25 Proponents of this view allege that such

1
2 works are said to have passed into the
3 public domain in the United States.

4 This position ignores the fact
5 that most European works were
6 automatically copyrighted at the moment of
7 creation, under Berne and the national
8 legislation in the country of origin, and
9 consequently required no formalities for
10 protection.

11 A failure to apply Berne to
12 existing European works contradicts
13 Article 28 of the Convention:
14 "This Convention shall apply to all works
15 which at the moment of its coming into
16 force have not yet fallen into the public
17 domain in the country of origin through
18 expiry of the term of
19 protection."

20 The Berne provision also runs
21 counter to Article VII of the Universal
22 Copyright Convention, to which the United
23 States has been a long time adherent.
24 That provision states, "This Convention
25 shall not apply to works which are

1
2 permanently in the public domain in the
3 said contracting state."

4 In conflict between the U.C.C.
5 and Berne, the so-called "Berne Safeguard
6 Clause" incorporated in the U.C.C.
7 provides that Berne, and not the U.C.C.,
8 prevails in the relationships between
9 Berne members. (Viz. Article XVII, and the
10 Appendix Declaration, Item b of the
11 U.C.C.)

12 "This Convention shall
13 not in any way affect the provisions of
14 the Berne Convention for the Protection of
15 Literary and Artistic Works or membership
16 in the Union created by that convention."
17 (Article XVII of the U.C.C.
18 subsection 1.)

19 Another section states: "The
20 Universal Copyright Convention shall not
21 be applicable to the relationships among
22 countries of the Berne Union insofar as it
23 relates to the protection of works having
24 as their country of origin, within the
25 meaning of the Berne Convention, a country

1
2 of the International Union created by the
3 said convention." (UCC Appendix Declaration
4 relating to Article XVII[b]).

5 Thus, to apply a resale royalty
6 prospectively only would serve to
7 strip the right from all existing
8 U.S. and foreign works, even though
9 the latter enjoy the right in nations
10 having the droit de suite. The terms
11 retroactive and prospective should
12 be employed in their proper context here,
13 (as understood by our Berne partners),
14 namely that the date of the secondary sale
15 and not the date of the work's creation,
16 be the determining factor. Consequently
17 there would be no retroactive application
18 of the resale royalty in the sense that the
19 royalty could never apply to
20 auction sales which took place prior
21 to the effective date of the law.
22 It would apply prospectively, that
23 is to all auction sales of eligible
24 works which occur after the effective
25 date of the law. Eligibility, therefore, would be

1
2 determined under the existing rule of life
3 plus 50 years, and within the reciprocal
4 norms of the Berne Convention.

5 Question five: A system similar to that
6 which operates in France would seem to be the
7 simplest and most direct form of administering
8 the right. In France droit de suite
9 functions in the following manner: A few
10 days prior to a given auction, the auction
11 house receives a list from the rights
12 society informing it of the titles of the
13 works and the names of the artists for
14 which the droit de suite is to be
15 collected. Such lists are formulated by
16 the rights societies from the sales
17 catalogs they receive in advance of the
18 auctions. After the sale has been
19 completed, the auctioneer fills out and
20 returns the list with information on the
21 sales price and the amount due for the
22 droit de suite. This is accompanied by a
23 payment which the society distributes to
24 the artist involved.

25 The landmark French artists

1
2 rights law of 1957, which fixed the
3 current rate at three percent, extended
4 the resale royalty right to galleries.
5 However, the law has never actively
6 been applied to galleries, although
7 there is some current effort in
8 France to do so. By contrast,
9 galleries as well as auction houses
10 are effectively covered under the
11 German law.

12 As the right is designed to apply
13 to sales of a work of art, there is no
14 basis of application in cases where the
15 object is presented as a gift or exchange,
16 and we would not attempt to assign a value
17 in such cases. Therefore, no resale
18 royalty would be collected in these
19 instances.

20 As we strongly recommend against
21 basing the right on the profit
22 differential between the present and
23 previous sale, there would be no need to
24 maintain a costly and time-consuming
25 registry of past sales prices.

1

2 The right is commonly
3 administered by the national artists
4 rights societies, and ARS is prepared to
5 perform this function for its very many
6 European adherents as well as its American
7 ones and would be willing to do so for all
8 potential beneficiaries.

9 Question six: The right should not be
10 waivable or alienable, lest a collector,
11 gallery, or museum demand such a waiver as a
12 condition of its offer to acquire a work.

13 Question seven: Finally the California
14 law should definitely be preempted in the event
15 of a federal law. The California Resale Royalty
16 Act of 1977, (Cal. Civ. Code SS 986; 1977 amended
17 in 1983) has failed on two main grounds: One,
18 it has proved impossible to determine the
19 previous sales price of a work, which is
20 needed to calculate the sum due the
21 artist, namely five percent of the profit
22 realized by the sale. And, secondly, it is
23 very difficult to enforce the law when it
24 applies to one state only.

25 Thank you very much.

1

2 MR. OMAN: Thank you very much,
3 Mr. Feder.

4 Now let me turn to Mr. Panzer.

5 MR. PANZER: Thank you.

6 My name is Robert Panzer. I am
7 the Executive Director of VAGA, the Visual
8 Artists and Galleries Association.

9 This statement was prepared by
10 me together with VAGA's founder and Vice
11 President, Martin Bressler, who
12 unfortunately could not attend because of
13 a long-standing prior commitment.

14 VAGA was formed in 1977, a few
15 years after our member Bob Rauschenberg
16 had his famous tete a tete with Robert
17 Scull and about the time that California
18 enacted its Resale Royalty Law. Over
19 the years VAGA has been interested in the
20 resale royalty debate and has actively
21 participated in it. We testified before
22 Senator Kennedy in favor of his bill;
23 discussed Senator Sieroty's bill with him
24 in California after it was introduced; and
25 if memory serves correct, debated the

1
2 merits of resale royalty with Steve Weil
3 before the Bar Association some 13 years
4 ago.

5 As a membership organization and
6 copyright collective of visual artists and
7 estates, VAGA, like ASCAP on a much
8 grander scale with authors and composers,
9 is dedicated to the collection of artists'
10 royalties, and like artists rights
11 societies, we represent the members of
12 other societies worldwide and our own
13 members in the United States. We are
14 extremely interested in these hearings and
15 the results that may flow from them. We
16 are impressed with the thoroughness with
17 which the Copyright Office is approaching
18 its mandate.

19 Most of the arguments in this
20 debate have been made. The testimony at
21 the San Francisco hearings in January
22 makes it abundantly clear that most of
23 what has to be said to you about resale
24 royalties has been said. What has not
25 been said will undoubtedly come forth from

1
2 the impressive international array of
3 speakers scheduled to come before you
4 today. What then is there to add? First,
5 VAGA, as an artists' membership
6 organization dedicated to the collection
7 of artists' rights fees for a broad
8 spectrum of artists and photographers, has
9 a constituency which is affected by resale
10 royalty legislation, and that constituency
11 should be heard.

12 Second, VAGA is in the unique
13 position of viewing resale royalties as
14 one piece in a panoply of artists' rights
15 still to be addressed, and that
16 constituency should be heard.

17 In anticipation of these
18 hearings, VAGA sent a letter to our 400
19 artist members asking them for their
20 views. We have received a substantial
21 number of responses and we ask the chair
22 if we can submit them for inclusion in the
23 record. The letters run the gamut for and
24 against resale royalties, and raise about
25 every issue that there is to raise about

1
2 such a law.

3 Excerpts from a few of these
4 letters will, in our view, demonstrate the
5 vox populi of the segment of our society
6 most effected by the law; artists and
7 estates of artists.

8 Jack Youngerman wrote in favor
9 of resale royalties saying that it is
10 "only basic economic justice."

11 He goes on and says,
12 "Congress and museums are properly
13 remunerated for every airing of their
14 work; such royalties on art sales is a
15 simple matter long overdue."

16 On the other hand, Jules Olitski
17 has said, "Who stands to benefit?
18 For the most part, artists who are least
19 in need of more money than they already
20 have.

21 In my opinion, the resale
22 provision will prohibit rather than
23 encourage the purchase of works of art,
24 thereby making life, if anything, more
25 difficult for those artists most in need."

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Jules Olitski's view is shared by Wolf Kahn who wrote: "The instances when the work of unknown artists is resold at a substantial increase in value are very rare. Usually it's the early work of a very established artist which sells at a higher price than the original purchase price."

Both Jules Olitski and Wolf Kahn expressed concern for the adventurous collector who may lose money on art acquired and later sold.

To this argument, member Rolland Golden responded and wrote: "To those who say what if it is sold at a loss, I say art should not be considered solely on an investment-business level, but as a pleasure and the enrichment of our lives. Unfortunately, those of us who paint must earn money to continue, and must be ever mindful of business matters, at least on some level."

Sarah Kuniyoshi, widow of Yasuo Kuniyoshi, is in favor of a resale

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2 royalty law so long as "the seller does
3 not suffer a loss in the
4 transaction."

5 VAGA's President, the artist
6 Richard Anuszkiewicz, favors a new law
7 because an artist's continuing effort
8 causes the value to increase. He writes:
9 "Many artists in this country work
10 for years and years and are forced to sell
11 their art for a pittance in order to
12 survive and to continue to create their
13 work. The increased value of the art they
14 sold for literally pennies, is due, in
15 large part for the artists' continued
16 persistence to produce work under adverse
17 conditions."

18 Stuart Davis's son Earl Davis
19 deals with the question much as does
20 Richard Anuszkiewicz. He says, "As
21 in my father's case, he suffered
22 tremendously throughout his life from
23 often desperate poverty. I believe,
24 therefore, that it is only fair and right
25 for our society to allow the artist or the

1
2 survivors to share in the future financial
3 rewards of something that
4 they created."

5 The question of moral rights and
6 its relationship to resale rights was
7 important to Louise Bourgeois. She wrote,
8 "The question of resale royalty is
9 very much connected to my beliefs about
10 artists' rights as reflected in this new
11 moral rights law. An artist is always
12 morally connected to his work, and the
13 future value of a work is absolutely a
14 reflection of the artists' reputation and
15 his continuing relationship to that art.
16 A resale royalty would recognize this
17 connection."

18 Fritz Eichenberg's widow,
19 Antonie Eichenberg echoes Ms. Bourgeois'
20 sentiments when she writes, "In my
21 late husband's case since he produced
22 during his long life a huge body of work,
23 spent many years of developing his unique
24 style and good reputation, it seems long
25 overdue to lawfully guarantee sharing the

1
2 profits of resales, since prices increase
3 after an artist's death."

4 So too, Robert Rentzer,
5 representing the Estate of Morris
6 Hirschfield, writes, "As the United
7 States moves closer to the European model
8 of recognizing the moral rights of
9 artists, it is fitting that we recognize
10 their contribution to
11 society."

12 Some of our members were
13 concerned about practical issues. Tom
14 Wesselmann writes, "I am already
15 appalled at the paperwork complexity that
16 runs through our society and I don't think
17 we should add to it. Life is complex
18 enough now, so I'm indifferent to the
19 proposal for artists' resale
20 rights."

21 Cleve Gray expresses Tom's
22 sentiment when he writes, "I am very
23 opposed to the resale royalty idea. It
24 makes far too complicated the question of
25 sales."

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2 On the other hand, Peter Grosz,
3 executor of the art of his father, George
4 Grosz, says, "The implementation is
5 difficult, but I think a workable solution
6 can and should be found."

7 George Rickey, while in favor of
8 the proposed laws, is "grateful
9 that his room and board do not depend on
10 the collection of resale royalties." He
11 thinks that the "law would be hard to
12 enforce" and goes on to say, "Do
13 the auction houses conform? Would they?
14 How will the artist learn of a resale? I
15 usually do not. Included in the
16 legislation should be a clause that the
17 artist learn what the sales price of a
18 work of his really was. He is sometimes
19 the last to learn."

20 Member June Wayne, who has
21 studied the question at length,
22 particularly from the identification and
23 recordation of sold works, is in favor of
24 a new law. She writes, "The issue
25 of residual rights for artists is one I

1
2 have long mulled about. It is worth
3 pursuing but its design must be made
4 robust enough to plug the leaks that the
5 travel of artworks produce."

6 I spoke with VAGA member Jim
7 Rosenquist the other day. I know he
8 will be offering his views on resale
9 royalty here later in the day, and I'm
10 certainly looking forward to that.

11 I have read you some of the
12 views of our members; they all have
13 different opinions. Speaking for the
14 majority, we suggest that a resale royalty
15 is appropriate. Specifically, we suggest
16 the following:

17 (a) a resale royalty law applying
18 to sales by auction houses. It is
19 believed that including "dealers" within
20 the law would be extremely difficult both
21 definitionally and from the standpoint of
22 enforcement. There are so many different
23 levels of sale in the United States that
24 effective enforcement would be exceedingly
25 difficult, if not impossible. There is

1
2 not one art market in America. There are
3 a multitude of markets, with disparate
4 businesses, who think or do not think
5 themselves to be dealers. On the other
6 hand, auction houses are licensed by the
7 government; they are discernible; the art
8 they sell is known, as is the price at
9 which it is sold.

10 To commence resale royalties
11 with auction houses will give the
12 collecting mechanism an opportunity to
13 mature. Later, perhaps five years after
14 the law is enacted, its expansion can be
15 reviewed. It must be noted that in
16 practice the French droit de suite has
17 been applied only to the auction houses.
18 Apparently, this limitation has not
19 adversely affected auction house sales as
20 compared to gallery sales. So too, as far
21 as we know, auction sales have not
22 transferred from France to the United
23 Kingdom, which as of this date does not
24 have a resale royalty law.

25 (b) The royalty should also be

1
2 based on a flat percentage of the sales
3 price. To have it only on gains would be
4 extremely cumbersome and require
5 investigations that will be strongly
6 resisted.

7 (c) The law should require the
8 auction house to retain the resale royalty
9 in a trust account and to pay it over to
10 the artist or to the collecting agency,
11 such as VAGA or ARS, appointed by the
12 artist to collect on his behalf.

13 (d) The period of coverage
14 should be 50 years beyond the death of the
15 artist whose work is resold. In that way,
16 estates could benefit from the expanded
17 popularity of the artist's work. If there
18 is no one to claim the right for a
19 particular work, the proceeds should be
20 segregated after a period of time for
21 appropriate disbursement to artists who
22 need the funds in order to do their work.

23 As mentioned in the beginning of
24 this statement, resale royalties is one of
25 a number of important issues facing visual

1
2 artists and is indeed a highly visible
3 issue. Our members are interested in
4 other problems which likewise call for
5 Copyright Office review. For example,
6 VAGA member Sabra Field wrote, "The
7 opportunity to receive a royalty on resale
8 seems nice, but also impossible to
9 enforce. My concerns as a
10 printmaker/designer fall more toward
11 control of unauthorized reproduction.
12 Wouldn't it be nice if we could protect
13 the work of past artists now in what I
14 guess is the 'common domain' from being so
15 ruthlessly ripped off."

16 VAGA suggests, and indeed urges
17 the Copyright Office to pursue, with
18 hearings such as the one today, the
19 question of the retroactive abolition of
20 the copyright notice requirement.

21 We have done extensive legal
22 research into this question, and have
23 written a law review article clearly
24 demonstrating that it can be accomplished
25 within constitutional restraints. If this

1
2 were to be accomplished, then perhaps the
3 last serious vestige of our system which
4 has been so at odds with the copyright
5 laws of the rest of the world, will be
6 abolished.

7 We all agree that art is crucial
8 to the well-being of a modern society.
9 Without it, we would indeed be
10 impoverished. When a young person says, I
11 want to be a doctor, or a mechanic, or a
12 salesman, we know there is a strong
13 likelihood that if he does choose one of
14 those professions he can make a living.
15 Yet if he chooses to be an artist, it is
16 very unlikely that he can make a living.

