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M. Elizabeth Petty

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**RAUSCHENBERG, ROYALTIES, AND ARTISTS' RIGHTS:
POTENTIAL *DROIT DE SUITE* LEGISLATION
IN THE UNITED STATES**

M. Elizabeth Petty*

“I’ve been working my ass off just for you to make that profit.”¹

INTRODUCTION

On a rainy evening in the Upper East Side of New York in October of 1973, Robert and Ethel Scull made art history.² The Sculls, who had made their fortune in the taxi cab business, were selling a portion of their extensive contemporary art collection³ at Sotheby Parke Bernet⁴ in preparation for a looming divorce.⁵ *A Selection of Fifty Works from the Collection of Robert C. Scull*⁶ was the “first

* J.D. Candidate, William & Mary Law School, 2014; M.A., Art Business, Sotheby’s Institute of Art/University of Manchester, 2008; B.A., Art History, University of Virginia, 2006. I would like to thank Michelle Sudano for her help through this process and the staff members of the *Bill of Rights Journal* for their hard work on Volume 22. I would also like to thank my friends and family for their patience, love, and support. Thank you for dragging me out of the *Journal* office every once in a while.

¹ See ANTHONY HADEN-GUEST, *TRUE COLORS: THE REAL LIFE OF THE ART WORLD* 16 (1996) (quoting Robert Rauschenberg).

² See Baruch D. Kirschenbaum, *The Scull Auction and the Scull Film*, 39 *ART J.* 50, 50–54 (1979) (discussing the 1973 auction in detail); see also Adam Lindemann, *Schooled by the Sculls*, *N.Y. OBSERVER* (Apr. 21, 2010, 1:41 PM), <http://observer.com/2010/04/schooled-by-the-sculls/>.

³ In 2010, the Acquavella Galleries in New York mounted *Robert & Ethel Scull: Portrait of a Collection*, with thirty-seven pieces on loan from museums, foundations, and private collections. See Roberta Smith, *Appetite for New and Next New*, *N.Y. TIMES*, Apr. 16, 2010, at C25. Contemporary art is difficult to define, as economist Don Thompson points out. DON THOMPSON, *THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART* 10 (2008). He concludes that “[t]he easiest definition is that contemporary art is what is sold by major auction houses in contemporary art sales.” *Id.*

⁴ Sotheby’s acquired Parke Bernet, the largest auction house in America, in 1964. See *About, SOTHEBY’S*, <http://www.sothebys.com/en/inside/about-us.html> (last visited Mar. 2, 2014) [hereinafter *SOTHEBY’S*].

⁵ For a discussion on Robert and Ethel Scull’s divorce, see JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 882–86 (1998).

⁶ See *SOTHEBY PARKE BERNET INC., A SELECTION OF FIFTY WORKS FROM THE COLLECTION OF ROBERT C. SCULL* (1973).

devoted to a single collection of [c]ontemporary art”⁷ featuring artists such as Andy Warhol, Barnett Newman, and Jasper Johns.⁸

The record sale, which fetched \$2,242,900,⁹ was a milestone in the history of the art market. The media attention surrounding the auction was both positive and negative. André Emmerich, president of the Art Dealers Association, said about the sale, “I felt awe and shock—that pictures could be worth that much money. And a certain embarrassment—that the Sculls should have to sell in this way.”¹⁰ Others were less than pleased with what they considered the commercialization of such a noble field.¹¹ Art historian Barbara Rose argued at the time that the sale was actually the collapse of the art world, suggesting “[t]he sale itself was a circus, with those artists dumb enough to attend as a little freak show in a rear room.”¹² This debate between the moral integrity of art versus its often-high value as a commercial good continues today.

In addition to the critics, another person who was not happy with the sale that evening was American artist Robert Rauschenberg.¹³ Rauschenberg saw his *Double Feature*, which Scull bought in 1959 for \$2,300, sell for \$90,000, and his *Thaw*, which Scull bought a year prior for \$900, fetch \$85,000.¹⁴ He confronted Scull after the auction, angrily telling him, “I’ve been working my ass off just for you to make that profit.”¹⁵ Rauschenberg was implying that Scull had received some sort of windfall in reselling his works, realizing a massive profit that Rauschenberg clearly thought Scull did not earn or deserve.¹⁶ Even if he was pleased with the prices his pieces

⁷ HADEN-GUEST, *supra* note 1, at 1.

⁸ Andy Warhol’s *Flowers* sold for \$135,000; Barnett Newman’s *White Fire* sold for \$155,000; and Jasper Johns’s *Double White Map* for \$240,000. Barbara Rose, *Profit Without Honor*, N.Y. MAG., Nov. 5, 1973, at 80.

⁹ Kirschenbaum, *supra* note 2, at 50.

¹⁰ HADEN-GUEST, *supra* note 1, at 17.

¹¹ See Rose, *supra* note 8, at 80. The art market has continued to grow, with records consistently set at auction, even during difficult economic times. In November 2013, Sotheby’s held a record-setting \$380 million sale, the highest in the auction house’s history. See Chris Michaud, *A \$105 Million Warhol Top Pick at Sotheby’s Best-Ever \$380 Million Auction*, REUTERS (Nov. 14, 2013, 12:42 PM), <http://www.reuters.com/article/2013/11/14/us-art-auction-idUSBRE9A604L20131114>. However, arguably since the Scull auctions, artists have feared the commercialization of their work. See Grace Glueck, *The Mania of Art Auctions: Problems as Well as Profits*, N.Y. TIMES, Nov. 26, 1988, at A1 (“Artists worry that while their work commands more money, price fever may be turning art into a commodity.”).

¹² Rose, *supra* note 8, at 80. While some scholars argue that art should be a non-commercial venture, the art market has remained steadfastly important throughout the history of art. See, e.g., ELIZABETH A. HONING, *PAINTING AND THE MARKET IN EARLY MODERN ANTWERP* 13–18 (1998) (describing the relationship between artists and seventeenth-century European markets).

¹³ See Kirschenbaum, *supra* note 2, at 51–53.

¹⁴ HADEN-GUEST, *supra* note 1, at 16.

¹⁵ *Id.*

¹⁶ Not all artists shared Rauschenberg’s anger. It is reported that pop artist Roy Lichtenstein asked in response, “What did he want, the work to decrease in value?” Edward Winkleman,

fetched that night, then Rauschenberg at least wanted a percentage of the profit, or a type of resale royalty known as *droit de suite*.

Most scholarly articles on the concept of an American *droit de suite* begin with the story of Rauschenberg confronting Scull after the Sotheby's auction.¹⁷ However, few continue the story to what happened immediately after Rauschenberg told his collector that he had "work[ed] [his] ass off." This Note argues that Scull's response after Rauschenberg confronted him is arguably more important in the debate about whether *droit de suite* legislation should be enacted in the United States. According to the reports, Scull responded to Rauschenberg, "It works for you, too, Bob. Now I hope you'll get even better prices."¹⁸ The story goes that Rauschenberg punched Scull in the stomach.¹⁹ The artist and his collector never spoke again.²⁰

In his response to the artist, Scull emphasized that it takes more than the artist to increase the value of art work, particularly because the art itself typically has no inherent value.²¹ In addition to the artist, collectors, dealers, gallery owners, and museums all play an important role once the work is created. "Since exhibition history enhances value, the collectors of what we might call 'market art' have a vested interest in seeing their work take up space in traditional public collections."²² Scull did seem to have a keen sense of the art market and the appreciation of value. In a magazine article before the auction, he said he wanted to sell the works "[b]ecause the works have a life of their own. They're going to outlive me and anyone who buys them. They have a grip on the concept of art history."²³ However angry Rauschenberg may have been that October evening, Scull appeared to be correct.²⁴ Rauschenberg

The Case for Droit de Suite in New York, ART NEWSPAPER (Apr. 28, 2010), <http://www.theartnewspaper.com/articles/The-case-for-droit-de-suite-in-New-York/20673>. Furthermore, iconic American artist Jasper Johns reportedly opened a bottle of champagne when he heard about the sale, anticipating the higher prices he was bound to realize in his future sales. *Id.*

¹⁷ See, e.g., Toni Mione, *Resale Royalties for Visual Artists: The United States Taking Cues from Europe*, 21 CARDOZO J. INT'L & COMP. L. 461, 462–63 (2013) (recounting the story of Rauschenberg and Scull).

¹⁸ HADEN-GUEST, *supra* note 1, at 16.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Some works, however, do have inherent value. For example, Damien Hirst's *For the Love of God*, a skull encrusted with over 8,600 high-quality diamonds, was offered for sale at \$100 million. See William Shaw, *The Iceman Cometh: Damien Hirst Sends a Chill Through the Art World*, N.Y. TIMES, June 3, 2007, at E58; see also DAMIEN HIRST, *FOR THE LOVE OF GOD: THE MAKING OF THE DIAMOND SKULL* 5 (2007).

²² James Panero, *The Art Market Explained*, NEW CRITERION, Dec. 2009, at 26, 29.

²³ Dorothy Seiberling, *Scull's Angles: Going Once, Going Twice . . .*, N.Y. MAG., Sept. 17, 1973, at 58.

²⁴ John Henry Merryman argues that the increased prices for Rauschenberg's works was due in part to "Castelli's [Rauschenberg's dealer] successful efforts in promoting Rauschenberg's work." John Henry Merryman, Comment, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 110 (1993). "Some of it was due to the activities of critics, museum curators

continued to see the value of his works appreciate and today is largely considered a master in twentieth-century American contemporary art.²⁵ Therefore, Scull's comment that a successful sale benefits the artist as well as the seller demonstrated an awareness that Rauschenberg *was* receiving a type of resale royalty through Scull's patronage. However, while Rauschenberg wanted a direct percentage of the final sales on that autumn evening, Scull was asserting that the royalty received from that sale would be indirect compensation, which he would realize with future sales.

The repercussions from that evening extended beyond Rauschenberg's bruised ego (and Scull's bruised stomach). Shortly after the auction, in 1976, the California legislature passed the California Resale Royalty Act (CRRA),²⁶ which allowed artists to collect a five-percent royalty on any resale of their art over \$1,000, if the seller resided in California or the sale took place in California.²⁷ California was the first and only state in the country to pass such legislation, known as *droit de suite*. *Droit de suite* is an "art proceeds right,"²⁸ which originated in France in 1920 as "a technique originally designed to furnish artists and sculptors with some portion of the increase in the value of their works when they are resold."²⁹ A majority of European countries, most recently the United Kingdom, have followed the *droit de suite* model and enacted legislation protecting artists.³⁰ While Congress has passed some federal legislation to protect artists under current federal copyright law, namely the Visual Artists Rights Act of 1990,³¹ any attempt at securing a *droit de suite* provision has

and venturesome collectors (like the Sculls) who admired, supported, showed and bought Rauschenberg's works before he became famous." *Id.*

²⁵ Today, Rauschenberg's work can be seen in museums such as the Museum of Modern Art, the Whitney Museum of American Art, the Guggenheim Museum, and the Tate Modern. See generally MARY LYNN KOTZ, RAUSCHENBERG: ART AND LIFE (2004); JAMES LAWRENCE & JOHN RICHARDSON, ROBERT RAUSCHENBERG (2011).

²⁶ CAL. CIV. CODE § 986 (West 1976).

²⁷ *Id.* Until the United Kingdom passed *droit de suite* legislation, California was the only common-law jurisdiction with such artist protection. Daniel Grant, 'Droit de Suite' Debate Heats Up, ART NEWS (Jan. 11, 2012), <http://www.artnews.com/2012/01/11/droit-de-suite-debate-heats-up/>; see also Merryman, *supra* note 24, at 103 n.1.

