ART RESALE ROYALTIES: SYMBOLIC OR ECONOMIC RELIEF FOR THE FINE ARTIST

I. INTRODUCTION

It has been frequently noted that visual artists[1] fail to enjoy the legal protection and attendant economic benefits afforded by copyright law.[2] Debate among policymakers and commentators has focused on whether to grant the visual artist an interest in the future appreciation and exploitation of his work. Resale royalties legislation has been proposed as a means of providing this residual right.[3] The legislation is intended to supplement copyright benefits so that the visual artist may enjoy a fair reward for his labor, comparable to

---

[1] As used in this article, the term "visual artist" includes any creator of a painting, drawing, graphic art, or sculpture who attempts to support himself exclusively through his creations.

[2] *See, e.g.*, L. DUBOFF, THE DESKBOOK OF ART LAW 673-771 (1977); Brenner, *A Two-Phase Approach to Copyrighting Fine Arts*, 24 BULL. COPR. SOC'Y 85, 105-17 (1976); Carroll, *Statutory Copyright—A Valuable Right for the Visual Artist*, 20 BULL. COPR. SOC'Y 316 (1973); Fabe, *The Fine Artist's Right to the Reproduction of His Original Work*, 23 COPYRIGHT L. SYMP. (ASCAP) 81 (1977); Hochfield, *Artist's Rights Pros and Cons*, ART NEWS, May 1975, at 20; Kunstadt, *Can Copyright Law Effectively Promote Progress in the Visual Arts*, 23 BULL. COPR. SOC'Y 233 (1976); Millinger, *Copyright and the Fine Artist*, 48 GEO. WASH. L. REV. 354 (1980); Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1342-48 (1968); Sheehan, *Why Don't Fine Artists Use Statutory Copyright*, 22 BULL. COPR. SOC'Y 242, 261-68 (1975); Sherman, *Incorporation of the Droit de Suite into United States Copyright Law*, 18 COPYRIGHT L. SYMP. (ASCAP) 50 (1970); Note, *Regulation of the New York Art Market: Has Legislation Painted Dealers Into a Corner*, 46 FORDHAM L. REV. 939 (1978) [hereinafter cited as Note, *Regulation of the New York Art Market*]; Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490 (1979) [hereinafter cited as Note, *The Artistic Reputation*]; Note, *Courting the Artist with Copyright: The 1976 Copyright Act*, 24 WAYNE L. REV. 1685 (1978) [hereinafter cited as Note, *Courting the Artist with Copyright*].

[3] *See, e.g.*, 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.22[A] (1979); Ashley, *A Critical Comment on California Droit de Suite, Civil Code Section 986*, 29 HASTINGS L.J. 249 (1977); Asimow, *Economic Aspects of Droit de Suite*, in LEGAL RIGHTS OF THE ARTIST (M. Nimmer ed. 1971), *reprinted in* J. MERRYMAN & A. ELSEN, LAW ETHICS AND THE VISUAL ARTS 4-124 (1979); Boyers, *Protection for the Artist: The Alternatives*, 21 COPYRIGHT L. SYMP. (ASCAP) 124, 131-51 (1974); Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under Copyright Law*, 6 BULL. COPR. SOC'Y 94 (1959); Hepp, *Royalties from Works of the Fine Arts: Origin of the Concept of Droit de Suite in Copyright Law*, 6 BULL. COPR. SOC'Y 91 (1959); Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U.L. REV. 19 (1966); Sherman, *supra* note 2; Solomon & Gill, *Federal & State Resale Royalties Legislation: "What Hath Art Wrought,"* 26 U.C.L.A. L. REV. 322 (1978); Weil, *Resale Royalties: Nobody Benefits*, ART NEWS, Mar. 1978, at 58; Note, *Applicability of the Droit de Suite in the United States*, 3 B.C. INT'L & COMP. L. REV. 433 (1980) [hereinafter cited as Note, *Applicability of the Droit de Suite*]; Note *California Resale Royalties Act*, 2 COMM/ENT L.J. 733 (1980); Note, *The Droit de Suite Has Arrived: Can It Thrive in California as It Has in Calais*, 11 CREIGHTON L. REV. 529 (1977) [hereinafter cited as Note, *The Droit de Suite Has Arrived*]; Note, *The Resale Royalties Act: Paintings, Preemption and Profit*, 8 GOLDEN GATE L. REV. 239 (1979) [hereinafter cited as Note, *Paintings, Preemption and Profits*]; Note, *A Proposal for National Uniform Art Proceeds Legislation*, 53 IND. L.J. 129 (1970); Note, *Droit de Suite: Only Congress Can Grant Royalty Protection for Artists*, 9 PEPPERDINE L. REV.

other copyright beneficiaries.[4] It is designed to redistribute money earned in the artist-dealer-collector relationship by allocating funds to the artist at the resale level.

In 1976, California enacted resale royalties legislation[5] and it is possible that additional legislation will be forthcoming.[6] However, it does not appear that market research sufficient to support such legislation has yet been conducted.[7] Thus, the potential market impact of royalties legislation is still uncertain. This is particularly significant because royalties legislation was designed to have a specific impact on market participants. Accordingly, legislators should consider what Monroe Price pointed out over fifteen years ago: Given the realities of the art market and the relationship between visual artists, their audience, and society, royalties legislation may have a very limited effect.[8] The addition of a residual right may only partially relieve the economic stress of a small portion of the fine art community.

---

111 (1981); Note, *Artists' Resale Royalties Legislation: Ohio House Bill 808 and a Proposed Alternative*, 9 U. TOL. L. REV. 366 (1978) [hereinafter cited as Note, *Ohio House Bill*].

[4] Measurement and comparison of equity of reward for various artistic endeavors through copyright is extremely subjective. Thus, an argument for one's position can be made to coincide with his perception of the injustice. Valid and valuable comparison, however, may be made between the benefits accorded authors or composers and those given to visual artists of equal caliber and fame. Legislators, and this Note, assume this comparison to be legitimate when considering legislation in the area of the visual arts.

[5] California Resale Royalties Act, CAL. CIV. CODE § 986 (West 1982) [hereinafter cited as California Act].

[6] On the national level, the 1978 Visual Arts Residual Rights Act, H.R. 11403, 95th Cong., 2d Sess., 124 CONG. REC. H6178 (daily ed. Mar. 8, 1978) [hereinafter cited as 1978 Act], was proposed but never enacted. *See generally* Solomon & Gill, *supra* note 3, at 343-51; Note, *Applicability of the Droite de Suite*, *supra* note 3, at 450.

Legislation has been proposed in nine other states (Georgia, Iowa, Maine, Minnesota, New York, Ohio, Pennsylvania, Tennessee, and Texas). *See* National Conference of State Legislatures, A Report of the Arts Task Force 10-11, 32-33 (1981)(compiled by L. Briskin)(available from the National Conference of State Legislatures, 1125 17th Street, Denver, Colo. 80202). Such legislation varies the terms upon which an artist is entitled to take advantage of the residual right. For example, the proposed Ohio legislation, H.B. 808, 112th Gen. Assembly, Reg. Sess., 1977-78, Ohio Law §§ 3379.11-.12 (1977), *discussed in* Note, *Ohio House Bill*, *supra* note 3, at 374-77, differs from the California Act in that it lowers the minimum sales price from $1,000 to $500, and allows for costs, attorneys' fees and interest when a claim is victorious. The Ohio Act would be similar in scope to the California Act in that it would control all in-state sales as well as any out of state sale made by a state resident. *See infra* note 49.

The most current New York proposal is the New York Resale Royalties Bill, Bill No. 6303-A, Gen. Assembly, 204th Sess., 1981 N.Y. Laws § 220-24, which would subject both the art dealer and auctioneer to the royalty payment by classifying them as "agents."

[7] Only one empirical study of the art market has been done. *See* Camp, *Art Resale Rights and the Art Resale Market*, 28 BULL. COPR. SOC'Y 146 (1980). Camp's study draws on statistics taken from auction sales records and interviews with 12 San Francisco art dealers.

