Clause of the United States Constitution should compel Congress to provide visual artists with a right to resale royalty. I hope some of you will join me in the effort to persuade our elected representatives to restore the resale royalty provision to the Kennedy Bill when it is reintroduced in the 101st Congress this year.

IV. THE CASE AGAINST AN AMERICAN *DROIT DE SUITE*

GILBERT S. EDELSON*****

A. *Introduction*

The "Visual Artists Rights Act of 1987,"[211] introduced in the 100th Congress by Senators Kennedy and Kastan, had three principal components: (i) a provision exempting visual artists from the copyright notice requirement, (ii) a grant of "moral rights" to visual artists, and (iii) provisions for a "resale royalty" of seven percent of the profits derived from the resale of artwork to be paid to the artist, or to the artist's estate, within fifty years of the artist's death.[212] This latter provision was coupled with a requirement that all art sales covered by the bill be publicly registered in the Copyright Office.

During the hearings on the Bill, it became apparent that there was widespread support in the visual arts community for both the "moral rights" provision and for the elimination of the copyright notice,[213] but that the community was sharply divided on the "resale royalty" and the public registration of sales.[214]

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211 Visual Artists Rights Act, *supra* note 2. *See also* Markey Bill, *supra* note 53. These are not the first attempts to introduce legislation in Congress providing for payment of a "royalty" to artists on the resale of their works. In 1978, Congressman Henry A. Waxman of California introduced similar legislation. H.R. 11403, 95th Cong., 2d Sess. (1978).

212 *See generally id.*

213 *See Hearings on S. 1619*, *supra* note 6.

214 *Id.*

> As a number of studies have shown, one effect of the resale proceeds right is to depress the primary market for contemporary art. . . .
>
> The proposition that the right favors the few artists at the expense of many seems irrefutable
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> [but] S. 1619 contains other important provisions. I . . . urge your support for the proposal to remove the requirement of copyright notice. I also favor the proposal to create rights of paternity and integrity in the artist . . . .

Id. at 83 (statement of John Henry Merryman, Professor of Law, Stanford University, Chairman, Visual Arts Division of the American Bar Association's Forum on the Entertainment and Sports Industries).

Following the hearings, the Bill was changed, amending the "moral rights" component, eliminating the "resale royalty," and mandating a study on its feasibility.[215] The Bill was not enacted, but has since been re-introduced by Senator Kennedy in the 101st Congress, and is referred to as the Kennedy Bill.[216]

The enactment of enabling legislation for adherence to the Berne Convention[217] accomplishes the elimination of the copyright notice requirement. Additionally, little controversy remains over the "moral rights" concept. Thus, the focus of this Article is on the issues surrounding the "royalty"— issues which have divided the art community.

Proponents of the controversial "resale royalty" concept argue that it will help artists in a number of ways.[218] The resale royalty provides artists with a continuing financial interest in their work similar to that now enjoyed by composers and authors, who are entitled to royalties from the sale of their copyrighted works.[219] Furthermore supporters assert that it is inequitable for the profits from a work's appreciation in value to accrue solely to the collector-purchaser when the artist is responsible for the creative element of art, the element which gives the work its financial value.

Why then would anyone seriously concerned about the welfare of artists oppose legislation so plainly beneficial to their interests? This portion of the symposium addresses the reasons for opposing the "resale royalty." It argues that the superficial appeal of this notion cannot withstand closer scrutiny. The term "resale royalty" is a misnomer; the proposal is essentially calling for mandatory profit-sharing, and constitutes a discriminatory surtax on the profit from the sale of those works of art to which it applies. A surtax on a product necessarily inhibits its sale, with

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215 Kennedy Bill, *supra* note 34.

216 *Id.*

217 Berne Implementation Act, *supra* note 37; Berne Convention, *supra* note 38.

218 *See generally* Professor Goetzl's discussion favoring the resale royalty, *supra* notes 142-82 and accompanying text.

219 17 U.S.C. §§ 102, 106-118 (1982 & Supp. V 1987).

> The resale proceeds right (in French, *droit de suite;* in German, *Folgerecht*), like the copyright, is a patrimonial or property right of the artist, not a right of personality. It does not apply to the "primary market"—that is, to transfers of works by the artist who created them. But subsequent transactions (sometimes referred to as the "secondary market") are subject to the artist's right to share in the proceeds. Thus if Artist sells a painting to Collector, and Collector then sells it to Museum, the Collector-Museum transaction may, depending on the applicable law and the facts, be subject to the proceeds right.

