Droit de Suite and Conflicting Priorities: The Unlikely Case for Visual Artists' Resale Royalty Rights in the United States

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DROIT DE SUITE AND CONFLICTING PRIORITIES: THE UNLIKELY CASE FOR VISUAL ARTISTS' RESALE ROYALTY RIGHTS IN THE UNITED STATES

I. INTRODUCTION

Democrat Representative Jerrold Nadler from New York proposed a new piece of legislation called the “American Royalties Too Act of 2014” which required, with some restrictions, that visual artists receive royalties if their works of art are resold in an auction.1 By amending Title 17 of the United States Code to include this provision, the United States would have followed the European example by adopting a pseudo droit de suite into Copyright law.2 Droit de suite, often referred in the United States as a resale royalty right, allows an artist to receive a royalty when his or her work is resold.3 This is important, especially for a visual artist, whose artwork is unique and he cannot receive a profit from making copies (unlike authors or musicians who can mass produce their works), because the original artist can benefit from a possible increase in value of the artwork after its original sale.4 The “American Royalties Too Act of 2014” was a revision of the rejected Equity for Visual Artists Act of 2011, which received very little support in Congress; in fact, this was the fifth attempt in proposing resale royalties legislation to Congress.5 With this poor history of unsuccessful attempts in passing this legislation, it appears unlikely that visual artists of the United States will ever benefit from resale royalties. This is unfortunate, as the analysis of

3 Id.
4 Id. at 11, n.60.
the historical and moral elements of droit de suite clearly indicate that resale royalties are rights that help protect and promote a visual artist’s craft. Not only will a droit de suite promote the arts, it is a matter of fundamental fairness that visual artists receive the continual benefit of their work, as do other types of artists.

II. BACKGROUND

A. Overview of the Copyright System


According to the United States Copyright Act, artists, including visual artists, have a “bundle of exclusive rights” with regards to their works. These basic rights protect most creative works and are relatively uniform around the world. In the United States, an author has six basic rights in this “bundle:” to copy the work, to prepare derivate works, to distribute the work, to publically perform the work, to publically display the work, and for sound recordings, to publically perform the work through a digital transmission. A resale royalty right would allow artists to continually benefit from their distribution right.

B. Defining Royalties and Droit de Suite

1. Moral rights, generally

According to French law, all artists, whether visual or not, have four moral rights: the right of paternity, the right of integrity, the right to release, and the right to withdraw or modify. These

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6 USCO Resale Royalty Report, at 10; see 17 U.S.C. §§ 106(1)-(6).
7 USCO Resale Royalty Report, at 10. I’m not seeing the portion of the text “...and are relatively uniform around the world” in this citation.
rights are continuous and absolute. These can be considered the French equivalent of the United States Copyright "bundle" of rights. The French law differs from the American law because in the United States, there are no moral rights in the Copyright Act.

2. Droit de Suite (France)

a. Albert Vaunois and Evolution

The concept of droit de suite was first mentioned in an article written in 1893 in the journal "Chronique de Paris," by Albert Vaunois, a French attorney. In this article, he defended the rights of artists and highlighted that writers, musicians, and authors could all have their works represented in multiple areas while visual artists could not perceive their paintings or sculptures ever being reproduced in this manner. This French tradition of realizing there are different rights between visual artists and other types of artists continued when Edouard Mack, another French attorney, addressed this issue in a report to the Berne Congress of the International Literary and Artistic Association in 1896. He stated that the droit de suite converges with moral rights while sharing many of its characteristics. In order to enact a droit de suite into French law, the Société des Amis du Luxembourg was formed in 1903. The Société wrote a report dealing with inherent unfairness that artists who create art that can be reproduced, such as photographers and engravers, could profit from selling their artwork in multiples whereas other visual artists would lose any profit if their work were resold. They submitted text to the French minister...

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11 Reddy at 514.
13 Reddy at 515, 545 n.59.
15 Reddy at 515.
17 Le Droit D'Auteur, at 21-22.
stating that even though the actual object is in possession of the collector, the right of reproduction remains the property of the creator of the artwork unless he otherwise disposes of that right.\textsuperscript{18} The Société’s beliefs would eventually culminate into France’s 1920 \textit{droit de suite} law.\textsuperscript{19}

3. Rationales for \textit{Droit de Suite}

\textit{a. Legal Justifications of \textit{Droit de Suite}}

As Karyn A. Temple Claggett, the Associate Register of Copyrights and Director of Policy and International Affairs United States Copyright Office stated in her statement before the Subcommittee on Courts, Intellectual Property and the Internet Committee on the Judiciary, “A resale royalty right is typically justified by the unique way in which some visual artists are affected by the copyright system.”\textsuperscript{20} The initial underlying idea of \textit{droit de suite} was to allow the artist to benefit and receive meaningful compensation from the increased value of his artwork when it was re-sold.\textsuperscript{21} An active \textit{droit de suite} in the United States fulfills the Copyright Clause’s original intent, which is to promote the progress of the arts.\textsuperscript{22} Visual artists differ drastically from other types of artists, such as composers or musicians, because of the means by which they are able to manipulate and promote their artwork. The latter gain profits from the mass production and transmission of their work whereas visual artists create a unique object of which mass production is impossible.\textsuperscript{23} According to current copyright law, once an artist sells his painting, for example, he cannot bene-

\textsuperscript{18} Le Droit D’Auteur at 22(“En consequence, le droit de reproduction demeure la propriété du créateur de l’oeuvre d’art, à moins qu’il n’ait dispose de ce droit d’une façon expresse.”).
\textsuperscript{19} Reddy at 515.
\textsuperscript{20} Karyn A. Temple Claggett, “\textit{Moral Rights, Termination Rights, Resale Royalty, and Copyright Term},” Subcommittee on Courts, Intellectual Property and the Internet Committee on the Judiciary, United States House of Representatives, 113th Congress, 2nd Session, 1 (July 15, 2014).
\textsuperscript{21} Reddy at 517.
\textsuperscript{22} Id. at 535.
\textsuperscript{23} Id. at 517.
fit from subsequent sales of this painting as can other artists. If his work of art appreciates in value over time, it will usually only economically benefit a third party, such as an auction house, dealer, or collector, and not the artist himself. For example, a writer can receive royalties from every copy of his book sold and can continually benefit beyond his initial sale, whereas once a visual artist sells a piece of art, he does not receive economic benefit from it beyond the initial sale. Ralph Oman, the then-Register of Copyrights, stated in 1989:

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

Although some artists are able to financially benefit from exploiting their work though reproductions or different means of distribution, this may not be possible for many visual artists; the very nature of the visual art is limited to its original form and there may not be a market for reproductions or different means of copyright exploitations.

Having a droit de suite element added to the current Copyright Act would, in fact, help further the initial intent of the Copyright Clause by “promoting the progress” of the arts. If a visual artist could continually benefit from the resale of his artwork, it would permit him to profit from the increasing value of his work

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24 Id.
25 Temple Claggett at 2.
26 This was during the pre-VARA hearing in front of the House Judiciary Committee’s Subcommittee on Courts, intellectual Property, and the Administration of Justice. USCO Resale Royalty Report at 11.
after the first sale.\textsuperscript{29} Even if there is a depreciation of the artwork’s value, the artist would still benefit economically in the future from a resale. Allowing visual artists to economically profit after the first sale incentivizes them to continue to create works of art, thus fulfilling the Copyright Clause’s intent. Artists are not only motivated by the prospect of economic gain, but the mere creation of additional art and allowing the public to view and appreciate it makes the world more aesthetic and cultured. The United States Supreme Court in \textit{Fogerty v. Fantasy} unanimously reaffirmed this Copyright principle. In this case, the Court stated through “the provision of a special reward,” such a \textit{droit de suite}, artists should be rewarded for their creativity thus fueling further motivation to create.\textsuperscript{30} Such “special reward” of continued economic incentives would fulfill the intent of the Copyright Clause.

\textit{i. Do artists have weak bargaining power?}

Historically, the “starving artist” rationale for a \textit{droit de suite} has been prevalent in order to create a balance in the perceived weak bargaining position an artist has with his buyers. Although there are clearly isolated incidents where artists have been mistreated because of their weak bargaining power, there is not a great deal of empirical evidence to substantiate that this is prevalent.\textsuperscript{31} In a study done by Randall K. Filer, he analyzed the 1980 census data, investigating artists’ earnings, and concluded that artists earned relatively the same amount as others who had similar personal characteristics and training.\textsuperscript{32} It is important to note that the empirical data shows that the starving artist stories meant to stir one’s emotions may no longer be completely accurate.

