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Equitable Resale Royalties

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EQUITABLE RESALE ROYALTIES

*Brian L. Frye**

TABLE OF CONTENTS

I.	INTRODUCTION	239
II.	A BRIEF HISTORY OF THE RESALE ROYALTY RIGHT.....	241
	A. THE CREATION OF THE RESALE ROYALTY RIGHT IN FRANCE.....	243
	B. THE SPREAD OF THE RESALE ROYALTY RIGHT TO OTHER COUNTRIES	244
III.	THE RESALE ROYALTY RIGHT IN THE UNITED STATES	246
	A. FEDERAL RESALE ROYALTY RIGHTS	249
	B. STATE RESALE ROYALTY RIGHTS.....	251
	C. THE CONSTITUTIONALITY OF A FEDERAL RESALE ROYALTY RIGHT.....	252
IV.	THE JUSTIFICATION OF THE RESALE ROYALTY RIGHT.....	256
	A. THEORIES OF COPYRIGHT	256

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238	<i>J. INTELL. PROP. L.</i>	[Vol. 24:237
	B. THE RESALE ROYALTY RIGHT UNDER THE ECONOMIC THEORY OF COPYRIGHT.....	259
	C. THE RESALE ROYALTY RIGHT UNDER THE MORAL THEORIES OF COPYRIGHT	265
V.	EQUITABLE RESALE ROYALTIES	267
	A. INDIVIDUAL RESALE ROYALTY RIGHTS.....	267
	B. EQUITABLE RESALE RIGHTS ORGANIZATIONS	268
	C. THE RESALE ROYALTY TAX.....	269
	E. METHODS OF IMPOSING A FEDERAL RESALE ROYALTY TAX	270
	E. METHODS OF DISTRIBUTING FEDERAL RESALE ROYALTY TAX REVENUES EQUITABLY	271
	F. DISTRIBUTING FEDERAL RESALE ROYALTY TAX REVENUES TO AN AGENCY	271
	G. DISTRIBUTING FEDERAL RESALE ROYALTY TAX REVENUES TO UNSUCCESSFUL ARTISTS	272
VI.	CONCLUSION	276

*Why do people think artists are special? It's just another job.*¹

I. INTRODUCTION

In 1958, Robert Rauschenberg created a painting titled *Thaw*. Soon afterward, he sold *Thaw* to prominent art collectors Robert and Ethel Scull for \$900. In 1973, the Sculls sold *Thaw* at auction for \$85,000. After the auction, a rueful Rauschenberg confronted Robert Scull: “I’ve been working my ass off for you to make that profit.” Scull replied, “How about yours. You’re going to sell now. I’ve been working for you too. We work for each other.”² Soon afterward, Rauschenberg began campaigning for the creation of a federal resale royalty right. As he explained, “From now on, I want a royalty on the resales, and I am going to get it.”³

¹ Andy Warhol, *THE PHILOSOPHY OF ANDY WARHOL* 178 (1975).

² Edward Jeffrey Vaughn, *America’s Pop Collector: Robert C. Scull; contemporary art at auction* (1990) (unpublished dissertation) (describing the production of the 1974 documentary film by E.J. Vaughn, entitled *America’s Pop Collector: Robert C. Scull – Contemporary Art at Auction* and including a transcript). See also Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-up Study*, 46 J. COPYRIGHT SOC’Y U.S.A. 531, 531 (1998–1999) (stating that Rauschenberg also said, “The least you could do is send every artist in this auction free taxis for a week.” Robert and Ethel Scull owned the Super Operating Corporation, a fleet of 130 cabs operated by 400 drivers. (quoting Roger Rickles, *Artists Decide They Should Share Profits On Resale of Paintings*, WALL ST. J., Feb. 11, 1974, at 1)). See also Christopher Rauschenberg, *Artists Deserve Royalties Too*, HUFFINGTON POST (July 15, 2014, 2:53 PM), http://www.huffingtonpost.com/christopher-rauschenberg/artists-deserve-royalties_b_5588388.html. According to art critic Irving Sandler, Rauschenberg was angry and shouted at Scull, “Kiss me — I like to be kissed when I’m being fucked.” GEORGINA ADAM, *BIG BUCKS: THE EXPLOSION OF THE ART MARKET IN THE 21ST CENTURY* 33 (2014). But see Marion Maneker, *The Famous Rauschenberg Scull Shoving Match Didn’t Go Down the Way You Think It Did*, ART MARKET MONITOR, Sept. 2, 2014, <http://www.artmarketmonitor.com/2014/09/02/the-famous-rauschenberg-scul-shoving-match-didnt-go-down-the-way-you-think-it-did/>.

³ Wu, *supra* note 2, at 531.

Robert Rauschenberg, *Thaw* (1958)

A “resale royalty right” or *droit de suite* (resale right) is a legal right that gives certain artists the right to claim a percentage of the resale price of the artworks they created.⁴ The Berne Convention for the Protection of Literary and Artistic Works⁵ and the Tunis Model Law on Copyright for Developing Countries⁶ provide for an optional resale royalty right. Many countries have created a resale royalty right, although the particulars of the right differ from country to country. But the United States has repeatedly declined to create a federal resale royalty right, and a federal court recently held that a resale royalty right created by California is preempted by federal law.⁷ However, the United States Copyright Office recently recommended the creation of a federal resale royalty right, and Congress has considered new bills to create such a right.⁸

⁴ *Resale Royalty Right*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/resaleroyalty>.

⁵ Berne Convention for the Protection of Literary and Artistic Works, art. 14*ter*, Sept. 9, 1986, 102 Stat. 2853, 161 U.N.T.S. 30, <http://www.wipo.int/treaties/en/ip/berne/>.

⁶ TUNIS MODEL LAW ON COPYRIGHT FOR DEVELOPING COUNTRIES, *reprinted in* COPYRIGHT BULL. Vol. 10, 1702, at 10 (1976), http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf.

⁷ *Estate of Graham v. Sotheby's, Inc.*, 178 F. Supp. 3d 974, 988 (C.D. Cal. 2016) (holding that a state resale royalty statute was preempted by both the first sale doctrine and the preemption provision of the Copyright Act).

⁸ *See* U.S. Copyright Office, *Resale Royalties: An Updated Analysis* (Dec. 2013). *See, e.g.*, American Royalties Too Act of 2014, S. 2045, 113th Cong. (2014).

Commentators disagree about the justification of the resale royalty right. Supporters argue that equity entitles artists to a resale royalty right, which also encourages the production of artwork and protects artists from exploitation. Opponents argue that the resale royalty right is both inequitable and inefficient, because it benefits successful artists at the expense of unsuccessful artists by lowering prices on the primary market, and cannot provide a salient incentive for economically rational artists to produce more artwork.

This Article assumes that the purpose of the resale royalty right is to increase the equity and efficiency of the art market, and asks how to create an equitable and efficient resale royalty system. It considers several different potential models for the collection and distribution of resale royalties, including a private right of action, resale royalty organizations, and federal taxation. It concludes that the most equitable and efficient model would be a “resale royalty tax,” distributed either to the National Endowment for the Arts (NEA) or on a progressive basis to unsuccessful artists.

II. A BRIEF HISTORY OF THE RESALE ROYALTY RIGHT

The resale royalty right is based on the premise that artists have an equitable right to share in the increase in value of the artworks they created. It emerged as a concept in the late nineteenth century, as increasing private wealth enabled the creation of an art market, in which certain artworks with a recognized pedigree became remarkably valuable. Artists were dismayed to realize that others were profiting from the sale of artworks they created and began searching for a way to share in the increased value of those artworks.⁹

Under nineteenth century French property law, the *droit de suite* or “resale right” provided that a mortgage on real property survived the transfer of the property to a third party.¹⁰ In 1893, Albert Vaunois argued that the *droit de suite* should be extended to give artists a resale royalty right in their artwork.¹¹ His argument resonated with a widely held belief that artists struggled to support themselves and were exploited by the art market. For example, Giacomo Puccini’s wildly popular 1896 opera *La bobème* opened with a scene of starving

⁹ At least apocryphally, the idea of a resale royalty right originated in the 1889 sale of Jean Francois Millet’s painting “L’Angélu” (1859) for 553,000 francs. At the time, Millet was dead and his family was destitute. See Tiernan Morgan & Lauren Purje, *An Illustrated Guide to Artist Resale Royalties (aka ‘Droit de Suite’)*, HYPERALLERGIC, Oct. 24, 2014, <http://hyperallergic.com/153681/an-illustrated-guide-to-artist-resale-royalties-aka-droit-de-suite/>.

¹⁰ See LILIANE DE PIERREDON-FAWCETT, *THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY* 3 (Louise-Martin Valiquette trans. 1991, Ctr. for Law and the Arts Colum. Univ. Sch. of Law) (citing Albert Vaunois, *Chronique de Paris*, February 25, 1893).

¹¹ See *id.* at 2.

artists shivering in an unheated Paris garret, suggesting that they deserved some form of support.¹²

A l'Hôtel des Ventes
(At the Auction Office)



— *Un tableau de papa!*

Jean-Louis Forain, *A l'Hotel de Ventes* (1905)

In 1903, the Societe des Amis du Luxembourg (Society of Friends of the Luxembourg), proposed a descendible resale royalty right of 1%–2% of the sale price of an artwork for fifty years.¹³ In 1905, many French newspapers published a drawing by Jean-Louis Forain titled *A l'Hotel de Ventes* (At the Auction Office), which depicted a ragged artist and his daughter outside an art auction, with the caption *Un tableau de papa!* (Your father's painting!). And in 1909, after a public demonstration, artists formed two groups to advocate for the adoption of a resale royalty right, the *Commission permanente du droit d'auteur*

¹² Giacomo Puccini, *La Bohème* (1896). The libretto was written by Luigi Illica and Giuseppe Giacosa, and was based on the 1851 novel *Scènes de la vie de bohème* by Henri Murger.

¹³ DE PIERREDON-FAWCETT, *supra* note 10, at 3.

aux artistes (Permanent Committee on Authors' Rights for Artists) and *Le Droit d'Auteur aux artistes* (Authors' Rights for Artists).¹⁴

A. THE CREATION OF THE RESALE ROYALTY RIGHT IN FRANCE

In 1914, the *Chambre des députés* (Chamber of Delegates) considered a bill proposing a resale royalty right of 2% of the sale price of artworks sold at auction. The bill was tabled during the war, but reconsidered in 1918.¹⁵ And on March 20, 1920, France created the first resale royalty right, giving artists an inalienable and descendible right to a percentage of the sale price of their artworks sold at public auction for the duration of the copyright in the artwork, “on the condition that these works, such as paintings, sculpture, or designs, are original and represent a personal creation of the artist.”¹⁶

Initially, the French resale royalty right required personal registration, and entitled artists to graduated royalty payments of: 1% of the sale price from 1,000 to 10,000 francs; 1.5% of the sale price from 10,000 to 20,000 francs; 2% of the sale price from 20,000 to 50,000 francs; and 3% of the sale price over 50,000 francs.¹⁷ In 1921, France amended its resale royalty right to permit registration by rights management organizations.¹⁸ In 1922, France reduced the threshold for the application of the resale royalty right to a sale price of 50 francs.¹⁹ And in 1985, France adopted a flat resale royalty right to 3% of the sale price of artworks sold for more than 100 francs “by public auction or through a dealer.”²⁰ The French resale royalty right also specifies how many copies of an editioned work an artist may create. For example, it permits the creation of eight copies of a sculpture during the artist’s lifetime, and an additional eight copies after the artist’s death.²¹

¹⁴ *Id.* at 3–4.