17 Somewhere along the line the
18 system has failed. While we recognize the
19 importance of art, our present market
20 economy denies all but a few artists the
21 chance to earn a livelihood. What is
22 needed is a change in the system to better
23 reward an artist without making it a
24 handout. Collecting royalties for
25 reproduction rights is a start, but it is

1
2 not enough, because so much American art
3 is in the public domain and there is not
4 enough of a reproduction market to affect
5 many artists. This is one reason why a
6 retroactive abolition of the requirement
7 of a copyright notice is now needed. A
8 resale royalty will be another step toward
9 rewarding the artist for his dedication
10 and obvious sacrifices. This reward will
11 be a reflection of the efforts of the
12 artist to keep active and continue to
13 create and it will allow artists
14 finally to be treated on the same basis as
15 other authors, particularly in the music
16 and literary industries.

17 Again, we congratulate you on
18 the thoroughness of these hearings, and on
19 behalf of VAGA and its members we offer to
20 help you in any way we can.

21 Thank you.

22 (Discussion held off the
23 record.)

24 MR. OMAN: We will take a break,
25 we have some administrative matters to

1
2 take care of.

3 (Recess taken.)

4 MR. OMAN: If the witnesses
5 could resume their positions at the table
6 we could continue the hearing.

7 MR. PANZER: Excuse me.

8 MR. OMAN: Gentlemen, we have a
9 few questions. We are going to try to
10 break at 1:00 o'clock, so we want to move
11 along.

12 Mr. Panzer, you raised the
13 question of the retroactive elimination of
14 the notice requirement. I just want to
15 make sure I understand the point you are
16 making.

17 Under the old law, prior to
18 1976, works of fine art generally did not
19 require notice if they were unpublished,
20 and most paintings were considered
21 unpublished. Of course, if you had a
22 postcard made or an illustration for a
23 book made from that painting, that did
24 require notice.

25 Subsequent to

1
2 the new law in 1978, failure to provide
3 notice may be corrected. Later in connection
4 with U.S. adherence to the Berne Convention,
5 U.S. law was amended so that the notice
6 requirement is no longer in place.

7 What would you gain from a
8 retroactive elimination of the notice
9 requirement?

10 MR. PANZER: What has happened
11 over the years is that very few artists
12 knew about the requirement of copyright
13 notice on their art, or on the
14 reproductions, or if they knew they were
15 ignorant about how to enforce it, or they
16 did not want to enforce it because it goes
17 against the very nature of what they do,
18 it commercializes their art.

19 MR. OMAN: You want to recapture
20 works that have fallen into
21 the public domain because of
22 failure to affix notice?

23 MR. PANZER: That's right, but
24 only for future reproductions, not for
25 reproductions that took place already,

1
2 that would be unfair and unenforceable.
3 It would be in those cases, of any new
4 reproduction of a creation that has
5 fallen into the public domain because of
6 the failure to affix the copyright notice.

7 A great deal of art falls
8 into that category; the large
9 majority of the art that is reproduced
10 falls into that category. It is not
11 even a matter of money; it's a matter of
12 control. Artists are not able to control
13 how their art is reproduced.

14 MR. OMAN: I understand.

15 Thank you very much for that
16 clarification.

17 I also want to reassure you that
18 the responses of your 400 artist members
19 will be included as part of the record.

20 MR. PANZER: Thank you.

21 MR. OMAN: I have a question for
22 both of you, and the question is, what
23 impact do you think the American antitrust
24 laws would have on your efforts to collect
25 under a federal droit de suite, if one were adopted?

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12 MR. FEDER: I wanted to add
13 something to the previous answer;
14 we are dealing not only with U.S.
15 artists. It is true that most U.S.
16 artists had no idea in the old days
17 that in order to safeguard their work they
18 would have to append a copyright notice to
19 the work and/or register it with the
20 Copyright Office, it just wasn't something
21 artists were aware of. Certainly,
22 very very few artists did that.

23 We could debate whether or not
24 they placed themselves voluntarily in a
25 situation where they deserved to be

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2 deprived of the right, which is so often
3 the case, tragically.

4 But dealing with the European
5 art, a European artist's work, under the
6 laws of his country, be it France,
7 Germany, and most other European
8 countries, and under the Berne Convention,
9 are automatically copyrighted at the
10 instant of its creation, it requires no
11 registration, no notice.

12 I just wanted to add to the
13 previous question, I am not an expert in
14 antitrust law, but it seems to me
15 that the functioning of the rights
16 society on behalf of artists in collecting

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2 and distributing the droit de suite would
3 not be that different from the way that
4 ASCAP and other societies collect and
5 disburse funds to their members.

6 MR. OMAN: Of course they have
7 had problems under the antitrust laws, and
8 they are operating under a consent
9 decree to collect, at least ASCAP is.

10 MR. FEDER: I don't want to be
11 facetious, but I guess it's one of the
12 problems we would be happy to have because
13 it would mean that the droit de suite had
14 been attempted and accepted.

15 I would want to add that we
16 would do whatever we could under the
17 evolving U.S. law. And, as I said, I am
18 not an expert in antitrust law, but it
19 seems to me it would not be all that
20 difficult to work out some kind of
21 conceptual agreement with the Antitrust
22 Office of the Treasury Department so that
23 we function in accordance with what those
24 laws mandate.

25 MR. OMAN: I wonder how long

1
2 CISAC has had authority in this area. Is
3 this something that dates back to its
4 origin in 1920, because CISAC,
5 technically, is concerned with the
6 creation of music. And I wonder when they
7 got into this sideline.

8 MR. FEDER: Yes. I think
9 there's an unfortunate similarity of the
10 names. I'm talking about CISAC, which is
11 an international authors, composers, and
12 artists rights society as opposed to the
13 domestic CISAC, which is a music
14 collecting society.

15 MR. OMAN: I am aware of the
16 distinction you are making, I know the two
17 organizations; but CISAC is limited to
18 authors and composers.

19 MR. FEDER: No. The CISAC of
20 which I am speaking --

21 MR. OMAN: I am just translating
22 the name. The literal translation of the
23 name is authors and composers.

24 MR. FEDER: Yes.

25 And if I may add to that, and

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2 that is, that it's quite common in Europe,
3 in fact it's more often the case than not,
4 that artists never are included within the
5 words "author's rights." If you ask what
6 is the nature of your society, they will
7 tell you that ours is an author's right
8 society. Artists are subsumed within the
9 term "authors" in the European context.

10 MR. OMAN: Fine.

11 So, my question still remains,
12 did they have jurisdiction over the
13 promulgation of artists' rights in 1920?

14 MR. FEDER: Absolutely. I don't
15 know whether it dates back to 1920; but in
16 my dealing with the organization, they do.
17 It's of long-standing, but I cannot
18 tell you precisely if it began in 1920
19 or whether it occurred, let's
20 say, ten years later.

21 MR. OMAN: Would you like to
22 answer the antitrust question, Mr.
23 Panzer?

24 MR. PANZER: Basically, I am
25 also not an attorney and there's really

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7 not much more to add. I mean, Ted pretty
8 much said how I feel also.

9 MR. OMAN: Thank you, gentlemen,
10 very much. We will be back in touch. We
11 appreciate your contribution.

12 MR. FEDER: I didn't mean to
13 imply that the difference of the two
14 organizations was not clear to the chair.
15 I am certain they were.

16 MR. OMAN: The point is well
17 taken, but there are perhaps others in the
18 room who would be confused by the similarity
19 and the sound of the names.

20 The last panel before lunch will
21 be the Volunteer Lawyers for the Arts
22 represented by Mr. Dan Mayer, and the New
23 York Artists Equity represented by Jeffrey
24 Homan.

25 Gentlemen, you have the floor.

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Will you please identify
yourselves for the record?

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MR. HOMAN: I am Jeffrey Homan.

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MR. MAYER: I am Daniel Mayer.

6

Thank you for this opportunity
to testify on behalf of the 8,000
individual artists, arts administrators
and attorneys who each year utilize the
resources of Volunteer Lawyers for the
Arts. For 22 years Volunteer Lawyers for
the Arts has offered free legal
representation, advice, and education to
low-income individual artists and art
organizations in all creative
disciplines.

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In 1969 a group of young lawyers
founded Volunteer Lawyers for the Arts
because they saw that most artists are
unable to afford legal counsel. Although
individual artists contribute immeasurably
to the cultural life of our country,
rarely are their contributions rewarded
economically. According to a recent study
commissioned by the New York Foundation

1
2 for the Arts and the Research Center for
3 Arts and Culture at Columbia University,
4 61 percent of the artists surveyed had an
5 annual income under \$15,000. Only 14
6 percent of the visual artists surveyed
7 were able to support themselves entirely
8 from their artwork.

9 The economic plight of visual
10 artists is empirically known to most
11 people who work in the arts community.
12 Volunteer Lawyers for the Arts supports
13 the enactment of legislation which will
14 provide visual artists with royalties
15 generated by the resale of their work.

16 Resale royalties are intended to
17 provide an economic benefit for visual
18 artists analogous to the royalty rights
19 currently enjoyed by composers. We
20 believe that the adoption of a national
21 resale royalty policy would encourage the
22 creation of new works of art by
23 recognizing that visual artists, like
24 writers and composers, have an ongoing
25 relationship with the fruits of their

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2 creativity and should share in the
3 proceeds these works generate.

4 The economic plight of artists
5 is not the only rationale for Volunteer
6 Lawyers for the Arts' support of resale
7 royalties. The Visual Artists Rights Act
8 of 1990 recognizes artists' continuing
9 interest in their artwork. But this
10 legislation stopped short of achieving its
11 goal and did not recognize an artist's
12 right to be compensated for subsequent
13 sales of art that they have created. The
14 result of this omission in the Visual
15 Artists Rights Act is an inequitable
16 system that does not fully acknowledge the
17 copyright of visual artists.

18 We urge that resale royalty
19 legislation be modeled on the French droit
20 de suite, which assesses a percentage of
21 the total gross price of each sale
22 regardless of whether the work has
23 increased in value since its last sale.
24 Specifically, we support a resale royalty
25 rate of five percent of gross resale

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2 proceeds. This percentage would
3 adequately protect the economic rights of
4 artists, without unduly affecting the art
5 market.

6 The resale royalty right should
7 apply to all original works of visual art
8 which are afforded moral rights protection
9 under the Visual Artists Rights Act of
10 1990. The only limitation is that the
11 price of the works should surpass a
12 threshold resale price of \$750. The right
13 should cover visual artists who are either
14 citizens or residents of the United States
15 whose works are either sold in the United
16 States, or sold outside of the United
17 States by a seller who either resides in
18 or is domiciled in the United States.

19 For ease of administration and
20 uniformity, Volunteer Lawyers for the Arts
21 believes it would be fair for the duration
22 of the resale royalty right to be
23 coextensive with the copyright in the
24 work. In other words, the resale royalty
25 right should last for the life of the

1
2 author and 50 years after the author's
3 death. The right should be descendible in
4 a manner analogous to copyrights.

5 We endorse the establishment of
6 private artists' rights societies as
7 essential to monitor and implement the
8 collection of resale royalties. These
9 societies would play the same important
10 role in the visual arts that ASCAP
11 and BMI play in the music world. The
12 French droit de suite law is generally
13 regarded as successful, in part, because
14 of the existence of the central private
15 organizations, such as those testifying
16 here today. Artists would be empowered by
17 the existence of strong central
18 organizations which would serve as a
19 collective voice for those who,
20 individually might not be heard.

21 To enable the private artists'
22 rights societies to monitor sales of works
23 of art effectively, we urge that the
24 legislation contain a mandatory disclosure
25 provision. The seller's failure to

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2 disclose sales information should be
3 subject to a penalty. Laws which do not
4 contain a disclosure obligation generally
5 have not been successful.

6 Volunteer Lawyers for the Arts
7 asserts that the resale royalty right can
8 and should be applied retroactively to
9 works in existence at the date of
10 enactment of legislation. Such a
11 retroactive application would not
12 unconstitutionally impair contracts or
13 violate due process. Moreover, the public
14 interest would be served by retroactive
15 legislation which improves the welfare of
16 artists who have already created works of
17 art. Also, given the volatility of the
18 art market and the fact that art is
19 generally purchased for aesthetic
20 qualities as well as for investment, it is
21 unlikely that the retroactive application
22 of resale royalties would substantially
23 disrupt the art market trade. Retroactive
24 application of the legislation would be
25 consistent with the legislation's goal, to

1
2 encourage and support artistic endeavors
3 as a vital part of American culture.

4 Resale royalties will not hurt
5 the American art market. The art market
6 is already accustomed to incurring certain
7 charges on the sale of artwork, for
8 example, the commission from consignors and
9 buyer's premiums to auction houses.
10 Moreover, a substantial number of
11 collectors purchase art for more than
12 anticipated economic gain; many enjoy the
13 aesthetics of the artwork and wish to
14 encourage the creation of new art.
15 Volunteer Lawyers for the Arts believes
16 that the American art market could easily
17 accommodate a modest resale royalty for
18 the benefit of artists.

19 The risk of sellers fleeing the
20 American art market is greatly minimized
21 by the increasing global recognition of
22 resale royalties. Currently 28
23 jurisdictions, including many of the
24 largest art markets in the world have
25 recognized resale royalties. A complete

1
2 discussion of the acceptance of resale
3 royalties internationally is found in The
4 Droit De Suite in Literary and Artistic
5 Property: A Comparative Law Study by
6 Liliane de Pierredon-Fawcett available at
7 the Center for Law and the Arts of
8 Columbia University School of Law.

9 The European Community has
10 replaced resale royalty legislation on its
11 agenda and is likely to put increasing
12 pressure on the United Kingdom and other
13 non-resale royalty rights countries to
14 conform and recognize these rights.
15 Volunteer Lawyers for the Arts believes
16 that the United States' recognition of
17 resale royalties rights is appropriate and
18 that such recognition will support current
19 collaborative European efforts.

20 There is an international
21 movement towards recognition of droit de
22 suite for visual artists. The United
23 States has an opportunity to take a
24 leadership role in investigating all of
25 the ways that resale royalties have been

1
2 implemented, and creating a dialogue with
3 how royalties may be recognized as part of
4 the copyright law of this country. We
5 applaud your efforts in beginning this
6 important dialogue.

7 MR. OMAN: Thank you very much,
8 Mr. Mayer.

9 I understand you are the newly
10 appointed head of the Volunteer Lawyers
11 for New York.

12 MR. MAYER: That's correct.

13 MR. OMAN: How long?

14 MR. MAYER: Very newly, two weeks.

15 However, when the written comments were submitted
16 by Volunteer Lawyers for the Arts last June, I was
17 the Director of Lawyers for the Creative Arts in
18 Chicago, which along with six other volunteers also
19 endorsed these comments.

20 MR. OMAN: It is good to have that
21 breadth in the record. It's wonderful to have you
22 here. Now we

23 Now we turn to Mr. Homan representing
24 the New York Artists Equity.

25 Mr. Homan

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MR. HOMAN: Thank you.

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I want to preface these comments by saying that these points were approved by the Board of New York Artists Equity and created with the assistance of our counsel.

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In view of the precedent set in California, New York Artists Equity Association, Inc. endorses the idea of federal resale royalty legislation as long as application of such a statute could be effected in a timely and practical manner.

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To that end, we make the following suggestions for your consideration:

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(1) Implementation of the federal law would involve the establishment of a national registry to be administered by the Register of Copyrights. In this scenario, the registration of artwork would be part of the copyright procedure. At the time of copyrighting, the work would be given a registration number. The registration of

1
2 artwork would be the responsibility of the
3 artist and underwritten by the artist in
4 the form of a fee.

5 (2) At the time of registration,
6 a registration document will be given to
7 the artist. At the time of sale this
8 document would be transferred to the
9 buyer. Possession of this document would
10 indicate clear title to the work by any
11 subsequent reseller.

12 (3) The five percent resale
13 royalty would be paid by the reseller to
14 the Register of Copyrights, not directly
15 to the artist. The Copyright Office would
16 in turn disburse monies to the artist. It
17 would be the responsibility of the artist
18 to keep the Register of Copyrights
19 informed of his or her whereabouts.

