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Edvard Much's "The Scream" Screams for Droit de Suite: Why Congress Should Enact a Federal Droit de Suite Statute Governing Artists' Resale Rights in the United States

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EDVARD MUNCH'S "THE SCREAM" SCREAMS FOR DROIT DE SUITE: WHY CONGRESS SHOULD ENACT A FEDERAL DROIT DE SUITE STATUTE GOVERNING ARTISTS' RESALE RIGHTS IN THE UNITED STATES

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I. INTRODUCTION

Edvard Munch's iconic masterpiece, "The Scream," became "the world's most expensive work of art ever to sell at an auction."[1] The famous painting sold for a record $119.9 million dollars at a Sotheby's auction in 2012.[2] Similarly, Pablo Picasso's famous oil painting, "Garcon a la Pipe," which Picasso painted in 1905, was sold at a Sotheby's auction in 2004 for a whopping $104,168,000 million.[3] Picasso's painting was first sold in 1950 for only $30,000.[4] Edgar Degas, a French artist, first sold his painting, "Répétition d'un Ballet," for only $100.[5] The same painting sold for $401,000 in 1965.[6] Although the artistic styles of Munch, Picasso, and Degas, are all extremely different, the three artists share one thing in common: the significant rise in value of their works. However, a common theme in the world of visual arts is the notion that "great wealth in the arts has rarely translated into great wealth for the artist."[7]

One way to remedy this injustice faced by artists is by implementing resale royalty right legislation in the United States. A resale royalty right, or as the French call it, *droit de suite*, emphasizes the commonly known injustice that Munch, Picasso, and Degas (or their estates) all experienced. The injustice is that an artist's work may sell for a low amount when created, and years later earn gallery owners and art collectors millions of dollars, while the original artist receives nothing from the proceeds.[8] Essentially, *droit de suite* is the concept that artists, their heirs, and their estates should receive a royalty every time one of their works is resold.[9] This royalty right will allow artists to benefit from the same copyright protections enjoyed by authors, as it will allow artists

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1. Carol Vogel, *'The Scream' is Auctioned for a Record $119.9 Million*, N.Y. TIMES, May 2, 2012, http://www.nytimes.com/2012/05/03/arts/design/the-scream-sells-for-nearly-120-million-at-sothebys-auction.html.

2. *Id.*

3. Chris Wilson, *Scream at the Prices: Edvard Munch's Record-Breaker and the Top 10 Most Expensive Artworks to ever go Under the Hammer*, MIRROR, May 3, 2012, http://www.mirror.co.uk/news/uk-news/the-scream-sold-for-1199million-and-the-top-10-816579.

4. *Id.*

5. *Id.*

6. Nithin Kumar, *Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of Droit de Suite Legislation*, 37 COLUM. J.L. & ARTS 443, 443 (2014).

7. *Id.*

8. *See* Jon M. Garon, *Commercializing the Digital Canvas: Renewing Rights of Attribution for Artists, Authors, and Performers*, 1 TEX. A&M L. REV. 837, 842 (2014).

9. 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/.

to commercialize their works for profit.[10] The injustice currently felt by artists who are deprived of a resale royalty right in the works is real. In the words of painter Robert Rauschenberg to art collector Robert Scull, who purchased Rauschenberg's painting "Thaw" for $900 and resold it ten years later for $85,000, "I've been working my ass off just for you to make that profit!"[11]

While the United States has not recognized *droit de suite* through any federal legislation, the right has been acknowledged by the U.S. Copyright Office and at the state level.[12] California was the first and only state to implement a statewide *droit de suite* statute, which recently fell short of constitutional support.[13] The California court's recent strike down of California's *droit de suite* statute constitutes a strong indication that a *droit de suite* law cannot survive at the state level, and federal legislation is needed to fill in the gaps in which the California law fell short. If Congress is to adopt federal legislation implementing a resale royalty right for artists, it will address and repair the injustice faced by artists, such as the ones felt by Munch, Picasso, Degas, and Rauschenberg. Furthermore, it will fulfill the original intent of the Copyright Clause of the Constitution by acknowledging a moral, as well as an economic incentive for creators of fine art.[14] Finally, federal legislation will bring the United States into harmony with the other members of the Berne Convention, as the implementation of a resale royalty law will allow American artists to benefit from the resale of their work in the United States, as well as abroad.[15]

First, this Article will review the general history of moral rights and the origins of *droit de suite*, touching into its French origins. Second, this article will examine the legal justifications and internationalization of the *droit de suite* right. Next, this Article will thoroughly analyze the U.S. attempts at enacting a *droit de suite* right, including a discussion on the Visual Artists Rights Act of 1990, the California Resale Royalties Act, the Equity for Visual Artists Act of 2011, and the American Royalties Too Act of 2014. This Article will then walk through the background history of federal legislation governing resale royalty rights in the United States, and will analyze the recent legislative attempts made by Congress to enact such a right. Finally, this Article will review the most recent report of the U.S. Copyright Office on resale royalties, and will review and rebut the criticisms of enacting a resale royalty right in the United

10. *Id.*

11. 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.J. 509, 509, 521 (1995).

12. *See* CAL. CIV. CODE § 986 (West 2014).

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

14. Reddy, *supra* note 11, at 512.

15. *Id.*

States, ultimately arguing that the United States should enact a federal resale royalty law for visual artists.

II. THE ORIGINS OF DROIT DE SUITE

A. *The Concept of Moral Rights*

To appreciate the concept of *droit de suite*, it is imperative to understand the doctrine of moral rights. *Droit de suite* is rooted in France's moral rights jurisprudence.[16] Poetically speaking, the moral rights doctrine enables one to know "the dancer from the dance."[17] The treatise of Entertainment Law defines the doctrine of moral rights as "[t]he doctrine which purports to protect the personal rights of creators, as distinguished from their merely economic rights . . . ."[18] Essentially, this doctrine represents that an artist retains an interest in her art that surpasses the physical embodiment of the work itself.[19] An artist's moral right in her work is best illustrated as the idea that although the artist may sell or part ways with her work, the artist still retains the reputation in the work itself and the "pride of authorship" of the work.[20]

Moral rights protect the non-pecuniary interests of an artist's work.[21] "France is considered the leader in . . . moral rights . . . [as]the term 'moral right' is a rough translation of the French term 'droit moral.'"[22] Moral rights in France are considered "independent from and superior to any pecuniary interest in a work of art."[23] This ideology contrasts from the law of United States, which "seeks to protect primarily the author's pecuniary and exploitative interests."[24] The moral rights doctrine typically protects five rights: attribution, integrity, disclosure, withdrawal, and resale royalties.[25]

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16. *Id.* at 513.

17. William B. Yeats, *Among School Children*, *in* THE TOWER, 25 (1928) (A Facsimile ed. 2004).

18. THOMAS D. SELZ ET AL., ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 20:27 (3d ed. 2014).

19. *Id.*

20. *Id.*

21. Sarah C. Anderson, *Decontextualization of Musical Works: Should the Doctrine of Moral Rights be Extended?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 871 (2006).

22. *Id.*

23. *Id.* at 873.

24. *Id.*

25. *Id.* at 872.

B. *Droit de Suite, Specifically: An Artist's Resale Rights Rooted from the Concept of Moral Rights*

France was the first country to recognize a resale royalty right for artists, as French courts gradually began to acknowledge that artists' moral rights in their works were fundamentally different from their economic rights in them.[26] Once French courts held that an artist possessed a permanent relationship with his or her art, French law started recognizing four perpetual and inalienable rights that all artists are entitled to: (1) the right of paternity (*droit a la paternite*); (2) the right of integrity (*droit au respect de l'oeuvre*); (3) the right to release (*droit de divulgation*); and (4) the right to withdraw or modify (*droit de retrait ou de repentir*).[27] Since its origins in France in the 1920s, *droit de suite* is now included in its own article of the Berne Convention, and seventy-nine countries have proactively implemented some form of *droit de suite* law.[28]

Although France first recognized the concept of *droit de suite* in 1920, it was not implemented into French copyright law until 1957.[29] Since its enactment, French fine artists are able to recover a royalty from the proceeds of any resale of their work.[30] This resale royalty is the right of an artist to be compensated with a percentage of the sales proceeds of any subsequent sale of her work.[31] In essence, droit de suite is a union between moral rights and an author's pecuniary rights because it incorporates the inalienable right of paternity and the right to participate in the future economic exploitation of a work.[32]

C. *The Legal Justification of Droit de Suite*

The rights granted to artists through the Copyright Act are derived from the U.S. Constitution. Article I Section 8, Clause 8 of the Constitution grants Congress the power "[t]o promote the Progress of

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26. *See* Reddy, *supra* note 11, at 513.

27. *Id.* at 514.

28. *See* OFFICE OF THE REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, RESALE ROYALTIES: AN UPDATED ANALYSIS, app. E (2013), http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf [hereinafter 2013 REPORT].

29. Katerina Eden, *Fine Artists' Resale Royalty Right Should be Enacted in the United States*, 18 N.Y. INT'L L. REV. 121, 124 (2005); Reddy, *supra* note 11, at 509-10.