Another classic argument is that artists have weak bargaining power. Some perceive that there is an imbalance of bargaining power between artists who want to retain some of their exclusive copyright rights and collectors or dealers who are cautious about

\begin{footnotesize}
\begin{enumerate}
\item Reddy at 535.
\item Reddy at 545; see Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994).
\end{enumerate}
\end{footnotesize}
allowing the artist to retain any of these rights. Some artists must sign away all of their exclusive copyright rights in order to make a sale. This is especially prevalent with emerging artists who must often sign away their rights in order to sell their works. Although artists may have weaker bargaining power initially and with concerns of copyright rights, they also have more advantages than other types of artists. For example, visual artists do not have to have contact with “powerful intermediaries with substantial market power” in order to sell their work. Visual artists do not need to search though the limited number of record labels or publishers to find representation; there are over 6,000 art dealers and galleries in the United States. Visual artists can receive fair consideration for their artwork in the competitive market due to the sheer quantity of ways their artwork can be exposed. Although the bargaining power of artists is dependent on a case-by-case basis, it is important to understand that artists can have an element of bargaining power and not all of them are “starving.”

**ii. Does the Copyright Act Disfavor Artists?**

Despite the evidence that visual artists do not receive proportional benefits for creating works as do other artists, there are arguments that the Copyright Act may in fact favor visual artists. Those who oppose a United States droit de suite have argued that all artists, including visual artists, have equal rights from copyright law because they all have the right to sell their work and license reproductions. It is entirely possible that a visual artist could make more money from an initial sale than might other artists, such as an author selling a manuscript, which may then be sold in copies. Additionally, copyright law helps correct market failures for non-visual artists. Copies of non-visual works are nearly identical substitutes for the originals. Without copyright protection,

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34 USCO Resale Royalty Report at 12, n.64.
35 Rub at 2.
36 *Id.*
37 USCO Resale Royalty Report at 32.
publishers would be able to drive prices down to the marginal cost of creating the work by making these perfect copies, thus destroying the non-visual artist's incentive to create as he will not be able to earn back the costs of creation.\textsuperscript{38} Copyright law fixed this problem by giving reproduction rights to artists thus making it illegal to copy the work without the artist's permission.\textsuperscript{39} Visual artists, however, do not suffer from this reproduction issue because, in general, a copy of a work of visual art is not an identical or suitable substitute for the original artwork.\textsuperscript{40} Copying a visual work of art does not have the same market and economic effect on the author as copying a non-visual work of art. Because of this, a visual artist is not barred from collecting the full value of the artwork (including his marginal costs, fixed costs, and expected revenue from the artwork) during the initial sale in the primary market.\textsuperscript{41} The Copyright Act was meant to correct the market failure for non-visual artists, as it has done. Arguments advocating that the Copyright Act disfavors visual artists are misplaced because the wrong that the Act is meant to remedy may not necessarily be applicable to visual artists.

\textit{C. Droit de Suite Policy around the World}

International copyright protection first came to being in the middle of the nineteenth century through the use of bilateral treaties.\textsuperscript{42} Today, over seventy different countries worldwide recognize some form of droit de suite for their visual artists; over thirty have adopted these laws since the 1992 United States Copyright Office Report.\textsuperscript{43}

\textsuperscript{38}Rub at 3.
\textsuperscript{39}See 17 U.S.C. § 106(1) ("The owner of copyright under this title has the exclusive rights to...reproduce the copyright work in copies or phonorecords.").
\textsuperscript{40}Rub at 3.
\textsuperscript{41}Id.
\textsuperscript{43}USCO Resale Royalty Report at 2.
1. The Berne Convention for the Protection of Literary and Artistic Works

The Berne Convention for the Protection of Literary and Artistic Works was formulated based on the need for a uniform, international system to protect and enforce copyright rights. The Berne Convention was adopted on September 9, 1886, and is the oldest international copyright treaty. It has been continually revised in order to adapt to the changing field and needs presented by international copyright. France proposed adding a resale royalty provision to the Berne Convention, which was added in 1948. The Berne Convention contains a droit de suite provision providing "an inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work" for all visual and non-visual art. When this provision was added, many countries opposed a resale royalty. In order to ease these countries’ concerns, an additional provision was added making droit de suite optional. It was not necessary for Member States of the Berne Convention to implement this right but the right is reciprocal; if a country did not implement a droit de suite, its citizens could not receive a resale royalty in other countries. This is an unusual provision because this is one of the only exceptions to the Berne Convention’s obligation that Member States treat other Member States in the same manner in which they would treat their own citizens. The United States is a signatory to the Berne Con-
vention; it has not, however, implemented a *droit de suite* because, according to Article 14ter(2), it was not required to do so to be a signatory. A consequence of not implementing *droit de suite* is that American artists cannot receive a resale royalty if their artwork is resold on the international secondary art market to a country that does have a *droit de suite*. The secondary art market is an international market, and this can pose as a problem if artists cannot receive royalties when their works are sold in a country that does offer a *droit de suite*.

2. EU 2001 Directive

In 2001, in an effort to harmonize resale royalty rights, the European Union adopted a Directive requiring its Member States to establish *droit de suite* legislation by 2006. Many observed an imbalance in the European market because *droit de suite* was applied in different ways between Member States, and it was completely absent in others. Since this right applies in the country where the sale occurs, there was the potential for art transactions to move from countries that had this right to ones that did not in order to avoid extra costs. The European Commission decided that in order to balance the European art market, either all Member States had to adopt a resale royalty, or it would be uniformly abolished. The Commission decided to institute a consistent *droit de suite* and adopted Directive 2001/84/EC in 2001 which established this. This Directive required EU member states to create *droit de suite* legislation where a work of visual art was resold under the purview

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52 USCO Resale Royalty Report at 5.
55 Id.
56 Id.
of "art market professionals." This broad language allowed these European countries to make laws to include works resold by the entire art market, such as dealers, collectors, and auctions. It allowed some flexibility, with some regulation, for Member States implementing their own droit de suite, such as giving the Member State authority to set the threshold resale price, what percent royalty, and how the collection of the royalty would be managed. Since January 1, 2010, the date that the Directive required full implementation of a resale royalty by its Member States, this is now a part of national laws across Europe.

On February 17, 2014, The EU Commissioner for Internal Market and Services, issued "Key Principles and Recommendations in the Management of Author Resale Right" which provided recommendations to help solve the transparency issue and various administrative problems Europe has experienced with implementing droit de suite. Representatives of collection agencies, artists, and art market professionals signed this document in order to better facilitate the solutions of these problems. The "Key Principles and Recommendations in the Management of Author Resale Right" proposed that participating parties, all collective management organizations administering droit de suite to artists, cooperate by sharing information with one another, in order to increase transparency. It also recommended to increase the understanding

58 Id. at Art. 1.
60 Id. at Arts. 4(2)-(3), 6(2).
61 Id. at Art. 8(2)-(3).
63 Id.
64 Key Principles and Recommendations on the management of the Author Resale Right, EUROPEAN COMMISSION, 3 (Feb. 17, 2014) available at
and overall awareness of the resale right for all parties involved by publishing clear guidelines, organizing seminars, and providing information to buyers.\(^{65}\)

3. The United Kingdom

The United Kingdom is the third largest global art-market and the largest European Union market.\(^{66}\) The UK began its implementation of a \textit{droit de suite} in 2006 with legislation that applied only to living artists.\(^{67}\) It then expanded this right to estates and heirs of deceased artists in 2012.\(^{68}\) The UK actually opted to have a lower threshold price for a resale royalty of €1000, compared to the European Commission’s suggested of €3000.\(^{69}\) After implementing its own \textit{droit de suite}, the UK's Intellectual Property Office ("IPO") conducted a study in 2008 to determine whether the resale royalty had an effect on the UK’s art market.\(^{70}\) It concluded that, “the art market in the UK, either despite or because of the introduction of \[droit de suite\], appears to be doing well.”\(^{71}\) Although this study was conducted when the resale royalty only applied to living artists, the report found no evidence that the art market was leaving the UK because of the implementation of \textit{droit de suite}.

\(^{65}\) Id. at 4-5
\(^{66}\) McAndrew at 23.
\(^{70}\) USCO Resale Royalty Report at 15.
Tania Spriggens, a member of the UK’s Design and Artists Copyright Society, commented on this 2008 study:

The art market has fluctuated enormously since 2006. In fact, in 2007, it grew astronomically huge. There was a massive bubble, which subsequently burst, that was nothing to do with the resale right. And all the evidence we’ve seen is that, lots of factors affect the art market, not the resale right.73

In its 2008 study, the United Kingdom’s Intellectual Property Offices found that the Artist’s Resale Right did not “divert business away from the UK.” In fact, the UK’s art market size has increased at a faster rate than other markets.