²⁸ Diane B. Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U. L. REV. 19, 20, 22 (1966) (explaining the three main ways to protect an artist are "(1) reproduction rights, (2) moral rights, and/or (3) proceeds rights (*droit de suite*)"). Authors have translated the term "droit de suite" differently. Rita Hauser translated it to "the follow-up right," as opposed to the "art proceeds right." Rita E. Hauser, *The French Droit De Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 11 COPYRIGHT L. SYMP. 2, 5 n.14 (1962).

²⁹ Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1333 (1968).

³⁰ For a list of European statutes and conventions, see MERRYMAN & ELSEN, *supra* note 5, at 374-79; see also Grant, *supra* note 27.

³¹ Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 17 U.S.C. § 106A (2006)).

failed.³² While copyright law extends limited protection to artists, as it does to authors and musicians, it generally focuses on reproduction rights.³³ However, while artists can reproduce their work for the masses, with posters, prints, and other novelty items, they typically receive economic benefit from the sale of unique works, unlike creators of other mediums.³⁴

The debate over *droit de suite* and artists' rights is once again in the national spotlight almost forty years after the 1973 Scull auction. In 2011, a group of artists and representatives of artists' estates filed a class-action lawsuit alleging California dealers owed them back royalties pursuant to the CRRA.³⁵ On May 17, 2012, Judge Jacqueline Nguyen of the U.S. District Court for the Central District of California granted the auction houses' motion to dismiss the suit, finding the 1976 statute was unconstitutional because it violated the dormant Commerce Clause.³⁶ The plaintiffs in the case, including the living artist Chuck Close, have appealed to the U.S. Court of Appeals for the Ninth Circuit.³⁷

Estate of Graham v. Sotheby's, Inc. shows the artists' increased interest in the idea of an American *droit de suite*. Moreover, it corresponds with another attempt at federal legislation that was introduced in the U.S. House of Representatives in late 2011.³⁸ In response to that measure, and arguably Judge Nguyen's decision in *Estate of Graham*, the U.S. Copyright Office conducted an inquiry into the possibility of incorporating a resale royalty clause into the current Copyright Act.³⁹ In December of 2013, it recommended that Congress consider adopting a resale royalty provision, suggesting that artists were at a significant disadvantage compared to other creators.⁴⁰ Although Judge Nguyen found the state *droit de suite* statute unconstitutional, the

³² See Helen Stoilas, *US Congress Lobbied Hard over Resale Rights*, ART NEWSPAPER, July/Aug. 2011, at 53.

³³ RALPH E. LERNER & JUDITH BRESSLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 1321 (3d ed. 2005).

³⁴ *Id.* A visit to almost any museum gift shop demonstrates the variety of art that can be mass-produced, from postcards to computer mouse pads to notebooks to jewelry. See, e.g., METROPOLITAN MUSEUM OF ART STORE, <http://store.metmuseum.org> (last visited Mar. 2, 2014); NATIONAL GALLERY OF ART SHOP, <http://shop.nga.gov> (last visited Mar. 2, 2014).

³⁵ *Estate of Graham v. Sotheby's, Inc.*, 860 F. Supp. 2d 1117 (C.D. Cal. 2012), *appeal docketed*, No. 12-56077 (9th Cir. June 8, 2012).

³⁶ *Id.* at 1125.

³⁷ *Estate of Graham v. Sotheby's, Inc.*, No. 12-56077 (9th Cir. filed June 8, 2012) (listing Plaintiff-Appellant Chuck Close as a party to the suit).

³⁸ H.R. 3688, 112th Cong. (1st Sess. 2011); see also Helen Stoilas, *Droit de Suite Bill Introduced in US Congress*, ART NEWSPAPER (Dec. 15, 2011), <http://www.theartnewspaper.com/articles/Droit-de-suite-bill-introduced-in-US-Congress/25297>.

³⁹ Resale Royalty Right, 77 Fed. Reg. 58,175 (Sept. 19, 2012).

⁴⁰ See Tracy Zwick, *U.S. Copyright Office Endorses Resale Royalty Rights for Visual Artists*, ART IN AM. (Dec. 16, 2013), <http://www.artinamericamagazine.com/news-features/news/us-copyright-office-endorses-resale-royalty-rights-for-visual-artists/>.

U.S. Copyright Office's actions may be the closest artists have come to seeing resale royalties protection under federal legislation.

This Note will argue that even if the Ninth Circuit reverses the lower court's decision and holds that the CRRA is constitutional, it most likely will not dissuade attempts to enact federal *droit de suite* legislation in the United States, pursuant to the Commerce Clause of the U.S. Constitution.⁴¹ While international efforts, particularly under the European Union,⁴² have successfully passed *droit de suite* legislation, this Note will argue that the United States should not adopt federal resale royalty legislation.

Part I of this Note will provide the general history of *droit de suite* laws. Part II will then look at the development of *droit de suite* in the United States beginning with the current copyright law through modern efforts to pass federal legislation. This Part will also discuss the development of the CRRA and the recent decision in *Estate of Graham*, analyzing the statute under the dormant Commerce Clause. Part III will then address the federal legislation attempts including the Equity for Visual Artists Act of 2011 and the Copyright Office Inquiry of 2012. Part IV will argue against the enactment of federal *droit de suite* legislation because of the potential harm to the art market, including the impracticability of administering the law and the disincentive for investment in younger, emerging artists.

This Note will conclude that *droit de suite* legislation will have a potential harmful impact on the U.S. economy and specifically the American art market by arguing that Scull was correct in 1973—that artists *are* currently receiving a benefit with appreciated values, regardless of whether they receive a percentage of the resale. Artists, particularly emerging artists, may be in a better financial position without a codified *droit de suite* clause if collectors are incentivized to invest in them, therefore allowing the secondary market to work to increase the image of these artists and the value of their works. Robert Rauschenberg complained that he worked for his collector to realize the profits. However, collectors, like Scull, investors, dealers, and museums also play an essential role in the art market by increasing the name recognition of artists and, accordingly, the value of their works. This Note argues that Rauschenberg was wrong to accuse Scull of unfairly benefitting from his work. Instead, it will argue that collectors and dealers do not receive a windfall from appreciation in value when they sell pieces because they are an integral piece of the art market in helping artists see appreciated values.

⁴¹ U.S. CONST. art. 1, § 8, cl. 3 (conferring upon Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States”).

⁴² See *infra* Part II; see, e.g., Victor Ginsburgh, *The Economic Consequences of Droit de Suite in the European Union*, EUR. CTR. FOR ADVANCED RES. IN ECON. & STAT. (Mar. 2006), available at <http://www.ecares.org/ecare/personal/ginsburgh/papers/143.consequences.pdf> (analyzing the impact of the European Union directive requiring member states to pass *droit de suite* legislation).

I. HISTORY OF *DROIT DE SUITE*

In 1920, France enacted the first *droit de suite* legislation after French legislators heard stories of “artists who died in misery at a time when their paintings were bringing enormous sums, among them Millet, Cezanne [sic], and Gauguin.”⁴³ However, the rationale behind *droit de suite*, particularly protecting the “starving artist,” began in the late nineteenth century, ultimately resulting in the creation of the *Société des Amis du Luxembourg*, which aimed to establish a *droit de suite* in France.⁴⁴ The folklore behind the law is the ideal of the “starving artist,” who suffers to provide for his family while others profit from his creativity.⁴⁵ The *Société* and the French press pushed until the Parliament passed the *droit de suite* in 1920, where it remains in effect.⁴⁶ The law was designed to protect artists the same way it protected creators of similar mediums.⁴⁷

Under French civil law, *droit de suite* was traditionally considered a “moral right[,]” meaning that it is a natural right inherent in the artist and thus not a part of copyright law.⁴⁸ In other words, the rights were seen as equitable rights as opposed to a form of incentive, an often-cited purpose of copyright law.⁴⁹ Elliott C. Alderman argues that the civil-law foundation is one of the fundamental problems of *droit de*

⁴³ Hauser, *supra* note 28, at 2–3. *See generally* JANE TURNER, FROM MONET TO CEZANNE: LATE NINETEENTH CENTURY FRENCH ARTISTS (2003) (providing a biography of Millet, Cézanne, and Gauguin and a general history of the artistic period of the late nineteenth century).

⁴⁴ Hauser, *supra* note 28, at 4.

⁴⁵ Price, *supra* note 29, at 1335.

⁴⁶ *See* Hauser, *supra* note 28, at 4–5.

⁴⁷ *Id.* at 5–6. Rita Hauser argues that the term should be *droit d’auteur* (“author’s rights”) because the *droit de suite* “was in no way conceived of as a special, unique right given to artists, but, rather, was intended to ensure them a benefit parallel to that which writers and composers derive through royalties.” *Id.*

⁴⁸ Jennifer J. Wirsching, *The Time Is Now: The Need for Federal Resale Royalty Legislation in Light of the European Union Directive*, 35 SW. U. L. REV. 431, 434 (2006). *Droit de suite* differs from another fundamental right, *droit moral*, which protects an artist’s creativity. *See* JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 21–25 (1999); *see also* Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y 1 (1980) (discussing *droit moral* and its comparisons to *droit de suite* and copyright).

⁴⁹ *See, e.g.*, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (“To encourage authors to create and disseminate original expression, [copyright law] accords them a bundle of proprietary rights in their works.”); *see also* Stuart Asher Tanenbaum, *Droit de Suite: Just How Sweet Is It?*, SETON HALL L. STUDENT SCHOLARSHIP (May 1, 2013), http://erepository.law.shu.edu/student_scholarship/315 (“Incentives encourage creation by giving a successful creator the financial ability to continue to create and to cover the costs of creating.”).

suite.⁵⁰ He writes that the natural law as developed in Europe “views art as a metaphysical concept instead of a market commodity, and ignores the realities of low profit margins, expenses of ownership and sale, and the inequity of sharing profit without risking loss.”⁵¹

Art is certainly a market commodity, as seen with the huge and seemingly impenetrable art market, and accordingly *droit de suite* is more appropriately situated in American copyright law that is designed to protect a creator’s market commodity.⁵² The Scull auction was arguably the beginning of the this “contemporary art bubble,” which “has been inflating for nearly forty years [since the Scull auction]. The larger this bubble gets, the more indestructible it seems.”⁵³ For instance, in November 2012, almost forty years after the Scull sale, Christie’s and Sotheby’s fetched \$787 million in their contemporary auctions, suggesting to some that the art market may be more than just a bubble and may actually be recession-proof.⁵⁴ That figure was eclipsed in November 2014 when Sotheby’s fetched a record-\$380 million at its contemporary sale⁵⁵ and Christie’s held the most expensive single auction in history fetching \$691.6 million.⁵⁶ In a recent letter to the editor in *The New York Times*, William Cole wrote that this bubble is the result of “hype” surrounding the art market.⁵⁷ He argues that collectors and investors “know the value of hype. They understand that if artworks sell at exorbitant prices, those works—and the artists who created them—become newsworthy, regardless of whether they’re actually any good.”⁵⁸ Economist Don Thompson argues that, much to the dismay of artists, “[e]xpensive work becomes

⁵⁰ Elliott C. Alderman, *Resale Royalties in the United States for Fine Visual Artists: An Alien Concept*, 40 J. COPYRIGHT SOC’Y 265, 267–70 (1992).

⁵¹ *Id.* at 282; see also Michael B. Reddy, *The Droite de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L.J. 509, 515 (1995) (“Some oft-cited examples of this disparity include the resale of a Degas painting originally purchased for 500 francs and later resold in 1912 for 436,000 francs [and] Millet’s *Angelus*, resold for a million francs a few years after its original sale price of 70,000 francs . . .”).

⁵² See 17 U.S.C. § 103 (2006).