[8] The *droit de suite* cannot function as the cornerstone of federal planning. The fashioning of government policy in the area of the arts is difficult enough without the additional paralysis of reliance on outmoded ideas of the production and distribution

In view of the limited scope and remedial effect of art resale royalties legislation, this Note questions the justification for extending such a benefit to fine artists. Part III reviews copyright procedure and discusses the problems of applying copyright to visual art. Part III discusses one legislative response, the enactment of resale royalties legislation, particularly in light of marketplace and administrative problems, parts IV and V. Part VI assesses alternatives which may better incorporate the residual right into the art marketplace.

II. Copyright and the Fine Artist

The copyright clause of the Constitution[9] authorizes Congress to enact legislation that will further the progress of the arts and sciences. It is predicated on the theory that such progress will benefit society. The Copyright Acts of 1909 and 1976 embody this principle.[10] They bestow some measure of economic security upon the creator of a unique work by granting him the exclusive right to its economic exploitation. In turn, this right produces an economic climate conducive to creative productivity. Copyright law, however, must reconcile competing interests in the created piece. For example, balanced

---

> of art. The rude intrusion of technology into the craft of the parlor and the rampant extension of the artistic imagination is rendering obsolete such notions as "paintings," "originals," "authentic." The shape of the demand profile is also changing. The practices of periodic resales and passing works of art from generation to generation are growing less significant as institutional, government, and corporate buying begin to become a greater proportion of the market. The pervasive idea of distinguishing between books and paintings must fade somewhat as the market for reproductions doubles and redoubles. What is most clear is that the government cannot define its policy on the basis of a ninteenth century view—or any fixed view—of the art market at a time when standards, and styles, and methods of sales are so quickly changing. That is the plague of the *droit de suite*. True, it offers a small solution to the problems of some painters. Yet the administrative problems it produces would probably outweigh its benefits and the government could better direct its energy in channels calculated to improve the economic security of the artist. In terms of its articulated goals, the *droit de suite* rewards the wrong painters with probably inconsequential amounts of money at the wrong time in their lives.

Price, *supra* note 2, at 1365-66.

Despite his criticism of resale royalties legislation, Professor Price assisted Governor Brown in analyzing the California legislation. He supported resale royalties as a temporary solution to artists' economic woes, because the private contracts, which he had hoped would secure the residual right, failed to gain widespread usage. Solomon & Gill, *supra* note 3, at 332 n.6.

[9] U.S. Const. art. I, § 8, cl. 8.

[10] The Copyright Act of 1976, 17 U.S.C. §§ 101-810 (Supp. IV 1980) supersedes the Copyright Act of 1909. For a comparison of the 1909 Act and the Copyright Act of 1976, see generally Gorman, *An Overview of the Copyright Act of 1976*, 126 U. Pa. L. Rev. 856 (1978).

against a creator's financial interest in controlling access to his work is the publisher's economic interest in the work's public availability and widespread dissemination.[11] Balanced against the public's interest in unlimited access to the creative work is the creator's interest in protecting his reputation and the work's artistic integrity.[12]

Copyright is an intangible right,[13] separate and distinct from the artistic creation. Initially, copyright resides with the creator.[14] Copyright then remains with the creator until there is a transfer of any of the rights in question,[15] or until the work is published[16] without meeting the necessary notice requirements.[17] The copyright owner has the exclusive right to reproduce,[18] prepare derivative works,[19]

---

[11] In order to promote the free exchange of ideas, the Constitution and copyright law grant exclusive copyright only for a limited time. U.S. CONST. art. I., § 8, cl. 8; 17 U.S.C. §§ 302-305 (Supp. IV 1980). The copyright expires fifty years after the author's death, *id.* § 302(a), or when the work enters the public domain.

[12] This is generally considered the artist's moral right. Moral rights are one of three principal classes of rights which protect the artist. The other two are reproduction rights (copyright), and the *droit de suite* (proceeds, or residual rights).

Moral rights are a bundle of rights which include: (1) the right of paternity, the artist's right to claim recognition as the author of his work and to prevent false attribution of his name to the work of another; (2) the right of integrity, the right to prevent objectionable alterations of his work; and (3) the right to display and withdraw his work from exhibition. Moral rights are derived from the artist's personality and reputation, and are therefore inalienable, regardless of copyright ownership. They are rights which remain with the artist even after the sale of the object. Generally, moral rights have not been recognized by courts of the United States. Gilliam v. American Broadcasting Cos., 538 F.2d 14, 24 (2d Cir. 1976). There is, however, much commentary which supports recognition of moral rights in this country. *See, e.g.*, DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPR. SOC'Y 1 (1980); Hauser, *supra* note 3, at 103-07; Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Solomon & Gill, *supra* note 3, at 324 n.10; Note, *The Applicability of the Droit de Suite*, *supra* note 3, at 434 n.5; Note, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554 (1940); Note, *An Artist's Personal Rights in His Creative Works: Beyond the Human Cannonball and the Flying Circus*, 9 PAC. L.J. 855 (1978).

[13] Law governing ownership of works of intellectual property is distinguished from traditional laws of property ownership because creative works are believed to contribute significantly to society. Although copyright is a property right, it continues beyond alienation of the physical object. 17 U.S.C. §§ 201(d), 202 (Supp. IV 1980). *See, e.g.*, Stephen v. Cady, 55 U.S. (14 How.) 528 (1852); Stevens v. Gladding, 58 U.S. (17 How.) 447 (1854).

[14] 17 U.S.C. § 201(a) (Supp. IV 1980). If the object falls within the subject matter of copyrightable material, copyright attaches automatically upon the work's fixation. *Id.* § 102.

[15] *Id.* § 204.

[16] Publication occurs upon the sale or other transfer of ownership, or upon the offer to distribute or publicly display the work for the purpose of promoting further distribution or display. *Id.* § 101.

[17] *Id.* §§ 401(a), 405.

[18] *Id.* § 106(1).

[19] *Id.* § 106(2).

distribute,[20] perform,[21] and display the piece.[22] He may also maintain an action against anyone exercising these rights without express authorization.[23] These rights allow the copyright owner to derive pecuniary gain from the public distribution of his work. The copyright owner may assign or license these rights in whole or in part.[24] In this way the creator's fortunes increase proportionately with the commercial value and public interest in his work.

Copyright protection may not be as readily applicable to the creations of fine artists as it is to those of authors and composers. Copyright law, therefore, may not be as financially useful to them. Although reservation of statutory copyright[25] may serve a significant

---

[20] *Id.* § 106(3).

[21] *Id.* § 106(4).

[22] *Id.* § 106(5). These exclusive rights are subject to certain limitations. *Id.* §§ 107-112.

[23] In order to bring a claim against the copyright infringer, *id.* § 501, the artist must have properly registered his work with the copyright office. *Id.* § 411. Where the claimant is a transferee of the copyright, he must have recorded the instrument of transfer with the Copyright Office before he may maintain a suit for infringement. *Id.* § 205(d).

[24] *Id.* § 201(d). Like other property interests, copyright may be fully or partially assigned. This is useful because all of the privileges afforded by copyright are rarely used by one copyright owner. Carroll, *supra* note 2, at 331-32. Any transfer of copyright ownership must be by written agreement. 17 U.S.C. §§ 101, 204 (Supp. IV 1980).

[25] 17 U.S.C. §§ 401-412 (Supp. IV 1980). Historically, there has been a dual system of copyright: statutory copyright protected published works while state and common law copyright protected unpublished works. The Copyright Act of 1976 sought to create a single, uniform system by preempting state and common law copyright protection that was "equivalent" to the federal copyright scheme. *See id.* § 301; H.R. REP. No. 1476, 94th Cong., 2d Sess. 129, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659.

