NOTE

ROYALTIES TOO?: EXPLORING RESALE ROYALTIES FOR NEW MEDIA ART

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INTRODUCTION

In 2002, the Solomon R. Guggenheim foundation acquired two new works of art to display in its gallery.[1] As part of the purchase agreement, the artists, Mark Napier and John Simon, agreed to award the Guggenheim museum exclusive rights to access, display, and perform maintenance upon the works.[2] This agreement would seem unremarkable. However, the Guggenheim's acquisition made national news[3] because the artworks the museum acquired did not exist in the real world. Instead, Napier's "net.flag" and Simon's "Unfolding Object" are pieces of Internet art, residing on the Guggenheim's servers, but accessible to the public through any internet-capable device.[4]

"Unfolding Object" and "net.flag" are examples of new media art, or art that uses media technology to interact with its audience.[5] "Net.flag," for example, allows users to digitally alter the image of a flag by providing them with the tools to integrate elements from international flags into the flag design.[6] The work is meant to cause users to think "about whether it is possible to stake a claim in cyberspace, where there are no boundaries."[7] Whether or not it is possible to stake such a claim, the Guggenheim Museum tried to do so when it purchased this piece from Napier for between $10,000 and $15,000.[8]

New media artwork presents a number of unique challenges for museums and galleries. As one commentator put it, "How do you collect art that exists everywhere—and yet nowhere—in cyberspace? What does one acquire when there is

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1 Matthew Mirapaul, *Getting Tangible Dollars for an Intangible Creation*, N.Y. TIMES, Feb. 18, 2002, at E2.

2 Brooke Oliver, *The Artist's Perspective in the Acquisition, Exhibition, and Preservation of New Media Works*, *in* LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 161, 167–68 (Joint Comm. on Continuing Legal Educ. of the Am. Law Inst. & Am. Bar Ass'n 2005).

3 *See, e.g.*, Mirapaul, *supra* note 1 (discussing the Guggenheim's acquisition).

4 *Net.flag—A Flag for the Internet*, SOLOMON R. GUGGENHEIM MUSEUM, http://webart.guggenheim.org/netflag/ [http://perma.cc/9E76-ERHH]; John F. Simon, Jr., *Unfolding Object*, SOLOMON R. GUGGENHEIM MUSEUM (2002), http://webart.guggenheim.org/unfoldingobject/ [http://perma.cc/CM4X-7R47].

5 *See* Oliver, *supra* note 2, at 163, 167–68. Subcategories of new media art include audio art, computer art, digital art, electronic art, generative art, hactivism, interactive art, Internet art, performance art, robotic art, software art, video art, and video game art. *Id.* at 166.

6 *See Net.flag—A Flag for the Internet*, *supra* note 4.

7 Mirapaul, *supra* note 1.

8 *Id.*

no tangible object to possess?"[9] Today's galleries have devised a number of strategies to sell digital art exclusively. Galleries often sell new media art in limited edition CDs and DVDs, accompanied by the artist's signature and a certificate of authenticity.[10] Although such limited edition prints can be copied, the copies have no resale value.[11] Alternatively, a gallery might sell shares to artist collectives, sell downloadable editions, or offer pay-per-view sales options.[12] Sometimes, though, new media artists prefer that their works be freely distributed online.[13] As John Ippolito, an assistant curator at the Guggenheim involved in the acquisition of "net.flag" put it, "Many of the artists who engaged in the Internet early on claim they did so as a reaction against the greed- and profit-driven art market of the 1980s."[14] Many new media artists choose to protect their artworks with limited "copyLeft" licenses that allow subsequent modifications, but preclude conversion into proprietary work.[15] Contracting to purchase and sell new media art, then, may be especially burdensome for galleries because contract terms must vary widely with artist preference.

Museums face similar complications acquiring new media art for display. Museums must often choose whether to acquire display rights only, or to purchase exclusive control over the source code.[16] Both options pose challenges. For example, source code must be updated as technology changes.[17] If the artist agrees to do the upkeep and allow the museum "link-through" display rights only, the maintenance may pose a continuing financial burden on the artist.[18] If the museum agrees to maintain the work, though, it may be difficult for the artist to relinquish control. About cessation of control of "net.flag" to the Guggenheim, Mark Napier said, "There's a definite tug for

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9 *Id.*

10 Kristina Mucinskas, Note, *Moral Rights and Digital Art: Revitalizing the Visual Artists' Rights Act?*, 2005 U. ILL. J.L. TECH. & POL'Y 291, 295–96 (2005).

11 *Id.* at 296.

12 *Id.*

13 *Id.*

14 Carly Berwick, *The New New-Media Blitz*, ART NEWS (Apr. 1, 2001), http://www.artnews.com/2001/04/01/the-new-new-media-blitz/ [http://perma.cc/JJ5L-VSHK]; Mirapaul, *supra* note 1, at E2.

15 Oliver, *supra* note 2, at 176.

16 *Id.* at 167–68.

17 Mirapaul, *supra* note 1 ("'With Internet art, it is only a question of time before there will have to be changes to the code.'").

18 Oliver, *supra* note 2, at 168. Artists maintaining a new media artwork must manage and pay for regular virus scans, hacking protection, server space, maintenance of computer equipment, and Internet access, all of which can prove quite financially demanding over time.

me. It's like the male version of an umbilical cord."[19] On the other hand, relinquishing maintenance control may make it possible for a new media artwork to outlive a digital artist—a rare possibility.[20] Further, whether or not to acquire an artwork's source code is not the only issue. It can be difficult to define the boundaries of an "original" work for purposes of acquisition because new media art incorporates user interaction.[21] Acquiring preexisting works already released also poses a challenge, especially if they have been released under "copyLeft" licenses or other unconventional licenses of the kind.[22]

Despite the fact that new media art poses challenges for museums and galleries, it is an expanding discipline.[23] As early as the 1960s and 70s, artists had begun experimenting with computers as a tool to generate unique images.[24] In 1966, a group of artists formed a collective called Experiments in Art and Technology (EAT) with the goal of encouraging collaborations between artists and engineers.[25] EAT attracted high-profile members such as Andy Warhol, Robert Rauschenberg, and John Cage.[26] Also around this time, a few museums began to add multimedia works to their collections.[27] However, new media art did not gain significant attention in the mainstream art community until the 1990s.[28] The 1990s saw an explosion of new media artworks, due in large part to innovations in and increased accessibility of film technology.[29] Today, the use of digital tools to create art is becoming more and more com-

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19 Mirapaul, *supra* note 1.

