

COMPENSATE THE WORK IN THE WORK OF ART: IMPLEMENTING THE ARTIST'S RESALE RIGHT IN AMERICA

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*I don't like masterpieces having one-night stands in collectors' homes
between auctions.*

-Robert Rauschenberg¹

I. INTRODUCTION

In 1860, French Realist painter Jean-François Millet sold a small canvas, *L'Angélu*, out of his studio.² The unremarkable sale brought in only 1,000 francs for Millet.³ In 1889, *L'Angélu* sold at auction to French copper industrialist Eugène Secrétan for a then record-breaking high of 553,000 francs.⁴ Millet's family, destitute at the time, saw no profits from the resale of the painting, which, ironically enough, depicts two peasants bowing in prayer.⁵ France, ostensibly in response to complaints made by the Millet family, became the first country to nationally implement a *droit de suite* in 1920.⁶ The *droit de suite*, literally meaning "right of following," is an artist's

* For Christopher D'Arcangelo—who taught me that the concept of equitable exchange in the art market is something worth pursuing.

1. Grace Glueck, *Castelli Gives Major Work to the Modern*, N.Y. TIMES, at C15 (May 10, 1989), <https://www.nytimes.com/1989/05/10/arts/castelli-gives-major-work-to-the-modern.html>.

2. Bradley Fratello, *France Embraces Millet: The Intertwined Fates of The Gleaners and The Angelus*, 85 ART BULL. 685, 685 (2003).

3. *Id.*

4. *Id.*; Tiernan Morgan & Lauren Purje, *An Illustrated Guide to Artist Resale Royalties (aka 'Droit de Suite')*, HYPERALLERGIC (Oct. 24, 2014), <https://hyperallergic.com/153681/an-illustrated-guide-to-artist-resale-royalties-aka-droit-de-suite/>.

5. Morgan & Purje, *supra* note 4.

6. *Id.*

royalty right, which grants the artist a percentage of the sales price when the artist's work is resold on the secondary art market.⁷

By contrast, in 1958, American artist Robert Rauschenberg sold his painting, *Thaw*, to collector Robert Scull for \$900.⁸ Scull and Rauschenberg both watched as *Thaw* sold at auction in New York for a hammer price of \$85,000 in 1973.⁹ Scull made a 9,400% profit; Rauschenberg made nothing. As the art world story goes, on the floor of Sotheby's Upper East Side selling room, Rauschenberg shoved Scull, shouting, "I've been working my ass off just for you to make that profit?"¹⁰ This outburst, echoed in whispers throughout Manhattan's 1970s art scene, became art world folklore, with some versions going so far as to end with Rauschenberg punching Scull in the stomach, and the two never speaking again.¹¹ Although the art world noted this tale, America did not. Despite efforts by many to implement a framework of artists' resale rights in the United States, the country does not currently recognize such rights under the Copyright Act.¹²

The Copyright Act in its current form provides an effective system of economic royalties for many creatives.¹³ Nevertheless, for visual artists, these benefits are hindered by the Act's doctrine of first sale.¹⁴ Many European countries, exemplified by France's post-Millet *droit de suite*, have addressed this inequity for visual arts with the codification of artists' resale royalty rights. It is time for the United States to harmonize with Europe by implementing the artist's resale right. However, the U.S. must first amend its Copyright Act in order to allow for such equitable royalties. Part II of this Note surveys the history of the artist's resale right in America under the Copyright Act and compares this lack of rights with the frameworks implemented in Europe. Part III explores the nature of the work of visual art

7. Alexander Bussey, *The Incompatibility of Droit de Suite with Common Law Theories of Copyright*, 23 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 1063, 1066 (2013); 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 n.5 (1995).

8. M. Elizabeth Petty, *Rauschenberg, Royalties, and Artists' Rights: Potential Droit de Suite Legislation in the United States*, 22 WM. & MARY BILL RTS. J. 977, 978 (2014); R.C. Baker, *Rauschenberg's Throwdown at Sotheby's*, VILL. VOICE (Oct. 10, 2018), <https://www.villagevoice.com/2018/10/10/banksy-wasnt-the-first-artist-to-cause-a-scene-at-an-auction/>.

9. Petty, *supra* note 8, at 977–78; Baker, *supra* note 8.

10. Petty, *supra* note 8, at 977–78; Baker, *supra* note 8.

11. Petty, *supra* note 8, at 979; Eileen Kinsella, *Ending a Seven-Year Dispute, a US Court Rules That Artists Aren't Entitled to Royalties for Artworks Resold at Auction*, ARTNET (July 9, 2018), <https://news.artnet.com/art-world/us-appeals-court-strikes-royalties-law-1314857>.