Some state and common law copyright remedies, however, are preserved by § 301(b)(3) of the Copyright Act. State and common law copyright often provide different remedies than those afforded by federal copyright. Examples include the tort remedies for defamation and deceptive trade practice (unfair competition). Such state and common law remedies are not preempted by federal copyright. *See* Kewanee Oil Co. v. Bicron Corp., 181 U.S.P.Q. 673 (1974) (where the purposes of the relevant statutes do not present an actual or inevitable conflict, then concurrent power would not undermine the federal copyright scheme). This case represents a shift from the earlier cases of Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964), and Compco Corp. v. Day-Brite Lighting, Inc., 374 U.S. 825 (1963) (state unfair competition laws may not preempt federal patent law), which established the presumption of exclusive federal power. For a discussion of preemption, see generally, Goldstein, *Preempted State Doctrines, Involuntary Transfer and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. REV. 1107 (1977); Mentlik, *Federal Preemption in the Field of Intellectual Creations—An End to the Common Law Copyright*, 23 COPYRIGHT L. SYMP. (ASCAP) 115 (1977).

On the issue of whether the California Act is preempted, see 2 M. NIMMER, *supra* note 3, § 8.22[B] (1979) (in granting distribution rights, the California Act is broader than federal copyright, but by inhibiting reproduction, it is narrower or at least equivalent to federal copyright); Brown, *Unification: A Cheerful Requiem for Common Law Copyright*, 24 U.C.L.A. L. REV. 1070, 1090 (1977) (common law copyright has completely disappeared under the present § 301); Katz, *Copyright Preemption Under the Copyright Act of 1976: The Case of Droit de Suite*, 47 GEO. WASH. L. REV. 200, 213, 219-20 (1978) (§ 301 does not preempt the moral and personal

function in preserving the integrity of a creation,[26] direct economic profits from artistic productivity derive primarily from the sale or reservation of reproduction rights.[27] This is problematic because reproduction rights cannot be profitably utilized by fine artists; duplicability is not fundamental to the commercial value of fine artwork.[28]

---

interests which an artist may have or a state may create, but it does preempt pecuniary benefits such as the economic right that the California Act seeks to confer); Note, *The Artistic Reputation*, *supra* note 2, at 1506-12 (many state claims will be preempted by the Copyright Act); Note, *The Fine Art of Preemption: Section 301 and the Copyright Act of 1976*, 60 OR. L. REV. 287, 295-97, 304-06 (1981) (the strong policy of creating a uniform system requires preemption of the California Act, because the California Act merely qualifies the absolute right derived from §§ 109 and 202 of the Copyright Act); Note, *Droit de Suite: Only Congress Can Grant Royalty Protection for Artists*, 9 PEPPERDINE L. REV. 111, 123-29 (1981). *Contra* Note, *The Droit de Suite Has Arrived*, *supra* note 3, at 548-50, 559 n.192 (the congressional intent to preempt need not extend to the resale royalty right); Note, *Paintings, Preemption, and Profit*, *supra* note 3, at 243-45, 254-59 (the Resale Royalties Act bestows a right that supplements federal law and hence is not equivalent to the Copyright Act); Note, *A Proposal for National Uniform Art Proceeds Legislation*, *supra* note 3, at 136-39; Comment, *The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law*, 81 COLUM. L. REV. 1315, 1316, 1325-32 (1981) (purposes of federal copyright to operate as an incentive for artistic creativity and to delineate entrance into the public domain are not unduly interfered with by the California Act).

[26] *See* Price, *supra* note 2, at 1342-48.

[27] Prior to the Copyright Act of 1976, courts held that reproduction rights presumably passed to the new owner of the piece absent explicit reservation of copyright. *See, e.g.*, Pushman v. N.Y. Graphic Soc'y, 287 N.Y. 302, 39 N.E.2d 249 (1942). This presumption resulted in the unwitting sale of reproduction rights by visual artists. Section 202 of the Copyright Act of 1976 reverses the *Pushman* presumption by specifying that transfer of ownership does not convey copyright rights to the buyer unless specifically indicated in writing. Thus the buyer may not reproduce without the artist's express authority. Fabe, *supra* note 2, at 83-84.

There has also been state legislation which reverses the *Pushman* presumption. *E.g.*, 19 N.Y. GEN. BUS. LAW § 224 (McKinney 1980); Act of Aug. 21, 1981, ch. 824, 1981 Or. Laws 730. These statutes reserve the right of reproduction for the creator after sale and until the work enters the public domain. These statutes, however, may be theoretically unsound because this country's copyright scheme has not recognized an artist's continuing rights aside from those secured by statutory copyright. *See supra* note 12.

See Millinger, *supra* note 2, at 363-64 (although federal and state legislation reverse the *Pushman* presumption it may nevertheless be impossible for the artist to reproduce the work if someone else possesses the original); *see also* Werckmeister v. Springer Lithographing Co., 63 F. 808 (S.D.N.Y. 1894). This problem, however, may be minimized because of the difficulty in making quality reproductions without the consent, help or advice of the artist. *See* Brenner, *supra* note 2, at 94. The Oregon statute may remedy this problem by allowing the artist, like the author or composer, to retain possession of the object, while assigning exclusive or nonexclusive reproduction rights to others. *See supra* note 24.

[28] Duplication may be augmented by recent developments in reproduction processes, material and media. In this regard, particular attention should be focused on developments such as the mass marketing of fine artwork as posters. As the number of artists who capitalize on reproduction increases, their leverage in negotiating private contracts with publishers will also increase. Thus, it is possible that by the time royalties legislation becomes more widely enacted and enforced, prevalent market and artistic trends may render it obsolete.

At present, the California Act limits the availability of the royalty and does not allow for expansion as new art forms develop. Some writers endorse this approach and suggest that

The market for visual creations, unlike written creations, lies primarily in the sale and resale of the original work. Therefore, the reproduction right provided by copyright law affords less commercial and market power to a visual artist than to an author or composer.[29]

The commercial value of fine art differs from that of books and scores in two respects. First, the paramount value of fine art lies in its uniqueness.[30] The fine artist's first and often only compensation derives from the sale of the original piece, complete with all rights attached. Accordingly, the sale price is large, relative to that of a manuscript or score. After the first sale, however, the visual artist's relationship to his work is often severed.[31]

In contrast, the value of an original manuscript or score as a unique creation is only tangentially important. The author or composer usually assigns or sells reproduction rights along with certain other uses of his work. Although the initial sale may bring only a small price, the author or composer may increase the minimal profit from a sale by reserving the right to collect royalties.[32] This residual right gives him a continuing interest in his work and enables him to participate in its future success.[33]

The second crucial distinction between fine art and other creative products lies in the difficulty of reproduction. Profitability of repro-

---

royalties legislation should be narrow in scope with enumerated criteria for application of the right. Sherman, *supra* note 2, at 61. This writer suggests that royalties legislation must keep abreast of artistic developments and enable expansive rather than restrictive applicability.

[29] *See* 2 M. NIMMER, *supra* note 3, § 8.22[A]; Boyer, *supra* note 2, at 125; Brenner, *supra* note 2, at 85-87; Hauser, *supra* note 3, at 94-95; Schulder, *supra* note 3, at 24-25; Sherman, *supra* note 2, at 57.

[30] Prevalent opinion is that duplication destroys the artistic and commercial value of artwork. Boyers, *supra* note 3, at 125; Brenner, *supra* note 2, at 86-87. There is an inverse relation between the size of a graphics edition and its later value. Thus, reproduction may be undesirable if not unwise. Boyers, *supra* note 3, at 125, 140; *see* Note, *Regulation of the New York Art Market*, *supra* note 2 (taking the extreme view that reproduction rights are useless because they prohibit the unauthorized copying of what amounts to an unreproducible medium). Some authors contend, however, that certain forms of reproduction, such as posters and photographs, may have little, if any, effect on the price of the original. Note, *Courting the Artist with Copyright*, *supra* note 2, at 1696-97.

[31] *See supra* note 27 (suggesting that the artist could perhaps maintain control of his work for purposes of reproduction).

[32] In addition to royalty payments, reproduction can provide an author with the opportunity for distribution and exposure of his work. Such exposure could nurture a market for the author's future works.