⁵³ Panero, *supra* note 22, at 29. The contemporary market has continued to grow, despite the recent financial crisis. “Even if contemporary art seems alien or odd to you, consider this: the market for this art has outperformed the Standard & Poor’s list of 500 common stocks since 2003.” *Even in Tough Times, Contemporary Art Sells*, CBS (Apr. 2, 2012, 7:09 PM), <http://www.cbsnews.com/news/even-in-tough-times-contemporary-art-sells/>. For a discussion of why the contemporary art market continues to grow, see *Art Market*, 60 MINUTES (Apr. 1, 2012), <http://www.cbsnews.com/video/watch/?id=7403948n&tag=contentBody;storyediaBox>.

⁵⁴ William Cole, *Invitation to a Dialogue: An Art Market Bubble*, N.Y. TIMES, Jan. 2, 2013, at A18.

⁵⁵ See Michaud, *supra* note 11.

⁵⁶ See Kathryn Tully, *The Most Expensive Art Ever Sold at Auction: Christie’s Record-Breaking Sale*, FORBES (Nov. 13, 2013, 12:42 PM), <http://www.forbes.com/sites/kathryntully/2013/11/13/the-most-expensive-art-ever-sold-at-auction-christies-record-breaking-sale/>.

⁵⁷ Cole, *supra* note 54.

⁵⁸ *Id.*

meaningful in part because it is expensive.”⁵⁹ Therefore, the concept of protecting artists through resale royalties may be better placed in the realm of copyright law, and not moral law.

Today, every European country except Switzerland has codified a version of *droit de suite*.⁶⁰ Currently, the French *droit de suite* law sets resale royalties at three percent of the sale price through either auction or through a dealer.⁶¹ In addition, several other Latin and South American countries, and a handful of African countries, have a form of *droit de suite* legislation. These countries include Brazil, Chile, Costa Rica, Ecuador, and Morocco.⁶² Most recently, China introduced a *droit de suite* provision in a draft of new copyright legislation that would provide for a resale royalty for original works sold at auction.⁶³ Opponents of the legislation cite the same arguments as those in the United States, including its potential negative impact on the market.⁶⁴

Prior to the enactment of the first French *droit de suite* legislation, European nations met in 1886 for the first Berne Convention for the Protection of Literary and Artistic Works.⁶⁵ The Convention, governed by the World Intellectual Property Organization, met to discuss international copyright standards, with the goal to “constitute a Union for the protection of the rights of authors in their literary and artistic works.”⁶⁶ Article 14ter was added in 1948, which set up an *optional droit de suite* provision:

- (1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to

⁵⁹ THOMPSON, *supra* note 3, at 178.

⁶⁰ DROIT DE SUITE, <http://www.coramjames.com/press/007/droit-de-suite.html> (last visited Mar. 2, 2014); *see also* LERNER & BRESSLER, *supra* note 33, at 1326–27.

⁶¹ LERNER & BRESSLER, *supra* note 33, at 1322 (explaining the most current version of the French *droit de suite* law was incorporated into copyright law in 1957 when it also expanded the law to dealer sales as well as auction sales).

⁶² For a list of world *droit de suite* legislation, *see id.* at 1326–27.

⁶³ Katie Hunt, *China Debates Droit de Suite*, ART NEWSPAPER, Feb. 2013, at 5; *see also* David S. W. Ma, Note, *Right to Integrity and the Proposed Resale Royalty Right and Notification Right in the PRC Copyright Law*, 49 STAN. J. INT'L L. 477 (2013) (comparing the Chinese *droit de suite* laws to the British laws and proposed American laws).

⁶⁴ Hunt, *supra* note 63.

⁶⁵ The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 [hereinafter The Berne Convention]. The Berne Convention sought to protect the moral rights of creators, while American copyright law protects the property rights of creators. Therefore, the two frameworks are fundamentally different from each other. *See* Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 380 (1995) (discussing how moral rights are distinct from economic rights); *see also* Edward J. Damich, *Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status*, 12 CARDOZO ARTS & ENT. L.J. 387, 387–88 (1994) (describing moral rights required by the Berne Convention).

⁶⁶ The Berne Convention, *supra* note 65, at art. 1.

original words of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

- (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.⁶⁷

The United States did not join the Berne Convention until 1988, but even after it joined, Congress continued to resist implementing any moral rights provisions under current copyright law.⁶⁸

The United States continued to resist complying fully with the requirements of the Berne Convention until President George H. W. Bush signed the Visual Artists Rights Act of 1990 (VARA) into law.⁶⁹ With the passage of that law, American artists finally enjoyed full protection of copyright interests abroad; however, they still were not entitled to resale royalties.⁷⁰

II. *DROIT DE SUITE* IN THE UNITED STATES

A. *Visual Artists Rights Act of 1990*

The Copyright Clause of the U.S. Constitution provides: “The Congress shall have the Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁷¹ However, artistic works have not fallen easily within the copyright protections in the United States. “Since its origins in Roman law, copyright has concentrated on protecting creations capable of being reproduced or ‘copied’ rather than on individual objects.”⁷² Accordingly, copyright law typically has benefited creators such as authors, composers, and filmmakers, rather than artists, because “fine art . . . is fundamentally different” than other mediums.⁷³ Artists typically create unique objects, for instance as seen with the traditional mediums of painting

⁶⁷ *Id.* at art. 14ter.

⁶⁸ Wirsching, *supra* note 48, at 437.

⁶⁹ *Id.*

⁷⁰ *Id.* at 437–38; *see also* Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5689 (codified as amended at 17 U.S.C. § 106(a) (2006)).

⁷¹ U.S. CONST. art. 1, § 8, cl. 8.

⁷² Reddy, *supra* note 51, at 534.

⁷³ *Id.*

and sculpture.⁷⁴ The Copyright Act protects creators “of original works of authorship,” which gives artists the right to make reproductions, distribute copies, and perform or exhibit publicly.⁷⁵ Accordingly, while somewhat protected under American copyright law, “artists are not allowed to profit from the increased value of their work to the same extent as writers and composers.”⁷⁶ Authors and composers are in a different position than artists because they “receive royalties through reproduction and performances rights for all the copies of their works that are exploited.”⁷⁷ Artists, on the other hand, typically only are paid for the first sale because they normally do not see any reproduction rights, and “they lose their most remunerative right—that of public display—once they sell their creations.”⁷⁸ Because of the restrictions of the copyright law, some have argued that *droit de suite* is the only way to allow artists to profit from the appreciation of their work in the same manner as authors and composers.⁷⁹

In 1990, Congress passed the Visual Artist Rights Act (VARA),⁸⁰ granting artists additional rights but stopping short of codifying a resale right.⁸¹ Senator Edward Kennedy⁸² and Representative Robert Kastenmeier⁸³ introduced the legislation that was passed and codified as part of the current Copyright Act. VARA had dual aims: “[T]o secure the rights of visual artists to prevent the intentional mutilation or destruction of their work, and to provide for resale royalties.”⁸⁴ The statute provides

⁷⁴ *Id.*

⁷⁵ 17 U.S.C. § 102(a) (2006).

⁷⁶ Reddy, *supra* note 51, at 532–33. Furthermore, the first sale doctrine allows buyers of an artist’s work to display it publicly without seeking the artist’s permission. *Id.* at 533.

⁷⁷ Alderman, *supra* note 50, at 273.

⁷⁸ *Id.* at 273–74. The Copyright Act of 1976 gave artists the right to display their work in public. *See* 17 U.S.C. § 106(5) (2006) (“[I]n the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, [the copyright owner has the right] to display the copyrighted work publicly.”). However, the first sale doctrine allows buyers of an artist’s work to display it publicly without seeking the artist’s permission. Reddy, *supra* note 51, at 533.

⁷⁹ *See, e.g.,* Reddy, *supra* note 51, at 533 (“Until Congress passes *droit de suite* legislation, or some equivalent, this inequity in the American copyright scheme will remain.”). *But see* Alderman, *supra* note 50, at 274 (“[I]t is extremely difficult to establish with any empirical certainty that the copyright treatment of fine artists is detrimental, and not just disparate.”).

⁸⁰ Pub. L. No. 101-650, 104 Stat. 5689 (codified as amended at 17 U.S.C. § 106(a) (2006)).

⁸¹ *Id.* *But see* Sherman, *supra* note 65, at 377 (“VARA does not provide moral rights protection for the authors of literary works, motion pictures, audiovisual works, computer programs, musical works, or many other creative works, which are all otherwise subjects of copyright protection under United States law.”).

⁸² S. 1198, 101st Cong., 135 Cong. Rec. S6811-13 (daily ed. June 16, 1989).

⁸³ H.R. 2690, 101st Cong., 136 Cong. Rec. H3111-16 (daily ed. June 5, 1990).

⁸⁴ Schuyler Chapin & Alberta Arthurs, *A Bill of Rights for Arts*, N.Y. TIMES, Oct. 29, 1987, at A31. Chapin was the chairman of the Independent Committee on Arts Policy and

that “the author of a work of visual art (1) shall have the right to . . . (A) claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create.”⁸⁵ Further, the statute gives artists the right “to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.”⁸⁶ Therefore, the Act protects the artistic integrity of individual works, aligning the legislation closer to the moral rights protected in civil-law countries, such as France, as opposed to protecting the commodity, typically seen with copyright law.⁸⁷

The original legislation included a resale royalties clause, allowing for a royalty of “seven percent from the resale profit whenever the sale price of a work of fine art was one hundred-fifty percent above the purchase price.”⁸⁸ Despite this provision, it was ultimately struck from the codified version of VARA “due to opposition from art dealers, gallery owners, auction houses, and others.”⁸⁹ Despite this, VARA, as passed, required the Copyright Office to conduct a feasibility study regarding possible *droit de suite* legislation in the future.⁹⁰

The “Study on the Resale Royalties for Works of Art” was conducted during 1991.⁹¹ The inquiry asked the public,⁹² in part, the following questions:

Arthurs was the president of the organization. *Id.* The group supported the bill, concluding that “those gifted with the insight, imagination and inventiveness to create fine art are due recognition and protection from Congress.” *Id.* Despite having many artist proponents, the legislation also had its detractors. See Clay Johnson, Letter to the Editor, *Next We’ll Need to Have Art Officially Defined*, N.Y. TIMES, Nov. 12, 1987, at A30 (“Every artisan who manufactures an artifact would want a good reason why he too shouldn’t get a royalty for his art. The answer would be to set up a panel or commission to settle the inevitable disputes. This is where the problem begins. . . . Get out of my life, Ted Kennedy.”). *But see* Arnold A. Gurwitch, Letter to the Editor, *Resale Royalty*, N.Y. TIMES, Dec. 12, 1987, at 30 (“The text introduced by Senator Kennedy contains a clear definition of what constitutes a ‘work of fine art’ in the application of the bill.”).

⁸⁵ 17 U.S.C. § 106A(a)(1) (2006).

⁸⁶ *Id.* § 106(2).

⁸⁷ Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 947 (1990).

⁸⁸ Reddy, *supra* note 51, at 525. From an economic perspective, Ben Bolch argued that the *droit de suite* provision would depress original prices for works and would punish investors who took risks with young artists. Ben W. Bolch, *There Is No ‘Just Price’ for Art*, N.Y. TIMES, Nov. 28, 1987, at 23 (“A royalty proposal by Kennedy is misguided.”).

⁸⁹ Reddy, *supra* note 51, at 525.

⁹⁰ *Id.*

⁹¹ Request for Information; Study on Resale Royalties for Works of Art, 56 Fed. Reg. 4110 (Jan. 24, 1991).