20 (4) The law would only apply to
21 major works selling for a substantial
22 amount, perhaps over \$5,000. This would
23 eliminate a huge number of transactions
24 that would ensue were the law applied
25 equally to the resale of all works of art,

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2 i.e., printed editions, et cetera.

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4 (5) The resale royalty would be
5 paid to the living artist and the artist's
6 heirs for a stated term not to exceed 75
7 years after the death of the artist.

8

9 (6) Resale royalty rights on
10 artwork would be nonassignable and
11 nontransferable to third parties by the
12 artist or the artist's heirs.

13

14 Thank you very much.

15

16 MR. OMAN: That's a very
17 provocative proposal and one that we will
18 look forward to studying in detail, and
19 perhaps consulting with you in the weeks
20 ahead. You raised a number of
21 interesting points, and it's
22 appropriate that they are brought up in
23 the context of this discussion of the
24 droit de suite because they do touch on
25 the same questions concerning artists'
26 prosperity and the continued incomes
27 generated by their work over the years.

28

29 Mr. Patry, do you have any
30 questions you'd like to ask?

1

2

MR. PATRY:

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6

Mr. Homan, in making your suggestions did you consider how they would impact on our obligations under the Berne Convention?

7

MR. HOMAN: Pardon me.

8

9

10

11

12

MR. PATRY: Did you look at the Berne Convention that the United States is a member of and figure out whether your suggestions would be consistent with our obligations?

13

14

MR. HOMAN: I'm sorry, I am not

familiar with that.

15

16

17

18

MR. PATRY: If I understand your proposal correctly, you would not be able to get droit de suite unless you register something with the Copyright Office.

19

MR. HOMAN: Yes.

20

21

22

23

MR. PATRY: If someone didn't register with the Copyright Office, no right at all?

24

25

MR. HOMAN: I would say that it would be a practical problem. My concern

1
2 here is that the purchase and resale of
3 art and any profit due the artist be
4 something that could be administered
5 easily.

6 One comment that was made
7 earlier about the deluge of paper in our
8 society I think is relevant here, and that
9 is why I am suggesting a central data bank
10 for this information.

11 MR. PATRY: Maybe it's manna
12 from heaven for people in Washington to
13 hear that you have more faith in the
14 government, a bureaucracy to do it, than
15 perhaps a private collection society.

16 My other question is about your
17 distinction with major works. Your
18 distinction would be purely based on
19 price, not on worth or quality; is that
20 correct?

21 MR. HOMAN: Since this is a
22 monetary consideration, I think that would
23 be appropriate, yes.

24 MR. PATRY:
25 Thank you very much.

1

2

MR. OMAN: A related question.

3

We have discussed on several occasions

4

within the Copyright Office the

5

possibility of maintaining a registry for

6

limited edition works, an artist makes 500

7

copies and numbers each of them, signs

8

each of them, and sometimes the plates

9

fall into the hands of an unscrupulous

10

heir or an unscrupulous dealer who makes

11

not just the 500 copies, but an additional

12

thousand copies because they need the

13

money.

14

If a central registry were instituted

15

in the Copyright Office, for instance, with each

16

copy of a limited edition documented -- the

17

chain of title following carefully in each

18

case -- would that protect not only the

19

original artist's intentions and his

20

particular creativity but also

21

protect the investors, the people who buy

22

the work and pay a premium price because

23

it is one of 500?

24

MR. HOMAN: It would seem so,

25

right. I think this could be invaluable

1
2 also because of the fact that artists very
3 often don't know where their works are. I
4 can vouch for that, three-quarters of my
5 work I probably have no idea where it is
6 right now. It is therefore very difficult to
7 determine whether or not it has been resold.
8 I think that this registry could cut
9 both ways; it could help in both
10 directions.

11 MR. OMAN: One point I want
12 to make, and in many ways it's an
13 admission against interest by the Register
14 of Copyrights, you do not have to register
15 work to get copyright protection.
16 Copyright exists from the moment of
17 creation, and we just function as an
18 agency of record for the recordation of
19 the copyright certificates; but we don't
20 grant copyrights in Washington.
21 Artists have that as a matter of law
22 without us doing anything.

23 Are there any further
24 questions?

25 MR. PATRY: Just one.

1
2 There was testimony earlier
3 about copyright notice and how a lot of
4 artists lose protection for failure to put
5 a notice on, which I think is probably
6 true. So, I am curious why you might
7 think that artists would be anymore likely
8 to be aware that they had to register
9 something with the Copyright Office in
10 order to get a resale royalty.

11 MR. HOMAN: I think this is a
12 very big problem. Certainly there needs
13 to be a real consciousness-raising effort
14 on the part of the art establishment in
15 this country, universities, galleries,
16 museums alike, to make this possible.

17 MR. OMAN: Traditionally artists
18 have not been organization people, but I
19 think that is changing. We have two
20 organizations representing them today, so
21 maybe that will increase the educational
22 process and make artists more careful about
23 protecting their rights in the future. At
24 least we hope so.

25 MR. PATRY: And I wanted to

1
2 compliment Mr. Mayer on the excellent
3 submission that was given to us earlier.

4

5 MR. MAYER: Thank you.

6 MR. OMAN: Thank all of you.

7 (Panel was excused.)

8 MR. OMAN: The hearing will
9 stand in recess. We will
10 reconvene at 2:00
11 o'clock sharp.

12 We thank the last panel for
13 its testimony.

14 (Luncheon recess taken.)

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2 A F T E R N O O N S E S S I O N

3 MR. OMAN: Our first panel this
4 afternoon includes Mr. George Koch of
5 National Artists Equity and James
6 Rosenquist and Sanford Hirsch, well-known
7 artists.

8 We welcome you to the hearing.
9 I ask you to identify yourselves and
10 decide among yourselves who wants to go
11 first.

12 MR. ROSENQUIST: I am James
13 Rosenquist.

14 How do you do?

15 I have a statement I would like
16 to give you. Should I do that now or are
17 we going to introduce the other
18 gentlemen?

19 MR. OMAN: They can introduce
20 themselves as they are ready to proceed.

21 MR. ROSENQUIST: All right.

22 Statesman, Lawmakers, Artists
23 and Friends, my name is James Rosenquist.
24 I am an artist/painter. I have been
25 painting and selling my work for 31 years

1
2 and I have had twelve retrospective
3 exhibitions, the last two in Moscow and in
4 Spain.

5 In 1971 I suffered an automobile
6 crash from a hit-and-run driver which
7 crippled my wife and son and put me
8 immediately in debt for \$61,000. I was in
9 mid-career, and it took a few years to get
10 back to making paintings again. Art
11 collectors visited my studios. They
12 looked at my paintings, said they were
13 wonderful and marvelous, then walked out
14 and went to the art auction that night and
15 bought a work that I had originally sold
16 for \$750 for \$45,000. This situation
17 continued and irked me because I was in
18 dire hardship. Several years later I
19 lobbied at the doorways of the Senate with
20 Marion Javits and Bob Rauschenberg for an
21 artists' royalty bill. Through our
22 Javits/Brademis/Koch amendment we added
23 the names of Hubert Humphrey and Senator
24 Magnuson from Washington. Our amendment
25 to a welfare bill passed the Senate but

1
2 failed the House. The law consisted of
3 the 15 percent royalty on the monies after
4 \$1,000 was achieved beyond the original
5 purchase price and only if the painting
6 went up in value. Later on, Senator Alan
7 Sieroty of California rewrote the bill with a five
8 percent royalty, and I believe that was to be
9 collected whether the painting went up or
10 down in value.

11 About four years ago I got a
12 call from a lawyer in San Francisco. He
13 said the state had a check for me for \$750
14 for a resale. At the time I was talking
15 to Senator Ted Kennedy. He said, "Jim,
16 don't cash the check, come down to
17 Washington and show it at a press
18 conference," which I did.

19 In my 31 year career the highest
20 frequency of resale has been maybe four
21 times per picture. Sometimes only once.
22 One resold for \$2,090,000 of which I did
23 not get a penny on the resale. The 1980's
24 were notorious for immediate secondary
25 sales of young artists. Get the picture

1
2 away from the artist and speculate with
3 it, was a general idea. Paintings were
4 bought in bulk for low prices and
5 auctioned off within a year or two.

6 The Art Dealers Association has
7 an attitude about art like the Goose that
8 Laid the Golden Egg: Save the egg but
9 kill the goose.

10 I know many artists who are
11 middle age and are in mid-career, who are
12 having a very difficult time;
13 they are quite brilliant people.

14 In 1978 I got a call from Joan
15 Mondale. She asked me if I would accept
16 an appointment from Jimmy Carter to serve
17 on the Council for the National Endowment
18 for the Arts, which I did for five years.
19 Our job was to try to inform senators and
20 congressmen what good an artist was, which
21 we were asked quite often. My statement
22 was that an artist provides an abstract
23 mental garden for other people to think,
24 live, work, and exist in. Having artists
25 and art around enhances the quality of

1
2 life and is the opposite of war. Artists
3 are a national treasure and are rare
4 because, much to my surprise, out of the
5 30 aspiring artists assistants I have had
6 over the past 30 years maybe one or two
7 will become an artist.

8 When Ronald Reagan became
9 President, he thought everything should be
10 funded by the private sector, which isn't
11 a bad idea, except the private sector is
12 ultra conservative as is our nation
13 today. Therefore, we sorely need the NEA
14 to fund the avant-garde, and we sorely need
15 other support.

16 Don't confuse art and commercial
17 art. An artist isn't thinking of the
18 money when he or she paints. The idea
19 they have is priceless to them, but
20 someone else comes along and puts a price
21 on it. The artist may think that price is
22 low, but the artist may have some comfort
23 with the royalty law knowing that their
24 priceless work they sold at a low price
25 may help their heirs in the future.

1
2 I want to make it clear I'm for
3 a 15 percent royalty law, but not a
4 retroactive law. If I receive a royalty
5 of 15 percent on the resale of my work, I
6 would gladly give one-half to start an
7 artists' fund to help struggling artists
8 in America. The Krasner-Pollock
9 Foundation, the Gottlieb Foundation, and
10 the Andy Warhol Foundation are directed by
11 people other than the original artists.
12 It would be good to have the living
13 artist's input into the direction of the
14 foundation because, as we all know, who
15 else can tell who is an artist but another
16 artist.

17 Thank you very much.

18 MR. OMAN: Thank you very much,
19 Mr. Rosenquist.

20 You touched on several items in
21 your testimony, specifically the
22 National Endowment for the Arts
23 issues, that are beyond the scope of our
24 hearing today; but they
25 are still important, and I am glad you did

1
2 mention them.

3 We do have
4 questions for you, but they will wait
5 until the completion of the panel. The
6 next witness will be?

7 MR. HIRSCH: Sanford Hirsch.

8 MR. OMAN: Yes, sir.

9 MR. HIRSCH: I'm a visual artist
10 as well as the Executive Director of the
11 Adolph & Esther Gottlieb Foundation, which
12 Mr. Rosenquist just mentioned, a
13 not-for-profit corporation that
14 administers two grant programs
15 specifically intended for mature painters,
16 sculptors, and printmakers. We were
17 established out of the estate of Adolph
18 Gottlieb specifically to make grants to
19 artists, mature artists, older artists who
20 are in current financial need.

21 We raise all our funding through
22 the sales of paintings that Mr. Gottlieb
23 left to us, so I know both about the
24 market for art and the need among artists,
25 and that is what I want to speak about.

1
2 Despite the impression of many
3 in the popular press, the overwhelming
4 majority of visual artists are not
5 wealthy. Most earn a meager living from
6 their artistic endeavors and must
7 supplement that income with some other
8 form of employment. Those who are
9 fortunate can find teaching jobs. Many
10 artists work in the service economy, in
11 fields of endeavor such as construction
12 trades or various types of freelance work
13 that offer little stability and no
14 benefits. Among those artists who are
15 fortunate enough to earn a living through
16 the sale of their art, the reality is that
17 the art market is unmercifully fickle,
18 providing some with fame and a comfortable
19 income for a very short period, and
20 leaving those same people without support
21 or entrance into a market when their work
22 is out of fashion. The one economic rule
23 he or she knows is that there are no
24 guarantees, and the artist's ability to
25 affect his or her market is virtually nil,

1
2 which, again, Mr. Rosenquist just
3 mentioned in a very personal way.

4 Since fashion is a major
5 determinant of art markets, there are
6 numerous artists who created work during
7 one period, which has a viable resale
8 market, yet there is little or no demand
9 for current work. It is this artist,
10 especially, who would benefit from resale
11 royalties. The interests which would be
12 served are general, for that artist who
13 has proven him or herself once is likely
14 to do so again. Unless, of course, he or
15 she is denied all encouragement or benefit
16 from their own creation. To withhold that
17 encouragement, as is currently the case,
18 argues against supporting proven talent
19 and experience.

20 Many of the relationships
21 between dealers and artists are close,
22 personal ones, and artists and dealers
23 often form lifelong friendships. Even so,
24 artists, as business-people are at
25 something of a disadvantage. They bear

1
2 all the costs of development and usually
3 bear many of the dealer's overhead costs
4 for items like crating, transportation,
5 framing, and advertising. When a work of
6 art sells, the proceeds of that sale today
7 are usually divided 50/50 between artist
8 and dealer. This raises two questions:
9 How are such sales arranged and how do we
10 perceive of a work of art? An individual
11 wishing to purchase the work of a given
12 artist will invariably seek out the dealer
13 who represents that artist's work. Since
14 that dealer has sold many of the artist's
15 works in the past, the dealer knows
16 exactly where the type of work sought by
17 the client may be, and knows as well what
18 the price paid was by the current owner.
19 Similarly, in the event that a collector
20 wishes to sell the work of a given artist,
21 he will seek out the dealer who represents
22 that artist, as both dealer and collector
23 know that a prospective buyer is much more
24 likely to contact an artist's agent than
25 to go elsewhere.

1

2 Auctions, I want to mention, are
3 usually perceived as a market of last
4 resort.

5 In any event, the dealer,
6 purchaser, and current owner all benefit
7 from the relationship of exclusivity that
8 is the norm in the art world. It only
9 stands to reason that the artist, whose
10 creation is the basis for these markets,
11 and who is expected to absorb research and
12 development costs, should reap some
13 benefit from his or her efforts.

14 Which brings me to my second
15 question of how to consider a work of
16 art. In the current market a work of art
17 is a simple commodity, nothing more or
18 less than a telephone or a pair of shoes.
19 Yet in selling a work of art, a dealer
20 does not simply fill the walls and floors
21 with assorted merchandise. The dealer
22 recognizes, through the means of
23 displaying works of art in a careful and
24 considered fashion, and usually organized
25 along a specific theme, that a work of art

1
2 is not a mere commodity. Its uniqueness,
3 its major selling point, if you will, is
4 that it is an intellectual property. This
5 quality is also recognized by the
6 existence of art museums, whose sole
7 purpose is to allow a broad public to
8 explore and consider the wealth of ideas
9 that are the distinguishing properties of
10 works of art. When considering
11 the market for works of art, we can look
12 to other forms of intellectual properties,
13 rather than commodities, for guidance.
14 When we do, we see that the notion of
15 royalties and residuals in the cases of
16 authors, actors, inventors, musicians, and
17 composers is the norm. In this analogy,
18 only visual artists are denied any share
19 of proceeds from the resale or reuse of
20 their creations.

21 Since the dealer controls access
22 to the market, that is, no artist has a
23 reasonable opportunity to display his or
24 her works in the art market except at the
25 invitation of a relatively small number of

1
2 dealers, fairness would dictate that some
3 mechanism be established to allow artists
4 some better ability for stable income.
5 One means of redressing this imbalance is,
6 I believe, to allow the artist to benefit
7 from the resale of works of art he or she
8 has produced. Among other things, such
9 increased stability would probably result
10 in more and better art from artists freed
11 of some of the anxiety of performing on a
12 tightrope without a safety net.