[33] However, in some instances, an author or composer may be able to reserve only a few cents on each sale. Therefore, the economic advantage of a royalty payment over a lump sum payment without reservation of residual rights depends upon the extent of the work's economic and artistic success. Thus it may be impossible to compare equity of return for artists and authors. Weil, *supra* note 3, at 59. *See supra* note 4.

duction may be tenuous because the physical characteristics of fine art make high quality duplication difficult. Consequently, the value and cost of reproduction can present an unattractive risk. Thus, the right to reproduce artwork in the form of prints, catalogues, and art books is not as useful to fine artists as the corresponding right is to authors and composers. Even when the reproduction right becomes available, it may only result in minimal profits for the visual artist.[34]

Scrutiny of the distinctions between visual art and other creative arts reveals that the right to reproduce is generally less valuable to a fine artist than it is to an author or composer. Consequently, a legislative attempt to increase the visual artist's reproduction right will not necessarily create parity of economic leverage.[35]

Furthermore, inequities which result from the application of copyright to the fine arts are compounded because visual artists generally do not reserve statutory copyright. The primary reason for the visual artist's failure to take advantage of statutory copyright is the art world's inadequate dissemination of information regarding the rights, benefits, and financial protection available.[36] In France, for example, artists have been reluctant to register for collection of royalty payments.[37] This experience attests to both inadequate communication between artists and their associations and to artists' general resistance to change.

Even among those artists who are aware of copyright, a large majority do not secure it. This results from the belief that a copyright notice defaces the work and destroys its aesthetic balance.[38] Another belief is that the copyright notice signifies undue concern with commercialization and reproduction.[39] The unfortunate and ironic result is that some visual artists view the exercise of their copyright rights as inimical to their financial interests.

---

[34] Boyers, *supra* note 3, at 129, 131. Even if the reproduction right becomes marketable, the return on its sale or license may not counterbalance the harm that duplication can cause. *See supra* note 30.

[35] *See supra* note 4.

[36] Sheehan, *supra* note 2, at 245-55. In fact, artists as a class seem to have only the barest understanding of the technical aspects of copyright and copyright notice. Unfortunately, it seems that this ignorance is fostered by artists, their associations and benefactors who perpetuate the romantic image of the naive, vulnerable and starving artist. *Id.* at 252-53. Professor Price disclaims this nineteenth century romantic characterization of the suffering and powerless artist. *See* Price, *supra* note 2, at 1334-36, 1364.

[37] *See infra* note 56.

[38] Sheehan, *supra* note 2, at 255-57.

[39] *Id.* at 257.

III. Resale Royalties Legislation

Statutes exist which seek to remedy the visual artist's plight. The *droit de suite*[40] has been adopted by France[41] and other civil law countries.[42] An American counterpart is the California Resale Royalties Act.[43] Additional legislation has been proposed at both state and federal levels.[44] These laws and proposals vest the fine artist with a

---

[40] The English translation of *droit de suite* is "follow up right," from French real property law. It is the right of an owner or creditor to pursue realty in the hands of the taker. *See* Hauser, *supra* note 3, at 96 n.7; Solomon & Gill, *supra* note 3, at 324 n.9. A more functional translation is "proceeds right." For the purpose of this Note, the terms *droit de suite,* proceeds right, royalties payment, and residual right are used interchangeably.

[41] France adopted its current *droit de suite* in 1957. Law of Mar. 11, 1957, No. 296, art. 42, 1957 Journal Officiel de la République Française [J.O.] 2723, 1957 Bulletin legislatif Dalloz [B.L.D.] 1971, *reprinted in* J. Merryman & A. Elsen, *supra* note 3, at 4-131.

[42] France, West Germany, Italy, Belgium, Portugal, Czechoslovakia, Yugoslavia, Turkey, Tunisia, Morocco, Algeria, Luxembourg, Chile, and Uruguay grant royalty rights. Note, *California Resale Royalties Act*, 2 Comment 733, 734 n.5. (1980). Similar legislation is being considered in other countries. *See* Schulder, *supra* note 3, at 22 n.13.

The French have been active in encouraging more widespread enactment of the *droit de suite*. They fear that enforcement of such a royalty by their country alone will drive the art market away from France. Price, *supra* note 2, at 1334 n.7.

Two major international treaties concerning international copyright protection are the Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, *revised* July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, *reprinted in* 4 H. Nimmer, Nimmer on Copyright, 24, 25 app. (rev. ed. 1979) [hereinafter cited as Copyright Convention], and the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, Berne Convention Union, *revised* June 26, 1948, 3 UNESCO Copyright Laws and Treaties of the World (1977), *reprinted in* 4 H. Nimmer, *supra*, 27 app. [hereinafter cited as Berne Convention]. The United States is not a party to the Berne Convention. *See generally* L. DuBoff, *supra* note 2, at 808; J. Merryman & A. Elsen, *supra* note 3, at 4-135; Hauser, *supra* note 3, at 107-10; Hepp, *supra* note 3, at 93; Price, *supra* note 2, at 1334 n.7; Note, *Applicability of the Droit de Suite*, *supra* note 3, at 451-54; Note, *U.S. Copyright Protection and the Berne Convention*, 13 Bull. Copr. Soc'y 215 (1966).

The Copyright Convention, art. 1, purports to provide adequate and effective protection of artists' rights. However, there is a difference of opinion as to whether the *droit de suite* is within the coverage of the Copyright Convention or merely a unique provision outside the scope of copyright laws. Some authors suggest that the artist's residual right is a pecuniary right within the ambit of copyright law and is, therefore, entitled to protection under the Copyright Convention. *See, e.g.*, Schulder, *supra* note 3, at 22 n.15. Others have cautioned, however, that since the question of *droit de suite* protection under the Copyright Convention is unresolved, the artist should turn to the Berne Convention. Fabe, *supra* note 2, at 96; Hauser, *supra* note 3, at 107 nn.52, 53.

The Berne Convention adopted the *droit de suite*, art. 14bis. The residual right, however, extends only to foreign artists whose country affords a reciprocal right. For an anomalous result of this reciprocity requirement, see Price, *supra* note 2, at 1334 n.7; Solomon & Gill, *supra* note 3, at 326; Note, *Applicability of the Droit de Suite*, *supra* note 3, at 462 nn.200-02. For a discussion of the French application of *droit de suite* to foreign artists of non-Berne Union Member countries, see L. DuBoff, *supra* note 2, at 858; Hauser, *supra* note 3, at 108, 110 n.67; Sherman, *supra* note 2, at 86.

[43] Cal. Civ. Code § 986 (West 1982).

[44] *See supra* note 6. Perhaps states with larger art markets and therefore a greater need for royalties legislation would enact such legislation more quickly than national legislation could be

monetary interest in the resale of his work. Current forms of royalties legislation vary in terms of type of transactions subject to the royalty payment (i.e., public or private),[45] minimum resale price necessary to qualify for the residual right,[46] duration,[47] alienability,[48] scope of application,[49] and percentage of resale price reserved as a royalty.[50]

---

enacted. As more states enact residual rights legislation, interesting questions are bound to arise concerning choice of law in interstate sales and the possibility of multiple taxation on a single sale.

[45] The French *droit de suite* applies only to transfers which take place at a public auction or through an intermediate merchant. J. MERRYMAN & A. ELSEN, *supra* note 3, at 4-131. In contrast, the California Act makes the royalty enforceable against both public and private resales. CAL. CIV. CODE § 986(a)(1) (West 1982). For the problems involved in administering these different transactions, see *infra* notes 82-83 and accompanying text.

[46] France's *droit de suite* minimum is 1000 francs. J. MERRYMAN & A. ELSEN, *supra* note 3, at 4-131. The California Act requires that the resale price must be at least $1,000 and exceed the original purchase price. CAL. CIV. CODE § 986(b)(2)(4) (West 1982). Ohio's proposed bill would set the minimum resale price at $500. H.B. 808, 112th Gen. Assembly, Reg. Sess., 1977-78, Ohio Law § 3379.12(B) (1977) *discussed in* Note, *Ohio House Bill*, *supra* note 3, at 376 n.44.