20 *Id.*

21 Oliver, *supra* note 2, at 166.

22 *Id.*

23 Mucinskas, *supra* note 10, at 295 ("Despite uncertainty in the sale, display, and conservation of digital art, the mainstream art community's interest in digital art is increasing."); Berwick, *supra* note 14 ("Digital art—in all its forms—is gaining prominence among artists, curators, and audiences.").

24 Mucinskas, *supra* note 10, at 292–93.

25 *Id.* at 293.

26 *Id.*

27 The Art Institute of Chicago acquired George Segal's sculptural and film work "The Truck" in 1966. Lisa Dorin, *"Here to Stay": Collecting Film, Video, and New Media at the Art Institute of Chicago*, 35 ART INST. CHI. MUSEUM STUD. 6, 6 (2009). Les Levine's "Iris" and Dan Graham's "Two Correlated Rotations" were two additional early audiovisual works to be collected by major museums. They were acquired by the Philadelphia Museum of Art in 1968 and London's Tate Gallery in 1973 respectively. *Id.* at 6 n.1.

28 *Id.* at 7 ("Compared to the boom that occurred in the following decade, most museums made relatively few film and video acquisitions in the 1980s . . .").

29 *Id.*

mon.[30] Many art schools now have departments dedicated entirely to the study of audiovisual art.[31]

New media art seems to be here to stay. Perhaps because acquiring new media art can be complex, though, or because digital artwork disrupts prototypical conceptions of "art," new media art is often forgotten. Notably, new media art has been overlooked in a number of recent Congressional bills calling for resale royalty rights for visual artists.[32]

The notion of awarding resale royalties to visual artists is not a new idea. Although resale royalties have been available to visual artists in France for nearly a century,[33] the issue first gained recognition in the United States in the 1970s after a widely publicized confrontation between artist Robert Rauschenberg and collector Robert Scull.[34] Rauschenberg had sold a painting entitled "Thaw" to Scull for $900.[35] Several years later, in 1973, Rauschenberg attended a New York auction where he witnessed the same painting sell for $85,000.[36] Rauschenberg, enraged, confronted Scull, exclaiming, "I've been working my ass off for you to make all that profit."[37] A nearby camera caught the incident on film, and the confrontation subsequently gained widespread notoriety.[38]

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30 *See supra* note 23 and accompanying text.

31 The Art Institute of Chicago established its Art and Technology department in 1972, and many institutions have since followed suit. Dorin, *supra* note 27, at 6.

32 For example, the American Royalties Too Act of 2015, the bill most recently introduced to Congress on the subject of resale royalties, would limit resale royalties to works that can be defined as "a painting, drawing, print, sculpture, or photograph . . . ." American Royalties Too Act of 2015, H.R. 1881, 114th Cong. § 2(4) (2015). The Equity for Visual Artists Act of 2011, the previous bill attempting to establish a resale royalty right for American visual artists, contained the same restriction. Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011). This definition borrows language from the Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 608(b), 104 Stat. 5089, 5128 (1990) (codified as amended at 17 U.S.C. § 106A (2015)). According to the comments of Mr. Moorhead, a supporter of the Visual Artists Rights Act, the "extremely narrow" definition of visual art was necessary to ensure that excluded "industries (motion pictures, magazines, newspapers, etc.) could [not] be held liable under section 106A for the manner in which they depict, portray, reproduce, or otherwise make use of such a work." 136 Cong. Rec. 36950–51 (1990). Likely, unable to anticipate the rise in popularity of new media art and worried about potential misuse of the Act, Congress created a definition of visual art that was over-narrow.

33 Toni Mione, Note, *Resale Royalties for Visual Artists: The United States Taking Cues from Europe*, 21 CARDOZO J. INT'L & COMP. L. 461, 464 (2013).

34 Michael B. Reddy, *Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L. REV. 509, 520–21 (1995).

35 Mione, *supra* note 33, at 462.

36 *Id.*

37 *Id.*

38 *Id.*

As the Rauschenberg incident demonstrates, the notion of a resale royalty right, known in France as the *droit de suite*, stems from the idea that artists do not benefit from copyright law to the same extent as authors.[39] Where authors might sell thousands of copies of a book and derive royalties from each sale, visual artists typically produce and sell only one original artwork.[40] If the artwork's value appreciates over time, the artist receives no pecuniary benefit beyond that original sale. Arising as a sort of hybrid moral and economic right, the right to resale royalties for visual artworks developed in France to allow fine artists to benefit from copyright law to the same extent as authors, and to facilitate a continuing moral connection between the artist and her work.[41]

In recent years, no fewer than six bills have been introduced to Congress that aimed to establish resale royalty rights for American artists.[42] The most recent bill, the American Royalties Too Act, died because of a "'quirk of parliamentary procedure'" when the 113th Congress left office,[43] but it was subsequently reintroduced on April 16, 2015.[44] Additionally, the international community is increasingly embracing the *droit de suite*.[45] Likely, the resale royalties debate will continue in the United States, and the *droit de suite* may even be introduced into the American copyright scheme in the next few years. However, new media art has been excluded from the definition of "visual art" that would qualify for resale royalties in recent bills.[46] Has new media art been correctly excluded?

This Note argues that if and when resale royalties are introduced into the United States federal copyright scheme, new media art should be included in the definition of protected

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39 Reddy, *supra* note 34, at 513.