MERRYMAN & ELSEN, *supra* note 122, at 213.

consequent damage to the seller of the product, which, in this case, is the artist. After all, a dealer/collector who knows he will eventually pay the artist a "resale royalty" will try to include that amount in the initial purchase price the artist receives. Furthermore, because only a minute percentage of the works of art created appreciate in value, only a very small number of artists will benefit from resale profit sharing. This discussion concludes that the overwhelming majority of artists would be harmed by legislation which gives them nothing and makes their work more difficult to sell.

B. *The True Nature of the "Resale Royalty"*

A royalty is compensation paid to a creator, owner, or copyright holder for permitting another to use or sell his property.[220] It is payable to creative artists for the authorized use of their works whether or not the user, be it a book publisher, music publisher, or play producer, makes a profit or suffers a loss.[221] There is a plain distinction between the sale of a book, created for distribution in multiple copies, for which each copy generates a royalty for the author, and the sale of a work of art. Where an author or composer creates a work for multiple distribution, the royalty unit is low. In contrast, visual artists generally create and sell a unique work for a one-time sale at a significantly higher price. When artists create paintings or sculptures, they rely on compensation from the single sale as opposed to royalties from reproductions of that work, as is the case with books, music, and plays. There is, therefore, a basic difference in the creative product and the manner in which the profit is to be realized.

It is argued that visual artists should be placed on a par with composers and writers who enjoy a continuing financial interest in the profits obtained from their work through the receipt of royalties.[222] But this is a false analogy. Unlike the composer or writer, the visual artist's compensation is based upon the profit from the first sale of the single work.

In sum, the "resale royalty" has nothing to do with the royalties for use contemplated by the copyright law—it is essentially

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[220] *See, e.g.*, 17 U.S.C. §§ 115, 116, and 801 (1982 & Supp. V 1987)(on the purpose and responsibilities of the copyright royalty tribunal).

[221] The royalty was included in the 1987 version, Visual Artists Rights Act, *supra* note 2, § 3, but was deleted from the 1988 Bill. Kennedy Bill, *supra* note 34.

[222] *See, e.g.*, Visual Artists Rights Act, *supra* note 2. "I think it is fair and just that a visual artist be allowed a continuing moral and economic interest in his or her work, just as literary and musician artists have in theirs." *Hearing on S 1619*, *supra* note 6, at 65 (statement of Robert Mangold, artist, Washingtonville, New York).

compulsory profit sharing. The term "resale royalty" is an Orwellian misuse of language, which confuses the argument, conceals the true nature of the proposal, and enables false analogies to be drawn between works of visual art and other works.

Let us, then, as lawyers and legal scholars be precise in our language. Let us stop using a misleading term. Let us, instead refer to the "resale royalty" according to its true nature, compulsory profit sharing.[223]

C. *The Policy Arguments Against Compulsory Profit Sharing*

The arguments against compulsory profit sharing are that it benefits only a few, is harmful to most, is unworkable, and has created more problems than it has solved.

The first, and most important need of every artist is a financial one—to be able to work and live in dignity from the income earned from the work which the artist creates. History and experience show that this basic need can be met only where there is a lively art market, since artists are dependent upon collectors for their primary source of income. The test of any proposal for improving the economic condition of artists is whether it furthers this primary need.

The economics are simple and ineluctable. Incentives which induce collectors to purchase single works of art or to form collections stimulate the art market, and thereby benefit artists. When disincentives are created, however, the art market and individual artists are harmed. The first important reason for opposing compulsory profit sharing is that it serves as a major disincentive for collectors and potential collectors to purchase works by living artists.