30. Reddy, *supra* note 11, at 510.

31. Eden, *supra* note 29, at 121.

32. Reddy, *supra* note 11, at 510. The Berne Convention recognizes the paternity right as a principle feature of the moral rights principle. William Strauss, *The Moral Right of the Author*, COPYRIGHT LAW. REVISION 109, 116 (1959), http://www.copyright.gov/history/studies/study4.pdf. The paternity right consists of "the author's right to be made known to the public as the creator of his work, to prevent others from usurping his work by naming another person as the author, and to prevent others from wrongfully attributing to him a work he has not written." *Id.*

Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]"[33] The goal of the American copyright system is essentially to promote the dissemination of knowledge to enhance public welfare.[34] This goal is accomplished by providing an economic incentive to creators in the form of a monopoly right for a limited amount of time.[35] The Supreme Court of the United States rationalized this ideology in *Mazer v. Stein*, stating, "[t]he 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.'"[36] However, in civil law countries such as France, copyright law is more individual-centered, aiming to protect an artist's pecuniary and exploitative rights, as well as her moral and intellectual rights.[37]

Notwithstanding the differences between American and French copyright laws, it is well established that, "[a]uthors are the heart of copyright."[38] As evidenced in Article I, Section 8, Clause 8 of the Constitution, authors are undeniably "the constitutional subjects of copyright."[39] Furthermore, the Copyright Act of 1976 states that, "[c]opyright protection subsists . . . in original works of authorship . . . ."[40] and that, "[c]opyright in a work . . . vests initially in the author or authors of the work."[41] Arguably, copyright law in the United States "does not seek merely to promote the distribution of works to the public. It also aims to foster their creation."[42] This incentive for creation, therefore, induces U.S. copyright law to acknowledge and incentivize an artist's moral right in her work.[43] However, the concept of moral rights, which is a feature found in countries with civil law systems, such as France, does not share the same weight of importance in common law countries, such

33. U.S. CONST. art. I, § 8, cl. 8.

34. Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 555 (2006).

35. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 6 (4th ed. 2005); Piotraut, *supra* note 34, at 554.

36. Mazer v. Stein, 347 U.S. 201, 219 (1954).

37. Piotraut, *supra* note 34, at 555. French copyright law favors the principles of natural justice, which relates to a jurisprudential tradition, which requires laws to comply with universal principles of truth and morality. *Id. See, e.g.*, W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 170 (1987).

38. Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1064 (2003).

39. *Id.* at 1068.

40. 17 U.S.C. § 102(a) (2012).

41. 17 U.S.C. § 201(a) (2012).

42. Ginsburg, *supra* note 38, at 1064.

43. Piotraut, *supra* note 34, at 558.

as the United States.[44]

If creators are the heart of copyright law, it is critical that the United States implement federal legislation that recognizes and compensates them for the moral rights in their work. The United States can accomplish this by enacting a federal *droit de suite* statute that would secure to artists a percentage of the increase in value of a work whenever the work is resold.[45] Current copyright law grants to authors certain exclusive rights in their creations.[46] These rights extend in some instances. For example, musical works receive a public performance right and a distribution right that provide the means for a writer to receive royalties for public performances and for the sales of copies of the work.[47]

The current Copyright Act fails to provide the same economic incentives for artists that create visual works, as it does for authors and composers. Visual artists are compensated only for the initial sale of their work and have no reproduction rights in their work.[48] It is necessary that creators of fine art receive a royalty for the resale of their work because, unlike authors and composers who can generate limitless copies of their work, an artist who creates fine art can create only one.[49] Therefore, just as copyright law allows authors to bargain for future royalties from the reproduction of multiple copies of their work, a federal *droit de suite*

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44. *Id.* at 597. Most nations today follow either a common law or a civil law legal tradition. *The Common Law and Civil Law Traditions*, THE ROBBINS COLLECTION, UNIVERSITY OF CALIFORNIA AT BERKELEY SCHOOL OF LAW, https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html (last visited Mar. 21, 2015). Common law is generally uncodified, and it is largely based on judicial precedent. *Id.* In contrast, civil law is codified, and countries that follow a civil law system have comprehensive and continuously updated legal codes that are specific about each matter brought before a court. *Id.*

45. Michael E. Horowitz, *Artists' Rights in the United States: Toward Federal Legislation*, 25 HARV. J. ON LEGIS. 153, 157 (1988).

46. *See* 17 U.S.C. § 106 (2012).

47. Neel Chatterjee, *Imperishable Intellectual Creations: The Limits of the First Sale Doctrine*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383, 386–87 (1995). Section 106 of the Copyright Act states the owner of a copyright has the exclusive rights,

> (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the . . . work; (3) to distribute copies . . . of the copyrighted work to the public by sale . . . ; (4) in the case of . . . audiovisual works, to perform the copyrighted work publicly; (5) . . . to display the copyrighted work publicly; and (6) . . . to perform the copyrighted work publicly.

17 U.S.C. § 106. (2012). Section 113(a) of the Copyright Act provides that, "the exclusive right to reproduce a copyrighted pictorial, graphic or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise." 17 U.S.C. § 113(a) (2012).

48. Elliott Alderman, *Resale Royalties in the United States for Fine Visual Artists: An Alien Concept*, 40 J. COPYRIGHT SOC'Y U.S.A. 265, 273 (1992).

49. *Id.*

statute in the United States will provide similar compensation for artists.[50]

The U.S. Copyright Office agrees. In its December 2013 report on resale royalties, the Copyright Office acknowledged that visual artists do not reap the long-term benefits and financial gains from the resale of their works, and the Office is in support of a federal resale royalty right statute to compensate for the imbalance in treatment of artists under current copyright law.[51] The 2013 Report recognizes that the income available to visual artists, such as painters, illustrators, sculptors, and photographers, is more limited than it is to other authors through reproduction and derivative uses of their works.[52] The 2013 Report noted that it is "common ground that reproduction rights represent a 'very minor aspect of [most artists'] careers' and that the first sale of a work is 'the main or exclusive source of income for almost all American artists.'"[53]

The Copyright Office made several recommendations and observations regarding the enactment of a resale royalty statute. The Office noted that the Copyright Act grants artists the same exclusive rights as authors, but due to the singular nature of a visual artist's work, discrepancies arise between the exclusive rights enjoyed by authors and the rights received by artists, as a visual artist's work is valued for its one-of-a-kind nature.[54] Furthermore, through its observations, the Office pointed out that there is no conclusive evidence to suggest that a resale royalty statute will harm the U.S. visual art market.[55] The Office did, however, recommend that should Congress act on implementing a resale royalty statute in the United States, it should do so with caution, as adoption of a resale royalty statute is not the only option under the law to address the disparate treatment of artists.[56]

D. *The Internationalization of Droit de Suite.*

Soon after France implemented a *droit de suite* statute into law, other countries such as Belgium and Czechoslovakia enacted similar resale royalty right laws.[57] Due to its recognition across several European nations, France recommended a *droit de suite* provision be added to the Berne Convention for the Protection of Literary and Artistic Works at the 1928 conference in Rome.[58] A *droit de suite* article was finally included

50. Eden, *supra* note 29, at 123.
51. 2013 REPORT, *supra* note 28, at 1–2.
52. *Id.*
53. *Id.* at 2.
54. *Id.* at 3.
55. *Id.*
56. *Id.*
57. *Id.* at 4.
58. *Id.* The Berne Convention is a treaty administered by the World Intellectual Property Organization (WIPO) that governs the international protection of works and the rights of their

in the Berne Convention at the 1948 Brussels revision conference; however, because several countries opposed the addition of such a right to the Convention, the article encompassing the resale royalty right is optional and reciprocal to all Member States.[59] Because of its optional nature, the United States is not required to enforce the *droit de suite* right in its domestic copyright law; however, due to its omission in enacting the right, artists in the United States are barred from receiving any royalties from the sale of their work in any Member States that have implemented the resale royalty right in their respective countries.[60]

III. DROIT DE SUITE EFFORTS IN THE UNITED STATES

Although the United States has not passed a federal *droit de suite* statute into law, federal lawmakers have discussed adopting resale royalty legislation for several years.[61] Throughout the 1960s and 1970s, the resale royalty right gained much attention in the United States, as several scholarly articles discussing the resale royalty trend in Europe were published.[62] The event that triggered the closest possibility of resale royalty legislation in the United States stemmed from an incident involving artist Robert Rauschenberg in the 1970s.[63] The incident arose when Rauschenberg publicly chastised an art collector who resold one of Rauschenberg's works for over $85,000 at a public auction, after purchasing it from Rauschenberg for only $900.[64] Many artists were extremely offended by the Rauschenberg incident, and within five years

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authors for all WIPO member states. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Mar. 23, 2015).