¹⁵ *Id.* at 4.

¹⁶ Law of May 20, 1920, Imposing on Public Sales of Artworks A Right Inuring to the Benefit of Artists, 1920 B.L.D. 236, 20 Duv. & Boc. 539, *reprinted in* DE PIERREDON-FAWCETT, *supra* note 10, at 218–20.

¹⁷ *Id.*

¹⁸ Ministerial Order of February 21, 1921, Relating to the Application of the Law of May 20, 1920, *reprinted in* DE PIERREDON-FAWCETT, *supra* note 10, at 221.

¹⁹ Law of October 27, 1922, Modifying the Provisions of the Law of May 20, 1920, *reprinted in* DE PIERREDON-FAWCETT, *supra* note 10, at 221–22.

²⁰ Lo: 57-298 du 1 Mars 1957 (as amended by Lo: 85-660 du 3 Juillet 1985) sur la propriété littéraire et artistique [Law 57-298 of March 11, 1957 on literary and artistic property], CODE DE LA PROPRIÉTÉ INTELLECTUELLE [I.P.C.] [INTELLECTUAL PROPERTY CODE], July 3, 1992. France’s *droit de suite* statute, codified today in Article L122-8 of France’s Intellectual Property Code, grants artists a flat 3% royalty for all “graphic and three-dimensional works” sold above a certain price. Intellectual Property Code, Art. L122-8, <http://perma.cc/38MU-W5N4>.

²¹ *Id.*

B. THE SPREAD OF THE RESALE ROYALTY RIGHT TO OTHER COUNTRIES

On June 25, 1921, Belgium created a resale royalty right similar to the French resale royalty right.²² In 1926, Czechoslovakia created a resale royalty right that gave artists a right to a percentage of the increase of the value of their artworks sold at auction, rather than the entire sale price.²³ Poland, Uruguay, and Italy also created resale royalty rights similar to the Czechoslovakian resale royalty right.²⁴

In 1948, the Berne Convention was revised to provide for an optional resale royalty right:

Article 14*bis*

- (1) The author, or after his death the persons or institutions authorized by national legislation, shall, in respect of original works of art and original manuscripts of authors and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first disposal of the work by the author.
- (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 degree permitted by the country where this protection is claimed.
- (3) The procedure for collection and the amounts shall be matters for determination by national legislation.²⁵

²² Belgian Law of June 25, 1921, Imposing in the Case of Works of Art Sold at Public Auction, a Levy in Favor of the Artists of the Works Sold et seq., *reprinted in* DE PIERREDON-FAWCETT, *supra* note 10, at 204–07.

²³ As amended by the Law of December 22, 1953 the Czechoslovakian Law of November 24, 1926, *cited in* DE PIERREDON-FAWCETT, *supra* note 10, at 215–16.

²⁴ Poland created a resale royalty right in 1935, but eliminated it in 1952. Law of March 22, 1935, abrogated by Law No. 234 on Copyright, July 10, 1952, *reprinted in* DE PIERREDON-FAWCETT, *supra* note 10, at 248. Uruguay created a resale royalty right in 1937. Law Number 9739 Concerning Literary and Artistic Copyright of December 15–17, 1937, amended February 15–25, 1938, *reprinted in* DE PIERREDON-FAWCETT, *supra* note 10, at 256. And Italy created a resale royalty right in 1941. Copyright Statute Law Number 633 of April 22, 1941 for the Protection of Copyright and Other Rights Associated with the Exercise Thereof et seq., *reprinted in* DE PIERREDON-FAWCETT, *supra* note 10, at 235–39.

²⁵ Berne Convention for the Protection of Literary and Artistic Works, Brussels Act, June 26, 1948, Art. 14*bis*. In 1971, the optional resale royalty right provision was moved to Article 14*ter*. Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, Art. 14*ter*.

The Tunis Model Law on Copyright for Developing Countries of 1976 also incorporated an optional resale royalty right:

[Section 4*bis*

- (1) Notwithstanding any assignment of the original work, the authors of graphic and three-dimensional works [and manuscripts] shall have an inalienable right to share in the proceeds of any sale of that work [or manuscript] by public auction or through a dealer, whatever the methods used by the latter to carry out the operation.
- (2) The foregoing shall not apply to architectural works or works of applied art.
- (3) The conditions of the exercise of this right shall be determined by regulations to be issued by the competent authority.]²⁶

In 2000, the European Union adopted a uniform *droit de suite* law, and required member states to implement national legislation consistent with the uniform law by 2006, with full harmonization by 2012.²⁷ The uniform law required member states to create a resale royalty right applying to all commercial sales of artwork, with some flexibility relating to the threshold price, method of collection, and rates. The maximum threshold price is €3,000, and the base rates are: (a) 4% for the portion of the sale price up to €50,000; (b) 3% for the portion of the sale price from €50,000 to €200,000; (c) 1% for the portion of the sale price from €200,000 to €350,000; (d) 0.5% for the portion of the sale price from €350,000 to €500,000; and (e) 0.25% for the portion of the sale price exceeding €500,000, with a maximum resale royalty of €12,500.²⁸

Today, almost eighty countries have created some form of resale royalty right.²⁹ But while many countries have created a resale royalty right, not all have

²⁶ TUNIS MODEL LAW ON COPYRIGHT FOR DEVELOPING COUNTRIES, *supra* note 6, Section 4*bis* (1976).

²⁷ Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, recital 3, 2001 O.J. (L 272) 32–36, http://www.wipo.int/wipolex/en/text.jsp?file_id=180301; *see also Resale Royalties: An Updated Analysis*, U.S. COPYRIGHT OFFICE (Dec. 2013), <http://www.copyright.gov/does/resaleroyalty/USCO-resaleroyalty.pdf> [hereinafter *Resale Royalties: An Undated Analysis*].

²⁸ Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, recital 3, 2001 O.J. (L 272) 32–36, http://www.wipo.int/wipolex/en/text.jsp?file_id=180301; *see also* U.S. COPYRIGHT OFFICE, *supra* note 27, at 13.

²⁹ *Resale Royalties: An Updated Analysis*, *supra* note 27, at 17.

functional resale royalty systems.³⁰ Some countries have created a nominal resale royalty right, but have not enabled enforcement.³¹ As Maitland observed, “where there is no remedy there is no wrong.”³² Some countries have created a resale royalty right that entitles artists to a percentage of the increase in value of their artworks.³³ While this is consistent with the premise of the resale royalty right, it is difficult if not impossible for artists to determine the increase in value of particular artworks, especially given the secrecy of the art market and the ability of buyers to engage in creative accounting. Also, some countries have created a resale royalty right that requires artists to collect resale royalties themselves.³⁴ While some artists may have the resources to collect their own resale royalties, most do not.

In practice, functional resale royalty right systems typically give artists the right to collect a percentage of the resale price of their artworks and authorize the creation of resale royalty rights organizations to collect resale royalties.³⁵ For example, the French resale royalty system relies on two resale royalty right organizations, the Societe de la Propriete Artistique et des Dessins et Models and the Association pour la Diffusion des Arts Graphiques et Plastiques.³⁶ French artists can join one of these organizations and assign it their right to collect resale royalties.³⁷

III. THE REALE ROYALTY RIGHT IN THE UNITED STATES

While the United States has not created a federal resale royalty right, Congress has considered creating one many times, and the Copyright Office has published two conflicting reports addressing resale royalty rights.

Surprisingly, the first effort to create a resale royalty right in the United States was entirely private. In 1971, the artist, curator, and gallerist Seth Siegelaub and the lawyer Robert Projansky collaborated on the creation of The

³⁰ U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST’S REALE ROYALTY* 49, <https://www.copyright.gov/history/droit-de-suite.pdf> [hereinafter *DROIT DE SUITE: THE ARTIST’S REALE ROYALTY*] (“Although a number of countries claim to have droit de suite, examination of their legal systems reveals that for many the principle is never carried out.” (internal citation omitted)); see also LILIANE DE PIERREDON-FAWCETT ET AL., *supra* note 10.

³¹ Anna J. Mitran, *Royalties Too?: Exploring Resale Royalties for New Media Art*, 101 CORNELL L. REV. 1349, 1370 (2016) (stating “[t]he California Act is often criticized for poor enforcement, and even France . . . cannot always collect royalties from non-auction sales”).

³² F.W. Maitland, *The Forms of Action at Common Law, Lecture I* (1909), <http://sourcebooks.fordham.edu/basis/maitland-formsofaction.asp>.

³³ Mitran, *supra* note 31, at 1356.

³⁴ DE PIERREDON-FAWCETT, *supra* note 10, at 122–23.

³⁵ Mitran, *supra* note 31, at 1356–59.

³⁶ Maitland, *supra* note 32.

³⁷ *DROIT DE SUITE: THE ARTIST’S REALE ROYALTY*, *supra* note 30.

Artist's Reserved Rights Transfer and Sale Agreement, a document that became known as the "Projansky Contract."³⁸ The Projansky Contract was an attempt to create a *de facto* resale royalty right by contract.³⁹ It consisted of a form agreement for artists to use when selling artwork for the first time. The form agreement provided, *inter alia*, that the buyer of the artwork agreed to pay the artist 15% of the appreciated value of the artwork in the event of any future transfer, and that the agreement would bind any future transferees for the life of the artist plus twenty-one years.⁴⁰

But the enforceability of the Projansky Contract was always dubious. For one thing, the common law disfavors equitable servitudes on chattels.⁴¹ Typically, a seller of personal property cannot restrict its subsequent use or transfer.⁴² While the seller of an artwork could create an enforceable contractual right to a percentage of the resale price of the artwork, the seller cannot create a contractual right that will bind future buyers, without securitizing the artwork. Of course, copyright does impose certain restrictions on the use of personal property that incorporates a copyrighted work of authorship.⁴³ But the Projansky Contract conflicts with the first sale doctrine, which provides that the sale of a particular copy of a copyrighted work of authorship exhausts the copyright owner's distribution right in that copy.⁴⁴ If the first sale doctrine applies, it should preempt any contractual restriction on alienation.

³⁸ The Artist's Reserved Rights Transfer And Sale Agreement (1971), <http://primaryinformation.org/files/english.pdf> [hereinafter Projansky Contract].

³⁹ *The Artist Reserved Rights Transfer and Sale Agreement*, PRIMARY INFORMATION, <http://www.primaryinformation.org/files/english.pdf> (last visited Mar. 30, 2017).

⁴⁰ *Id.*

⁴¹ See Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 955, 977 (1928) (observing that "the doctrine of equitable servitudes on chattels has been effectually killed by the courts," but asking whether some equitable servitudes should be enforceable). *But see* Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1452 (2004) (observing that "personal property servitudes, while exceptional, do still appear in the law and can serve legitimate purposes in commercial transactions").

⁴² See Chafee, *supra* note 41, at 948–50.

