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The Future of Resale Royalties in the United States

by

Rachel Jiwon Duffy

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Preceptor and Advisor: Dr. Dawn Herrera

I. Introduction

In recent years, an unprecedented amount of capital has flowed through the burgeoning art market. Modern and contemporary art have dramatically risen in popularity and influence over the past few decades, and each year, artworks from this category continue to break records at auction. In 2021, Pablo Picasso's "Femme Assise près d'une Fenêtre (Marie-Thérèse) (1932)" and Jean-Michel Basquiat's "In This Case" fetched an astounding $103.4 million and $93.1 million respectively, contributing to the $65 billion made through global art sales in the past year alone.[1] Beyond shattering records, the upsurge in price has painfully accentuated the deep financial rift between elite and starving artists: in spite of such record-breaking sales made within the US secondary market, American artists often do not have access to these secondary fruits of their labor, as they are eligible to receive funds only from the first sale of their work. Although designating a fraction of secondary earnings to artists could help build their careers and provide better support for artmaking, instead, the entities that stand to benefit most from this explosive popularity are auction houses and those facilitating resale. This disparity within the secondary market could be formally addressed and rectified through resale royalty legislation, an aspect of the body of art law. A close examination and overview of the history of resale royalty law and the reasons for its inability to gain prevalence in the United States may help guide a determination of its future possibilities.

In my thesis, I will provide a detailed overview of resale royalty law and its history, addressing and analyzing why the attempts at its adoption in the United States have been unsuccessful. I will begin with its origins in Europe, explore American efforts to establish resale

[1] Block, Fang. "Global Art Auction Sales Hit a Record $6.5 Billion in 2021." *Barron's*, Dow Jones & Company, 15 Dec. 2021. https://www.barrons.com/articles/global-art-auction-sales-hit-a-record-6-5-billion-in-2021-01639600051; Porterfield, Carlie. "Art Market Surpassed Pre-Pandemic Levels In 2021 With $65 Billion In Sales, Report Says." *Forbes*, Forbes, 14 Apr. 2022, https://www.forbes.com/sites/carlieporterfield/2022/03/29/art-market-surpassed-pre-pandemic-levels-in-2021-with-65-billion-in-sales-report-says/?sh=15467d7c68e5.

royalty law (especially the enactment and subsequent repeal of the California Resale Royalties Act), and will finally investigate possibilities for these laws in the near and distant future. First, I will provide an expository overview of the subject of resale royalty laws, examining their history both internationally and domestically. I will then evaluate the positions of legal scholars on resale royalties and embody an advocacy approach, detailing potential prescriptive recommendations for federal enactment in the United States. To substantiate the case for establishing resale royalties in the United States, I will address examples of their implementation and further evaluate other scholars' recommendations for future legislative possibilities.

II. What is art, what is art law?

Functioning as a rational, regulatory framework counterbalancing the abstract, arcane art world, art law, as its name suggests, is concerned with matters dealing with art and artists, specifically with works of fine art and the visual arts.[2] The definition of art has traditionally led to heated debate and a lack of definitive agreement; however, legal definitions of art are comparatively restrictive.[3] Within section 101 of the US Copyright Act, which maintains national consistency through its federal status, the fine and visual arts are formally composed of pictorial, graphic, and sculptural works, including paintings, photographs, drawings, diagrams, and jewelry.[4] The definition of visual art in the Visual Artists' Rights Act (VARA) extends legal protections to paintings, drawings, prints, photographs or sculptures existing in either a single copy or a limited edition of two hundred or fewer. VARA's definition of the visual arts excludes many other relatively artistic works, including motion pictures, books, musical compositions, and photographs not taken for exhibition purposes, limiting the kinds of protections available to

[2] Lind, Robert C., Robert M. Jarvis, and Marilyn E. Phelan. *Art and Museum Law: Cases and Materials*. Durham, N.C: Carolina Academic Press, 2002.
[3] See Danto, *What is Art?*
[4] United States, Congress. United States Code, Title 17. section 101. Updated 9 Dec. 2010. https://www.law.cornell.edu/uscode/text/17/101

creations that may be conventionally, but not legally, considered as art objects.[5] For the purposes of the discussions of art law within this thesis, I will adhere to the conventional federal definitions provided above.[6]

Rather than being a separate, unified area of practice, art law is a flourishing, multi-disciplinary body of law. Art law encompasses a wide variety of legal fields, encompassing criminal and civil law more broadly, and comprising multiple areas at both the domestic and international level, including contracts, intellectual property, tax, and trusts and estates.[7] An art lawyer may represent a diverse array of individuals, including artists, dealers, and collectors in diverse circumstances and institutions, such as galleries, museums, or within the art market. Thus, due to the vastness of the body of art law, it is necessary for practitioners to have an extensive, well-rounded understanding of the law at both a general and specific level.[8]

The proliferation of art-specific legislation that regulates the art market at both the federal and state level is the most notable development that has accompanied the rise of art law.[9] Though many of the legal conflicts artists are involved with may not concern their status as creators or even the objects of their artistic production, the disputes that epitomize the field mostly focus on intellectual property, authenticity, title, and taxes. Art-specific statutes within these areas of practice have altered the relationships between artists, buyers, and sellers, remedying imbalances

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[5] United States, Congress, House. United States Code. Title 17, section 106A. 1 Dec. 1990, https://www.law.cornell.edu/uscode/text/17/106A.
[6] Lind, Robert C., Robert M. Jarvis, and Marilyn E. Phelan. *Art and Museum Law: Cases and Materials*. Durham, N.C: Carolina Academic Press, 2002, p.14.
[7] Lind, Robert C., Robert M. Jarvis, and Marilyn E. Phelan. *Art and Museum Law: Cases and Materials*. Durham, N.C: Carolina Academic Press, 2002, p.3.; Steiner, Christine, and Bee-Seon Keum. "Art Law: Looking Back, Looking Forward." *Chapman Law Review*, vol 20, no. 1, 2017, pp. 119-120.
[8] Steiner, Christine, and Bee-Seon Keum. "Art Law: Looking Back, Looking Forward." *Chapman Law Review*, vol 20, no. 1, 2017, p.143.
[9] Lind, Robert C., Robert M. Jarvis, and Marilyn E. Phelan. *Art and Museum Law: Cases and Materials*. Durham, N.C: Carolina Academic Press, 2002, p. 3; Steiner, Christine, and Bee-Seon Keum. "Art Law: Looking Back, Looking Forward." *Chapman Law Review*, vol 20, no. 1, 2017, pp. 121-124; 128.

and imposing new standards for the art market at both the federal and state level.[10] Intellectual property is an especially prominent field within art law, as it governs copyright and trademark, which through the granting of exclusive rights to artists, impacts creative output and affects artists' ability to distribute originals and reproductions of their work.[11]

Finally, the moral rights, or *droit moral*, are the natural rights that a creator or artist holds within their work, including paternity and integrity. Under *droit moral*, artworks are regarded as an extension of the artist's personality, and thus, require special considerations and protection. The rights that are included under *droit moral* include the right to attribution, integrity, disclosure, withdrawal, and resale royalties, or *droit de suite*.[12] Resale royalty holds a unique status among the *droit moral*, as it has both economic and moral qualities: it is directly linked to the moral conception of copyright, indicating that an artist's creative process and the resulting personality in their work have a moral right to be maintained and protected in combination with the artist's right to participate in future economic capitalization of their work.[13] Though the European *droit moral* tradition was established in France and Germany in the early 1920s, leading to inclusion in the 1928 amendment of by the Berne Convention for the Protection of Literary and Artistic Works, the United States did not join the Convention until 1988, establishing American artists' moral rights only in 1990.[14] In spite of the present-day adoption of moral rights in the United States through the 1990 Visual Artists Rights Act (VARA), there is

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[10] Lind, Robert C., Robert M. Jarvis, and Marilyn E. Phelan. *Art and Museum Law: Cases and Materials*. Durham, N.C: Carolina Academic Press, 2002, p. 9.; Steiner, Christine, and Bee-Seon Keum. "Art Law: Looking Back, Looking Forward." *Chapman Law Review*, vol 20, no. 1, 2017, p. 127.