59. 2013 REPORT, *supra* note 28, at 4–5. The droit de suite provision in the Berne Convention is optional and may be adopted by a WIPO Member State if the state elects to; however, in order to receive the benefits from the right in other countries, a Member State needs to implement the right because the right is reciprocal. *Id.* Chapter II, Article 7 of International Copyright Law and Practice on Third-country nationals entitled to receive royalties provides that, "(1) Member States shall provide that authors who are nationals of third countries . . . shall enjoy the resale right in accordance with . . . the legislation of the Member State concerned only if legislation in the country of which the author or his/her successor in title is a national permits resale right protection in that country for authors from the Member States and their successors in title." INTERNATIONAL COPYRIGHT LAW AND PRACTICE, at Eu-app. 8, ch. 2, art. 7 (Lionel Bently et al. eds., NexisMatthew Bender & Co., Inc. 2015) (1988).

60. 2013 REPORT, *supra* note 28, at 5.

61. Stephanie B. Turner, *The Artist's Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 338 (2012).

62. *Id.* at 336.

63. *Id.* at 338.

64. John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 109–11 (1993).

after this event occurred, resale royalty legislation arose in several states.[65]

A. *The First Step Toward Droit De Suite in the United States: The U.S. Recognition of Moral Rights via the Visual Artists Rights Act Of 1990.*

The United States first recognized an artist's moral rights in her work when Congress enacted the Visual Artists Rights Act of 1990 (VARA), which President George H.W. Bush signed into law after the United States joined the Berne Convention.[66] Prior to VARA, U.S. copyright law was primarily focused on the economic protection of visual artists rather than the protection of a visual artist's moral rights.[67] Even though VARA recognizes an artist's moral rights in her work, the moral rights protected under the statute are limited.[68] Section 2 of VARA defines a work of visual art as:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.[69]

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65. Turner, *supra* note 61, at 338.

66. Geri J. Alison, B.L.J. 79, 80 (1996); Alison B. Friedberg, *Work in Progress: Reconciling VARA, Unfinished Works, and the Moral Rights of Artists*, 13 TUL. J. TECH. & INTELL. PROP. 217, 218 (2010); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 80–81 (1996). The moral rights provision is found in Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works, and it was adopted at the Rome Convention of 1928. Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1212 (2002). Article 6bis subsection (1) states that "[i]ndependently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work . . ." Berne Convention for the Protection of Literary and Artistic Works, of September 9 1886, art. 6bis, July 14, 1967, 828 U.N.T.S. 221, https://treaties.un.org/doc/Publication/UNTS/Volume% 20828/v828.pdf. Article 6bis also provides for moral rights after the author's death and a means of redress for safeguarding the rights under Article 6bis. *Id.*

67. Friedberg, *supra* note 66, at 218.

68. *Id.* at 219.

69. 17 U.S.C. § 101 (2012).

The statute also specifies what a work of visual art does not include, such as a poster, map, applied art, motion picture or other audiovisual work, book, magazine, newspaper, and electronic publication, to name a few of its exclusions.[70] Furthermore, VARA includes only those works created after the statute's enactment on June 1, 1991, and only for the lifetime of the artist plus fifty years.[71] With respect to the moral rights of the artist, VARA provides that the author of a visual work has the right of attribution and integrity and the right to prevent any intentional distortion or destruction of her work.[72] Under VARA, attribution includes the

> [r]ights to claim authorship of a work, to prevent attachment of an artist's name to a work which he did not create, and, where there has been a subsequent distortion, mutilation, or modification of the work prejudicial to the artist's honor or reputation, the right to disclaim authorship and to prevent identification of the artist's name with the work.[73]

B. *The California Resale Royalties Act*

California was the only state in the United States to pass a resale royalty statute at the state level.[74] In September 1976, the governor of California signed into law the California Resale Royalties Act (CRRA), which authorized the first and only *droit de suite* legislation in the United States.[75] The CRRA, codified in Section 968 of the California Civil Code, provided that:

> (a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. The right

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70. *See id.*

71. *See* 17 U.S.C. § 106A (2012); Friedberg, *supra* note 66, at 220.

72. 17 U.S.C. § 106A. The right of attribution is an artist's "right to claim authorship of a work he or she created." Friedberg, *supra* note 66, at 220. Under the rights of attribution and integrity, an author "shall have the right to claim authorship of that work; and . . . shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation." § 106A (a)(1)–(2).

73. Cynthia Esworthy, *A Guide to the Visual Artists Rights Act,* http://www.law.harvard.edu/faculty/martin/art_law/esworthy.htm.

74. 2013 REPORT, *supra* note 28, at 20.

75. Toni Mione, *Resale Royalties for Visual Artists: The United States Taking Cues from Europe*, 21 CARDOZO J. INT'L & COMP. L. 461, 467 (2013); *see*); *see* Carole M. Vickers, *The Applicability of the Droit de Suite in the United States*, 3 B.C. INT'L & COMP. L. REV. 433, 444 (1980), *available at* http://lawdigitalcommons.bc.edu/iclr/vol3/iss2/5.

> of the artist to receive an amount equal to 5 percent of the amount of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale. An artist may assign the right to collect the royalty payment provided by this section to another individual or entity. However, the assignment shall not have the effect of creating a waiver prohibited by this subdivision.[76]

The CRRA also imposed many restrictions prior to the actual payment of a resale royalty to an artist. In order to recover a percentage of the proceeds from a resale of a work under the CRRA, (1) the sales price of the work resold must amount to more than $1,000;[77] (2) the resale of the work must be more than the purchase price initially paid by the seller;[78] (3) the resale by an art dealer to a purchaser cannot be within ten years of the initial sale of the work by the artist to an art dealer;[79] (4) the artist must be a citizen of the United States, or a resident of the California for at least two years;[80] (5) the work must fall under the statute's definition of "fine art," which according to the statute means, "an original painting, sculpture, or drawing, or an original work of art in glass;"[81] and (6) either the seller must reside in California, or the sale of fine art must be executed in California.[82] Furthermore, under the CRRA, the burden was on the seller to locate and pay the artist the appropriate royalty percentage for the resale of the work, and if the seller could not locate the artist, the statute stated that 5% of the amount of the sale was to be transferred to the California Arts Council, where the burden then shifted to the Arts Council to locate the original artist.[83]

Although artists were satisfied that California enacted a *droit de suite* statute, many others criticized the law, which criticisms later proved to have legitimate legal merit.[84] Some of the criticisms that the CRRA faced concerned the statute's application "to sales outside of California;" "application to sales by dealers and to private sales;" and "giving the artist 5% of the gross resale price rather than a percentage of the profit, if any,

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76. CAL. CIV. CODE § 986 (West 2014).
77. *Id.* § 986(b)(2).
78. *Id.* § 986(b)(4).
79. *Id.* § 986(b)(6).
80. *Id.* § 986(c)(1).
81. *Id.* § 986(c)(2).
82. *Id.* § 986(a).
83. *Id.* § 986(a)(1)-(2).
84. M. Elizabeth Petty, *Rauschenberg, Royalties, and Artists' Rights: Potential Droit de Suite Legislation in the United States*, 22 WM. & MARY BILL RTS. J. 977, 990 (2014); *but*). *But see* Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d 1117 (C.D. Cal. 2012) (holding that the California Resale Royalties Act violated the Commerce Clause of the Constitution).

on the resale."[85] Furthermore, with respect to the actual implementation of the CRRA, artists faced challenges in collecting the royalties from resale, asking Congress to step in and pass a federal law to govern such resale royalties.[86]

The constitutionality of the CRRA was challenged shortly after the statute's enactment in *Morseburg v. Balyon*. In *Morseburg*, an art dealer brought suit challenging the CRRA's constitutionality, claiming that the 1909 Copyright Act preempted the California statute, and that the statute violated the Due Process and Contracts Clauses of the Constitution.[87] On appeal, the Ninth Circuit Court of Appeals rejected both of these claims, and upheld the CRRA, referred to as "an American version of what the French call the droit de suite, an art proceeds right."[88] In its opinion, the Ninth Circuit recognized that "works of fine art" are the types of work where "the sales proceeds realized by the artist upon its first sale are significantly less than the prices at which it subsequently changes hands."[89] While the court noted several explanations for this phenomenon, such as greater recognition for the artist after the work leaves the artist's hands, an increase in the overall demand for artwork, inflation, and shifts in fashion or taste,[90] none of these rationalizations seemed to justify the injustice faced by artists. The court reasoned that the Copyright Clause did not prevent the enactment of the CRRA, and the Copyright Act did not preempt California's state law because none of the rights provided for in the CRRA were found in the Copyright Act, and the CRRA merely provided an additional right to artists.[91] Furthermore, the court held that section 27 of the 1909 Copyright Act did not preclude the enactment of resale royalty acts by individual states, reasoning that works can be transferred without restriction, and "[t]he fact that a resale may create a liability to the creator artist or a state instrumentality and, at the same time, constitute an exercise of a right guaranteed by the Copyright Act does not make the former a legal restraint on the latter."[92] For preemption to apply, the court explained

85. Petty, *supra* note 84, at 991.

86. *Id.*

87. Morseburg v. Balyon, 621 F.2d 972, 974–75 (9th Cir. 1980). On appeal, the Ninth Circuit explicitly limited its decision to the 1909 Copyright Act and not the more recent 1976 Copyright Act because the transactions that initiated this action too place prior to the Copyright Act of 1976. *See* 2013 REPORT, *supra* note 28, at 21.

88. *Morseburg*, 621 F.2d at 974–76.