40 *See id.*

41 *See id.*

42 These bills were: 1) American Royalties Too Act of 2015, H.R. 1881, 114th Cong. (2015); 2) American Royalties Too Act of 2014, S. 2045, 113th Cong. (2014); 3) Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. (2011); 4) Visual Artists Rights Act of 1987, S. 1617, 100th Cong. (1987); 5) Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986); and 6) Visual Artists' Rights Act of 1978, H.R. 11403, 95th Cong. (1978). Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. FORUM 1, 1 & n.3 (2014); American Royalties Too Act, H.R. 1881, 114th Cong. (2015).

43 Jillian Steinhauer, *The ART Act is Dead, but Congressman Will Reintroduce It*, HYPOALLERGIC (Jan. 13, 2015), http://hyperallergic.com/174540/the-art-act-is-dead-but-congressman-will-reintroduce-it/ [http://perma.cc/FR5U-MBWK].

44 American Royalties Too Act of 2015, H.R. 1881, 114th Cong. (2015); American Royalties Too Act of 2015, S. 977, 114th Cong. (2015).

45 *See infra* Part I.B.

46 *See supra* note 32 and accompanying text.

visual art. Part I will review the history of the *droit de suite* abroad and in the United States. Part II will explore arguments for and against the resale royalty right that proponents and critics have advanced in the United States debate. It will then apply the rationales for and against resale royalty rights to new media art, and will conclude that new media art should receive resale royalty rights along with other forms of visual art.

I
A BRIEF HISTORY OF THE *Droit de Suite*

A. The *Droit de Suite*'s Origins: The Doctrine in France

The concept of the *droit de suite* was first developed in an article by Albert Vaunois published in the Cronique de Paris in 1893.[47] By 1903, the Societe des Amis du Luxembourg had formed in Paris for the express purpose of codifying the *droit de suite* into French law.[48] The idea of a resale royalty right quickly became popular after the French press began calling attention to the plight of visual artists by publicizing examples of the stark disparity between artworks' purchase and resale prices.[49] One widely shared drawing showed an auctioneer selling a painting for 100,000 francs while children in rags looked on, saying, "Look, one of Papa's paintings!"[50]

Despite the strength of the public support for a resale royalty right, parliamentary debates were interrupted by World War I.[51] Finally, a *droit de suite* bill was introduced to Parliament in 1918.[52] On May 20, 1920, the President signed it into law.[53]

France's *droit de suite* legislation, codified today in Article L122-8 of France's Intellectual Property Code, grants artists a flat 3% royalty for all "graphic and three-dimensional works" sold above a certain price.[54] Originally, the royalty right was restricted to sales at public auctions, but, in 1957, the statute

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47 Reddy, *supra* note 34, at 515 & n.59.

48 *Id.* at 515.

49 *Id.*

50 *Id.*

51 *Id.* at 516. In fact, Abel Ferry, the legislator who initially sponsored the bill, was killed in the war. *Id.*

52 *Id.*

53 *Id.*

54 CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L122-8, http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations [http://perma.cc/38MU-W5N4].

was amended to apply to all art sales "through a dealer."[55] The right is inalienable.[56]

The French resale royalty system functions with the help of the Association pour la Diffusion des Arts Graphiques et Plastiques (ADAGP), a collective rights management society that boasts the membership of almost 100,000 artists.[57] The organization collects and distributes royalties to its members by obtaining catalogues from auction houses to track public sales of art.[58] ADAGP keeps a portion of the resale royalties it collects to cover administrative expenses, but disseminates the rest to its members.[59] Like the American Society of Authors, Composers and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) in the United States, ADAGP increases the collective bargaining power of artists and allows for efficient administration of artists' royalties.[60] ADAGP has been quite successful in collecting royalties, but it is worth noting that ADAGP collects the majority of its royalties from auction houses rather than private galleries, and that the French art market is heavily centralized in Paris, which decreases administrative burdens for ADAGP significantly.[61]

B. The *Droit de Suite*'s International Reach

In 1921, Belgium followed France's 1920 *droit de suite* statute with a resale royalty statute of its own.[62] Like France, Belgium chose to calculate the royalty based on resale price alone.[63] Czechoslovakia, in contrast, passed a resale royalty statute in 1926 that calculated the artist's royalty as a percentage of the seller's *profit*—that is, the artist received a percentage of the difference between the original price and the resale price.[64] This approach was logically consistent with the rationale behind the *droit de suite*—that artists should benefit from resale profits when their artworks have appreciated—but made the statute "practically impossible" to enforce, because previous sales prices were difficult to monitor.[65] The Czechoslovakian statute created a doctrinal confusion about the optimal

55 Reddy, *supra* note 34, at 516.
56 *Id.*
57 Mione, *supra* note 33, at 465–66.
58 *Id.* at 466.
59 *Id.*
60 *See id.*
61 *Id.* at 466–67.
62 Reddy, *supra* note 34, at 518.
63 *Id.* at 518–19.
64 *Id.* at 519.
65 *Id.*

approach to resale royalties that slowed the progress of the *droit de suite* across the world.[66] Only three additional countries—Poland, Italy, and Uruguay—had enacted resale royalty statutes by 1941.[67]

The *droit de suite* was given new life in 1948, though, when it was added to the Berne Convention as an optional provision.[68] The Berne Convention is an international copyright-law agreement that was first ratified in 1886 and, as of 2007, had been signed by no fewer than 163 countries.[69] The United States initially resisted signing the Berne Convention, in part because the agreement requires signatories to provide certain moral rights to its artists, but, facing pressure to expand protection for United States intellectual property abroad, the United States became a Berne Convention signatory in 1989.[70] Article 14ter of the Berne Convention permits any signatory to pass legislation allowing artists to claim an inalienable "interest in any sale of [an original] work subsequent to the first transfer."[71] A country can claim *droit de suite* protection for its works abroad, though, only if it provides a resale royalty to its own artists.[72] In this way, Article 14ter serves as an incentive for countries to adopt *droit de suite* legislation.[73] There have been numerous attempts to incorporate the *droit de suite* into the Berne Convention as a mandatory right, and Article 14ter was initially passed as an interim compromise between proponents and opponents of the mandatory resale royalty.[74] However, because moral rights protections have increased with every amendment to the Berne Convention, and because the international community is increasingly supportive of *droit de suite* legislation, future amendments to the Berne Convention "will undoubtedly . . . mak[e] resale royalties a compulsory