12. Copyright Act of 1976, 17 U.S.C. §§ 101–1511; *Resale Royalty Right*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/docs/resaleroyalty/> (last visited Dec. 29, 2022).

13. 17 U.S.C. §§ 101–1511; *Resale Royalty Right*, *supra* note 12.

14. 17 U.S.C. § 109; *Resale Royalty Right*, *supra* note 12.

and identifies the inequity of not having resale rights for visual artists in the U.S. It also details how the European system of artists' royalty rights functions and explains the benefits of such rights for both artists and the art market. Part IV examines previous attempts to enact the artist's resale right in America, proposes an amendment to the Copyright Act as a means of effectuating harmonization with Europe, and provides rationale for such an amendment to carve out protection for visual artworks. Part V concludes that amending the Copyright Act would allow for the enactment of the artist's resale royalty right in America.

II. HISTORY OF THE ARTIST'S REALE RIGHT IN AMERICA AND EUROPE

The U.S. Copyright Act, as currently enacted,¹⁵ provides an effective system of economic royalties for many creatives—with the exception of visual artists. The Copyright Act protects original works of authorship for the life of the author and seventy years after the author's death.¹⁶ This protection is largely found in the exclusive rights of reproduction and distribution, which allow creatives to receive economic royalties for the use of their work.¹⁷

The Copyright Act's first sale doctrine, which grants the purchaser of a copy of a copyrighted work the right to sell or dispose of that copy,¹⁸ obstructs the visual artist's future monetary benefit. Unlike other works of creative authorship, where the royalty value lies in the exclusive rights of reproduction and distribution, a work of visual art finds its primary economic value for the copyright holder in its first sale.¹⁹ This key difference between the singular nature of the work of art and the reproducibility of other creative works positions the visual artist at an economic disadvantage under the Copyright Act's first sale doctrine.²⁰ The success of an artwork, unlike musical or audio-visual works, is not determined by its mass production and dissemination.²¹ To counteract this royalty imbalance, there have been multiple attempts to enact the artist's resale right in America.²² However,

15. 17 U.S.C. §§ 101–1511.

16. *Id.* § 302.

17. *Id.* § 106; Joëlle Farchy & Kathryn Graddy, *The Economic Implications of the Artist's Resale Right*, WORLD INTELLECTUAL PROP. ORG. [WIPO] 16, SCCR/35/7 (Nov. 6, 2017), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_7.pdf.

18. 17 U.S.C. § 109.

19. Farchy & Graddy, *supra* note 17.

20. 17 U.S.C. § 109.

21. *See* Reddy, *supra* note 7, at 534.

22. California Resale Royalty Act, CAL. CIV. CODE § 986 (West 2023), *invalidated by* Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d 1117 (C.D. Cal. 2012); American Royalties Too Act

these attempts have failed because the first sale doctrine preempts such secondary art market royalties.²³

In comparison, the artist's resale right has a long history in the European Union and the United Kingdom. Predating its implementation in France in 1920, French legal scholar Albert Vaunois first used the term *droit de suite* in 1893 to critique the disparity between visual artists and musicians.²⁴ The notion of the artist's resale right slowly spread throughout continental Europe²⁵ before it was introduced in Article 14*ter* of the Berne Convention for the Protection of Literary and Artistic Works at the Brussels Conference of 1948.²⁶ Article 14*ter* put forth the artist's resale right as an optional provision that entitled an artist to a royalty if a resale right was enacted in both the artist's country of residence and the country of sale.²⁷ For half a century, the terms of implementation of this optional provision were discretionary across the EU and UK.

In 2001, the European Resale Rights Directive harmonized the terms of the artist's royalty right across all EU member states (which included the UK at the time).²⁸ The Directive defined the resale right as "the right, for the benefit of the author of an original work of art, to receive a percentage of the price obtained for any resale, made by professionals from the art market, of this work (auction houses, galleries or any other art market)."²⁹ The Directive also clarified that works of visual art are defined as "works of art . . . made by the artist or . . . copies made in limited numbers which are considered to be original works of art according to professional usage (limited productions or signed works, for example), . . . such as; pictures; collages; paintings; drawings; engravings; prints; lithographs; sculptures;

of 2014, S. 2045, 113th Cong. (2014); American Royalties Too Act of 2018, S. 3488, 115th Cong. (2018).