89. *Id.* at 975.

90. *Id.* at 976.

91. *Id.* at 977.

92. *Id.* at 977–78. Section 27 of the 1909 Copyright Act provides, "[t]hat the proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action." Copyright Act of 1909, § 27.ch. 320, 35 Stat. 1075 § 27 (amended 1976).

that, "[t]he crucial inquiry is not whether state law reaches matters also subject to federal regulation, but whether the two laws function harmoniously . . . " with each other, and in this case the court held that the two laws did.[93] The court also rejected the argument that the CRRA violated the Contracts and Due Process Clauses of the Constitution.[94]

C. Estate of Graham v. Sotheby's, Inc.—*The Case that Officially Declared that the California Resale Royalties Act Violated the Commerce Clause of the Constitution*

After the court in *Morseburg* held that the Copyright Act of 1909 did not preempt the CRRA, the Supreme Court denied *certiorari* to review the issue.[95] Following *Morseburg*, no challenges were raised against California's Resale Royalty Right Law for several years.[96] However, that changed in 2011 when several artists began filing lawsuits in California against auction houses, alleging that these auction houses were violating the CRRA, and leading to the case that determined the fate of the CRRA: *Estate of Graham v. Sotheby's Inc.*.[97]

In *Sotheby's*, the plaintiffs, who were a group of artists and their estates, brought a class action against two world-renowned auction houses, both incorporated in New York and both with principal places of business in New York, for failing to comply with the CRAA by failing to pay the resale royalty that is provided for under the CRAA.[98] A punitive class action complaint was filed on October 18, 2011 by the Sam Francis Foundation, the Estate of Robert Graham, Chuck Close, Laddie John Dill, and on behalf of all others similarly situated against Christie's, Inc., an auction house incorporated in New York with its principal place of

93. *Morseburg*, 621 F.2d at 978.

94. *Id.* at 978–80.

95. *See* Morseburg v. Baylon, 449 U.S. 983 (1980).

96. *See* Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d 1117 (C.D. Cal. 2012); *but*). *But see* Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 159 Cal. App. 3d 637, 644 (Cal. Ct. App. 1984) (holding that architectural plans are not "fine art" within the meaning of the California Resale Royalties Act, and in the absence of legislative expression to include architectural plans, the CRRA bars recovery of a royalty for the resale of such works); Simons v. Horowitz, 151 Cal. App. 3d 834, 843 (Dist. Cal. Ct. App. 1984) (holding that an individual defendant art dealer was not required to make an appearance prior to filing his notice of appeal, to obtain permission to intervene in matter, to make motion for new trial, or to be designated as class representative in order to have standing to appear on behalf of interests of rest of alleged defendant class on appeal from judgment ordering each defendant class member to account for and pay each member of plaintiff class commissions due on sales of fine art, since there was an absence of effective representation of defendant class by designated representative).

97. *See Estate Sotheby's*, 860 F. Supp. 2d 1117, at 1126; *see also* Sam Francis Found. v. eBay Inc., No. 2:11-cv-08622-JHN-PLA, 2012 WL 12294395 (C.D. May 17, 2012); Sam Francis Found. v. Christie's Inc., No. 2:11-cv-08605-JHN-FFM (C.D. Cal. May, 17, 2012).

98. *Sotheby's*, 860 F. Supp. 2d at 1119.

business in New York.[99] The complaint alleged that Christie's sold works of fine art on behalf of California sellers and failed to comply with the CRRA by not making the appropriate royalty payments, and it also alleged that Christie's violated California's Unfair Competition Law by engaging in unlawful business practices by improperly retaining funds that did not belong to it.[100]

In response to this class action lawsuit, auction houses Christie's, Sotheby's, and eBay responded in a joint motion to dismiss, arguing that the CRRA violated the Constitution by attempting to regulate interstate commerce.[101] In its motion to dismiss, Sotheby's stated, "[b]ecause the CRRA expressly regulates commerce outside California, it violates the [C]ommerce [C]lause per se, and the court need look no further to dismiss plaintiffs' claims based on out-of-state auction sales."[102] The defendants' main argument was that "by purporting to regulate transactions that take place wholly outside of California, the CRRA violate[d] the Commerce Clause of the United States Constitution."[103] The auction houses also argued that the CRRA effectuated a taking of private property, thus violating the Fifth Amendment of the Constitution, and that the federal Copyright Act's first sale doctrine barred the resale royalty demands by the artists.[104]

The court in *Sotheby's* held that the CRRA did in fact violate the Commerce Clause of the Constitution, and it therefore did not address the defendants' preemption and Taking Clause arguments.[105] The Commerce Clause of the Constitution provides that, "[t]he Congress shall have Power . . . [t]o regulate Commerce among the several States . . ."[106] The court quoted prior precedent stating, "[a]lthough the Commerce Clause is phrased as an affirmative grant of regulatory power to Congress, the Supreme Court . . . has long interpreted the Clause to have a 'negative aspect,' referred to as the dormant Commerce Clause . . . ."[107] The dormant Commerce Clause acts as a "limitation upon the power of the States," by holding in prior jurisprudence that States do not have the "power [to] unjustifiably . . . discriminate against or burden the interstate flow of articles of commerce."[108]

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99. Class Action Complaint at 1-2, Sam Francis Found. v. Christie's, Inc., No. 2:11-CV-08605-SVW (C.D. Cal. Oct. 18, 2011).

100. *Id.* at 2–4, 7–10.

101. Megan Leonhardt, *Christie's Sotheby's, eBay Say Calif. Royalties Law Illegal*, COOLEY (Jan. 13, 2012), https://www.cooley.com/showinthenews.aspx?Show=66054.cooley.

102. *Id.*

103. *Sotheby's*, 860 F. Supp. 2d at 1120.

104. *Id.* at 1119.

105. *Id.*

106. *Id.* at 1122 (quoting U.S. CONST. art. I, § 8, cl. 3).

107. *Id.* (quoting Conservation Force, Inc. v. Manning, 301 F.3d 985, 991 (9th Cir. 2002)).

108. *Id.*; Edgar v. MITE Corp., 457 U.S. 624, 640, (1982) (quoting Great Atl. & Pac. Tea

To determine whether the CRRA violated the dormant Commerce Clause, the court first had to decide whether the CRRA regulated an activity that was subject to federal control.[109] With respect to activity that Congress may regulate under the Commerce Clause, the Supreme Court has identified three broad categories where Congress may regulate: "(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) 'those activities that substantially affect interstate commerce.'"[110] Regarding the CRRA, the court first found that works of fine art constitute "things" in interstate commerce, and therefore, Congress may regulate transactions where works of fine art are sold from one state into another.[111] Second, the court found that the CRRA substantially affected interstate commerce, considering the fact that the statute had an effect on commerce by providing "economic regulation to promote artistic endeavors generally."[112] The Supreme Court has held in prior precedent that Congress may exercise its Commerce Clause power so long as "in the aggregate the economic activity in question would represent a general practice . . . subject to federal control."[113] The court in *Sotheby's* used this reasoning to find that the dormant Commerce Clause applied to the CRRA because "[w]hen the number of art sale transactions throughout the United States that the CRRA purports to regulate are considered in the aggregate, [there is] little doubt that the CRRA has a 'substantial effect' on interstate commerce such that Congress could regulate the activity."[114]

After the court in *Sotheby's* found that the dormant Commerce Clause applied to the CRRA, it had to determine whether the California statute violated it.[115] In order to make this determination, the court had to decide whether the CRRA either "(1) directly regulates interstate commerce; (2) discriminates against interstate commerce; or (3) favors instate economic interests over out-of-state interests."[116] The court held that the CRRA violated the Commerce Clause per se.[117] Its rationale for holding that the CRAA violated the Commerce Clause derived from Supreme Court

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Co., Inc. v. Cottrell, 424 U.S. 366, 370–71, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976)); *Sothebys*, Inc. 860 F. Supp. 2d at 1122 (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994)).

109. *Sotheby's*, 860 F. Supp. 2d at 1122.

110. *Id.* at 1122–23.

111. *Id.* at 1123.

112. *Id.* (quoting Morseburg v. Balyon, 621 F.2d 972, 979 (9th Cir. 1980)).

113. *Id.* (quoting Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56–57, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003)).

114. *Id.*

115. *Id.*

116. *Id.* at 1124.