66 *Id.*
67 *Id.*
68 *Id.*
69 Cassandra Spangler, Comment, *The Integrity Right of an MP3: How the Introduction of Moral Rights into U.S. Law Can Help Combat Illegal Peer-to-Peer Music File Sharing*, 39 SETON HALL L. REV. 1299, 1307 (2009).
70 ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 433 (6th ed. 2012); Spangler, *supra* note 69, at 1307.
71 Berne Convention for the Protection of Literary and Artistic Works, art. 14ter, ¶ 1, May 4, 1896, S. TREATY DOC. No. 99-27 (1986), 1161 U.N.T.S. 3.
72 Mione, *supra* note 33, at 483–84.
73 *Id.* at 484.
74 *Id.* at 483–84.

condition for compliance."[75] Likely encouraged by the inclusion of the *droit de suite* as an optional provision in the Berne Convention, thirty-six countries had afforded resale royalties to visual artists by 1992.[76]

In 2001, the European Commission introduced the EU Resale Right Directive,[77] requiring member states to establish a resale royalty right for artists.[78] Although the Directive allows its members states to establish individual resale royalty laws, it sets certain specific requirements that all legislation must meet.[79] Like the French *droit de suite* law, the Directive limits the availability of the right to "works of graphic or plastic art."[80] It applies to all original works and affords protection for the lifetime of the author and seventy years after his death.[81] The right is inalienable and unwaivable.[82] The Directive requires that the *droit de suite* not apply to works sold for less than _3,000, and sets an inverse rate scale for royalties such that the royalty percentage decreases as the price of the work increases and cannot exceed _12,500.[83]

The Directive came into force on January 1, 2006.[84] At that time, four of the fifteen member states—the Netherlands, Austria, Ireland, and the United Kingdom—did not have any resale royalty system in place.[85] Those four countries were allowed a transitional period to implement the resale royalty right.[86] Despite vigorous resistance by the United Kingdom, the Directive was fully implemented by January 1, 2012.[87]

The United Kingdom—which includes London, "the international center for secondary market sales of both modern and contemporary art"[88]—was initially concerned about imple-

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75 Jennifer J. Wirsching, Comment, *The Time Is Now: The Need for Federal Resale Royalty Legislation in Light of the European Union Directive*, 35 SW. U. L. REV. 431, 445 (2006).

76 U.S. COPYRIGHT OFFICE, *Droit de Suite*: The Artist's Resale Royalty 8 (1992) http://copyright.gov/history/droit_de_suite.pdf [http://perma.cc/PF6J-PXHV].

77 Council Directive 2001/84, arts. 1–2, 2001 O.J. (L 272) 34–35 (EC).

78 Mione, *supra* note 33, at 478–79.

79 *Id.*

80 Council Directive 2001/84, arts. 1–2, 2001 O.J. (L 272) 34–35 (EC). The Berne Convention, in contrast, applies generally to all "original" works. *See supra* note 69 and accompanying text.

81 Council Directive 2001/84, arts. 1–2, 2001 O.J. (L 272) 34–35 (EC).

82 *Id.* at art. 1.

83 Mione, *supra* note 33, at 478–79.

84 *Id.* at 479.

85 *Id.*

86 *Id.*

87 *Id.* at 479–80.

88 Wirsching, *supra* note 75, at 433.

menting the *droit de suite* because it feared that the imposition of an additional royalty would cause major art transactions to move to royalty-free jurisdictions such as the United States and China.[89] However, in 2011, the European Commission helped to alleviate some of those fears when it published the Report on the Implementation and Effect of the Resale Right Directive in compliance with Article 11 of the EU Resale Right Directive.[90] Although the report was methodologically limited—researchers had access to limited data for countries that did not keep meticulous resale royalty records—the Commission found no clear pattern that would "link the loss of the EU's share in the global market for modern and contemporary art with the harmonisation of provisions relating to the application of the resale right in the EU . . . ."[91]

The EU Resale Right Directive "firmly establishe[d] resale royalty rights in the European Union, and in so doing change[d] the art world."[92] With Europe leading the way, resale royalty legislation has expanded rapidly across the globe. Between 1992 and 2013, the number of countries boasting a resale royalty right more than doubled.[93] More than seventy countries afforded artists resale royalties by 2013, including thirteen countries in Latin America and sixteen countries in Africa.[94]

C. Resale Royalties in the United States

Although the United States has not yet enacted federal resale royalty legislation, it has not been absent from the global debate. The state of California has a resale royalty statute that has persisted since the 1970s (although it is currently subject to constitutional challenges).[95] Congress has considered resale royalty bills on multiple occasions,[96] and the Copyright Office has issued two reports on the subject since 1992.[97] Especially

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89 Mione, *supra* note 33, at 479–80.

90 *See Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee: Report on the Implementation and Effect of the Resale Right Directive*, COM (2011) 878 final (Dec. 14, 2011).

91 *Id.* at 10; Mione, *supra* note 33, at 481–83.

92 Wirsching, *supra* note 75, at 433.

93 U.S. COPYRIGHT OFFICE, RESALE ROYALTIES: AN UPDATED ANALYSIS 17 (2013), http://copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf [http://perma.cc/4USM-VDQ5].

94 *Id.*

95 *See infra* Part I.C.1.

96 *See supra* note 42 and accompanying text.