13 The second issue is the
14 feasibility of resale royalties.
15 Arguments have been made that the amount
16 of accounting necessary would be too
17 great, that the concept of allocating some
18 small part of a purchase too daunting for
19 a collector, and the problem of keeping
20 track of artists too difficult to allow
21 the collection and distribution of resale
22 royalties. While I have no formal system
23 to propose at this point, I would again
24 look to those types of endeavors analogous
25 to the visual arts. The number of visual

1
2 artists and the works they produce, not to
3 mention the number of times any given work
4 is sold, is far less, and would involve
5 much less tracking and paperwork, than is
6 currently utilized to track the number of
7 times any one song plays every day over
8 radio stations in every part of the
9 country. Yet it is possible to pay the
10 composers and musicians (and paying them
11 includes being able to find them) for each
12 time a song plays. A comparable system
13 exists in order to pay residuals to
14 actors. I cannot believe that, with some
15 thought and consideration, an effective
16 system for the collection and distribution
17 of resale royalties is an insurmountable
18 problem.

19 The remaining issue, the
20 willingness of a purchaser to be bound to
21 pay such royalties, is more difficult. I
22 certainly don't know of anyone when
23 purchasing anything that would volunteer
24 to pay more. However, we do routinely
25 assess and distribute costs in order to

1
2 insure equity and thus keep a market and a
3 system strong and healthy. Equity, in
4 this case, calls for a royalty to be paid
5 to the artist. Since the amount under
6 discussion is a small percentage of the
7 purchase price, and since the benefit to
8 the artist helps ultimately to support the
9 market for his or her work, I don't think
10 an informed collector will object. In the
11 event the rules are the same for all
12 purchases, as would be the case,
13 objections would not seriously inhibit the
14 sale or purchase of works of art.

15 Finally, some have argued that
16 resale royalties would benefit only those
17 artists who are already wealthy, and would
18 inhibit the sales of the works of art of
19 younger or unsuccessful artists. I doubt
20 that artists have made such objections. I
21 would note that the wealth of a Thomas
22 Edison, mostly gained through royalties
23 paid on patents, has not inhibited scores
24 of inventors from attempting to follow in
25 his footsteps; nor has it reduced

1
2 investment in research and development.
3 It does not make sense that artists would
4 cease to create or collectors cease to
5 seek out new, creative talent simply
6 because a somewhat different commercial
7 arrangement has come into being.

8 I urge you to consider these
9 observations, and to make your
10 recommendations on the basis of fairness.

11 Thank you.

12 MR. OMAN: Thank you very much,
13 Mr. Hirsch.

14 Mr. Koch.

15 MR. KOCH: Thank you.

16 My name is George Koch. I am
17 Vice President of National Artists Equity
18 representing visual artists across the
19 United States.

20 I would like to give some
21 examples of the collective -- we have
22 heard some personal examples today, and I
23 would like to give you some statistics and
24 a framework to look at visual artists in
25 the United States.

1
2
3 If we could imagine of the
4 individuals who are in the
5 audience, that if we took one-half to my
6 right and made those artists, and the other
7 half to my left and made those
8 accountants, or individuals
9 similarly educated to artists,
10 and made some comparison,
11 we would have away of looking at
12 this group of artists. We heard some
13 testimony about earnings and so forth,
14 but there are other economic facts
15 that are more interesting, I think.

16 The artists to my right
17 will be unemployed more often than the
18 accountants to my left. When they are
19 unemployed, these artists will be
20 unemployed for longer periods of time than
21 the accountants on the left.

22 Two other items are critical
23 to this. One, the artist will work less
24 as an artist than the accountant will work
25 as an accountant because the artist's need for

1
2 support means taking other jobs in order
3 to support their families, themselves,
4 and their art habit.

5 Finally, and not
6 suprisingly, the artists on the right will
7 earn less in their lifetime than the
8 accountants on the left. This is
9 important because you need to look at the
10 whole as well as the individual
11 experiences.

12 There have been several comments
13 made today, and like Sandy, I would like
14 to address a few that relate to some of
15 the criticisms of resale royalties.

16 The first issue has to do with
17 the range of artists. In California you
18 had Ruth Asawa testify. Ruth created a
19 fountain in Ghiradelli Square and collected
20 royalties of about \$5,000 when that
21 was resold. She's a
22 relatively well-known
23 artist in San Francisco, but not beyond
24 that.

25 On the other hand, to my right

1
2 you have Jim Rosenquist, who got \$700,
3 who is a very well-known artist.
4 Here you see one artist who is unknown get
5 \$5,000; another artist who is known getting
6 \$750. These examples go on.

7 In your testimony in California
8 you heard from Richard Mayer who got \$55.
9 You also received a letter from Mel
10 Ramos who has been able to collect his
11 royalties from sales through the auction
12 houses because of his tenacity in
13 following up with California owners and
14 reminding them of their responsibilities.

15 The other issue is the starving
16 artist issue. I have always found it
17 amazing that no one raises the issue about
18 whether or not Michael Jackson should
19 receive his royalties, the
20 Hemingway estate should receive
21 royalties from his books, or Norman
22 Mailer should receive royalties from
23 his intellectual property. I don't feel
24 that the same argument holds because I
25 happen to be a visual artist. Yet people

1
2 will raise the issue about whether or not
3 I, or Jim Rosenquist will be entitled to
4 the royalty based upon our status.

5 The issue of tracking is
6 just like Sandy said, in the United States
7 we'll find a way. No one envisioned
8 ahead of time the number
9 of times that Elvis Presley's "Hound Dog"
10 would be played in the United
11 States, or how one would be
12 able to track that. I believe that if
13 minds are put together a system can
14 be proposed in order to manage that
15 tracking.

16 You also heard today that there
17 are going to be artists for and against
18 this issue; you heard it in the VAGA
19 testimony. It's not a popularity contest
20 that we are dealing with in terms of
21 whether or not artists are going to have a
22 right to vote and whether or not they have
23 these rights. The issue really gets down
24 to whether or not it's a right that
25 artists have in terms of the intellectual

1

2 property they create.

3 As in other movements in the

4 United States, whether it has been the

5 women's movement, or the movement of the

6 black man of the United States among

7 African Americans, there have always been

8 individuals for and against.

9 I think what we are looking at, as

10 Sandy said, is what is right with this

11 particular issue.

12 I would just like to say in closing

13 that we are very pleased that we had an

14 opportunity to participate in these

15 hearings, and we look forward to the report

16 by the Copyright Office to Congress on the

17 feasibility of implementing a program of

18 resale royalty in the United States.

19 Thank you.

20 MR. OMAN: Thank you very much,

21 Mr. Koch. I agree that the report that

22 we submit to Congress will frame the issues

23 and is an important undertaking.

24 I should note that we are very

25

1
2 pleased to have with us at the hearing today --
3 I just made this discovery a few minutes
4 ago -- Senator Kennedy's Chief
5 Counsel, Carolyn Osolinik.

6 If you have any particular
7 questions of the political intentions of
8 the United States Senate maybe Ms.
9 Osolinik will be able to give you some
10 hints as to what might happen after the
11 report is submitted.

12 I have a few questions. This is
13 for anyone on the panel.

14 Congress generally does not act
15 if there are other means available to
16 resolve the problems that they perceive to
17 be out there. We heard this morning
18 that there are certain alternatives to a
19 droit de suite, specifically the
20 contractual provisions that some of the
21 artists are able to inject into their
22 contracts. We heard testimony
23 specifically about the Projansky clause,
24 which seems to be working well and
25 to have a universal application.

1

2 Why shouldn't Congress simply
3 let the marketplace sort this out? Why
4 does the government have to rush in with
5 pistols blazing?

6 Mr. Koch.

7 MR. KOCH: I don't think
8 they are going to need their pistols; they
9 certainly haven't needed it with music and
10 other authors' rights.

11 As Mr. Haacke said in his
12 testimony earlier, he recognized the fact
13 that he had a certain position that
14 allowed him to exercise the rights of the
15 Projansky agreement and that many artists
16 did not have that position in order to be
17 able to exercise these rights.

18 We also have a unique
19 relationship between the artist and the
20 dealer where the dealer is very supportive
21 of the agreement and spoke about his
22 sympathies with it. And, so, you have a
23 unique set of circumstances.

24 If every dealer in the
25 United States was a John Weber, maybe you

1
2 would be correct; but, unfortunately, we
3 have many different points of
4 view in the United States among dealers,
5 as we do among artists, and I think that the
6 agreement would not be a practical solution.

7 Finally, I would just say
8 that the issue of rights is an issue
9 across the board; other authors have
10 these rights, and we are one of the few
11 groups of authors of intellectual property
12 that do not have these kinds of rights.
13 I think that it comes back to a
14 fairness issue as opposed to an issue of
15 how it can be applied in terms of whether
16 or not a Projansky agreement could be
17 used.

18 MR. OMAN: Yes, sir, Mr.
19 Rosenquist.

20 MR. ROSENQUIST: When I served
21 on the National Endowment for the Arts
22 between 1978 and 1983, I guess it was, one
23 of the biggest problems in America was the
24 lack of an audience for art in America.
25 Our Chairman, at the time, Livingston Biddle,

1
2 said at one meeting, "You know,
3 there's 50 of our great states that aren't
4 asking for any art help at all, maybe we
5 should go out and solicit money from them."

6 I think you should come in
7 with guns blazing to raise the interest,
8 raise the feeling for art in America to what
9 exists in other countries because, after
10 all, it's a great country. Artists in
11 France and Italy are respected because of
12 the great heritage there; I think it's
13 a general support, a legal support
14 for the arts.

15 MR. HIRSCH: If I can just
16 follow quickly --

17 MR. OMAN: Yes.

18 MR. HIRSCH: One issue that I
19 touched on is the issue of fairness. The
20 art market is really a very small limited
21 market compared to any other kind of
22 market that exists in this country, or
23 elsewhere for that matter. Because the
24 market is so small, because the artists'
25 position in it is one --

1

2 MR. ROSENQUIST: It's small.

3

4 MR. HIRSCH: Even smaller, as
5 Jim corrects me -- I think is the very
6 reason that we need the government to come
7 in and ensure that there is fairness
8 throughout.

8

9 If the market could have
10 remedied the situation, the market would
11 have by now remedied the situation.
12 Clearly, it cannot and it has not.

12

13 MR. OMAN: I promise you that
14 will be one of the judgments that
15 Congress will be making.

15

16 Mr. Patry, do you have any
17 questions?

17

18 MR. PATRY: Yes, I do have
19 some.

19

20 Is there any argument to be made
21 in favor of droit de suite based on the
22 different economic importance of the
23 rights?

23

24 For example, Mr. Rosenquist, how
25 important to you is the reproduction right?

25

1

2

How much money

3

would you make for authorizing

4

reproductions of your work compared to how

5

much money you would have made if there

6

hadn't been an artist resale royalty right

7

in place throughout your career?

8

MR. ROSENQUIST: In the past 31

9

years I think I have received probably

10

less than \$3,000 for reproduction rights

11

for all my work. It's a very small

12

amount of money from reproduction rights;

13

it doesn't amount to much of anything.

14

MR. PATRY: Thank you.

15

One of the things I would like

16

to understand, too, is what is the resale

17

art market for most works. What

18

type of artists have their

19

works resold, what type of people resell

20

them, and how does that market work in

21

comparison to the primary market, what

22

sort of artists would this be protecting,

23

what sort of people would be selling it?

24

We need some facts so that

25

we'll know, if Congress is to regulate

1
2 this area, who is it regulating, who is it
3 benefitting, and how would it work.

4 MR. ROSENQUIST: I will
5 try to give you some information.

6 An artist like myself started
7 working in Manhattan in 1955. I sold
8 my work for \$300, \$700, \$500, \$1,000,
9 whatever. And I kept on working, and I
10 kept on working, and working, and working,
11 and working, and working, and working over
12 the years. I had my first prospective
13 exhibition at the Whitney Museum in 1972,
14 which went then to Colonge, Germany and
15 also to Chicago. In that show were
16 the early works plus the later works.

17 The people said, his late
18 work is rather nice, but what is really
19 important, really, is just the feeling
20 that got him going originally, that is
21 what is really important. So that is what
22 is really desirable, that always seems to
23 be desirable.

24 In May of this year a gallery
25 which I am not really affiliated with is

1
2 doing a medium-large show of my 1961
3 paintings, some of which are in the
4 middle range that I sold for \$500.

5 There are many artists lately
6 who have died from various causes, AIDS
7 being one of them, drugs being another,
8 among other things happening to
9 them. Their work, I believe, won't ever
10 be worth a lot of money because the
11 people, men and women, didn't have a
12 chance for a lot of work, so their careers
13 were cut off right in midpoint.

14 MR. PATRY: Could I follow-up on
15 that for a second?

16 MR. ROSENQUIST: Sure.

17 MR. PATRY: One of the arguments
18 to be made is this, when Rauschenberg sold
19 his painting through his agent,
20 Leo Castelli,
21 presumably that was what the market price
22 for that work was at the time. When the
23 Skulls resold the work 12 or 13 years later,
24 presumably that was the market price
25 for that work at the time as well.

1
2
3
4 Is there an argument that in
5 Rauschenberg's case, as in yours, you continue
6 to work, you continue to create new works
7 and develop a reputation, whereas
8 you pointed out some of the younger
9 artists who were dying from different
10 causes don't -- is there an argument that
11 the increase in the resale price
12 is attributable to the fact that the
13 artist has continued to work after that
14 original sale?

15 MR. ROSENQUIST: That is true,
16 and that is partly the reason for a resale
17 law, because I know many -- I know Bob
18 quite well, and I know that he's had
19 extreme ups and downs in his life. At a
20 certain period of time a royalty certainly
21 would have helped him get through the
22 tough spots.

23 Then the work that people
24 thought undesirable at one period,
25 sells sometimes after a long

1
2 I believe that an artist can
3 never count on his life as a business,
4 even though the IRS looks at it as a
5 business; but it's not really a business
6 because of the creative aspect, and it's
7 very, very difficult. So that is the
8 reason.

9 MR. HIRSCH: I want to jump in.
10 I think the point you made is a very good
11 one and a very valuable one.

12 The artist participates very
13 directly in building his or her market.
14 That artist participates, as Jim said, as
15 you alluded to, by continuing to produce.
16 Those things that sell won't necessarily
17 sell at high prices. They might, again
18 as Jim was saying, later on
19 sell for high prices.

20
21 Artists are not guaranteed any
22 kind of stable income from sales. When
23 their work is in fashion, they can reap
24 larger or demand larger and higher prices
25 as they continue to create work. The new

1
2 work they may create may not be in demand
3 immediately. The work that they had
4 created years earlier might be in demand
5 and might demand very large figures. That
6 artist might come very close to starving.

7 In my work with the
8 foundation I have seen a number of cases
9 of artists who are very well-known whose
10 works from an early period sell for very
11 high prices, yet they gain nothing from
12 those sales, they come looking to
13 non-profit organizations like the Gottlieb
14 Foundation or the Pollock-Krasner
15 Foundation to help get through that
16 period. If they could have the benefit of
17 even a small percent of those resale
18 royalties, they could more than likely keep
19 going without the kind of fear, and
20 anxiety, and hardships that they now have
21 to endure. Not necessarily that a resale royalty
22 will cure all the evils in the world, it won't
23 by any means; it will certainly help.

24 MR. OMAN: Does anyone have the
25 audacity to suggest that suffering is good

1
2 for an artist --

3 MR. HIRSCH: If they do, they
4 will hear from me very quickly.

5 MR. OMAN: -- You know, the
6 stereotype of a Grub Street scholar living in a
7 garret eating cat food somehow enobles the
8 spirit and creates great works of art.

9 MR. HIRSCH: It also kills
10 people.

11 MR. OMAN: Yes. I think that is
12 the answer to the question.

13 MR. PATRY: Thank you.

14 MR. OMAN: That completes our
15 questions.

16 Thank you very much. It was a
17 pleasure having you with us today, and we
18 are grateful for your testimony.

19 (Panel was excused.)