⁹² The Copyright Office was particularly interested in hearing from those “involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, auction houses, investment advisors, collectors of fine art, and curators of art museums.” *Id.*

- (1) Would resale royalty legislation promote or discourage the creation of new works of art, and if so, how? . . .
- (2) If resale royalty legislation is appropriate, what form should it take? . . .
- (3) Who should benefit from the requirement? . . .
- (4) What should the term of any resale requirement be? . . .
- (5) Should there be any enforcement mechanisms, central collecting societies, or registration requirements?⁹³

In December of 1992, the U.S. Copyright Office produced a 760-page report entitled *Droit de Suite: The Artist's Resale Royalty*.⁹⁴ The report carefully analyzed the effects of *droit de suite* legislation in other civil-law countries, such as France, Belgium, and Germany, before considering the implications of a similar statute in the United States.⁹⁵ The Report echoed some of the criticisms of *droit de suite*, including that it would not encourage creation because “resale royalties benefit only a very small percentage of artists and will depress prices for works in the primary market, possibly chilling rather than stimulating the incentive to create.”⁹⁶ The Report also acknowledged a possible privacy issue: “[T]hat artists would need to obtain certain information about sales prices and ownership that sellers, purchasers, and other owners may not want to disclose.”⁹⁷ In its conclusion, the Report noted: “Copyright legislation in the United States is grounded in the constitutional clause [as opposed to the moral right of paternity], which motivates creativity, while encouraging the broad public dissemination of works.”⁹⁸ The emphasis on encouraging creativity highlights the fundamental difference between France and the United States’ approach to *droit de suite*.⁹⁹

Ultimately, the Report recommended that because “the Copyright Office [was] not persuaded that sufficient economic and copyright policy justification exist[ed,]” Congress should not enact *droit de suite* legislation.¹⁰⁰ However, it included a caveat: “Should the European community harmonize existing *droit de suite* laws, Congress

⁹³ *Id.*

⁹⁴ U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY* (1992) [hereinafter 1992 REPORT].

⁹⁵ *Id.* at ii–iv.

⁹⁶ *Id.* at x.

⁹⁷ *Id.* at 130.

⁹⁸ *Id.* at 142.

⁹⁹ See Tanenbaum, *supra* note 49, at 9 (“An incentive is something ‘which urges to action, especially a promised reward for working harder.’ To urge to action, it must be forward-looking. In contrast, a right of equity in this context would be based upon rewarding past efforts and be something the creator would gain that does not result solely from the creator’s own choices.” (footnote omitted)). However, Tanenbaum argues that *droit de suite* “is an incentive in form, [but] it is entangled with being an equitable vehicle for creators.” *Id.* (footnote omitted).

¹⁰⁰ 1992 REPORT, *supra* note 94, at 149.

may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its member States.”¹⁰¹ Therefore, the U.S. Copyright Office did not recommend the passage of any legislation in the United States at that time, but it left the door open for a possible review if the European Community “harmonized” its efforts.¹⁰² However, the concerns regarding *droit de suite* legislation that the study highlighted are still present today, suggesting these issues are fundamental, inherent challenges in the American art market—and to some extent the global art market. Therefore, the question should not be *when* this type of legislation should be passed, but whether it should *ever* be passed in the United States.

Despite this concern, the harmonization to which the Report referred likely occurred in 2001 when the European Union required member nations, both civil and common-law countries, to pass some form of resale royalty act.¹⁰³ The directive had two stages.¹⁰⁴ Beginning in 2006, living artists could receive royalty payments; however, the law allowed countries that did not have such legislation until 2012 to pass a law to extend *droit de suite* to artists’ estates.¹⁰⁵ Because of the move by the European Union, particularly in the United Kingdom, as well as other factors that will be discussed below, Congress, in fact, reopened the inquiry into possible resale royalty legislation.¹⁰⁶ The U.S. Copyright Office released its report in December 2013, changing its position and suggesting that Congress consider passing some type of legislation to protect artists.¹⁰⁷

B. California Resale Royalty Act

Beyond the attempts at federal legislation, at least one state determined to take on the issue of resale royalty. A potential result of the backlash from the 1973 Scull auction, in 1976 California became the first and only state to pass a resale royalties act.¹⁰⁸ The California Resale Royalty Act (CRRRA) requires that

¹⁰¹ *Id.* (emphasis added).

¹⁰² *Id.*

¹⁰³ Council Directive 2001/84, 2001 O.J. (L 272) 32 (EC) [hereinafter E.U. Directive].

¹⁰⁴ Shane Ferro, *Europe’s Droit De Suite Dilemma: Threat to the Art Boom or Tempest in a Teapot?*, BLOUIN ART INFO (July 14, 2011), <http://ca.blouinartinfo.com/visual-arts/article/38042-europes-droit-de-suite-dilemma-threat-to-the-art-boom-or-tempest-in-a-teapot>.

¹⁰⁵ *Id.*

¹⁰⁶ Resale Royalty Right, 77 Fed. Reg. 58,175 (Sept. 19, 2012) (requesting information, in part, regarding current copyright law; promoting production of creative works; fostering the art marketplace; and contractual considerations).

¹⁰⁷ U.S. COPYRIGHT OFFICE, RESALE ROYALTIES: AN UPDATED ANALYSIS (2013) [hereinafter 2013 REPORT], available at <http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>.

¹⁰⁸ CAL. CIV. CODE § 986 (West 1976); see also Ben W. Bolch et al., *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L. REV. 689 (1978); *California Resale Royalty Act*, CAL. ARTS COUNCIL, <http://www.cac.ca.gov/artsinfo/resaleroyalty.php> (last visited Mar. 2, 2014) (providing guidance for artists).

Whenever a work of fine art¹⁰⁹ [over \$1,000] 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.¹¹⁰

Further, the statute requires that “[w]hen a work of fine art is sold at an auction or by a gallery, dealer, broker, 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.”¹¹¹ If the seller cannot find the artist, the royalty is due to the California Arts Council, which is tasked with locating the artist.¹¹² At the time, several younger artists feared that collectors may stop investing in them to avoid paying future royalties.¹¹³ For instance, a California sculptor commented at the time, “If the law turns off the collectors . . . and has a negative effect on selling art in the first place, then all we’ve done is lost something.”¹¹⁴

When the statute was passed, many artists clearly were pleased with the move towards *droit de suite*. However, collectors, dealers, and museum officials overwhelmingly opposed the law.¹¹⁵ Among their criticisms were its application “to sales outside of California;” “application to sales by dealers and to private sales;” and “giving the artist 5% of the gross resale price rather than a percentage of the profit, if any, on the resale.”¹¹⁶ Moreover, soon after the legislation passed, artists were faced with challenges in collecting the royalties, resulting in supporters of the state statute asking Congress for help in passing federal legislation.¹¹⁷

¹⁰⁹ The statute defines “fine art” as “an original painting, sculpture, or drawing, or an original work of art in glass.” § 986(c)(2).

¹¹⁰ *Id.* § 986(a).

¹¹¹ *Id.* § 986(a)(1).

¹¹² *Id.* § 986(a)(2)(5).

¹¹³ William Bates, *Royalties for Artists: California Becomes the Testing Ground*, N.Y. TIMES, Aug. 14, 1977, § 2, at 1 (describing that “younger artists . . . see the royalties due established artists as a threat to their own careers”).

¹¹⁴ *Id.* Interestingly, when the California legislation was passed, Robert Rauschenberg publicly announced that he would give all of his royalties to a foundation he established called “Change, Inc.,” which provided grants to emerging artists who are experiencing difficult financial situations. See Daniel Grant, *Emergency Relief Funds Help Artists in Dire Need*, HUFFINGTON POST (Sept. 20, 2011, 11:47 AM), http://www.huffingtonpost.com/daniel-grant/emergency-relief-funds-he_b_969297.html.

¹¹⁵ See, e.g., Bates, *supra* note 113.

¹¹⁶ MERRYMAN & ELSEN, *supra* note 5, at 382.

¹¹⁷ See Everett R. Holles, *California Law Giving Royalties to Artists Is Stymied by Complications*, N.Y. TIMES, Sept. 25, 1977, at 53 (“Representative Henry A. Waxman, . . . who concedes that enforcement of royalty payments by an individual state is virtually impossible because of the secrecy of many art sales and the opportunity for out-of-state ‘bootlegging,’ has drafted the Visual Arts Act of 1977.”).

The statute was challenged soon after its enactment in *Morseburg v. Balyon*.¹¹⁸ Henry Morseburg, a Beverly Hills art dealer, appealed a decision in the U.S. District Court for the Central District of California, that had found the CRRA was not preempted by the 1909 Copyright Act¹¹⁹ nor did it violate the Contract Clause of the Constitution.¹²⁰ The Ninth Circuit Court of Appeals held the CRRA was not unconstitutional because it was not preempted by the 1909 Copyright Act.¹²¹ Morseburg argued that the CRRA “‘restricts the transfer’ of a copyrighted ‘work of fine art’ when in the hands of one who lawfully obtained it, such as a purchaser from the artist.”¹²² The court held that works of art often are not copyrighted because of “‘ignorance, a distaste for legal details, weak bargaining power, and the desire to avoid defacing the work with a copyright symbol.’”¹²³ However, the reason why artists do not copyright pieces of art is arguably not due to ignorance but rather because the majority of art sold on the secondary market are unique works. Nonetheless, the court was correct in highlighting the fact that many pieces of art are not copyrighted.

The court held that the CRRA provides an additional protection to artists, and thus the 1909 Copyright Act did not preempt the statute.¹²⁴ Therefore, the CRRA was upheld in 1980. While the court did not review the statute under the 1976 Copyright Act, Jennifer Clarke made the following analysis in 1981:

Offering a means to test this analysis, the California Resale
Royalt[y] Act grants a right with respect to fine art, a subject

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

¹¹⁹ The Ninth Circuit did not consider whether the CRRA violated the Copyright Act of 1976 because the sales were made before the passage of the revised act. For a discussion of how the CRRA would fare under the Copyright Act of 1976, see Bob Jones, *Morseburg v. Balyon—The High Court Grants Royalty a Reprieve: Constitutional Challenges to the California Resale Royalty Act*, 3 HASTINGS COMM. & ENT. L.J. 1, 1–2 (1980).

¹²⁰ *Id.* at 2.

¹²¹ *Morseburg*, 621 F.2d at 978 (“These observations permit us to conclude that the 1909 Copyright Act has not occupied the area with which we are concerned and that the California Act is not in conflict with it.”); *see also* Jennifer R. Clarke, Note, *The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law*, 81 COLUM. L. REV. 1315, 1320 (1981) (“By force of the supremacy clause of the Constitution, a federal statute displaces a state statute when the state statute interferes with the purposes of the federal statute.”).

¹²² *Morseburg*, 621 F.2d at 975.

¹²³ *Id.* at 975–76.

¹²⁴ The Ninth Circuit held that *Goldstein v. California*, 412 U.S. 546 (1973), was controlling. *Morseburg*, 621 F.2d. at 977. In that case, the appellants were convicted under a “California statute making it a criminal offense to ‘pirate’ recordings produced by others.” *Goldstein*, 412 U.S. at 548. The Court in *Goldstein* held that the scope of the statute was not preempted by the 1909 Copyright Act. *Id.* at 571 (“We conclude that the State of California has exercised a power which it retained under the Constitution, and that the challenged statute, as applied in this case, does not intrude into an area which Congress has, up to now, pre-empted.”).

matter which is also protected under the Copyright Act. The right conflicts with one provision of the Copyright Act, but neither of the two primary purposes of copyright law—providing an incentive to authors and ensuring the flow of ideas into the public domain—is significantly impeded by the [resale royalty] right. The California Act, therefore, is not preempted by the [1976] Copyright Act.¹²⁵

The Ninth Circuit affirmed the lower court,¹²⁶ upholding, for at least the next thirty-two years, the constitutionality of the CRRA.¹²⁷ The court's holding in *Morseburg v. Balyon* was the first and only time a court ruled on the constitutionality of the CRRA until 2012.