[11] Frye, Brian L. "Art Law & the Law of the Horse." 10 Dec. 2017, p. 5-6; Steiner, Christine, and Bee-Seon Keum. "Art Law: Looking Back, Looking Forward." *Chapman Law Review*, vol 20, no. 1, 2017, p.143.

[12] Frye, Brian L. "Art Law & the Law of the Horse." 10 Dec. 2017, p. 7; Mastrangelo, Lara. "Droit de Suite: Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International and Comparative Law,* Vol 18, No. 1, 3 June 2018, p. 4.

[13] Reddy, Michael B. "The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty." *Loyola of Los Angeles Entertainment Law Review*, vol. 15, no 3, 1995, pp. 510.

[14] Mastrangelo, Lara. "Droit de Suite: Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International and Comparative Law,* Vol 18, No. 1, 3 June 2018, p. 5.

still no formal conception of *droit de suite* in the US, hence motivating the study at hand. In what follows, I will discuss resale royalties, their history both internationally and domestically, and the possibilities for their adoption in the United States.

III. What are resale royalties; comparison to royalties in music, publishing

Before examining the intricacies of resale royalty law, it is necessary to briefly explore royalties more generally. Royalties are payments made from one party to another for the continuous use of an asset, typically under a licensing agreement. Currently, royalties are in use for a variety of purposes outside of the domain of the visual arts. The sale of books and musical works are subject to royalties upon future sale, providing monetary benefit for authors, composers, and performers for decades to come. Conversely, visual artists are compensated for the initial sale of their work, rather than through the reproduction of their works. Within the visual arts, resale royalty law would provide for percentage-based royalty payments made to the original artist upon resale of their original work, differing from the royalties imposed on reproducible musical and literary works.[15] For example, when a sculpture has been sold from an artist to a collector, and then the collector sells the sculpture to a gallery, the second transaction would trigger the requirement for the payment of a resale royalty.

Proponents of resale royalty maintain that if established for US artists, resale royalty law could purportedly serve as additional protection for artists' rights alongside other initiatives such as the Visual Artists' Rights Act (VARA). In brief, a resale royalty law in the US would allow American artists to more directly receive financial benefit from their future artistic success. Although not every artist sees immense future growth in popularity, without a provision for resale royalties, those who do are entirely unable to profit off the potentially skyrocketing value

[15] Hansmann, Henry, and Marina Santilli. "Royalties for Artists versus Royalties for Authors and Composers." *Journal of Cultural Economics*, vol. 25, no. 4, 2001, pp. 259–81.; "Resale Royalty Right." *Copyright.gov*, U.S. Copyright Office, https://www.copyright.gov/docs/resaleroyalty/.

of their work. Consider the oft-cited case of Robert Rauschenberg and his painting, *Thaw*. When the piece was resold in 1973—fifteen years after its initial sale for $900—its purchase price was $85,000, over sixty times its original cost when adjusted for inflation. Because Rauschenberg received compensation exclusively from the first sale, only the collectors and sellers downstream were able to benefit from the increased value of the artwork.[16] If the United States had a provision for resale royalties, however, Rauschenberg would have been eligible to receive a percentage of the $85,000 secondary sale price.

IV. European origins and iterations: droit de suite

Although resale royalties remain conspicuously absent in the United States, resale royalty law is well-established in Europe. Initially instituted in France in the 1920s, the legal conception of *droit de suite*, or "right to follow," has been subsequently adopted in over seventy European countries. In the original French iteration of resale royalty law, artists or their heirs receive a royalty from resale up to seventy years after the artist's death, with both collectors and private dealers held responsible for paying this royalty under the current law. The royalty provided graduated payments depending on the monetary value of the artwork, with a rate of 1% for artworks sold for 1,000 to 10,000 francs, 2% for artworks sold for 20,000-50,000 francs, and 3% for works over 50,000 francs.[17] All other resale royalty laws in Europe are closely related to this original model, particularly after the 1948 revision of the Berne Convention and the Tunis Model Law on Copyright for Developing Countries of 1976, both of which included an optional provision for *droit de suite*.[18]

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[16] Merryman, John Henry. "The Wrath of Robert Rauschenberg." *The American Journal of Comparative Law*, vol. 41, no. 1, 1993, p. 110.
[17] Frye, Brian L. "Equitable Resale Royalties." *Journal of Intellectual Property Law,* vol 24, 19 Jan. 2017, p. 7.
[18] Reddy, Michael B. "The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty." *Loyola of Los Angeles Entertainment Law Review*, vol. 15, no 3, 1995, p. 519.

Most recently, the implementation of Directive 2001/84/EC called for all European Union member states to adopt and adhere to resale laws on an equal basis.[19] With the adoption of the directive, all European countries were required to align their laws with the newly implemented standards, or establish new laws if there were none already enacted. Under this directive, the resale law is applicable to sales of original works of "graphical or plastic art" between sellers, buyers, and other intermediary art professionals.[20] The maximum amount of resale royalty payable to an artist is €12,500, while the minimum required price for royalty to be gathered from a sale is €3,000.[21] The law is applicable to artists who are citizens of European Union countries or other countries that also provide resale royalties, and under these provisions the artist benefits for life, with their heirs eligible to receive the royalties for 70 years after the artist's death.

The last country to follow this directive was the United Kingdom, which remained firmly opposed to its adoption until it reluctantly complied at the latest opportunity in 2006. The United Kingdom's adoption of resale royalties is notable because of the global prominence of the art market in London; it has further contributed to the significant pressure to establish resale royalties at a global level, particularly in the United States.[22] However, in the wake of the United Kingdom's exit from the EU, less than twenty years after its participation in the uniform European adoption of resale royalty law, it remains unclear whether the British laws will be upheld or revoked. The British art market remains divided on resale royalties, with curators and artists maintaining support for *droit de suite*, whereas market officials have continued their

[19] Frye, Brian L. "Equitable Resale Royalties." *Journal of Intellectual Property Law,* vol 24, 19 Jan. 2017, p. 8.
[20] DuBoff, Leonard D, Sherri Burr, and Michael D. Murray. *Art Law: Cases and Materials*. New York, NY: Aspen Publishers, 2010, p. 248.
[21] Frye, Brian L. "Equitable Resale Royalties." *Journal of Intellectual Property Law,* vol 24, 19 Jan. 2017, p. 10.
[22] Mastrangelo, Lara. "Droit de Suite: Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International and Comparative Law,* Vol 18, No. 1, 3 June 2018.

oppositional stance.[23] Due to the global influence of the British art market, the eventual fate of the United Kingdom's resale royalty law may be of consequence to the already uncertain chances of the royalty's adoption in the US, and should be closely monitored.