23. See generally *Close v. Sotheby's, Inc.*, 894 F.3d 1061 (9th Cir. 2018). See also Jori Finkel, *Appeals Court Largely Strikes Down California's Artist Resale Rights Law*, ART NEWSPAPER (July 9, 2018), <https://www.theartnewspaper.com/2018/07/10/appeals-court-largely-strikes-down-californias-artist-resale-rights-law>.

24. Farchy & Graddy, *supra* note 17.

25. See Allison Schten, *No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right*, 7 NOTRE DAME J. INT'L & COMPAR. L. 115, 117 (2017) (resale royalty right introduced in Belgium in 1921 and Czechoslovakia in 1926); see also Reddy, *supra* note 7, at 519 (resale royalty right introduced in Poland and Italy by 1941).

26. Farchy & Graddy, *supra* note 17.

27. *Id.*

28. *Id.*; 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, 2001 O.J. (L 272) 32–36.

29. *Resale Right for the Benefit of the Author of An Original Work of Art*, EUR-LEX, <https://eur-lex.europa.eu/EN/legal-content/summary/resale-right-for-the-benefit-of-the-author-of-an-original-work-of-art.html#:~:text=Resale> (Jan. 11, 2019).

tapestries; ceramics; glassware; and photographs.”³⁰ The harmonized terms put forth by the Directive include: (i) limited eligibility for and applicability of the artist’s resale right; (ii) tiered royalty rates; (iii) a maximum royalty payable per work; and (iv) distribution of royalties by neutral collection organizations.³¹

III. THE U.S. PROBLEM

A. *The Artist’s Resale Right in America*

Unlike works such as musical or audio-visual compositions, which receive royalties as they are reproduced and distributed, a work of visual art holds monetary value for exactly the opposite reason—because there are not endless copies to be reproduced and distributed. The market places a “premium on uniqueness”³²—the work’s value derives from its original, tangible form.³³ This sought-after exclusivity of possession of an artwork effectively renders the exclusive rights of reproduction and distribution meaningless for the visual artist.

Further differentiating an artwork from other creative expressions is that, after the work’s first and singular sale, the visual artist no longer retains control over the work.³⁴ Compare a songwriter with a painter—both create copyrightable works.³⁵ As the copyright holder, the songwriter has the ability to license the song to numerous buyers and for numerous purposes. The songwriter not only receives payment for the license but also receives royalties as the song is repeatedly played. The painter has only one painting to sell to one buyer. The painter may select the first buyer and receives a one-time payment for the sale of the painting. However, the painter’s control and compensation end there, despite remaining the copyright holder. After the painting’s first sale, the painter no longer retains authority over the work’s continued distribution because the buyer is free to resell the painting on the secondary market without the artist’s consent.³⁶ Should the purchaser decide

30. *Id.*

31. See Farchy & Graddy, *supra* note 17, at 16–22; DESIGN & ARTISTS COPYRIGHT SOC’Y, TEN YEARS OF THE ARTIST’S RESALE RIGHT: GIVING ARTISTS THEIR FAIR SHARE 2 (2016), <https://www.dacs.org.uk/DACSO/media/DACSDocs/reports-and-submissions/Ten-Years-of-the-Artist-s-Resale-Right-Giving-artists-their-fair-share-DACS-Feb-16.pdf>; Schten, *supra* note 25, at 118–19.

32. Morgan & Purje, *supra* note 4.

33. See Reddy, *supra* note 7, at 534.

34. See Farchy & Graddy, *supra* note 17.

35. 17 U.S.C. § 102.

36. See Farchy & Graddy, *supra* note 17.

to resell the painting, the purchaser alone is entitled to the profits of the secondary sale—the artist receives no proceeds from the resale.³⁷

The doctrine of first sale is at the core of preventing artists from partaking in these secondary market proceeds. The doctrine permits the owner of a copyrightable work “to sell or otherwise dispose of the possession of that copy” and “to display that copy publicly.”³⁸ In most creative industries, the first sale doctrine does not affect the economic royalties of the copyright holder because the value of the work is not held in its tangible reproductions. Revisiting the songwriter and the painter, the song is the valuable, intangible work, not the individual copies of printed records or downloaded digital files. The first sale doctrine allows a buyer who purchases a record to resell that copy of the record. After that copy of the record is sold by the buyer, the songwriter will continue to receive royalties every time another record is sold. Similarly, when the painter sells a painting, the buyer receives the right to freely sell the painting. However, as established for the painter, the first sale is the only one from which the artist receives compensation. There are no royalties because there are no additional copies of the painting. Additional copies would actually undermine the value of the original painting, which is priced in part because it is unique.