C. Estate of Graham v. Sotheby's, Inc.

In 2011, a group of artists, including Chuck Close,¹²⁸ Laddie John Dill,¹²⁹ and the estate of Robert Graham,¹³⁰ filed a class action complaint against Sotheby's and Christie's, both New York-based premier auction houses.¹³¹ The artists and their heirs claimed that the auction houses owed them back royalties under the CRRA.¹³²

¹²⁵ Clarke, *supra* note 121, at 1332.

¹²⁶ *Morseburg*, 621 F.2d at 974–75.

¹²⁷ See *High Court Upholds Artists' Royalties*, N.Y. TIMES, Nov. 11, 1980, at C14; see also *Estate of Graham v. Sotheby's, Inc.*, 860 F. Supp. 2d 1117, 1126 (C.D. Cal. 2012) (holding that the CRRA violates the Commerce Clause of the Constitution).

¹²⁸ See Anandashankar Mazumdar, *Two Lawsuits by Artists May Test Validity of California Resale Royalty Rights Statute*, BLOOMBERG BNA (Oct. 27, 2011), <http://www.bna.com/two-lawsuits-artists-n12884904025>; see also Interview by Steven Colbert with Chuck Close (Aug. 12, 2010), available at <http://www.colbertnation.com/the-colbert-report-videos/343737/August-12-2010/chuck-close>. For more information on Close, considered “one of America’s most celebrated living artists,” see CHRISTOPHER FINCH, CHUCK CLOSE: WORK (2010).

¹²⁹ See Mazumdar, *supra* note 128; see also LADDIE JOHN DILL OFFICIAL WEBSITE, <http://www.laddiejohndill.com/index.php> (last visited Mar. 2, 2014).

¹³⁰ See Mazumdar, *supra* note 128. For a detailed analysis of one of Graham’s most famous public works, see JACK MILES ET AL., ROBERT GRAHAM: THE GREAT BRONZE DOORS FOR THE CATHEDRAL OF OUR LADY OF THE ANGELS (2002); Suzanne Muchnic & Cara Mia DiMassa, *Robert Graham, 1938–2008: Sculptor’s Legacy Is Visible All over L.A.*, L.A. TIMES, Dec. 28, 2008, at A1.

¹³¹ *Estate of Graham*, 860 F. Supp. 2d at 1119.

¹³² *Id.* Christie’s and Sotheby’s have not been without scandal throughout their long history in the art world. In 2001, both auction houses were defendants in an antitrust trial, after being accused of price-fixing. The trial, which shook the art world, resulted in the imprisonment of Sotheby’s CEO, Alfred Taubman. See generally CHRISTOPHER MASON, THE ART OF THE STEAL: INSIDE THE SOTHEBY’S–CHRISTIE’S AUCTION HOUSE SCANDAL (2005) (providing both a history of the auction houses and a closer look at the scandal).

In an interview, Chuck Close said that the lawsuit was “a question of basic fairness.”¹³³ The artists alleged that the auction houses—“acting as the agents for California sellers—sold works of fine art at auction but failed to pay the appropriate resale royalty provided for under the CRRRA.”¹³⁴ In their complaint, the artists alleged that “Sotheby’s custom and practice is to conceal the fact of a seller’s California residency, or the fact that a sale took place in California, from communications with the public concerning auctions and sales of Fine Art.”¹³⁵ The defendant auction houses filed a motion to dismiss the claim based on three allegations: that (1) the California Resale Royalty Act violated the Commerce Clause; (2) the Act constituted a taking for purposes of the U.S. and state constitutions; and (3) that the 1976 Copyright Clause preempted the statute.¹³⁶ Judge Jacqueline Nguyen, of the U.S. District Court for the Central District of California, agreed with the auction houses and granted their motion to dismiss.¹³⁷ She decided the case on the narrowest grounds, analyzing the suit under the Commerce Clause, and did not address the takings or preemption arguments.¹³⁸ The plaintiffs have appealed the case to the Ninth Circuit.¹³⁹

Judge Nguyen analyzed the statute under the dormant Commerce Clause, holding that “[a] state statute implicates the dormant Commerce Clause if the activity it regulates could likewise be regulated by Congress.”¹⁴⁰ Determining that the art market was within Congress’s reach under the Commerce Clause, she continued her analysis, concluding that the California law was facially discriminatory and per se invalid. In doing so, Judge Nguyen cited *Healy v. Beer Institute, Inc.*,¹⁴¹ in which the Supreme Court held that “a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”¹⁴² She determined that, despite the fact that the defendants were New York corporations, they were still bound by the CRRRA “by virtue of selling art that is owned by a California seller—even if the transaction takes place

¹³³ Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, N.Y. TIMES, Nov. 2, 2011, at C1.

¹³⁴ *Estate of Graham*, 860 F. Supp. 2d at 1119.

¹³⁵ Class Action Complaint at 3, *Estate of Graham v. Sotheby’s, Inc.*, 860 F. Supp. 2d 1117 (C.D. Cal. Oct. 18, 2011) (No. 2:11-cv-08604-JHN-FFM).

¹³⁶ *Estate of Graham*, 860 F. Supp. 2d at 1119.

¹³⁷ *Id.*

¹³⁸ *Id.* For a brief analysis of the two issues that Judge Nguyen did not address, see Mione, *supra* note 17, at 473–78.

¹³⁹ See Appellants’ Opening Brief, *Estate of Graham v. Sotheby’s Inc.*, No. 12-56067 (9th Cir. Feb. 28, 2013).

¹⁴⁰ *Estate of Graham*, 860 F. Supp. 2d at 1122 (citing *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 993 (9th Cir. 2002)).

¹⁴¹ 491 U.S. 324 (1989).

¹⁴² *Id.* at 336.

wholly in New York, and even if the beneficiary of the 5% royalty is a New York artist.”¹⁴³ She found

that the CRRA explicitly regulates applicable sales of fine art occurring wholly outside California. Under its clear terms, the CRRA regulates transactions occurring anywhere in the United States, so long as the seller resides in California. Even the artist—the intended beneficiary of the CRRA—does not have to be a citizen of, or reside in, California.¹⁴⁴

However, while Judge Nguyen held that the statute was *per se* invalid because it was facially discriminatory, it appears that she applied the wrong test to the statute.

Furthermore, both auction houses have an “extensive presence” in California with sale rooms in multiple California cities.¹⁴⁵ Because of their presence in the state, the plaintiffs in the case have argued that the statute is *per se* valid because it satisfies the bright-line rule established by *Quill Corp. v. North Dakota*,¹⁴⁶ which states that “all that is needed for a state to impose such a duty on an out-of-state merchant, consistent with the Commerce Clause, is that the out-of-state merchant have a ‘physical presence’ in the state imposing the levy.”¹⁴⁷ Therefore, “if [an out-of-state] merchant has a physical presence in the levy-imposing state (or employs persons in the state), then there is no Commerce Clause barrier in requiring the merchant to fulfill the levy-collection and payment obligation.”¹⁴⁸ Because the auction houses do have a visible presence in California, the Appellants argue that the statute does not violate the Commerce Clause and does not reach unfairly outside of the state.

Even if the Ninth Circuit does not hold that the statute is *per se* valid, it could still find the statute constitutional under the analysis set forth in *Pike v. Bruce Church, Inc.*,¹⁴⁹ which states that “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹⁵⁰ The legitimate local interest is to protect artists, and it is possible that the Ninth Circuit may find that the burden on interstate commerce is minimal compared to the burden on the state. However, it is also possible that the court will agree with Judge Nguyen that the burden on

¹⁴³ *Estate of Graham*, 860 F. Supp. 2d at 1125.

¹⁴⁴ *Id.* at 1124 (citations omitted).

¹⁴⁵ See Appellants’ Opening Brief, *supra* note 139, at 11–12.

¹⁴⁶ 504 U.S. 298 (1992).

¹⁴⁷ Appellants’ Opening Brief, *supra* note 139, at 18 (citing *Quill*, 504 U.S. at 314–15).

¹⁴⁸ *Id.* at 20 (citing *Quill*, 504 U.S. at 315).

¹⁴⁹ 397 U.S. 137 (1970).

¹⁵⁰ *Id.* at 142.

interstate commerce, namely the use of agents outside of the state, outweighs the benefit to artists.

Moreover, Judge Nguyen seemed to overlook the fact that there is a California connection in all of these sales—either the sale took place in California or the seller was a California resident. Christie’s and Sotheby’s, although New York-based companies, were only acting as agents for the seller. Therefore, they had “affirmatively chosen to subject” themselves to the California statute by contracting with the sellers or selling in California.¹⁵¹ Therefore, pursuant to the dormant Commerce Clause’s goal, the CRRA “burdens only in-state interests and, thus, gives out-of-state interests an advantage.”¹⁵²

Judge Nguyen granted the defendants’ motion to dismiss. However, as stated above, the artists have filed an appeal to the Ninth Circuit, on which Judge Nguyen recently has been confirmed as a judge.¹⁵³ Following her decision, plaintiffs’ counsel, Eric George, made a statement regarding her decision:

The artist protection law was properly enacted by California’s legislative and executive processes, pursuant to powers the U.S. Constitution reserves to the states. For a single federal judge to invalidate the law more than 35 years later and without allowing any evidence to be taken, it marks a departure from established constitutional law. We are confident, as both sides have always believed, this case will ultimately be resolved by the 9th Circuit Court of Appeals, which already upheld this very statute in 1981 [in *Morseburg v. Balyon*].¹⁵⁴

The artists filed a motion to stay the decision with Judge Michael Fitzgerald of the Central District of California. However, Judge Fitzgerald denied the motion, stating that, “Apart from whatever rights accrued to Sotheby’s and Christie’s, the Order is not a binding precedent on other district courts either within or outside the Ninth Circuit. . . . The Court can no more ‘stay’ the Order than it could ‘stay’ a law review article.”¹⁵⁵ Michael Bowse, one of the lawyers for the artists, reportedly made the motion as a way “to clarify to all parties—as well as the media—that the law remains

¹⁵¹ See *S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 468 (9th Cir. 2001).

¹⁵² Appellants’ Opening Brief, *supra* note 139, at 35.

¹⁵³ See Lisa Mascaro, *Jacqueline H. Nguyen of L.A. Confirmed to U.S. 9th Circuit Court*, L.A. TIMES (May 7, 2012), <http://articles.latimes.com/2012/may/07/nation/la-na-nguyen-20120508>.

¹⁵⁴ Alison Frankel, *Should Artists Get Royalties on Resales? California Judge Says No*, THOMPSON REUTERS NEWS & INSIGHT (May 19, 2012, 5:26 PM), <http://blogs.reuters.com/alison-frankel/2012/05/19/should-artists-get-royalties-on-resales-california-judge-says-no> (quoting Eric George).

¹⁵⁵ Order Denying Ex Parte Application, *Estate of Graham v. Sotheby’s, Inc.*, No. CV-11-8604-MWF (C.D. Cal. June 6, 2012).

in effect.”¹⁵⁶ Some media outlets have called the motion a “backhanded win,” claiming the denial of the motion “means that the auction houses will have to keep fighting to avoid the possibility of having to pay artists royalties for reselling their work in California.”¹⁵⁷ Because Judge Nguyen dismissed the claim without ordering any action, Judge Fitzgerald had nothing to stay because “[t]he Court . . . did not enjoin California from attempting to enforce the Act.”¹⁵⁸ It appears that the lawyers for the artists may consider the denial of the motion a possible hint that the Ninth Circuit may find no merit in Judge Nguyen’s Commerce Clause analysis of the statute.¹⁵⁹

III. RECENT FEDERAL LEGISLATION ATTEMPTS

A. *Equity for Visual Artists Act of 2011*

As Judge Nguyen stated in her opinion, Congress may regulate the art market pursuant to the Commerce Clause of the U.S. Constitution.¹⁶⁰ She concluded that the art market has a “substantial effect” on interstate commerce, therefore bringing it under the power of Congress to regulate.¹⁶¹ Despite this power, attempts at federal legislation regarding resale royalties have failed. In late 2011, however, Representative Jerrold Nadler of New York introduced new legislation regarding *droit de suite*.¹⁶² The bill, known as the Equity for Visual Artists Act of 2011 (EVAA), would provide a seven-percent royalty for works sold for \$10,000 or more at major auction houses, half of which would go to the artist and half would go to non-profit art museums.¹⁶³ The legislation provides for the following:

Whenever a work of visual art is sold as the result of auction of
that work by someone other than the artist who is the author of

¹⁵⁶ Andrew Russeth, *Court Ruling Reminds Art World that California Resale Royalty Law Remains in Effect*, GALLERIST (June 8, 2012, 2:25 PM), <http://galleristny.com/2012/06/court-ruling-reminds-art-world-that-california-resale-royalty-law-remains-in-effect>.