V. Legislation in the United States

In the United States, there have been several attempts to enact resale royalty laws to varying degrees of success at both the federal and state level. At the federal level, the first efforts to implement resale royalty law were the initial versions of VARA in 1978, later amended in 1986 and 1987. These earlier iterations of VARA included a provision stipulating resale royalties for the duration of the artist's life plus 50 years, and would pay the artist 7 percent of the appreciated value achieved upon secondary sale, insofar as the increase in value was at least 150% and the sale price of the artwork was at least $1,000.[24] Ultimately, this controversial provision was eliminated from the final edition of the 1990 bill; however, the implementation of VARA did at least delegate the task of determining the viability of resale royalty to the Copyright Office, which in 1992 released a report outlining its feasibility. This report concluded that *droit de suite* should not yet be implemented in the US, but provided guidelines for the potential enactment of *droit de suite* in the future. The report cited a lack of empirical evidence to support the effects of resale royalties, especially because at the time the European Union had not yet finalized or coordinated its laws, something that would later be achieved through the 2001 Directive. In 2013, over a decade after the EU's harmonization of its resale royalty laws, the Copyright Office released an update on its original report, revising it to cautiously conclude that *droit de suite* might be a feasible option for Congress to consider on behalf of the protections

[23] Rub, Guy A. "The Unconvincing Case for Resale Royalties." Yale Law Journal. vol 124, 25 April 2014, pp. 667-668.
[24] United States, Congress, Senate. Visual Artists Rights Act of 1988. *Congress.gov*, https://www.congress.gov/bill/100th-congress/senate-bill/1619/text?r=93&s=1. 100th Congress, Senate Bill 1619, Introduced 6 Aug. 1987. United States, Congress, Senate. Visual Artists Rights Amendment of 1986. Congress.gov, https://www.congress.gov/bill/99th-congress/senate-bill/2796. 99th Congress, Senate Bill 2796, Introduced 9 Sept. 1986.

of artists. In brief, the report demonstrated that visual artists are disproportionately disadvantaged compared to other creators and that there was no evidence that resale royalties would harm the US art market. Finally, the 2013 report included an array of practical suggestions for its enactment and enforcement.[25]

Between the 1992 report's unfavorable conclusions and the 2013 report's more promising determinations, there were other attempts toward achieving federal legislation in the US. The 2011 Equity for Visual Artists Act (EVAA) proposed the inclusion of a resale royalty right through the amendment of a preexisting federal copyright law and called for large auction houses to pay a royalty essentially equivalent to European resale royalty laws, stipulating "7% for resales in excess of $10,000 at large auction houses, half of which would go to the visual artists, and the other half to nonprofit art museums in the United States."[26] However, the EVAA was not passed by Congress for two primary reasons: first, because the EVAA only concerned large auction houses which sold more than $25 million dollars of artwork annually, all of the sales in the private sector would go unregulated. This exclusive regulation of public auction could encourage migration of sales to the unsupervised private sector.[27] Second, the 7% royalty was to be divided between the artist, museum, and other administrative costs, resulting in less than 3% of royalty funds being received by the artist, greatly reducing their potential benefit.[28]

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[25] Kumar, Nithin. "Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of Droit De Suite Legislation." *The Columbia Journal of Law & The Arts*, vol. 37, no. 3, July 2014, p. 461; Mastrangelo, Lara. "Droit de Suite: Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International and Comparative Law,* Vol 18, No. 1, 3 June 2018, p. 18.

[26] Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, p. 332.

[27] Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, p. 364.

[28] United States, Congress, House. Equity for Visual Artists Act of 2011. *Congress.gov*, https://www.congress.gov/bill/112th-congress/house-bill/3688. 112th Congress, House Resolution 3688, Introduced 15 Dec. 2011.

VI. State Legislation

There have also been numerous attempts to enact resale royalty legislation at the state level, including in Massachusetts, New York, Illinois, and most notably, California.[29] The California Resale Royalties Act (CRRA), passed in 1976 and enacted in 1977, is the only example of a successfully effected resale royalty law in the United States. Resembling European notions of droit moral and droit de suite, the CRRA provided that if a work of fine art (under California law, either an original painting, sculpture, drawing, or glass work) was resold by a seller residing in California, or resold in California for at least $1,000, the artist would be entitled to receive 5% of the resale price from the seller within ninety days of the sale. The royalty would apply throughout the duration of the artist's life, plus twenty years, and applied exclusively to sales "at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent," and was not applicable to private sales.[30]

Today, the CRRA is functionally invalid, as in 2018 it was invalidated on the grounds of federal preemption, which provides that in the case of conflict between state and federal law, the state law will be displaced by the federal law, which is the higher authority.[31] Both in its scope and enforcement, the CRRA ultimately paled in comparison to most European resale royalty laws: it seems that the extent of its underenforcement had especially curtailed its effectiveness. One reason for these enforcement issues was the difficulty of tracking down artists and paying them—though the CRRA created a council to deal with payment issues, it was inefficient and

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[29] Shipley, David E. "Droit de Suite, Copyright's First Sale Doctrine and Preemption of State Law." *Hastings Communications and Entertainment Law Journal*, 4 Oct. 2016, p. 6; Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, p. 339.
[30] California, State Legislature. California Resale Royalties Act, Civil Code section 986. *https://leginfo.legislature.ca.gov,* 1976. *California Legislative Information,* https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV&sectionNum=986.#; Rub, Guy A. "The Unconvincing Case for Resale Royalties." Yale Law Journal. vol 124, 25 April 2014, pp. 658.
[31] *United States Constitution*. Article VI, Clause 2.

difficult to maintain.[32] Aside from these enforcement problems, as written, the CRRA suffered from serious limitations, because it only applied to public and dealer resale, and not private resales. In theory, this limited scope should have at least made the CRRA easier to administer. Public resale may be fairly transparent and thus simpler to monitor, whereas this is not the case for private resales, which are inherently less trackable even if subjected to the same standards as resales from significantly larger auction houses.[33] By eliminating the need to assess inconspicuous private sales, the CRRA should have at least been enforced rigorously within its established boundaries. However, this was not the case. By 1987, a decade after its enactment, only $15,000 of royalties had been collected, and until the mid 2010s, only about 400 artists had received royalties through the CRRA.[34]

These fundamental enforcement issues eventually precipitated the CRRA's downfall. A 2011 class-action suit filed by a group of artists against Sotheby's, Christie's, and eBay asserted that the three defendants sold works at auction without paying resale royalties required by the CRRA. This case led to the District Court for the Central District of California's 2012 finding that the CRRA violated the Dormant Commerce Clause, a Constitutional restriction on the passing of state laws that would unduly interfere with interstate commerce. As the federal Commerce Clause explicitly provides Congress with the singular authority to control interstate commerce, states are implicitly prevented from regulating or burdening commercial transactions that cross state lines.[35] According to the District Court, in effect, the CRRA regulated sales

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[32] Kumar, Nithin. "Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of Droit De Suite Legislation." *The Columbia Journal of Law & The Arts*, vol. 37, no. 3, July 2014, pp. 5-7.
[33] Merryman, John Henry, and Albert E. Elsen. *Law, Ethics, and the Visual Arts*. 3rd ed. Kluwer Law International, 2007, p. 609; Rub, Guy A. "The Unconvincing Case for Resale Royalties." Yale Law Journal. vol 124, 25 April 2014, pp. 668.
Merryman, John Henry. "The Wrath of Robert Rauschenberg." *The American Journal of Comparative Law*, vol. 41, no. 1, 1993, p. 121.
[34] Cohen, Patricia. "Artists File Lawsuits, Seeking Royalties." *The New York Times*, The New York Times, 1 Nov. 2011, https://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html.