117. *Id.* at 1125.

precedent that held "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."[118] The court stated that "[t]he 'critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State,'" and with respect to the CRRA, the court held that it did just that by explicitly regulating applicable sales of fine art occurring wholly outside California.[119] The court stated, "[u]nder its clear terms, the CRRA regulates transactions occurring anywhere in the United States, so long as the seller resides in California. Even the artist—the intended beneficiary of the CRRA—does not have to be a citizen of, or reside in, California."[120] The court found the possible reach of the CRRA was problematic, and illustrated the problematic effect through an example:

Assume a California resident places a painting by a New York artist up for auction at Sotheby's in New York, and at the auction a New York resident purchases the painting for $1,000,000. In such a situation, the transaction that the CRRA regulates—the one between the New York auction house and the New York purchaser—occurs wholly in New York. Despite the fact that even the artist receiving the royalty is a New York resident, the CRRA reaches out to New York and regulates the transaction by mandating that Sotheby's (1) withhold $50,000 (*i.e.*, 5% of the auction sale price); (2) locate the artist; and (3) remit the $50,000 to the New York artist. Should Sotheby's in New York fail to comply, the New York artist may bring a legal action under California law (the CRRA) to recover the applicable royalty. If the artist cannot be located, Sotheby's must send the money withheld in the transaction to the California Arts Council.[121]

In this case the court found that the defendants, both New York corporations, were subjected to California law just by selling artwork owned by a California seller, even when the transaction took place in New York and when the beneficiary of the 5% royalty was a New York artist.[122]

To rebut the defendant's Defendant's Commerce Clause argument, plaintiffs relied heavily on the Ninth Circuit's prior precedent in *Morseburg*, arguing that the court "rejected constitutional challenges brought against the [CRRA]."[123] However, the court in this case addressed the dormant Commerce Clause challenge to the CRRA as one

118. *Id.* at 1124 (quoting Healey v. Beer Inst., Inc., 491 U.S. 324, 336 (1989)).
119. *Id.*
120. *Id.*; *see also* CAL. CIV. CODE § 986(c)(1).
121. *Id.*
122. *Id.* at 1125.
123. *Id.* at 1122.

of first impression.[124] The court held that *Morseburg* did not control because *Morseburg* involved a preemption challenge to the CRRA with respect to the 1909 Copyright Act *only*, whereas this case involved a dormant Commerce Clause challenge to the CRRA.[125] For these reasons, the court held that the CRRA had the "'practical effect' of controlling commerce 'occurring wholly outside the boundaries' of California even though it may have some 'effects within the State.'" Furthermore, with respect to the validity of the CRRA as a whole, the court found that the provisions of the CRRA that violated the Commerce Clause could not be severed from the rest of the statute.[126] Therefore, the court concluded that the entire CRRA statute was invalid because it violated the Commerce Clause of the Constitution.[127] This decision is currently on appeal in the Ninth Circuit and is going to be reheard by the entire court *en banc*.[128]

D. *Legislative History of Droit de Suite in the United States*

1. Legislative History of the CRRA, Specifically

The court's ultimate ruling that the CRRA was invalid because it violated the Commerce Clause of the Constitution did not come at much surprise. With respect to the legislative history of the CRRA, the initial statute introduced on April 2, 1975 sought to provide a resale royalty only when "an original work of fine art [was] sold at an auction or by a gallery or museum *in California.*"[129] However, the legislature abandoned the original language of the bill and drafted an amended version that provided the CRRA applied "[w]henever a work of fine art [was] sold *and the buyer or the seller resides in California or the sale takes place* in California."[130] The bill's language was amended again and eventually adopted "to require a resale royalty for sales outside of California where the 'seller resides in California.'"[131]

California's own legislative counsel recognized the extraterritorial reach of the CRRA when the law was being considered by the California legislature in August of 1976.[132] In an opinion letter on the CRRA's initial proposal, legislative counsel George H. Murphy wrote that "[w]hile the state has a legitimate local interest in furthering the fiscal rights of artists within thisthis state, we find little such interest where the

124. *Id.*
125. *Id.* (emphasis added).
126. *Id.* at 1125.
127. *Id.* at 1125–26.
128. *See* Sam Francis Found. v. Christie's, Inc., 769 F.3d 1195, 1195 (9th Cir. 2014).
129. *Sotheby's*, 860 F.Supp.2d at 1126.
130. *Id.*
131. *Id.*
132. *Id.* at 1124.

artist resides out of the state orcountry."[133] Furthermore, the legislative counsel warned that "the application of the CRRA to 'out-of-state sales . . . would be invalid under the [C]ommerce [C]lause,'" and that the bill "would constitute an undue burden on interstate commerce in contravention of the Federal Constitution in its application to sales which occur outside the State of California."[134] Despite the opinions of the California legislative counsel, the CRRA was ultimately adopted with these extraterritorial implications and the reasons for doing so seemed "obvious" to some;[135] defendants in *Sotheby's* argued in oral argument that the legislature's decision to include extraterritorial language in the statute was because if "the CRRA [was] to apply *only* to sales occurring *in* California, the art market would surely have fled the state to avoid paying the 5% royalty."[136]

With respect to the actual application of the CRRA and statistics reporting compensation paid under the CRRA, several artists reported that the statute provided them with a significant financial gain; however, the law was also widely criticized as "underused" and "underenforced," and a 1986 survey of California artists and dealers was inconclusive on any statistical data relating to the royalties actually paid under the CRRA.[137] One source criticized the CRRA for entrusting the distribution of royalties to a government agency "with an incentive to hold on to funds," reporting that the California Arts Council distributed only $256,144 in royalties to 319 artists from the statute's enactment up to the statute's demise in 2012.[138] Furthermore, according to a survey of artists that was conducted ten years after the CRRA was enacted, 32% of respondents reported that "'dealers had refused to give them the name or address of the buyer or even the resale price.'"[139] Additional criticisms of the CRRA centered on the fact that the payment of royalties under the statute was contingent upon an artist's knowledge that a resale was taking place;[140] if a seller never informed an artist of the resale of the artist's work of art, the artist would have no way of learning that such a resale took place, and thus, would not collect the appropriate royalty associated

133. *Id.* at 1124–25.

134. *Id.* at 1125–26.

135. *Id.* at 1126.

136. *Id.*

137. *See* OFFICE OF THE REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, *Droit de Suite: The Artist's Resale Royalty*, at v (1992), http://www.copyright.gov/history/droit_de_suite.pdf [hereinafter 1992 REPORT].

138. Ian Holubiak, *Droit de Suite: Art Resellers Take a Hit After California Royalty Statute, N.Y. Congressman Jerrold Nadler Takes Case National*, CLASSICALITE (Mar. 3, 2014, 2:35 PM), http://www.classicalite.com/articles/6408/20140303/art-resellers-take-a-hit-after-california-resale-royalty-statue-jerrod-nadler-takes-case-national.htm.

139. Turner, *supra* note 61, at 361–62.

140. *Id.* at 361.

with the resale.[141] After California passed the CRRA, several other states, including Connecticut, Florida, Illinois, Iowa, Maine, Michigan, Nebraska, New York, Ohio, Rhode Island, and Texas, introduced *droit de suite* legislation in their respective states.[142] However, none of these states adopted a *droit de suite* statute as state law due to its unknown impact on the art market, and because the law posed several legal questions regarding its validity.[143]

2. Background History of Federal Legislation Governing Resale Royalty Rights in the United States

The United States has considered implementing a federal *droit de suite* statute for several years.[144] Proposals for droit de suite legislation in the United States began in the early 1960s.[145] Several bills were proposed in the mid-1970s that covered resale royalties and moral rights for visual artists.[146] In 1978, the Waxman Bill was proposed, which provided that artists would receive a 5% royalty of the gross sales price of works resold in interstate or foreign commerce for $1000 for more.[147] This bill was conditioned on the creation of a National Commission of the Visual Arts and a Visual Arts Fund under the Department of Treasury to enforce the right, which provided that in order for an artist to receive the royalty, the work would have to be registered with the Commission prior to resale.[148] The bill proposed that failure to make a royalty payment would result in punitive damages of three times the amount of the royalty due or $5,000, whichever was greater.[149]

In 1986, Senator Edward Kennedy proposed another bill that sought to incorporate a resale royalty right in the United States, entitled the Visual Artists Rights Amendment of 1986.[150] This bill provided that a seller pay a 7% royalty of the appreciated value of the work—the difference between the purchase price and the sales price—when the resale price was more than $500 and 140% higher than the price paid by the seller.[151] The following year Senator Kennedy introduced an amended

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141. *Id.*

142. 1992 REPORT, *supra* note 137, at 75.

143. *Id.* at 75–76.

144. Kevin P. Ray, *Droit de Suite: California Resale Royalty Revisited*, GREENBERG TRAURIG: CULTURAL ASSETS (Nov. 5, 2014), http://www.gtlaw-culturalassets.com/2014/11/droit-de-suite-california-resale-royalty-revisited/.

145. 1992 REPORT, *supra* note 137, at iv.

146. *Id.* at vi.

147. *Id.*; *see also* 2013 REPORT, *supra* note 28, at 6.

148. 2013 REPORT, *supra* note 28, at 6.

149. *Id.* at 6–7.

150. *Id.* at 7.