97 *See infra* Part I.C.2.

in light of the *droit de suite*'s recent reception abroad, the United States' resale royalty story is likely far from over.

1. *The California Resale Royalties Act*

Shortly after the Rauschenberg incident,[98] in 1976, California passed the Resale Royalties Act,[99] which established a flat 5% resale royalty whenever a work of fine art is sold for $1,000 or more and the seller resides in California or the sale took place in that state.[100] Under the statute, an artwork is only subject to the royalty if it is "an original painting, sculpture, or drawing, or an original work of art in glass."[101] Unlike under the *droit de suite* statutes abroad, then, new media art is definitively excluded.[102] Further, the resale royalty right is assignable, and the right survives twenty years after the artist's death.[103] Notably, if the resale fetches a lower price than the original sale, the resale royalty right does not attach.[104]

Critics of the California Act have found issue with two main components of the law.[105] First, they argue that the statute places too high of a burden on the seller.[106] Under the Act, art sellers are charged with the duty to withhold the 5% royalty, locate the artist, and pay the artist within ninety days.[107] If the artist cannot be located during that time, the seller must transfer the 5% royalty to the Arts Council, a California state agency dedicated to promoting the arts within the state.[108] If the Arts Council cannot locate the artist within seven years, it can use the funds to aid the general artistic community by acquiring fine art in public buildings.[109] Critics argue that the Act places too much onus on the sellers, who have an incentive to conceal

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98 *See supra* notes 34–38 and accompanying text.

99 CAL. CIV. CODE § 986 (West 2012).

100 Mione, *supra* note 33, at 467.

101 CAL. CIV. CODE § 986(c)(2).

102 Both the EU Directive and France's original *droit de suite* statute provide protection for "graphic and plastic" works which arguably includes new media art. *See supra* notes 52, 78 and accompanying text. The Berne Convention's language is even more inclusive—it extends protection to all "original works of art and original manuscripts of writers and composers." Berne Convention for the Protection of Literary and Artistic Works, art. 14ter, ¶ 1, May 4, 1896, S. TREATY DOC. No. 99-27 (1986), 1161 U.N.T.S. 3.

103 CAL. CIV. CODE § 986(a).

104 *Id.* at § 986(b)(4).

105 Mione, *supra* note 33, at 468–69.

106 *Id.* at 469.

107 CAL. CIV. CODE § 986(a).

108 *Id.* at § 986(a)(2); *Mission, Vision, Values*, CALIFORNIA ARTS COUNCIL, http://www.cac.ca.gov/aboutus/mission.php [http://perma.cc/5F8G-47US].

109 CAL. CIV. CODE § 986(a)(5).

the sale and keep the 5% royalty for themselves.[110] Even if the artist eventually learns of the sale, she must personally sue the seller to collect the royalty.[111] Unaided by a mammoth collection company like France's ADAGP, individual artists may be loath to sue because litigation could be risky, expensive, or harmful to the artist's relationship with the seller.[112]

Second, critics argue that the Act is over-inclusive.[113] The Act applies when works of fine art are "sold at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller."[114] France, in contrast, for many years applied resale royalties only to public sales at auction.[115] With private sales included in California's scheme, critics argue that the Act will be difficult to enforce.[116]

Further, the requirement that the work appreciate and the short duration of the right[117] (copyright, by contrast, generally lasts seventy years beyond the author's death[118]) may unnecessarily complicate the resale royalties scheme, creating enforcement difficulties. Finally, the fact that the royalty right is assignable creates a risk that artists, who may hold reduced bargaining power, will have no choice but to contract away the royalty if they want to make a sale.

Despite these criticisms, there is some evidence that artists have benefitted from the California law. A 1986 survey of artists conducted by Bay Area Lawyers for the Arts (BALA) found that many Californian artists have received significant royalty payments.[119] The same study, however, reported that 32% of artists noted that uncooperative art dealers had refused to give them buyer contact information.[120]

Effective or ineffective, though, the California Resale Royalty Act is under threat of being declared unconstitutional. In 2011, a group of artists filed class action lawsuits in the Central District of California against two auction houses—Christie's and Sotheby's—alleging that the auction houses were systematically denying artists fees under the Resale Royalty

110 *See* Mione, *supra* note 33, at 469.
111 *See* CAL. CIV. CODE § 986(a)(3).
112 Mione, *supra* note 33, at 470.
113 *Id.* at 486.
114 CAL. CIV. CODE § 986(a)(1).
115 *See supra* note 55 and accompanying text.
116 Mione, *supra* note 33, at 468.
117 CAL. CIV. CODE § 986.
118 *See* 17 U.S.C. § 302(a) (2015).
119 *See* Reddy, *supra* note 34, at 523.
120 *Id.*

Act.[121] The auction companies filed a motion to dismiss on the grounds that the Act was unconstitutional under the Commerce Clause.[122] Much to the chagrin of the artists, the court granted the defendants' motion and struck down the Act in its entirety.[123] The court found, under the dormant Commerce Clause doctrine, that because the Act affected interstate commerce by regulating works sold both in and out of the state, California had no authority to promulgate the Act because to do so would encroach on Congress's power to regulate interstate commerce.[124]

The artists appealed, and the 9th Circuit en banc held "that the provision regulating out-of-state sales violates the dormant Commerce Clause but that the provision is severable from the remainder of the Act."[125] The California Resale Royalties Act therefore survives for the moment, but only as applied to in-state sales. "The question will be whether the resolution of this law . . . will affect the art market significantly. In a mobile market, it certainly disincentives [sic] holding sales in California."[126] The Supreme Court recently denied certiorari.[127] "Following the denial of certiorari, supporters of artists' resale rights are declaring victory because the statute, which was struck down by the trial court, survives. Opponents point to the inability to enforce the CRRA outside California as a major win for the auction houses."[128]

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121 Estate of Graham v. Sotheby's, Inc., 860 F. Supp. 2d 1117, 1119 (C.D. Ca. 2012). The artists also sued eBay, but eBay did not take part in the motion to dismiss described *infra* at note 122 and accompanying text. *See* Sam Francis Found. v. Christie's, Inc., 769 F.3d 1195, 1195 (9th Cir. 2014).