A rising resale market value may be seen as good in itself for the artist as a means of increasing the primary sale price of the artist’s future works. Nevertheless, this does not negate the fact that artists should be able to benefit from the commercialization of their prior works to the same extent that other creatives are able to do so. Additionally, because a license or permission is not needed from the artist, the frequency at which art changes hands on the secondary market is high.³⁹ This frequent turnover without remuneration highlights how visual artists are “unable to commercialize their works for profit in the same way” as other creators.⁴⁰ Even though the visual artist retains the copyright of the artwork after its first sale, licensing the artwork as a means of receiving royalties is not widely attainable by all artists. Licensing is usually applicable only to the most well-known artists and their most recognizable works in the form of merchandise, and only before the artworks enter the public domain.

The U.S. and UK art markets are the two global leaders.⁴¹ Eighty-three percent of all fine art auction sales over 1,000,000 euros take place in either

37. *Id.*

38. 17 U.S.C. § 109.

39. See Schten, *supra* note 25, at 116.

40. Morgan & Purje, *supra* note 4.

41. Farchy & Graddy, *supra* note 17, at 13.

New York or London.⁴² Of this 83%, 55% of transactions over 1,000,000 euros occur in the U.S. and 28% in the UK.⁴³ In other words, over two-thirds of million-euro transactions are not subject to artists' resale rights. The strongest justification for implementing the artist's resale right is not one based on sentiment or compassion, but that of viewing the artist's resale right as an author's right.⁴⁴ Perceiving the artist's resale right as an author's right recalls Vaunois's 1893 conception of the *droit de suite* as a critique of the disparity between visual artists and musicians.⁴⁵ This rationalization is based on "notions of parity or fairness as between groups of creators and looks at the position of the visual artist *qua* other categories of author."⁴⁶ When viewed as an author's right, the artist's resale royalty bridges the gap between the unique nature of works of art and other authors' works, affording the artist what the musician receives from the rights of reproduction and distribution.⁴⁷ In addressing the purpose of the resale right, the 2001 EU Directive states, "It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works."⁴⁸ The artist's resale right functions as a remuneration right.⁴⁹

The artist's resale right additionally provides the non-monetary benefit of a tracking system for artworks on the secondary market.⁵⁰ The art market notoriously operates behind closed doors, leaving artists in the dark as to where their works exist in the world.⁵¹ When an artist receives a royalty payment, it informs the artist "how [a] work is moving about in the marketplace."⁵² The resale royalty as a tracking system also yields a means of verifying an artwork's provenance and authenticity.⁵³

42. *Id.*

43. *Id.*

44. See SAM RICKETSON, PROPOSED INTERNATIONAL TREATY ON DROIT DE SUITE/RESALE ROYALTY RIGHT FOR VISUAL ARTISTS 15 (2015).

45. Farchy & Graddy, *supra* note 17.

46. RICKETSON, *supra* note 44, at 15.

47. *Id.* at 15–16.

48. *Id.* at 16.

49. *Id.*

50. Farchy & Graddy, *supra* note 17, at 27.

51. *Id.*

52. *Id.*

53. See DESIGN & ARTISTS COPYRIGHT SOC'Y, *supra* note 31, at 13.

B. *The Artist's Resale Right in Europe*

To safeguard the interests of visual artists, the European Union and the United Kingdom have implemented a framework of harmonized artists' resale rights. Under this system, the resale right applies only to secondary sales by art market professionals, not private sales, and only to artists who are citizens or permanent domiciles of the EU or UK.⁵⁴ Common across all EU member states and the UK is that: (i) the royalty is a percentage of the sales price (before sales tax); (ii) the royalty rates are tiered according to sales price; (iii) there is a ceiling on the total amount of royalty payable on any one resale; (iv) the duration of the resale right is tied to the length of copyright; (v) the right is inalienable; (vi) the state must have a national, not-for-profit entity to receive the money owed to artists and pay it out to the artists; and (vii) an individual artist cannot claim the right, it must be enforced by a collection agency.⁵⁵ Although this program is limited in scope—to the detriment of the artist and the relief of the resale right critic—it is more than that which exists in the United States.