20 MR. OMAN: Our next witness is
21 Tom Dackow, an independent expert who has
22 developed a system for restoring and
23 retrieving images of works of art.

24 Mr. Dackow will provide an
25 explanation of the systems that exist

1
2 for restoration and retrieval.

3 Thank you very much for taking
4 the time to appear with us today.

5 MR. DACKOW: I am happy to be
6 here.

7 MR. OMAN: The floor is yours.

8 MR. DACKOW: I have been
9 involved in the development of two
10 different systems for two different
11 purposes, which deal with the recording
12 and transmission of images of artworks.
13 I would like to mention that they are
14 part of a species of systems which are
15 designed generally with the same end
16 purpose in mind, and the medium for the
17 delivery can change from either telephone
18 transmission to distribution through the
19 utilization of optical media. The
20 processes I have been concerned with have
21 generally been concerned with capturing
22 information about artwork, and one of
23 the pieces of information happens to be
24 the visual information.

25 One of the systems I developed

1
2 was for a group called the Art Lost
3 Register, and it's concerned with the
4 relocation of stolen artworks. It is, as
5 the name suggests, a registry. Works
6 which have been stolen are registered
7 generally by the previous owners or by the
8 insurance company who, in fact, is the
9 then current owner, and this data is stored
10 in a repository and either compared against
11 artworks that are presented for auction, or
12 used in response to inquiries from
13 the police, Interpol, Scotland Yard, the
14 FBI. All sorts of groups use that
15 particular reservoir as an information
16 source.

17 The other system I have worked
18 on, which is being provided by Centrox
19 Corporation, is a system that is designed
20 to monitor the sale of works worldwide.
21 It consists of a series of scanning
22 stations. The art catalogs that are
23 published by various auction houses around
24 the world are scanned, some information is
25 entered into them, the information is then

1
2 placed on optical disks, and that
3 information can be accessed worldwide
4 through a global network. It's generally
5 used by people who are either in the
6 business of buying or selling such
7 artworks. So, in a certain sense, it's an
8 extension to the catalogs.

9 MR. OMAN: Do they subscribe on
10 a yearly basis or pay a fee every time
11 they use your data bank?

12 MR. DACKOW: It actually is a
13 combination of both. In point of
14 fact, I think the whole question as to how
15 that kind of service might be priced is
16 unknown because it is not entirely clear
17 what the market requires at this point.
18 I think that will be changing over
19 time; but it's quite a bit like the other
20 indexes. There's the art index that I
21 believe comes out of England, it has got a
22 similar function: As artworks are sold the
23 information is recorded and is available
24 for retrieval. It can be used for a
25 variety of purposes, it can be used for

1
2 appraisals by insurance companies. In one
3 instance it's being used by a large bank
4 in the trust area to determine the
5 collateral worth of works of art that are
6 being placed with the bank by clients who
7 are borrowing money against those works.

8 I guess in the simplest
9 sense, it's a way for people to look
10 quickly through a vast amount of material
11 without having to go to libraries or other
12 places where that material has
13 traditionally been stored.

14 MR. OMAN: The
15 Judiciary Committee is concerned about
16 privacy, especially in this electronic age
17 where data bases are accessible all over
18 the world and some of the information
19 on these data bases is
20 confidential.

21 Is there a technical way
22 to insure that the artists and their
23 representatives have the information they
24 need without encroaching on their privacy
25 in the process?

1
2 MR. DACKOW: The two
3 systems I have described are quite
4 different. In one instance privacy is the
5 key issue, and that is the stolen work
6 repository, for a variety of reasons.
7 People often don't want the world at
8 large to know that something that they
9 purchased was stolen for a variety of
10 reasons. So in that instance it's under
11 very close control; there is no access
12 from anyplace outside of the small group
13 of people who actually operate the
14 system. There are two copies, one in
15 London and one in New York as a matter of
16 operational convenience.

17 The only consideration that has
18 been seriously given to extending that
19 information beyond the confines of the
20 organization is a recent request from
21 Scotland Yard to have access to the
22 information as well. But it's generally
23 perceived that it would be a grave mistake
24 to make that information available to
25 other groups.

1
2 In the second case, in the case
3 of the Centrox System, the information is
4 already available, the catalogs can be
5 subscribed to, they can be purchased for a
6 nominal fee from any of the 170-some
7 auction houses that are represented. So
8 it's not really a question of whether or
9 not the information is public or private,
10 it's already public. In fact, they
11 generally have Library of Congress numbers
12 assigned. So, I don't think that is, in
13 this situation, an issue. What is
14 different is there is easier access to the
15 information.

16 MR. OMAN: Mr. Patry.

17 MR. PATRY: But if there were a
18 droit de suite law that applied to dealers
19 perhaps the same public information
20 wouldn't be around.

21 MR. DACKOW: I'm sorry. Would
22 you repeat that?

23 MR. PATRY: Yes.

24 If there were a law that required
25 auction houses to pay royalties --

1

2 MR. DACKOW: Yes.

3

4 MR. PATRY: -- then there
5 wouldn't be a problem, as you say, because
6 that information is publicly available;
7 but what if the law applied to dealers as
8 well as to galleries?

8

9 My understanding is that
10 information is not always publicly
11 available.

11

12 MR. DACKOW: That's correct.

12

13 MR. PATRY: Would the concerns
14 that Mr. Oman expressed then be
15 relevant?

15

16 MR. DACKOW: I actually don't
17 see how, if I understand the
18 question. Dealers don't have at
19 this point, to my knowledge, any
20 requirement to make public the information
21 about what they are buying and what they
22 are selling; so there is no way that the
23 kinds of systems that I have developed
24 would even have that information
25 available.

25

It sounds to me as if you are not

1
2 so much concerned with making the
3 information private as with making it
4 public. Until it's public the kinds of
5 systems that we developed would have no
6 access to it.

7
8 If it were required
9 that it be made public in lieu of catalog
10 publication, that would certainly be a
11 vehicle that could be used for
12 distribution. I have reason to
13 believe that there would be incentive to
14 use it that way on the part of the people
15 that are in a position to provide that
16 information.

17 MR. PATRY: Yes.

18 In Europe, especially in
19 Germany, since the law does apply to
20 galleries there, a critical component
21 is a legislative requirement that an
22 artist or the artists' society have access
23 to information. It's difficult
24 perhaps to enforce a right to collect a
25 royalty if you don't know when the sale

1
2 took place. A component of that could
3 be a requirement somehow that you have
4 access to information about sales --

5 MR. DACKOW: Yes.

6 MR. PATRY: -- and you could do
7 it any number of ways, you could make the
8 information public, you could make it
9 somehow private. Presumably, the
10 system that we were just talking about
11 could be put in place to operate either
12 way, or to at least keep track of those
13 sales.

14 MR. DACKOW: I would expect that
15 in a situation where the information was
16 made public that it could be picked up by
17 any of the services that currently are in
18 that business because it would provide the
19 same benefits to their subscribers.

20 One of the things that is
21 convenient about the types of systems we
22 are talking about is that it does make a
23 lot of information that would be quite
24 difficult to gather together on an
25 individual basis available to a fairly

1
2 large group at a fairly nominal cost.

3 I think if you were to go to
4 either of these organizations and look at
5 the amount of effort required to capture
6 that information you would realize that it
7 would be very difficult for other
8 organizations to replicate it unless they
9 were prepared to have the same costs,
10 which is, in fact, probably in the order
11 of \$100,000 a month. It is not an
12 inexpensive process to maintain that type
13 of information reservoir; it's fairly
14 expensive.

15 MR. PATRY: Thank you very
16 much.

17
18 MR. OMAN:
19 Thank you.

20
21 MR. OMAN: Our next witness is the Chair
22 of the Committee on Art Law of the Association
23 of the Bar of the City of New York.
24 Mr. John Koegel will present the
25 Association's views.

1

2

I note that we are on schedule.

3

And we have allocated 15 minutes for Mr.

4

Koegel.

5

We welcome you to the

6

hearing and look forward to your

7

testimony.

8

MR. KOEGEL: Good afternoon,

9

your Honor.

10

May I approach the bench?

11

MR. OMAN: Let the record note

12

that I am not the honorable. The Register

13

of Copyrights is not confirmed by the

14

United States Senate, so, therefore, does

15

not officially qualify for the title "the

16

Honorable," merely Mr. Ralph Oman.

17

MR. KOEGEL: Well, as you

18

pointed out, my name is John Koegel, and I

19

am appearing as Chairman of the Committee

20

on Art Law of The Association of the Bar

21

of the City of New York.

22

The Committee on Art Law is

23

a standing committee of the Association.

24

It is comprised of 28 members,

25

on an annually rotating basis. The members

1
2 are typically fairly varied, but most are
3 very involved as attorneys in the arts. And,
4 as I said, membership rotates from year to year.

5 The Committee's work is also
6 carried out in coordination with other
7 committees, so that the comments that I
8 have presented to you have been reviewed
9 by the Copyright Committee and
10 by the Executive Committee of the
11 Association. Therefore, my submission
12 represents the views of the Association
13 as a whole.

14 I should also note that in 1987
15 the Committee on Art Law, which, of course,
16 was a different committee then, studied
17 the Kennedy legislation which had a resale
18 royalty provision, and it authored a rather
19 lengthy report at that time. When the inquiry
20 from the Copyright Office came up, the current
21 Art Law Committee revisited the concept
22 and we, of course, looked at the questions
23 that you had asked. The Committee
24 concluded that it did not approve of the
25 resale royalty concept, as

1
2 had been the case in 1987. Therefore,
3 it declined to answer the questions, most
4 of which were implementation oriented.
5 You have before you the position of a
6 subcommittee which wrote up the reasons
7 why the Committee had declined to approve
8 the concept.

9 Since I happen to disagree with the
10 Committee's position, I asked the subcommittee
11 Chairman to give these remarks. Unfortunately,
12 he pressed me to appear, so here I am
13 to present this report.

14
15 The Committee came up with seven
16 reasons why it saw barriers to or detriments in the
17 resale royalties concept. First, they felt that
18 a resale royalty would help only the successful
19 artist who already benefits financially
20 from appreciation of his earlier work. They
21 also could not see any direct current
22 financial help to the, quote, "struggling artist."
23

24 Second, the Committee thought
25 that sellers, purchasers, and other owners

1
2 had a reasonable right to
3 confidentiality and would not want the
4 sales price publicly disclosed. And, of
5 course, if any resale royalty law were to
6 be enacted it would have to somehow enable
7 artists to obtain that information.

8 Third, the Committee thought that
9 the resale royalty right was too remote
10 and too uncertain for it to provide an
11 incentive to create.

12
13 Fourth, the Committee saw a conflict
14 with the first sale doctrine in copyright law.
15 And while recognizing that Congress could
16 change that, the Committee thought that there
17 was not a compelling need to abandon that
18 doctrine in the copyright law.

19 Also, the Committee saw a resale royalty
20 right, especially one that was
21 nonwaivable, as an interference with the
22 ability to contract because it would be
23 like a nut there that you
24 could not get around.

25

1

2

3

4

Sixth. The Committee saw it as unfair to collectors who are really the ones taking the big risks and therefore should reap all the rewards and not have to share any profit.

9

10

And, finally, the Committee thought droit de suite would push the art market underground or overseas.

13

So, those are the seven reasons for the Committee's opposition.

15

The Committee did recognize, however, that most of these concerns were in the nature of conjecture. Therefore, the primary recommendation of our Committee is that the Copyright Office base its report on empirical evidence rather than on theory which is the root of what has been presented to you so far.

23

I myself am a bit ambivalent on the subject of resale royalties because I am concerned about the political capital and the effort that

25

1
2 would be needed to pass legislation of
3 this nature given the obstacles and the
4 controversy it seems to engender. But I am
5 nevertheless inspired to speak,
6 because of the demagoguery and the
7 strong-man tactics from the
8 auction houses, art dealers, and museums.
9 For example, these interests like to call
10 the resale royalty a tax, but we know that a
11 tax is a levy imposed by the government
12 for a governmental purpose. The resale royalty
13 is not a tax, and yet they like to say that it is.

14 My Committee got sucked into this "straw
15 like" argument a bit when it said that a resale
16 royalty would not accomplish the purpose for which
17 it was intended. And, here the Committee and
18 others are saying that the primary purpose
19 is to help the struggling artist.

20 The problem with this argument is that
21 nobody ever said that this concept was designed
22 to provide immediate financial benefits to
23 struggling artists. On the contrary, the concept
24 of a resale royalty is, like the copyright law
25 itself, a system of rewards for the successful

1
2 artists. It rewards successful creativity, not
3 unsuccessful creativity. It rewards success, and,
4 of course, in so doing, creates an incentive to
5 create and an incentive to publish. And
6 how the art dealers, museums, and auction houses
7 can say there is no incentive is beyond
8 me. You have to speak to artists to know
9 whether or not an incentive exists.

10

11 I represent artists, and I
12 believe that there is an incentive when
13 there is the recognition that a future reward
14 will be achieved. A resale royalty right
15 creates an incentive to allow work to be
16 sold early in one's career with the solace
17 that there will be a financial
18 participation in the future.

19 The opponents of this concept also
20 talk about the burden on the market. One
21 important point often overlooked is that a
22 resale royalty does not affect the original
23 purchase transaction. It is of no
24 consequence to that event.
25 Yet, there is

1
2 all this hubris of how a resale royalty right
3 would dissuade people from purchasing art
4 because 20 years from now when they resell
5 that art, they might have to pay five percent
6 of any profit. That is absurd. There simply
7 is no negative impact on the original
8 transaction.

9 Indeed, I think that the resale royalty
10 would be a positive aspect or element in the
11 original purchase. The artist and the collector
12 would to some degree mutually benefit from the
13 artist continually trying to enhance the overall
14 value of his work. This connection between
15 artist and collector is a valuable one that
16 I think is often overlooked.

17

18

19 I am glad you asked Jim
20 Rosenquist about reproduction
21 rights, because there is no significant
22 economic value in reproduction rights for
23 visual artists. The only way a visual artist
24 realistically participates in the success of
25 a work of art -- and this is being said

1
2 over and over again -- is through participation
3 in the appreciated value of that work.

4 Finally, I submit that this study
5 comes at a very important time for visual
6 artists. The concept of a resale royalty
7 right provides or is based on respect for the
8 role of the artist in creating great works of
9 art. It further recognizes that visual artists
10 do not have the same ability as other authors to
11 participate in the success of their works.

12

13

14

15 MR. OMAN: Thank you very much,
16 Mr. Koegel.

17 You capture within your
18 testimony the tensions involved
19 in the issue.

20 Senator Mathias once told me of
21 a great moment in the Maryland legislature
22 when one legislator got up and said that
23 some of our friends are in favor of this
24 proposal, some of our friends are against
25 it, and we are going to stick with our friends.

1

2

3 You are sticking with your
4 friends on this issue. It is
5 a difficult issue with a lot of strong
6 passions; but we are grateful for the
7 insight. Your paper also provides a great
8 deal of useful information.

9 Thank you very much for that.

10 Let me ask Mr. Patry if he
11 has any questions.

12 MR. PATRY: I don't.

13 Thank you very much.

14

15 (Panel was excused.)

16 MR. OMAN: Our final panel
17 consists of three witnesses: Stephen Weil,
18 Deputy Director of the Hirshhorn Museum in
19 Washington; Gilbert Edelson,
20 Administrative Vice President, Art Dealers
21 Association of America; and Mitchell
22 Zuckerman, President, Sotheby's Financial
23 Services Incorporated.

24 Mr. Weil has written about
25 droit de suite for a long time, and I

1
2 believe has described himself as a fierce
3 opponent of the concept. Why don't we
4 begin with Mr. Weil?