151. *Id.*

proposal called the Visual Artist Rights Act of 1987 that provided a 7% royalty on sales of visual art sold for $1,000 or more and over 150% of the purchase price paid by the seller, which also required artists and sellers to register their works with the Copyright Office in order to qualify for the royalty.[152] Congress eventually adopted VARA, but it removed the resale right provision from the bill, and instead, provided limited moral rights for artists in certain situations.[153] Although Congress did not adopt a resale royalty right when it passed VARA, the Act did not discredit the idea of a resale royalty right completely; instead, section 608(b) of VARA directed the Copyright Office and the Chair of the National Endowment for the Arts to research the viability of future resale royalty legislation.[154]

In response to this directive by VARA, the Copyright Office issued a comprehensive examination of *droit de suite* in its 1992 Report.[155] The Copyright Office's 1992 Report acknowledged that any *droit de suite* law enacted in the United States should be at the federal level.[156] The 1992 Report suggested enactment at the federal level rather than at the state level because it feared that "[a]ny state resale royalty scheme may be preempted under section 301 of the 1976 Act because it inhibits the section 106 distribution right as modified by the section 109 'first sale' doctrine."[157] However, the 1992 Report concluded that the Copyright Office was "not persuaded that sufficient economic and copyright policy justification exists to establish *droit de suite* in the United States."[158] The Office recognized, however, that "[s]hould the European Community harmonize existing *droit de suite* laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its member States."[159]

Only thirty-six countries had adopted a *droit de suite* law when the 1992 Report was published.[160] However, in 2001, in an effort to harmonize the resale royalty right across Europe, the European Union adopted a directive requiring all E.U. Member States to implement resale royalty legislation by 2006.[161] The Directive required all E.U. Member

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 8; *see also* 1992 REPORT, *supra* note 137.
156. 1992 REPORT, *supra* note 137, at vi.
157. *Id.* at v–vi.
158. *Id.* at 149.
159. *Id.*
160. 2013 REPORT, *supra* note 28, at 8.
161. *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Report Before the Subcomm. on Courts, Intellectual Prop. and the Internet Comm. on the Judiciary*, 113th Cong. (2d Sess. 2014) (statement of Karyn A. Temple Claggett, Associate Register of Copyrights and Director of Policy and International Affairs, U.S. Copyright Office), http://www.copyright.gov/

States to "establish a royalty for art sales involving 'art market professionals' that occur after the first transfer of the work by the author."[162] To date, all Member States in the European Union have fully implemented *droit de suite* laws, and over seventy countries around the world provide the resale royalty right.[163]

3. Recent Attempts for Federal Legislation Governing Resale Royalty Rights in the United States

Following compliance of all E.U. Member States to enact resale royalty legislation in response to the E.U. Directive, resale royalty legislation, once again, came under serious scrutiny in the United States.[164] In 2011, Representative Jerrold Nadler and Senator Herb Kohl introduced the Equity for Visual Artists Act of 2011.[165] The following year, Representative Nadler and Senator Kohl requested that the Copyright Office follow up on its 1992 Report, which the Copyright Office did in its 2013 Report by providing an updated analysis on the issues surrounding visual artists and resale royalties in the United States.[166]

a. Equity for Visual Artists Act of 2011

On December 15, 2011, Representative Nadler introduced the Equity for Visual Artists Act of 2011 (EVAA), for the purpose of amending the copyright law to secure the rights of artists or works of visual art to provide royalties.[167] The EVAA sought to amend Section 106 of Title 17 of the U.S. Code by adding the following provision:

> Whenever a work of visual art is sold as the result of auction of that work by someone other than the artist who is the author of the work, the entity that collects the money or other consideration paid for the sale of the work shall, within 90 days of collecting such money or other consideration, pay out of the proceeds of the sale a royalty equal to 7 percent of the price. Such royalty shall be paid to a visual artists' collecting society. The collecting society shall distribute, no fewer than 4 times per year, 50 percent of the net

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regstat/2014/regstat07152014.html.

162. *Id.* (quoting Council Directive 2001/84/EC, art. 12(1), 2001 O.J. (L 272) 32–36 (EC), http://www.wipo.int/wipolex/en/text.jsp?file_id=180301).

163. 2013 REPORT, *supra* note 28, at 8.

164. *Id.*

165. *Id.*. at 8–9; *see* H.R. 3688, 112th Cong. (1st Sess. 2011); S. 2000, 112th Cong. (1st Sess. 2011).

166. *See* 2013 REPORT, *supra* note 28, at 9–10.

167. H.R. 3688.

> royalty to the artist or his or her successor as copyright owner. After payment to the artist or his or her successor as copyright owner, the remaining 50 percent of the net royalty shall be deposited into an escrow account established by the collecting society for the purposes of funding purchases by nonprofit art museums in the United States of works of visual art authored by living artists domiciled in the United States. The right to receive such royalty and the obligation to deposit the remaining share of sale proceeds into the escrow account provided in this subsection may not be waived by the artist or his successor as copyright owner. Failure of the entity collecting the money or other consideration resulting from the sale of the work to pay the royalty provided under this section shall constitute an infringement of copyright. Any such infringement shall be subject to the payment of statutory damages under section 504.[168]

It did not come as a surprise that Congress did not enact the EVAA into law; among other things, the EVAA was problematic due to its narrow scope. This detailed and lengthy provision, provided that Section 106(b) of the Copyright Act be amended to require a royalty, equivalent to 7% of the sales price of the visual art resold, to be paid to the visual artist's collecting society within ninety days of the entity's collection of such payment.[169] The collecting society was then responsible for distributing 50% of the net royalty to the artist or the artist's successor as copyright owner.[170] The EVAA, in other words, required the collecting society to set aside a royalty rate of 7% for resales in excess of $10,000 at large auction houses, half of which would go to the visual artists, and the other half to nonprofit art museums in the United States. [171] With respect to operating costs, the EVAA provided that the collecting societies could collect up to 18% of the royalty to use toward the costs of collecting and distributing the royalty to artists and their successors.[172]

The EVAA further limited the scope of the legislation by prohibiting the artist or successor from waiving the rights afforded to them by the provision.[173] Also, the EVAA implemented repercussions for noncompliance of the provision, stating that failure of the entity collecting the royalty to distribute the proper amount to the artist would

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168. *Id.* § 3.

169. Mione, *supra* note 75, at 486.

170. *Id.*

171. Elisa D. Doll, *The Equity for Visual Artists Act of 2011 (EVAA): Crafting an Effective Resale Royalty Scheme for the United States through Comparative Mediation*, 24 IND. INT'L & COMP. L. REV. 461, 481 (2014); Mione, *supra* note 75, at 486–87.

172. Mione, *supra* note 75, at 487.

173. *Id.*

constitute copyright infringement under the Copyright Act.[174] One of the more controversial limitations of the EVAA was its non-applicability to sales of work with a gross sales price of less than $10,000, and the fact that the EVAA would only apply to auction houses with annual sales of $25 million or more.[175] The latter restriction meant that the law would not affect online or private sales of visual art.[176]

Among the many criticisms of the EVAA, the ultimate flaw of the proposed bill was the fact that, at the end of the day, artists would not benefit much by its enactment.[177] Under the EVAA, an artist would be compensated for the resale of her work only after subtracting 18% percentof the royalty for administrative costs for the collecting society, and then another half subtracted for the museum fund escrow.[178] In effect, this would leave the artist with less than 3% of the total royalty paid.[179] To illustrate EVAA's flaw in practice:

> [A] painting or sculpture sold at Sotheby's for the minimum threshold price of $10,000 would lead to a total amount of $700 being taken as a 7% royalty; removing 18% of that amount in administrative costs would leave $574; half of that would go toward the museum fund; and finally, the artist is left with $287 after a $10,000 sale.[180]

Apart from the little compensation the EVAA would ultimately provide to the artist, the limiting scope of the EVAA to large auction houses would likely lead to a significant number of visual art sales within the private sector in order to avoid paying the royalty altogether.[181]

b. An Updated Analysis by the U.S. Copyright Office on Resale Royalties: The 2013 Report

Due to the changes in law and practice that took place throughout the two decades following the 1992 Report, the Copyright Office issued an updated report in 2013 on the issue surrounding visual arts and resale royalties in the United States.[182] The issues with implementing a federal *droit de suite* statute in the United States were acknowledged in the 2013 Report on Resale Royalties as "information problem[s]" that existed in

174. *Id.*
175. *Id.*
176. *Id.* at 487, 491–92.
177. *Id.* at 493.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *See* 2013 REPORT, *supra* note 28.

the art market.[183] The 2013 Report recognized that

> [a]ny assessment of the treatment of visual artists under U.S. law suffers from a lack of independently verifiable data about the operation of the art market and a resulting difficulty in determining whether a resale royalty in particular would truly operate to place artists on equal footing with other authors.[184]

However, despite these issues and criticisms, the Copyright Office's 2013 Report supported the implementation of a federal *droit de suite* right in the United States, and it found no impediment to the enactment of such a right.[185]

The 2013 Report recognized the various legal changes and developments since the 1992 Report, including European harmonization, enactment of a resale royalty right by countries not associated with the European Union, the unconstitutionality of the resale royalty right at the state level, as evidenced by the CRAA, and changes within the art market itself.[186] With respect to the latter, the 2013 Report acknowledged that the art market in the United States has experienced tremendous growth since the 1990s.[187] At the time the 1992 Report was issued, the art market in the United States accounted for $9.7 billion; that same market has increased exponentially over the past twenty years, estimated at $59 million in 2012.[188] Additional changes in the art market include the growth of the online market for visual art and the increase in popularity of art fairs across the United States.[189] Furthermore, the development of various auction price databases, indexes, and news and analytics resources has made the art market more "transparent" in the last twenty years.[190]