The resale royalty in the EU and UK is not applicable until triggered by a minimum sales price.⁵⁶ The minimum must be at most 3,000 euros, though member states may lower the threshold at their discretion.⁵⁷ Keep in mind that this minimum sales price must be met in a secondary sale by art market professionals, such as at public auction or sale by professional dealers, and the artist's home country must be an EU member state or the UK.⁵⁸ Upon becoming applicable, the resale royalty rate is applied on a sliding scale: as the sales price increases, the royalty rate decreases.⁵⁹ For sales up to 50,000 euros, a 4% royalty is applied.⁶⁰ In only this lowest price tier, member states may elect to apply a 5% royalty.⁶¹ From 50,000.01 euros to 200,000 euros, the royalty rate is 3%; from 200,000.01 euros to 350,000 euros, it is 1%; from 350,000.01 euros to 500,000 euros, it is 0.5%.⁶² For sales above 500,000.01

54. See *id.* at 2; see also Farchy & Graddy, *supra* note 17.

55. See DESIGN & ARTISTS COPYRIGHT SOC'Y, *supra* note 31; see also Farchy & Graddy, *supra* note 17, at 16, 24; Directive 2001/84/EC, *supra* note 28, at 33–35.

56. See DESIGN & ARTISTS COPYRIGHT SOC'Y, *supra* note 31; Directive 2001/84/EC, *supra* note 28, at 35; Schten, *supra* note 25, at 118.

57. See DESIGN & ARTISTS COPYRIGHT SOC'Y, *supra* note 31, at 11; Directive 2001/84/EC, *supra* note 28, at 35; Schten, *supra* note 25, at 118.

58. See DESIGN & ARTISTS COPYRIGHT SOC'Y, *supra* note 31; Directive 2001/84/EC, *supra* note 28, at 33–34; Farchy & Graddy, *supra* note 17.

59. See DESIGN & ARTISTS COPYRIGHT SOC'Y, *supra* note 31; Directive 2001/84/EC, *supra* note 28, at 35; Schten, *supra* note 25, at 119.

60. Directive 2001/84/EC, *supra* note 28, at 35.

61. *Id.*

62. *Id.*

euros, the royalty rate is 0.25%.⁶³ The maximum cap for the total amount of royalty payable on any one resale is 12,500 euros.⁶⁴

The duration of the artist's resale royalty is tied to the length of the copyright.⁶⁵ The 2001 EU Directive explicitly states that the term of protection of the resale right corresponds to the term of protection of the copyright,⁶⁶ which is for the life of the author and seventy years after the author's death in the EU and UK.⁶⁷

To clarify by example, revisit Rauschenberg's *Thaw*. Imagine the harmonized system of European artists' resale royalties was in effect in New York at the time of *Thaw*'s sale (for the convenience of this hypothetical, imagine that the value of the euro is directly equivalent to that of the U.S. dollar). *Thaw* sold for \$85,000 at Sotheby's auction.⁶⁸ The three prerequisites for the applicability of the artist's resale right are met: (i) the minimum price threshold of \$3,000 is crossed; (ii) Sotheby's is a public auction house; and (iii) Rauschenberg was born in Texas,⁶⁹ making him a citizen of the U.S.—the country in which the sale took place and where the right is hypothetically enacted. *Thaw*'s hammer price of \$85,000 is within the \$50,000.01 to \$200,000 tier, making the applicable royalty rate 3%. Therefore, Rauschenberg would be entitled to \$2,550.

Recall that Rauschenberg originally sold *Thaw* to Scull for \$900.⁷⁰ In a secondary art market without the artist's resale right, Rauschenberg never sees another cent from his painting that accrued value while it simply hung on Scull's wall, yet Scull finds himself \$84,100 richer (minus any applicable taxes and auction house fees). In a secondary art market *with* the artist's resale right, Rauschenberg makes an additional \$2,550 and Scull *still* finds himself \$84,100 richer (again, minus any applicable taxes and auction house fees). This is because the artist's resale royalty usually does not come out of the first purchaser's (now, the seller at auction) profits.⁷¹ Instead, liability for the royalty payment is typically passed on to the buyer on the secondary

63. *Id.*

64. *Id.*

65. *Id.* at 33.

66. *Id.*

67. Council Directive 93/98/EEC, of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 11, 13 (current version at Directive 2006/116/EC, of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights, 2006 O.J. (L 372) 12–18).