During the summer of 2014, the UK’s Intellectual Property Office (“IPO”) conducted a survey of professionals in the art market in order to find empirical evidence of the effect of the artist’s resale right (“ARR”) on the UK art market.74 This survey also focused on the lower payment band of artists (those who sell artwork valued from €1000-€3000)75 to determine whether the ARR was affecting lower income artists.76 The survey analyzed forty-three responses from art galleries, art dealers, auction houses, and the two collecting agencies that collect the royalties from ARR – Artists’ Collecting Society (ACS) and Design and Artists Copyright Society (DACS).77 This is the most recent, comprehensive survey on the effects of the ARR on those present in the British art market. Two thirds of the participants reported that the ARR applied to less than 25% of their art sales and that most of their sales that ARR applied to were above €3000.78

72 Id. at 2.
73 Resale Royalty Public Round Table, U.S. COPYRIGHT OFFICE, (April 23, 2013) at 17.
75 The survey used Euros as currency.
76 Id.
77 Id.
78 Id.
4. France

France was the first country to officially implement *droit de suite* on May 20, 1920. This law was enacted as an addition to its copyright law, which some believed was inadequate in protecting artists. This law allowed visual artists to be on an "equal economic footing" as other artists, such as composers and writers, by creating a resale royalty right for visual artists, which the other artists already enjoyed. Artists could receive a percentage of the sales price, depending on the price, each time their original artwork was resold at a public auction. In 1957, a new law was enacted and changed the fixed percentage to three percent, no matter the resale price of the artwork, in order to simplify collecting the royalty. The resale royalty right only applies to artwork resold at a public auction. Marie-Anne Ferry-Fall, member of Société des Auteurs dans les Arts Graphiques et Plastiques, stated,

In France, it’s the highest author’s right and it’s very, very important for an artist to follow the career of their works and to receive something for the auctioneers who make money, and that’s a good thing, but they make money with their works and artists must benefit of it.

This shows that France continues to find this moral right crucial for its artists.

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80 *Id.* at 438.
81 Vickers at 438.
82 The artist would receive one percent of the sales price if the artwork was resold for 50,000 francs, one and a half percent if the artwork was resold for 10,000-20,000 francs, two percent if the artwork was resold for 20,000-50,000 francs, and three percent if the artwork was resold for over 50,000 francs. *Id.* at 438, n.20.
83 *Id.* at 439, n.23.
84 Resale Royalty Public Round Table at 36-37.
5. Australia

When implementing their own resale royalty bill in 2009, Australian Minister for the Environment, Heritage and the Arts observed: "[h]istorically, the achievements of our visual artists have not been recognized to the same extent as those of our composers, authors and performers . . . . [T]his bill[] addresses a situation which is plainly inequitable." The Resale Royalty Right for Visual Artists Act provides artists with a 5% royalty on sales over $1,000 AUD. This resale right, however, only lasts for the life of the artist plus seventy years. Sellers of the art have a ninety day limit to report, in writing, the resale with enough information that a collection agency can distribute the possible royalty. What makes this bill unique is that it is prospective and no royalty is due in the first sale if a work was acquired before the bill took effect and resold; only subsequent sales will qualify for the resale royalty.

Similar to the United States, before implementing the bill, the Australian parliament requested a report to analyze potential impacts and whether there was support for the bill. The Australian Copyright Council first supported an Australian droit de suite in 1989 and the Australian Report showed prevalent support for its implementation, especially to better protect Indigenous visual artists and their rights in the market. With the support of the Australia Report, the droit de suite was implemented in Australia in June 2010.

87 Resale Royalty Right for Visual Artists Act 2009 at §32.
88 Id. at §28.
89 Id. at §11.
In 2013, the Australian government published a comprehensive review of its *droit de suite* bill. In its corresponding discussion paper, the Australian government received input from art market professionals, artists, and visual arts organizations.\(^\text{92}\) The paper reported that as of its publication, 26 percent of artwork that was being resold was eligible for the royalty, 91 percent of royalties distributed were to living artists, and the majority of royalties being received by artists valued between $51-$500.\(^\text{93}\) This shows that Australian artists are receiving royalties for the resale of their artwork and not only at the high end.\(^\text{94}\)

**D. Current Policy and Law in the USA: Attempts to Introduce Droit de Suite**

1. **Historical Efforts in the USA**

The United States has unsuccessfully attempted to implement *droit de suite* legislation many times in the past. After signing the Berne Convention in 1928, the United States did not seriously consider *droit de suite* legislation until 1973 when the artist Robert Rauschenberg’s 1958 painting “Thaw” was sold at auction.\(^\text{95}\) Rauschenberg initially sold his painting for $900, but when it was resold in 1973 for $85,000, Rauschenberg did not receive any royalties for this sale.\(^\text{96}\) This seems to be unjust for artists because they are not only not able to benefit in the same ways as other artists, but they possibly could economically lose due to unfair


\(^{94}\) If the majority of artists are receiving between $51-$500, or 5% of the resale value, these artworks were sold between $1,020-$10,000.

\(^{95}\) USCO Resale Royalty Report at 6.

practices in the secondary market. Rauschenberg began fighting for droit de suite rights for artists after this event. According to his son, Christopher Rauschenberg, his father’s “hard work was beginning to pay off, but not for him.” What he meant by this was that the auction house benefitted from the increase in value of the painting, due to the hard work of Robert Rauschenberg over the past fifteen years, and not the artist himself. “Implementing legislation that equitably distributes the proceeds of creative output will cost taxpayers absolutely nothing, yet would mean a great deal to the artistic community.”

Previous attempts have been made to implement resale royalty rights for visual artists in the United States. In 1978, Representative Henry Waxman introduced the Visual Artist Residual Rights Act of 1978 (“Waxman Bill”) during the 95th Congress proposing that a visual artist would receive a 5% royalty on a resale over $1000. Part of the proposal required the work to be registered with the National Commission on the Visual Arts, which would regulate and distribute the royalties. This was a prospective right applying only to resale that occurred one year after the installation of the Waxman Bill. In 1986, Senator Edward Kennedy proposed the unsuccessful Visual Artists Rights Amendment of 1986, providing that visual artists receive 7% of the difference between the sales price and the purchase price when it was resold for over $5000. The next year, the Visual Artist Rights Act of 1978 (the “Kennedy-Markey Bill”) was proposed by Senator Kennedy asking for a 7% royalty for works of art sold for $1000 that were registered with the U.S. Copyright Office. During the hearings for this bill, Representative Edward Markey stated

97 Id.
99 Christopher Rauschenberg, Artists Deserve Royalties Too, HUFFINGTON POST.
101 H.R. 11403 §§ 3(a), 5(c), (1978).
102 Id. at § 8.
that visual artists “need the right to participate economically in the success of the work.”


The United States finally joined the Berne Convention when Congress executed the Berne Convention Implementation Act in 1988. The United States’ main motivation in implementing this Act was to gain more international intellectual property protection, rather than promoting American artists’ rights. In order to comply with the Berne Convention, the United States needed to enact some form of federal moral rights legislation. Despite opposition to federal moral rights, Congress passed the Visual Artists Rights Act of 1990, but only after removing the resale right provision. This amendment of the 1976 Copyright Act is narrowly defined to apply to visual artwork that would otherwise be eligible for copyright protection. The only mention of resale royalties for visual rights in VARA was the request for the Copyright Office to organize a study on the feasibility of success of future resale royalty legislation.

The implementation of VARA was the first step in granting visual artists additional rights in the United States, but, compared to the rest of the world,

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107 This may have been due to the increase in computer software during the time of the Act’s implementation. Gerstenblith, 174.

108 Id.

109 Article 6bis of the Berne Convention states:

(1) Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

110 USCO Resale Royalty Report at 7.

111 This cannot be a work made for hire. 17 U.S.C. § 101

112 17 U.S.C. § 101

113 Id.
it is lacking. VARA grants very limited moral rights to artists, including the right of attribution and integrity, is limited to the duration of the artist’s life, and may be waived by the artist.114


When the Copyright Office published its comprehensive report, requested by the implementation of VARA in 1992, it concluded that it was “not persuaded that sufficient economic and copyright policy justification exists” to have resale royalties in the United States.115 In the report, the Copyright Office expressed its concern that implementing a droit de suite in the United States could harm visual artists because it would decrease profits from the primary market to compensate for economic gain in future sales.116 The report also suggested that United States should wait until more members of the European communities granted droit de suite before deciding whether resale royalties should be implemented to harmonize with Europe.117 At the time of the report, only thirty-six countries had implemented a droit de suite, whereas today, over seventy countries, including the entire European Union, have implemented this right.118 Presently, Europe has acted with droit de suite and the United States has a justified reason to implement it itself because the European Union harmonized its droit de suite laws.119 If the United States implemented a droit de suite, not only would it become more harmonized with Europe, but also American artists could receive royalties when selling their works abroad through reciprocity.