The 2013 Report also took policy into consideration with respect to implementing a federal resale royalty right in the United States.[191] The policy arguments that surround enacting a resale royalty right focus on two main issues: "(1) the effect of a resale royalty on the U.S. art market and (2) the extent to which the right would benefit U.S. visual artists."[192] A critical factor in the policy considerations of implementing a resale royalty right is the constitutional mandate found in Article I, Section 8 of

183. *Id.* at 2.
184. *Id.*
185. *Id.* at 2–3.
186. *See id.* at 13–26.
187. *Id.* at 24.
188. *Id.*
189. *Id.* at 25–26.
190. *Id.* at 28.
191. *Id.* at 36.
192. *Id.* at 66.

the U.S. Constitution that empowers Congress "[t]o promote the Progress of [S]cience and useful [A]rts, by securing for limited [T]imes to [A]uthors and [I]nventors the exclusive [R]ight to their respective [W]ritings and Discoveries[.]"[193] Supporters of the resale royalty argue that the right would encourage creativity of living artists who would be motivated to create art today in anticipation of supporting their heirs after their deaths, that a resale royalty right will inspire more individuals to choose art as a career, and that it will encourage current artists to produce more work.[194] However, the 2013 Report found that there is insufficient evidence to support the conclusions that a resale royalty right will encourage creativity, and instead, focused on whether a resale royalty would further the fundamental purposes of the Copyright Act.[195] Supporters of the right maintain that a resale royalty has the potential of incentivizing visual artists to "release more works of art into the stream of commerce, because wider exposure may lead, in turn, to greater popularity and more secondary sales."[196]

The 2013 Report's overall findings supported legislation of a resale royalty right in the United States to address the inconsistency in the treatment of artists under the current U.S. copyright system.[197] Furthermore, the Copyright Office noted that there was no significant evidence to support the policy arguments for or against adopting a resale royalty right, and it found no legal or policy impediments to imposing such a right.[198] The report recommended that if Congress decided to propose resale royalty legislation, the legislation should be written in a way that "benefits the greatest number of artists while causing the least amount of disruption in the art market."[199] The 2013 Report offered several considerations for Congress to consider in striking this balance.[200]

c. The 2013 Report's Proposed Model for a Federal *Droit de Suite* Statute in the United States

In its 2013 Report on resale royalties, the Copyright Office proposed several legislative considerations for Congress to keep in mind when drafting resale royalty legislation, if and when it ever decides to address the resale royalty issue legislatively.[201] The first consideration involved

193. U.S. CONST. art. I, § 8, cl. 8; 2013 REPORT, *supra* note 28, at 36.
194. 2013 REPORT, *supra* note 28, at 37.
195. *Id.* at 39.
196. *Id.* at 40.
197. *Id.* at 65.
198. *Id.* at 66.
199. *Id.*
200. *See id.* at 73–81.
201. *Id.* at 73.

the types of sales that should be covered by the legislation:[202] "[a] resale royalty law should be broad in scope, covering not only sales by large auction houses, but also sales by other art market professionals."[203] The Office found that a broader scope, such as the one used by the E.U. Directive, would be more effective in advancing the legislation's goals.[204] The EVAA fell short of this by providing a very narrow scope with respect to its coverage.

Next, the Office addressed the threshold value of the sales that should be covered by the legislation, noting that "[a] resale royalty law should include a minimum price threshold that is sufficiently low to cover a wide range of sales, while not so low as to be offset by the administrative costs of collecting and distributing the royalty."[205] Whereas the EVAA applied to artwork sold for $10,000 or more, the reporter suggested that a reasonable minimum requirement for artwork sold would range from $1,000 to $5,000.[206]

The Office also had a suggestion for the types of work that should be subject to a resale royalty, stating that "[a] resale royalty should apply only to 'work[s] of visual art' as currently defined in Section 101 of the Copyright Act."[207] With respect to an appropriate royalty rate, the Office recommended that the rate fall between 3% and 5%, a range that was also recommended by the 1992 Report, and one that is generally supported by visual artists'artists societies. The Office noted that "[t]he rate of a resale royalty should reflect multiple factors, including the amount needed to incentivize creativity and the potential danger that it will raise overall prices in the art market."[208] As the resale royalty rate in many countries around the world falls within the 3 to 5% range, the Office acknowledged that a similar resale royalty percentage would be appropriate in the United States.[209] As to the length of time the resale royalty rate would be in effect, the Office suggested that it follow a shorter term than the copyright of the visual work, which is life of the author plus seventy years, and instead limit the royalty term to the life of the artist.[210]

To minimize the likelihood of constitutional challenges to resale royalty legislation, the Office suggested that Congress apply the legislation prospectively.[211] This prospective application provides that "the resale right would cover only those works *created* on or after the

202. *Id.* at 73–74.
203. *Id.* at 73.
204. *Id.*
205. *Id.* at 74.
206. *Id.*
207. *Id.* at 76.
208. *Id.*
209. *Id.*
210. *Id.* at 77.
211. *Id.*

date on which the law becomes effective."[212] Furthermore, the Office suggested that the resale royalty right should be inalienable and non-waivable.[213] The Berne Convention provides for an "inalienable right" to resale royalties in Article 14. The Office notes that for "U.S. law to follow a different approach, there would arise a risk that other Member States might deem the law insufficient for purposes of according reciprocal benefits to U.S. artists."[214] Also, the Office recommended that "any resale royalty legislation should apply to foreign artists whose qualifying works are sold in the United States."[215] Including a provision for foreign artists is important for reciprocity considerations so the right can be enjoyed by American artists whenever their works are sold in other Member States of the Berne Convention, and vice versa.[216]

Regarding collection and administration of the royalty, the Office suggested that "a resale royalty system should be collectively managed by private collecting societies, whose functions would be similar to those of SoundExchange in the music context."[217] It also recommended that the legislation limit the administrative fees charged by those entities to guarantee that the artists receive the maximum possible payment from the royalty charge.[218] This recommendation addresses another issue found in the EVAA because the high administrative charges the legislation allowed for would have left the artists with negligible rewards.

Furthermore, the Office questioned whether copyright registration should be a prerequisite for receiving a resale royalty. The Office suggested that Congress should consider whether "requiring copyright registration of a work as a prerequisite to the collection of resale royalties" is necessary.[219] For legislation to require that a work be registered with the Office as a condition for receiving a resale royalty would essentially limit the legislation to the United States exclusively.[220] ItIt would mean the United States would not be able to reap the reciprocity benefits when a resale occurs in other Member States of the Berne Convention.[221]

The Office also had recommendations concerning the remedies available for failure to comply with legislation, the right to information,

212. *Id.* (emphasis in original).
213. *Id.* at 79.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* SoundExchange is an independent nonprofit performance rights organization that collects and distributes digital performance royalties to featured artists and copyright holders. SOUNDEXCHANGE, http://www.soundexchange.com/about (last visited Apr. 25, 2015).
218. 2013 REPORT, *supra* note 28, at 79.
219. *Id.* at 80.
220. *Id.*
221. *Id.*

provisions for museums, and future review of any proposed law.[222] The Office suggested that damages should "avoid any unduly harsh effects and the adverse market impact that could result" from a harsh remedy.[223] A proper damages provision would be similar to the one proposed in the 1978 resale royalty bill, which "limit[ed] damages for intentional violation to the greater of three times the royalty amount due or $5,000, plus reasonable costs, including attorney['s] fees."[224] As for the right to information, the Office recommended that Congress adopt guidelines similar to that of the E.U. Directive, which required art market professionals "'to furnish any information that may be necessary in order to secure payment of royalties in respect of the resale' upon request from an eligible artist or collective management organization within three years of the resale."[225] The Office suggested "adopting a similar model, perhaps by providing artists with a general right to relevant information while directing the Copyright Office to promulgate regulations governing the acquisition and handling of personal data by collecting societies."[226] On the other hand, the Office outright rejected a provision that would provide a percentage of the royalties collected to be given to a museum.[227] The Office recognized that, "in order to fully effectuate the purposes of the royalty, all net collections [should] be paid to visual artists."[228] Finally, the Office suggested that "[a]ny resale royalty legislation should direct the Copyright Office to conduct a preliminary study of the law's effectiveness and impact on the U.S. art market within a reasonable time after its initial implementation."[229]

d. American Royalties Too (ART) Act of 2014

The most recent resale royalty bill was introduced to Congress on February 26, 2014.[230] The American Royalties Too (ART) Act of 2014 expanded copyright owners' exclusive rights, allowing the copyright owner "in the case of a work of visual art, to collect a royalty for the work if the work is sold by a person other than the author of the work for a price of not less than $5,000 as the result of an auction."[231] ART provided a 5% royalty for the price paid for the work of visual art, or the payment

222. *Id.* at 80–81.
223. *Id.* at 80.
224. *Id.*
225. *Id.*
226. *Id.* at 81.
227. *Id.*
228. *Id.*
229. *Id.*
230. *See* American Royalties Too Act of 2014, S. 2045, 113th Cong. (2014), https://www.congress.gov/bill/113th-congress/senate-bill/2045/text.
231. *Id.* § 3.