[35] *United States Constitution*. Article I, Section 8, Clause 3.

occurring outside of its borders because as long as the seller of the artwork resided in California, the statute would apply to sales occurring anywhere in the United States.[36] Consequently, the CRRA was almost entirely invalidated by the Ninth Circuit Court of Appeals in 2018 when the court's decision held that the federal 1976 Copyright Act preempted the state royalty law, since the latter conflicted with the first sale doctrine of the Copyright Act by improperly enhancing the artist's distribution right and limiting a purchaser's lawful ability to sell artwork.[37] The lengthy series of legal battles that followed culminated with rendering the CRRA as essentially invalid, as it was determined only to apply to secondary sales that took place in 1977, the only year the CRRA was active before the enactment of the 1976 Copyright Act, which was implemented in 1978.

VII. Why resale royalties? Analysis of perspectives, issues

With the virtual elimination of the CRRA, the scope of possibilities for the future of resale royalty laws in the United States has narrowed. As noted above, the law has faced significant roadblocks in the United States due to the many controversies surrounding resale royalties as well as concerns regarding its fairness and enforceability. Thus, before examining solutions for the possible enactment of resale royalties, it is necessary to explore the arguments for both sides to evaluate their merits and feasibility.

A. Proponents' view

There are a few primary justifications for establishing a resale royalty law. First is the claim that artists are currently treated differently from authors and composers, and should be

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[36] Mastrangelo, Lara. "Droit de Suite: Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International and Comparative Law,* Vol 18, No. 1, 3 June 2018, p. 19; Kumar, Nithin. "Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of Droit De Suite Legislation." *The Columbia Journal of Law & The Arts*, vol. 37, no. 3, July 2014, p. 451.

[37] Shipley, David E. "Droit de Suite, Copyright's First Sale Doctrine and Preemption of State Law." *Hastings Communications and Entertainment Law Journal*, 4 Oct. 2016, p. 9; United States, Court of Appeals for the Ninth Circuit. *Close v. Sotheby's, Inc*. 3 December, 2018. *LexisNexis*, https://www.lexisnexis.com/community/case-opinion/b/case/posts/close-v-sotheby-s-inc.

elevated to equal status. Without a resale royalty right, the first sale of an artwork is of paramount consequence to the artist, who has no ability to benefit from future sale, and is thus more likely to lose possible profits. This perspective depends on the "starving artist" rationale, which is based on the notion that artists unfairly struggle to make a living from their work, and that both artists and their heirs stand to benefit significantly from secondary sale royalties. When the resale royalty was first implemented in France, the vision of the struggling, starving artist was a commonly held view among the public, demonstrated most famously in the opening scene of the French opera *La bohème*.[38]

Another justification emphasizes the personal link that artists have with their work, closely associated with the conception of *droit moral*—that artists maintain a personal connection to their artwork, which functions as a unique, original projection of the artist's personality, unlike the productions made within other creative fields.[39] Because of the artist's genius, creative ability, and reputation, some scholars primarily attribute the increase in resale value to artists' continued production of work and self-marketing efforts, rather than to the efforts of dealers and other representatives.[40]

Finally, the third primary argument focuses on the resale royalty as providing an economic incentive for artmaking. Like copyright protections, resale royalties would encourage artistic production through the promise of payment through secondary sale, encouraging artists to improve their reputations, expand their artistic oeuvres, and refine their work.[41] If artists struggle

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[38] Shipley, David E. "Droit de Suite, Copyright's First Sale Doctrine and Preemption of State Law." *Hastings Communications and Entertainment Law Journal*, 4 Oct. 2016, p. 6.
[39] Reddy, Michael B. "The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty." *Loyola of Los Angeles Entertainment Law Review*, vol. 15, no. 3, 1995, p. 517.
[40] Pierredon-Fawcett, Liliane de. *The Droit De Suite in Literary and Artistic Property: A Comparative Law Study*. Center for Law and the Arts, Columbia University School of Law, 1991, p. 2; Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, pp. 344.
[41] Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, p. 345.

to find remuneration for their work, and subsequent increase in the value of their work is primarily awarded to resellers and middlemen, there will be less motivation for artists to continue their creative pursuits. Though many artists may be unable to ultimately achieve artistic success, much less success on the secondary market, resale royalties may serve as an incentive alongside the potential for fame and desire for personal fulfillment and self-expression. More generally, some scholars argue that as a key player in the global market, the US is obligated to follow the global trend, in response to the unanimous adoption of resale royalties by European countries, along with the Latin American countries that have followed suit.[42]

B. Opposing views

In response to these proponents' views, there are four primary arguments that have been made against resale royalty in the United States: 1. a resale royalty would harm the current market for fine art; 2. it would benefit only a select few artists; 3. it would be unenforceable; and 4. it would be unfair, whether due to its "one-sidedness" or its divergence from other established forms of royalties.[43]

1. Resale royalties would harm the current market

Those who caution against resale royalties contend that they would not be advantageous for visual artists, and often even consider them to be actively harmful to the interests of artists.[44] Concerns regarding resale royalty's impact on the art market began with the earliest iteration of resale royalty legislation in France, with art dealers in the 1920s proclaiming that French public auction would be negatively impacted through the preference of international sale.[45] According

[42] Mastrangelo, Lara. "Droit de Suite: Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International and Comparative Law,* Vol 18, No. 1, 3 June 2018, p. 23.
[43] Reddy, Michael B. "The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty." *Loyola of Los Angeles Entertainment Law Review*, vol. 15, no 3, 1995, p. 527.
[44] Weil, Stephen E. *Beauty and the Beasts: On Museums, Art, the Law, and the Market*. Smithsonian Institution Press, 1990, p. 211.
[45] DuBoff, Leonard D, Sherri Burr, and Michael D. Murray. *Art Law: Cases and Materials*. New York, NY: Aspen Publishers, 2010, p. 236.

to Stephen Weil and John Merryman, as the resale royalty has historically been an unwaivable right, it would function like a tax by affecting the demand for artwork, eventually reducing price and therefore reducing the funds used toward for the purchase of contemporary art overall.[46] Many artists, especially those with less established careers, also may never make it to the secondary market; thus, they would never benefit from a resale royalty, and be adversely affected by the accompanying reduction of primary sale prices. Rather than establishing resale royalties, according to this view, it would be better to provide incentives for greater spending on artwork through government-levied taxes, including percent for art legislation, which would designate a percentage of public project funds for use by public art programs.[47]

2. Resale royalties would benefit only a select few artists

Scholars have dismissed the starving artist rationale as a poor justification for legal reform, dismissing it as a "folkloric," "romantic nineteenth-century notion," claiming that resale royalty laws would primarily benefit already successful artists, rather than transferring wealth to newer, younger artists.[48] As mentioned above, most artists' works are not sold on the secondary market, therefore, resale royalties would fail to benefit the majority of artists. Additionally, a resale royalty law would be unlikely to provide economic benefit or incentive to artists who have not already achieved renown: as resale royalties are generally calculated as a certain percentage of the selling value, for artists who have achieved marginal or no financial success, the resale royalty does little to help, whereas it pays significant amounts to the artists who are already

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[46] Merryman, John Henry. "The Wrath of Robert Rauschenberg." *The American Journal of Comparative Law*, vol. 41, no. 1, 1993, pp. 118-119; Weil, Stephen E. *Beauty and the Beasts: On Museums, Art, the Law, and the Market*. Smithsonian Institution Press, 1990, pp. 211, 216.