114 17 U.S.C. §§ 106A(a), (d), (e).
116 Id. at 133.
117 Id. at 149.
118 Id. at xi, 149.
119 Lehman, Resale Royalties Round Table, pg. 159; see USCO Resale Royalty Report, pg. 13.
4. Legal Concerns with a Droit de Suite

Implementing a droit de suite in the United States raises potential legal and Constitutional issues because a droit de suite potentially interferes with an individual’s bundle of property rights. Critics have argued that a resale royalty in the United States violates both the First Sale Doctrine as well as constitutes as a Fifth Amendment regulatory taking.

a. First Sale Doctrine

Some critics of a resale royalty bill believe it would interfere with the First Sale Doctrine of the Copyright Act. This doctrine gives the right to the purchaser of a lawfully produced copy of a copyrighted work to dispose of it as he or she wishes without permission from the original copyright owner. Critics of a droit de suite in the United States believe that implementing this right would violate this doctrine by preventing buyers of the artwork from ever obtaining complete title over the artwork. Supporters argue that a droit de suite would not violate the First Sale Doctrine because a resale royalty only requires payment when the artwork is resold and does not prevent the free transfer or property. The current owner of the artwork would not be prevented by a resale royalty from reselling the work of art freely because the droit de suite would be considered more of a tax instead of a property restriction.

17 U.S.C. §109(a) - Notwithstanding the provisions of section 106 (3), the owner of a particular copy or phonorecord lawfully made under this title is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

USCO, Resale Royalties: An Updated Analysis, at 58 (Dec. 2013); see also Christie’s, Inc. & Sotheby’s, Inc., Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry re Resale Royalty Right at 7 (Dec. 5, 2012).

USCO Resale Royalty Report, at 58.

USCO Resale Royalty Report, at 58.
b. Fifth Amendment Constitutional Issues: Regulatory Taking

A droit de suite in the United States raises concerns regarding Fifth Amendment property rights, specifically the takings clause. These concerns are raised in conjunction with whether a resale royalty can be applied retroactively to the resale of works of art that were purchased from an artist before the implementation of the droit de suite.\textsuperscript{124} If the droit de suite was implemented retroactively, it could negatively affect the bundle of property rights that are granted to Americans, especially the right of alienation. When the current purchaser bought the work of art, he or she relied on the First Sale Doctrine; when purchasing the artwork, the purchaser gained ownership interest in the physical object and the artist would no longer have this interest.\textsuperscript{125} If, however, the artist can now instill a royalty requirement on the purchaser, this potentially destroys the alienability right of the purchaser.

Having a governmental regulation interfere with an individual’s property rights could be considered a regulatory taking.\textsuperscript{126} A regulatory taking is a fact-specific inquiry by balancing the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.\textsuperscript{127} A resale royalty could have a significant “economic impact” on some parties because of the amount of the royalty to be paid to the artist. This could be to a lessened degree if there is a cap on the amount of royalty the artist could receive.\textsuperscript{128} If a resale royalty were to be enacted retroactively, this could affect someone’s “reasonable investment-backed expectation.”\textsuperscript{129} A collector who purchased a work of art could not have had a reasonable expectation that the purchased artwork would now be worth less when resold because an artist would be entitled to a percentage of the sales.\textsuperscript{130} This could severely burden the buyer’s “in-

\textsuperscript{124} USCO Resale Royalty Report, at 60.
\textsuperscript{125} 17 U.S.C. § 109.
\textsuperscript{126} As compared to a per se taking which requires a permanent physical occupation of someone’s property. See Loretto v. Manhattan Teleprompter CATV Corp, 458 U.S. 419 (1982).
\textsuperscript{128} id. at 124; USCO Resale Royalty Report, at 62.
\textsuperscript{129} Penn Central, 438 U.S. at 124.
\textsuperscript{130} USCO Resale Royalty Report, at 62.
vestment-backed expectations” of his or her property. An opposing argument is that if the value of property is reduced, this is the same as a taking of the property.\textsuperscript{131} The “character of the government action” could lean towards either party’s favor.\textsuperscript{132} Supporters of a resale royalty could argue that droit de suite is so prevalent around the rest of the world and it is directed at a very limited group of people, that this government action could not be considered extraordinary.\textsuperscript{133} Those who oppose a droit de suite could argue that placing a burden on someone’s physical property is a mass departure from the established beliefs of property rights.\textsuperscript{134} The Penn Central test can certainly weigh in either side’s favor; thus the outcome of whether a droit de suite would be considered a regulatory taking cannot be accurately predicted.

5. California Resale Royalties Act

In 1976, California enacted the California Resale Royalties Act (the “CRRA”): the only resale royalty legislation that has passed in the United States.\textsuperscript{135} This act applies to sales by both private dealers and public auctions.\textsuperscript{136} The CRRA provides that “[w]henever 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.”\textsuperscript{137} Before payment of a royalty, the CRRA imposes several conditions which must first be satisfied.\textsuperscript{138} The CRRA also provides that the seller’s agent must pay the resale royalty to the artist, specifically, “[w]hen a work of fine art is sold at an auction or by a gallery, dealer, bro-

\textsuperscript{132} Penn Central, 438 U.S. at 124.
\textsuperscript{133} USCO Resale Royalty Report, at 62-63.
\textsuperscript{134} USCO Resale Royalty Report, at 62.
\textsuperscript{135} USCO Resale Royalty Report, at 20.
\textsuperscript{136} Vickers, at 445.
\textsuperscript{137} Cal. Civ. Code § 986(a)
\textsuperscript{138} (1) The artist must be a U.S. or California citizen for at least two years; (2) the sale must take place in or the seller must reside in California; (3) the work must satisfy the conditions of being a work of fine art according to California law; (4) the work must be sold for a profit; and (5) the work must be sold for $1,000 or greater. See Cal. Civ. Code § 986.
ker, museum, or other person acting as the agent for the seller the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist." The agent has 90 days to locate the artist to pay the 5 percent royalty; if it is unable to find the artist during this time frame, it must pay the royalty to the California Arts Council who then has seven years to find the artist or the funds will be used by the California Arts Council for "use in acquiring fine art." Finally, if the agent does not provide the artist with the royalty, the artist may "bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer."

Many issues went unaddressed with this act. First, the California Resale Royalties Act did not have a requirement to publicly disclose sales information. This is problematic because if the sales are not publically disclosed, artists and the collection agencies may not be aware that their artwork was resold. Although unlikely, this could be a disincentive for a dealer to inform the artist of the resale, thus preventing the dealer from losing money with the resale royalty. Another possible issue is that artist may not want to bring an action if the artist is not paid. A seller is often not a stranger to the artist and many artists may fear jeopardizing their careers if they lose the relationship with this seller.

Another enforcement problem could have arisen in connection to the provision that the droit de suite terminates upon the artist's death and would not apply to a work of art whose resale price is less than the original purchase price. A dishonest seller could sell artwork by both living and dead artists as a bundle to a buyer with the artwork by the deceased artist overpriced and the artwork by the living artist underpriced, thus avoiding the resale royalty.

This act has not gone unchallenged since its enactment, with two major court decisions concerning preemption by federal law.

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142 Vickers, at 446.
143 Id.
144 The resale royalty shall not apply to "the resale after the death of such artist" and "to the resale of the work of fine art for a gross sales price less than the purchase price paid by the seller." Cal. Civ. Code §§ 986(1)(b)(3)-(4).
145 Vickers, at 446.
copyright law. In Morseburg v. Balyon, an art dealer brought suit to avoid paying royalties claiming federal copyright law preempted the CRRA.\textsuperscript{146} The Ninth Circuit held on appeal that since the transaction occurred prior to the Copyright Act of 1976, the Copyright Act of 1909 did not preempt CRRA.\textsuperscript{147} This was the first of many suits challenging the validity of the CRRA.