⁴³ See, e.g., Shyamkrishna Balganes, *Copyright and Good Faith Purchasers*, 104 CAL. L. REV. 269 (2016).

⁴⁴ 17 U.S.C. § 109(a) (2012) (providing that "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord"). At the time the Projansky Contract was drafted, the first sale doctrine was codified in the Copyright Act of 1909 § 41, which provided, "[N]othing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained." Pub. L. No. 60-349, 35 Stat. 1075, 1084 (1909). See generally Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual and Personal Property*, 90 NOTRE DAME L. REV. 1211 (2015) (examining the history and policy goals of copyright exhaustion).



Seth Siegel & Robert Projansky, *The Artist's Reserved Rights Transfer and Sale Agreement* ["Projansky Contract"] (1971)

Of course, courts have limited the application of the first sale doctrine by allowing copyright owners to characterize transactions as "licenses" rather than "sales."⁴⁵ However, courts have recognized limitations on the first sale doctrine almost exclusively in relation to transactions involving digital property, and have rejected efforts to restrict the transfer of physical property.⁴⁶ Artwork is typically physical property.⁴⁷ Moreover, the Projansky Contract itself explicitly refers to the contemplated transfer of the artwork as a "sale." It is highly unlikely that courts would find the Projansky Contract enforceable as written.

⁴⁵ Irina D. Manta & David S. Olson, *Hello Barbie: First They Will Monitor You, Then They Will Discriminate Against You. Perfectly.*, 67 ALA. L. REV. 135 (2015) ("While the doctrine still holds today in both patent and copyright, the courts have eroded the doctrine and begun to permit downstream control of goods, especially when the purchaser has notice of the restrictions.").

⁴⁶ Compare *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (enforcing restrictions on the use of software), with *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) (invalidating restrictions on the transfer of books).

⁴⁷ *Visual Artwork and Copyright Protection*, SPRINGBOARD FOR THE ARTS, <http://springboardforthearts.org/wp-content/uploads/2014/06/visual-art-and-copyright.pdf> (last visited Feb. 26, 2017).

In any case, the Projansky Contract was intended more as a statement of principle than as a means of actually creating an effective resale royalty right. As Projansky observed, “We never expected this to become the standard of the art world, but we wanted to raise the subject and maybe influence some legislation.”⁴⁸ Few artists ever tried to use the Projansky Contract, and even fewer successfully convinced buyers to accept it. Ironically, only artists whose artworks were already in considerable demand could insist that buyers accept the Projansky Contract, and the few who did were more concerned about making a statement of principle than economic gain. Interestingly, Daniel Buren used the Projansky Contract without the resale royalty provision, purely in order to keep track of his artworks.⁴⁹ By the late 1970s, the Projansky Contract was largely forgotten. Its enforceability was never tested, although it did complicate the 1987 auction of Hans Haacke’s artwork *On Social Grease* (1975), when the artist insisted the auctioneer display and read the Projansky Contract aloud to the audience before the sale.⁵⁰

A. FEDERAL RESALE ROYALTY RIGHTS

The United States Congress first considered a bill to create a federal resale royalty right in 1978, in response to a campaign led by Rauschenberg, among others. The Visual Artists’ Residual Rights Act of 1978 would have given artists a resale royalty right to 5% of the sale price of their artwork sold for \$1,000 or more.⁵¹ The bill also would have created a National Commission on the Visual Arts, and required registration with the Commission in order to collect a resale royalty.⁵² The resale royalty right would not have applied to works sold by the artist or to works sold at a loss, and would have lasted for the life of the artist plus fifty years.⁵³

⁴⁸ Roberta Smith, *When Artists Seek Royalties on Their Resales*, N.Y. TIMES (May 31, 1987), <http://www.nytimes.com/1987/05/31/arts/when-artists-seek-royalties-on-their-resales.html?pagewanted=all>.

⁴⁹ MARIA EICHORN, *THE ARTIST’S CONTRACT: INTERVIEWS WITH CARL ANDIE, DANIEL BARREN, PAULA COOPER, HANS HAACKE, JENNY HOLZEN, ADRIAN PIPER, ROBERT PROJANSKY, ROBERT RYMAN, SETH SIEGELAUB, JOHN WEBER, LAWRENCE WEINER, JACKIE WINSOR* (Geiti Pietzek ed., 2009).

⁵⁰ See also Kibun Kim, *Could a Long-Forgotten Contract Settle the Artist Resale Royalties Debate?*, HYPERALLERGIC, Jan. 5, 2015, <http://hyperallergic.com/172688/could-a-long-forgotten-contract-settle-the-resale-royalties-debate/> (unwittingly invoking Betteridge’s Law); ESSEX STREET, *The Contract*, <http://www.essexstreet.biz/exhibition/67> (last visited Mar. 29, 2017) (documenting exhibition of artworks sold subject to the Projansky Contract).

⁵¹ Visual Artists’ Residual Rights Act of 1978, H.R. 11403, 95th Cong. § 4(a)(1) (1978).

⁵² *Id.* §§ 3(a), 4(d), 5(c), 6(a).

⁵³ *Id.* § 4(e).

In 1986, Congress considered the Visual Artists Rights Amendment of 1986. The amendment would have amended the Copyright Act to give certain moral rights to visual artists, including a resale royalty right to 7% of the difference between the purchase and sale price of an artwork, if the sale price was more than \$500 and at least 140% of the purchase price.⁵⁴ The right would have lasted for the life of the artist plus fifty years, but after the artist's death royalties would have been paid to the National Endowment for the Arts.⁵⁵ In 1987, Congress considered the Visual Artists Rights Act of 1987, a similar bill that would have created a resale royalty right to 7% of the difference between the purchase and sale price of an artwork, if the sale price was more than \$1,000 and at least 150% of the purchase price paid by the seller.⁵⁶

On December 1, 1990, President Bush signed into law the Visual Artists Rights Act of 1990 (VARA), which gave authors of “works of visual art” certain waivable rights of attribution and integrity, but did not include a resale royalty right. Instead, it directed the Copyright Office to conduct a study of resale royalty rights in consultation with the National Endowment for the Arts. Following the study, in 1992, the Copyright Office released a report opposing the creation of resale royalty rights, primarily on economic grounds.⁵⁷

However, the push to create a resale royalty right eventually resumed. In 2011, Congress considered a bill titled the Equity for Visual Artists Act of 2011, which would have given visual artists a resale royalty right to 7% of the sale price of artworks sold for more than \$10,000.⁵⁸ Although the bill failed, it prompted Congress to ask the Copyright Office to produce another report on resale royalties.

In 2013, the Copyright Office released a revised report on resale royalties, which recommended the creation of a federal resale royalty right.⁵⁹ Specifically, it recommended the creation of a resale royalty right of 3%–5% of an artwork's resale price lasting for the life of the artist, applied to all commercial sales of artwork registered for copyright protection, with a threshold value of \$1,000–\$5,000 and a maximum resale royalty per sale.⁶⁰ It also recommended the creation of resale royalty organizations to collect and distribute resale royalties.

The Copyright Office based its recommendation primarily on its conclusion that copyright disadvantages artists because it typically does not enable them to

⁵⁴ Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986).

⁵⁵ *Id.*

⁵⁶ Visual Artists Rights Act of 1988, S. 1619, 100th Cong. (1988); Visual Artists Rights Act of 1987, H.R. 3221, 100th Cong. (1987).

⁵⁷ *DROIT DE SUITE: THE ARTIST'S REALE ROYALTY*, *supra* note 30.

⁵⁸ Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. (2011).

⁵⁹ *Resale Royalties: An Updated Analysis*, *supra* note 27.

⁶⁰ *Id.*

benefit from the economic success of their artworks.⁶¹ It also concluded that the creation of a resale royalty right could provide an additional incentive to create and distribute artworks, and probably would not adversely affect the United States art market.⁶² But it recommended caution, observing that creating a resale royalty right would benefit very few artists, and could impose significant administrative costs.⁶³

In response to the 2013 study, Congress considered a bill titled the American Royalties Too Act of 2014, known by its predictable “backronym” the “ART Act.”⁶⁴ The bill would have given artists a resale royalty right to the lesser of 5% of the sale price or \$35,000 of artworks sold at auction for \$5,000 or more.⁶⁵ The right would have been inalienable, except in the case of works made for hire or copyright transfer. Royalties would have been payable to rights management organizations regulated by the Copyright Office, and the failure to pay royalties would have been a form of copyright infringement.⁶⁶

B. STATE RESALE ROYALTY RIGHTS

Many states have also considered creating a resale royalty right, but only California actually created one. In 1976, California enacted the California Resale Royalties Act (CRRA).⁶⁷ It gave artists an inalienable resale royalty right to 5% of the sale price or an artwork sold for more than \$1,000 in California or by a California resident, if the artwork had increased in value.⁶⁸ The right applied to “fine art,” defined as original paintings, sculptures, drawings, and glass works, lasted for the life of the artist plus twenty years, and was non-waivable, unless a written contract provided a royalty larger than 5%.⁶⁹ The royalty was payable to the artist or the artist’s heirs, unless they could not be located, in which case it was payable to the California Arts Council, for the eventual benefit of the City of Sacramento’s Art in Public Places Program.⁷⁰

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ American Royalties Too Act of 2014, S. 2045, 113th Cong. (2014).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ California Resale Royalties Act, CAL. CIV. CODE 986 (1976).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY*, *supra* note 30, at 68. The provision making unclaimed funds payable to the California Arts Council was eventually removed. See generally *California Resale Royalty Act*, CAL. ARTS COUNCIL, <http://www.cac.ca.gov/resources/rra.php> (last visited Mar. 29, 2017).

In 1978, art dealers challenged the constitutionality of the CRRA, arguing that it was preempted by the first sale doctrine, among other things.⁷¹ But in 1980, the Ninth Circuit rejected their claim. It held that the CRRA was not preempted by the first sale doctrine of the Copyright Act of 1909 because it regulated a matter not covered by that Act. And it held that the Copyright Act of 1976 did not apply because the sales in question occurred before it went into effect.⁷² The Supreme Court denied certiorari, and the art dealers declined to pursue further action, leaving the validity of the CRRA under the 1976 Act in limbo.⁷³

In 2011, a group of artists filed a class action against Sotheby's and Christie's, alleging that they had violated the CRRA by selling at auction artwork owned by California residents and not paying any royalty.⁷⁴ Initially, the district court held that the CRRA was unconstitutional because it violated the Commerce Clause.⁷⁵ In 2015, the Ninth Circuit reversed in part, holding that extraterritorial application of the CRRA was preempted by the dormant Commerce Clause, but application in California was not.⁷⁶ But in 2016, the district court held that the CRRA was preempted by both the first sale doctrine and the preemption provision of the Copyright Act.⁷⁷ While the plaintiffs have appealed, they are unlikely to prevail.⁷⁸ If a statutory resale royalty right is going to exist in the United States, it will almost certainly have to be a federal resale royalty right created by Congress, unless Congress amends the Copyright Act to allow states to create a resale royalty right.