68. Baker, *supra* note 8.

69. *Id.*

70. *Id.*

71. See Farchy & Graddy, *supra* note 17, at 19; Schten, *supra* note 25, at 119–20.

art market.⁷² Although responsibility for the royalty payment is not a harmonized term of the 2001 EU Directive,⁷³ the European Court of Justice ruled that the payment of the resale right may validly be “borne by the buyer rather than the seller.”⁷⁴

Introduction of the artist’s resale right has not caused a decline in art market sales.⁷⁵ According to data from the UK—the largest European art market—implementation of the royalty has not diverted art sales to markets in other countries in which the right is not enacted.⁷⁶ Two years after the artist’s resale right went into effect in the UK,⁷⁷ a 2008 study conducted by the UK Intellectual Property Office concluded “that the UK market continued to grow after the introduction of the ARR [Artist’s Resale Right].”⁷⁸ The study provided statistics supporting an increase in UK art market sales notwithstanding adoption of the royalty:

After an initial dip both by value and by volume during the first five and a half months after the introduction of ARR, the UK increased percentage sales on both measures. Importantly, between the period February 15, 2006 and July 31, 2006 and the period August 1, 2006 and July 31, 2007, the per cent of sales by volume increased from 29.35 per cent to 32.46 per cent in the UK (an increase of 10.5 per cent points); by value, sales in the UK increased from 35.28 per cent to 37.34 per cent (an increase of 5.8 per cent). For the same time periods, the volume of US sales increased from 30.83 per cent to 33.20 per cent (an increase of 7.8 per cent – less than in the UK) while the value of sales rose from 50.56 per cent to 52.09 per cent (an increase of about 3 per cent – again less than in the UK).⁷⁹

This data shows that not only did UK sales increase by both value and volume, but they did so more than in the United States, a non-royalty market. Additionally, the royalty payments imposed by the artist’s resale right are low when compared to standard auction fees.⁸⁰ The highest possible royalty rate is 5% (applied to the lowest price tier of up to 50,000 euros, resulting in a maximum royalty of 2,500 euros).⁸¹ By contrast, auction houses charge

72. See Farchy & Graddy, *supra* note 17, at 19; Schten, *supra* note 25, at 120.

73. See Schten, *supra* note 25, at 119–20.

74. Farchy & Graddy, *supra* note 17, at 19.

75. See Farchy & Graddy, *supra* note 17, at 21–23; DESIGN & ARTISTS COPYRIGHT SOC’Y, *supra* note 31, at 2, 8–9.

76. DESIGN & ARTISTS COPYRIGHT SOC’Y, *supra* note 31, at 8.

77. See Farchy & Graddy, *supra* note 17, at 20.

78. *Id.* at 22.

79. *Id.*

80. *Id.* at 20.

81. Directive 2001/84/EC, *supra* note 28, at 35.

commission fees to participating buyers that are often as high as 25% of the hammer price.⁸²

IV. FIXING THE PROBLEM

A. *Amending the Copyright Act*

There have been multiple attempts to implement artists' resale rights in America.⁸³ The most notable is the 1977 California Resale Royalty Act (CRRA).⁸⁴ The CRRA states that a 5% royalty rate is applied to secondary art market sales in California.⁸⁵ There are several procedural similarities between the CRRA and the artist's resale right enacted in Europe. The CRRA's royalty right: (i) has limited applicability; (ii) is a percentage of the sales price; (iii) applies when an entry threshold price is crossed; and (iv) provides for collection and distribution by a neutral agency.⁸⁶ The 5% royalty, triggered by a minimum sales price of \$1,000, is only applicable when the seller resides in California or the sale takes place in California.⁸⁷ The CRRA designates the Arts Council as a neutral collection and distribution agency, but only "[i]f the seller or agent is unable to locate and pay the artist within [ninety] days."⁸⁸

The CRRA's procedural differences from the European framework exceed the foregoing similarities. Under the CRRA: (i) the artist's resale right may be waived by written contract; (ii) the right is assignable; (iii) the royalty rate comes out of the seller's profits; (iv) the seller or seller's agent is liable for paying the royalty; (v) the payable royalty has no ceiling; (vi) an individual artist may file a claim for the royalty owed; (vii) the royalty is not applicable within the first ten years of sale if "all intervening resales are between art dealers"; and (viii) the duration of the right is not connected to the term of copyright protection, lasting for the life of the artist and only twenty years after the artist's death.⁸⁹ The CRRA lacks clarity as to whether the resale royalty is applicable to all secondary sales in California over

82. Farchy & Graddy, *supra* note 17, at 20.

83. California Resale Royalty Act, CAL. CIV. CODE § 986 (West 2023), *invalidated by* Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d 1117 (C.D. Cal. 2012); American Royalties Too Act of 2014, S. 2045, 113th Cong. (2014); American Royalties Too Act of 2018, S. 3488, 115th Cong. (2018).