The CRRA was challenged and held invalid in Estate of Graham v. Sotheby’s Inc.\textsuperscript{148} The Plaintiffs, agents of California sellers, claimed Sotheby’s had sold their artwork at a New York auction, but did not pay the CRRA’s required royalty.\textsuperscript{149} Sotheby’s replied that the CRRA violated the Constitution’s Commerce Clause because it “regulate[d] transactions that [took] place wholly outside of California.”\textsuperscript{150} When looking at the CRRA’s legislative history, the court noted that the California legislature discussed and ultimately rejected the royalty only applying to in-state sales due to the fear that the art market would leave California in order to avoid paying the royalty.\textsuperscript{151} The court found that artwork constitutes a “thing” in interstate commerce when an artwork is sold from one state to another, thus falling under Congress’ power from the Commerce Clause.\textsuperscript{152} The court also found the CRRA “substantially affected” interstate commerce because the statute had to do with “commerce or any sort of economic enterprise, however broadly one might define those terms.”\textsuperscript{153} The Central District Court of California held that the CRRA had the “effect of controlling commerce occurring wholly outside the boundaries of California” thus in violation of the Commerce Clause by interrupting the federal government’s right to control commerce between states.\textsuperscript{154} Despite having a severability clause in its text, the court found the CRRA invalid not only because it violated the Commerce Clause but also the California legislature would not have

\textsuperscript{147} Morseburg v. Baylon, 621 F.2d 972, 975 (9th Cir. 1980).
\textsuperscript{149} Id. at 1119.
\textsuperscript{150} Id. at 1120; see also U.S. CONST. art. 1, §8, cl. 3.
\textsuperscript{151} Estate of Graham, 860 F. Supp. 2d at 1126.
\textsuperscript{152} Id. at 1123; see also United States v. Lopez, 514 U.S. 549, 558-59; 115 S.Ct. 1624, 1629 (1995).
\textsuperscript{153} Id. at 1123, quoting Lopez, 514 U.S. at 561; 115 S.Ct. 1624.
\textsuperscript{154} Estate of Graham, 860 F. Supp. 2d at 1124-25.
enacted the CRRA if it only applied to transactions occurring within California.\textsuperscript{155}

California has had extreme difficulty in the enforcement of the CRAA. Many dealers and parties in sales are not complying with these new rules. According to a \textit{New York Times} article, since the enactment of the CRRA, only around 400 artists have received royalties in amounts totaling $328,000.\textsuperscript{156} In addition to the non-compliance, the California Arts Council struggled with administering the royalties; BALA reported that the California Arts Council was holding $13,435 in royalties for artists whose locations could not be found.\textsuperscript{157} Due to these inconsistencies, it is extremely difficult to see the effects, whether positive or negative, the CRRA has had on individual artists and the art market.

6. \textit{Equity for Visual Artists Act of 2011 (EVAA)}

In 2011, Representative Nadler, as well as Wisconsin Democratic Senator Herb Kohl, introduced the \textit{Equity for Visual Artists Act of 2011} (the “EVAA”) which proposed collecting a 7 percent royalty if a visual artist’s artwork was resold at auction for at least $10,000.\textsuperscript{158} This 7 percent of the sale price would be accumulated by a collecting society and split between the artist and an escrow account created to support a nonprofit museum in the United States.\textsuperscript{159} The money given to the museum would promote its further collecting of artworks.\textsuperscript{160} This bill failed as Representative Nadler was unable to gain any cosponsors, and it was never voted on after the 112\textsuperscript{th} Congress finished in 2012.\textsuperscript{161}

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\textsuperscript{155} The extraterritorial reach could not be severed from the bill, thus the entire bill had to be struck down. \textit{Id.} at 1126.
\textsuperscript{157} USCFO Resale Royalty Report, at 23.
\textsuperscript{159} EVAA § 3.
\textsuperscript{160} EVAA § 3.
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In December 2013, the United States Copyright Office released its “Resale Royalties: An Updated Analysis” where it compiled its findings since it released the 1992 report. After analyzing the many positive and negative aspects of having a droit de suite in the United States, the report found that many artists in the United States are disadvantaged compared to other authors, such as literary or musical, due to the structure of the current copyright system.\(^{162}\) The Copyright Office acknowledged that the lack of data available on this topic did prevent it from making a definitive conclusion about droit de suite in the United States, but it did recognize that the data it did have showed that visual artists could not benefit in the same way as other artists due to the fact that visual art is not commonly distributed in copies, as are other forms of art.\(^{163}\) The nature of visual art limits an artist’s financial gain. The Copyright Office urged Congress to consider ways to resolve this problem by finding solutions to encourage visual artists to continue their craft. Although over seventy countries have adopted resale royalty legislation, the Copyright Office believed that there may be other, more effective, ways of accomplishing these goals. Since there is a significant lack of information, the Copyright Office cautioned about the actual effect a droit de suite would have on United States’ artists.\(^{164}\) The Copyright Office concluded by indicating that it does support resale royalty legislation, but it is also important to explore other options such as voluntary initiatives or encouragement. It cautioned Congress that if it does propose a droit de suite, it must be advantageous to the greatest number of artists while, most importantly, posing the least disturbance on the art market.\(^{165}\) It also raised the consideration of waiting to implement resale royalty legislation until even more data can be collected and the effect can be further studied.\(^{166}\) This is very similar to the end recommendations of the 1992 report, which suggested waiting un-

\(^{162}\) USCO Resale Royalty Report, at 65.
\(^{163}\) Id.
\(^{164}\) Id.
\(^{165}\) Id. at 66.
\(^{166}\) Id.
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Until further empirical data was collected. There may never be adequate information to decide whether a droit de suite is feasible in the United States.

III. ECONOMIC DISCUSSION OF DROIT DE SUITE

A. How a Resale Royalty May Affect the Overall Market – An Economic Approach

Although there is a lack of empirical data regarding the art market and the potential effects of a droit de suite, an economic analysis can be conducted. A resale royalty can be treated as an excise tax. An excise tax is a governmental tax on the sale, use, or production of certain commodities or services, and can be included in the price of the product. Even though there is little data on the effect of droit de suite on the art market, performing an elasticity analysis can be instructive. The economic issue that needs to be explored is the demand curve’s elasticity for works of art that have a resale royalty. If the demand curve for artwork subject to a droit de suite is elastic, then the total amount of money flowing into the secondary art market will decrease. According to economic theory, if the secondary art market decreases, it will also affect the primary art market with a depressive effect. Some factors that would affect the art market’s elasticity include the price position of the product on the demand curve, the availability of substitutes, and how much of the consumer’s income the purchase of this product represents. Therefore, if any of these factors can be easily influenced by the change in price, it would make the demand curve more elastic. This can be easily done since the price of an artwork can be high, thus a purchaser spending a high percentage of his income on the artwork, and there could be suitable sub-

168 A common example is an excise tax on the sale of tobacco or gasoline.
169 Elasticity is how sensitive the demand curve is to a certain independent variable, usually the change in price. Michael R. Baye, Managerial Economics and Business Strategy 75 (McGraw-Hill International Edition, 7th Ed).
170 Vickers, at 459-60.
171 Vickers, at 460.
172 Id.
stitutes of artwork that are not affected by droit de suite. Therefore, this basic economic analysis shows that a droit de suite renders the demand curve for the art market more elastic and a resale royalty could likely harm both the secondary and primary art markets. Additionally, in an economic application the resale royalty acts as a discriminatory tax, and could result in the market viewing artwork subject to a resale royalty as a poor investment.

1. Incentive to Create New Works

One of the major purposes of copyright law is to promote creativity by protecting an artist’s work. A resale royalty right could support this copyright goal, therefore justifying the legislation. Although other countries may not emphasize the promotion of creativity as does the United States, it is still equally important to protect artists’ rights, specifically through droit de suite. Artists could have an additional financial benefit from a resale royalty, further promoting creativity by allowing them to maintain their artistic careers. Even if the royalty is minimal, it is still additional revenue that an artist could use to promote his craft. Not only could living artists benefit from this additional revenue, but it could also have a positive effect on post mortem benefits. A droit de suite for a piece of visual art by an artist who has passed away could allow his heirs to benefit financially. This idea could motivate artists to not only create art, but to excel and have a positive reputation in the art world, which would benefit their heirs post mortem with a higher number of sales, and thus a higher amount of resale royalties.

173 Id.
175 USCO Resale Royalty Report, at 36-37.
176 Id. at 37.
177 The increased revenue could be used for supplies, studio space, or other working expenses that artists encounter during their craft. By allowing artists to have better access to these expenses, it helps fulfill the Constitutional provision of copyright.
Critics of resale royalties contend that a *droit de suite* would not motivate artists to create more artwork. They argue that visual artists create art based on their own personal inspiration, not whether they will receive economic compensation from creation. As Théophile Gautier stated, artists create "art for art's sake." Another criticism of *droit de suite* is that dealers may be unwilling to invest long term in younger artists beginning their careers knowing that they will have increased transaction costs later. As one dealer in the United Kingdom said:

> It is not encouraging us to deal with less established artists that is certain, it definitely impacts on my ability to speculate on riskier artists. I want to support young artists but this discourages my interest in doing so, it is not that I don’t want to help them but I am less likely now to purchase outright at an early stage in the artist’s career.

Dealers frequently purchase young, up-and-coming artists’ works prior to exhibitions as an investment; these risky investments often do not yield initial returns. With the possibility of a *droit de suite*, the price of these young artist’s works would have to increase in order for dealers to make a profit. Dealers have argued that the increase in price may be unattractive to prospective buyers; if the dealers know there will be greater difficulty selling these works, they will be less likely to invest in these artists initially.