[47] France's *droit de suite* extends for the artist's life, plus 50 years. J. MERRYMAN & A. Elsen, *supra* note 3, at 4-131. The California Act extends only to living artists. CAL. CIV. CODE § 985(b)(3) (West 1982). This Note suggests that future legislation should follow the proposed 1978 Act, *supra* note 6, and extend the term of the royalty to life, plus 50 years.

[48] In accord with the artist's other moral rights, *see supra* note 12, the French right to receive royalty payments is inalienable. Only the surviving spouse or heirs may claim the payment. J. MERRYMAN & A. ELSEN, *supra* note 3, at 4-131. This provision, together with the extension of the residual right past the artist's lifetime, *see supra* note 47, reflects the French determination that the artist's family also merits the right to share in the appreciation of the work.

Under the California Act, an artist may not sell his right to receive royalty payments. He can, however, contract for a higher percentage than provided for by statute. CAL. CIV. CODE § 986(a) (West 1982).

[49] The California Act applies retroactively. CAL. CIV. CODE § 986(d) (West 1982). The retroactive application was considered in Morseburg v. Balyon, 201 U.S.P.Q. 518 (C.D. Cal. 1978), the only court challenge of the California Act. There the plaintiff-seller claimed that the retroactive effect of the Act violated the due process and contract clauses of the Constitution. The court, in denying the plaintiff's claim, stated that states possess the power to adopt such regulatory measures as long as they are designed to achieve a valid public purpose. *Id.* at 520.

Another issue which the *Morseburg* court raised, but did not decide, was whether the statute was overbroad. *Id.* at 521. The California Act imposes a royalty on transactions made by Californians either inside or outside the State. In so doing, the California Act may intrude on Congress' power to regulate interstate commerce under article I, section 8, of the Constitution. *See* Note, *The Droit de Suite Has Arrived*, *supra* note 3, at 556; *see generally* Katz, *supra* note 25, at 220-21; Solomon & Gill, *supra* note 3, at 322.

The overbreadth issue is problematic. Correcting it by amending the statute to apply only to California sales may so limit the California Act's scope as to make it virtually ineffective. A national proceeds right would resolve the problems raised by the California Act if it would apply to all interstate transactions, and eliminate retroactive royalty payment. In addition, national legislation would provide the benefit of a uniform system of enforcement. *See infra* text accompanying notes 90-98.

[50] France's *droit de suite* reserves for the artist three percent of the gross resale price. J. MERRYMAN & A. ELSEN, *supra* note 3, at 4-131.

Various theories suggest different bases for reservation of a specific percentage as a royalty. The French theory posits that an artist deserves payment commensurate with the utilization of his work. The work's appreciation in value is attributed to the artist's original investment of his personality in the work. Therefore, he is entitled to receive a percentage of the gross price on each resale whether or not there has been a profit.[51] The German theory,[52] known as the "capital gains theory," stands for the proposition that increased value is latent in the work. This increase in value results from the artist's earlier labors for which he was duly compensated when he sold the work. Accordingly, the German theory allows the artist only a percentage of the profit realized by the seller.[53] The Belgian residual right[54] is based on contract theories. Increased fame and notoriety constitute a changed circumstance calling for a revision of the terms in the artist's contract. Furthermore, the artist is considered to have a continuing relationship with the buyer. When the buyer profits on the increased value of the work, the artist is entitled to a share of the profit to prevent unjust enrichment.[55]

The primary purpose of the *droit de suite* is to redress a perceived injustice.[56] The premise is that there is a time lag between creation, public understanding and appreciation of art. During the early stages of his career, a visual artist usually receives a low price for his work. Even if the artist's reputation grows and the value of his earlier work increases, the artist reaps no monetary benefit from the appreciation in value of that piece.[57] The injustice is that only the dealer or

---

[51] *See* Schulder, *supra* note 3, at 30; Sherman, *supra* note 2, at 58.

[52] Law of Sept. 16, 1965, No. 51, art. 26 (W. Ger.), *reprinted in* J. MERRYMAN & A. ELSEN, *supra* note 3, at 4-132.

[53] *Id.; see* Schulder, *supra* note 3, at 30; Sherman, *supra* note 2, at 59; Note, *Applicability of the Droit de Suite, supra* note 3, at 441-42; Note, *A Proposal for National Uniform Art Proceeds Legislation, supra* note 3, at 130. A portion of the Italian system operates in the same way. Law of Apr. 22, 1941, No. 633, arts. 144-45, *reprinted in* J. MERRYMAN & A. Elsen, *supra* note 3, at 4-132.

[54] Law of June 25, 1921, Moniteur Belge (20 Aug. 1921), [1921] Pasinomie 343, *cited in Note, Applicability of the Droit de Suite, supra* note 3, at 444 n.66.

[55] Hauser, *supra* note 3, at 110; Sherman, *supra* note 2, at 59; Note, *Applicability of the Droit de Suite, supra* note 3, at 444 n.66, 456 n.166; Note, *A Proposal for National Uniform Art Proceeds Legislation, supra* note 3, at 130. See Schulder, *supra* note 3, at 31-33, for theories underlying legislation in other countries.

[56] Another of the original purposes of the *droit de suite* was to enable purchasers to authenticate ownership. This was to be accomplished by registering art transfers to create a record of ownership. This effort has largely been unsuccessful. Schulder, *supra* note 3, at 25, 39. For the development of the French law since 1920, see Sherman, *supra* note 2, at 51-54 (1968).

[57] The example most cited by commentators as a model of the plight of the fine artist is the sale of Rauschenberg's "Thaw." The well-known artist, Robert Rauschenberg, sold his collage,

collector who had the foresight to recognize talent or was lucky enough to purchase at a low price profits from the artist's increased popularity. The central question is this: Does such a perceived injustice warrant legislative intervention?[58]

The intent of resale royalties legislation is to allow the artist to capitalize on the commercial value of his work. It recognizes that artwork is most valuable as an "original" rather than as a master for copy. Therefore, the royalty attaches to each resale of the original.

Royalties legislation is based upon two assumptions: First, that during an artist's lifetime the value of his work appreciates; second, that his work changes hands frequently. These assumptions, however, have been criticized as belied by the realities of the art market. Some commentators contend that most works by living artists actually depreciate in value.[59] Further, the only empirical study of the art market[60] indicates that very few living artists command a secondary market; of those who do, only the very successful have significant resales.[61]

In part, the poor resale market may be caused by trends in consumer behavior. First, individuals often transfer artwork via gift or bequest.[62] Second, institutions, such as corporations and museums, purchase artwork as long-term investments.[63] Thus, buyers, both individual and institutional, tend to hold on to works of art for a long time.[64] Therefore, there are relatively few transactions which would result in resale royalties for the fine artist.[65]

"Thaw," to collector Robert Scull for $900. Scull later sold the piece for $85,000. *See* N.Y. Times, Oct. 19, 1973, at C5, col. 1; Wall St. J., Feb. 11, 1974, at 1.

[58] Royalties legislation may shock one's property sensibilities. Once an artwork falls into the collector's possession, it becomes his property and the artist's rights in the piece should cease. *But see* Schulder, *supra* note 3, at 28-29. Furthermore, such legislation may offend one's sense of free trade. The collector who risks his capital on an unknown artist is usually aware that the chance of a huge return on resale is small. If he is nevertheless willing to purchase the work and promote artistic progress, perhaps we should not burden him with royalty payments in the event his investment becomes valuable. *But see* Hauser, *supra* note 3, at 112-113 (rights in private property, like copyright, are constantly the subject of legislative limitations and, therefore, the *droit de suite* is inoffensive).

[59] Note, *Courting the Artist with Copyright*, *supra* note 2, at 1687 n.15.

[60] Camp, *supra* note 7.