C. THE CONSTITUTIONALITY OF A FEDERAL RESALE ROYALTY RIGHT

If Congress creates a federal resale royalty right, it may not apply to all artworks. Presumably, any resale royalty right would be created by amending the Copyright Act, much as the Visual Artists Rights Act of 1990 amended the Copyright Act to extend attribution and integrity rights to the authors of "works of visual art."⁷⁹ The Copyright Act specifically provides, "[a] work of

⁷¹ *Morseburg v. Balyon*, 1978 U.S. Dist. Lexis 18831, 1978 WL 980 (C.D. Cal. Mar. 23, 1978), *aff'd*, 621 F.2d 972 (9th Cir. 1980).

⁷² *Morseburg v. Balyon*, 621 F.2d 972, 975, 977 (9th Cir. 1980).

⁷³ *Morseburg v. Balyon*, 101 S. Ct. 399 (1980).

⁷⁴ *Estate of Graham v. Sotheby's Inc.*, 860 F. Supp. 2d 1117, 1119 (C.D. Cal. 2012).

⁷⁵ *Id.* at 1126.

⁷⁶ *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015).

⁷⁷ *Estate of Graham v. Sotheby's, Inc.*, 178 F. Supp. 3d 974, 988 (C.D. Cal. 2016) (citing 17 U.S.C. § 109(a) (2012) (first sale doctrine); 17 U.S.C. § 301(a) (2012) (preemption provision)).

⁷⁸ See generally David E. Shipley, *Droit de Suite, Copyright's First Sale Doctrine and Preemption of State Law*, 39 HASTINGS COMMS. & ENT. L.J. 1 (2017) (concluding that the district court opinion is correct).

⁷⁹ Visual Artists Rights Act (VARA), Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (1990) (codified in part in 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501) (2012).

visual art does not include . . . any work not subject to copyright protection under this title.”⁸⁰ Under the Intellectual Property Clause, copyright can only protect original works of authorship, and originality requires both independent creation and some degree of creativity.⁸¹ The Copyright Act also specifically provides that copyright cannot protect ideas, only particular expressions of ideas.⁸² This “idea-expression” dichotomy prompted courts to create the “merger doctrine,” which provides that copyright cannot protect an expression of an idea that can only be expressed in one way or a limited number of ways, because the idea “merges” with the expression.⁸³

While the originality bar to copyright protection is vanishingly low, it precludes copyright protection of at least some works of modern and contemporary art. Marcel Duchamp’s notorious sculpture *Fountain*, which consisted of a porcelain urinal signed, “R. Mutt 1917,” surely fails to qualify for copyright protection, as Duchamp did not contribute any elements that satisfy the originality requirement.⁸⁴ Likewise, Yves Klein’s monochrome paintings, which consist of canvases painted a uniform aquamarine color known as “International Klein Blue,” surely fails the originality requirement for the same reason. The copyrightability of many artworks under the merger doctrine is also unclear. Many of Frank Stella’s paintings, which typically consist of simple geometrical patterns, probably do not qualify for copyright protection, because they reflect an “idea” that can only be expressed in one way or a limited number of ways. Likewise, many of Agnes Martin’s paintings, which typically consist of hand-painted or hand-drawn lines and grids, may not qualify for copyright protection.

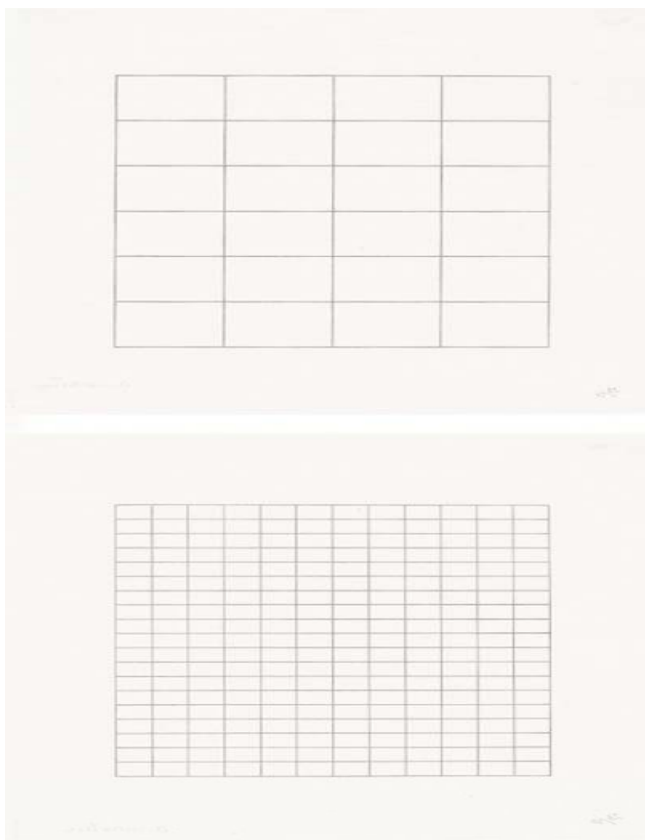
⁸⁰ 17 U.S.C. § 101(2)(c) (2012).

⁸¹ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 355 (1991).

⁸² 17 U.S.C. § 102(b) (2012) (stating “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work”).

⁸³ *See, e.g., Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

⁸⁴ *But see Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (stating “[p]ersonality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.”).



Agnes Martin, *[untitled]*, from the portfolio *On a Clear Day* (1973)

If an artwork cannot constitutionally be protected by copyright, it is unclear whether Congress can constitutionally grant its creator a resale royalty right. At the very least, it would be in tension with the constitutional subject matter of copyright.

Of course, this tension is inevitable when Congress grants “moral rights” in works of authorship. For example, the Visual Artists Rights Act of 1990 granted “moral rights” of attribution and integrity to the authors of certain works of authorship defined as “works of visual art.”⁸⁵ Copyright is typically conceptualized as a form of property right because it is alienable. Copyright

⁸⁵ Visual Artists’ Rights Act of 1990, Pub. L. No. 101-650, Title VI, 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (2012)).

owners may transfer their exclusive rights in whole or in part essentially at will.⁸⁶ By contrast, the moral rights of attribution and integrity granted to the authors of works of visual art by VARA are personal rights, not property rights, because they are waivable but inalienable.⁸⁷ Likewise, resale royalty rights are personal rights, not property rights, because they are typically non-waivable and inalienable.

Moreover, while copyright grants exclusive rights in an intangible work of authorship that can be reproduced indefinitely, “moral rights” often grant exclusive rights in particular copies of a work of authorship.⁸⁸ A copyright owner has the exclusive right to reproduce and distribute copies of a work of authorship, but once a copy is sold, the first sale doctrine provides that the copyright owner no longer has an exclusive right to distribute that particular copy. By contrast, “moral rights” often must survive the sale of a particular copy in order to be meaningful. The right of integrity is meaningful only if it applies to particular copies of a work of authorship, which may be unique objects. Likewise, the resale royalty right is meaningful only if it applies to particular copies of a work of authorship, for the same reason.

Scholars have long recognized the tension between “moral rights” and the property rights granted by copyright.⁸⁹ Indeed, Congress itself tacitly recognized that tension by making the “moral rights” granted by VARA waivable, rather than non-waivable, as they are under the Berne Convention.⁹⁰ In other words, Congress tried to make moral rights look more like property rights, in order to reconcile them with copyright.

Nevertheless, Congress could amend the Copyright Act to create a federal resale royalty right. In fact, it considered doing so when it enacted VARA.⁹¹

⁸⁶ See 17 U.S.C. § 201(d) (2012) (stating “(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession. (2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.”).

⁸⁷ Cf. Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 209 (2012) (discussing the relationship between alienability and property).

⁸⁸ Cf. Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559 (2016) (arguing that copyright is irrelevant to most artists, who sell unique objects, rather than reproductions of copyrighted works of authorship).

⁸⁹ See, e.g., Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009).

⁹⁰ See Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986); Visual Artists Rights Act of 1987, S. 1619, 100th Cong. (1987); H.R. 3221, 100th Cong. (1987) (precursors to VARA).

⁹¹ Visual Artists’ Rights Act of 1990, Pub. L. No. 101-650, Title VI, 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (2012)). See also Berne Convention, Article 6bis.

And a federal resale royalty right would probably be constitutional, under either the Commerce Clause or the Taxing and Spending Clause.⁹²

IV. THE JUSTIFICATION OF THE RESALE ROYALTY RIGHT

Scholars are divided on the justification of the resale royalty right. Some argue that it is justified, because it encourages artists to make artwork, prevents unfair treatment of artists, and enables artists to equitably share in the value of their work.⁹³ Others argue that it is not justified, because it is unnecessary, inequitable, and inefficient.⁹⁴ But assessments of the justification of the resale royalty right typically reflect underlying beliefs about the theoretical justification of copyright.⁹⁵

A. THEORIES OF COPYRIGHT

The prevailing theory of copyright under United States law is the economic theory, which holds that copyright is justified because it solves market failures in works of authorship, thereby increasing net economic welfare.⁹⁶ Not only does the Intellectual Property Clause of the Constitution imply an economic

⁹² U.S. CONST. art. I, § 8, cl. 1 (Commerce Clause) & 3 (Taxing and Spending Clause). However, a retroactive resale royalty right might be a “taking” under the Fifth Amendment, because it would affect the property rights of an owner of a particular copy of a work of authorship. Cf. Gregory Dolin & Irina D. Manta, *Taking Patents*, 73 WASH. & LEE L. REV. 719 (2016) (arguing that the Takings Clause should apply to regulatory takings of patents); Davida Isaacs, *Not All Property is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents, and Why They are Right to Do So*, 15 GEO. MASON L. REV. 1 (2007) (arguing that the Takings Clause should not apply to regulatory takings of patent rights). This could be a problem for proposals like the “ART Act,” which contemplates retroactive resale royalties. See also American Royalties Too Act of 2014, S. 2045, 113th Cong. (2014).

⁹³ See, e.g., DE PIERREDON-FAWCETT, *supra* note 10, at 122–23; Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L. REV. 509 (1995).

⁹⁴ See, e.g., Elliott C. Alderman, *Resale Royalties in the United States for Fine Visual Artists: An Alien Concept*, 40 J. COPYRIGHT SOC'Y U.S.A. 265, 267 (1993) (“[T]he proponents of the resale right have not demonstrated empirically that the Copyright Act, in fact, treats fine artists less favorably than authors and composers who create numerous copies of their works. Nor have they shown that the creation of a resale royalty would promote the broad availability of works and stimulate artistic creation.”); Alexander Bussey, *The Incompatibility of Droit de Suite with Common Law Theories of Copyright*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1063 (2013); Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. FORUM 1 (2014).

⁹⁵ See generally ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011) (discussing relationship between intellectual property theory and policy).

⁹⁶ See, e.g., RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS 97–125 (2013); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325 (1989).

theory of copyright, but also Congress and the Supreme Court have repeatedly and uniformly adopted an economic theory of copyright.⁹⁷ And the economic theory of copyright is also the prevailing theory among copyright scholars.⁹⁸

Classical economics predicts that free riding will cause market failures in public goods.⁹⁹ Works of authorship are public goods, because they are purely non-rival and non-excludable. Consumption of a work of authorship cannot diminish the supply of the work, and in the absence of copyright, the author of a published work cannot prevent anyone from consuming it. Accordingly, in the absence of copyright, classical economics predicts market failures in works of authorship. Rational economic actors underinvest in the production of new works of authorship, because consumers will free ride, rather than pay the marginal cost of production. In theory, copyright can solve market failures in works of authorship by making them partially excludable, thereby enabling authors to force consumers to pay the marginal cost of production.¹⁰⁰

The economic theory is explicitly consequentialist. Under the economic theory, copyright is justified because it increases net economic welfare by solving market failures in works of authorship.¹⁰¹ By extension, copyright is justified only if and when it increases net economic welfare, and is not justified if and when it decreases net economic welfare.