An artist's work appreciates in value because the demand for that work and for other works by that artist increases among collectors, thereby creating an active resale market. But most art declines in value. This proposition, which is not immediately obvious—and which would seem to be contradicted by the publicity surrounding a small number of sales of works of art at astonishingly high prices—becomes clearer when placed in a historical context. There were approximately 30,000-50,000 or more artists at work in Paris at the turn of the century when Paris was the

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[223] Paul Johnson has written, "beware of those who seek to win an argument at the expense of the language. For the fact that they do so is proof positive that their argument is false." P. JOHNSON, ENEMIES OF SOCIETY 259 (1977). Where an argument is founded upon misuse of the language and false analogy, one is justified, at least, in viewing the argument with suspicion. And that suspicion is justified here.

center of the art world. But the works of only a very small number—perhaps two dozen—of those artists have appreciated in value over the years. This remains true today. The works of only a very small number of living artists have, or are likely to, increase in value. A recent study at the Stanford University Law School indicates that less than one quarter of one percent of all living artists have active resale markets for their work.[224] Not surprisingly, those artists are well-known and successful artists and will be the sole beneficiaries of compulsory profit sharing.[225]

Most artists in this small, successful group already benefit from their works' appreciation in value in the secondary market. Artists generally have an inventory of unsold works. This inventory develops because artists at the beginning of their careers are usually unable to sell all the works which they create. Even where a young artist has a lively market and can earn a good income from sales, artists frequently retain work as an investment for the future. In addition, established artists whose work has appreciated in an existing secondary market, will attain significantly higher prices for their newly created works. For example at the beginning of his career, the work of Willem deKooning sold for a few thousand dollars. Now those works sell for millions of dollars. Accordingly, newly created works by deKooning bring substantial prices, which reflect the appreciation in value of his works in the secondary market.[226]

It is clear, then—and conceded by the proponents of compulsory profit sharing—that the proposal will benefit only a very small group of successful artists. But, these proponents argue, there is nothing wrong with making the well-off even better-off. They draw an analogy between artists and writers, and argue that successful artists, like successful writers, should share in the profits from future sales. But that analogy, for the reasons previously stated, is erroneous. There is, of course, nothing intrinsically wrong with improving the status of the well-off. But there is a real problem when the price of making the well-off better-off is to make the least well-off worse-off. This is the effect of compulsory profit sharing.

In essence, compulsory profit sharing is a discriminatory tax.

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224 *See* MERRYMAN & ELSEN, *supra* note 122 at 229.

225 *Id.*

226 Many established artists—those who have experience in the art market and understand the effect of resale prices and appreciation—oppose compulsory profit sharing. Indeed, a substantial number of artists who would most directly benefit from adoption of compulsory profit sharing have asked the Congress not to adopt such a measure.

The proposal would add a seven percent surcharge to the existing twenty-eight percent capital gains tax on sales of works of art,[227] which would be paid to the artist or the artist's estate. The surcharge amounts to a twenty-five percent increase in the existing tax on the profit from sales of those works of art covered by the proposal—a total of thirty-five percent of the profit. The notion that a discriminatory, twenty-five percent increase in the tax on the profits from the resale of certain works of art, would not have a detrimental effect on sales of the works subject to the additional tax, ignores reality.

An example will demonstrate the point: Let us assume that a tax surcharge of an additional seven percent is added to the present twenty-eight percent capital gains tax on the profit from the sale of newly issued securities, for a total thirty-five percent tax rate.[228] Assume further that the existing law is changed to deny owners of newly issued securites a tax loss when such securities are sold at a loss, as is now the case with works of art.[229] Is there any doubt that there would be a substantial adverse effect on the sale of those newly issued securities because of the increased tax on profits? Similarly, a tax rate on profits for the resale of certain works of art which is twenty-five percent higher than the rate on other works, and twenty-five percent higher than the capital gains rate will adversely affect the sale of art. The increased tax is a disincentive to collectors of contemporary art, who already take a significant economic risk when they purchase the work. The incentive is to acquire works of art which are not subject to the tax surcharge is thus removed.

Proponents of compulsory profit sharing, some of whom view the art market in terms of the class struggle, are not disturbed by this disincentive. Art collectors are frequently wealthy persons who, they argue, can well afford the additional tax mandated by compulsory profit sharing. But it is one thing to argue that a customer can afford something; it is quite another to get the customer to agree to an additional tax payment. One does not induce collectors to purchase art by making the process more difficult.