[61] *Id.* at 151. Sales records from a four-year period indicate that of the many hundreds of thousands of artists, only 152 artists had resales over $1,000. Among the 152 artists, 41% had only one resale, 14% had only two, indicating that less than half of the 152 artists had significant resales. Of the 750 resales over $1,000, 143 of them were of works by the top five artists, *id.* at 152 (Table II), and they commanded the highest prices, 31.4% of all dollars earned on resales, *id.* at 153 (Table III).

[62] *See* Price, *supra* note 2, at 1350-51.

[63] *Id.*

[64] If art is owned by an individual or corporation, it may remain out of public view and thereby deprive the young artist of the opportunity for public exposure.

The small portion of artists who do command a resale market may nevertheless fail to receive a significant financial return from the royalty. This may be due to the fact that resales are sporadic, and when they do occur, the resultant royalties may be minimal. Artists who receive substantial returns are likely to have a more developed market for their current works. Success usually breeds success, and consequently, a successful artist's later works may command higher prices. Moreover, such artists will generally possess greater leverage in private contract negotiations and may be in a better position to protect their economic interests. Perhaps this is sufficient reward for recognition; no further legislation is necessary.

In any event, it is a fair assumption that artists subject to receive royalty payments are few in number, financially secure, and not dependent upon these likely small returns. These artists, generally not viewed as victims of injustice, are least in need of legislative protection. Resale royalties legislation, therefore, offers a very limited remedy in relation to the broad spectrum of visual artists' financial maladies. Because it is not economically remedial, a reexamination of the legislation's purpose is necessary.

Contrary to the views of many proponents, royalties legislation cannot be acclaimed as providing greater economic security for struggling artists.[66] Although this is a laudable objective, consonant with the tenor of the copyright clause,[67] in actuality royalties legislation may impede artistic productivity by damaging the market for works by younger visual artists.[68] Furthermore, resale royalties legislation may fail as an incentive for the young artist because its benefits are too tenuous to encourage increased artistic endeavors. Royalty payments are contingent upon future recognition and success, and therefore, may be insufficient to compensate the young artist for present struggles.[69]

As noted, resale royalties legislation is neither an incentive for the fine artist nor a complete economic remedy. Resale royalties can only

---

[65] In fact, most sales are likely to occur after the artist's death. *See* Price, *supra* note 2, at 1350-51. Royalties legislation is premised on a time lag between creation and market acceptance, the assumption being that visual artists are usually ahead of their time. Thus, resale royalties may operate over too narrow a period. By the time there is a market for a certain artist or artistic outlook, the collection period may have expired. *Id.* at 1336-37 & n.13.

[66] *See* Camp, *supra* note 7, at 150 (Table I), 166 app. D. The French *droit de suite* was adopted to enable artists to support themselves and to encourage artistic creativity. Schulder, *supra* note 3, at 24.

[67] *See supra* notes 9-10 and accompanying text.

[68] *See infra* text accompanying notes 70-74.

[69] Price, *supra* note 2, at 1335-36.

be justified as a symbolic measure in recognition of the artist's success. By awarding the artist part of the return on his work's increased value, it shifts some of the public approval back to the artist, compensating for the injustice in allowing the entrepreneur and society to profit exclusively from his creative efforts.

IV. Marketplace Considerations

Assuming that resale royalties legislation benefits only a limited class of visual artists, it may nevertheless be worthwhile. To make this determination, however, it is necessary to balance the goals of resale royalties legislation against the potentially harmful effects it may have on the art market. The primary consideration has been on whom the cost of the residual right will fall. If the cost is passed on to the buyer in the form of a higher price, sales may drop. As one commentator suggests, a royalty payment operates like a tax, making an already poor investment an even more undesirable risk.[70] Although the art collector or investor may purchase art for other than investment purposes, he could be drawn to other markets by lower prices.[71] To maintain sales levels, either the artist or the dealer inevitably must absorb this "tax."

Art dealers have been vociferous in attacking the California Act. Under the Act, an art dealer is considered a "seller" and may be required to pay the royalty on each sale. Dealers argue that they already incur heavy expense in reselling a work; general overhead includes the cost of exhibition, conservation, insurance, and shipping. If royalties are also demanded, dealers may be forced to operate at a loss[72] or perhaps cease the risky practice of introducing fledgling artists.[73]

Alternatively, the dealer may decide to exercise his superior bargaining position and revert the cost of the encumbered artwork back

---

[70] See Asimow, *supra* note 3, at 4-125 to -127, who draws an analogy between the royalty payment and an excise tax in which the demand curve would determine the amount of money available in the art market. Influential factors affecting the elasticity of the demand curve include the availability of substitutes, the relative position of the price on the particular demand curve, the percentage of consumer income that the product represents, and the number of uses for the product. He concludes that if the royalty payment were added to the sales price this "tax" would depress the art market. *Id.*

[71] *See* Camp, *supra* note 7, at 158-59.

[72] The dealer would have to sell at a 125% increase to recoup his expenses, Weil, *supra* note 2, at 60-61, or at a 150% increase, Note, *Ohio House Bill*, *supra* note 3, at 379.

Some dealers even suggest that the royalty will so greatly affect overhead costs that marginal dealers will be forced out of business. Camp, *supra* note 7, at 159. More likely, dealers will not handle works subject to a royalty. *Id.*

[73] Camp, *supra* note 7, at 159, 160 (Table VIII); Note, *Ohio House Bill*, *supra* note 3, at 380-81. An alternative would be to continue front-room exhibits of young artists' work and supplement the costs of royalty payments from other sources. Camp, *supra* note 7, at 160.

to the artist. Dealers may only be willing to purchase the artist's work at a discounted price. In the final analysis, then, the artist may be forced to absorb this "tax," thus imposing a heavier burden on the fledgling artist.[74] The royalty, presumably designed to benefit fine artists, may, in fact, hurt those artists who most need assistance.

Perhaps the argument that resale royalties would damage the structure of the art marketplace is exaggerated. It is difficult to conceive of a five percent royalty as prohibitive to either collector or dealer.[75] Furthermore, based on the analogy between resale royalties and a tax, proponents of royalties legislation argue that equitable treatment of the fine artist justifies taxing those who use, purchase and enjoy artistic creations.[76]

Collectors and dealers refute this argument. They contend that they already subsidize artists and should not be forced to bear a disproportionate burden of supporting artistic creativity. Moreover, if the public welfare is the final cause for inducing artistic activity, then the whole of society should absorb the costs involved.[77] Since the public fails to show sufficient appreciation by returning a just reward for engaging in artistic activity, there is no justification for demanding that art patrons absorb the extra cost for society's edification. The 1978 Visual Arts Residual Rights Act[78] would ameliorate some of the harsh effects imposed on dealers by the California Resale Royalties Act. The 1978 Act would require royalty payments only on those resales occurring at least two years after the work is originally sold, provided that all exchanges until that time result from sales or transfers among dealers.[79] This provision effectively removes the dealer

---

[74] In effect, the artist would be investing in his own work and its chance of future success. *See* Ashley, *supra* note 3, at 252.

[75] Camp, *supra* note 7, at 158.

[76] *But see* Price, *supra* note 2, at 1348; Note, *The Droit de Suite Has Arrived*, *supra* note 3, at 543-44. Others doubt whether a royalty can be imposed when it inures to the benefit of select artists on transactions made outside of the state. *See supra* note 49. Where similar taxes were upheld, the funds procured went directly into the state treasury, rather than to a particular class. L. DuBoff, *supra* note 2, at 864, Asimow, *supra* note 3, at 4-124.

[77] One way to encourage artistic progress is for society to absorb the cost that dealers and collectors currently bear. Tax incentives for the purchase of art may relieve the undesirable burden which legislation such as the California Act places on buyers and sellers. Art purchasers could be awarded a favored tax status which would encourage the resale of art by living artists. One suggestion has been to defer a capital gains tax, provided that the proceeds realized from the sale be used for the purchase of art by a living artist. Note, *Applicability of Droit de Suite*, *supra* note 3, at 465-66 & nn.226-28. Another proposal has been to offer the collector a tax deduction on the royalty payment, or other such payments, as a business expense which could be credited against taxable profits. Glueck, *Royalties Are Far From Universal*, N.Y. Times, Nov. 12, 1980, at C25, col. 5.