5 MR. WEIL: Thank you.

6 And good afternoon.

7 As the panel members know, I have previously
8 raised questions about the propriety, the utility and
9 the potential consequences of the resale royalty in two
10 articles which were originally published in the March,
11 1978 and May, 1991 issues of ARTnews magazine. Copies
12 of those articles have been submitted to the Copyright
13 Office, and I will not attempt to repeat their substance
14 here. The observations that follow will be brief, and
15 are intended to be largely supplementary. They represent
16 solely my own views and in no way reflect those of the
17 Hirshhorn Museum or the Smithsonian Institution.

18 Like any market, the art market is a complex
19 mechanism. Proposed legislation that would substantially
20 interfere with its customary operation ought not to be
21 considered lightly. That a particular group of visual artists
22 might themselves benefit through the establishment of a resale
23 royalty is not in itself a sufficient reason for its imposition.
24 To justify resale royalty legislation, something more would be
25 necessary. A simple three-part test might be as follows:

1 First: What (in the language of
2 an old English case) is the particular
3 "mischief" that the proposed legislation
4 would be intended to remedy?

5 Second: To what extent would
6 such legislation in fact be effective to
7 remedy that particular mischief? And,

8 Third: In its consequent
9 redistribution of economic benefits and
10 burdens, to what extent might the proposed
11 legislation be the source of some new
12 mischief as great or greater still
13 than the mischief it was initially
14 intended to remedy?

15 The case of the resale royalty
16 has been argued intermittently in the
17 United States since it was first proposed
18 by Diana B. Schulder in 1966. In my own
19 view, its proponents have yet to offer any
20 consistently satisfactory answer to the
21 most basic of these questions: What is
22 the "mischief" that such a royalty would
23 be intended to remedy? In general, their
24 efforts to justify a resale royalty have
25 followed four principal lines:

1

2 First: that increases in the
3 market value of a work of art subsequent
4 to its first sale are attributable to the
5 artist's continuing efforts.

6 Second: that the inequality of
7 bargaining power between those who produce
8 art and those who collect it gives rise to
9 a situation through which collectors are
10 enabled to enrich themselves unjustly at
11 the expense of artists.

12 Third: that visual artists
13 suffer an economic disadvantage in
14 comparison to such other serious creative
15 individuals as authors and composers who
16 receive a greater part of their
17 compensation through royalties; and

18 Fourth: that the resale
19 royalty -- functioning as a sort of economic
20 "umbilical cord" -- might serve as the means
21 through which visual artists could
22 maintain a continuing relationship with
23 the works of their own creation.

24 To take these arguments in order:

25

1
2 First: That an artist's
3 continuing efforts might -- as an incidental
4 consequence -- increase the secondary market
5 value of his or her earlier work is
6 certainly true. It is equally true,
7 however, that the artist's premature death
8 might produce exactly the same effect. So
9 could the artist's failure -- see, for
10 instance, the examples of de Chirico,
11 Vlaminck, or Utrillo -- to live up to his
12 or her earlier promise. So could a
13 devastating studio or warehouse fire that
14 reduces the available supply of the
15 artist's work. So could the inclusion of
16 the artist's work in a particularly
17 well-known collection. So even could an
18 inflation of the art market generally.
19 Unpalatable as some may find it, works of
20 art in the marketplace are priced like any
21 other commodity. Their value in the
22 market fluctuates with the interplay of
23 supply and demand. Any number of factors
24 can impact one side of that equation or
25 the other. What the artist does is simply

1

2 one of these factors.

3

4 Let us assume, though, for
5 argument's sake, that the artist's
6 continuing efforts could be identified as
7 the principal factor in increasing the
8 value of his or her work. By what
9 self-evident principle would it then
10 follow that the artist was entitled to a
11 share of any such increase? If I should
12 be able to sell my house for more than
13 otherwise because a real estate developer
14 had built a golf course nearby, would
15 anybody seriously argue that I should pay
16 the developer some portion of that
17 incidentally-bestowed benefit? Likewise,
18 if the value of my house were to increase
19 because the architect who designed it
20 subsequently became famous, would anybody
21 really contend that the architect was
22 entitled to share in some portion of the
23 sale proceeds? Incidental benefits, like
24 incidental burdens, are simply a normal
25 part of everyday life. We don't keep
books on them. We simply assume that they

1
2 will more or less balance out over time.

3 Second: The argument that would
4 justify a resale royalty on the unequal
5 bargaining power of artists and their
6 collectors appears rooted in that romantic
7 vision of the art world which Monroe and
8 Ainee Brown Price described in their 1968 Yale
9 Law Journal article ¹ analyzing how such royalties
10 worked in France. It was, they said, a vision

11 . . . of the starving
 artist, with his genius
 unappreciated, using his
 last pennies to purchase
 canvas and pigments which
 he turns into a misunder-
 stood masterpiece. The
 painting is sold for a
 pittance. . . . The
 purchaser is a canny
 investor. . . . Thirty
 years later the artist is
 still without funds and
 his children are in rags;
 meanwhile his paintings,
 now the subject of a
 Museum of Modern Art
 retrospective. . . fetch
 small fortunes at Parke-
 Bernet and Christie's....
 The droit de suite is La
 Bohême and Lust for Life
 reduced to statutory
 form.

¹ Government Policy and Economic Security for Artists: The Case of the Droit de Suite, 77 Yale Law Journal, 1330.

1
2 The description of the nineteenth-
3 century Parisian art scene given by Liliane de
4 Pierredon-Fawcett in her comparative law study
5 The Droit de Suite in Literary and Artistic
6 Property ² is not marketedly different:

7 In point of fact, while
 Impressionist masters,
 excluded from official
 publications, were
 scorned by the public,
 certain shrewd dealers
 bought their paintings at
 ridiculously low prices.
 General disdain was
 followed by infatuation
 and these same paintings
 then commanded extra-
 ordinary amounts of
 money. . . . The artists
 were excluded from this
 wealth.

8 Whether or not this once was the
9 case in France, it is most emphatically
10 not the case in the United States today.
11 It is true, certainly, that the
12 overwhelming majority of American artists
13 earn extraordinarily little from their
14 calling. A 1991 study by the Center for
15 Arts and Culture at Columbia University

² Center for Law and the Arts, Columbia University School of Law, 1991.

1
2
3 indicated that 73 percent of
4 currently-active painters earned annual
5 incomes of \$7,000 or less from the sale of
6 their artwork. Fewer than five percent
7 had annual incomes from their art
8 of more than \$40,000. In each case, these
9 are gross figures before any deduction for
10 studio and other art-related expenses.

11 It is also certainly true that
12 there are a number of living American
13 artists whose work can regularly command
14 five-to-seven figure prices in the
15 secondary market. There are not, however,
16 very many of these. For works of art to
17 be offered for auction in the main
18 salesrooms of Sotheby's or Christie's, for
19 example, their estimated value must
20 generally be \$10,000 or greater.
21 According to a representative of
22 Sotheby's, the total number of living
23 American artists whose work was thus
24 offered for sale at either auction house
25 during the 1990-1991 season was 219.

1
2 That constitutes something considerably
3 less than one percent of all the visual
4 artists now working in the United States
5 and perhaps, even, as little as one-tenth
6 of one percent. Adjust this figure as you
7 may, it will still include only a handful
8 of artists.

9 What has yet to be demonstrated
10 is that any substantial number of
11 contemporary American artists are
12 themselves living in reduced circumstances
13 while their work is simultaneously
14 commanding high prices in the secondary
15 market. That should be no surprise.
16 These markets are not independent of each
17 other. They are functions of one
18 another. What emboldens a collector to
19 pay a higher price for an artwork on its
20 first sale in the primary market is the
21 knowledge of a strong secondary market
22 that can act as a safety net in case the
23 work should be resold. A \$100,000
24 painting that can, with some certainty, be
25 resold for at least \$90,000 requires a

1
2 great deal less courage to purchase than a
3 \$20,000 painting that can never be resold
4 at all.

5 Also implicit in this unjust
6 enrichment argument is the suggestion that
7 collectors may be able to use their
8 putatively greater bargaining power to buy
9 works of art from artists for less than
10 their real worth. This too involves a
11 romantic fiction. In economic terms,
12 there is no "real worth" to a work of art
13 (or anything else in the market) except
14 what a purchaser will pay for it. Works
15 of art are worth what they sell for once
16 the calculus of supply and demand has run
17 its course. The argument that collectors
18 enrich themselves unjustly at the expense
19 of artists remains to be proved.

20 Third: Again, it certainly is
21 true that visual artists are compensated
22 in a different manner than other creative
23 individuals. That, however, has not
24 necessarily worked to their disadvantage.
25 To the contrary, the successful visual

1
2 artist would, when measured in economic
3 terms, appear to have been enormously
4 successful. While Pablo Picasso (with an
5 estate estimated in the billions of
6 dollars) or -- to move from the sublime to
7 the local -- Andy Warhol (on February 11,
8 The Chronicle of Philanthropy reported his
9 estate to now be valued at \$298 million)
10 may represent an extreme, one must
11 nevertheless be struck by the number of
12 American artists who have been able to
13 leave behind such sizable
14 charitable enterprises as the Rothko
15 Foundation, the Pollock-Krasner Foundation
16 or the Adolph and Esther Gottlieb
17 Foundation. There is no evidence that
18 serious creative artists who are
19 compensated through royalties have done
20 nearly so well as have successful visual
21 artists.

22 It is argued, lastly, that the
23 resale royalty might serve as a sort of
24 "umbilical cord" to permit the artist some
25 continuing relationship with his or her

1
2 work. As I have pointed out elsewhere, though,
3 an umbilical cord that transmitted nothing
4 but potential gains would be a very
5 curious and selective appendage indeed.
6 Filtered out entirely would be the
7 collector's ongoing expenses for framing,
8 insurance, conservation, storage, and the
9 time-use of capital. Filtered out as well
10 would be whatever loss the collector might
11 suffer on a resale, even a resale of the
12 same artist's work. In the best of all
13 worlds, where it didn't cost anything to
14 own anything and the art market could only
15 go up, such a one-way umbilical cord might
16 still have a certain plausibility. In the
17 real world, where everything has a cost
18 and the value of artworks can both go up
19 and go down, it seems manifestly inequitable.

20 To move then to the second point
21 of our inquiry: If we nonetheless could
22 perceive some mischief here that needed to
23 be remedied, what kind of a resale royalty
24 would be effective to provide such a
25 remedy?

1
2 If the collector's putatively
3 unjust enrichment is taken to be the basis
4 for imposing such a royalty, then the
5 basis for calculating the royalty ought to
6 be relatively simple. It would be based,
7 presumably, on the net amount by which the
8 collector had been enriched after reducing
9 the gross profit realized by the cost of
10 resale and by whatever other deductible
11 expenses had been incurred during the
12 intervening period of ownership. It
13 would, in other words, be calculated in
14 much the same fashion as any other income
15 tax. Thorny questions to be resolved
16 might include the degree to which losses
17 on the sale of contemporary art might be
18 balanced against gains, the degree to
19 which inflation might be taken into
20 account in measuring gains and losses and
21 the calculation of the cost-basis of works
22 of art received as gifts or bequests or
23 through exchanges.

24 Whether the Copyright Act (not
25 to say the Copyright Office) is the most

1
2 appropriate vehicle through which to
3 operate such a mechanism, or whether it
4 would be better left to the Tax Code and the
5 Revenue Service, is by no means clear.
6 Also unclear is how such an additional tax
7 might be integrated into the existing
8 system of tax law. Neither is it clear
9 whether a proposal to increase the tax
10 burden on capital gains transactions of
11 this particular kind would have any real
12 political viability just now.

13 Wholly clear, however, ought to be how
14 rational such an income-tax-like approach would
15 be in comparison to what has most frequently been
16 proposed and what actually became
17 the law in California:
18 a resale royalty, based on an
19 artwork's entire resale price, i.e., on
20 both the collector's profit and on the
21 collector's underlying capital
22 investment. In her study of the droit de
23 suite, Ms. Pierredon-Fawcett acknowledges
24 that such an approach, as it was applied
25 in France, "departed from [the]

1
2 rationale" of the resale
3 royalty. She seems to suggest, however,
4 that a resale royalty based on
5 appreciation alone, i.e., one that
6 functioned as a form of income tax, would
7 have been impractical in France because of
8 the difficulty in tracking successive
9 sales. Our situation in the United States
10 is, of course, different. In general, the
11 requirement that such sales be reported
12 for income tax purposes would put most of
13 the necessary information on official
14 record.

15 Rather than remedy any claimed
16 mischief, a resale royalty calculated on
17 the entire selling price produces a wholly
18 arbitrary distribution of benefits. In
19 place of some estimate of the increase in
20 the value of art works, it substitutes the
21 velocity of their turnover as the chief
22 determinant of who is to get how much. As I
23 pointed out last year:

24 Using the California
 formula of a royalty
 equal to five percent of
 the gross selling price,

1

2

we can obtain the following results: Two artists each sell a painting for \$10,000. One is resold four times at the progressively higher prices of \$20,000, \$40,000, \$60,000, and \$80,000. The artist receives a total of \$10,000 in resale royalties. During the same time period, the other painting is resold only once, but for \$100,000. The second artist -- albeit his work is more highly valued by the market -- gets \$5,000, or just half as much.

3

Even that, however, may be beside the point. Regardless of how a resale royalty is to be calculated, it still cannot remedy the mischief complained of if the law itself is readily avoidable. We have been told in the past, for example, that the California law has not been wholly effective because it was too easily avoided by the removal of commercial transactions to other states. Art world transactions can be removed to other countries as well. The recent

14

1
2 decision of the Court of Appeals in
3 Dusseldorf that the German artists'
4 proceeds right -- a part of German copyright
5 law -- had no extraterritorial application
6 to a sale of German art (specifically the
7 work of Joseph Beuys) in England should be
8 a caution.

9 For highly valued works of art,
10 the cost of removing their resale from the
11 United States to a more hospitable
12 jurisdiction might be a fraction of the
13 resale royalty that would be otherwise
14 payable by selling them here. While this
15 outcome might, in turn, be avoided by
16 truly reformatting the resale royalty into
17 some form of an income tax, there would be
18 mind-boggling complexities in collecting
19 such a tax through the Treasury Department
20 and then redistributing it as some kind of
21 a government grant-in-aid to a specific
22 group of largely well-to-do artists.

23 Once again, though, let us
24 suppose that the resale royalty could be
25 justified and that these hurdles could be

1

2 overcome. Are we certain that the good
3 which is then to be accomplished for some
4 few artists will not be outweighed by the
5 harm that may be done to the mass of
6 them? By no means.

7

8 The 1978 analysis of the
9 California Resale Law by the Vanderbilt
10 University economists Ben Bolch, William
11 Damon, and C. Elton Hinshaw ³ is clear on
12 this point. According to their
13 calculations, the introduction of the
14 royalty could be anticipated to depress
15 prices generally in the primary market.
16 For a handful of artists, that would later
17 be compensated and more by the royalties
18 expected to be received in subsequent
19 years. For most artists, however, the
20 initial loss would never be made up.

21

22 "Profitable resale of artwork is
23 rare," they wrote. "Few artists have a
24 secondary market and few works of art
25 appreciate significantly in value. The
26 resale royalty law will result in only a
27 small economic gain to a few and an

³ An Economic Analysis of the California Art Royalty Statute, 10 Conn. L. Rev. 689.

1
2 economic loss to many should be repealed
3 for the sake of the artists affected."
4

5 The Bolch-Damon-Hinshaw analysis
6 contemplated that the introduction of
7 resale royalties would generally depress
8 the prices collectors were willing to pay
9 in the primary market. Under an even
10 grimmer scenario, however, some number of
11 those collectors might abandon the market
12 for contemporary art altogether in favor
13 of some other and less-disadvantaged form
14 of collecting: art by long-dead artists,
15 baseball cards, or American pottery. They
16 need only be a fraction of collectors to
17 have some impact on contemporary artists
18 generally.