[47] Weil, Stephen E. *Beauty and the Beasts: On Museums, Art, the Law, and the Market*. Smithsonian Institution Press, 1990, pp. 220-222.

[48] Merryman, John Henry. "The Wrath of Robert Rauschenberg." *The American Journal of Comparative Law*, vol. 41, no. 1, 1993, pp. 107; Rub, Guy A. "Experimenting with State-Enacted Resale Rights." *Kentucky Law Journal,* Vol 107, no. 4, 2019, pp. 666-667; Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, pp. 345-346.

successful.[49] Further, if resale royalties decrease the upfront cost of primary sale, they might actually transfer wealth from the unsuccessful artists to those who are prosperous, lessening the possible profits that the majority of artists could more realistically hope to receive.[50]

In response to these concerns, other scholars have proposed that even if resale royalties may tend to provide protections to already well-established artists, and few benefits to marginal artists, they would still balance profits between market sellers and artists, improving pay conditions for artists altogether.[51] Furthermore, as noted above, instances of resale are generally infrequent, and will rarely occur for the work of more marginal artists. While paying resale royalties for the works of well-established artists would be costly for sellers, implementing resale royalties might not have such a widespread impact on the art market after all, since there would not be a relatively few incidences of resales requiring royalty payments.

3. Resale royalties are unenforceable

Opponents of resale royalty also consider legislation to be inefficient and ineffective because of prior sporadic enforcement in Europe and the United States.[52] In many places where resale royalties have been established, they are neglected and underused, likely because they are enforced as civil rather than criminal law.[53] In all countries except Italy, violation of the droit de suite does not elicit the protections of criminal law—in response to a violation, artists can only file a civil suit. For many years, resale royalties in Europe were rarely enforced; at least until the early 1990s, 24 of 29 jurisdictions internationally (most of these jurisdictions were European, but

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[49] Frye, Brian L. "Equitable Resale Royalties." *Journal of Intellectual Property Law,* vol 24, 19 Jan. 2017, p 26.
[50] Frye, Brian L. "Equitable Resale Royalties." *Journal of Intellectual Property Law,* vol 24, 19 Jan. 2017, p. 31. Pierredon-Fawcett, Liliane de. *The Droit De Suite in Literary and Artistic Property: A Comparative Law Study*. Center for Law and the Arts, Columbia University School of Law, 1991, p. 144.
[51] Mastrangelo, Lara. "Droit de Suite: Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International and Comparative Law,* Vol 18, No. 1, 3 June 2018, pp. 11-12.
[52] Rub, Guy A. "Experimenting with State-Enacted Resale Rights." *Kentucky Law Journal,* Vol 107, no. 4, 2019, p. 669-670; Merryman, John Henry. "The Wrath of Robert Rauschenberg." *The American Journal of Comparative Law*, vol. 41, no. 1, 1993, p. 103.
[53] Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, pp. 347.

also included California) that recognized a resale royalty right in principle rarely applied the law.[54] Though France had a fair compliance record, countries like Italy struggled with widespread underenforcement, likely due to the complexity of their resale royalty laws—one facet of the pre-directive Italian law called for the usage of a sliding scale, which increases the amount of royalty an artist can receive when resale greatly outweighs the initial sale price.[55] The continued underenforcement of California's resale royalties also serves as an especially prominent example for opponents of resale royalties, as the resulting ineffectuality of the resale royalty right made it difficult to achieve its principles.[56]

Before the implementation of the European directive in the United Kingdom, due to the international presence of its market, concerns arose regarding a similar migration of sales to other comparable markets abroad that do not have resale royalties—namely, the United States and China.[57] However, the results of a study conducted by the United Kingdom's intellectual property office illustrated that there had been no shift in sale location.[58] Moreover, the analysis of statistical data demonstrates that while the United Kingdom's sales in postwar and contemporary art have dropped, sales have also decreased in the United States and China, rather than increasing, indicating that the resale right may not be such a pivotal factor in the fluctuations of the art market.[59]

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[54] Pierredon-Fawcett, Liliane de. *The Droit De Suite in Literary and Artistic Property: A Comparative Law Study*. Center for Law and the Arts, Columbia University School of Law, 1991, p. 106, 133-135.
[55] Hansmann, Henry, and Marina Santilli. "Royalties for Artists versus Royalties for Authors and Composers." *Journal of Cultural Economics*, vol. 25, no. 4, 2001, pp. 259.
[56] Kumar, Nithin. "Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of Droit De Suite Legislation." *The Columbia Journal of Law & The Arts*, vol. 37, no. 3, July 2014, pp. 449; Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, p. 347.
[57] Lazerow, Herbert I. "Art Resale Royalty Options." *San Diego Legal Studies,* May 2016, p. 238.
[58] Mastrangelo, Lara. "Droit de Suite: Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International and Comparative Law,* Vol 18, No. 1, 3 June 2018, pp. 10-11.
[59] Mastrangelo, Lara. "Droit de Suite: Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International and Comparative Law,* Vol 18, No. 1, 3 June 2018, p. 20.

4. Resale royalties are otherwise unfair, unjustifiable

Finally, critics of the right to resale royalties assert that resale royalties are inherently unfair and rely on either a distorted view of the artist-dealer relationship or a misleading comparison between artists and other creators. First, increase in resale value may be more properly attributed to successful efforts by dealers, collectors, and critics, rather than artists themselves.[60] The example of the collector who profits off resale may not be a particularly common one; even as the "wrath of Robert Rauschenberg" and the image of the starving artist have endured, it is statistically unclear how many works are sold on the secondary market at a higher, windfall price to the benefit of dealers and agents.[61] Furthermore, it is also uncertain how well hypothetical and anecdotal examples properly account for inflation, interest cost, and expenses of ownership.[62]

Opposing scholars also do not accept that visual artists can be aptly compared to authors and composers, instead arguing that the proposed resale royalty differs from a typical royalty and does not extend from the established conception of property and ownership. When considering the top five most successful artists in comparison to composers and authors, the overall earnings of visual artists appear to be consistently above the earnings of composers and authors, even when accounting for royalties. According to this view, the sale of a single work can secure an artist's living, whereas many more sales of books and recordings are necessary for the success of composers and authors.[63]

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[60] Merryman, John Henry. "The Wrath of Robert Rauschenberg." *The American Journal of Comparative Law*, vol. 41, no. 1, 1993, pp. 109-110.
[61] Weil, Stephen E. *Beauty and the Beasts: On Museums, Art, the Law, and the Market*. Smithsonian Institution Press, 1990, p 214.
[62] Weil, Stephen E. *Beauty and the Beasts: On Museums, Art, the Law, and the Market*. Smithsonian Institution Press, 1990, p. 215.
[63] Merryman, John Henry. "The Wrath of Robert Rauschenberg." *The American Journal of Comparative Law*, vol. 41, no. 1, 1993, pp. 108, 113; Weil, Stephen E. *Beauty and the Beasts: On Museums, Art, the Law, and the Market*. Smithsonian Institution Press, 1990, p. 212.

A few objections can be made in response to this view. The works of authors and composers do not have to achieve success overnight to become profitable, albeit under the current system, the visual artwork only has one initial opportunity to become successful. Many visual artworks cannot be as easily reproduced as books or musical compositions, and even for works that are reproducible, there may be distinctive value present within an original edition or model. Additionally, as noted earlier, VARA's provisions allow for the protection of sculptures, prints, and certain photographs in editions of no more than 200, a number far smaller than the sales that are universally achieved by bestselling books and chart-topping albums.