Many considerations must be assessed when analyzing whether a resale royalty will promote the purposes of copyright. The majority of the speculations on whether a resale royalty would increase creativity are not supported by solid evidence. These

179 *Id.* at 38.
180 In French, “L’art pour l’art.”
182 *Id.*
183 USCO Resale Royalty Report, at 38.
statements are speculative and may even be the result of an over-confidence bias where individuals have the belief that they possess some unique trait or ability that allows them to overcome odds, whereas others do not have this trait. This extreme optimism gives skewed support for a droit de suite because it is unlikely to know if this will, in fact, promote creativity.\textsuperscript{185}

2. The Primary Art Market

Due to the difficulty in obtaining information about the primary art market, it is problematic to accurately analyze how a droit de suite in the United States would affect the primary art market.\textsuperscript{186} Not only does the United States have difficulties assessing the future consequences of a droit de suite, but other countries worldwide, even those who have implemented a resale royalty, have encountered problems empirically analyzing the droit de suite. For example, Australia posed questions about how a resale royalty would affect their primary art market in a report corresponding with their resale royalty bill in 2008.\textsuperscript{187} In its government's review of the bill five years later, these questions still had not been sufficiently answered because they could not deduce the effect due to the lack of sufficient data to even extrapolate results.\textsuperscript{188} This lack of primary art market transparency is troublesome if the United States wishes to implement a droit de suite, because a lack of data

\textit{Droit de suite} critics have argued that a resale royalty cannot survive a simple supply and demand analysis. Critics argue that collectors who will not buy artwork because of the resale royalty will decrease demand, but the supply of art will not increase. This could cause prices to go down, due to the inverse nature of supply and demand. Moreover, collectors may demand reduced prices in the primary market in order to compensate for potential

\textsuperscript{185} \url{http://freakonomics.com/2011/12/22/artist-resale-royalties-do-they-help-or-hurt/}.
\textsuperscript{186} Id.
\textsuperscript{187} USCO Resale Royalty Report, at 42.
\textsuperscript{188} Australia Report, at 34.
\textsuperscript{188} Australia 2013 Review, at 6.
royalties in the secondary market. This would have a deleterious effect on artists’ payments in the primary market.

Critics of a resale royalty in the United States have stated that its implementation may prevent buyers from purchasing art on the primary art market. It is important to note that many art collectors buy art not because of its price. People collect art for a variety of reasons, including the obvious reason of actually enjoying the art for its visual and symbolic appeal. Many purchase art for its aesthetics and not as an investment. Although some collectors may base their purchases on whether there is a resale royalty or not, it is important to realize that this may not be the primary reason to make a purchase.

Unless more quantitative data is made available in the primary art market, it will be nearly impossible to conclude whether the primary art market will be affected by a droit de suite. Major legislative decisions cannot be made because of lack of data and because of speculations on how a droit de suite would affect the primary market. These decisions are made even more difficult not because the data is not present, it is because the data is unlikely to be discovered in the primary art market.

3. The Secondary Art Market

Droit de suite is a concept involving the secondary art market. The secondary art market is where artwork is resold, primarily through auction houses and private dealers. There is limited information about the economics of the secondary market in order to protect the privacy of purchasers, but not to the same extent as the primary market. Supporters and those opposed to a resale royalty disagree on a droit de suite’s effect on this market for many of the same reasons regarding resale royalties and their effects on the primary market. Multiple factors that are often ab-

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189 USCO Resale Royalty Report, at 44.
192 USCO Resale Royalty Report, at 46.
sent in the primary art market impact and shape the secondary art markets. These include commissions, advances, insurance fees, third-party guarantees, and storage and transportation fees. Many more influences affect the secondary art market, rendering it difficult to deduce the impact of a resale royalty.

Again, proponents believe that the increased incentive to create will cause artists to produce more work, eventually having a positive effect on the secondary art market. They argue that the increased administrative costs in enforcing a resale royalty will be of minimal concern because buyers and sellers in the secondary art market already experience a significant amount of transaction costs. These costs, such as buyer’s premiums and fees for unsold art at auctions, have nothing to do with benefiting the artist and are generally much higher than the proposed droit de suite. If the threshold for the resale royalty is appropriate, the benefits of the droit de suite are likely to outweigh the administrative costs of compliance.

Those who oppose a resale royalty argue that by imposing a droit de suite, the overall incentive to resell artwork may diminish, thus reducing the secondary art market. Again, the unavailability of information poses another problem. If critics argue a resale royalty will decrease the secondary art market, it is extremely difficult to prove that droit de suite is the single factor that affects the market. A variety of other factors could lead to the secondary art market’s decrease, such as the changes in ways that collectors are purchasing art, decrease in the supply of artwork, and changes in taste in artwork. In sum, it is impossible to determine that a resale royalty would destroy the secondary art market. As in the primary art market, arguments by both supporters and opponents are speculative.

Opponents fear that if the United States imposes a resale royalty, the secondary market would leave the United States for

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193 Id. at 56.
194 Id. at 46.
196 USCO Resale Royalty Report, at 47.
197 Id.
198 Id. at 50.
199 EC Report, at 7.
other countries that do not have the droit de suite. As one of the "global market hubs," the United States cannot afford to lose merchants.\(^{200}\) From an economic standpoint, merchants will sell commodities, such as art, where there are less transaction costs imposed on them. If a resale royalty adds to transaction costs, sellers will take this into consideration when choosing locations to sell their goods.\(^{201}\) Again, it is uncertain whether art merchants' moves from the United States to other countries are primarily due to a resale royalty. The UK did not record any noticeable changes in merchants leaving the UK after they implemented a resale royalty.\(^{202}\) Causality cannot be solely attributed to a droit de suite; a correlation does not necessarily imply a cause-and-effect relationship.\(^{203}\) The location of the secondary art market also depends on many other factors such as public taste, the structure of the art market, taxes, the availability of experts, and the ability to interest consignors.\(^{204}\)

The efficacy of a droit de suite on the secondary market also may depend on the frequency that the artwork is resold. If the

\(^{200}\) According to the EC Report, a "global market hub" is a location where the highest valued art transactions occur. These are the sales of artwork over €50,000. EC Report, at 7.

\(^{201}\) EC Report, at 7-8.

\(^{202}\) UK Report at 16.

\(^{203}\) Commenting on the potential shift of transactions to countries without a droit de suite, Gerhard Pfennig from VG Bild-Kunst stated, "we have often heard the argument that sales would be shifted to other countries, to United States or Switzerland, to Great Britain. The experience shows that even galleries from Switzerland, where there is no resale royalty, moved to London...which shows that resale royalty, which they have to pay in London, doesn't have any affect on these business developments because buyers come to London. This is the effect in Europe, most of the market goes to London, because there are the buyers." Resale Royalty Round Table, at 27-28.

artwork is never resold, a resale royalty is not imposed. An artist may economically benefit more if his work is continually resold as compared to an artist whose artwork does not resell as often. This shows that success from a droit de suite may be more analogous to the artwork’s turnover than value based on the art market. This is an important consideration when deciding whether to institute a resale royalty in the United States.

4. Changes in the Art Market

Although an arguably broad topic related to resale royalties, it is instructive to address the various changes that are occurring in the modern art market. The movements towards a more globalized and digital world will continue to have implications on the art market in the future. Not only has art become more accessible to the public, but new unprecedented legal issues will have to be addressed with future legislation. In its report on resale royalties, the United States Copyright Office made it clear that it did not have any evidence that the growth in art fairs and other non-traditional art market transactions is a result of the implementation of resale royalties across the globe.

a. Art Fairs and the Online Market

Over the past twenty years, the art market has undergone a revolution secondary to an increase in sales in art fairs. There has been a strong movement towards these fairs where buyers can purchase works of art directly from dealers and artists as a competitive reaction to the increased power that auction houses possess. Today, fairs comprise about thirty percent of dealers’ sales. These fairs are open to the public and have allowed the

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206 Id.
207 USCO Resale Royalty Report, at 55.
209 McAndrew, at 113.
210 Id. at 114.
traditional exclusivity of the art market to thrive in a more general setting.\textsuperscript{211} This allows people who normally would not be able to collect art to be immersed into the primary and secondary art markets. Art fairs have affected both the primary and secondary art markets because artists now have to surrender their own creative habits to the demands of the art fair schedule.\textsuperscript{212}

The presence of the Internet in art transactions has also advanced the art market. The use of the Internet has created more efficient and cost-effective methods for parties to not only communicate but also to engage in transactions, regardless of physical location.\textsuperscript{213} Currently, many dealers and auction houses have both websites to provide buyers with information and real-time participation in auctions.\textsuperscript{214} Not only are major auction houses and dealers moving toward an online market, but according to the 2013 Online Art Trade Report, fifty-nine percent of the galleries that were surveyed are planning to incorporate an online purchase option on their websites.\textsuperscript{215} This shows a major trend toward an art market on the Internet and the potential decrease in the personal interaction with dealers and auction houses, thus decreasing the tension that exists between them. "Emergence and growth of Internet marketplaces during the last two decades have fostered an increase in artistic endeavors by providing more outlets for discovery and remuneration."\textsuperscript{216}