19 This is speculation, of course,
20 but nonetheless the possibility that the
21 introduction of resale royalties might
22 impact both the price level and breadth of
23 the primary market for contemporary art
24 and, simultaneously, drive some part of the
25 secondary market overseas ought give pause

1
2 to even its most ardent proponents. If
3 the moneys collected were perhaps to
4 benefit the visual artist community
5 generally -- if they were to be used, for
6 example, to help provide more adequate
7 health insurance for artists -- then those
8 risks might be justified. It might even
9 then make sense to seek a royalty on all
10 sales of art, on sales of new and old art
11 alike. A universal surtax on art sales to
12 benefit artists generally is not, however,
13 what is before us. What we are
14 considering here is a narrow impost on
15 contemporary art that would provide only a
16 small group of artists with any
17 substantial benefit.

18 As hitherto formulated, the
19 resale royalty directs its benefits to
20 those artists who least need them while at
21 the same time posing a distinct danger and
22 offering little or nothing by way of
23 recompense to those artists who could most
24 benefit from its help. It is not merely,
25 as the Prices concluded in their 1968

1
2 study of the droit de suite, that "to
3 those who have shall more be given."
4 Worse still, it is all too possible that
5 from those who already don't have
6 even more shall be taken.

7 Twenty-six years of discussion ought to
8 be enough. However well-meant in its
9 conception, the resale royalty simply will
10 not work under the specific conditions of
11 the art market as we know it in the United
12 States. It deserves to be put to rest.

13 Thank you.

14 MR. OMAN: Thank you very much,
15 Mr. Weil.

16 Mr. Edelson.

17 MR. EDELSON: Thank you, sir.

18 I have not handed up a written
19 statement, and I would request your
20 permission to submit the statement I am
21 about to make in writing after this
22 hearing.

23 MR. OMAN: That will be fine.

24 MR. EDELSON: I have previously
25 submitted a statement when the comments

1
2 were first requested on behalf of the Art
3 Dealers Association of America, which I
4 assume you have, and I will, therefore,
5 not repeat the contents of that statement.

6 I would wish, however, to call
7 your attention to the two page document
8 which was included in that document headed
9 Arguments Against the Resale Royalty.

10 There are a few points which
11 require additional emphasis.

12 Although, for some reason, the
13 term "resale royalty" is being used by
14 some, the proposal which is being
15 considered is not a royalty as we know
16 that term, that is a payment for the
17 license to use copyrighted works. The
18 proposed resale royalty, when you really
19 analyze it, is really a tax imposed on the
20 seller by the government for the benefit
21 of a specific artist.

22 I want to emphasize that the
23 position which we have taken is pro-artist
24 in the larger sense. Artists after all
25 need to support themselves from the sale

1
2 of their work. Those sales are critical
3 to the artists' financial well-being.
4 Those sales are made to collectors. That
5 which encourages collectors to acquire
6 works by living artists, benefits living
7 artists. That which discourages or
8 inhibits collectors from acquiring work by
9 living artists, hurts those artists.
10 Based upon our collective knowledge of the
11 American art market and of the buying
12 habits of collectors, we are of the strong
13 view that the net result of the enactment
14 of what amounts to a tax on art will
15 discourage and inhibit collectors from
16 acquiring works by living artists,
17 particularly works by younger, or emerging
18 artists, which are already the most
19 difficult to sell. This is especially true
20 in the present art market which is suffering
21 considerably in today's economic climate.

22

23 Consider the tax consequences to
24 the collector of works by living artists.
25 To begin, this collector is in a very

1
2 risky field. We estimate -- and the
3 figures that Mr. Weil quoted confirms -- that
4 98 percent of works by living artists
5 decline in value, they never achieve a
6 secondary market. Only a tiny percentage,
7 perhaps less than one percent of living
8 artists have a secondary, or resale,
9 market for their work. The likelihood
10 then is that a person buying a work by a
11 living artist will never profit
12 financially. And that loss is not even
13 tax deductible.

14 In the rare event that the
15 collector will, at some point, earn a
16 profit on a resale, that profit will be
17 taxed. If the seller lives in New York or
18 in another state where there is a state
19 income tax, a total of 40 percent of the
20 profit will be paid in taxes. To that
21 must be added the proposed additional tax
22 which we are discussing today.

23 It is proposed to raise taxes on
24 gasoline in order to conserve on fuel by
25 reducing consumption. There can be no

1
2 real doubt that taxing art will also
3 reduce sales of works of art. And the
4 major effect will be to make those works
5 which are already the most difficult to
6 sell, works by younger artists, who are
7 not well-known, who have not established
8 themselves, even more difficult to sell.
9 These are the artists who most need help
10 and support, particularly now. Why should
11 they be hurt in order that certain
12 artists, who are, for the most part our
13 most successful artists and have a
14 secondary market for their work, receive a
15 comparatively small share of the profit in
16 the resale of a work. In a sense, this is
17 a reverse Robin Hood proposal. It would
18 take from the less successful artist to
19 give to the more successful artist.

20 We need to provide incentives and not
21 disincentives to the collection of works
22 by living artists. It is only when more
23 collectors come into the market, when more
24 collectors are willing to spend their
25 money to support living artists, that

1
2 those living artists can hope to earn a
3 greater living than they now do from the
4 works which they sell. The proposal
5 before us now is a deterrent and not an
6 incentive to the collection of works of
7 living artists.

8 It is interesting to note that
9 the support for the tax on art comes
10 almost entirely from persons who, although
11 well-motivated and convinced that the
12 proposed tax will benefit artists
13 generally, have no actual hands-on
14 experience in the art market.

15 There is also the vexing
16 question of how the proposed tax is to be
17 collected, distributed, and enforced -- and
18 who will pay for this enforcement
19 mechanism. There are some who will and
20 have argued that the government should do
21 this. There are some who have and will
22 argue that private organizations,
23 preferably their own, should do this for a
24 profit. But no matter who does it, and
25 how it is done, one thing is clear, some

1
2 sort of bureaucracy will have to be
3 created or expanded. Forms will have to
4 be filled out, submitted, and processed.
5 Computers will have to be employed. Money
6 will have to be spent. And that money
7 will ultimately come from the collectors
8 who might otherwise use that money to
9 acquire works of art. And, so, money,
10 which might otherwise go to the support of
11 art and artists will go to support a
12 bureaucracy and a tax collection system
13 for the benefit of a relatively small
14 number of people, most of whom
15 are already successful.

16 In the end, no matter how it is
17 done, a system will have to be developed
18 to track the sales of works of art.
19 Assuming that the tax is to be levied on
20 profits, not on losses, some method will
21 have to be devised to verify the profit.

22 I was somewhat surprised and
23 shocked to hear testimony today which
24 suggests that the tax or the royalties
25 should be paid on the gross selling price

1
2 even where the collector suffers a loss.
3 That the collector, in essence, would go
4 out, take a chance on the artist, support
5 the artist, pay the money, lose money, and
6 then pay something to the artist in
7 addition. I don't quite understand why
8 that is fair, but that is something else.

9 I can tell you now, that record
10 keeping, whether by artists or collectors,
11 is not the long suit of the American art
12 market. The long and short of it, is that
13 whatever system of tax collection and
14 enforcement is devised, it will be a
15 further deterrent to the collection of
16 contemporary art. This is especially true
17 because many collectors do not wish their
18 purchases and sales of art to be made
19 public; they don't want their private
20 affairs to be disclosed to the world and
21 third persons. Like many of us, they
22 value their privacy.

23 The filing of forms in
24 Washington and elsewhere and the payment
25 of fees for the filing of those forms is

1
2 anathema to most Americans. And the
3 filing of forms will be required if the
4 tax collection system is to work,
5 especially since more than 90 percent of
6 sales of works by living artists are
7 private sales and not sales at auction. I
8 can assure you that any system for the
9 registration of the sales of art in this
10 country will be tremendously unpopular and
11 will meet with real resistance from
12 collectors.

13 There may be other systems
14 suggested based upon one or another
15 European model. But what works in a
16 small, European country will not
17 necessarily work here.

18 Those who suggest the French
19 model might also consider whether the
20 French market for contemporary art today
21 has any real viability, and what has happened
22 to the French market in the past thirty or forty
23 years. It is not necessarily because of droit de
24 suite, but Paris is certainly no longer a
25 great center of contemporary art. The

1
2 great centers of contemporary art are New
3 York and London, which, curiously enough,
4 are two of the jurisdictions which do not
5 have the droit de suite.

6 What is most unfortunate about
7 the proposal for this resale tax is that
8 it divides the art community. The
9 gentleman from VAGA who was here this
10 morning to testify for the right conceded
11 the artists members of his own
12 organization are divided on the issue. It
13 is by no means the case that all artists
14 support the proposal. I must say it's
15 difficult for anyone to say no when the
16 government comes and says, "do you want some
17 money?" Nevertheless, in the course of the
18 Senate hearings, more than forty of America's
19 most important artists submitted a
20 statement in opposition to the proposal.

21 Let me read to you from a letter
22 from Elaine de Kooning, who was married to
23 Willem de Kooning, one of our greatest
24 living artists. This letter, written
25 shortly before her death, was in connection

1
2 with the hearings on the Kennedy Bill.
3 And I am quoting.

4 "Artists appreciate Senator
5 Kennedy's efforts in their behalf, but it
6 seems to us that one provision of the law
7 he is proposing is counter-productive. It
8 is a 'Fat Cat' provision which would
9 benefit very few artists, those least in
10 need of help, artists whose work has
11 increased greatly in value over the years.

12 "It is comparable to the law
13 subsidizing farmers with enormous holdings
14 while small farmers are going bankrupt all
15 over the country.

16 "The majority of artists who barely eke
17 out a living (if they're lucky) from the
18 sale of their work would not be helped by
19 this law in any way. It would most certainly
20 discourage collectors from buying art. I
21 have not met a collector who is in favor of it.

22 "As it is, the bookkeeping
23 involved in the sale of a single work of
24 art is already burdensome: name of work,
25 measurements, date, provenance, slides,

1
2 photographs, price, commission, discounts,
3 name and address of purchaser, date of
4 sale -- all to go into an artist's file (if
5 the artist is organized enough to have
6 files).

7 "For the artist who sells his
8 work, the bookkeeping entailed in
9 registering each and every sale is
10 appalling to contemplate. Buying or
11 selling a work of art is not like buying
12 or selling an automobile or a house,
13 transactions that generally do not exceed
14 one a year. The sale of fifty works during
15 the space of one year might barely cover
16 an artist's expenses. To be forced to
17 register each one invokes George Orwell's
18 1984. And one shudders to think of the
19 governmental bureaucracy required to
20 handle all the paperwork!

21 "Willem de Kooning -- certainly
22 one of the artists who would most benefit
23 from this law -- has seen work that he sold
24 for a few hundred dollars in the forties
25 and fifties re-sell for millions, of which

1
2 he received not one penny. Yet he is
3 against this law. He is happy that people
4 who bought his work before he was famous
5 are rewarded by the increase in value. It
6 was these collectors who helped him to
7 continue painting by enabling him to pay
8 for art materials and food and rent when
9 there were no critics to sing his
10 praises. And his present value was
11 established, after all, by subsequent
12 collectors."

13 She suggests other laws, and I
14 won't go into that.

15 MR. OMAN: You can submit it for
16 the record, and it will be included as a
17 permanent part of the record.

18 MR. EDELSON: Thank you, sir.

19 Likewise, let me quote a
20 statement by Leo Castelli, which appeared
21 in the New York Times on February 8, 1992.
22 For the benefit of those who may not have
23 heard of Leo, let me say that he is the
24 dean of American dealers in works of
25 living artists, whose devotion to artists

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2 over the years is well-known. Leo
3 said of the proposal, and I am quoting:

4

5 "I think it would have the same kind of
6 lack of success if it were developed
7 nationally; it's just interfering with the
8 freedom of exchange, and that never
9 works."

10 Finally, I want to respond to
11 the argument most frequently made in
12 support of the proposal for mandatory
13 profit sharing, or the resale royalty, or
14 whatever else it can be called. That
15 argument, briefly stated, is that it is
16 only fair that the artist who creates a
17 work and sells it to another should share
18 in the monetary reward which results from
19 the artist's creative genius -- that it is
20 unfair that the artist, who is really
21 responsible for the profit, should receive
22 nothing for his or her efforts.

23 But artists do profit when their
24 works are resold at higher prices.

25 Frequently, artists still hold in their possession

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2
3 works which they have created, which become
4 more valuable. Second, the artist shares
5 because his or her later works are also
6 sold at higher prices. Finally, since
7 most works decline in value, one may ask
8 whether the artist should participate in the
9 profits, but not the losses. No one
10 expects the artist to share in a loss,
11 that would be unfair. The risk of loss is
12 and should be entirely on the collector.
13 But if the collector bears the risk of
14 loss, as he or she should, why should the
15 collector not be entitled to the entire
16 profit as a reward for his or her
17 considerable risk. This is fair for the
18 collector, whose purchases ultimately
19 support the artist. It is important that
20 artists be treated fairly. It is also
21 important that collectors be treated
22 fairly.

23 How, for example, would
24 collectors react to a proposal that they
25 must pay an artist even when they lose

1
2 money in supporting the artist. Somebody
3 mentioned before what about inflation,
4 suppose a collector buys a work in 1980
5 for a thousand dollars and sells it in
6 1992 for \$1200, most of that is probably
7 inflation. Why should the collector pay a
8 tax on that?

9 We know from the experience of
10 Eastern Europe that government
11 interference in the market, however
12 well-meaning, can have serious
13 consequences. A government must,
14 therefore, interfere only with great care,
15 lest more harm than good result from its
16 action. This is such a case.

17 There is much that can and
18 should be done for our artists, who are a
19 great treasure and material resource.
20 Improved health care, which has been
21 mentioned, for example, comes to mind.
22 There are many things that the government
23 can do to help artists who need help. The
24 proposal for a tax on art, for mandatory
25 profit sharing, will help those artists

1
2 who least need help, at the expense of
3 those who most need it.

4 For this reason, we oppose the
5 proposal as unworkable and ultimately not
6 in the best interest of artists.

7 Thank you.

8 MR. OMAN: Thank you very much,
9 Mr. Edelson.

10 Our cleanup hitter today is Mr.
11 Zuckerman. Mr. Zuckerman, you have the floor.

12
13 MR. ZUCKERMAN: Stephen and Gil
14 did such a good job that I am inclined to
15 sit here and say I am persuaded and then
16 shut up because I can add very little to
17 the theoretic argument.

18 If I can add any value at all, it
19 is to speak to you as somebody who is in
20 the middle of the resale market. We are
21 the world's largest resale market maker.
22 And I'm here to tell you today that as
23 somebody who makes his living 12 or 14
24 hours a day doing what everybody else is
25 talking about, we are absolutely convinced

1
2 that if an additional tax is imposed on
3 top of the state and federal income tax it
4 will simply depress prices, it will impair
5 the market, and it will send business away
6 from the United States and back to European
7 jurisdictions which have not imposed the
8 tax. We know that differences as small as
9 two or three percent in a commission,
10 in a competitive situation where we
11 are trying to win business from another
12 auction house, will either attract or
13 deflect a business elsewhere.

14 Sellers have many choices of
15 where to bring their property for resale,
16 but the art market, as others have said,
17 is indeed global. Major works of art are
18 highly portable and will be taken to the
19 jurisdiction in which the cost of the
20 transaction is the smallest. This is
21 simply a fact of economic life.

22 However well-motivated the
23 objective of the resale royalty is, we can
24 tell you that it will have precisely the
25 opposite effect. This point ought to be

1
2 weighed very seriously by the legislature
3 when it considers the resale royalty.

4 I would just like to point out a
5 few other studies, and I don't know
6 whether they have been quoted yet.

7 From having made a review of
8 this a couple years ago when the Kennedy
9 Bill was introduced, I learned that droit
10 de suite legislation was first passed by
11 France in 1920. And I think it has since
12 been enacted by Chile, Luxembourg, Norway,
13 Portugal, Turkey, Belgium, Czechoslovakia,
14 Poland, Uruguay, Italy, Germany, and
15 Morocco. None of those countries today is
16 known for its thriving contemporary art
17 market.