Some proponents argue that an additional seven percent tax on resale profits will not deter those collectors who acquire art because of the psychic reward the art engenders. They have said

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227 26 U.S.C. § § 1, 1201-51 (1982 & Supp. V 1987).
228 *Id.*
229 *Id.*

that the art market might, in fact, be better if those who acquire art for profit are prevented from doing so. This is true to some extent; a surtax in the form of compulsory profit sharing might drive some away from the contemporary art market while other collectors would not be significantly deterred. No one claims that compulsory profit sharing will completely destroy the contemporary art market. What it will do, however, is inhibit the sale of new works. Practically speaking, it will affect those sales which are now most difficult to make—sales of works by younger, less established artists—to whom the loss of a few sales each year can make a significant difference in their standard of living.

Experience also shows that compulsory profit sharing is unworkable. The California Resale Proceeds Right Law,[230] enacted in 1976, was followed by an immediate down-turn in the local art market.[231] It is well known that the law has been widely evaded over the years, allowing the California art market to recover to a great extent, particularly in Los Angeles.[232] Nonetheless, actual damage did result from California's Resale Royalty law.

Compulsory profit sharing, *droit de suite*, was first enacted in France in 1920, and revised in 1957.[233] Since then, it has become law in a number of other countries, including Italy, Brazil, Belgium, Poland, and West Germany.[234] None of these countries is known today for its thriving contemporary art market. Paris, once the center of the world art market, particularly in contemporary art, has lost its standing.[235] It is noteworthy, however, that the most vital art markets are in the United States and England where the *droit de suite* has not been enacted. Surely, this is not entirely coincidental.

The compelling evidence is that wherever compulsory profit

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230 CAL. CIV. CODE § 986 (West 1982 & Supp. 1989).

231 Sotheby's, a major international auction house, closed its Los Angeles branch as a result of the decline in consignors' sales of contemporary art, which coincided with the passage of the law. California was thus deprived of the presence of a major auctioneer, which is of great importance to the dynamics of any art market. *Hearing on S. 1619*, *supra* note 6, at 305 (remark of Michael L. Ainslee, President, Sotheby's Holdings, Inc).

232 *See id.* at 291 (supplemental statement of R. Frederick Woolworth, President, Art Dealers Association of America, Inc.). The public registration requirement in S. 1619 is designed to combat evasion, and presumably results from the experience in California.

233 Loi de 11 Mars 1957, *supra* note 10.

234 Other countries which have royalties for artists are Uruguay, Turkey, Portugal, Tunisia, Chile, Luxembourg, Czechoslavakia, Yugoslavia, Morocco, and Algeria. *See Hearing on S. 1619*, *supra* note 6, at 311 (supplemental statement of R. Frederick Woolworth, President, Art Dealers Association of America, Inc.).

235 It may be argued that there is no evidence that the decline in the French art market was a result of the *droit de suite*, and that the decline can be attributed to post-World War II economic conditions in that country. That argument does not explain the contrast between the French market and the contemporaneously rising English market.

sharing has been enacted it has invited evasion, non-compliance, and fraud. The concept has not worked.[236] Another very substantial problem with the Kennedy Bill is the public registration requirement it imposes on sales of works of art.[237] Many art buyers value their privacy. Whether it be for security reasons or because they wish to preserve their right of privacy, they do not want their private transactions placed on the public record. Indeed, many citizens are deeply concerned about the impact that computerized government records will have on their private lives and transactions. There can be no question that the public registration requirement will add substantially to the disincentive provided by compulsory profit sharing.

D. *Conclusion*

The *droit de suite* represents a victory of ideology over economic common sense. However well intentioned, compulsory profit sharing does more harm than good. Over the years, artists, dealers, museums and collectors have made the United States the world center for contemporary art. They have done so almost entirely without government assistance. Government intervention in any market has its risks, especially where the government acts from motives other than the protection of the general public. Compulsory profit sharing is not designed to benefit the general public and it is counter-productive to the interests of the art community.

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236 A further argument is made by Stephen E. Weil:

> The most serious economic problem facing most contemporary artists is the lack of any broad initial market for their work. . . . What would benefit these artists most is an increase in the funds available to purchase works of art. This is the basic flaw in the resale royalty. It does not seek to increase these funds [but] by imposing a discriminatory tax on contemporary art, it would reduce such funds.

Weil, *Resale Royalties: Nobody Benefits*, ARTNEWS, Mar. 1978, at 58, 62.

237 Kennedy Bill, *supra* note 34, at § 4.