C. Other concerns

Within the scholarly arguments of both the proponents and opponents of resale royalty law, there is a dearth of consistent, reliable empirical data, which has contributed to a compromising dependence on anecdotal evidence and theoretical arguments to support competing views. Perhaps this is why scholarly arguments have generally failed to convince lawmakers, and by extension, could be why legislative efforts have not resulted in more specific, readily enforceable provisions of resale royalty law in the United States.[64] A variety of conflicting evidence is often used to support many of the scholarly positions examined above. For example, those who argued against the establishment of the CRRA often cite the subsequent closure of Sotheby's Los Angeles branch as evidence of the detrimental effect on the California art market and its smaller galleries.[65] Even so, others cite a survey of art dealers by the 1986 California Lawyers for the Arts, which indicated that royalty had no effect on their sales. On a similar note, some scholars argue that the United States and China's recent dominance over the

[64] Lazerow, Herbert I. "Art Resale Royalty Options." *San Diego Legal Studies,* May 2016, pp. 201-267; Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, p. 347.

[65] Merryman, John Henry. "The Wrath of Robert Rauschenberg." *The American Journal of Comparative Law*, vol. 41, no. 1, 1993, p. 116; Rub, Guy A. "The Unconvincing Case for Resale Royalties." Yale Law Journal. vol 124, 25 April 2014, p. 665.

art market (comprising 66% of global sales) can be ascribed to the two countries' lack of resale rights, while dissenting scholars have responded by stating that the British art market was still ranked second in the world, with a similar decrease in market shares between the US, China, and the United Kingdom.[66] Empirical evidence can be an considerably effective tool; however, the inconsistencies between various studies, as well as the ways in which these studies have been utilized by legal scholars, has often led to ambiguous, inconclusive results.

D. A means for equity and social justice?

In spite of the enforcement difficulties, information problems, and potential unfairness associated with resale royalties, it is difficult to reject arguments in favor of resale royalties entirely, particularly when considering their relevance as a means for achieving equity and social justice. Though the starving artist example may seem less compelling after further analysis, what may be worth considering more closely is the example of the artist who is both marginal in his or her vocational success and has also been marginalized on a socioeconomic and political level. The most convincing cause for resale royalties may not just be about achieving equity between artists, composers, and authors more generally, but for achieving equity for those artists who have been particularly disadvantaged, thus retaining the general framework of the "starving artist" model yet also augmenting it. Equitable resale royalties could therefore function as another means of achieving social justice, benefitting and rectifying the historical marginalization and underrepresentation of artists.

The potential monetary gains that would be made possible through resale royalties may particularly benefit Black artists, who have been historically marginalized, as well as female

[66] Mastrangelo, Lara. "Droit de Suite: Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International and Comparative Law,* Vol 18, No. 1, 3 June 2018, p. 16; Zhao, Zhao. "Fulfilling the Right to Follow: Using Blockchain to Enforce the Artist's Resale Right." *Cardozo Arts & Entertainment Law Journal*, vol. 39, no. 1, 2021, p. 246.

artists and those of other traditionally underrepresented groups.[67] In recent years, there has been an unprecedented surge of interest in the works of Black artists. Buyers have purchased the works of artists such as Kerry James Marshall and Jean-Michel Basquiat at record-breaking prices that have far surpassed previous auction highs, and these surging figures can be attributed to a newer tendency to reevaluate the work of neglected artists, revising previous stigmas and making it more likely for secondary sales and future primary sales to take place.[68] As it stands, younger, newly established Black artists are the only ones who stand to benefit from this newly established appreciation, but if a resale royalty were established, these benefits would extend to a greater proportion of the community.

Resale royalties may also ameliorate past injustices experienced by indigenous artists, whose artworks are notorious for being initially purchased at low prices, only to be marked up significantly at secondary sale. An example reminiscent of the resale of Rauschenberg's *Thaw* forcefully illustrates this point. *Water Dreaming at Kalipinypa*, a depiction of a spiritually sacred site painted by aboriginal artist Johnny Warangkula Tjupurrula. After its original purchase price of $75, it was sold for $263,145 in 1997, 25 years after its first sale. In 2000, the artwork was again sold for an even higher price—$486,500.[69] In both instances of resale, Tjupurrula received no payment from the buyer or seller because of the lack of resale royalty provisions. Whether or not these astonishing profits are due to the dealer's work and curatorial efforts, Tjupurrula's complete inability to benefit from sharing his culturally significant artmaking practices is deeply disheartening, particularly because of the ways in which indigenous peoples have persistently

[67] Anderson, Maxwell. "'Self-Taught' Black Artists Are Often the Last to Benefit When Their Prices Go Up. But We Can Change That—Here's How." *Artnet News*, Artnet, 25 Nov. 2020, https://news.artnet.com/opinion/resale-royalties-souls-grown-deep-1926363.
[68] Reyburn, Scott. "Auction Buyers Are Catching on to African-American Art." *The New York Times*, The New York Times, 25 May 2018, https://www.nytimes.com/2018/05/25/arts/design/art-market-african-american-art.html.
[69] Zhao, Zhao. "Fulfilling the Right to Follow: Using Blockchain to Enforce the Artist's Resale Right." *Cardozo Arts & Entertainment Law Journal*, vol. 39, no. 1, 2021, p. 258.

experienced socioeconomic injustices. Furthermore, in contrast to Tjupurrula, Rauschenberg was already artistically well-established at the time of the resale of *Thaw*, as opponents of the resale royalty have recognized. Yet, Tjupurrula has remained comparatively unknown in spite of the increased value of his work.[70]

VIII. The future of resale royalty law in the US: Potential avenues for enactment

After examining the variety of legal stances on resale royalty law, there are several potential solutions for its implementation. Several legal scholars have explored the possibilities for establishing resale royalties, with an emphasis on federal, state, and private models, each of which would range in terms of their scope and flexibility. The feasibility, benefits, and disadvantages of both legislative and private options will be explored below.

A. Federal solutions

Due to the Copyright Act being a federal statute, efforts to effectively establish resale royalty laws within the United States would need to emerge from Congress. Indeed, the Copyright Office's 1992 report emphasized that because of the possibilities of issues with "preemption, enforcement, and multiple application, any *droit de suite* that is enacted in the United States should be at the federal level."[71] Possibilities for the federal implementation of resale royalties would include amending the Copyright Act to account for resale royalties as the EVAA did, instead of overlooking them entirely, or alternatively, creating a national system through the enactment of new legislation. The most recent attempts at federal legislation include the Resale Royalties Too (RRT) Act of 2014 and the American Royalties Too (ART) Act of 2018. The ART, just as the RRT previously recommended, called for the amendment of Title 17

[70] Merryman, John Henry. "The Wrath of Robert Rauschenberg." *The American Journal of Comparative Law*, vol. 41, no. 1, 1993, pp. 107.
[71] Zhao, Zhao. "Fulfilling the Right to Follow: Using Blockchain to Enforce the Artist's Resale Right." *Cardozo Arts & Entertainment Law Journal*, vol. 39, no. 1, 2021, p. 249.

of the United States Code, proposing the institution of a royalty of 5% on works sold for up to $35,000 at auction houses making at least one million dollars in sales annually.[72] This royalty would have been inalienable, unassignable and unwaivable, therefore following both the Copyright Office's recommendations and the preexisting model devised through the European Directive of 2001. However, just like the EVAA, although this model may be easier to enforce because of its narrow applicability to auction houses, it could result in migration to private sales.