Of course, there are alternative natural right and moral right theories of copyright.¹⁰² The natural right theory holds that copyright is justified because

⁹⁷ See U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”); H.R. REP. NO. 2222, 60th Cong., 2d Sess., 6–7 (1909) (stating that copyright was designed “primarily for the benefit of the public,” for “the benefit of the great body of people, in that it will stimulate writing and invention”); see also H.R. REP. NO. 105-452, p. 4 (1998) (term extension “provide[s] copyright owners generally with the incentive to restore older works and further disseminate them to the public”); see also *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

⁹⁸ MERGES, *supra* note 95, at 2 (“Current convention has it that IP law seeks to maximize the net social benefit of the practices it regulates.”).

⁹⁹ Free riding is the consumption of a good without paying the marginal cost of production; market failures are inefficiencies in the market for a good; and public goods are goods that are non-rival and non-excludable.

¹⁰⁰ See, e.g., CASS & HYLTON, *supra* note 96, at 97–125; Landes & Posner, *supra* note 96, at 325.

¹⁰¹ See, e.g., Landes & Posner, *supra* note 96, at 325; CASS & HYLTON, *supra* note 96, at 97–125.

¹⁰² See generally Peter S. Menell, *Intellectual Property: General Theories*, in 2 ENCYCLOPEDIA OF LAW & ECONOMICS 129 (Boudewijn Bouckaert & Gerrit de Geest, eds., 2000) (outlining the labor and personhood theories, among others); MERGES, *supra* note 95, at 3 (providing a more detailed account of the Lockean and Kantian theories of intellectual property); Jane C. Ginsburg, *A Tale of*

authors have a natural right to enjoy the fruits of their labor.¹⁰³ And the various moral right theories hold that copyright is justified because authors have a moral right to control the use of the works of authorship they create, and share in the profits generated by those works.¹⁰⁴

Adherents to consequentialist theories of copyright—including the economic theory—typically consider the justifications offered by moral theories as little more than question-begging *ipse dixit*.¹⁰⁵ The moral theories hold that copyright is justified because authors are entitled to certain rights in their works of authorship. Consequentialist theories of copyright ask why authors are entitled to those rights. Specifically, they ask why authors should be entitled to those rights if they are inefficient and decrease net social welfare. For consequentialists, copyright is a means to an end. For moral rights theorists, it is an end in itself.

The resale royalty right, like the “moral rights” of attribution and integrity granted by VARA, is essentially a form of para-copyright that grants authors certain rights in particular copies of their works of authorship, rather than the underlying work itself. If the resale royalty right is a form of copyright, presumably its justification ought to be evaluated on the same terms as other forms of copyright. In other words, if one accepts the economic theory of copyright, then the resale royalty right is justified only if and when it increases net economic welfare. By contrast, if one accepts a moral rights theory of copyright, then the resale royalty right is justified only if it advances some deontological value.

Proponents of the resale royalty right typically argue that it is justified under both the economic and moral rights theories, because it increases both economic efficiency and equity.¹⁰⁶ They claim it increases economic efficiency by providing an incentive for artists to create artworks. And they claim it increases equity because artists have an equitable right to claim a percentage of the resale price of the artworks they created. But are they correct? And if they are not, is it possible to create a resale royalty system that is justified under both theories?

Two Copyrights: Literary Property in Revolutionary France and America, 64 TUL. L. REV. 991 (1990) (exploring the different justifications for copyright law under French and United States law).

¹⁰³ Mennell, *supra* note 102; MERGES, *supra* note 95, Ginsburg, *supra* note 102.

¹⁰⁴ Mennell, *supra* note 102.

¹⁰⁵ See, e.g., Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328 (2015).

¹⁰⁶ See, e.g., Thomas M. Goetzl, *In Support of the Resale Royalty*, 7 CARDOZO ARTS & ENT. L.J. 249 (1989); Alma Robinson, *Resale Royalties for Visual Artists: Promoting Equity and Expression*, 6 CYBARIS INTELL. PROP. L. REV. 96 (2015); see also DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY, *supra* note 30, at 31–40.

B. THE RESALE ROYALTY RIGHT UNDER THE ECONOMIC THEORY OF COPYRIGHT

The resale royalty right as traditionally formulated is difficult to justify under the economic theory of copyright. Under the economic theory, copyright is justified because it solves market failures in works of authorship by providing salient incentives for marginal authors to invest in the production of works of authorship. Accordingly, the resale royalty right is justified only if it provides salient incentives for marginal artists to invest in the production of artworks. But it probably does not.

First, the economic case for copyright protection of art is weak, because copyright does not provide salient incentives to most artists. As Amy Adler has observed, copyright is largely irrelevant to visual artists.¹⁰⁷ Not only is copying “essential to contemporary art,” but also, copyright protection has no economic value to most artists.¹⁰⁸

Copyright assumes that authors create an original work of authorship and sell copies of that work to consumers. Copyright law provides salient incentives to authors by giving them certain exclusive rights to reproduce, distribute, perform, display, and adapt the works of authorship they create. These rights enable them to prevent free riding and internalize some of the positive externalities they generate.¹⁰⁹

But most artists do not sell reproductions of their artworks: they sell the originals. Intangible works of authorship are public goods, but tangible artworks are not. Copyright assumes abundance, but the art market depends on scarcity. Copyright assumes reproduction, but the art market depends on the “aura” of the unique artwork.¹¹⁰ Copyright assumes that it gives authors valuable exclusive rights, but the art market largely ignores copyright, except to flout it. If anything, most artists have an incentive not to exercise the exclusive rights of copyright owners, because uncontrolled reproduction, distribution, and display of the intangible works of authorship they create typically increases the value of the unique artworks they actually sell.

Some advocates of the resale royalty right argue that it is justified because copyright disadvantages artists by providing exclusive rights that are valuable to many authors—but not to artists.¹¹¹ The exclusive rights of copyright owners

¹⁰⁷ See generally Adler, *supra* note 88, at 559.

¹⁰⁸ *Id.* at 567, 573 n.50.

¹⁰⁹ See generally Brett M. Frischman & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 282 (2007).

¹¹⁰ Cf. WALTER BENJAMIN, *THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION* (1936).

¹¹¹ See, e.g., *Resale Royalties: An Updated Analysis*, *supra* note 27, at 31.

are valuable to authors who create works of authorship typically sold as reproductions, but not to artists who create works of authorship typically sold as unique object. The resale royalty right simply gives artists a right that is actually valuable to them.

But there is no reason to give authors an additional right simply because they choose to participate in a market in which the other rights they receive are not valuable. Artists can and do sell reproductions as well as originals. Indeed, the most popular artists can generate significant income by licensing the reproduction of their artworks, and many commercial artists generate income primarily by selling reproductions rather than originals.

Moreover, unlike many authors who effectively must transfer copyright ownership of their works of authorship in order to profit from those works, artists typically retain the copyright in their works of authorship, even after they have sold the original. Musicians, screenwriters, commercial artists, and so on are typically expected to transfer copyright ownership in their works to a publisher or distributor in exchange for an advance and a percentage of the profits. However, more often than not, the works are unprofitable, and the author never receives anything but the advance. By contrast, artists typically retain the copyright in their works of authorship, and in the event the copyright becomes valuable, they are in a position to exploit it.

Some advocates of the resale royalty right also argue that it is justified because it provides an economic incentive to artists.¹¹² On its face, this argument is implausible, because the resale royalty right is vanishingly unlikely to provide salient incentives to marginal artists. The economic theory of copyright assumes that authors are rational economic actors who make decisions on the basis of risk-adjusted returns on investment. Copyright provides an incentive to marginal authors by reducing the risk of free riding and increasing the return on successful investments, thereby providing salient incentives to at least some marginal authors. Rational authors would not create easily copied or expensive to produce works of authorship in the absence of copyright. Copyright surely provides salient incentives to at least some marginal authors, especially those who produce commercial works of authorship with reasonably predictable, well-developed, and liquid consumer markets. No one would invest in the production of commercial films costing hundreds of millions of dollars without copyright protection.

By contrast, the resale royalty right is highly unlikely to provide salient incentives to economically rational marginal artists. Few artists sell any

¹¹² See, e.g., Robinson, *supra* note 106, at 98 (“The resale royalty, or ‘*droit de suite*,’ provides the visual artist with an economic incentive to continue to work in a demanding and often financially challenging as well as lonely, profession.”).

artworks at all, and even fewer artists sell artworks that increase in value. Less than 1% of living artists have a resale market for their artworks.¹¹³ In theory, the resale royalty right cannot provide salient incentives to marginal artists who have not yet established a market for their artworks, because it is vanishingly unlikely that it ever provides meaningful returns. Neither can the resale royalty right provide salient incentives to marginal artists who have established a market for their artworks, because they can easily price risk-adjusted returns into the initial sale price.

Of course, people typically are not rational economic actors, and artists are no exception. Indeed, if anything, artists are especially irrational.¹¹⁴ Given the risk-adjusted rate of return, it is irrational to become an artist. Just as copyright is hypersalient to some authors, the resale royalty right may be hypersalient to some artists.¹¹⁵ For example, one supporter of the resale royalty right reports, “In a 2012 survey of [California Lawyers for the Arts] members, 84% of the respondents said that California resale royalty is an important incentive for them to continue their work, even though most have not received such payments.”¹¹⁶ Either the respondents didn’t understand the question, or they are economically irrational.

¹¹³ RUTH TOWSE, *HANDBOOK OF CULTURAL ECONOMICS* 38 (2003) (“In most Western European countries and the USA, only a small percentage of contemporary artists can make a living from selling their work on the market. Works made by an even smaller percentage of living artists are traded on the secondary market.”); see *DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY*, *supra* note 30, at 103–04 & n.30 (citing surveys finding that from 1972–1977, about 150 out of 200,000 living artists had a resale market, in 1980 about 300 out of 200,000 living artists had a resale market, and in 1990, only 219 living artists met the \$10,000 threshold for resale royalties, based on auction at Christie’s and Sotheby’s); see also *Resale Royalties: An Updated Analysis*, *supra* note 27, at 42 n.283 (“A 1999 study found that ‘of the 233,000 U.S. citizens who classified themselves as ‘painters, sculptors, craft-artists, and artist printmakers,’ 357 (0.15 percent) have an art resale market of greater than \$1,000 over the last fifty-one-month period.’”).

¹¹⁴ See JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2014) (finding that artists self-report as not responding to economic incentives to create artworks).