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\textsuperscript{211} USCO Resale Royalty Report, at 25.
\textsuperscript{213} USCO Resale Royalty Report, at 25.
\textsuperscript{214} \textit{See} How to Place a Bid, BONHAMS, \url{http://www.bonhams.com/how_to_buy/9879/}; Christie's LIVE Online Bidding, CHRISTIE'S, \url{https://www.christies.com/livebidding/}; BIDnow/Watch Live, SOTHEBY'S, \url{http://www.sothebys.com/en/auctions/watch-live.html}.
\textsuperscript{215} The Online Art Trade 2013, HISCOX & ARTTACTIC, 4-5 (April 9, 2013) \textit{available} at \url{http://www.arttactic.com/market-analysis/art-markets/us-a-european-art-market/559-hiscox-report-online-art-trade-2013.html?Itemid=102}.
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b. Changes in Artistic Medium

Although United States’ copyright law does not affect the typical visual artist in the same manner as other types of artists, visual artists have been able to adapt. The popularity of art reproductions has allowed visual artists to benefit in the same manner as other artists. The ability of artists to sell reproductions, or “prints” of their works allows them to receive economic compensation by selling copies of their works.\(^{217}\) Prints have become a significant influence in the art market as major collectors and museums have purchased these artworks.\(^{218}\) It is important to note that artists are adapting to the changes in the art market as well as being able to adjust their craft in order to benefit more from the United States’ copyright system. Supporters of a \textit{droit de suite} constantly make the argument that visual artists do not receive the same benefits as other artists, yet in some ways and in some mediums artists can benefit.

IV. American Royalties Too Act of 2014 – Most Recently Proposed Legislation

The Proposed “American Royalties Too Act of 2014” aimed to provide a royalty to visual artists whose art was resold at auction. It was introduced on February 26, 2014 by the New York Democrat Representative Jerrold Nadler to amend title 17 of the United States Code.\(^{219}\) His major cosponsor was the Democrat Senator from Wisconsin, Tammy Baldwin.\(^{220}\) As of October 2014, he had fifteen cosponsors in the House of Representatives\(^{221}\) and

\(^{217}\) These “prints” include etchings, silkscreens, lithographs, aquatints, and stereographs. Vickers, at 463.
\(^{218}\) The Applicability of Droit de Suite, at 463.
\(^{219}\) American Royalties Too Act of 2014, H.R. 4103, 113th Cong. This provision is concerned with an individual’s copyrights.
\(^{221}\) They are, in chronological order of becoming co-sponsors: Louise McIntosh Slaughter [D-NY-25], James P. Moran [D-VA-8], Grace Meng [D-NY-6], Wm. Lacy Clay [D-MO-1], Eliot L. Engel [D-NY-16], Donna M. Christensen [D-VI-At Large], Judy Chu [D-CA-27], John Lewis [D-GA-5], Janice D. Schakowsky [D-IL-9], Ed Pastor [D-AZ-7], Maxine Waters [D-CA-43], Sam Farr [D-CA-
one additional co-sponsor in the Senate. This bill, however, was unable to survive the 113th Congress and was never voted on before the end of the term.

A. Text of the Bill

The bill proposed that in order to be eligible to collect a resale royalty, the work of visual art must be resold at auction at a price of $5,000 or more. The proposed bill made it clear that the artwork must be sold at auction by an individual who is not the original artist, thus ensuring that this was not the first sale of the work, but was indeed a resale. An artist would receive a royalty on the initial sale because he directly sold his work to the buyer either by himself or through an auction or dealer representing the artist.

The text of the proposed bill defined the specifics of collecting the royalty. The royalty would be calculated as 5% of the sale price up to a cap of $35,000. These figures would be adjusted every year according to the cost-of-living adjustment provided by that year’s Internal Revenue Code of 1986. The royalties would be collected within ninety days of the sale by a visual artists’ copyright collecting society which, four or more times a year would distribute the royalty less reasonable administrative costs to the artist or the valid copyright holder.

222 Senator Edward J. Markey, a Democrat from Massachusetts is the only Senate co-sponsor of this bill. See: https://www.congress.gov/bill/113th-congress/senate-bill/2045/cosponsors?q=%7B%22search%22%3A%5B%22american+royalties+too%22%5D%7D.


225 Id. at §(a)(7).

226 Id. at §§ 3(b)(2)(A)(i)-(ii).

227 Id. at §§ 3(B)(2)(B)(i)-(ii).

228 Id. at §§ 3(b)(3)(A)-(B)
holder, to receive royalty payment. The artist or current copyright owner must have been either a citizen, currently domiciled in, or created the work of visual art in the United States or another country that already provides resale royalty rights.

The proposed bill had many criteria required of a valid collecting society. This visual artists' copyright collecting society would be approved to collect the royalties from the auction houses and distribute them to the artists or the valid copyright owner. In order to become an authorized artists' copyright collecting society, the society must have either had previous experience licensing copyrights of visual artists or have been approved by 10,000 or more visual artists "directly or thought reciprocal agreements with foreign collecting societies, to license the rights granted under section 106." If an artists' copyright collecting society failed to distribute the royalties within five years, it would lose its authorization to collect and distribute future royalties. If an artists' copyright collecting society failed to pay a royalty, it could have constituted as copyright infringement subject to payment of the entire royalty and statutory damages.

Finally, the proposed bill required the Register of Copyrights to conduct a study within five years which would explore the effects of this proposed bill on the art market and whether this act should be expanded to "other professionals engaged in the sale of works of visual art" such as dealers and galleries.
B. Opposition

The American Royalties Too Act of 2014 faced a great deal of opposition, especially since it specifically targeted public auction houses. According to Clare McAndrew, from Art Economics, only “0.4 percent of artists in the U.S. will benefit from [a droit de suite].”\(^{237}\) If such a small number of artists would benefit from this bill, it raises the question whether it is fair on even beneficial for this bill to have solely applied to public auction houses?

Many auction houses in the United States strongly lobbied against this bill, since it did specifically target sales at auction. Sotheby’s spent approximately $1 million in lobbying efforts.\(^ {238}\) Despite doubts that the bill would pass due to a divided Congress, Sotheby’s approached this bill seriously.\(^ {239}\) The bill appeared to be unfairly directed at auction houses because the droit de suite would not apply to dealers or galleries. Christie’s and Sotheby’s, through their attorney, Simon J. Frankel, responded to the Copyright Office’s Notice of Inquiry into the possibility of implementing a droit de suite in the United States and expressed their opposition to the legislation.\(^ {240}\) They argued that a resale royalty would do nothing to increase the market for emerging artists, stating that “absent identification of an actual problem in the art market to be addressed and compelling evidence that a resale royalty will do so, there are no good reasons to enact a federal resale royalty right in the country, and many reasons not to do so.”\(^ {241}\)

\(^ {237}\) Resale Royalty Round Table, at 121.


\(^ {239}\) Id.

\(^ {240}\) Letter: Comments of Sotheby’s, Inc. and Christie’s Inc. (Dec. 5, 2012).

\(^ {241}\) Letter: Comments of Sotheby’s, Inc. and Christie’s Inc. (Dec. 5, 2012).
A major pitfall of the California Resale Royalties Act involved collecting and administering the royalty collected by a collection agency. The text of the bill does give specifics regarding becoming an authorized collection agency, but it does not discuss how the collection agency needs to function in order to be successful. In order to have a practical resale royalty in the United States, it must be inexpensive to regulate and administer the royalty and it must be enforceable. These were issues that the California Resale Royalty Act faced and were potential problems for the American Royalties Too Act. A major reason why the American Royalties Too Act targeted auction houses is because artists can much more easily verify that their art is being resold in a public auction verses being resold in a private gallery.

2. Art Market Transparency and Lack of Information on the Art Market

When researching the possible effects or consequences of implementing a droit de suite in the United States, policymakers face an “information problem.” In order to properly analyze the actual or potential impact of a resale royalty in the United States, a certain amount of information must be available to the parties involved. In the real world application, however, those involved in the United States market guard this information because of the lack of transparency in the art market. For example, buyers’ and sellers’ identities are often kept secret and the values of artworks are concealed from the public to promote anonymity in the trans-

244 Id. at 334.
actions. The prices of these private sales are not recorded or available to the public. When the United States Copyright Office issued its 1992 report, it realized that there was an “information problem” and even cited this as one of the reasons that it advised against adopting a droit de suite; the USCO believed that it did not have enough “empirical data” to adequately analyze the outcomes of implementing this right. Even the 2013 USCO Resale Royalties Report stated that it faced difficulties when trying to analyze data on resale royalties because the majority of that data comes from the same one or two sources. This can be problematic because different sides of the droit de suite argument will support their respective arguments with the same data. Obtaining solid data on the art market is difficult because it is almost impossible to conduct a “controlled experiment and use scientific method.”