84. CIV. § 986.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

\$1,000 or only to sales by art market professionals. Section (a) of the CRRA states, “Whenever a work of fine art is sold,” yet section (a)(1) reads, “When a work of fine art is sold at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller.”⁹⁰

In 2018, after seven years of appeals, the Ninth Circuit declared that the Copyright Act preempts the CRRA.⁹¹ In 2011, artists Chuck Close, Laddie John Dill, and the Sam Francis Foundation originally brought suit against the two largest auction houses, Sotheby’s and Christie’s, as well as eBay, for unpaid royalties.⁹² The Ninth Circuit found that the CRRA conflicts with federal copyright law—specifically the first sale doctrine.⁹³ The decision stated that the CRRA could only apply to works created during the one-year window between January 1, 1977, when the CRRA went into effect, and January 1, 1978, when the Copyright Act went into effect.⁹⁴ Due to federal preemption, the Ninth Circuit effectively overturned the only artist’s resale right enacted in the United States to date.

The American Royalties Too (ART) Act was first introduced in Congress in 2014 and reintroduced in 2018, but both times failed to pass their respective legislative sessions.⁹⁵ The ART Act proposed more procedural similarities to the European royalty framework than the CRRA. The ART Act presented an artist’s resale right that would be: (i) applicable only to public sales; (ii) triggered by a minimum threshold of \$5,000; (iii) a sales price percentage royalty of 5%, with a cap on the maximum payable amount at \$35,000; (iv) distributed by an agency; and (v) applicable to artists who are citizens or domiciles of the U.S.⁹⁶ Although the ART Act failed to pass in Congress, it would likely meet the same fate as the CRRA: preemption by the doctrine of first sale.

The purpose of the first sale doctrine is to promote alienability and protect the rights of first and subsequent purchasers.⁹⁷ However, artists’ resale rights neither burden alienability in the art market nor limit the rights of purchasers. First and subsequent purchasers retain the right to sell works of visual art without permission from the artist. This right to sell is not

90. *Id.*

91. Kinsella, *supra* note 11; Finkel, *supra* note 23.

92. Kinsella, *supra* note 11.

93. *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1070–72 (9th Cir. 2018).

94. Kinsella, *supra* note 11; Finkel, *supra* note 23.

95. Coline Milliard, *No Artist Resale Rights for US, for Now*, ARTNET NEWS (Jan. 14, 2015), <https://news.artnet.com/market/no-artist-resale-rights-for-us-for-now-220318>; American Royalties Too Act of 2014, S. 2045, 113th Cong. (2014); American Royalties Too Act of 2018, S. 3488, 115th Cong. (2018).

96. S. 3488.

97. *Close*, 894 F.3d at 1070–73.

hindered by the purchasers losing money by paying a royalty to the artist because the cost of the royalty is passed on to the secondary art market buyer. There is no evidence from Europe showing that the implementation of the artist's resale right has had negative effects on the art market.⁹⁸ The global art economy is rapidly expanding, and distributing money back to artists allows the artists to create more works, which then enter and perpetuate the art market.⁹⁹

The Ninth Circuit's nullification of the CRRA exemplifies the incompatibility of the artist's resale right and the first sale doctrine. In order to implement artists' resale royalties in America, the Copyright Act needs to be amended to exempt works of visual art from the first sale doctrine. After such an amendment is enacted, the U.S. will be able to introduce a federal artist's resale right without fear of preemption. The resale right implemented by statute should, similar to the proposed guidelines of the ART Act, imitate the European royalty framework with: (i) a minimum sales threshold; (ii) applicability to secondary sales by art market professionals; (iii) eligibility for artists who are citizens or domiciles of the U.S; (iv) a sales price percentage royalty; (v) tiered royalty rates; (vi) a ceiling on the payable royalty; (vii) the duration of the right tied to the length of copyright; and (viii) distribution of royalties by neutral collection organizations. The Copyright Act was previously amended to harmonize the term of copyright protection with that of European signatories to the Berne Convention, demonstrating that amending the Act is a feasible option.