¹¹⁵ See *Resale Royalties: An Updated Analysis*, *supra* note 27, at 39 & n.263 (2013) (“The idea that a resale royalty encourages creativity does find some support in social psychology literature, specifically the concept of ‘optimism bias,’ which refers to an individual’s irrational or unrealistic optimism that his or her work will be successful or otherwise highly valued.” (citing Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 51 (2011) (“Creators are likely to overvalue works that they were internally motivated to create and that required substantial creative effort compared with both potential purchasers and mere owners of the works. Our data suggest this valuation anomaly is driven primarily by creators’ irrational optimism about their works’ likelihoods of success.”)). “Professor Sprigman in particular is skeptical of the resale royalty, but, if artists believe, however irrationally or unrealistically, that their works are likely to be successful on the secondary market, then the optimism bias — embodied as a resale royalty — might incentivize greater creativity.”).

¹¹⁶ Robinson, *supra* note 106, at 99.

However, we should be skeptical of survey results. While a survey may provide an accurate assessment of people's normative beliefs, it does not necessarily provide an accurate assessment of how they actually respond to incentives. There is no evidence that the adoption of the CRRA increased the production of artworks in California, or that its invalidation reduced the production of artworks. Moreover, the epicenter of the art world—New York—does not have a resale royalty right. Notably, while Paris and Berlin remain important centers of the art world, their importance diminished after they adopted a resale royalty right, suggesting that the resale royalty right could actually decrease the production of artworks, presumably by reducing demand.

Moreover, it seems highly unlikely that the resale royalty right could actually provide a salient incentive even to irrational economic actors. The probability of any particular artist eventually becoming successful is very low, at best about 0.1%.¹¹⁷ As a consequence, the expected future value of an artwork created by an artist who is not currently successful is effectively zero. To the extent that marginal artists respond to economic incentives at all, they are necessarily gambling on success. It is implausible that the right to a percentage of the resale price of an artwork currently lacking any value could actually provide a salient additional incentive to marginal artists, no matter what they might say when asked.¹¹⁸ Experience suggests that the resale royalty right is valued highly by successful artists, who are already in the money, but irrelevant to unsuccessful artists, for whom it is little more than a pipe dream.

Supporters of the resale royalty right also argue that it is justified under the economic theory because artists are often in a poor bargaining position when they sell their artworks. But this argument is not compelling.¹¹⁹ For one thing, artists are in a “poor bargaining position” only to the extent that the future value of the artworks they create is highly uncertain. While a small number of artworks increase in value over time, and a vanishingly small number become immensely valuable, the overwhelming majority decrease in value, and many are worth nothing or almost nothing.¹²⁰

The resale royalty right enables artists to internalize the positive externalities they generate by giving them a right to a percentage of the increase in the value

¹¹⁷ See *DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY*, *supra* note 30, at 103–04 & n.30.

¹¹⁸ Cf. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (Breyer, J., dissenting) (“No potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter. After all, if, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term)—must be far smaller.”).

¹¹⁹ See, e.g., Rub, *supra* note 94, at 1.

¹²⁰ Gilbert S. Edelson, *The Case Against an American Droit de Suite*, 7 *CARDOZO ARTS & ENT. L.J.* 260, 263–64 (1989) (observing that “most art declines in value” and “less than one quarter of one percent of all living artists have active resale markets for their work”).

of their artworks, but does not require them to internalize any negative externalities.¹²¹ As the painter Gerome observed in 1903:

One cannot neglect the other side of the coin: you pay a very high price for one of those pieces of trash which are popular nowadays and you sell it again for a mere song in a more or less distant future. Will you ask the seller to share the loss? I already know what his answer would be.¹²²

The price a rational buyer is willing to pay is the expected future value of the artwork, discounted by the risk that it will be worth less.¹²³ The resale royalty right provides that artists get a percentage of any increase in the value of the artwork, effectively reducing its expected future value. As a consequence, rational buyers will reduce the amount they are willing to spend on an artwork, especially when its future expected value is uncertain. In other words, the resale royalty right makes the bargaining position of as-yet-unsuccessful artists even worse, because the expected future value of their artworks is highly uncertain.¹²⁴

In a free-market . . . , the value of an object is what a willing buyer will pay a willing seller at a given time. Thus, when a young artist without a recognized market sells a work to a collector—who assumes the considerable risk that the work may decline in value—market forces dictate the price and terms of the exchange. And consistent with free-market property rights, the collector receives the interests he negotiated in the work as a *quid pro quo* for his gamble.¹²⁵

Critics of the resale royalty right also argue that the “starving artist” is a myth. “Visual artists are neither poor nor in a weak bargaining position vis-à-

¹²¹ *Id.* at 261.

¹²² DE PIERREDON-FAWCETT, *supra* note 10, at 11.

¹²³ *Resale Royalties: An Updated Analysis*, *supra* note 27, at 38 (observing that opponents claim “a resale royalty will drive down demand for works and lower prices in the primary market because buyers will offer less for an encumbered work than for one that could be purchased free and clear”).

¹²⁴ See Ben W. Bolch, William W. Damon & C. Elton Hinshaw, *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L. REV. 689, 693 (1978) (“Although both the artist and the buyer agree on the future price of the work, they differ in their preferences for present consumption relative to future consumption. In a noncoerced exchange, both parties benefit. However, at some later time, because of increased wealth or for other reasons, the artist may have a lesser need for present consumption and may in retrospect view the sale with regret, feeling that a just price was not obtained at the time of original sale.”).

¹²⁵ Alderman, *supra* note 94, at 270.

vis their buyers, and the Copyright Act does not disfavor these artists in any way.”¹²⁶ As they observe, the market for artwork is robust and lucrative. Barriers to entry are low and returns on investment are potentially substantial. And “most studies conclude that artists’ lifetime earnings ‘very closely approximate what they could achieve in non-artistic pursuits.’”¹²⁷

While these observations are true, they are also incomplete. By at least one measure, the average income of an artist is similar to the average income of other copyright owners.¹²⁸ But median income seems like the more relevant measure, given that a vanishingly small number of artists are wildly successful, and a slightly larger number are modestly successful, but the overwhelming majority are abject failures.¹²⁹ Moreover, how should a study of the median income of artists account for unsuccessful artists? If one includes both successful (“primary job”) and unsuccessful (“secondary job”) artists in the study, surely it would dramatically diminish the median income figure, at least insofar as that income is derived from the sale of artworks. Critics of the resale royalty right are correct that successful artists are not disadvantaged. But the opposite is true of unsuccessful artists.

Supporters of the resale royalty right often try to offer alternative economic justifications. For example, Thomas Goetzl argued, “The resale royalty is an economic right and artists whose works sell in a secondary market ought to benefit from that sale.”¹³⁰ As he observed, in France, the prevailing argument for the resale royalty right is that any increase in the value of an artwork is primarily attributable to the efforts of the artist. In Germany, the prevailing argument is that artists are entitled to share in the inherent “true value” of their artwork.¹³¹ And in Belgium, the prevailing argument is based on the contract principles of changed circumstances and unjust enrichment.¹³² Essentially, all of these supposedly economic justifications rely on unjust enrichment. In other words, they are equitable arguments dressed up as economic ones. But there is

¹²⁶ Rub, *supra* note 94, at 1.

¹²⁷ *Id.* at 3 (quoting Randall K. Filer, *The “Starving Artist”—Myth or Reality? Earnings of Artists in the United States*, 94 J. POL. ECON. 56, 59 (1986)).

¹²⁸ See Stephen E. Weil, *Residue Royalties: Nobody Benefits*, ARTNEWS, Mar. 1978, at 59.

¹²⁹ *Resale Royalties: An Updated Analysis*, *supra* note 27, at 35 n.237 (observing that studies of median and mean artist income “cannot account for artists who are unable to make a living in the art field, and therefore self-identify in other sectors,” because they only count people who list their “primary job” as “artist,” and “in 2010 roughly 264,000 U.S. workers had a ‘secondary’ job as an artist — that is, they worked most of their weekly hours in another job” (quoting National Endowment for the Arts, *Artists and Arts Workers in the United States: Findings from the American Community Survey (2005–2009)*)).

¹³⁰ Goetzl, *supra* note 106, at 257.

¹³¹ *Id.* at 256 n.190.

¹³² Alderman, *supra* note 94, at 271.

no reason to think the enrichment of the lucky buyer who managed to purchase one of the few artworks that increased in value is in any way unjust, any more than the loss experienced by the buyers who purchased artworks that decreased in value is unjust.

In sum, under the economic theory, resale royalty rights are not justified, because they cannot provide salient incentives to marginal artists, and therefore are inefficient. But more troubling, they are inequitable by design, because they can only benefit only the very few artists who achieve financial success.

[O]nly established artists are likely to benefit from the statute and then only if their works were originally sold in the absence of the royalty provision when potential buyers did not adjust their bid prices downward to account for the royalty. According to the Art Dealers Association, only about fifty living artists have a resale market for their works, and ninety-nine percent of all art depreciates in value. Thus, if the statute benefits anyone, it benefits the select few who need protection the least.¹³³

Adding insult to injury, resale royalty rights effectively transfer wealth from unsuccessful artists to successful artists. The predicted effect of resale royalty rights is to decrease prices on the primary market in order to offset the cost of resale royalty rights on the secondary market. In other words, all artists selling artwork will make less money up front, in order to provide a windfall to the vanishingly few artists who hit the jackpot and become successful. “There is, of course, nothing intrinsically wrong with improving the status of the well-off. But there is a real problem when the price of making the well-off better-off is to make the least well-off worse-off. This is the effect of compulsory profit sharing.”¹³⁴ In other words, the resale royalty right isn’t just inefficient, it’s also a form of rent-seeking, which forces the poor to subsidize the rich.

C. THE RESALE ROYALTY RIGHT UNDER THE MORAL THEORIES OF COPYRIGHT

While the resale royalty right as traditionally implemented fares poorly under the economic theory, it does better under the moral rights theories of copyright. “On balance, it may be argued that European and other societies with natural law traditions, which broadly recognize a moral obligation to authors apart from the proprietary rights of copyright, are inherently more receptive to the resale royalty, despite its shortcomings.”¹³⁵

¹³³ Bolch, Damon & Hinshaw, *supra* note 124, at 696.

¹³⁴ Edelson, *supra* note 120, at 264.

¹³⁵ Alderman, *supra* note 94, at 265 n.2.

The Lockean natural right theory of copyright holds that authors have a natural right to the fruits of their labor.¹³⁶ Similarly, the resale royalty right enables artists to claim a percentage of the future value of their artworks, which would otherwise belong to the buyer, rather than the artist. If increases in the value of an artwork are attributable to the artist's labors or the intrinsic value of the artwork, then perhaps under the natural rights theory the artist is entitled to a claim on that increase in value. But resale royalty systems typically do not require artists to show that they caused the increase in value of their artwork.

By contrast, the Kantian and Hegelian moral right theories of copyright hold that authors have a moral right to control and benefit from the use of their works of authorship, as an expression of their autonomy.¹³⁷ Like the moral rights of attribution and integrity, the resale royalty right establishes an enduring connection between artists and their artworks. The rights of attribution and integrity give artists the right to claim or disclaim authorship of their artworks. The resale royalty right gives artists the right to claim a percentage of the sale price of their works of authorship. These are rights in property that persist even after its transfer, establishing an enduring connection between artists and their artworks. But an economic interest in the resale price of an artwork does not seem like the kind of autonomy interest contemplated by the Kantian and Hegelian theories.