Besides this potential for migration from the public to the private sphere, there are other economic concerns regarding the enforcement of a federal resale royalty law, such as the cost of administrative action and distribution of royalties to artists and their families. In evaluations of other national iterations of resale royalty law, administrative costs have been a key concern for opponents of resale royalties. Certain systems, including those in the United Kingdom and France, expect larger private organizations to administer the collection and distribution of royalties in exchange for a share.[73] In other systems, such as the CRRA, a public agency has been designated to handle administration. Whether expecting private, member-only artist's rights organizations to administer the collection of a fee or allocation (which may introduce further inequalities into the art world because of inaccessibility to the public), or requiring a public agency to carry out these duties, the costs of distribution are high, and can be viewed as a waste of government funds.[74] These significant costs are especially difficult to justify for less expensive works, the royalties for which could be only in the double digits. Thus, a threshold for low-value works has some merit, as it would limit the number of transactions that must be

[72] United States, Congress, House. American Royalties Too Act of 2018. *Congress.*gov, https://www.congress.gov/bill/115th-congress/house-bill/6868. 115th Congress, House Resolution 6868, Introduced 25. Sept 2018.
[73] Rub, Guy A. "The Unconvincing Case for Resale Royalties." Yale Law Journal. vol 124, 25 April 2014, pp. 667-668.
[74] Frye, Brian L. "Equitable Resale Royalties." *Journal of Intellectual Property Law,* vol 24, 19 Jan. 2017, p. 38; Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, pp. 359-361.

performed for minimal payoff. As more limited efforts are utilized toward enforcing low-cost resales, unclaimed funds could instead contribute to museums or other art education initiatives.[75]

Under a prospective federal model, one viable solution to the issues of cost and efficiency is having the burden of enforcement and distribution fall upon the federal government, as the Copyright Report has suggested that oversight and administrative fees paid to private collection societies will help limit the administrative costs that often accompany resale royalties. A federal resale royalty law could rely on the Copyright Office's registration system to maintain a detailed record of works, thus limiting the amount of inquiry that would need to be conducted.[76] The system would function similarly to registering for copyright under an administrative agency, requiring artists to register first sale, and sellers to register secondary sale, allowing for a more streamlined collection of data and easier subsequent contact with the artist. Monitoring and enforcing transactions would be expensive, but could be an especially effective solution for upholding the rationale of resale royalty laws.[77]

A resale royalty law could also function as an equitable measure by redistributing wealth from successful to unsuccessful artists if it were made into a tax, which would allow the government to collect and distribute the revenue through the Internal Revenue Service.[78] As art is already subjected to the capital gains tax like other kinds of property, it would not be especially burdensome for the IRS to implement an additional tax for artwork, as it would rely on an existing framework.[79] Therefore, it could be advisable for the federal government to

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[75] Rub, Guy A. "The Unconvincing Case for Resale Royalties." Yale Law Journal. vol 124, 25 April 2014, pp. 667-668.
[76] Kumar, Nithin. "Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of Droit De Suite Legislation." *The Columbia Journal of Law & The Arts*, vol. 37, no. 3, July 2014, p. 462.
[77] Turner, Stephanie Barron. "The Artist's Resale Royalty Right: Overcoming the Information Problem." *UCLA Entertainment Law Review*, vol 19, no. 2, 2012, pp. 367-368.
[78] Frye, Brian L. "Equitable Resale Royalties." *Journal of Intellectual Property Law,* vol 24, 19 Jan. 2017, pp. 36-37; Kumar, Nithin. "Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of Droit De Suite Legislation." *The Columbia Journal of Law & The Arts*, vol. 37, no. 3, July 2014, pp. 455.
[79] Frye, Brian L. "Equitable Resale Royalties." *Journal of Intellectual Property Law,* vol 24, 19 Jan. 2017, pp. 34-36.

distribute and administer royalties through the IRS, potentially by providing a tax credit to artists. Finally, a federally managed tax-based system would have the added advantage of being capable of distributing these funds directly to the National Endowment for the Arts, or immediately to marginal artists, perhaps by being distributed to arts education initiatives or even to museums, as was suggested in the 2011 EVAA bill.[80] Thus, a federal resale tax could benefit both visual artists and the broader arts community.

B. State Solutions

Overall, in light of the CRRA's damaging brushes with the Commerce Clause and the Copyright Act's first sale doctrine, it seems that a federal model is preferable and less difficult to uphold than a state-enacted resale royalty. Some scholars have interpreted the ruling of the CRRA as unconstitutional as being invalid; though the Dormant Commerce Clause forbids states from placing an undue burden on interstate commerce, states are not entirely forbidden to be involved with the monetary matters of other states, such as when taxing out-of-state income. As the CRRA's burden on out-of-state transactions is minimal, the Ninth Circuit's interpretation may be oversimplified. Moreover, it has been argued that state-based resale royalties would conflict minimally with the federal first sale doctrine, which allows the purchaser of a work to transfer, sell, display, or destroy an original work. In spite of this scholarly disagreement, however, there has yet to be a successful appeal, and the above federal provisions are unlikely to be challenged by another comparable state provision.[81]

In the hypothetical scenario that a state resale royalty would not interfere with the federal Commerce Clause, state-level experimentation with enacting resale royalties may provide

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[80] Frye, Brian L. "Equitable Resale Royalties." *Journal of Intellectual Property Law,* vol 24, 19 Jan. 2017, pp. 36-38; United States, Congress, House. Equity for Visual Artists Act of 2011. *Congress.gov*, https://www.congress.gov/bill/112th-congress/house-bill/3688. 112th Congress, House Resolution 3688, Introduced 15 Dec. 2011.

[81] Rub, Guy A. "Experimenting with State-Enacted Resale Rights." *Kentucky Law Journal,* Vol 107, no. 4, 2019, pp. 671-673; 677-681.

valuable empirical data that could indicate whether the federal enactment of resale royalties is a desirable outcome. If there continue to be substantial difficulties with enacting a federal resale royalty law, beginning with state measures may help demonstrate the overall effectiveness of a federal law. Data collected from state resale royalties could crucially assist with the lack of empirical data originally asserted by the Copyright Office's report, as these state-based results may be especially valuable as domestic, rather than international examples. However, the state model would be accompanied by many complicating factors that would be remedied by the implementation of a federal model. For example, many states do not have sizable art markets, and the weight of the art market varies widely across different states, with the New York resale market alone potentially outweighing the combined market share of the remaining 49 states. Additionally, the small size of many states allows for sales to be made immediately over state lines, essentially facilitating the circumvention of the law and limiting the relevance and applicability of the data provided by state-enacted resale royalties.[82] Finally, returning to the pitfalls of the CRRA, the uniformity and scope of state approaches could easily conflict with each other, as each state system would have to separately address where the artwork was made, where it was sold, and where the artist and seller reside.