[78] 1978 Act, *supra* note 6.

[79] *Id.* § 4(d).

dealer from the category of seller. In addition, the 1978 Act would require royalty payment only on secondary sales that exceed the original purchase price, plus five percent.[80] Therefore, the 1978 Act would be fairer to sellers because it would not require payment of a royalty if the seller would suffer a loss as a result of that payment.

Another improvement on current royalties legislation may be to restructure the royalty payment. Royalties could be based on a sliding scale rather than on a strict percentage of the resale price.[81] The royalty percentage would increase in tandem with the resale price. Thus, the artist's rewards would rise proportionately with the increased reputation and value of his work. Because the royalty percentage would increase proportionately with the resale price, and hence with the seller's profits, a sliding scale levy would not impose a substantial burden on the seller. This modification, if combined with the advantageous terms of the 1978 Act, might ease the disruptive effect of resale royalties legislation on market participants. At the very least it would ensure the collector more of a profit on resale.

V. Administration and Enforcement of the Royalty

Even if one believes that the goals of royalties legislation are attainable and that it is fair to impose the cost of achievement upon the art dealer and collector, enforcement may nevertheless prove too cumbersome and inefficient to warrant legislative intervention. In France, for example, the *droit de suite* has not been authorized for private non-commercial sales.[82] French legislators were unwilling to impose a royalty on private transactions because of the difficulty involved in administering claims on private sales.[83]

The problem of enforcing the royalty payment is two-fold: First, for the seller to locate the artist and pay the royalty, or for the artist to bring a lawsuit against a defaulting seller, some record of transfer is necessary; second, even assuming the existence of a recording system which would provide artists, sellers and subsequent purchasers with

---

[80] *Id.* § 4(c).

[81] Such a scheme is exemplified by the Italian royalties legislation, *see supra* note 53, which mandates that the royalty percentage increase proportionately with the work's increased value. *See* Price, *supra* note 2, at 1333 n.2; Sherman, *supra* note 2 at 55.

[82] Schulder, *supra* note 3, at 33-35; Sherman, *supra* note 2, at 66.

[83] Private transfers offer no procedure by which the artist or collection agency is put on notice of a transfer. In addition, when a work has been bartered, the sale price is difficult to ascertain. Despite these difficulties, some authors suggest that the royalty should apply to private transfers since a majority of the transactions which occur are private. Thus, if the goal of the proceeds right is to be achieved, private transfers must be regulated. Boyers, *supra* note 3, at 142-45; Schulder, *supra* note 3, at 34-35.

notice of transfer, an administrative agency would be necessary to oversee such a function. It is questionable whether a bureaucratic agency could accomplish this operation in a cost-efficient manner. A solution to both problems may lie in the formation of an artist's association similar to the French Union for Artistic Property.[84]

The French Union for Artistic Property is a private association to which all French artists belong. The French Union records all sales, demands royalty payments due, holds payment for unlocated artists, and maintains actions on artists' behalf. Supporters of the French system say it is successful because sales are recorded and administered by a single agency.[85]

The California Act provides for the establishment of the California Arts Council. The California Act requires the seller to locate and pay the artist.[86] In the event the artist cannot be located, the Arts Council acts as a repository for payment.[87] The Arts Council, however, has no enforcement powers, nor does it provide the seller with information concerning the artist's whereabouts. Without this information or the threat of agency enforcement, it is unlikely that the seller will remit payment.[88] The artist, then, must bear the cost of bringing suit.[89] In most cases the small returns available may not warrant this expense, hence the payment would go unenforced. The statute also saddles the artist with the burden of tracing title to his work so that he knows who to challenge and when to make a claim for payment. It is questionable, however, whether the artist has the resources to compile this information.

---

[84] To monitor sales and collect payments, the Union for Artistic Property uses the registration records from public auctions and information found in trade papers. Solomon & Gill, *supra* note 3, at 326.

[85] For statistical data as to funds received by artists under the *droit de suite*, see, e.g., Hauser, *supra* note 3, at 101; Schulder, *supra* note 3, at 22 & n.16; Sherman, *supra* note 2, at 53-54 (citing as evidence of success the paucity of cases arising under these provisions as well as the amount of money collected by artists).

For a discussion of the administration of the *droit de suite*, see Hauser, *supra* note 3, at 98-101; Sherman, *supra* note 2, at 24-26, 34, 39; Note, *Applicability of the Droit de Suite*, *supra* note 3, at 439 n.33.

[86] CAL. CIV. CODE § 986(a) (West 1982).

[87] *Id.* § 986(a)(2).

[88] As of 1980, only one seller remitted payment after not finding the artist. *High Courts Back Artists' Royalties*, N.Y. Times, Nov. 11, 1980, at C14, col. 4. Even if there were an effective notification system, it would be easy to elude the visual artist and circumvent royalty payment. Among other ploys, the dealer can negotiate a long-term lease with a purchase option since the right to royalties terminates at the death of the artist. Ashley, *supra* note 3, at 257-58.

[89] CAL. CIV. CODE § 986(a)(3) (West 1982). The artist has a right of action for three years after sale, or one year after discovery of sale.

These problems could be remedied by national legislation establishing an administrative agency with registration, notification, and enforcement powers. The 1978 Act proposed the creation of the National Commission on Visual Arts to administer royalty payments.[90] The Commission would be composed of five presidential appointees representing major artistic disciplines.[91]

The 1978 Act differs from the California Act in that it would empower a government agency to administer and directly collect royalty payments.[92] The 1978 Act would require artists to register the work with the Commission as a prerequisite for collection of payments.[93] In addition, sellers would be required to register any subsequent transfer of the work.[94] These procedures would result in a nationwide record of art transfers providing notice to interested parties.[95]

The Commission would also provide incentive for sellers' compliance by assuming most of the burden of enforcement. It could maintain an action on behalf of itself or the artist,[96] impose a $1,000 civil fine for a seller's failure to register the transfer of a work,[97] and award damages, costs, and attorneys' fees for a seller's intentional violation.[98]

Some writers suggest that a government commission should record transfers and that a private artists' association should administer royalty payments, much as the French *droit de suite* currently operates.[99] Others respond that government should not be involved in any regulation of the market. They contend that if a residual right is

---

[90] 1978 Act, *supra* note 6, § 3.

[91] *Id.*

[92] *Id.* §§ 3-4.

[93] *Id.* § 5.

[94] *Id.* § 4.

[95] A byproduct of the Commission's nationwide registry of art transfers would be the establishment of a record providing relevant information which might aid in making a decision to invest. In addition, such information would be helpful in those states which have enacted legislation demanding disclosure in the sale of fine art prints. *See, e.g.*, CAL. CIV. CODE §§ 1740-45 (West 1973) (effective July 1, 1971); ILL. ANN. STAT. ch. 121½ §§ 361-69 (Smith-Hurd Supp. 1980) (effective July 1, 1972); HAWAII REV. STAT. § 481F(1)-(5) (1981) (effective March 31, 1980); MD. COM. LAW CODE ANN. §§ 14-501 to 05 (1975); N.Y. GEN. BUS. LAW § 220 (McKinney 1981) (effective March 1981).

[96] 1978 Act, *supra* note 6, § 4.

[97] *Id.*

[98] *Id.* A court could award three times the payment due, not exceeding $5,000. *Id.*

[99] *See supra* notes 84-85 and accompanying text.