of $35,000, whichever is less.[232] The bill slightly expanded the definition of "work of visual art," defining it as "a painting, drawing, print, sculpture, or photograph, existing either in the original embodiment or in a limited edition of 200 copies or fewer. . . ."[233] The bill placed the burden on the auction conducting the sale to collect and pay the royalty to a visual artists copyright-collecting society no later than ninety days after the date of the auction.[234] The copyright-collecting society would then be responsible for distributing the difference between the net royalty attributable to the sales of the artist and the reasonable administrative expenses to the artist or the artist's successors.[235] The bill also made the right to receive the royalty inalienable, unassignable and unwaivable, and it included a provision on an individual's eligibility to receive the royalty payment, limiting the right to an individual "who is a citizen or domiciled in the United States[,]" "who is a citizen of or domiciled in a country that provides resale royalty rights[,]" or "whose work of visual art is first created in the United States or in a country that provides resale royalty rights.[.]"[236] This provision of the ART bill expressly would allow for reciprocity with other Member States of the Berne Convention. The bill also contained a reasonable remedies provision, providing that failure to pay the royalty would constitute copyright infringement, and infringers would be liable for either statutory damages or the full payment of the royalty due.[237]

E. *Developments Following ART, and a Discussion on Why Federal Legislation is Needed in the United States*

Unfortunately, ART's demise occurred the day the 114th Congress took its seats on January 3, 2015.[238] The fate of ART and resale royalty legislation in general appears to be in the hands of the lobbyists. Federal lobbying reports show that in the two years leading up to the introduction of EVAA, the Visual Artists Rights Coalition and the Artists Rights Society spent $280,000 on lobbyists, who included the former commissioner of the USPTO, Bruce Lehman, and former congressional staff member, John Weinfurter.[239] Major auction houses, such as

232. *Id.*
233. *Id.* § 2.
234. *Id.* § 3.
235. *Id.*
236. *Id.*
237. *Id.*
238. Nicholas O'Donnell, *With New Congress, Resale Royalties Bill and Foreign Cultural Exchange Jurisdictional Immunity Clarification Act Are Dead (Again)*, ART LAW REP. (Jan. 5, 2015)), http://www.artlawreport.com/2015/01/05/with-new-congress-resale-royalties-bill-and-foreign-cultural-exchange-jurisdictional-immunity-clarification-act-are-dead-again/.
239. Patricia Cohen, *Lobbyists Set to Fight Royalty Bill for Artists*, N.Y. TIMES (Mar. 23,

Sotheby's and Christie's, strongly opposed the bill and have spent over one million dollars in the last few years hiring well-known legal and lobbying talent in Washington D.C. to lobby against the bill's passing.[240]

Auction houses, sellers, and museums are also strongly opposed to enacting resale royalty legislation because they view the royalty as an added tax that will raise the cost of doing business and reduce the overall prices in the art market.[241] However, adversaries' fear of the alleged substantial effect on the art market is unfounded. The reasonable resale royalty percentage range as recommended by the Copyright Office would implement a royalty on works of visual art that is less than the current sales tax in most states.[242] It is not surprising that proponents and opponents of a resale royalty right disagree about the extent to which such a right would benefit or harm the secondary art market in the United States.[243] However, when compared to other countries with a similar resale right in place, the presence of the right has proved to benefit the secondary art market.[244] The United Kingdom's 2008 report on its resale royalty scheme concluded "the cost of administration does not appear burdensome relative to the benefits to the artists."[245] Furthermore, there is no conclusive proof in the U.K. or E.U. markets that secondary art markets have suffered, directly or indirectly, from imposing a resale royalty.[246] In fact, adversaries of the right acknowledge the causation issues with arguing that a decline in the secondary art market is due to the presence of a resale royalty.[247] Auction houses themselves have said that there could be a variety of reasons for downturns in the art market, such as the recessionary economy and stiff competition in the industry.[248] The European Commission concluded in its 2011 review that "[n]o clear pattern can be established to link the loss of the [E.U.]'s share in the global market for modern and contemporary art with the harmoni[z]ation of provisions relating to the application of the resale right in the EU on 1 January 2006."[249] From a macroeconomic standpoint, implementing a

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2014), http://www.nytimes.com/2014/03/24/arts/design/auction-houses-taking-no-chances-on-american-royalties-too-act.html.

240. *Id.*

241. *Id.*

242. *See State Sales Tax Rates*, SALES TAX INSTITUTE, http://www.salestaxinstitute.com/resources/rates (last visited Apr. 30, 2015).

243. 2013 REPORT, *supra* note 28, at 46.

244. *See id.* at 49.

245. *Id.* (quoting KATHRYN GRADDY ET AL., A STUDY INTO THE EFFECT ON THE UK ART MARKET OF THE INTRODUCTION OF THE ARTIST'S RESALE RIGHT 36 (2008), http://people.brandeis.edu/~kgraddy/government/ARR_Finalnc.pdf).

246. *Id.* at 50.

247. *See id.*

248. *Id.* at 50–51.

249. *Id.* at 51. (quoting EUROPEAN COMMISSION, REPORT FROM THE COMMISSION TO THE

resale royalty right "'represents a negligible percentage of the value' of the overall art market."[250] In the United Kingdom, "[o]n average the resale royalties collected each year . . . equate to less than 0.15 percent of the value of the entire UK art market, and 0.4 percent of the modern and contemporary art market" turnover.[251]

Furthermore, major auction houses fear that the resale royalties would only benefit the wealthiest of artists and estates because well-known and established artists are the ones whose art is most frequently sold in the secondary market.[252] With respect to scope, auction houses argue that ART is flawed because it unfairly and narrowly targets auction houses, while art galleries and private dealers who do not fall within the meaning of "auction," as defined under the bill, would be free from the paying the royalty.[253] ART's narrow scope, targeting only auction houses, may be the only argument of the bill's adversaries with legitimate merit. Auction, as defined under ART, includes an entity that conducts public sales of visual art to the highest bidder, and which sold at least $1 million of works of visual art during the previous year.[254] Limiting the scope of the bill to this extent does not accomplish the policy goals that this type of legislation is meant to address, which goals include correcting the injustice faced by visual artists under the current copyright regime.[255] The Copyright Office's 2013 Report recommended that proposed legislation be broad in scope in order to achieve these goals.[256]

Regardless of its scope issues, ART died the day the 114th Congress went into session earlier this year.[257] In order for a resale royalty right to be considered going forward, a new bill will have to be introduced into Congress.[258] Supporters of the right will have to draft yet another revision of the bill, paying closer attention to the key legislative considerations the Copyright Office expressed in its 2013 Report.[259] Specifically, drafters of the bill will have to tailor the law to ensure that the right benefits the greatest number of artists with the least amount of disruption to the art

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EUROPEAN PARLIAMENT, THE COUNCIL AND THE ECONOMIC AND SOCIAL COMMITTEE: REPORT ON THE IMPLEMENTATION AND EFFECT OF THE RESALE RIGHT DIRECTIVE (2001/84/EC) 10 (2011), http://ec.europa.eu/internal_market/copyright/docs/resale/report_en.pdf).

250. *Id.*

251. *Id.* (quoting DESIGN & COPYRIGHT SOC'Y, DACS RESPONSE TO THE INQUIRY INTO THE RESALE ROYALTY RIGHT BY THE U.S. COPYRIGHT OFFICE 1 (2012), http://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/Design_and_Artists_Copyright_Society.pdf).

252. Cohen, *supra* note 239.

253. *Id.*

254. *See* American Royalties Too Act of 2014, *supra* note 230.

255. *See* 2013 REPORT, *supra* note 28, at 1.

256. *See id.* at 65, 73.

257. O'Donnell, *supra* note 238.

258. *See id.*

259. *See* 2013 REPORT, *supra* note 28, at 73–81.

market.[260]

IV. CONCLUSION

The issue of implementing a resale royalty right in the United States has come down to an issue of "fundamental fairness."[261] Congress has emphasized the concept of *droit de suite* as an appropriate consideration in copyright policy to address the injustice that visual artists face under the current copyright regime.[262] The current international trend of implementing resale royalty right laws has made this a compelling and timely issue for the United States.[263] Furthermore, case law has proved that implementation of a resale royalty right in the United States cannot survive at the state level; rather, this is an issue for Congress to address through federal legislation. The positive impacts of implementing a resale royalty right in the United States outweigh the fears of the right's adversaries. American fine artists should have the right to a resale royalty because: (1) current copyright law unfairly prejudices fine artists by limiting their ability to participate in the economic exploitation of their work; (2) a resale royalty right will promote the creation of additional works of fine art, thus fulfilling the original intent of the Copyright Clause of the Constitution; (3) implementing a resale royalty law will allow American artists to enjoy the reciprocity benefits allowed for under the Berne Convention; and (4) a federal law will solve the constitutional issues that state resale royalty laws have faced in the past. Famous artists, Munch, Picasso, and Degas, have all faced the injustice that great wealth in the arts rarely translates into great wealth for the artist. The time to enact a federal resale royalty right to counter this known injustice faced by artists is now.

260. *Id.* at 73.
261. Claggett, *supra* note 161.
262. *Id.*
263. *Id.*