Despite the major informational obstacles that must be overcome in order to have a more accurate understanding of resale royalties, there have been improvements. Over the past twenty years, many new auction price databases, indexes, and analyses resources have emerged. These new resources have increased the

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246 Id. at pg. 16.
248 See 1992 REPORT at xv.
249 USCO Resale Royalty Report, at 27. These sources are: Art Economics (see http://www.arteconomics.com) and the studies performed by Kathryn Graddy et al.
250 Resale Royalties Round Table, pg 103 (Victor S. Perlman).
251 Resale Royalties Round Table, pg 103 (Victor S. Perlman). It is difficult to figure out causality because “there is no way to conduct a controlled experiment and use scientific method. All we have is some anecdotal information and statistics.”

These resources include: ArtPrice (http://www.artprice.com), ArtNet (http://www.artnet.com), Invaluable (http://www.invaluable.com), Art Market Research (http://www.artmarketresearch.com), Mei Moses
transparency of the art market, but there are still many flaws in the data. The lack of this information from these transactions prevents accurate results and adds to the uncertainty about the art market. For example, there is even confusion about the number of private sales that take place. This lack of information not only prevents proper studies from being conducted on the possible effects of the droit de suite, but it could potentially impact the success of a resale royalty.

3. Sales and Works Subject to a Resale Royalty

The bill made it clear that the resale royalty would have applied to “works of visual art” and the bill even proposed to consolidate the language in 17 U.S.C. § 101’s definition for “works of visual art.” Initially, there was some opposition to this because it did not include works of decorative art such as jewelry, furniture, architectural structures, and rugs. However, no one submitted any empirical evidence that these items receive substantial profits on the secondary market, so the definition for “works of visual art” did not need to be expanded to include these items.

Additionally, with the continuing transformation of the art market, this bill could have encountered issues because many major auction houses now have online auctions. This bill could have

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253 Id.
254 Erica Coslor estimates that private sales account for about 60% of the art market while public auctions make up about 40%, while Clare McAndrew stated that “in 2012, auction houses accounted for just 21 percent of domestic sales, with dealers and galleries accounting for 79 percent.” McAndrew, Clare. 2007. The Art Economy: An Investor's Guide to the Art Market. Dublin: Liffey Press.
255 The bill proposed to changed the definition of “work of visual art” to “A ‘work of visual art’ is a painting, drawing, print, sculpture, or photograph, existing either in the original embodiment or in a limited edition of 200 copies or fewer that bear the signature or other identifying mark of the author and are consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.” H.R. 4103 § 2(4)
256 USCO Resale Royalty Report, at 76.
257 Id.
unfairly targeted auction houses because their online sales would be subject to a royalty, but other online art auctions or dealers who sell online would not have to pay the royalty.\textsuperscript{258} It would have been difficult to distinguish how the bill would have treated a regular auction selling online versus other online transactions that resell art. The bill did define an auction as “a public sale at which a work of visual art is sold to the highest bidder and which is run by an entity that sold not less that $1,000,000 of works of visual art during the previous year.”\textsuperscript{259} This definition, with the threshold profit off of visual art sales, applies to larger auction houses, thus many minor auctions would not have had to pay a resale royalty.

4. Alienability and Retroactivity

The bill stated, “the right to collect a royalty...may not be sold, assigned, or waived except as provided in section 201.”\textsuperscript{260} Section 201 of the Copyright Act allows an individual to transfer his copyright rights “by any means of conveyance.”\textsuperscript{261} What this means is that the resale royalty right cannot be alienated unless it is in the same manner as transferring copyright rights; a visual artist can alienate this right. This is not in harmony with the EU Directive because its droit de suite is both inalienable and unassignable.\textsuperscript{262} This may be counterproductive in trying to provide artists more bargaining power. By being able to sign away their resale royalty rights, it is just another right in the bundle of copyright rights that artists sometimes sign over to purchasers in the primary market. If this bill made the right absolutely inalienable, it could have focused on some artists’ bargaining power. Critics, however, argue that if this right was inalienable, many artists would not be
able to make as much in the primary art market because now many sign their rights away to ensure a better purchase price.\textsuperscript{263} If an artist could not transfer these rights, he might not receive as much profit from his initial sale.

Another issue with alienability is with reciprocity and the Berne Convention. The Berne Convention states that \textit{droit de suite} is an "inalienable right."\textsuperscript{264} If the United States enacted legislation that allowed an artist’s resale royalty right to be alienable, there would be inconsistencies in reciprocity with other countries since most countries have this as an inalienable right.\textsuperscript{265} If other countries find the United State’s law insufficient compared to theirs, United States’ artists may have difficulties benefitting from \textit{droit de suite} abroad.\textsuperscript{266} This, again, is counterproductive because the bill was first enacted in order to promote international reciprocity. The text of the bill would have applied prospectively. This is important because if it were to have been applied retroactively, many more Fifth Amendment issues, such as Takings and Due Process, would have been challenged.\textsuperscript{267} The text of the bill, however, was vague regarding the specifics of application prospectively. For example, the Copyright Office’s 1992 report defined a prospective application of a \textit{droit de suite} as covering works of art that were created after the effective date of the law.\textsuperscript{268} Difficulties could arise, however, in proving when some artworks were created if disputes arise around whether a work of art was created before or after the effective date. Another possible way to bypass this issue would be for this bill to have applied to works of art that were resold after the effective date. This could be more easily manageable because the date of creation is irrelevant. Most artists sell their work directly in the primary market, so any transaction not from the artist or his dealer would be considered a secondary market transaction, thus a resale. The American Royalties Too Act should have been more specific in its language in terms of how it is going to be applied.

\textsuperscript{263} \textit{Id.}
\textsuperscript{264} Berne Convention 14ter(1).
\textsuperscript{265} USCO Resale Royalty Report, at 78.
\textsuperscript{266} \textit{Id.}
\textsuperscript{267} \textit{Id} at 77.
\textsuperscript{268} 1992 Report, at 155.
B. Possible alternatives to resale royalty legislation

1. Private Contracts – Artists’ Reserved Rights Transfer and Sale Agreement

There have been attempts to ensure an artist’s resale royalty rights through contracts between the artist and the buyer. One of the most famous contracts was the Artists’ Reserved Rights Transfer and Sales Agreement, or the “Projansky Agreement” which was drafted and published in 1971 by New York Lawyer Robert Projansky in association with the art dealer Seth Siegelaub.\(^{269}\) According to this contract, every time a purchaser resold the artwork, the artist would receive fifteen-percent of the proceeds.\(^{270}\) In order to ensure that the artist would receive proceeds for each resale, the contract would follow the work of art.\(^{271}\) This was done by permanently fixing notice of the covenant on the work of art and having the purchaser agree not to alienate or sell the work without binding the new buyer to this covenant.\(^{272}\)

Despite being able to contract an artist’s resale royalty rights, there are still many drawbacks to not only the Projansky Agreement, but also the idea of contracting an artist’s rights. In normal transactions, most artists do not have significant bargaining power, so it may be extremely difficult to convince a purchaser to sign a contract that binds him and future purchasers to pay an artist’s resale royalty right.\(^{273}\) Another issue with contracting a droit de suite is enforcement; if this covenant follows the artwork throughout every resale, it may be extremely difficult to enforce this right if the artwork is continually resold. Not only would it be difficult to enforce this contract if it is resold, it may also be difficult to resell the artwork with this provision that the new buyer must give the artist fifteen-percent of the proceeds if he resells the artwork at a future date.\(^{274}\)

\(^{269}\) Vickers, at 448.
\(^{270}\) Projansky Agreement, Art. Two (b)
\(^{271}\) Projansky Agreement, Art. Five
\(^{272}\) Projansky Agreement, Art. Two, Art. Five
\(^{273}\) Vickers, at 449.
\(^{274}\) Id.
VI. CONCLUSION

It is a difficult to find a balance between the United States' domestic rights and how to better harmonize with the international art market, which shows why droit de suite has been so problematic to establish in the United States. Until the information problem is confronted, an accurate and well-calculated decision for a droit de suite cannot be made. For Congress to be successful in implementing a resale royalty, it must stop targeting just auction houses and find a way for it to be more fairly administered throughout the United States. It seems unlikely that Congress will be successful in passing federal legislation for artist’s resale royalties, especially if it continues to target only a small portion of the secondary art market. If Representative Nadler is to be successful in passing an American droit de suite, he needs to base his bill on empirical data and to be able to show that American artists need this right; two pieces of information he may struggle to substantiate due to the lack of overall data in the art market as a whole. Additionally, the “American Royalties Too Act of 2014” had many issues that needed to be addressed in order to even be implementable, another reason for its failure. It is a good idea to try to implement more moral rights for visual artists in the United States; however due to the inherent issues and pitfalls it will likely never be an artists’ right.

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