18 In 1977 we found that a
19 committee of the House of Commons in
20 England undertook a very comprehensive
21 review of copyright laws around the world,
22 specifically looking at droit de suite
23 legislation, so that they could make a
24 recommendation to the Parliament as to
25 whether or not a provision similar to the one

1
2 currently proposed should be adopted. I
3 would like to read to you its conclusion
4 about the resale royalty. "Having
5 considered all of the relevant matters we
6 find ourselves unable to recommend the
7 introduction of droit de suite in this
8 country. Our view is that it is not
9 necessarily fair or logical, and that the
10 main lesson to be drawn from the
11 experience in other countries is that
12 droit de suite is just not practical,
13 either from the point of view of
14 administration or as a source of income to
15 individual artists and their heirs." My
16 own colleagues in Europe report that the
17 practical experience of Germany with its
18 laws is that the cost and administrative
19 burdens greatly exceed the revenues
20 collected. We also understand that the
21 relevant authorities in Italy, Belgium,
22 and Germany are recommending the abolition
23 of those laws in those countries.

24 I would like to close my remarks
25 simply by quoting a statement made in 1978 by

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2
3 Representative Henry Waxman of California
4 at the time he introduced the first
5 Resale Royalty Bill in the United States House of
6 Representatives. Then he said,
7 "The benefits to be gained by visual
8 artists by Congressional recognition and
9 by enactment of royalties for them may be
10 outweighed by the harm done."

11
12 I would like to say that we
13 share that concern. We think that some
14 empirical study ought to be done, as has
15 been previously said, and we are
16 absolutely convinced that an additional
17 tax will not work, and it will impair the
18 market and not enhance it, and that what
19 impairs the market cannot possibly be good
20 for working artists.

21 Thank you.

22 MR. OMAN: To accept your
23 premise we must concede that artists don't
24 recognize their own self-interest, that
25 they are doing something that will hurt

1
2 their livelihood in the long run.

3 MR. ZUCKERMAN: Well, lots of
4 artists, as Gil has said, recognize that
5 the imposition of a tax on the market will
6 hurt their --

7 MR. OMAN: Certainly, the French
8 have had the resale royalty since 1920.
9 And, certainly, even though you contend --
10 and some would probably disagree with you
11 -- that Paris is not now the center for
12 the modern art market, which did raise a
13 few eyebrows when you said that, still in
14 the 1920's and 1930's Paris was the center
15 and the resale royalty did not seem to
16 inhibit it.

17 MR. ZUCKERMAN: We would have to
18 look back to the 1920's and 1930's and see
19 how much resale royalty was actually being
20 collected.

21 MR. OMAN: I agree that an
22 empirical study is reasonable.

23 MR. EDELSON: I always say to
24 people who ask me: Name me the most
25 important living artists.

1

2 MR. OMAN: It's a long list,
3 but I would not want to presume. I am not
4 an expert in the field, and we do have
5 experts. If you would like to have an
6 extended discussion, I suspect there are
7 three people here who would love to engage
8 you in that discussion.

9 MR. ZUCKERMAN: Again, I am just
10 testifying as a market maker. If the tax
11 is imposed, the market, to a large extent,
12 will go elsewhere. That has been our
13 experience. And if that is what the
14 public policy desires, then the tax should
15 be implemented; but I can't believe that
16 is the intended consequence or that it
17 would be good for artists.

18 MR. OMAN: I'm not quibbling
19 with your premise, I am just saying it suggests
20 that there are a lot of artists that
21 aren't able to identify their own self-interest,
22 which is a difficult argument to make.

23 MR. EDELSON: What is to divide it?

24 There is, by no means, unanimity

25

1
2 among artists about this, as we have
3 pointed out.

4 MR. OMAN: Right.

5 MR. EDELSON: There are artists
6 for and against it. And, as I said
7 before, it's awfully difficult to say no
8 when the government comes to you and says,
9 would you like to have some money.

10 MR. ZUCKERMAN: But as Gil
11 pointed out, there are two sides. There
12 are the artists who produce and the consumer
13 who buy. And based on our daily experience with
14 the consumer who buys and sells, and I am
15 telling you how they behave; the artists
16 may not realize it.

17 MR. OMAN: Let me make one
18 additional point. As the Register of
19 Copyrights, I feel an institutional
20 obligation to make the point that we were
21 an extremely efficient administrator of
22 similar funds when we collected \$200
23 million for the cable television
24 industry. Our overhead is less than one
25 percent. And we are very proud of the

1
2 fact that we are lean and mean and getting
3 more so every day.

4 Mr. Patry.

5 MR. PATRY:

6 My first question is for Mr.
7 Weil. One of the arguments that you make,
8 and others who have been opposed to droit
9 de suite make, is that this will actually
10 benefit a small number of people, and the
11 most successful artists.

12 I believe in the written
13 material it was mentioned that at
14 Sotheby's and Christies, generally, you
15 have to sell your work for \$10,000 or
16 more. And there's, what, 219 American
17 living artists who sold through Sotheby's
18 and Christies last year, which,
19 admittedly, is a small number.

20 If there was a law, however,
21 that applied not just to Sotheby's and
22 Christies, but to other auctions, and
23 certainly to galleries, the number of
24 artists who might benefit would be
25 larger. Do you agree or not?

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MR. WEIL: I think the number would certainly be larger; but the question is, if you were really passing a law, let's multiply by ten the number of artists who might benefit. So, we may be talking about one percent. And let's double that and talk about two percent, and say we are talking largely about sales maybe at the level of \$400 or \$300. So, we may be looking at rights of what -- I mean, is this what we need at this point, to set up an enormous apparatus to benefit what is still relatively a handful of people?

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Let me just say, if we wanted to do something for contemporary artists we could do something very similar, we could put a discriminatory tax on older art. Let's say art made before 1900 carries a sales tax or art tax that was two percent higher than anything else, and that went to older art. Then we would be doing something to benefit, really, a very small number of people.

1

2 MR. PATRY: Well, your argument
3 is a variant of the trickle down theory.
4 You propose to benefit the people
5 who can afford to buy art, but not to
6 benefit artists directly.

7

8 Are you really saying that you
9 don't believe droit de suite is worthwhile
10 for artists who make a small amount of money,
11 so that we shouldn't bother with them at all?

12 Let me just give you an example. In
13 San Francisco an artist, Richard Mayer, said
14 that, yes, indeed he took that small amount of
15 money and reinvested it in supplies and
16 made more money. Is that --

17

18 MR. WEIL: Let me answer. And
19 there is an anecdote within an anecdote,
20 because there was a reference in the
21 testimony earlier to the fountain in
22 Ghiradelli Square. What needs to be told is
23 the fountain was not sold, the real estate
24 project, Ghiradelli Square, was sold, and
25 included among the many, many parts of

1
2 Ghiradelli Square was the fountain by Ruth
3 Saswa. And Ruth raised a claim of \$5,000
4 because her fountain was there. The
5 overall price of Ghiradelli Square was many
6 of millions of dollars. That was a large
7 real estate transaction.

8 We are dealing here with
9 incidents which really constantly take us
10 away from the questions who is really
11 going to benefit, who is going to pay.

12 MR. PATRY: I would actually say
13 that your example was more of an anecdote
14 away from what mine was.

15 MR. WEIL: Okay.

16 She did testify at the hearing.
17 And my understanding is that they
18 ultimately gave her what the cost of the
19 material would have been if they created
20 it at the time.

21 MR. PATRY: But my question was
22 this: Should we say to Richard Mayer,
23 because you would only get \$100 for this
24 particular work it's not worth it for us
25 to give it to you, even though you might

1
2 reinvest it in creating a new work?

3 MR. WEIL: If the cost of that
4 were jeopardizing the art market as it is,
5 I would say that.

6 MR. PATRY: And how would giving
7 Richard Mayer \$55 jeopardize the art
8 market?

9 MR. WEIL: Because I think this
10 money is not going to come out of thin
11 air, it's going to come out of somebody's
12 pocket, and somebody is going to react.
13 And we don't know what those circumstances
14 are.

15 MR. PATRY: Let me turn your
16 example around. If droit de suite is paid on
17 a higher amount for a more expensive work,
18 presumably that is a person who can afford
19 the amount. Obviously, it's a matter
20 of degree. If you are talking about a 25
21 percent droit de suite, or even a 15
22 percent, that Mr. Haacke got, that is a
23 fair amount of money. If you are talking
24 about three percent like it is in France,
25 and it's three percent on a sale of work

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2 of art by somebody who can afford to pay a
3 million dollars, or something, it's not
4 self-evident, at least, that that three
5 percent is an imminent danger to the art
6 market.

7 MR. ZUCKERMAN: That is like
8 arguing that New York ought to raise its
9 incremental tax rate on the top ten
10 percent of its wage earners.

11 Do you think they are not
12 portable, they won't go elsewhere?

13 The point I am trying to make
14 is, you don't just look at the one artist
15 who gets \$100. If you impose a structural
16 range on the economics of the market
17 you'll do something radical which will
18 upset the very functioning of that
19 market. You need to be sure if you impose
20 the tax that the transactions will still
21 occur.

22 MR. EDELSON: Don't you
23 think if you raise the New York sales tax,
24 which is now eight-and-a-quarter percent, by
25 three percent, that the increase would have

1
2 an effect on sales in New York?

3 MR. PATRY: I wanted
4 to find out what are the current taxes and
5 commission fees on works of art that you
6 sell. For dealers, what
7 is the average commission that a dealer
8 charges for a sale of a work?

9 MR. EDELSON: Is that in the
10 primary market or resale?

11 MR. PATRY: Well, I would
12 be interested in both.

13 MR. EDELSON: Well, it depends
14 on the art. For some artists it's as low
15 as 33 percent or as high as 50 percent,
16 depending on the saleability of the
17 artists.

18 And on a resale it's obviously
19 negotiable. It could be anywhere from
20 five percent to 15 to 20 percent,
21 depending, again, on the work and the
22 value of the work.

23 MR. PATRY: Have those
24 figures been fairly standard?

25 Has it been that way

1
2 for the last three years or --

3 MR. EDELSON: I think by and
4 large the commission may go up slightly,
5 especially in the primary market, because,
6 as you know, it is an extremely risky
7 business.

8 As a matter of fact, our experience
9 is that most fewer than 25 percent galleries
10 who are dealing in contemporary art -- the
11 riskiest kind of art to sell -- do not
12 last for five years. It is an extremely
13 risky business and not a terribly profitable
14 business.

15
16 MR. PATRY: When those
17 commission fees went up, did people
18 undertake an empirical study to decide
19 whether the increase in those commission
20 fees would depress the market, jeopardize
21 the market, or send the sales to other places
22 that had lower commissions?

23 MR. EDELSON: Yes. But one
24 thing that the dealers recognize is that
25 they are also competing with my friend,

1
2 Mitchell Zuckerman, at the auction house,
3 and if their commission goes up those
4 people will go to the auction house.
5 If the auction houses in the United States
6 don't make them a decent offer, they will
7 go abroad.

8 So, yes, indeed, the commission
9 rate that dealers charge on a resale is
10 very much in tune. And to the extent that
11 they do raise that they stand to lose
12 business, absolutely.

13 People in that market are very
14 conscious of how much will it cost me, and
15 it makes economic sense. Nobody likes to pay
16 taxes. And -- you know -- taxes are
17 the price of civilization, but it's
18 one thing to say it in the abstract, and another
19 thing to want to pay it.

20
21 And I am afraid that
22 it's easy to say to collectors, well, you
23 are wealthy, you can afford it. It's
24 easy to say that to somebody who is
25 wealthy, boy, you are rich, you can

1
2 afford that. Then watch them come back
3 at you.

4 MR. OMAN: I remember several
5 years ago in connection with the opening
6 of the Hirshhorn Museum in Washington,
7 Barbara Walters interviewed Joseph
8 Hirshhorn. She leaned forward, looked
9 him earnestly in the eye, and said, "what,
10 Mr. Hirshhorn, has given you the utmost
11 satisfaction?", expecting him to say
12 building a wonderful art collection or
13 building a great museum. And he said,
14 "Well, Barbara, that is easy, it was making
15 all the money."

16 We have spent a great deal of time here
17 today talking about money and very
18 little about art.

19 MR. EDELSON: I can say
20 something else about Joe Hirshhorn; he,
21 by the way, never made money on art, that
22 I know of, and he gave it to the country,
23 which I think is a great thing. If you
24 were trying to sell to Joe Hirshhorn,
25

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2
3
4 he was very conscious of the price he paid,
5 and if you didn't meet his offer he went
6 somewhere else. Frequently -- and
7 this is true of many collectors today --
8 there is considerable negotiation involved
9 in the sale of works of art, considerable
10 negotiation, and, yes, discount prices and
11 increases are all important.

12 This is not only the case,
13 by the way, with people who are
14 speculators or investors; it is true of
15 collectors as well.

16 MR. PATRY: Just to make sure I
17 understand, what fees are charged to
18 buyers by auctions on average?

19 MR. ZUCKERMAN: At most auctions
20 in London, New York, and in the United
21 States, the transaction cost is split
22 fairly evenly between the seller and the
23 buyer. We, for example, charge a
24 standard commission of ten percent to the
25 seller and a standard commission of ten

1
2 percent to the buyer.

3 Now, in making the --

4 MR. WEIL: Sales tax.

5 MR. ZUCKERMAN: I'm coming to
6 that.

7 In making this economic
8 decision, we can't make a market unless
9 people bring us things to sell. Our
10 business is entirely supply-driven in the
11 resale market because we are a broker.

12 What I'm talking about is
13 our very serious concern that a tax will
14 deflect sellers. The seller brings his product to
15 the market, he has to pay the commission,
16 the capital gains tax, and the commission on
17 resale. And there are sales taxes and
18 other costs associated with the transaction.

19
20
21 A buyer who does not have a resale
22 certificate in New York City has to pay
23 an 8-3/4 percent sales tax, and
24 whatever other costs are incurred in
25 moving the art from the auction floor to

1
2 his floor. The same thing occurs when he buys
3 from a dealer. So, transaction costs
4 here, compared to other venues in the
5 world, are already significant.

6 If you layer additional transactional
7 costs on top of that, it is
8 absolutely certain that you will deflect
9 some portion of business elsewhere
10 into jurisdictions with lower
11 transaction costs.

12 MR. PATRY: What if the European
13 Community were to adopt a resale royalty,
14 that would include England?

15 MR. ZUCKERMAN: Yes. We'd be
16 very happy about that, because our business
17 would increase, and that would be
18 good for the artists.

19 And then, you are right, people
20 would have no place else to go, and the
21 entire sea level would rise altogether.
22 So, if you want to do it here you've got to
23 make sure you do it in the other places in order
24 not to drive more business underground. Driving
25 businesses underground doesn't benefit the artist

1
2 nor those of us in the above-ground economy.

3
4 MR. WEIL: I think it's also
5 noteworthy that the Swiss Legislature just
6 voted down a droit de suite. I would
7 imagine that the Swiss Legislaure
8 envisioned Switzerland continuing to
9 be an art market haven for just that
10 reason.

11 MR. EDELSON: The other problem
12 with the droit de suite, of course, is
13 that it certainly doesn't provide an
14 incentive to collect contemporary art.

15 People who care about art care
16 about a lot of art, and they are also
17 movable from one area to another.

18 MR. OMAN: Any other questions?

19 MR. PATRY: No.

20 MR. OMAN: Thank you all very
21 much. It was a provocative panel. We are
22 grateful for your views, and they will be
23 fully considered in the course of
24 preparation of the report.

25 I thank all of the witnesses for

1

2 their excellent presentations.

3 We have a great deal to consider
4 as we prepare our report.

5 Thank you all very much.

6 The hearing stands in recess
7 subject to the call of the chair.

8 Thank you.

9 (Time noted: 4:00 p.m.)

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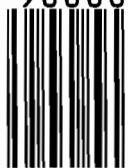
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