Tellingly, supporters of the resale royalty right typically do not rely on Lockean, Kantian, or Hegelian arguments. Instead, they argue that artists have an "equitable" right to claim a percentage of the resale price of their artworks, because artists are entitled to share in the increase in the value of the works of authorship they create. Opponents of the resale royalty right respond that the buyer of an artwork takes a risk on the future value of that artwork and is entitled to the proceeds of that risk.¹³⁸

It is unclear why "equity" vis-à-vis artists and collectors necessarily cuts in favor of artists. In particular, it is hard to see why "equity" cuts in favor of the successful artists who stand to gain from the resale royalty right, when they already benefit indirectly from the increase in the value of their artwork. As Robert Scull reminded Robert Rauschenberg, the remarkable increase in the value of *Thaw* implied a corresponding increase in not only the value of the existing artworks that Rauschenberg had not yet sold, but also the artworks he had not yet created. While Scull profited handsomely on the increase in value

¹³⁶ See Menell, *supra* note 102.

¹³⁷ See MERGES, *supra* note 95, at 68–101; Bussey, *supra* note 94, at 1094.

¹³⁸ *Resale Royalties: An Updated Analysis*, *supra* note 27, at 33 ("In fact, critics of a resale royalty also query why visual artists should have the right to 'share in a collector's profits if the value of his art goes up, without having a corresponding obligation to compensate the collector for his losses' if the work's value declines.").

of a single artwork, Rauschenberg stood to profit handsomely from the increase in value of many artworks.

But what about equity vis-à-vis successful and unsuccessful artists? The decision to become an artist is very risky. While the potential for profit is high, the likelihood of success is vanishingly low, akin to buying a lottery ticket. Presumably, we want to provide salient incentives for marginal artists to invest in the creation of artworks. But as explained above, resale royalty rights cannot provide salient incentives to marginal artists, only windfall gains to successful artists, at the expense of unsuccessful artists.

V. EQUITABLE RESALE ROYALTIES

The only way to provide salient incentives to marginal artists is to mitigate the risk associated with the choice to become an artist in the first place. Resale royalty rights cannot achieve this goal, because by design they can only benefit successful artists. But perhaps a resale royalty system could achieve this goal, by distributing resale royalties to unsuccessful artists. This would use some of the windfall profits associated with art world success to mitigate the risk associated with choosing to become an artist.

Of course, supporters of the resale royalty right insist that equity requires it to benefit the artists whose artworks increased in value: “The resale royalty was never intended as welfare legislation.”¹³⁹ But why? Why not rethink the resale royalty right as a means of redistributing wealth from successful to unsuccessful artists? Or why not rethink the resale royalty right as a resale royalty tax, used to fund welfare legislation designed to benefit those who took a socially beneficial risk by investing in the production of artwork, but were not successful?

A. INDIVIDUAL RESALE ROYALTY RIGHTS

As observed above, Congress could probably create a resale royalty system based on a federal resale royalty right, consistent with its constitutional authority. And it could make the resale royalty right an individual right, asserted and collected by individuals. But the evidence suggests that individual resale royalty rights are difficult or impossible for artists to actually enforce. And in any case, a resale royalty system based on an individual resale royalty right cannot be equitable, because it can only benefit successful artists at the expense of unsuccessful artists.

¹³⁹ Goetzl, *supra* note 106, at 258.

B. EQUITABLE RESALE RIGHTS ORGANIZATIONS

As observed above, functional resale royalty systems typically rely on resale royalty organizations.¹⁴⁰ A resale royalty organization resembles a performing rights organization like ASCAP, BMI, or SESAC, in that it collects resale royalties and distributes them to its members. Performing rights organizations enabled the creation of a functional performance rights licensing system by using reducing transaction costs on individual copyright owners and users. Likewise, resale royalty organizations enable the creation of a functional resale royalty system by reducing transaction costs on the collection of resale royalties.¹⁴¹ Artists join a resale royalty organization, which collects resale royalties from auctioneers and dealers, and distributes those royalties to its members *pro rata* less a fee. In other words, artists receive a proportional share of the royalties collected.

While resale royalty organizations enable the creation of a functional resale royalty system, they don't make it equitable. If a resale royalty organization distributes royalties *pro rata*, it perpetuates the same inequity that affects a resale royalty system based on an individual resale royalty right: benefiting successful artists at the expense of unsuccessful artists. In fact, it exacerbates the inequity by enabling the creation of a functional resale royalty system and causing collectors to discount the expected future value of artworks created.

But resale royalty organizations could create a more equitable resale royalty system by distributing royalties *per stirpes* or progressively. In other words, a resale royalty organization could distribute equal shares of the royalties collected to all of its members, or distribute shares of the royalties collected only to its unsuccessful members. Both of these options would make a resale royalty system more equitable by allowing unsuccessful artists to benefit from resale royalties. A *per stirpes* distribution would be mildly equitable, because it would benefit all members of the resale royalty organization equally, regardless of success. A progressive distribution would be more equitable, because it would benefit the unsuccessful members of the organization, who are in need, rather than the successful members, who are not.

Existing resale royalty organizations distribute royalties *pro rata* because they assume that the resale royalty right is analogous to the performance right granted by the Copyright Act: an individual right managed by the organization. But that is not required. Artists could voluntarily join equitable resale rights organizations, as a way of insuring themselves against the significant likelihood

¹⁴⁰ See *Resale Royalties: An Updated Analysis*, *supra* note 27, at 13–20, 79; see also DE PIERREDON-FAWCETT ET AL., *supra* note 10, at 106–39.

¹⁴¹ See *Resale Royalties: An Updated Analysis*, *supra* note 27, at 13–20, 79; see also DE PIERREDON-FAWCETT ET AL., *supra* note 10, at 106–39.

that they will not be successful. Of course, equitable resale royalty organizations might not appeal to artists with higher risk tolerance. And artists who became successful would have a strong incentive to leave an equitable resale royalty organization for a *pro rata* resale royalty organization.

Equitable resale royalty organizations could mitigate these problems by requiring artists to join early in their careers and form long-term agreements with penalties for early termination. Congress could solve the problem by requiring resale royalty organizations to distribute royalties on a *per stirpes* or progressive basis. Resale royalties can exist only if Congress decides to create them. If the purpose of the resale royalty right is to promote efficiency and equity, then Congress should take those considerations into account if and when it creates a resale royalty right. One way to accomplish that goal would be to permit the collection of resale royalties only via an equitable resale royalty organization.

C. THE RESALE ROYALTY TAX

Opponents of the resale royalty right often call it a tax, rather than a right. “The term ‘resale royalty’ is a misnomer; the proposal is essentially calling for mandatory profit-sharing, and constitutes a discriminatory surtax on the profit from the sale of those works of art to which it applies.”¹⁴² They are correct. The traditional resale royalty right is essentially a tax imposed on the sale of certain artworks and distributed to a particular class of artists. It is also an unusually regressive tax, because it benefits a small class of successful artists who are entitled to collect resale royalties, at the expense of a vastly larger class of unsuccessful artists who are not.

But if the resale royalty right is a tax, the government can collect and distribute the resale royalty tax revenue however it chooses. Supporters of resale royalties argue that they are intended to increase the efficiency and equity of the art market. Congress is uniquely well positioned to create an efficient and equitable resale royalty system by imposing a resale royalty tax on the secondary market for artwork and distributing the revenues in an equitable fashion.

Traditional resale royalty systems essentially impose a sales tax on all qualifying transactions, and distribute the proceeds either directly or indirectly to the artist who created the artwork in question.¹⁴³ Many states already impose a sales tax on qualifying transactions, including sales of artwork. The resale royalty tax is effectively an additional sales tax that applies to certain

¹⁴² Edelson, *supra* note 120, at 261.

¹⁴³ See, e.g., Intellectual Property Code, Art. L122-8, <http://perma.cc/38MU-W5N4>, California Resale Royalties Act, Cal. Civ. Code 986 (1976). While the CRRRA only applies if an artwork has increased in value, it still applies to the entire sales price, even if the increase in sale price is small.

transactions. For example, the CRRA effectively imposes a 5% sales tax on art transactions of in excess of \$1,000, if the artwork has increased in value, and the European Union *droit de suite* law effectively imposes a graduated sales tax on all commercial sales of artwork in excess of €3,000, with a maximum tax of €12,500.¹⁴⁴

Traditional resale royalty systems are inefficient because they rely on private enforcement, either by individual artists or by private resale royalty organizations. Neither has direct access to financial information relating to sales of artwork. At best they can pursue resale royalty taxes levied on auction and commercial sales, but cannot effectively pursue resale royalty taxes on private sales. The European Union resale royalty tax is especially inequitable because it is regressive, effectively imposing a higher tax rate on low-value art sales than on high-value art sales. And because the tax is capped, the higher-value the sale, the lower the effective tax rate.

Traditional resale royalty systems are also inequitable, because they benefit successful artists at the expense of unsuccessful artists, and the more successful the artist, the larger the financial benefit. In addition, they enable successful artists to benefit every time an artwork they created is sold, often even if the artwork has not increased, or even decreased in value. An equitable resale royalty system would benefit unsuccessful artists, rather than successful artists.

D. METHODS OF IMPOSING A FEDERAL RESALE ROYALTY TAX

A federally managed resale royalty system could avoid these inefficiencies and inequities. Congress could impose a resale royalty tax in many different ways, but the two simplest solutions would be via a sales tax or a surcharge to the capital gains tax.

First, Congress could create a federal resale royalty tax by simply imposing a flat tax on all sales of artwork. This would require the creation of a new tax, which would effectively be a form of national sales tax imposed on the sale of artwork. Many state and local governments already impose sales taxes on most transactions, including the sale of artwork, and the federal government imposes federal sales taxes on the sale of certain goods, like gasoline, alcohol, and cigarettes. There is no reason that Congress could not impose a federal sales tax on sales of artwork, and require sellers to report any sales to the IRS.

Second, Congress could create a federal resale royalty tax by increasing the capital gains tax on artwork. Artwork is already subject to the capital gains tax,

¹⁴⁴ Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, recital 3, 2001 O.J. (L 272) 32–36, http://www.wipo.int/wipolex/en/text.jsp?file_id=180301; *see also Resale Royalties: An Updated Analysis*, *supra* note 27, at 13.

like any other form of property, so it would not significantly increase the administrative burden on the IRS or the tax preparation burden on taxpayers to create a capital gains tax surcharge for artwork. Creating a federal resale royalty tax through the capital gains tax would have the effect of only taxing increases in the value on an artwork, and not taxing sales of artwork that had decreased in value. However, it would probably also be easier for taxpayers to avoid or minimize than a federal sales tax.

E. METHODS OF DISTRIBUTING FEDERAL RESALE ROYALTY TAX REVENUES EQUITABLY

Once Congress decides how to impose a federal resale royalty tax, it must decide how to distribute the revenue collected in an equitable fashion. There are two obvious options: Congress could either distribute the revenue to a federal agency or distribute it directly to unsuccessful artists.