¹⁵⁷ Shane Ferro, *Artists Score Backhanded Win in California Resale Royalties Case, But Longer Fight Looms*, BLOUIN ART INFO (June 8, 2012), <http://www.blouinartinfo.com/news/story/807627/artists-score-backhanded-win-in-california-resale-royalties-case-but-longer-fight-looms>.

¹⁵⁸ Order Denying Ex Parte Application, *Estate of Graham v. Sotheby’s, Inc.*, No. CV-11-8604-MWF (C.D. Cal. June 6, 2012). Judge Fitzgerald also disclosed that Eric George, counsel for the artists, is a member of Senator Barbara Boxer’s Judicial Advisory Committee for the Central District of California, which recommended him for the open judicial position. *Id.*

¹⁵⁹ Ferro, *supra* note 157.

¹⁶⁰ U.S. CONST. art. 1, § 8, cl. 3.

¹⁶¹ See *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the Commerce Power extends to a local activity if Congress has a rational basis for determining that the activity substantially affects interstate commerce).

¹⁶² See Stoilas, *supra* note 38.

¹⁶³ Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. (1st Sess. 2011).

the work, the entity that collects the money or other consideration paid for the sale of the work shall, within 90 days of collecting such money or other consideration, pay out of the proceeds of the sale a royalty equal to 7 percent of the price. Such royalty shall be paid to a visual artists' collecting society. The collecting society shall distribute, no fewer than 4 times per year, 50 percent of the net royalty to the artist or his or her successor as copyright owner. After payment to the artist or his or her successor as copyright owner, the remaining 50 percent of the net royalty shall be deposited into an escrow account established by the collecting society for the purposes of funding purchases by nonprofit art museums in the United States of works of visual art authored by living artists domiciled in the United States.¹⁶⁴

Representative Nadler said of the bill, "It's important to ensure that artists are fairly compensated—even more so in difficult economic times, when normal channels of support for artists are less dependable."¹⁶⁵ He continued by stating that the bill would "provide incentives for the creation of art by providing resale royalty rights and establishing a fund for nonprofit art museums to buy art from those artists."¹⁶⁶ However, Representative Nadler's statement overlooks the fact that this legislation would provide an incentive to buy works by *already established* artists, because it places the royalty on pieces sold for over \$10,000.¹⁶⁷ Therefore the bill would serve those artists, not emerging artists, rebutting the "starving artist" theory to which Nadler alluded in his comments.¹⁶⁸ While some have argued that the escrow account created under the EVAA for museum purchases will be "beneficial for young and emerging artists,"¹⁶⁹ this assumption may not be enough to overcome the burden of the price threshold on younger artists.

The concept of the poor artist is a fundamental principle that underlies the *droit de suite* doctrine, but historically, these legislative proposals have not protected the poor or emerging artist, undercutting the intended rationale behind *droit de suite*.¹⁷⁰

¹⁶⁴ *Id.*

¹⁶⁵ Stoilas, *supra* note 38 (quoting Representative Jerrold Nadler).

¹⁶⁶ *Id.*

¹⁶⁷ S. 2000 § 3.

¹⁶⁸ *Id.* But see Mike Boehm, *Nationwide Royalty on Artwork Sales Introduced in Congress*, L.A. TIMES (Dec. 16, 2011), <http://articles.latimes.com/2011/dec/16/entertainment/la-et-artist-royalties-20111216> (arguing that the portion reserved for museums will encourage those museums to invest in new artists).

¹⁶⁹ Mione, *supra* note 17, at 489.

¹⁷⁰ Prior to the California statute's ratification, Monroe E. Price and Aimée Brown Price argued that *droit de suite* rests on the fact that a "postponement in value is attributable to the lag in popular understanding and appreciation . . . therefore the artist is subsidizing the

Judith Prowda, Chair of the Entertainment, Arts and Sports Law Section of the New York Bar Association, writes that the *droit de suite* legislation, such as the proposed EVAA, is “ineffective” and that the benefits are “highly skewed.”¹⁷¹ She argues that “the law enriches a very small minority of artists who actually see their works resold and gain in value.”¹⁷² Even when Scull placed his Rauschenberg works in the 1973 auction, Rauschenberg was a well-known, established artist, evidenced by the mere fact his works were in a highly publicized Sotheby’s sale. A resale royalty would not have been beneficial to Rauschenberg when the works were sold in 1973. Instead, he arguably would have benefitted more from some type of subsidy when he created the works years before the Scull auction and, more importantly, years before he was an established American artist.

Moreover, the legislation excludes sales conducted through private sale and only imposes the royalty on public auctions. This disregards the large number of transactions that occur privately.¹⁷³ Legislation such as the EVAA may push auction houses into the private market, which would not be subject to the royalty and, accordingly, would not help in compensating artists.¹⁷⁴ Further, the importance of auction houses in the art market cannot be overstated. As one of the most transparent aspects of the art market, which in itself is far from completely transparent,¹⁷⁵ the major auction houses serve as “the greatest value-adding component” to contemporary art.¹⁷⁶ On the other hand, the private secondary art market “is the least transparent and least

public’s education with his poverty.” Monroe E. Price & Aimée Brown Price, *Rights of Artists: The Case of the Droit de Suite*, 31 ART J. 144, 144 (1971).

¹⁷¹ Judith B. Prowda, *Assessing Artist’s Resale Rights Legislation*, N.Y. L.J. ONLINE (Jan. 23, 2012), <http://www.newyorklawjournal.com/id=1202539351744>.

¹⁷² *Id.*

¹⁷³ See Benjamin Genocchio, *Auction Houses Versus Private Sales: What Is the Future of Buying Art?*, BLOUIN ART INFO (Oct. 4, 2012), <http://www.artinfo.com/news/story/830496/auction-houses-versus-private-sales-what-is-the-future-of>; see also Carol Vogel, *In Slump, More Art Is Selling in Private*, N.Y. TIMES, Apr. 26, 2009, at A17 (arguing that selling privately is a strategic move for collectors during difficult economic times). In an opinion piece, Abigail Esman suggests that the bill may also thwart contemporary sales all together by encouraging collectors to invest in Old Masters, Modern, and Impressionist artists. Abigail R. Esman, Op-Ed., *The Droit de Suite Dilemma (and Why It’s Just a Bad Idea)*, FORBES (Dec. 12, 2011, 11:51 AM), <http://www.forbes.com/sites/abigailsesman/2011/12/21/the-droit-de-suite-dilemma>.

¹⁷⁴ See Nic Forrest, *The Coming Out of Private Art Sales*, ART MARKET BLOG (Apr. 30, 2012), <http://www.artmarketblog.com/2012/04/30/the-coming-out-of-private-art-sales-artmarketblog-com>; see also CHRISTIE’S PRIVATE SALES, CHRISTIE’S, <http://www.christiesprivatesales.com> (last visited Mar. 2, 2014).

¹⁷⁵ Auctions are still cloaked with some mystery. For instance, many buyers will opt to place their bids through a representative or through a telephone bid, allowing them to maintain their anonymity. See THOMPSON, *supra* note 3, at 131–32.

¹⁷⁶ *Id.* at 13.

regulated major commercial activity in the world.”¹⁷⁷ If the market moved away from the auction houses to the private hands of dealers in an effort to avoid additional fees under the EVAA, the entire market could suffer.

B. Copyright Inquiry of 2012

The U.S. Copyright Office made the decision to relaunch an inquiry into the possibility of amending current copyright law.¹⁷⁸ The move was likely in response to the recent developments in *droit de suite*, both in this country and abroad, including the introduction of the EVAA¹⁷⁹ and the European Union directive¹⁸⁰ to members to implement *droit de suite* legislation. The inquiry described international developments, including the United Kingdom’s adoption of resale royalty legislation.¹⁸¹ It also outlined developments in the United States with the district court decision in *Estate of Graham v. Sotheby’s, Inc.* and the introduction of the EVAA.¹⁸² The inquiry posed questions about the possible implications the royalty may have on the existing American art market:

The effect of a resale royalty on current or future markets is a related, important question, though that is not to say that the law must or should protect all existing business models. Is it possible, however, that a resale royalty right might add to the costs of those who buy and invest in artworks and, if so, are such costs acceptable from a policy perspective? In this regard, the art market should be broadly defined, including emerging artists, heirs, investors and collectors.¹⁸³

The U.S. Copyright Office was, thus, rightly beyond looking at the fairness argument and considering the larger impact that a resale royalty act would have on the larger art market. These implications will be discussed below.

The inquiry asked for “comment from the public on factual and policy matters addressed above, including the potential effect of a resale royalty on visual artists, current copyright law and practical implications for commerce.”¹⁸⁴ This suggests that the trend is moving toward the passage of federal *droit de suite* legislation.

¹⁷⁷ *Id.* at 29.

¹⁷⁸ *See* Resale Royalty Act, 77 Fed. Reg. 58,175 (Sept. 19, 2012).

¹⁷⁹ *See supra* Part II.A.

¹⁸⁰ *See supra* notes 103–05.

¹⁸¹ Resale Royalty Act, 77 Fed. Reg. at 58,177.

¹⁸² *Id.*

¹⁸³ *Id.* at 58,177–78.

¹⁸⁴ *Id.* at 58,179.

On December 12, 2013, the U.S. Copyright Office released its 124-page report, suggesting “that Congress may want to consider a resale royalty, as well as a number of possible alternative or complementary options for supporting visual artists, within the broader context of industry norms, market practices, and other pertinent data.”¹⁸⁵ The Report acknowledged the disadvantage that visual artists face compared to other types of creators because they “do not share in the long-term financial success of their works because works of visual art are produced singularly and valued for their scarcity.”¹⁸⁶ Although the Report cited several factors for its support, it also recognized that it is unclear what the implications would be of *droit de suite* on the American art market.¹⁸⁷ Because of that, the Report only recommended that any type of resale royalty benefit only the artist during his life and it be applied proactively.¹⁸⁸

The Report was requested by Senator Herb Kohl and Representative Jerrold Nadler, the sponsors of the EVAA.¹⁸⁹ In February 2014, a revised version of the EVAA, entitled American Royalties Too Act (A.R.T.), was introduced to Congress, which reduces the proposed *droit de suite* from seven percent to five percent on any piece sold at auction for over \$5,000.¹⁹⁰ Nadler has stated that he only would apply the EVAA to auction houses, not to any private sales conducted through dealers and galleries.¹⁹¹ However, as will be argued below, this would only force more sales into the ultra-secretive private sphere and could severely impact the number of artists who benefit from any type of *droit de suite* legislation because the number of sales conducted publicly is limited.

IV. ARGUMENT AGAINST FEDERAL LEGISLATION

One of the arguments against the recent move to pass federal legislation codifying artist resale royalty rights is the fact that the United States is a common-law country.¹⁹² Accordingly, the analogy to France and other civil-law countries is misplaced.¹⁹³ A more accurate comparison can be made between the United States' efforts and the recent move to *droit de suite* laws passed in the United Kingdom.