Opponents argue that a federally funded body would be an improper burden on the government. Schulder, *supra* note 3, at 39-40, 73. Because it is impossible to legislate a private association which would perform both roles, Schulder suggests combining the forces of government and private groups by creating a private organization to act in conjunction with a federal registry. *Id.* at 26-28, 39-41, 73. Another author suggests that the collection function should be

desired, it should be administered by the art community.[100] A self-policing art community may, in fact, be more effective than a government agency in administering the royalty system. A private organization, specifically designed to service the art market, may be better equipped to reach artists and art patrons.[101] Such an organization could resemble the French Union for Artistic Property or the American Society of Composers, Authors and Publishers (ASCAP).[102] For more comprehensive protection of visual artists, private organizations should also institutionalize a variety of other trade practices. For instance, a system for licensing reproduction rights could be created based upon the different uses of a work or the number of copies sold.[103] The organization also could enforce non-copyright privileges which do not depend on reproduction,[104] such as payment of exhibition, rent or loan fees. In addition, it could represent artists during negotiations.[105] Most important, such an organization could provide a forum for educating artists.[106] Coupled with community participation and encouragement, a private artists' organization could provide effective administration and enforcement of the residual right.

VI. Private Contract Agreements

Aside from enforcement problems, royalties legislation is criticized for departing from its presumed goal of strict parity among artistic creators. Whereas authors and composers may reserve or sell their rights of reproduction at the bargaining table, royalties legislation would, in effect, replace the negotiation process for the artist.

An alternative to resale royalties legislation is to incorporate the residual right into a private sales agreement. The "Artists' Reserved

---

performed by a private organization, and that a government body should control the filing of sales. Sherman, *supra* note 3, at 77. It is even contended that an organization, along the lines of ASCAP, *see infra* note 102, survey art ownership and enforce the residual right. Hauser, *supra* note 3, at 112.

[100] Boyers, *supra* note 3, at 151-61; Hauser, *supra* note 3, at 2; Sheehan, *supra* note 2, at 152.

[101] As an overall guideline for the administration of a residual right in the art market, Professor Price suggests:

> (1) the workings of the marketplace should be improved so that voluntary action rather than continuous government intervention will produce the desired results; (2) legislative policies are better if more rather than fewer citizens are benefitted; (3) cost and administrative convenience are significant considerations; (4) legislation should disorder existing arrangements as little as possible.

Price, *supra* note 2, at 1352.

[102] ASCAP is a non-profit performing rights organization which protects its members from copyright infringement occasioned by unauthorized non-dramatic public performances of their works. The organization also issues licenses to perform copyrighted works.

[103] Boyers, *supra* note 3, at 129, 151-61.

[104] Brenner, *supra* note 2, at 98.

[105] Fabe, *supra* note 2, at 97.

[106] *Id.*

Rights Transfer and Sale Agreement," frequently referred to as the "Projansky contract,"[107] has been offered as a model for such an agreement. The Projansky contract gives the artist a fifteen percent royalty on profits realized by a seller.[108] It reserves for the artist the following rights: (1) to be notified of, and consent to, the work's exhibition,[109] (2) to receive one-half of any income the buyer may earn from rental of the work,[110] (3) to borrow the work for exhibition,[111] (4) to be consulted regarding any restoration,[112] and (5) to reproduce and copy the work.[113] Further, the contract contains a covenant that the purchaser will not destroy, damage, alter, modify or in any way change the work.[114] In return, the artist agrees to authenticate the work for future buyers.[115] Finally, the contract provides for notification to the artist upon any subsequent transfer of the work.[116] This establishes a record of ownership.

A contract between artists and dealers, collectors or publishers is desirable because it sets a framework for negotiations and provides flexibility for determining terms beneficial to the parties. In practice, however, terms as favorable to the artist as those of the Projansky contract are unlikely. The fine artist simply lacks sufficient bargaining power.

Moreover, a contract may never be finalized because buyers may incur substantial risk in contracting with artists. Contracts generally require privity between the parties. Although there is privity between the artist and initial purchaser, such privity does not extend to subsequent purchasers unless they have notice of the artist's continuing interest in the piece and have agreed to assume contractual obligations.[117] In order for the initial purchaser to convince a subsequent

---

[107] This contract was devised and published by New York attorney Robert Projansky and artist Seth Seiglub. *See* Projansky, *The Right of Artists*, JURIS DOCTOR, June 1974, *reprinted in* A GUIDE TO THE CALIFORNIA RESALE ROYALTIES ACT 23 (Price & Sandison eds. 1976), *and in* J. MERRYMAN & A. ELSEN, *supra* note 3, at 4-143 to -156 [hereinafter cited as Projansky contract].

[108] Projansky contract, *supra* note 107, art. 2(b).

[109] *Id.* art. 7.

[110] *Id.* art. 11.

[111] *Id.* art. 8.

[112] *Id.* art. 10.

[113] *Id.* art. 12.

[114] *Id.* art. 9.

[115] *Id.* art. 6. The artist maintains a file of every transfer of his piece.

[116] The collector must file a record of transfer to notify the artist of his right to claim payment. *Id.* art. 2(a). In the event of resale, the seller executes and files with the artist a transfer and sale agreement, signed by the transferee. *Id.* art. 2(b). The contract includes a restraint upon the subsequent sale to anyone who will not agree to assume the terms of the contract. *Id.* art. 5.

[117] This rule is analogous to covenants in a lease which run between lesser and lessee. Liability for breach of covenant can rest either upon privity of contract or privity of estate. Even after

one to assume these obligations, it may be necessary to offer the work for a lower price. As a result, initial purchasers may hesitate to deal with artists who demand such contracts.[118]

Finally, as with current royalties legislation, payment under the Projansky contract depends upon the seller's good faith. There is no outside agency to assist the artist in making a claim against the seller. Therefore, even if the artist can obtain such a contract he still faces the practical impediments of effective compliance and enforcement of the contract.

Despite the above obstacles, private contracts are a desirable goal for visual artists and may become effective in ensuring a royalty in the event that adequate legislation is not forthcoming. However, widespread use of such contracts must await industry recognition and acceptance. To that end, artists must utilize the power they wield in the market: successful artists must continue to demand contracts while artists' associations must encourage greater use of contracts and endorse advantageous terms for artists.

VII. Conclusion

The efficacy of resale royalties legislation may be belied by the realities of the art market. Before effort and money are expended to enact more legislation, further study of market trends and dynamics is necessary. The art market may be ill-suited to absorb artworks encumbered with a residual right. Enforcement of such a right may severely limit free transferability in an already stagnant market. Furthermore, the espoused goals of the legislation should not camouflage the true effects. Resale royalties legislation is not a vehicle to buttress the general welfare of struggling artists. A royalty will confer upon the successful visual artist some amount of recognition comparable with societal recognition of his creation. At the present, it seems that

---

assignment, the initial lessee can remain liable on the contract as a surety. However, the transferee of a leased property is obligated to perform express promises as long as:

(a) the promise creates a burden that touches and concerns the transferred interest;
(b) the promissor and promissee intend that the burden is to run with the transferred interest;
(c) the transferee is not relieved of the obligation by the person entitled to enforce it; and
(d) the transfer brings the transferee into privity of estate with the person entitled to enforce the promise.

Restatement (Second) of Property § 16.1(2) comment a (1976).

The royalty payment can be analogized to covenants in a lease to pay rent or tax and, as such, would run with the painting to subsequent transferees. *Id.* comment b, illustrations 9, 10.

[118] Other problems are as yet unresolved. Royalty contracts are rare and still untested as to the question of inheritance of artworks subject to a contract and the question of a museum's recourse against an artist who may borrow his piece at will.

resale royalties are justifiable only as a symbolic gesture to the visual artist. Perhaps this warrants some degree of hardship on the market.

If resale royalties legislation is ultimately deemed justified in its goal and means of achievement, artists necessarily must enter the process of enforcing the royalty to establish the residual right as a permanent feature of art sales. Whether through private contracts or through registration with a government agency, a residual right can become useful only when the visual artist asserts and demands such protection. Because of the artist's weak position as a single voice in the market, a non-profit organization, similar to ASCAP, is necessary to harness the collective power available to fine artists in the art market. With the combined effort of the art community and increased legislation, in time, resale royalties may become an accepted practice in the trade, leading to more equitable treatment of the visual artist and appreciation of his role in society.

Carol P. Glucksman