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

123 *Id.* at 1126.

124 *Id.* at 1124–25.

125 Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1326 (9th Cir. 2015).

126 Nicholas O'Donnell, *California Resale Royalty Act Ruled Unconstitutional as to Out of State Sales, What Effect on the Market?*, ART LAW REPORT (May 6, 2015), http://www.artlawreport.com/2015/05/06/california-resale-royalty-act-ruled-unconstitutional-as-to-out-of-state-sales-what-effect-on-the-market/ [http://perma.cc/V9BL-VEB7].

127 Sam Francis Found. v. Christies, Inc., 136 S. Ct. 795 (Jan. 11, 2015).

128 Gonzalo Zeballos, *Artists and Auction Houses Declare Victory Over California Artists' Resale Royalties Statute,* COPYRIGHT, CONTENT AND PLATFORMS (Feb. 4 2016), http://www.copyrightcontentplatforms.com/2016/02/artists-and-auction-houses-declare-victory-over-california-artists-resale-royalties-statute/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original [http://perma.cc/65MA-L6UV].

2. *Resale Royalties in Congress*

Since the 1970s, no fewer than six bills have been introduced to Congress that would establish resale royalties for artists.[129] In 1986 and 1987, Representative Thomas Downey, Senator Ted Kennedy, and Representative Edward Markey introduced bills to bring the United States into conformity with the Berne Convention's moral rights requirements, and these bills included resale royalty rights provisions.[130] However, due to vehement opposition to the resale royalty by auction houses and art dealers, the provision was dropped when the bill was reintroduced in 1989.[131] When the Visual Artists Rights Act (VARA) finally passed in 1990, there was no resale royalty provision, but the Act required the U.S. Copyright Office to conduct a study concerning the feasibility of enacting a *droit de suite* in the United States.[132]

In 1992, the Register of Copyrights released its comprehensive report on the *droit de suite*.[133] Although the Register ultimately recommended that the United States not pursue a resale royalty for its artists,[134] it was clear that this advice was not absolute. The report repeatedly emphasized that information collection had been rushed, and that "the Copyright Office lacks sufficient current empirical data about several important facts."[135] Further, the report specifically noted that "[s]hould the European Community harmonize existing *droit de suite* laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its member States."[136] In 2001, the EU did just that.[137]

Perhaps in response to the changing climate abroad, a new resale royalty bill was introduced in 2011.[138] Although ultimately defeated, Congress responded to the bill by asking the Copyright Office to comprehensively review the *droit de suite* issue a second time.[139] The Register of Copyrights released an

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129 *See supra* note 42 and accompanying text.
130 Reddy, *supra* note 34, at 525.
131 *Id.*
132 Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 608(b), 104 Stat. 5089, 5132 (1990) (codified as amended at 17 U.S.C. § 106A (2015)).
133 U.S. COPYRIGHT OFFICE, *supra* note 76
134 *Id.* at 143 ("[T]he Copyright Office is not persuaded that there are legitimate economic interests of visual artists that would be helped by a resale royalty.").
135 *Id.* at 145.
136 *Id.* at 149.
137 *See supra* notes 77–94 and accompanying text.
138 *See* Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. (2011).
139 U.S. COPYRIGHT OFFICE, *supra* note 93.

updated report in 2013.[140] This time, the Register advocated for the introduction of resale royalties legislation into the United States copyright scheme.[141] Armed with the Copyright Office's report, Senator Tammy Baldwin, Senator Ed Markey, and Representative Jerrold Nadler introduced a new resale royalties bill in 2014.[142] The bill died when the new Congress took office, but was reintroduced this year.[143] In the United States, then, the debate seems to be far from over.

II
THE DEBATE—HOW DOES NEW MEDIA ART FIT IN?

As the debate over resale royalty rights rages in the United States, new media art has been all but forgotten. Although new media art would arguably be eligible for resale royalties under most international *droit de suite* legislation,[144] the resale royalty bills introduced to Congress have largely excluded new media art from the royalty right's auspices.[145] Should new media art be excluded from the protection of a future United States resale royalty right? To answer that question, this Note will explore some of the common arguments both for and against the implementation of a *droit de suite* in the United States, and examine the applicability of those arguments to new media art.

A. Arguments in Favor of the Resale Royalty Right

1. *Visual Artists Are Disfavored Under Current United States Copyright Law*

One of the most common arguments for implementing a resale royalty right in the United States is that the introduction of such a right would correct a copyright scheme that unfairly favors authors and composers over visual artists.[146] Where authors, playwrights, and musicians receive royalties whenever consumers buy their books, attend their plays, or play their songs publicly, visual artists cannot expect the same financial rewards when buyers exploit their works after the ini-

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140 *Id.*

141 *Id.* at 65 ("[T]he Office supports legislation as a possible means to address the disparity in the treatment of artists under the current legal system . . . .").

142 Steinhauer, *supra* note 43. This bill was the American Royalties Too Act of 2014, S. 2045, 113th Cong. (2014).

143 *See supra* note 43–44 and accompanying text.

144 *See supra* note 102.

145 *See supra* note 32.