¹⁸⁵ 2013 REPORT, *supra* note 107.

¹⁸⁶ *Id.*

¹⁸⁷ Julia Halperin, *Copyright Office Reverses Its Position on Droit de Suite in the US*, ART NEWSPAPER (Dec. 16, 2013), <http://www.theartnewspaper.com/articles/US-Copyright-Office-reverses-its-position-on-droit-de-suite-in-the-US/31365>.

¹⁸⁸ 2013 REPORT, *supra* note 107, at 77.

¹⁸⁹ Halperin, *supra* note 187.

¹⁹⁰ Patricia Cohen, *New Bill Proposes Auction Royalties for Artists*, N.Y. TIMES (Feb. 26, 2014, 2:20 PM), http://artsbeat.blogs.nytimes.com/2014/02/26/new-bill-proposes-auction-royalties-for-artists/?_php=true&_type=blogs&_r=0.

¹⁹¹ Halperin, *supra* note 187.

¹⁹² See Henry Hansmann & Marina Santilli, *Authors' & Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 142–43 (1997).

¹⁹³ See Prowda, *supra* note 171 (“Copyright law in civil law countries, such as France, is grounded in the *droit moral*, or the moral rights, which views creative works as an extension of the author’s personality.”).

The European Union, of which the United Kingdom is a member, passed a directive in 2001, requiring its member states to pass *droit de suite* legislation.¹⁹⁴ Many countries, including France and Germany, already had such protection in place. However, the United Kingdom resisted, fearing that the enactment of such legislation would have a negative effect on its art market.¹⁹⁵ The United Kingdom was required to have some legislation in place by January 1, 2006, for resale royalties to living artists.¹⁹⁶ They were required by January 1, 2010, to provide for artists' estates.¹⁹⁷ Several commentators predicted that the implementation of *droit de suite* legislation would have a crippling effect on the British art market, sending collectors, dealers, and sellers to New York.¹⁹⁸ Anthony Browne of the British Art Market Federation predicted that “[the royalty] is expensive and complicated to administer, and it will shift buyers and sellers from the U.K., which has lost a considerable amount of global art market share in the past five years, to countries where there is no royalty to be paid.”¹⁹⁹

Despite these concerns, it appears that the legislation has not resulted in the demise of the British art market. One auction specialist at Bonham's in London said:

When [*droit de suite*] was first introduced in 2008 there was a lot of opposition and a prevailing belief that it would affect the British market locally and internationally. We are yet to experience such an impact in auction related sales and London has in fact strengthened as an art market capital in recent years.²⁰⁰

Auction houses have continued to see strong sales, with modern and contemporary sales fetching over \$140 million each.²⁰¹ It will be necessary to monitor the trends

¹⁹⁴ See E.U. Directive, *supra* note 103.

¹⁹⁵ See Jennifer B. Pfeffer, Comment, *The Costs and Legal Impracticalities Facing Implementation of the European Union's Droit de Suite Directive in the United Kingdom*, 24 NW. J. INT'L L. & BUS. 533, 534 (2004). This was the not the first time a European Union directive had a negative impact on the United Kingdom's art market; when a 2.5% value-added tax was imposed in 1995, it pushed sellers to the New York market. See Carol Vogel, *Poignant Cry at London Auctions*, N.Y. TIMES, July 23, 1997, at C9 (quoting a consultant at Christie's who said, “In the end it is not up to us. Unless Europe decides it is desirable to have an art market in Europe, we're lost.”); see also *Is London Done For?*, ECONOMIST, July 26, 1997, at 54.

¹⁹⁶ E.U. Directive, *supra* note 103, at art. 6, art. 12.

¹⁹⁷ *Id.* art. 8, § 2.

¹⁹⁸ See, e.g., Vogel, *supra* note 195, at C9 (“In the frenetic art world, [London's] loss has been New York City's gain.”).

¹⁹⁹ Grant, *supra* note 27; see also *The British Art Market: A Winning Global Entrepôt*, BRITISH ART MARKET FEDERATION (2010), available at http://www.lapada.org/public/The_British_art_Market.pdf.

²⁰⁰ E-mail from Rupert Worrall, Head of Dep't, Old Master, Modern & Contemporary Prints, Bonham's, to author (Oct. 1, 2013, 11:21 AM EST) (on file with author).

²⁰¹ See Daniel Grant, *UK's Artist Resale Royalty Law Didn't Damage the Art Market (Despite All the Claims)*, HUFFINGTON POST (Sept. 14, 2012, 10:42 AM), <http://www>

of the market over the next several years. Because the United Kingdom is so closely linked with the rest of Europe, the impact on European sales should remain at a minimum. However, there is a very real possibility that the market will shift toward the United States, as sellers bring their works to American centers, in particular, New York. If sellers begin to move their sales to the United States, this would serve as even more incentive to resist any American *droit de suite* legislation attempts.

However, despite the fact that the E.U. Directive has not had the negative impact many thought would occur to this point, the principle behind *droit de suite* in the United Kingdom and the United States remains at odds because common-law copyright law is based on economic, not moral rights. Michael Rushton argues that “a government mandated scheme that is inalienable and unwaivable is difficult to justify.”²⁰² Further, Jennifer Pfeffer argues that “[t]he purpose of the *droit de suite* is to give visual artists rights and economic incentives similar to those the law gives to authors and musicians.”²⁰³ While the fairness argument can be made, fairness is a principle of the *droit moral* found in civil-law countries, not in common-law countries, such as the United States.²⁰⁴

Despite the fact that the *droit de suite* measures seem to have had little negative impact in Great Britain to date, there are still serious concerns that the U.S. Congress must address before passing any similar legislation. These include the potential prohibitive administrative costs in enforcing such legislation, the lack of transparency in the art world, and finally that the law would help too few, specifically those artists who were already established in the field.²⁰⁵

The art world notoriously has been cloaked in secrecy. Moreover, collectors and sellers are turning to private sales, as opposed to public auctions, to buy and sell works.²⁰⁶ Michael Findlay, a gallery director in New York, has said, “If [a piece] doesn’t sell [privately], it’s not a public event . . . However, if your painting is on the cover of an auction catalog and it’s been marketed globally and then doesn’t sell—ouch!”²⁰⁷ Therefore, any *droit de suite* legislation would have to extend beyond auction sales to private sales; however, this lack of transparency will make

.huffingtonpost.com/daniel-grant/uks-artist-resaleroyalty_b_1881430.html; see, e.g., *Art Market News: Modern British Art Performs Best at Sotheby’s Auction*, TELEGRAPH (May 15, 2012, 2:10 PM), <http://www.telegraph.co.uk/culture/art/artsales/9267228/Art-market-news-Modern-British-art-performs-best-at-Sothebys-auction.html>.

²⁰² Michael Rushton, *The Law and Economics of Artists’ Inalienable Rights*, 25 J. CULTURAL ECON. 243, 250 (2001).

²⁰³ Pfeffer, *supra* note 195, at 547–48; see also *supra* notes 48–51 and accompanying text.

²⁰⁴ See generally DaSilva, *supra* note 48.

²⁰⁵ For more on the “information problem,” see Stephanie B. Turner, *The Artist’s Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329 (2012).

²⁰⁶ Katya Kazakina, *Bargain Warhols, Secrecy Bring Collectors to Private Art Sales*, BLOOMBERG (July 27, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=apWHlzppIlaM>.

²⁰⁷ *Id.*

accounting and administration very difficult.²⁰⁸ If buyers and sellers consciously move to private deals to avoid publicity, then a scheme like the EVAA, which applies to works sold over \$10,000 at public auction,²⁰⁹ may force even more secrecy in the art world, with more deals brokered privately.

If more sales are conducted privately, with generally fewer auction sales, the amount of secrecy in an already unregulated art market may increase and could affect tastes in the market.²¹⁰ This could negatively impact more emerging artists who want to use auctions as a way of promoting themselves. Additionally, auctions are an important tool for establishing taste and therefore value, regardless of whether the sale takes place publicly or privately.²¹¹

Proponents of *droit de suite* legislation continue to argue that fairness is an underlying principle.²¹² Artists argue that collectors receive a windfall with secondary sales when they sell pieces for significantly more than the initial purchase.²¹³ In defending the rationale of *droit de suite*, proponents often cite the Rauschenberg-Scull story, suggesting Rauschenberg was a poor artist who was not able to enjoy the profits of his creation on that evening in 1973.²¹⁴ However, few continue the story to include Scull's response to Rauschenberg—"It works for you, too, Bob."²¹⁵ This comment is crucially important when analyzing the art market and resale royalty's place within it. The assumption that collectors and dealers receive a windfall with sales on the secondary market is misplaced.²¹⁶ It incorrectly assumes that increases in value occur in a vacuum. Art does not automatically appreciate over time, in the same way other investments, such as real property, may. For instance, dealers have a range of marketing responsibilities for their artists that includes advertising, securing

²⁰⁸ See Turner, *supra* note 205, at 350–53 (describing the secrecy surrounding private sales).

²⁰⁹ H.R. 3688, 112th Cong. § 3 (2011); S. 2000, 112th Cong. § 3 (2011).

²¹⁰ See, e.g., Robin Pogrebin & Kevin Flynn, *As Art Values Rise, So Do Concerns About Market's Oversight*, N.Y. TIMES, Jan. 28, 2013, at A1 (discussing the debate surrounding relating the market).

²¹¹ See Eric Konigsberg, *The Trials of Art Superdealer Larry Gagosian*, VULTURE (Jan. 20, 2013, 9:10 PM), <http://www.vulture.com/2013/01/art-superdealer-larry-gagosian.html>.

²¹² See Reddy, *supra* note 51, at 517.

²¹³ See Wirsching, *supra* note 48, at 432.

²¹⁴ See, e.g., Turner, *supra* note 205, at 338.

²¹⁵ HADEN-GUEST, *supra* note 1, at 16.

²¹⁶ In fact, one could argue that the artists are receiving a windfall. Using an economic analysis, Asher Tanenbaum argues:

When a creator sells his [artwork] he discharges the risk and reward that comes with owning the [art] in return for the present value of the [art]. Yet [*droit de suite*] allows the creator to keep a hand in the cookie jar. [*Droit de suite*] disrupts the allocation of risk and reward by giving the creator a contingent interest in the [art]. The creator has no investment in the [art] but can benefit nonetheless.

Tanenbaum, *supra* note 49, at 22.

exhibitions, and general public relations management.²¹⁷ As Thompson describes it, “most marketing is not intended to produce immediate sales, but rather to build the dealer brand and obtain coverage for the artist in art publications.”²¹⁸ In other words, the dealer’s goal is to increase the artist’s reputation, which ultimately results in the appreciation of the artist’s work. The dealer is working for his artist as much as the artist is working for his dealer. While dealers and collectors are certainly distinguishable—for instance, a dealer receives a percentage of any sales—their roles in an artist’s career can both be invaluable. An established dealer who represents an emerging artist or a collector who invests in him both can launch that artist’s career.

Therefore, the effort of collectors, museums, and dealers must be factored into the appreciation of works.²¹⁹ Economist Don Thompson writes that contemporary art is described “in terms of innovation, investment value, and the artist being ‘hot,’ meaning a relative unknown where word-of-mouth reports make them suddenly sought-after.”²²⁰ It is this group of stakeholders who determine who and what is “hot” in the art world, often racing to find the newest trend in which to invest both their time and money. Accordingly, these investments in emerging artists serve an important role in influencing the market. Henry Hopkins,²²¹ former director of the San Francisco Museum of Modern Art, gave the following statement shortly after the CRRA was passed, explaining the importance of collectors and highly established artists:

[Sam Francis²²² is] selling now in the \$30,000 to \$40,000 range for a major canvas. Let’s say a collector who bought one of his works 15 years ago for \$3,000 decides, for the benefit of his family, to sell now for \$40,000. I’d think it would put Sam in a terrible moral position. Does he press the 5 percent claim or not?