C. Private Solutions, Blockchain Technology

Another viable alternative to the established federal or state legislative models is the private resale royalty. A well-known private model is the Artist's Reserved Rights Transfer and Sale Agreement, also known as the Artist's Contract, by Seth Siegelaub and Robert Projansky. Conceived in the 1960s, the Artist's Contract was created to initiate social changes in the art world from the private sphere. Unlike the federal and state legislative options discussed

[82] Rub, Guy A. "The Unconvincing Case for Resale Royalties." Yale Law Journal. vol 124, 25 April 2014, p. 669.

previously, the Artist's Contract outlines and proposes a variety of artists' moral rights, including resale royalties, on a private, case-by-case basis.[83] Because of the noncompulsory nature inherent to the contractual model, however, the Artist's Contract suffered from enforceability problems and an overall lack of appeal. Notwithstanding the fact that its provisions are obviously palatable for the artists who spearheaded its use, the Contract delineated a series of extra requirements and rules for buyers and sellers, who could simply decide not to buy these artists' work and instead turn to a number of other artists or artworks that were not accompanied by such additional requirements. The challenges of using the Contract led many artists to forgo using the model entirely, or only to incorporate portions of it into their own contractual agreements—the contractual provisions were especially difficult for younger, less established artists to uphold, due to their weaker bargaining power.[84] Furthermore, through the private contract model, upon secondary resale the next contract would take place between the first seller and secondary buyer, and the artist would no longer be a central party to the contract, instead becoming a third party with less influence over the contractual terms.[85]

Another possible private model is the private organization, which would also be able to register and enforce its own resale royalty system. One example is Souls Grown Deep, a private organization providing a Resale Royalty Award Program that is designed to specifically address economic inequities faced by Black artists. The approximately 50 artists represented by Souls Grown Deep are annually provided with an award equal to 5% of the sale of their artwork, up to $85,000; through its privately determined operations and standards, the organization would also

[83] Bradley, Christopher G. and Brian L. Frye. "Art in the Age of Contractual Negotiation." *Kentucky Law Journal,* 19 June 2019, pp. 548-591.
[84] Reddy, Michael B. "The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty." *Loyola of Los Angeles Entertainment Law Review*, vol. 15, no 3, 1995, p. 520.
[85] Bradley, Christopher G. and Brian L. Frye. "Art in the Age of Contractual Negotiation." *Kentucky Law Journal,* 19 June 2019, pp. 579-580.

be compatible with a legislative model.[86] The organization's royalty program is specifically geared toward remediating socioeconomic inequities, and therefore also serves as an effective example of the implementation of an equitable resale royalty.

Private resale royalties in the US would also need to account for and reflect the drastic changes that have occurred in the art world over the past few decades. As both artistic mediums and art acquisitions have rapidly evolved due to the influence of the digital sphere, resale royalties will benefit from taking a digitally adaptable approach. Although they are one of the most controversial recent developments in the art world, non-fungible tokens (NFTs) present a potential model for achieving resale royalties within the rest of the art world through their disregard for the traditional first sale doctrine.[87] NFTs are encoded with smart contracts, which upon any secondary sale, will automatically deduct a designated percentage as a royalty payment to the original artist, a provision reminiscent of both *droit de suite* and the CRRA.[88] Currently, NFT royalties are only recognized and paid if sale occurs through the same platform of the first sale, but there are standards underway that would potentially unify resale royalties across multiple platforms. Through this unified system, NFT royalties could transform resale royalties, effecting a positive development within the intensifying digitalization of the present-day art world.

Beyond NFT's, blockchain technology can also serve as an alternative mechanism for the collection and enforcement of resale royalties, as opposed to the traditional reliance on collective management organizations. Within traditional visual artworks, blockchain may not be digitally

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[86] Anderson, Maxwell. "'Self-Taught' Black Artists Are Often the Last to Benefit When Their Prices Go Up. But We Can Change That—Here's How." *Artnet News*, Artnet, 25 Nov. 2020, https://news.artnet.com/opinion/resale-royalties-souls-grown deep-1926363.

[87] Franceschet, Massimo, et al. Crypto Art: A Decentralized View. *Leonardo*, vol. 54, no. 4, 2021, 402–405.

[88] "Buying & Selling NFTs: Navigating the Legal Landscape." *JD Supra*, 30 Nov. 2021, https://www.jdsupra.com/legalnews/buying-selling-nfts-navigating-the-2284166/; Zhao, Zhao. "Fulfilling the Right to Follow: Using Blockchain to Enforce the Artist's Resale Right." *Cardozo Arts & Entertainment Law Journal*, vol. 39, no. 1, 2021, p. 241.

embedded as it is within NFT's, but the usage of physically attached CryptoSeal technology would provide a tamper-proof, non-repudiable method of registration and tracking of artworks.[89] This might also solve the problem of the elusive private sales, as the physical traceability of the object could be used to corroborate change of hands.[90] Eliminating the middleman through blockchain would minimize administrative fees and maximize the royalties going to the artists themselves.

Perhaps the utilization of blockchain could also help with the enforcement problems of the Artist's Contract. Though some scholars maintain that this might not be more helpful than developing a central registry at the federal or private level, the private model developed by Fairchain may serve as a useful prototype for the utilization of a digital ledger. Established in 2019, Fairchain provides artists and galleries with encrypted certificates of title and authenticity which are only transferable under certain conditions. These certificates are transferred to new buyers only after they have signed and committed to making a resale royalty payment to the original artist in an amount that can range from zero to ten percent, predetermined by the artist. Moreover, Fairchain's nonprofit initiative functions as another method for achieving equity for marginal and marginalized artists. After collecting a $10 fee from every sale, Fairchain donates 1 to 1.5% of the profit made from each sale to the Fairchain Fund for Working Artists, which makes emergency contributions to artists in need, further extending the use of blockchain technology to aid artists in an equitable manner.[91]

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[89] Zhao, Zhao. "Fulfilling the Right to Follow: Using Blockchain to Enforce the Artist's Resale Right." *Cardozo Arts & Entertainment Law Journal*, vol. 39, no. 1, 2021, p. 241.
[90] Zhao, Zhao. "Fulfilling the Right to Follow: Using Blockchain to Enforce the Artist's Resale Right." *Cardozo Arts & Entertainment Law Journal*, vol. 39, no. 1, 2021, p. 251.
[91] Pogrebin, Robin. "Tech Start-Up Aims to Get Artists Royalties for Resale." *The New York Times*, The New York Times, 23 Mar. 2022, https://www.nytimes.com/2022/03/23/arts/design/fairchain-artists-resale-royalties.html.

The models above demonstrate the value of private resale royalties, both in terms of incorporating novel blockchain-based technologies to provide artists with better opportunities for receiving resale royalties. These technologies can assist with the socially equitable goals of specific organizations like Souls Grown Deep and Fairchain, which aim to remedy social injustices through their distribution of targeted, equitable funds and resale royalties.

IX. Conclusion

After an examination of the perspectives of scholars and the feasibility of different options for instituting resale royalties, it is clear that the US can and should continue to strive for a federal system that would automatically preempt all state laws. State-enacted resale royalty laws would likely encounter the same difficulties that the CRRA did, and if adopted across the country, would lead to conflicting rules and widely varying standards. Private resale royalties are also appealing, yet due to their lack of legal enforceability, they are less ideal than a legislative option. However, private royalties may still be useful as a supplemental option alongside federal and state legislation, particularly for the purposes of achieving equity for socioeconomically marginalized artists, one of the most compelling reasons for adopting resale royalties overall. Finally, as the art world has profoundly transformed through technology and digitalization, blockchain technology may serve as a useful tool for all resale royalty options. Although there is much disagreement in legal academia concerning the necessity of resale royalties and the forms they should ideally take, resale royalties are imperative. By compensating deserving creators and incentivizing further creation, resale royalties have the capability to transform the art market in the United States and augment the ways American consumers think about art sales and artmaking practices. Thus, it is evident that adopting a federal resale royalty law is advisable for the United States not only to adhere to global precedents but more crucially to support diverse artists and acknowledge their essential role in today's rapidly evolving art world.

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