146 Katreina Eden, *Fine Artists' Resale Royalty Right Should Be Enacted in the United States*, 18 N.Y. INT'L L. REV. 121, 139 (2005).

tial sale.[147] Although the 1976 amendments to the Copyright Act gave fine artists the exclusive right to publicly display their works, the first sale doctrine practically ends that right after the original work is sold.[148] Proponents of the resale royalty right argue that the addition of the *droit de suite* would be akin to a compulsory license for artists, which would put visual artists on a level playing field with other content creators.[149]

Critics, however, argue that visual artists are not at a disadvantage. The purpose of copyright, they argue, is to ensure that unauthorized copying does not economically disincentivize artists from creating new works.[150] Fine artists, in contrast to authors, "simply do not suffer from the problem that copyright law mitigates. Because copies are a poor substitute for original visual artworks, free copying does not significantly harm the commercial value of the work."[151]

In the digital world of new media art, however, copies can often be a perfect substitute for the original. In contrast to painters and sculptors, then, new media artists may be disincentivized from creating new art because of the threat of unauthorized copying.[152] As a result, there may be even more reason to incentivize new media artists with a resale royalty right than there is to award such a right to painters and sculptors.

2. *Artists Deserve Special Protection Because of Their Weak Bargaining Position*

Proponents of the resale royalty right also argue that artists are entitled to resale royalties because they have a weak bargaining position and cannot always successfully protect their own financial interests through contract.[153] This argument motivated many initial legislative efforts to enact the *droit de suite*.[154] It is an argument that has been hotly disputed, however. Some studies have shown that artists' lifetime earnings are not significantly lower than the earnings they could

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147 *Id.* at 139–40.
148 Reddy, *supra* note 34, at 533.
149 *See id.* at 534.
150 Rub, *supra* note 42, at 5.
151 *Id.*
152 Although some new media artists are not financially motivated, others are. *See supra* notes 13–15 and accompanying text. Perhaps, too, more new media artists would choose to work in the field if they were afforded resale royalties.
153 Rub, *supra* note 42, at 1.
154 *See supra* notes 34–38, 50 and accompanying text concerning the Rauschenberg incident and the French press.

achieve in non-artistic careers.[155] Further, in the United States, the largest fifty art galleries and dealers generate only 40% of the income in the field, so artists are often dealing with smaller companies that might be on more equal footing.[156]

New media artists, however, are likely in an even weaker bargaining position than more conventional visual artists. Although the field is growing, new media art is still a new and unfamiliar idea to much of the mainstream art world, and its acquisition also poses certain logistical complications for museums and galleries.[157] Buyers may therefore be less willing to contract with new media artists, which places them at a disadvantage relative to their more conventional counterparts. Following this reasoning, new media artists may be more deserving of resale royalty rights than conventional visual artists.

3. *The Resale Royalty Right Incentivizes Additional Artistic Creation*

Because a resale royalty right would ideally afford visual artists additional compensation for their works, the resale royalty may incentivize increased artistic creation.[158] Opponents of the right argue that the uncertain and remote prospect of future resale royalties is not a powerful incentive for artists,[159] but whether or not the incentive effect is large, "the promise of future revenue cannot reasonably be seen as a disincentive to creativity."[160]

Presumably, royalties are awarded to authors of books because the incentive effect of a structured copyright and royalty scheme is larger where unauthorized copying can harm the economic value of a work.[161] Because new media art is also often prone to devaluation as a result of unauthorized copying,

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155 Rub, *supra* note 42, at 2–3, 3 n.8. Rub notes, however, that "empirical research on the question is incomplete." *Id.* at 2.

156 *Id.* at 3.

157 *See supra* Introduction.

158 Eden, *supra* note 146, at 144; Reddy, *supra* note 34, at 536 ("[A] resale royalty . . . gives [artists] an economic incentive to create additional works of art . . . ."); *see also* U.S. COPYRIGHT OFFICE, *supra* note 93, at 40 ("[T]he prospect of a resale royalty—codified in the copyright law—might incentivize visual artists to release more works of art into the stream of commerce, because wider exposure may lead, in turn, to greater popularity and more secondary sales.").

159 Eden, *supra* note 146, at 144 n.142.

160 *Id.* at 144. It is for this reason that a resale royalty right could be established by Congress, which is authorized to enact intellectual property legislation only if it would "promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8.

161 *See supra* notes 150–151 and accompanying text.

royalties may provide additional incentives for new media artists.

4. *Adherence to International Trends Is in the Long-Term Interest of the United States*

The *droit de suite* has become increasingly popular internationally.[162] Although the *droit de suite* is only an optional provision of the Berne Convention, "[t]he one hundred year history of Berne revisions shows a clear and continuing trend toward increased protections for authors, more uniform protections for copyright holders, as well as a steady increase in moral rights provisions for artists."[163] Likely, then, the *droit de suite* will soon become compulsory under Berne. The United States, as a signatory of Berne, will have to enact *droit de suite* legislation or risk losing international protection for its copyrighted works, the exportation of which generate billions of dollars of trade surplus annually.[164] In the interest of international uniformity and economic self-interest, then, the United States should enact its own *droit de suite* legislation.

The United States' interest in international uniformity would be better served by enacting a resale royalty law that includes new media art. International *droit de suite* legislation does not generally exclude new media art from eligibility.[165] By adopting a more expansive definition of "visual art" for purposes of its resale royalty legislation, the United States could better conform its lawmaking to international trends.

B. Arguments Against the Resale Royalty Right

1. *A United States Resale Royalty Right Would Damage the Existing Fine Art Market*

Opponents of the resale royalty right argue that art investors engage in forum shopping, and the imposition of resale royalties in the United States would drive art investors away.[166] This would depress initial prices in the art market, which hurts artists in the long term.[167] Indeed, there is some evidence that

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162 *See supra* Part I.B.

163 Reddy, *supra* note 34, at 544.

164 *Id.* at 543. *See also* Wirsching, *supra* note 75, at 449 ("[I]f and when the Berne Convention makes resale royalties compulsory, any benefit the United States may hope to gain [from refraining from enacting *droit de suite* legislation and] luring the art market to the United States, would be vastly outweighed by the costs of losing copyright protection in all Berne member countries.").

165 *See supra* note 102.