²¹⁷ THOMPSON, *supra* note 3, at 31.

²¹⁸ *Id.*

²¹⁹ As Don Thompson argues, even the type of dealer is a factor that must be considered when determining value. He argues that a branded dealer will be able to fetch higher prices for works because “it is the dealer branding, and substitution of the dealer’s choice and judgment for the collector’s, that add value.” *Id.* at 14. He argues that dealers—like Larry Gagosian—who give their stamp of approval to any artist will instantly increase that artist’s legitimacy and, thus, value. *Id.*

²²⁰ *Id.* at 12.

²²¹ Henry T. Hopkins was the director of the San Francisco Museum of Modern Art from 1974 until 1986. Under his leadership, the museum transitioned from the San Francisco Museum of Art to the Museum of Modern Art. See Kenneth Baker, *Henry T. Hopkins Dies, Put ‘Modern’ in SFMOMA*, S.F. CHRON. (Oct. 1, 2009, 4:00 AM), <http://www.sfgate.com/bayarea/article/Henry-T-Hopkins-dies-put-Modern-in-SFMOMA-3215228.php>.

²²² See generally CONNIE W. LEMBARK, *THE PRINTS OF SAM FRANCIS: A CATALOGUE RAISONNÉ 1960–1990* (1992).

After all, the person who bought his work for \$3,000 back in the old days did more for Sam than \$2,000 *now will ever do*.²²³

Museums also add to this value, because when they exhibit an artist's work, they add to the work's provenance, or the work's exhibition and major public sale history.²²⁴ The better the provenance, the higher the piece will fetch, increasing the artist's reputation.²²⁵ Additionally, museum acquisitions and exhibitions can give "immediate validation and reputation enhancement" to younger artists, "which often translate[s] into financial success that in the long run likely exceeds any resale royalty an artist would receive."²²⁶ Furthermore, publication, commissions, and exhibitions all contribute to the "fostering" of an artist's career and "ensuring that [an artist] can make a living from their creative efforts."²²⁷ The American Association of Museum Directors (AAMD) has stated its opposition to any proposed *droit de suite* legislation, expressing its concerns that a resale royalty could stymie the market for new artists. Instead, it argues, the existing system of supporting both established and emerging artists does much more for the individual artist without the fear of depressing the market.²²⁸

Special exhibitions like the Whitney Museum of American Art's *Biennial*²²⁹ and "superdealers" like Charles Saatchi²³⁰ and Larry Gagosian²³¹ also create taste. Eric Shiner, the director of the Andy Warhol Museum, commented that "[i]n many ways,

²²³ Bates, *supra* note 113, at 67 (emphasis added).

²²⁴ See Missy Sullivan, *Provenance: Ignore It at Your Peril*, FORBES (Feb. 11, 2005), http://www.forbes.com/2005/02/11/cz_ms_0211soapbox2_inl.html (suggesting a good provenance can increase the value of a work); see also Kimerly Rorschach, Comment from the Association of Art Museum Directors (Dec. 5, 2012) [hereinafter Comment from the AAMD], available at http://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/Association_of_Art_Museum_Directors.pdf (listing the ways, independent of *droit de suite*, in which museums help to advance artists' careers).

²²⁵ THOMPSON, *supra* note 3, at 13. Thompson lumps all of these important players in the market as recognizable "brands," which he argues helps to increase the value of contemporary artists. *Id.* He writes that "[t]he motivation that drives the consumer to bid at a branded auction house, or to purchase from a branded dealer, or to prefer art that [is shown] at a branded museum, is the same motivation that drives the purchase of other luxury consumer goods." *Id.*

²²⁶ Comment from the AAMD, *supra* note 224, at 2.

²²⁷ *Id.*

²²⁸ *Id.* at 3.

²²⁹ See, e.g., Roberta Smith, *A Survey of a Different Color*, N.Y. TIMES, Mar. 2, 2012, at C21 (describing the 2012 Whitney Biennial); Jerry Saltz, *Leaving Babylon*, N.Y. MAG. (Mar. 1, 2012), <http://nymag.com/arts/art/reviews/whitney-biennial-saltz-2012-3>.

²³⁰ See generally RITA HATTON & JOHN ALBERT WALKER, SUPERCOLLECTOR: A CRITIQUE OF CHARLES SAATCHI (2000).

²³¹ See Konigsberg, *supra* note 211 (arguing that Larry Gagosian and other superdealers shape the art market).

having a show with [Gagosian] is synonymous with having a show at MoMA or the Tate Modern [in London].”²³² Gagosian is largely responsible for the market for Warhol’s screen prints, while Charles Saatchi was the inventor of the “Young British Artists,” and should be attributed for elevating the status of then relatively unknown artists like Tracey Emin and Damien Hirst.²³³ Even successive auction sales can influence taste. As Don Thompson acknowledges, “An uncertain bidder is doubly persuaded; two auction houses and two different sets of specialists say that contemporary art is desirable, prestigious, and a good investment. The unsuccessful bidder at the first auction may be an even more determined bidder at the second.”²³⁴

These players in the art market are searching constantly for young, raw talent. They want to be responsible for seeing their investment grow. However, federal *droit de suite* legislation could dissuade collectors and dealers from taking that risk with younger artists, for fear that the return on their investment may be diminished due to potential royalty fees. Under an incentive-based common-law system, if collectors, museums, and dealers are dissuaded from making these investments, the underlying purpose of the resale royalty to support artists ultimately will be defeated.

Furthermore, one only need to look as far as California to see that *droit de suite* will not be successful in the United States. If one considers California’s move almost forty years ago as an example of a “laboratory of experimentation”²³⁵ under a federalism theory, then obviously the experiment has not succeeded. Artists are not benefitting from the statute because they are not receiving the royalties they are due, as evident by the class-action lawsuit against Christie’s and Sotheby’s in *Estate of Graham*. Expanding this type of program to a federal level will only increase the frustrations that artists face when trying to collect royalties. The combination of federal bureaucracy and the lack of transparency in the art world may be too difficult to overcome. Therefore, the market could suffer because of the mere fact that federal legislation was passed. However, the artists may not benefit practically from *droit de suite* legislation because of the difficulties in collecting and distributing the

²³² *Id.* (quoting Eric Shiner).

²³³ *Id.* The term “Young British Artists” was coined after a Saatchi exhibition, *Sensation: Young British Artists from the Saatchi Gallery*, in 1997. See generally NORMAN ROSENTHAL & RICHARD STONE, *SENSATION: YOUNG BRITISH ARTISTS FROM THE SAATCHI COLLECTION* (1997). The exhibition caused a scandal when it traveled to the Brooklyn Museum of Art, after Mayor Rudolph Guiliani threatened to withdraw funding to the museum because one of the artists, Chris Ofili, incorporated elephant dung in his portrait of the Virgin Mary. See Gustav Niebuhr, *Anger over Work Evokes Anti-Catholic Shadow, and Mary’s Power as Icon*, N.Y. TIMES, Oct. 3, 1999, at 48.

²³⁴ THOMPSON, *supra* note 3, at 21.

²³⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); see James A. Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996).

royalties. Ultimately, then, no one benefits from this type of legislation. The art market in the United States is not conducive to such legislation for the purposes outlined above, and the failure of the California statute to protect artists demonstrates that.

There are alternatives to *droit de suite* that can be considered to address the fairness concerns echoed by proponents of resale royalty legislation. Private contracts between artists and buyers can address the resale concern. Don Thompson suggests that dealers who want exclusive access to developing artists may offer stipends to keep them producing art.²³⁶ Thompson writes that Charles Saatchi once offered English artist Jenny Saville a monthly stipend for two years for first right of refusal for any works she created.²³⁷ “This is precisely what patrons in Renaissance Italy did—supporting an artist over a period of time in anticipation of later acquiring their work.”²³⁸ While this could result in the artist feeling more like a cog in the dealer’s money-making machine, the underlying issue of fair compensation would be addressed.²³⁹

Additionally, museums could compensate artists for exhibiting their works; however, this initiative may be unrealistic as museum funding has suffered since the recent financial crisis.²⁴⁰ If the idea that merely exhibiting an artist can boost value, however, then compensating artists could be considered unnecessary. If the goal of compensating artists is to support and encourage younger artists to exhibit in important spaces, then it appears that this model would be more effective than *droit de suite*, which would primarily target more established artists in the secondary market. Government subsidies schemes are another option. In the United States, government funding is funneled through the National Endowment for the Arts, which is still one-twentieth of the support provided to French artists by the French Culture Ministry.²⁴¹

CONCLUSION

The Ninth Circuit will determine in the coming months whether the California Resale Royalty Act is constitutional. If the court finds that it does violate the Commerce Clause and invalidates the statute, then proponents of *droit de suite* must turn to the federal government to pass legislation. Regardless of the court’s holding, the initiative to pass federal legislation will continue. However, the Equity for Visual

²³⁶ THOMPSON, *supra* note 3, at 46.

²³⁷ *Id.* at 90. Saville, one of the Young British Artists, is now represented by Larry Gagosian. See GAGOSIAN GALLERY, <http://www.gagosian.com/artists/jenny-saville> (last visited Mar. 2, 2014).

²³⁸ THOMPSON, *supra* note 3, at 90.

²³⁹ *See id.* at 46.

²⁴⁰ *See, e.g., The Status of New York State’s Museums 2012*, MUSEUM ASS’N OF N.Y. (2011), <http://manyonline.org/advocacy/status-nys-museums> (“A national survey conducted by the American Association of Museums of 383 museums reports that 70 percent of respondents are in economic stress, with 32 percent suffering ‘severe’ or ‘very severe’ stress.”).

²⁴¹ THOMPSON, *supra* note 3, at 181.

Artists Act of 2011 will not address the “starving artist” dilemma, as it will provide royalties for already-established artists. Collectors, museums, and dealers may turn their focus away from contemporary art to avoid these resale royalties. Without these taste-makers investing in younger, emerging artists, the larger art market will be damaged, reducing the benefits from any type of resale royalty.

Therefore, collectors should be encouraged to purchase works of art and not threatened with a potential penalty for identifying talent. Moreover, the basic idea of fairness is not a strong enough principle in the U.S. common-law system to override the established copyright doctrine, which incentivizes production. By working with collectors, dealers, and museums, younger artists can work together to increase the value of their pieces. Ultimately, no one receives a windfall and all of these groups benefit. As Robert Scull said to Robert Rauschenberg during their now-infamous confrontation when Rauschenberg claimed he had done all of the work for Scull to enjoy the profit, “It works for you, too, Bob. Now I hope you’ll get even better prices.”²⁴² Indeed, Rauschenberg may not have seen a return for his pieces that sold that autumn evening in 1973; however, one cannot overstate the vital importance that the sale had on his career.²⁴³ Although Rauschenberg claimed he worked his “ass off just for [Scull] to make [a] profit,”²⁴⁴ Rauschenberg’s *Thaw* did not increase in value magically in the fifteen years between when he created the work and when Scull ultimately sold it.²⁴⁵ Scull’s influence in the art world contributed to the success of all of the pieces in the sale.

The U.S. government should not pass federal artist resale royalty legislation because *droit de suite* does not produce a windfall for collectors and dealers who resell pieces and may actually provide a disincentive for those stakeholders to purchase art.

²⁴² HADEN-GUEST, *supra* note 1, at 16.

²⁴³ See THOMPSON, *supra* note 3, at 56 (noting that Rauschenberg is the sixth-top contemporary artist behind Jasper Johns, Andy Warhol, Gerhard Richter, Bruce Nauman, and Roy Lichtenstein).

²⁴⁴ HADEN-GUEST, *supra* note 1, at 16.

²⁴⁵ See *id.*