The Berne Convention for the Protection of Literary and Artistic Works of 1886 required that signatory countries provide copyright protection for creative works for the duration of the author's life and at least fifty years after the author's death.¹⁰⁰ This minimum standard allowed for unequal terms of copyright protection across Europe. In a 1993 European Union Directive on harmonizing the term of copyright protection, all members of the EU (which included the UK at the time) adopted a standardized duration of the author's life and seventy years after the author's death.¹⁰¹

The U.S. Copyright Act of 1976 originally provided copyright protection for creative works for the duration of the author's life and fifty years after the author's death.¹⁰² Although the U.S. became a Berne signatory

98. See DESIGN & ARTISTS COPYRIGHT SOC'Y, *supra* note 31, at 8.

99. See *id.* at 7, 11.

100. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG. [WIPO], https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Jan. 2, 2023).

101. Council Directive 93/98/EEC, *supra* note 67, at 9–11.

102. *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003).

in 1989,¹⁰³ it had no obligation under the 1993 EU Directive to extend the duration of its copyright protection to match that of the European Berne signatories. After the 1993 EU Directive went into effect, the U.S. copyright term lasted for only the life of the author and fifty years after the author's death, while the EU and UK provided copyright protection for the life of the author and seventy years after the author's death. This twenty-year discrepancy provided an economic incentive for creatives to produce works in Europe, where they could enjoy the benefits of copyright protection for a longer term.¹⁰⁴ To overcome its economically disadvantaged position, the U.S. enacted the Copyright Term Extension Act (CTEA) in 1998.¹⁰⁵ The CTEA extended the term of copyright protection in America by an additional twenty years after the author's death, thereby matching Europe's copyright duration.¹⁰⁶ The CTEA illustrates that the U.S. not only *can* amend its Copyright Act, but already *has* amended it. Further, the U.S. amended the Copyright Act to harmonize with Europe before, and therefore can—and should—do so again to allow for the enactment of an artist's resale right.

B. *Treating Different Mediums Differently*

The targeting of different areas of creative compensation is not unprecedented in the context of the Copyright Act. A quasi-precedent for carving out medium-specific rights is found in music's compulsory license.¹⁰⁷ The compulsory license permits a musician to record and distribute a rendition of a previously recorded song by paying royalties to the original composer.¹⁰⁸ This license is a limitation on the exclusive rights of musical composition copyright holders.¹⁰⁹ It essentially states that once a composer puts out a song into the world, other musicians may put out their own versions of the song.¹¹⁰ Musicians seeking to cover songs do not need to obtain explicit permission from the copyright holder.¹¹¹ Instead, musicians recording previously recorded songs under a compulsory license need only

103. *Berne Notification No. 121*, WORLD INTELL. PROP. ORG. [WIPO], https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_121.html (last visited Jan. 2, 2023).

104. *See Eldred*, 537 U.S. at 205–06.

105. *Id.* at 193.

106. *Id.* at 193, 195–96.

107. 17 U.S.C. § 115.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

file a notice of intention with the copyright owner and pay a pre-determined royalty fee.¹¹²

Under the compulsory license, composers are forced to give up their otherwise exclusive rights to reproduce and distribute their musical compositions. However, the compulsory license also serves as a statutory mechanism for compensating a creator after a work is put out into the world. The mandatory licensing chips away at the rights of the copyright owner but compensates for this dispossession of rights by apportioning royalties to the composer.

The artist's resale right is not as intrusive as the compulsory license. Implementing an artist's resale right limits the rights of neither the copyright holder (the artist) nor the subsequent purchaser. The visual artist's royalty right is consistent with the buyer's right to resell an artwork. The royalty right does not burden the artwork's owner because the owner does not need to obtain permission from the artist to put the work up for sale on the secondary market. The artist's resale right simply offers visual artists the ability to profit from the success of their works that is already afforded to other authors. Amending the first sale doctrine to create an exception for works of visual art would be treating different creative mediums differently, but the Copyright Act already does that, as exemplified by the compulsory license for musical compositions.

V. CONCLUSION

The Copyright Act as presently enacted positions visual artists at an economic disadvantage when compared to other creators. The Act's first sale doctrine burdens the artist's ability to profit from the future commercial success of an artwork. The EU and UK have balanced the interests of artists with the economic value of their work by implementing the artist's resale right. This royalty right recognizes that artists have an ongoing financial interest as artworks are resold on the secondary art market.

To fairly compensate visual artists, the United States should follow the European example and enact a framework for artists' resale rights. However, in order to do so, the U.S. must amend the Copyright Act to create an exception to the first sale doctrine, which currently preempts the artist's resale right. Not only has the Copyright Act previously been amended, but the United States has also previously targeted different areas of creative compensation. Amending the first sale doctrine would make possible the codification of an American royalty right for artists.

112. *Id.*