166 Reddy, *supra* note 34, at 527.

167 *Id.*

both California and Paris lost standing in the art market after they introduced the resale royalty right.[168] However, there is also evidence that contradicts this contention. A 1986 California survey reported that 100% of art dealers said that the introduction of the resale royalty had no significant effect on their art sales.[169] France, Germany, and Belgium, countries with extensive experience with the *droit de suite*, have reported no decrease in first sale prices and a steady increase in resale royalty payments.[170] Indeed, the EU's 2011 resale royalties report found no evidence that the *droit de suite* had any impact on the EU's art market.[171]

Perhaps the data are inconclusive because people buy art not just for investment purposes, but for "uniquely personal aesthetic appeal."[172] In other words, buyers may not be forum shopping and depressing initial prices as much as pure economic rationality might dictate. Even if the forum shopping effect truly depresses sales, though, that fact simply strengthens the argument for international uniformity.[173] If the United States enacted a *droit de suite* law, global uniformity would be closer, forum shopping would become less common, "and . . . artist[s] would be able to benefit more fully from the sale of [their] work."[174]

Digital new media art is perhaps especially conducive to forum shopping, because it does not tangibly exist in one location. Perhaps, then, digital new media art should be excluded from a United States *droit de suite* statute so that the United States can avoid pushing the secondary market for digital art sales abroad and losing that sales revenue. On the other hand, perhaps new media art should be included in a United States resale royalty law because its inclusion could promote international uniformity and reduce forum shopping in the long term.

2. *Resale Royalties Benefit Mostly Established Artists*

Critics of the *droit de suite* also argue that the resale royalty right redistributes artist income so that more established

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168 Eden, *supra* note 146, at 151–52.

169 Reddy, *supra* note 34, at 528.

170 Eden, *supra* note 146, at 149.

171 *See supra* notes 90–91 and accompanying text; *see also* Wirsching, *supra* note 75, at 447 ("European nations currently with resale royalty rights have not seen depression of the market.").

172 Reddy, *supra* note 34, at 529.

173 *See* Eden, *supra* note 146, at 152.

174 *Id.* at 152–53.

artists are more highly compensated.[175] These critics argue that resale royalties will decrease initial sales revenue for all artists, but only the most successful artists will be compensated for this loss when their works are resold at higher prices.[176] Because young, struggling artists place a higher premium on extra income, this redistribution harms visual artists as a group.[177] Further, the redistribution comes with high enforcement transaction costs that decrease total income for artists.[178]

Proponents of the resale royalty right dispute that initial sales prices become depressed as a result of the *droit de suite*,[179] and also that established artists are the predominant beneficiaries of the right. Jean-Marc Gutton, general manager of France's ADAGP,[180] said under oath that in 1990, ADAGP collected more than $17 million in resale royalties that it distributed amongst 1,700 artists.[181] Eight million dollars of that sum was distributed to 1,600 artists, with only fifty artists receiving $40 thousand or more.[182] These numbers tend to show that in France, younger artists do benefit significantly from the resale royalty right. Although supporters of the *droit de suite* would admit that more established artists do tend to benefit more than up-and-coming artists, they do not believe this is a problem.[183] As one commentator noted, "the resale royalty right is not intended as welfare legislation."[184]

If the *droit de suite* does redistribute wealth among artists, new media artists are likely to be hard-hit by this phenomenon. New media art is a technological, cutting-edge artistic field that likely attracts younger, less established artists. However, it is likely that as the discipline grows and expands, new media artists will become more demographically diverse.

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175 *See* Rub, *supra* note 42, at 6.
176 *See id.*
177 *Id.*
178 *Id.* at 7.
179 *See supra* Part II.B.1.
180 *See supra* notes 57–61 and accompanying text.
181 Reddy, *supra* note 34, at 531.
182 *Id.*
183 *Id.* ("[T]hose who have the greatest success will benefit the most. Furthermore, this art market 'fact of life' does not alter the reality . . . that lesser known artists would still derive significant benefits from the payment of small resale royalties.").
184 Eden, *supra* note 146, at 147.

3. *The Resale Royalty Right Is Too Difficult to Enforce*

Another common argument against enacting a United States *droit de suite* is that such legislation is very difficult to enforce.[185] The California Act is often criticized for poor enforcement,[186] and even France, with a large infrastructure of collecting organizations like ADAGP in place, cannot always collect royalties from non-auction sales.[187] Opponents would say that setting up enforcement infrastructure would be costly and difficult, and without it, there is little purpose in passing *droit de suite* legislation.

Supporters of the resale royalty right seem nonplussed by this argument. They argue that perfect law enforcement is never possible, and that "'[i]mperfect solutions are better than none.'"[188] Just as it would be unwise to dismiss the resale royalty right because not all artists have their works resold,[189] it would be unwise to dismiss the right because it might not be perfectly enforced for all eligible artists.

However, it may actually be easier to enforce a resale royalty right for new media artists. Contracting with artists to buy or display new media art is often a tricky business, requiring complicated contracts and deep technological understanding.[190] As a result, it may often be easier to track down the original new media artist when a work is resold. Because enforcement will likely be simpler, there seems to be little reason to exclude new media art from a United States resale royalty statute.

CONCLUSION

An examination of both sides of the United States *droit de suite* debate brings clarity to the question of whether new media art should be eligible for protection if and when Congress passes a resale royalty statute. The arguments in support of a United States resale royalty right seem to apply equally well—or better—to new media artwork, and the arguments against the right do not weigh heavily against new media art eligibility. Although the evolving nature of new media artwork may some-

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185 Reddy, *supra* note 34, at 527.

186 *See supra* notes 105–116 and accompanying text.

187 *See supra* note 61 and accompanying text.

188 Reddy, *supra* note 34, at 530. *See also* Eden, *supra* note 146, at 146 ("Not being able to enforce a law perfectly is no defense to claiming the law would thus be ineffective.").

189 Eden, *supra* note 146, at 145 n.151.

190 *See supra* notes 9–22 and accompanying text.

times make it difficult to resell, if such a resale does take place, there seems to be little reason to deprive the artist of a fair resale royalty.