F. DISTRIBUTING FEDERAL RESALE ROYALTY TAX REVENUES TO AN AGENCY

If Congress chooses to distribute the resale royalty tax revenue to a federal agency, the obvious choice would be the National Endowment for the Arts (NEA). Congress created the NEA in 1965, in order to promote progress and scholarship in the humanities and the arts in the United States.¹⁴⁵ The NEA provides grant funding to art institutions and projects on the federal, state, and local level. It is the largest public arts grant making institution in the United States and has extensive institutional experience in administering public funds in the public interest to promote the arts. It is perfectly situated to disburse the revenue from a federal resale royalty tax in an equitable fashion.

In addition, it is an opportune time to create a dedicated source of tax revenue to fund the NEA. While the NEA budget has changed over time, the 2016 NEA budget was \$148 million.¹⁴⁶ On March 16, 2017, President Trump submitted his administration's first budget request to Congress.¹⁴⁷ Among other things, the proposed budget eliminates all funding for the NEA in fiscal year 2018.¹⁴⁸ President Trump and members of his administration have stated that the budget eliminates funding for the NEA because it is not appropriate to ask taxpayers to support arts programs they do not consume.

¹⁴⁵ National Foundation on the Arts and the Humanities Act of 1965 (P.L. 89-209).

¹⁴⁶ NATIONAL ENDOWMENT FOR THE ARTS, <https://www.arts.gov/> (last visited Mar. 30, 2017).

¹⁴⁷ OFFICE OF MANAGEMENT AND BUDGET, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICAN GREAT AGAIN (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf.

¹⁴⁸ NATIONAL ENDOWMENT FOR THE ARTS, <https://www.arts.gov/> (last visited Mar. 30, 2017).

A federal resale royalty tax could provide a revenue stream that would replace or even increase the budget of the NEA. In 2015, the global art market reported total sales of \$63.8 billion, of which the United States accounted for 43% or \$27.4 billion.¹⁴⁹ Accordingly, a 1% federal resale royalty tax on federal sales tax on the sale of artwork could generate as much as \$274 million, or about double the 2016 budget of the NEA. Notably, this is a considerably lower rate than is imposed by most traditional resale royalty systems. If Congress wanted to further increase the revenue available for arts funding, it could impose a rate of 2% or 3%. It is harder to predict how much revenue would be generated by an increase in the capital gains tax on artwork, but a small increase would probably also be sufficient.

Historically, the NEA has been politically controversial. Conservative politicians have objected to the content of artworks sponsored by the NEA, and to its mission as “welfare for the cultural elite.”¹⁵⁰ Using a federal resale royalty tax to fund the NEA would have the salutary effect of providing a dedicated revenue stream for federal arts funding, while imposing the tax burden on those who consume art benefit directly from the consequences of arts funding. Indeed, artists have long suggested a similar approach. For example, artist William Powhida has observed that almost \$1 billion in artwork was sold at one auction at Christie’s in New York: “If you had a 2 percent tax just on the auctions in New York you could probably double the NEA budget in two nights.”¹⁵¹

G. DISTRIBUTING FEDERAL RESALE ROYALTY TAX REVENUES TO UNSUCCESSFUL ARTISTS

If Congress chooses to distribute the federal resale royalty tax revenues directly to unsuccessful artists, it also has several options. As discussed above, Congress could require the federal resale royalty tax to be collected and distributed by an equitable resale royalty organization. But this approach has the disadvantages of potential inefficiency introduced by relying on private organizations vulnerable to information costs to collect resale royalties, and inequity introduced by the limited membership of such organizations. For

¹⁴⁹ Alexander Forbes, *The 10 Most Important Takeaways from the 2016 TEFAP Art Market Report*, ARTSY (Mar. 11, 2016, 12:00 PM), <https://www.artsy.net/article/artsy-editorial-the-10-most-important-takeaways-from-the-2016-tefaf-art-market-report>.

¹⁵⁰ See *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); Kyle Munzenrieder, *Trump Vows to Defund the Arts: Here’s What Happens Next*, WMAG (Mar. 16, 2017), <http://www.wmagazine.com/story/donald-trump-defunds-arts-organizations>.

¹⁵¹ Neda Ulaby, *In Pricey Cities, Being A Bohemian Starving Artist Gets Old Fast*, NPR (May 5, 2015), <http://www.npr.org/2014/05/15/312779821/in-pricey-cities-being-a-bohemian-starving-artist-gets-old-fast>.

example, equitable resale royalty organizations cannot effectively collect resale royalties on private transactions. And even equitable resale royalty organizations will be imperfectly equitable, because unsuccessful artists can receive distributions only if they are members of the organization.

The federal government could probably administer a resale royalty system more efficiently and equitably itself, using the tax code and the administrative capacity of the Internal Revenue Service (IRS). The IRS has access to information about taxpayer financial transactions that private parties do not, as well as the means to distribute federal resale royalty tax revenues more equitably across a broader range of taxpayers.

For example, the IRS could distribute the federal resale royalty tax revenues to taxpayers who filed a tax return claiming income as an independent artist. Taxpayers who operate a business as an “independent artist” must file a Form 1040 Schedule C, “Profit or Loss from Business (Sole Proprietorship)” to report income and loss from that business.¹⁵² Taxpayers are required to prepare a separate Schedule C for each of their businesses.¹⁵³ Schedule C requires taxpayers to identify the “Principal business or profession, including product or service” for which it is filed and to provide the appropriate “Principal Business or Professional Activity Code” from the Instructions for Schedule C.¹⁵⁴ Under the heading “Arts, Entertainment, & Recreation” appears the code “711510 Independent artists, writers, & performers.”¹⁵⁵

Of course, the scope of the existing code category is slightly overbroad. The resale royalty right is typically understood to extend to artists, but not necessarily writers and performers.¹⁵⁶ However, the definition of “artist” in contemporary art has expanded and probably includes at least some writers and performers. In any case, the IRS could easily break “independent artists” out into a separate category, and allow taxpayers to determine whether their business fits into that category.

The IRS could distribute the revenue from the resale royalty tax in a variety of ways. Probably the simplest would be to provide a *per stirpes* tax credit to all taxpayers who filed a Schedule C for a sole proprietorship as an independent artist. Of course, this method would be sub-optimally equitable, as the tax credit would go to both successful and unsuccessful artists. The IRS could also provide

¹⁵² 2016 Instructions for Schedule C, C-17, INTERNAL REVENUE SERV. (Oct. 25, 2016), <http://www.irs.gov/pub/irs-pdf/i1040SC.pdf>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *Resale Royalties: An Updated Analysis*, *supra* note 27, at 32 (attributing the need for the resale royalty right specifically to visual artists because “without a resale royalty, many if not most visual artists will not realize a benefit proportional to the success of their work”).

the tax credit only to those taxpayers whose Schedule C shows a loss. For several reasons however, this would not solve the equity problem. First, a single year Schedule C filing may not accurately reflect the overall level of an artist's success. Highly successful artists may show a loss in one year's filing, and vice versa. Furthermore, it could encourage tax arbitrage to collect the credit.

The IRS could also make the tax credit progressive by tying it to a taxpayer's overall return. In other words, the IRS could allocate the tax credit to taxpayers who file a Schedule C for a sole proprietorship as an independent artist who report total taxable income under a certain level. Additionally, the IRS could allocate the largest tax credit to the taxpayers with the lowest incomes, with the credit phasing out as taxpayer income reaches the cutoff.

Of course, all of these approaches suffer from the defect that they can only distribute the resale royalty tax to artists who choose to itemize their deductions, who are disproportionately likely to be more successful and higher income taxpayers. Even if the IRS adopts a progressive approach to distributing the resale royalty tax credit, relying on Schedule C filings to identify artists will necessarily preclude distribution of the credit to the least successful and most deserving artists.

Accordingly, the IRS should consider relying on taxpayer self-identification as an artist independent of Schedule C filing. For example, the IRS could include a check box on all of the 1040 forms, asking taxpayers if they consider themselves artists, along the lines of the existing check box for the Presidential Election Campaign Fund. While this would be a significant change in the administration of the federal income tax, it is not entirely unprecedented. For example, federal income tax law currently allows qualified performing artists to deduct performing-arts-related expenses.¹⁵⁷ To further increase the granularity and equity of the resale royalty tax credit, the IRS could ask taxpayers how many artists reside in their household. After all, taxpayers who are not artists themselves may have dependents who are artists. It would be unfair to deny the credit to taxpayers who are supporting artists. Of course, this expanded credit could also be distributed on a *per stirpes* or progressive basis, with a preference for the latter.

¹⁵⁷ IRS Form 1040, Line 24 (2016).

Presidential Election Campaign

Check here if you, or your spouse if filing jointly, want \$3 to go to this fund. Checking a box below will not change your tax or refund.

You **Spouse**

IRS Form 1040, *President Election Campaign Fund Checkoff* (2016)

Of course, some advocates of the resale royalty right may object to such an agnostic approach because it rewards people who are not truly artists. But in the postmodern age of contemporary art, who is to say who is and who is not an artist? After all, contemporary art is primarily about appropriation, and contemporary artists appropriate works from all manner of sources, including authors not typically considered part of the art world.¹⁵⁸ Moreover, it is certainly consistent with the longstanding aesthetic nondiscrimination principle of copyright law, which provides that copyright protection is not and cannot be conditioned on the aesthetic value of a work of authorship. If a pictorial work of authorship is protected by copyright, is it not an artwork? On that definition, the overwhelming majority of artworks are produced by artists who are not and never will be part of the art world: the artists who sell their artworks at craft fairs and on street corners; the designers who create advertisements; floral arrangers and interior decorators; high school students drawing in their notebooks; employees doodling during meetings; toddlers scribbling with crayons. All of these people and innumerable more create visual works of authorship, or “artworks.”

While one may well dismiss the aesthetic value of many of those works, the *de gustibus* principle holds that any such aesthetic judgments should be irrelevant under the law.¹⁵⁹ Moreover, much of contemporary art exists in relation to the rejection or transcendence of aesthetic values. Duchamp objected to the aestheticization of his readymades, not necessarily because they lacked aesthetic values, but because it missed the point.¹⁶⁰ And today, aestheticism is an ironic gesture, deployed in a dialectic with its rejection. The cynicism of contemporary

¹⁵⁸ See, e.g., Adler, *supra* note 88.

¹⁵⁹ See generally Brian L. Frye, *Aesthetic Nondiscrimination & Fair Use*, LAW FACULTY SCHOLARLY ARTICLES, Paper 587 (2016), http://uknowledge.uky.edu/law_fapur/587.

¹⁶⁰ Adler, *supra* note 88, at 601 (citing ARTHUR C. DANTO, *AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY* 16 (1997)).

art feeds on the sincerity it purports to reject.¹⁶¹ If contemporary art needs the vernacular, why shouldn't the resale royalty right subsidize vernacular art?



Marcel Duchamp, *Fountain* (1917)

VI. CONCLUSION

If the United States decides to create a federal resale royalty system, it should ensure that the system is efficient and equitable. Existing resale royalty systems are neither. They are inefficient because they do not provide salient incentives to marginal artists, and they are inequitable because they benefit successful artists at the expense of unsuccessful artists. However, it is possible to create a resale royalty system that is both efficient and equitable by collecting a federal resale royalty tax and distributing the revenue either to the NEA or directly to unsuccessful artists.

¹⁶¹ See generally *id.* (criticizing the fair use doctrine's emphasis on transformativeness in light of the necessity of copying in art).